

Experts, Mental States, and Acts

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I. INTRODUCTION

In my book *Proving the Unprovable*, I discussed at length the considerations that might govern the admissibility of expert psychiatric and psychological testimony in criminal and quasi-criminal cases.¹ This evidence law symposium gives me the opportunity to elaborate on one particular thesis of that book—that the definition of expertise in the criminal justice system, derived in the federal courts and in most states from *Daubert v. Merrell Dow Pharmaceuticals Co.*,² should vary depending on whether the issue involved is past mental state or past conduct. I will also briefly discuss whether that proposition should be limited to expert testimony introduced by defendants in criminal trials, or whether instead it should be expanded to use of experts by the prosecution and by civil litigants.

Of course, assessing the admissibility of expert testimony involves more than the reliability inquiry associated with *Daubert*. Such evidence must also be material (logically related to the substantive issue in question), helpful (in the sense of incrementally improving the factfinder's understanding of the issue), and not substantially likely to be prejudicial or misleading (because, for instance, the evidence is more likely to lead the factfinder to consider immaterial issues).³ In the following discussion I generally ignore these other admissibility criteria and focus on the reliability factor addressed in *Daubert* (or what I have called the probative value inquiry), as it applies to expert testimony on past mental states and past acts.

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¹ CHRISTOPHER SLOBOGIN, *PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS* (2006).

² 509 U.S. 579 (1993).

³ See SLOBOGIN, *supra* note 1, at 15.

My conclusion is that, while expert psychological testimony about past acts ought to be based on scientifically verifiable assertions, expert psychological testimony about subjective mental states relevant to criminal responsibility need not meet the same threshold. This stance emanates from the interplay between what I call the “right to voice” and a necessity rationale. The right to voice derives from the Constitution, which can be read to give criminal defendants a break whenever they want to present expert testimony. But respect for *Daubert* and scientific epistemology counsels that this bow to the defense should occur only when a scientific approach is not possible. Such an approach is futile with respect to opinion testimony about past mental state, so a relaxed evidentiary standard should govern there. However, when, as with past act testimony, the necessity argument is weak, *Daubert* should apply with full force.

II. MEASURING THE PROBATIVE VALUE OF EXPERTISE IN CRIMINAL CASES

To get us started, consider these six cases:

- *Clark v. Arizona*.⁴ The defendant presented psychiatric evidence suggesting that he thought the police officer he killed was an alien, evidence designed to show not only that he was insane at the time of the killing but also that he lacked the mens rea for his charge, which required proof that he intentionally or knowingly killed a police officer.
- *United States v. Bright*.⁵ The defendant, charged with possessing stolen mail (specifically, mail with checks in it), proffered testimony from a psychologist to the effect that she was a passive-dependent personality and thus gullibly believed an acquaintance of her boyfriend when he told her the stolen checks were made out to him.
- *Jahnke v. State*.⁶ Expert psychiatric testimony suggested that Jahnke, who killed his father when the father came home from dinner with his wife, felt that his sister, his mother, and he had no other means of escaping long-term, relentless beating and mistreatment by the father.
- *Waine v. State*.⁷ The expert psychiatrist testified that the defendant was a passive person and that the two homicides with which he was charged “would be totally out of character.”

⁴ 126 S. Ct. 2709, 2716–18 (2006).

⁵ 517 F.2d 584, 585–86 (2d Cir. 1975).

⁶ 682 P.2d 991, 995–96 (Wyo. 1984).

⁷ 377 A.2d 509, 521–23 (Md. 1977).

- *People v. Stoll*:⁸ Testimony based on psychological testing asserted that the defendant, charged with molestation of younger boys, showed no indication of sexual deviance and only a low indication of antisocial or aggressive behavior, and thus was unlikely to have been involved in the sex offenses with which he was charged.
- *People v. McCoy*:⁹ Based on a psychological interview, a prosecution expert in a sexual abuse case testified that the alleged victim met the criteria for child sexual abuse syndrome and thus had been sexually abused.

In *Clark*, the state court excluded the testimony to the extent it was meant to negate mens rea, a decision the Supreme Court of the United States upheld, against a constitutional challenge, on the ground that states may bar expert testimony likely to be speculative and misleading. In *Bright*, where the testimony was also directed at mens rea, and *Jahnke*, where the testimony was proffered to support a self-defense claim, the courts likewise excluded the expert testimony, for similar reasons. In *Waine*, *Stoll*, and *McCoy*, in contrast, the state courts admitted the testimony *over* objections that it was speculative and misleading. So, in *Waine* and *Stoll* expert opinion evidence was admitted to suggest the defendant did not commit the crime, while in *McCoy* it was admitted to prove that a crime had occurred (with other evidence suggesting that the defendant committed it).¹⁰

As I hope to demonstrate in this Article, all six of these cases were wrongly decided. In *Proving the Unprovable*, I pushed the idea that *Daubert's* stipulation that expert testimony be subject to some sort of scientific verification process should be interpreted differently depending on the context. More specifically, I contended that while behavioral science testimony focused on whether the defendant committed a criminal act should be subject to the usual inquiries about the scientific methodology underlying the testimony, clinical testimony about subjectively-defined mental state doctrines such as insanity, diminished responsibility, or self-defense in battered women and battered child cases need only satisfy a beefed-up version of the well-known general acceptance test (a test defined further below).¹¹ These prescriptions would mean that the evidence presented in *Waine*, *Stoll*, and *McCoy* probably should have been excluded and that

⁸ 783 P.2d 698, 707–15 (Cal. 1989).

⁹ 400 N.W.2d 807, 810 (Minn. Ct. App. 1987).

¹⁰ See *supra* notes 4–9.

¹¹ SLOBOGIN, *supra* note 1, at 43–46.

the evidence in *Clark*, *Bright*, and *Jahnke* probably should have been admitted.

A. *Why Past Mental State Is Different*

This proposed differentiation between past mental state and past act opinion testimony is based on a necessity rationale born of epistemological considerations. Most expert testimony should have to meet *Daubert's* demand for verification. But we should be willing to contemplate a relaxed evidentiary threshold for opinion testimony about mental states that determine criminal culpability because we simply cannot ascertain what they are, at least in the same rigorous way we can use scientific methods to figure out whether a person committed a particular act.

This epistemological difficulty exists for a number of reasons. First, as I pointed out in *Proving the Unprovable*, we can only know past mental states “through acts of interpretation that inevitably differ depending on a host of factors, including the identity of the observer and the time at which the mental state is observed.”¹² Perpetrators like Clark, Bright, and Jahnke may not be able to access their (often jumbled) thoughts and beliefs even at the time of the criminal act, much less weeks or months later. Thus, even when honest, they are more likely to give a narrative account than a precise, uncolored description of their motivations when queried by researchers, mental health professionals and legal factfinders. And these later interlocutors will add still another interpretive gloss to the analysis of the defendant’s past mental state, based on stereotypes, biases, analogies and personal experiences that are likely to be different from the defendant’s. As Andrew Taslitz points out, “[w]hen jurors name a mental state as ‘premeditation,’ ‘heat of passion,’ or a ‘belief in the imminent need to use deadly force in self-defense,’ they are crafting an interpretation that partly embodies their own assumptions, attitudes and beliefs.”¹³ In short, there is no ground truth about these types of past mental states. The well-known Rashomon effect, named after the Akira Kurosawa film in which a crime witnessed by four individuals is described in four mutually contradictory ways, illustrates the point nicely.¹⁴

¹² *Id.* at 43 (citing Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 26 (1998)).

¹³ Taslitz, *supra* note 12, at 26.

¹⁴ For an interesting analysis of the epistemological implications of the Rashomon effect, see Wendy D. Roth & Jal D. Mehta, *The Rashomon Effect: Combining Positiv-*

Second, even if past mental states can be said to exist in some objective sense, “science will often not be up to the task of measuring them.”¹⁵ The reason is that the questions the criminal law asks about past mental state—does an offender claiming insanity “lack substantial appreciation of the wrongfulness of his actions” or feel “compelled”?¹⁶ to what extent is a person like Clark or Bright misperceiving or oblivious to obvious fact?¹⁷ how strongly does someone like Jahnke believe that harm to himself or his family is “imminent” and that violence is the only way to prevent it?¹⁸—are very difficult to answer in a quantifiable way. As I put it in *Proving the Unprovable*, “even if research relevant to past mental state can be characterized as science, it is science that is so likely to be tainted by methodological flaws that, in effect, it is no different from interpretation and storytelling.”¹⁹

Third, even if we could somehow objectively verify and measure past mental states, research designed to study them is often either impossible to conduct or very likely to produce irrelevant results. Experiments designed to recreate situations analogous to criminal events are ethically dubious for obvious reasons. And natural world observation that does manage to acquire accurate information about mental states will often be legally immaterial. Consider, for instance, a typical study, which found that twenty-two percent of those people with a serious mental illness who commit violence do so in a “gratuitous” manner, while only fourteen percent of defendants who are not so afflicted commit violence that can be labeled gratuitous.²⁰ Even if we can be assured that the measurement of gratuitousness is reliable

ist and Interpretivist Approaches in the Analysis of Contested Events, 31 SOC. METHODS & RES. 131 (2002).

¹⁵ SLOBOGIN, *supra* note 1, at 44.

¹⁶ See, e.g., MODEL PENAL CODE § 4.01 (1962) (excusing a person whose “mental disease or defect” resulted, at the time of the offense, in a lack of “substantial capacity to appreciate the criminality [wrongfulness] of his conduct or conform his conduct to the requirements of the law”).

¹⁷ For many crimes, the mens rea is knowledge or recklessness, which requires an awareness of the result and circumstances of the crime. See MODEL PENAL CODE § 2.02(2)–(3) (1962).

¹⁸ The more subjective definitions of self-defense require proof that the actor believed the crime was necessary to prevent harm. See MODEL PENAL CODE § 3.02 (1962). In many states, imperfect self-defense or “extreme mental or emotional disturbance” can reduce the charge from murder to manslaughter. See MODEL PENAL CODE § 210.3(1)(b).

¹⁹ SLOBOGIN, *supra* note 1, at 46.

²⁰ Ellen Hochstedler Steury & Michelle Choinski, “Normal” Crimes and Mental Disorder: A Two-Group Comparison of Deadly and Dangerous Felonies, 18 INT’L J.L. & PSYCHIATRY 183, 197 (1995).

and that gratuitousness mitigates criminal culpability (both big assumptions), the assertion that a defendant with serious mental illness is one and a half times more likely to commit gratuitous violence is very likely to lack what *Daubert* called “fit” because of the small base rates involved and the small difference between the ill and non-ill groups.²¹ Summing all of this up in social science terms, identifying the correlates of insanity, diminished responsibility, and other defensive mental state conditions in a scientific fashion is very difficult because the dependent variables (insanity, diminished responsibility, fear of imminent harm) are so hard to discern, measure, and generate in sufficient numbers to produce statistically significant results.

In contrast, research regarding conduct—on the behavioral tendencies of killers and molesters and the psychological correlates of abuse that might be relevant in *Waine*, *Stoll*, and *McCoy*—is based on dependent variables (killings, molestation and abuse) that are objectively observable and “measurable” and that can be found in significant quantities in the natural world. The social scientist operating in this context is trying to answer a much less amorphous question: did the defendant engage in conduct that caused a particular result? Consider *Waine* specifically. The goal of research relevant to the testimony in that case would be to examine the base rate for homicidal violence by people who are passive in the same sense *Waine* was passive and compare it to the base rate of other types of individuals. The dependent variable in this research (homicide and similarly violent acts) is much easier to discern than the dependent variable in past mental state research.

Of course, this research also involves an independent variable (passivity) which will probably be more of a chore to assess. But it is still easier to evaluate than a past mental state such as appreciation of wrongfulness, intent, or gratuitousness, for two reasons. First, the passivity at issue in *Waine* (and the “aggressiveness” at issue in *Stoll* and the correlates of abuse that were the focus in *McCoy*) can be measured in the here and now; no reconstruction of the past, essential in evaluating past mental state, is necessary.²² Second, passivity is a trait, not an event. Gauging one’s character or arriving at a diagnosis is not easy, but it is easier than getting an accurate snapshot of how

²¹ 509 U.S. at 591 (“‘Fit’ is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.”).

²² See, e.g., Regina Schuller & Patricia A. Hastings, *Battered Child Syndrome*, in 2 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 298–300 (David Faigman et al. eds., 2005) [hereinafter MODERN SCIENTIFIC EVIDENCE] (describing methodology of research on, inter alia, correlates of child abuse).

the person was feeling and thinking at a particular point in time in the past. As discussed in more detail below, for instance, we possess pretty good tools for deducing whether a person suffers from psychosis; determining whether and how that psychosis impaired one's ability to appreciate the consequences of one's actions at the time of a crime is an entirely different matter.

Other types of social science research about criminal conduct are even less onerous to carry out, again because of the solidity of the dependent variable and the relative accessibility of the independent variables. Behavioral scientists attempting to figure out the correlates of good and bad eyewitness identification can create situations in which the perpetrator is known and witnessing conditions varied,²³ and those who study the risk posed by criminals can track the careers of multiple offenders.²⁴ Thus, not surprisingly, research on these types of issues is much more robust than empirical work about past mental states, which, as the preeminent forensic researcher Thomas Grisso notes, has long been characterized by "meager advances."²⁵

B. Normative Considerations: Necessity and Voice

Assuming this scientific dichotomy between past mental states and acts exists, what are the implications for evidence law? Because the basis of expert testimony about criminal acts of the type presented in *Waine*, *Stoll*, and *McCoy* is susceptible to typical scientific testing, it should have to pass the standard *Daubert* test. Since in none of these cases was good relevant data produced (at least as far as one can glean from the appellate opinions), the testimony should have been inadmissible under *Daubert*.

But a different conclusion should be reached with respect to the opinion testimony presented in *Clark*, *Bright*, and *Jahnke*, because though it too was suspect, a "scientific" opinion was not possible in those cases. Of course, even under a rigid interpretation of *Daubert*, behavioral observations can be described. Thus, the defense expert in *Clark* wanting to bolster Clark's claim of mental illness at the time of the offense could report the fact that Clark claimed he turned his car radio up—the act that attracted the attention of the cop who was

²³ See, e.g., Gary L. Wells, *Eyewitness Identifications*, in 2 MODERN SCIENTIFIC EVIDENCE, *supra* note 22, at 481–85 (describing methodology of eyewitness identification research).

²⁴ John Monahan, *Predictions of Violence*, in 2 MODERN SCIENTIFIC EVIDENCE, *supra* note 22, at 104–06 (discussing methodology of research about risk of violence).

²⁵ Thomas Grisso, *Pretrial Clinical Evaluations in Criminal Cases: Past Trends and Future Directions*, 23 CRIM. JUST. & BEHAV. 90, 97–98 (1996).

his eventual victim—to drown out his “voices.” The expert could also describe Clark’s claim that he thought the officer was an alien. But a robust interpretation of *Daubert* might not permit the expert to state further that people with mental illness often use music to deal with auditory hallucinations and that visual hallucinations about aliens are common among such people, unless the expert could produce solid data supporting his assertions (which would be hard to do).²⁶ And it would certainly not permit the expert to opine that Clark probably felt justified and perhaps compelled in shooting what he perceived to be a threatening figure. Indeed, the United States Supreme Court, although not purporting to apply *Daubert*, held that such testimony can be excluded on the ground that it is speculative and potentially misleading, at least with respect to the mens rea issue.²⁷ Similarly, the expert in *Bright* would not be able to talk about the likelihood that Bright’s gullibility affected her decision to accept the stolen checks because of the lack of research on co-dependency and criminal acts. And, while there is ample empirical research on the effects of familial battering on a person’s perceptions of her or his options,²⁸ many who are enamored of *Daubert* do not believe the research is good enough to pass that case’s threshold,²⁹ so the analogous expert testimony in *Jahnke* would probably be excluded as well.

This necessity rationale is likely to be unpersuasive, however, to those who believe that testimony that isn’t up to snuff should *never* be admitted; on this view, the fact that the testimony can’t possibly make

²⁶ Although any veteran mental health professional can recount patients who “treat” their voices with music and who experience alien delusions, no research verifies the prevalence of such phenomena. E-mail from Paul Appelbaum, M.D., Elizabeth K. Dollard Professor of Psychiatry, Medicine and Law Director, Department of Psychiatry, Columbia University College of Physicians and Surgeons Department of Medicine, to author (Dec. 11, 2007) (on file with author) (stating that while he has no knowledge of research on either issue, such phenomena are clearly “in the realm of common wisdom” among mental health professionals).

²⁷ *Clark v. Arizona*, 126 S. Ct. 2709, 2734 (2006) (referring to “the potential of mental-disease evidence to mislead jurors . . . through the power of this kind of evidence to suggest that a defendant suffering from a recognized mental disease lacks cognitive, moral, volitional, or other capacity, when that may not be a sound conclusion at all”).

²⁸ See generally Regina Schuller & Sara Rzepa, *Battered Woman Syndrome*, in 2 MODERN SCIENTIFIC EVIDENCE, *supra* note 22, at 236–54 (describing a number of theories, usually backed up by at least some research, as to why battered women feel bonded to the batterer or do not leave the relationship).

²⁹ David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 114 (1997) (“The syndrome, first proposed in the 1970’s [sic] and based on the clinical observations of a single researcher, has yet to be corroborated by serious and rigorous empirical work.”).

the grade is simply too bad.³⁰ In *Proving the Unprovable*, I argued against this tough stance toward past mental state opinion evidence on several grounds, all ultimately predicated on the assumption that defendants, who are much more likely than the state to benefit from relaxation of *Daubert* in connection with this type of testimony, have a constitutionally-based right to voice—a right to tell their story in the most effective way possible. Depriving a defendant of a qualified expert on past mental state issues trenches on the right to testify, which stems from the Fifth Amendment and the Due Process Clause, and on the Sixth Amendment rights to confront accusers, present evidence, and have one’s charges considered by a (fully informed) jury.³¹ Indeed, the Supreme Court’s pronouncement in *Rock v. Arkansas*,³² the case that established the right to testify, went so far as to state that testimony from the defendant can be excluded only when it “is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.”³³ Others have argued that the compulsory process clause incorporates a fair process rationale that entitles the defendant to present any evidence that is material to her case,³⁴ and that the right to jury trial would be undermined if lay people are not given the opportunity to consider whether the defendant’s story, however fantastic on the surface, may nonetheless ultimately be plausible.³⁵

Without an expert providing an opinion on past mental state, evidence about it will usually consist primarily of a description of mental condition, either by the defendant or through the expert, shorn of educated guesses about causal factors, garbled because of impaired mental condition or simple inarticulateness, and discounted by jurors and judges who, lacking expert counterfactuals, are

³⁰ Another response is to change the substantive law, so that mens rea and the affirmative defenses are defined entirely objectively. See, e.g., Bruce Ledewitz, *Mr. Carroll’s Mental State and What is Meant by Intent*, 38 AM. CRIM. L. REV. 71, 100–07 (2001) (arguing that, given the “evanescence” and unfalsifiability of intentions, the criminal law should readopt the presumption that a person intends the natural and probable consequences of his actions). A response to that response is beyond the scope of this Article.

³¹ See SLOBOGIN, *supra* note 1, at 53–55, 139.

³² 483 U.S. 44, 61 (1987).

³³ *Id.*

³⁴ Janet C. Hoeffel, *The Sixth Amendment’s Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275, 1316–51.

³⁵ Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom about Excluding Defense Evidence*, 86 GEO. L.J. 621, 636–39 (1998).

more likely to rely on misconceived notions of mental aberration and to assume sanity and intent from the defendant's actions. *With* an expert, defendants can present a more coherent and credible picture of what they were thinking and feeling at the time of the offense—a picture which, while inevitably speculative, is not clearly wrong, except in those rare instances (addressed below) when defendants successfully malingering. Furthermore, contrary to the apparent assumption of some commentators and courts, judges and juries are unlikely to be hoodwinked by such testimony, about which they are naturally skeptical and which normally must be very persuasive to overcome lay preconceptions about mental functioning.³⁶ And even if the fact finder does get it wrong, the practical impact of an erroneous verdict is usually not dire: “successful” defendants will end up in a mental hospital if they pleaded insanity, and in prison on reduced charges if they pleaded lack of specific intent or argued that a syndrome of some sort diminished their responsibility.³⁷ This latter fact, by the way, is an additional pragmatic distinction between past mental state testimony and past act testimony—besides the aforementioned differences in the ease of producing useable research—arguing in favor of maintaining *Daubert* as the threshold for past act testimony, which, if successfully deployed by the defendant, results in outright acquittal.

C. *A Proposed Evidentiary Standard*

The necessity and voice rationales only take us so far, however. While they justify a relaxed test for past mental state testimony, they probably do not sanction the porous standard that many courts still adhere to despite fifteen years of *Daubert*. Except when truly novel “syndrome” evidence is presented, or when, as in *Clark*, *Bright*, and

³⁶ Claims of diminished responsibility are rarely successful. *See, e.g.*, Stuart M. Kirschner & Gary M. Galperin, *The Defense of Extreme Emotional Disturbance in New York Country: Pleas and Outcomes*, 10 BEHAV. SCI. & L. 47, 49 (2002) (contested diminished responsibility claims failed in ten of eleven jury trials and in all five cases in which a bench trial was held). Additionally, significant research debunks the notion that juries are easily swayed by defense experts. *See* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 689 (2001) (“It is clear that expert testimony is not accepted in a mindless fashion by gullible jurors awed by flashy credentials.”); *see also* SLOBOGIN, *supra* note 1, at 86.

³⁷ Even when battered woman and battered child syndrome evidence is introduced in an effort to gain acquittal on self-defense grounds, the usual result is conviction on manslaughter charges. *See* Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 U. KAN. L. REV. 269, 279 (2007) (“Studies consistently find that large percentages of the women incarcerated for murder or manslaughter are in prison because they killed intimate partners who had abused them.”).

Jahnke, it is directed at defenses other than insanity, the courts tend to let a psychiatric expert say anything.³⁸ Although the language in *Rock v. Arkansas* might seem to support this approach, *Rock* involved conspicuously self-serving fact testimony by the defendant that would be viewed with skepticism by any jury, not supposedly objective and more influential opinion testimony by an expert. A more demanding standard should be required in the latter context.

In *Proving the Unprovable*, I proposed the “generally accepted content validity” test, which consists of two parts, general acceptance and content validity.³⁹ The general acceptance concept is well known to lawyers because it comes from the 1923 decision in *Frye v. United States*,⁴⁰ which dominated analysis of expert testimony admissibility until *Daubert* was decided in 1993. Expert testimony passes the *Frye* test if it is based on theories and methodology accepted by most or many practitioners in the relevant field.⁴¹ Content validity is a concept well-known to social scientists. It is to be distinguished from criterion validity and construct validity, both of which are also means of measuring accuracy. Criterion validity requires having objective criteria against which to measure a finding, and construct validity requires identifying a valid outcome measure of constructs analogous to the construct being studied so that comparisons can be made.⁴² Because, for the reasons suggested above, good criteria and comparable outcomes are not readily available for past mental state findings, content validity is probably the best we can do for now in this setting. Content validity asks whether the content of an assessment *looks like* it addresses the relevant issues.⁴³

So, in combination, “generally accepted” “content validity” requires that expert testimony assess factors that knowledgeable and experienced experts in the field consider important in the type of case at issue. In practical effect, it would require that experts evaluating mental state at the time of the offense use standardized interview protocols similar to those developed in related evaluation settings.⁴⁴

³⁸ See SLOBOGIN, *supra* note 1, at 27.

³⁹ *Id.* at 60–62.

⁴⁰ 293 F. 1013 (D.C. Cir. 1923).

⁴¹ See Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1228–32 (1980).

⁴² NOREEN L. CHANNELS, *SOCIAL SCIENCE METHODS IN THE LEGAL PROCESS* 140–42 (1985).

⁴³ *Id.*

⁴⁴ See, e.g., GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 149–54 (3d ed. 2007) (describing standardized instruments for evaluating competency to stand trial); *id.* at

Here is an excerpt from *Proving the Unprovable* providing an example of how the generally accepted content validity test would be implemented and how it could impose limits on past mental state testimony sufficient to satisfy a loose interpretation of *Daubert's* verification requirement:

Assume . . . that a defendant charged with murder is asserting an insanity defense and a psychologist is ordered to evaluate his mental state at the time of the offense. The psychologist carries out a thorough evaluation and concludes that the defendant was suffering from posttraumatic stress syndrome [(PTSD)] as a result of fighting in the Iraq war. . . . [Such a conclusion might be based, in part, upon] statistical information about, for instance, the prevalence of PTSD among war veterans[. B]ut, for reasons [given above], this type of data will seldom be useful in making individualized culpability determinations, except to the extent it may bolster a claim that the defendant had PTSD. The more important information will be the sources consulted, the questions asked, the instruments and psychological tests used (e.g., the SIRS [for Structured Interview of Reported Symptoms], a well-constructed instrument designed to detect malingering), and the reasoning that led to the evaluator's conclusions.

This evaluation report could provide several lessons for future evaluators. First, of course, it would provide an illustration of how the [American Psychiatric Association's Diagnostic and Statistical Manual's] PTSD criteria apply in a criminal case. Second, it may identify several post-trauma behaviors that are indicative of people with PTSD who commit crime. Third, it could provide a list of potential sources of information—research-based and anecdotal—in such cases. Fourth, it should indicate what kinds of psychological tests, if any, are relevant in such an investigation. Ideally it would also identify the clinical factors the legal fact finder considered relevant to its finding of insanity Over time, a consensus might develop as to how PTSD-based insanity claims should be assessed, aided perhaps by researchers with access to the database [of like reports] who could test interrater reliability [O]ne or more generally accepted evaluation formats for this type of case might emerge.

The role of such a format in determining admissibility would be straightforward. If future evaluators faced with potential PTSD

309–14 (describing risk assessment tools). The general acceptance threshold would also exclude testimony from individuals who are merely good “story-tellers.” Cf. David Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1013, 1085–86 (1989) (arguing there is no distinction between suppositional testimony from mental health professionals and “Dostoevskian psychologist[s]”).

cases failed to consider the various clinical factors it incorporates—the diagnostic criteria, their forensic implications, sources of information, testing information—the admissibility of their opinion would be called in doubt, depending on the degree of failure and whether reasonable alternatives were used. Ultimately, a clinician who wanted to testify about PTSD-induced insanity but who paid little heed to various factors that case law (in both the legal and [clinical] sense of that term) has identified as significant to that inquiry would be prohibited from taking the stand. In this sense, at least, *Daubert's* demand for verification that an expert's opinion be reliable can be implemented in the culpability context.⁴⁵

The battered woman scenario provides another example of how the concept of generally accepted content validity might work. Research suggests that factors that could be present when a battered woman kills her batterer include subjective psychological variables (learned helplessness, traumatic bonding, symptoms of posttraumatic stress disorder), relatively objective behavioral variables (substance abuse by the batterer, threats to children as well as the woman, more frequent and severe injuries due to battering, childhood abuse of the woman) and external variables (the availability of services to help battered women).⁴⁶ Under the proposed test, an expert who did not collect information about and consider these variables would be prohibited from testifying due to a lack of content validity. Conversely, scientific proof, complete with error rates, of the extent to which women who meet these conditions kill in fear would not be required. Whether fear was the motivating factor, how powerful the fear was, and whether it was generated by a perception that grave harm was otherwise inevitable are not “facts” susceptible to such proof.

III. THE SEARCH FOR “SUBSTANTIVE ACCURACY”

Some reviewers have found this approach to opinion testimony about past mental state plausible.⁴⁷ In an article in this symposium issue, Edward Imwinkelried indicates that he is not necessarily opposed to it, but that he is concerned that the generally accepted con-

⁴⁵ SLOBOGIN, *supra* note 1, at 65–66.

⁴⁶ See Shuller & Rzepa, *supra* note 28.

⁴⁷ Robert L. Halon & Theodore Donaldson, *Charting the Course Out of Admissibility Chaos*, in CONTEMPORARY PSYCHOLOGY: APA REVIEW OF BOOKS 1, 3–4 (2007) (“We fully endorse allowing defendants to decide whether mental health information and/or clinical *opinion*, reliable or not, will be introduced in their defense at culpability trials.”); Andrew E. Taslitz, *Book Review: Proving the Unprovable*, CRIM. JUST., Fall 2007, at 70, 76 (stating that the book’s “arguments are persuasive and practical, and the law is likely to move in the direction he suggests over time”).

tent validity standard gives up too easily—in his words, it “abandon[s] the search for substantive accuracy.”⁴⁸ Professor Imwinkelried then purports to illustrate why that search need not be futile by describing in detail the science of detecting malingering or, as behavioral scientists call it, the science of gauging response styles. That branch of mental health forensic work has matured appreciably in the past decade and, Professor Imwinkelried argues, shows that assessments of past mental states are not as immune to research-based efforts as I suggest.

I agree with at least two aspects of Professor Imwinkelried’s article. First, we should never abandon the search for substantive accuracy. As Professor Imwinkelried notes, at several points in *Proving the Unprovable* I state that scientifically reliable evidence ought to be presented when available.⁴⁹ If a method for obtaining such evidence for particular types of past mental state is developed, it should find its way into the type of evaluation format I described above. Perhaps the behavioral sciences will even advance to the point where we can fairly apply the same verification test we apply to other sorts of expert testimony. I doubt that will happen any time soon, but we obviously should not foreclose that possibility.

Professor Imwinkelried is also correct that social scientists have done a remarkable job devising a number of reliable and valid instruments and techniques for detecting when a criminal defendant may be exaggerating, fabricating, or denying certain symptoms. While significant caveats about these advances must be made,⁵⁰ they are clearly superior to seat-of-the-pants assessments of response style

⁴⁸ Edward Imwinkelried, *The Case Against Abandoning the Search for Substantive Accuracy*, 38 SETON HALL L. REV. 1031 (2008).

⁴⁹ See, e.g., SLOBOGIN, *supra* note 1, at 59 (“In those few instances when scientifically reliable information material to [past mental state] is available, the expert should rely on it.”).

⁵⁰ One review of the literature (in a book of which I am a co-author) states the caveats this way:

First, because they do not provide information about *why* an examinee might be feigning symptoms, even the best measures of symptom exaggeration/fabrication are not measures of malingering—a diagnosis that, according to the DSM-IV, indicates feigning for a specific purpose. Second, given the limitations of existing assessment approaches, examiners should be cautious in their descriptions of examinees’ response styles, and recognize the potential for error. Third, examiners should not make the fundamental error of assuming that evidence of symptom exaggeration indicates the absence of genuine impairment, since persons who exaggerate and fabricate difficulties can still also have significant impairment.

MELTON ET AL., *supra* note 44, at 62.

at figuring out who among those claiming psychosis, depression, and other major impairments are actually suffering from those conditions. Thus, as the example in the previous section of this Article indicates, instruments like the SIRS⁵¹ clearly should be part of every clinician's assessment package (and would be required under a generally accepted content validity test).

Unfortunately, however, the ability to ascertain whether a person is fabricating mental disability is not very useful in most cases. Popular imagination and fiction notwithstanding, most defendants who claim insanity or some other legal defense based on mental impairment have a colorable claim of disorder, based on previous hospitalizations, trauma from battering, or other evidence of symptoms.⁵² At the same time, few of them are found insane or diminished in responsibility. In *Clark*, for instance, the state did not contest that Clark suffered from a significant mental illness. Rather, the assertion was that, despite his psychosis, Clark knew his victim was a police officer, intended to kill him, and knew it was wrong when he was doing it (all assertions that the factfinder in that case accepted).⁵³ Similarly, in probably the most famous recent insanity case, the prosecution did not argue that Andrea Yates was fabricating her mental disorder, the evidence for which was substantial; rather, it contended that her thought process was not so confused that she was incapable of knowing how wrong it was to drown her five children in the bathtub (an assertion that prevailed in Yates's first trial but not her second, which suggests how slippery these issues are).⁵⁴ The same points can be made in connection with the *Bright* and *Jahnke* cases.⁵⁵ The extent to which gullibility and fear, respectively, drove the defendant's actions at the time of the offense were the key issues in those cases, not

⁵¹ See Richard Rogers et al., *Faking Specific Disorders: A Study of the Structured Interview of Reported Symptoms (SIRS)*, 48 J. CLINICAL PSYCHOL. 643, 643 (1992).

⁵² I can find no statistics directly on point, but it is clear that most individuals found insane are in fact suffering from psychosis. See MELTON ET AL., *supra* note 44, at 234 tbl.8.1 (reporting results from six studies in four states showing between sixty-eight percent and ninety-seven percent prevalence rate of psychosis among those found not guilty by reason of insanity).

⁵³ *Clark v. Arizona*, 126 S. Ct. 2709, 2718 (2006) ("The judge noted that though Clark was indisputably afflicted with paranoid schizophrenia at the time of the shooting, the mental illness 'did not . . . distort his perception of reality so severely that he did not know his actions were wrong.'").

⁵⁴ Phillip J. Resnick, *The Andrea Yates Case: Insanity on Trial*, 55 CLEV. ST. L. REV. 147, 150-53 (2007).

⁵⁵ See *U.S. v. Bright*, 517 F.2d 584 (2d Cir. 1975); *Jahnke v. State*, 682 P.2d 991 (Wyo. 1984).

whether Bright was a dependent personality and Jahnke a battered child who suffered trauma as a result.

Another way of making this point is to divide expert testimony about mental state into ascending levels of inference, as I did in *Proving the Unprovable*.⁵⁶ The first level involves little or no inference, because it consists of a description of behavioral observations (e.g., the defendant talks to himself, thinks he is Napoleon, or hears voices from people who are not there). The second level, which requires at least some degree of inference-drawing, is that the individual is experiencing psychiatric symptoms (e.g., delusions and hallucinations, as opposed to, for instance, mumbling that is simply a nervous trait). The third level is diagnostic categorization (e.g., is he better labeled with schizophrenia or schizoaffective disorder?), which allows the expert to talk about characteristics—perhaps discovered through research, perhaps known through experience—that a person like the defendant might have. The fourth level is the extent to which the mental disorder, if there is one, impaired cognition or volition at the time of the offense. The final level of inference involves reaching the ultimate legal issue (e.g., sane or insane). I, among many others, do not think mental health professionals should address the ultimate legal issue, for evidentiary and ethical reasons.⁵⁷ I do think they should be permitted to address the other four levels of inference. While better symptom-assessment and response-style instruments and more precise diagnostic criteria have permitted fairly high reliability with respect to levels two and three, science is left behind when the expert addresses level four.

IV. A BRIEF CASE STUDY

In other writing, I have provided several examples of how level four expert testimony about past mental state can be helpful to criminal defendants.⁵⁸ To bring home both the impact a strict interpretation of *Daubert* would have and the relative unimportance of response style instruments in many cases concerning criminal responsibility, consider another example of expert testimony about past mental state, this time presented in a capital sentencing hearing, where the rules of evidence are sometimes held to (and should) apply.⁵⁹ The defendant in this case was, on the face of it, an unsympa-

⁵⁶ SLOBOGIN, *supra* note 1, at 50.

⁵⁷ *See id.* at 80–85.

⁵⁸ *See id.* at 52 (providing a summary of cases).

⁵⁹ *See* Thomas Regnier, *Barefoot in Quicksand: The Future of "Future Dangerousness" Predictions in Death Penalty Sentencing in the World of Daubert and Kumho*, 37 AKRON L.

thetic individual. The jury had convicted him for killing the young daughter of his girlfriend shortly after the girlfriend had rejected him while they were in a bar. After this public humiliation, he stormed out of the building, saying to the woman “You will cry a river of tears”; he then drove home and locked himself in the couples’ bedroom. When the police forced open the door shortly thereafter, they found the defendant, as well as the girl lying in a pool of blood.⁶⁰

The defense’s psychiatric evidence was meant to bolster the claim that the homicide was not what it appeared to be—a revenge killing—but rather the result of “extreme mental or emotional stress” stemming from, among other things, sexual abuse as a child and his subsequent relations with women. After noting that the defendant had been anally raped at age eleven and discussing some of the research showing that such sexual abuse can affect an individual’s “emotional instability and impulsivity” (level three inference in the hierarchy described above), the following dialogue took place between the defense attorney and the expert:

Q: What is the most violent type of rape that . . . can occur?

A: It is not well researched, but anecdotally what is usually assumed to be true, because we do not have good research in this area, is that any type of penetration of a violent nature, whether it be anal penetration or oral sodomy, or vaginal rape, any type of significant penetration, with violence and aggression has a more determining effect than if the individual has not been penetrated. . . .

Q: Would it be your opinion within a reasonable degree of psychiatric certainty that there’s a likelihood that some of these effects would be present [in the defendant]?

A: Well, I would think it’s a very, very high probability, and I would say 80 to 90 percent probability that what I described is present. I would say even higher than that.

Prosecutor: I object to this judge.

Judge: Overruled.

A: I would say, unquestionably, that he suffered traumatic effects from this sexual rape that had terrific effects on his personality . . . and will continue to affect him all life long. . . . And I would say it contributed greatly to his rage when he killed this little girl.

Q: Do you see a continuing trend throughout his life in terms of the remnants or the effects of this trauma?

REV. 469, 504–06 (2004) (arguing for stricter evidentiary standards in capital sentencing cases).

⁶⁰ E-mail from Edith Georgi, Public Defender, Miami, FL, to author (Dec. 7, 2007) (on file with author) [hereinafter Email from Georgi].

A.: Well, I see it mainly in terms of his relationships with women, which I think really originates from his real damaged sense of masculinity subsequent to the rape where he ultimately failed to really satisfy his common law wife . . . because she ultimately betrayed him and was unfaithful with a brother-in-law and that unfaithfulness only kind of certifies and confirms his own doubts about his masculinity. . . . Then when he finally meets [the mother of the victim] he really hopes will be the love of his life, he tries desperately to please her and placate her. He does the laundry. He does the cleaning. He does the cooking. He does everything that he imagines will satisfy her but in spite of his best effort he really is unable to satisfy her and she spurns him and displays interest in other men and once again, he feels terribly betrayed, which confirms his own sense of doubt about his own masculinity and I think these factors contributed greatly to his overwhelming rage at the night of the homicide.⁶¹

Note first that credibility was not an issue here. The past sexual abuse, the relationship problems, and the defendant's anger at the time of the offense (as distinct from the expert's explanation of it) were all accepted by the prosecution.⁶² Response style measurement would have served no useful purpose. Note next that most of this testimony is not based on data (and indeed the expert candidly admits the absence of science on the issue). Rather, it is a story about the psychodynamics of the defendant's motivations at the time of the offense—what Professor Bonnie and I have called “informed speculation,”⁶³ but speculation nonetheless—and thus inadmissible under a strict *Daubert* standard. If it had been excluded, the jury might still have had the descriptions of the defendant's abuse as a child, the research indicating that abused people have emotional problems, and evidence about his bad relationships with women. But nothing would have tied all of this information together and, more importantly, nothing would have shown how it might provide a (possibly mitigating) explanation for the offense. In fact, the defendant was given a life sentence instead of the death penalty, a result the defense attorney attributes to the expert testimony.⁶⁴ Whether or not one agrees with the outcome, there is little doubt that, without the expert, the defendant's story would have been much less ably told.

⁶¹ Transcript of Record, *State v. Matute-Chirinos*, at 71–72. (11th Jud. Cir., Dade County, Fla., May 6, 1997) (No. 94-18663).

⁶² Email from Georgi, *supra* note 60.

⁶³ See Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980).

⁶⁴ Email from Georgi, *supra* note 60.

V. PAST MENTAL STATE EVIDENCE
PRESENTED BY THE PROSECUTION AND CIVIL LITIGANTS

Looking at the issue from the perspective of whether an adversarial system or some other procedural regime best serves justice, Michael Risinger has also (tentatively) concluded that proof standards should be dichotomized depending upon whether the testimony involves potentially “normative”/“value” issues—under which he classifies mental states—or “factual”/fact issues.⁶⁵ As he puts it:

When the practically live issues are either normative or magnitude judgment issues not like the simple binary fact of perpetration, then perhaps free-proof, free-for-all, highly contextualized, thick-description sausage-making by partisan cooks is the most legitimate way to approach the special competence of a jury. But by the same token, when the actual triable issue in a criminal case is the simple binary issue of perpetration, or a similar pure-fact binary issue, then this is perhaps the least legitimate way to proceed.⁶⁶

Restating these observations in a way that bolsters the stance taken in this Article, while jury decision making, partisan evidence presentation, and free-proof may be prone to lead to biased results on relatively black-and-white whodunit questions, they are relatively well-suited for dealing with amorphous mental state issues.

Professor Risinger’s focus is on the proper procedures for ensuring that factually innocent defendants are not convicted or sentenced to death. But, in the course of concluding that proof of binary facts ought to be subject to special burdens, he appears willing to extend partisan free-proof flexibility to *all* litigants wanting to “contextualize” any of the “polyvalent” (mental state) aspects of the case, not just criminal defendants making assertions about subjective culpability at the time of the offense.⁶⁷ When viewed through the prism of jury versus non-jury decision-making, that position may make sense. But do the arguments identified in this Article about letting criminal defendants off the *Daubert* hook when they want to present past mental state opinion testimony also apply to prosecutors and civil litigants who want to do the same, and to any party—criminal accused, prose-

⁶⁵ D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1290–95 (2004).

⁶⁶ *Id.* at 1307.

⁶⁷ *Id.* at 1294 (“Some state-of-mind judgments that we expect juries to make, such as negligence or insanity, carry a more or less explicit normative warrant.”); see D. Michael Risinger, *A Functional Taxonomy of Expertise*, in 2 MODERN SCIENTIFIC EVIDENCE, *supra* note 22, at 138–40 (discussing expertise on “normative” issues).

cutor, or civil litigant—who wants to introduce expert evidence about *present* mental state?

With one major exception and perhaps one small one, my inclination is to say no. The defendant's right to voice, stemming from a number of constitutional provisions, is stronger than that of other litigants. Thus, criminal defendants have the best argument for a relaxed *Daubert* standard. At the same time, even their strong right to voice should not permit criminal defendants to evade usual evidentiary strictures when the necessity rationale is absent, as is the case not only with past act evidence but with present mental state evidence as well.

The major exception to the view that parties other than criminal defendants should be forced to adhere to *Daubert*-heavy (as opposed to *Daubert*-lite) occurs when the prosecution wants to respond in kind to a defendant's assertions about past mental state. Adversarial balance, combined with the necessity rationale, should permit the government to present past mental state expertise once the defendant decides to do so. Thus, the prosecution should be able to respond to speculative psychiatric testimony supporting insanity or mens rea with similarly speculative expert evidence.

A different situation is presented, however, if the defendant makes assertions about his or her subjective culpability *without* relying on an expert. In *State v. Hickman*,⁶⁸ the prosecution's expert in a rape case was allowed to testify that the defendant fit the profile of an "aggressive rapist," suggesting, contrary to the defendant's assertion, that the intercourse was non-consensual. Even if it were to pass *Daubert*, this expert testimony, which was evidence of propensity, should have been inadmissible under the character evidence rule.⁶⁹ A defendant's assertion that intercourse was consensual is an assertion about his mental state at a particular time, not his personality, and thus does not open the character evidence door.⁷⁰

⁶⁸ 337 N.W.2d 512, 516 (Iowa 1983).

⁶⁹ See FED. R. EVID. 404(a)(1) (prohibiting prosecution presentation of evidence about the defendant's bad character unless the defendant first introduces evidence of good character).

⁷⁰ Unfortunately for the prosecution, this type of inadmissible character evidence is likely to be the only expert testimony available to it unless the defendant decides to use a mental health professional to support an insanity or diminished responsibility defense, at which point the defendant is usually thought to waive Fifth Amendment protection from an evaluation seeking rebuttal evidence, and the state can acquire specific information about the defendant's mental state at the time of the offense. See *Buchanan v. Kentucky*, 483 U.S. 402, 422–23 (1987) (noting that many United States courts of appeal have held that defendants may be required to submit to a state-ordered psychiatric evaluation after they assert an insanity defense).

Accordingly, prosecution-initiated expert testimony on past mental state should generally be permitted only when the defense uses an expert on the same issue. But a second exception might arise when the prosecution's expert focuses on the *victim* rather than the defendant. Consider, in this regard, expert opinion evidence about rape trauma syndrome, which is designed to rebut a rape defendant's claim that the intercourse was consensual by providing evidence that the alleged victim experienced trauma around the time of the intercourse (which, thus, must have been forced).⁷¹ The research basis for this past mental state claim is weak, so it does not meet the strict version of *Daubert*.⁷² But it might still be admissible on necessity grounds (because it focuses on mental state at the time of the offense) and on voice grounds (given the new interest in victim's rights⁷³), and despite the character evidence rule (because it is being introduced to prove the past mental state of the victim, not of the defendant).⁷⁴

As to the relevance of all of this to civil cases, a preliminary observation is that most civil suits do not require normatively-tinged assessments of subjective past mental states. Negligence is an objective standard, and assessments of mental injury, while necessary in a wide range of civil litigation, usually do not require pinpoint analysis of previous mental states.⁷⁵ But when past mental state does become an issue—in wills contests when the testator is dead or when the motivation of the alleged perpetrator in sexual harassment or punitive damage cases becomes pertinent—necessity and voice arguments could be made here as well, although the different stakes involved, the absence of a constitutional thumb on the scale in favor of one of the

⁷¹ See, e.g., *State v. McCoy*, 366 S.E.2d 731, 736–37 (W. Va. 1988).

⁷² Patricia A. Frazier, *Rape Trauma Syndrome: Legal Issues*, in 2 MODERN SCIENTIFIC EVIDENCE, *supra* note 22, at 428 (“much of what passes as expert testimony [about rape trauma syndrome] today is not supported in the research literature”).

⁷³ See generally Douglas E. Beloof & Paul Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005). At most, however, victims may have a right under statutory or state constitutional law to attend trial, not to testify, a fact which diminishes the voice argument. *Id.* at 546.

⁷⁴ A further consideration in this setting is that jurors may well be skeptical of women who claim rape when there is no physical evidence of forcible intercourse, the usual scenario in which rape trauma evidence is presented. See Toni Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 443–44 (1985) (arguing that evidence of rape trauma syndrome should be admissible in part to overcome preconceptions of jurors about rape).

⁷⁵ See MELTON ET AL., *supra* note 44, at 414 (“[M]ental injury evaluation . . . [c]onsider[s] the examinee's functioning prior to the alleged harm (a retrospective assessment), at the time of the evaluation (a current-state assessment), and in the future (a prospective assessment).”).

parties, and a host of other factors make the analysis much more complicated.

I will not undertake that analysis here, but rather merely emphasize that the best case for permitting suspect opinion testimony about past mental states rests with criminal defendants. They have the most to lose when they are prevented from telling their stories, and are the group of litigants most likely to be disbelieved when they tell their stories unaided by experts. In short, they are the litigants most in need of expert speculation about past mental states. Assuming it is material and possesses the minimal degree of probative value contemplated by the generally accepted content validity test, such speculation should be permitted, even if we are sure that we are not sure about its scientific bona fides.