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# The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation

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## THE DISORDERED AND DISCREDITED PLAINTIFF: PSYCHIATRIC EVIDENCE IN CIVIL LITIGATION

*Deirdre M. Smith\**

### ABSTRACT

*This Article examines civil defendants' use of evidence of a plaintiff's alleged current or prior psychiatric diagnosis or treatment by analyzing and critiquing the three primary rationales offered in support of the relevancy of such evidence: (1) to suggest an alternative cause of the plaintiff's alleged psychological injuries; (2) to impeach the plaintiff's credibility by asserting that a mental illness interferes with the plaintiff's ability to recount or to perceive events accurately; and (3) to reveal certain propensities that inform how the plaintiff likely acted with respect to the events at issue in the litigation. While attaching a label of mental disorder can be a powerful means to discredit a person, its role as trial evidence goes largely unexamined, unquestioned, and unregulated by courts. Few courts carefully consider whether evidence of a plaintiff's mental illness is truly probative of the issues for which it is purportedly offered. I explain that evidence of a plaintiff's psychiatric history poses a significant risk of unfair prejudice to the plaintiff in light of the persistent and pervasive stigmatizing effects of psychiatric diagnoses. Regardless of the relevancy theory advanced by defendants in support of admissibility, fact finders likely use such evidence improperly to discount a plaintiff's credibility and to conclude that the plaintiff possesses certain behavioral propensities that weigh in favor of a finding for the defendant. I conclude by urging courts that face admissibility questions concerning such evidence to closely scrutinize the purported relevancy of the evidence and to exercise their discretion to guard against factual findings that are ultimately traceable to the stigmatizing effects of mental illness.*

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It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed.

—Justice Benjamin Cardozo<sup>1</sup>

## INTRODUCTION

In October 1991, Anita Hill became one of the most famous complainants in United States legal history when she testified before the U.S. Senate Judiciary Committee about her alleged experience of sexual harassment by her former employer, then-Judge Clarence Thomas. After an aggressive cross-examination of Professor Hill by the committee members and a public relations campaign by others, the Senate voted to confirm Judge Thomas's nomination to the U.S. Supreme Court. A majority of senators and a large segment of the American public dismissed Professor Hill's testimony due to, in large part, Judge Thomas's supporters' strategy of branding her as being "a bit nutty, and a bit slutty."<sup>2</sup> Specifically, the supporters, through debate and testimony in the Senate, as well as in statements to the press,

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<sup>1</sup> Shepard v. United States, 290 U.S. 96, 104 (1933).

<sup>2</sup> David Brock, *The Real Anita Hill*, AM. SPECTATOR, Mar. 1992, at 18; see also JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 284-86, (1994) (suggesting that Thomas's allies had portrayed Hill as "having lusted after [her former boss] with such fervor that her sanity—not to mention her credibility—was in doubt").

suggested that Professor Hill suffered from delusions and a serious mental disorder referred to as “erotomania.”<sup>3</sup>

The Hill-Thomas controversy was, at its essence, a battle of competing stories,<sup>4</sup> and in that critical respect it was much like a trial. In civil litigation, a plaintiff presents the fact finder with a story as a basis for recovering damages and other relief. The defendant’s strategy generally consists of a combination of undermining the credibility of the plaintiff and presenting a competing, more plausible version of the events in question. Some defendants use evidence of a plaintiff’s alleged current or prior psychiatric diagnosis or treatment as part of that strategy. The suggestion of mental disorder can be a powerful means to discredit a person, much as its use effectively discredited Professor Hill; however, its role as trial evidence in civil litigation goes largely unexamined, unquestioned, and unregulated by courts.

Scholarship and case law have extensively examined and considered the role of psychiatric testimony in criminal law and other legal deprivations of liberty, particularly in the context of evaluating a criminal defendant’s alleged mental disorder as it bears on issues such as the insanity defense, mens rea, competency, sentencing, and involuntary commitment.<sup>5</sup> However, the approaches to the admissibility of such evidence in the civil and criminal context are not interchangeable; the role of a party’s psychiatric history in civil litigation is far less clear and has been the focus of minimal scholarship. Courts largely fail to note the implications of such evidence, and accordingly provide little scrutiny of a defendant’s use of evidence of a plaintiff’s psychiatric history.

In a recent article, I reviewed and analyzed federal courts’ approaches to controversies regarding discovery of plaintiffs’ psychiatric histories in civil litigation, with a particular focus on disputes regarding whether a plaintiff had waived the psychotherapist-patient privilege by making particular allegations, such as claims of

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<sup>3</sup> Andrew Rosenthal et al., *Psychiatry’s Use in Thomas Battle Raises Ethics Issues*, N.Y. TIMES, Oct 20, 1991, at 23; see Paul Fitzgerald & Mary V. Seeman, *Erotomania in Women*, in *STALKING AND PSYCHOSEXUAL OBSESSION: PSYCHOLOGICAL PERSPECTIVES FOR PREVENTION, POLICING AND TREATMENT* 165, 166, 170-77 (Julian Boon & Lorraine Sheridan eds., 2002) (noting that this condition, which is characterized by “obsessive, excessive, unwanted or delusional love,” generally appears only in individuals with underlying psychotic or delusional disorders); see also MAYER & ABRAMSON, *supra* note 2, at 306-10.

<sup>4</sup> Senator John C. Danforth, Judge Thomas’s primary sponsor and supporter, explained in his account of the confirmation process that the controversy boiled down to a question of credibility and that he developed the “delusion theory” in consultation with several psychiatrists as a way to explain the sharp disparity in Professor Hill’s and Judge Thomas’s accounts and then injected that theory into the public debate beginning with an appearance on *Face the Nation*. JOHN C. DANFORTH, *RESURRECTION: THE CONFIRMATION OF CLARENCE THOMAS* 155, 160-61, 168-70 (1994).

<sup>5</sup> See generally CHRISTOPHER SLOBOGIN, *PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS* (2007).

disability discrimination or for emotional distress damages.<sup>6</sup> I touched on only briefly, and left for another day, a close examination of defendants' arguments regarding the relevancy and admissibility of evidence of such history. I now turn to those questions directly.

This Article considers and analyzes civil defendants' use of evidence of a plaintiff's alleged current or prior psychiatric diagnosis or treatment in three occasionally overlapping contexts. First, a defendant may argue that a plaintiff's mental illness serves as evidence of one or more alternative causes of the plaintiff's alleged psychological injuries. Second, a defendant may use evidence of a psychiatric diagnosis to impeach the plaintiff's credibility by asserting that a mental illness interferes with her ability to perceive or to recount events accurately. Third, a defendant may suggest that the plaintiff's mental illness was a factor in the events in question because such condition indicates certain propensities that inform how the plaintiff likely acted on a particular occasion.<sup>7</sup> Although this last use runs afoul of the character evidence prohibition contained in many evidence codes,<sup>8</sup> courts generally fail to recognize it as such.

Few courts closely examine whether evidence of a plaintiff's mental illness is truly probative of the issues for which a party purportedly offers it, and therefore whether it is appropriate to admit it in trials. Rather, they rely upon assumptions—often incorrect—regarding what exactly evidence of mental illness reveals. Psychiatry itself constructs “mental illness” and therefore psychiatric diagnoses do not provide the firm foundation for fact finding that many courts assume they do. More significantly, the law provides the concepts of causation, credibility, and character with case-specific constructions, rather than fixed meanings. In a given case, a court can construct these concepts with or without consideration of a person's alleged mental illness. Therefore, a court's determination of the relevancy of a plaintiff's alleged mental illness with respect to any of these three concepts in a given case is not a foregone conclusion, but rather a value-based

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<sup>6</sup> Deirdre M. Smith, *An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in the Federal Courts*, 58 DEPAUL L. REV. 79 (2008).

<sup>7</sup> Another context in which such evidence may be offered in civil litigation is family law, such as to assert mental illness as a basis for divorce, which has become less common as states have progressively loosened the requirements for divorce. See Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 270-71 (1997). Evidence of mental illness has also been used for determinations of parental fitness in custody disputes. Courtney Waits, Comment, *The Use of Mental Health Records in Child Custody Proceedings*, 17 J. AM. ACAD. MATRIMONIAL LAW. 159, 159-61 (2001). The use of such evidence in these contexts is beyond the scope of this Article, largely because the overall approach to relevancy in family law differs significantly from that seen in most civil litigation, particularly where juries rather than courts resolve factual issues.

<sup>8</sup> See, e.g., FED. R. EVID. 404(a) (mandating that except in certain enumerated instances, “[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion”).

determination of whether such evidence should be considered in arriving at a “just” result in that particular case.

This Article concludes that the admission of psychiatric evidence<sup>9</sup> under any of these three approaches implicates the dangers against which Rule 403 of the Federal Rules of Evidence<sup>10</sup> and analogous rules used in state courts were intended to guard, which suggests that judges must make greater use of their discretion to exclude such evidence. Specifically, and most significantly, the admission of evidence of a plaintiff’s psychiatric history poses a significant risk of unfair prejudice to the plaintiff in light of the persistent and pervasive stigmatizing effects of psychiatric diagnoses. Regardless of the purported basis for the relevancy of such evidence, fact finders will, often unwittingly, use such evidence improperly to discount a plaintiff’s credibility and to conclude that the plaintiff possesses certain behavioral propensities that weigh in favor of a finding for the defendant. The use of such evidence in each of these contexts therefore requires close analysis and careful consideration to guard against factual findings that are ultimately derived from the stigma of mental illness.

Fact finders are likely to misuse psychiatric evidence, particularly when offered through expert witnesses, because they have few tools to independently evaluate such evidence and thus may overvalue the significance of psychiatric diagnoses for the resolution of factual questions. Accordingly, trial judges should scrutinize defendants’ purported bases for offering such evidence and, even where such evidence is ostensibly relevant, should consider whether the potential misuse of psychiatric evidence nonetheless warrants its exclusion.

The rationale offered by courts when admitting evidence of a plaintiff’s mental illness is nearly always one of ensuring fairness to both parties by providing fact finders with evidence that both supports

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<sup>9</sup> I will generally use the term “psychiatric evidence” to refer to evidence of an individual’s psychiatric diagnosis and/or treatment by a mental health professional. Such evidence is often, but not necessarily, offered through an expert witness who is a mental health professional. I use the term “psychiatric,” as opposed to “psychological,” because my primary focus is on evidence of diagnosed mental disorders developed in the field of psychiatry, such as in the *Diagnostic and Statistical Manuals* published by the American Psychiatric Association, rather than evidence of human behavior, syndrome evidence, psychological testing and the like, which is commonly referred to as “psychological evidence.” However, parties quite often present such psychiatric diagnoses through the testimony of forensic or clinical psychologists, who, in most jurisdictions, may also offer opinions on mental disorders and the causation of psychological damages with respect to individual litigants. See GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 23 (3d ed. 2007); DANIEL W. SHUMAN, *PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE* § 8:2, at 8-2-8-5 (3d ed. 2005).

<sup>10</sup> The Rule provides: “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.” FED. R. EVID. 403.

and challenges each party's core assertions so that such fact finders are more likely to reach an accurate determination of the disputed facts. However, by failing to acknowledge the unique complexities of psychiatric evidence and the impact of stigma on those who have been labeled as having a mental disorder, courts too often fail to rule in a way that is in fact fair and just.

Part I of this Article examines and critiques the use of psychiatric evidence to rebut a plaintiff's claims for psychological injuries. It begins by reviewing the general principles of causation in civil litigation and contrasting them with psychiatry's views of causation.<sup>11</sup> Part I then analyzes the rationales accepted and rejected by courts regarding the role of psychiatric evidence in determining the causation and apportionment of damages.<sup>12</sup> Part II considers courts' conflicting views on the role of psychiatric evidence on the issue of a trial witness's credibility, and particularly a civil plaintiff's testimony.<sup>13</sup> Part III reviews the character evidence prohibition in more detail and then demonstrates how, notwithstanding such broad prohibition, courts admit psychiatric evidence that is rife with negative characterizations of civil plaintiffs and that can be easily used to draw inferences about such plaintiffs' propensities and predispositions.<sup>14</sup>

Part IV discusses three distinct dangers presented by civil defendants' use of psychiatric evidence. First, the stigmatizing effect of mental illness continues to pervade our society, and associating a plaintiff with a psychiatric label directly implicates such attitudes and beliefs.<sup>15</sup> Second, psychiatric diagnoses are of little utility in reaching accurate factual conclusions in most civil litigation.<sup>16</sup> Third, fact finders generally lack appreciation of the complexity of evidence regarding mental illness.<sup>17</sup> These dangers, I argue, require courts to scrutinize the purported relevancy of psychiatric evidence and use their discretion under Rule 403 and other rules to exclude such evidence to guard against the dangers of unfair prejudice, misuse of the evidence, and confusion of the issues.<sup>18</sup> I conclude by suggesting that the consideration of a party's mental illness in any part of the analysis in civil litigation implicates basic questions of justice.<sup>19</sup>

While the focus of this Article is the admissibility of psychiatric evidence at trial, trends in the case law on evidence have a direct

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<sup>11</sup> See *infra* notes 22-114 and accompanying text.

<sup>12</sup> See *infra* notes 61-198 and accompanying text.

<sup>13</sup> See *infra* notes 199-271 and accompanying text.

<sup>14</sup> See *infra* notes 272-319 and accompanying text.

<sup>15</sup> See *infra* notes 320-330 and accompanying text.

<sup>16</sup> See *infra* notes 331-346 and accompanying text.

<sup>17</sup> See *infra* notes 347-353 and accompanying text.

<sup>18</sup> See *infra* notes 355-379 and accompanying text.

<sup>19</sup> See *infra* notes 381-388 and accompanying text.

bearing on the scope of civil discovery, which is generally limited to evidence that is “relevant to any party’s claim or defense,” meaning that it is “reasonably calculated to lead to the discovery of admissible evidence.”<sup>20</sup> Therefore, a court’s determination that a plaintiff’s psychiatric history is, for example, relevant to the issue of her claim for emotional distress damages will enhance a defendant’s position in a dispute regarding the discoverability of evidence of such history.<sup>21</sup> By extension, the prospect of the admissibility of such evidence at trial has direct impact on the respective settlement positions of the parties. Thus, even as civil trials become less frequent in contemporary litigation, the likelihood of the admissibility (or not) of evidence at trial has bearing on the entire course of litigation.

### I. CAUSATION

The case law suggests that civil defendants that seek the admissibility of evidence of a plaintiff’s preexisting or current psychiatric diagnosis most frequently argue that the relevance of such evidence is its connection to the issue of causation of emotional distress or other forms of psychological injury alleged by the plaintiff. Specifically, these defendants claim, evidence of preexisting or concurrent psychiatric illness can demonstrate possible alternative causes of the plaintiff’s alleged psychological injuries.<sup>22</sup> Such alternative causes may suggest that the claimed psychological injury did not in fact arise from the defendant’s alleged conduct or that there are multiple causes of the plaintiff’s current distress, requiring apportionment among these various causes to ensure that the defendant is not required to compensate the plaintiff for injuries that are not wholly attributable to its actions.

There are two broad contexts in which the concept of psychological injury has developed in the law, and particularly in tort law. One is the development of distinct torts that permit recovery based upon “pure emotional harm,” a psychological injury occurring in the absence of a physical injury.<sup>23</sup> These actions for intentional infliction of emotional distress and negligent infliction of emotional distress became

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<sup>20</sup> FED. R. CIV. P. 26(b)(1).

<sup>21</sup> See Smith, *supra* note 6, at 121-28. Indeed, as discussed *infra* at notes 155-157 and accompanying text, a significant number of controversies regarding the relevancy of such evidence are raised and resolved during the discovery stage.

<sup>22</sup> See James J. McDonald, Jr. & Francine B. Kulick, *Preface* to MENTAL AND EMOTIONAL INJURIES IN EMPLOYMENT LITIGATION, at xli (James J. McDonald, Jr. & Francine Kulick eds., 2d ed. 2001).

<sup>23</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM ch. 8, scope note (Tentative Draft No. 5, 2007).

widely recognized in state courts in the second half of the twentieth century.<sup>24</sup> In most instances, before any liability may be imposed, courts require a showing of a particular degree of emotional harm—usually “severe”—that “a reasonable person in the same circumstances would suffer.”<sup>25</sup>

The second context in which psychological injuries are the focus concerns the extent of any emotional and psychological injuries, most commonly referred to as “emotional distress” damages, allegedly caused by a defendant’s wrongful actions that serve as a basis for imposing liability in a personal injury case (including tort, discrimination, and civil rights litigation). Thus, in the first context, the presence of psychological injury has bearing on a finding of liability, while in the second context, such injuries determine the amount of damages awarded to a plaintiff.<sup>26</sup> Both contexts require fact finders to make determinations of causation—that is, whether the defendant’s actions or omissions caused the plaintiff to suffer some degree of emotional distress. Depending upon the specific claims in a given case, a defendant may assert that psychiatric evidence of a plaintiff’s prior or current mental illness is relevant in either or both contexts.

The legal basis for recovery of psychological injuries evolved in the face of long-standing judicial skepticism of such claims.<sup>27</sup> Therefore, when the claims were eventually permitted to go forward, they often had to conform to certain conditions and standards—such as the “zone of danger” test<sup>28</sup> or the requirement of accompanying physical injury<sup>29</sup>—that have been characterized by some as “artificial, convoluted, and without merit,” and devoid of empirical support.<sup>30</sup> While many acknowledge that psychological injuries can be real and cause serious and lasting impairment, others remain wary of basing damage awards upon a “soft” science such as psychiatry whose diagnoses are “fluid and debatable.”<sup>31</sup> This skepticism about the

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<sup>24</sup> *Id.* § 45 reporter’s note; *id.* § 46 reporter’s note.

<sup>25</sup> *Id.* § 45 cmt. i (using the standard of “[s]evere emotional disturbance”).

<sup>26</sup> *Pearson v. City of Austin*, Civ. A. No. 99-CA-434JN, 2001 WL 681663, at \*1 (W.D. Tex. Apr. 4, 2001) (noting distinction between “[pleading] emotional distress as a cause of action” and “[pleading] mental anguish as part of [plaintiffs’] damages”).

<sup>27</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 45 scope note (Tentative Draft No. 5, 2007) (“Courts have played an especially critical role in cabining this tort [intentional (or reckless) infliction of emotional disturbance] by requiring ‘extreme and outrageous’ conduct and ‘severe’ emotional disturbance.”).

<sup>28</sup> John A. Call, *Liability for Psychological Injury: Yesterday and Today*, in PSYCHOLOGICAL INJURIES AT TRIAL 40, 47 (Izabela Z. Schultz & Douglas O. Brady eds., 2003) (American Bar Ass’n CD-ROM).

<sup>29</sup> *Id.* at 43.

<sup>30</sup> *Id.* at 41; see also Daniel W. Shuman, *Persistent Reexperiences in Psychiatry and Law: Current and Future Trends in Post-Traumatic Stress Disorder Litigation*, in PSYCHOLOGICAL INJURIES AT TRIAL, *supra* note 28, at 850, 852.

<sup>31</sup> Call, *supra* note 28, at 41.

validity of such claims may well account in large part for courts' reluctance to limit the evidence offered by defendants to rebut claims of psychological injury.

Emotional distress and other psychic injuries are a key component of civil noneconomic damages and are now recoverable in a wide range of civil actions, including common law tort and statutory civil rights actions.<sup>32</sup> Indeed, such alleged injuries may be the exclusive basis for damages in employment and other discrimination cases.<sup>33</sup> The prevalence of such damage claims means that defendants often seek discovery and admissibility of psychiatric evidence. While the relevance of such evidence is often assumed without controversy, there is no framework in either psychiatry or the law to guide fact finders on the appropriate use of psychiatric evidence to resolve factual disputes regarding causation and the apportionment of psychological damages.

#### A. *General Concepts of Causation*

At the outset, it is valuable to review the basic framework of causation<sup>34</sup> in the law and particularly in personal injury litigation, the specific context in which damages for psychiatric injuries are sought. Tort principles regarding damages and causation generally apply to all kinds of actions in which a personal injury is alleged, including civil rights and discrimination cases.<sup>35</sup>

While one may initially assume that the determination of causation of injuries is a straight-forward, objective, factual inquiry, causation is, in fact, a necessarily complex concept. Several fields and disciplines employ conceptualizations of causation for varied purposes. The legal system has constructed the notion of "causation" for the purpose of allocating legal responsibility for a given event and for determining whether a payment of compensatory damages is warranted. While law

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<sup>32</sup> See Smith, *supra* note 6, at 84-85 (discussing the expansion of the types of cases in which emotional distress damages may be raised); McDonald & Kulick, *supra* note 22, at xxxvi-vii (discussing same with respect to employment discrimination claims).

<sup>33</sup> McDonald & Kulick, *supra* note 22, at xxxviii.

<sup>34</sup> The terms "causation" and "causality" are frequently used interchangeably in both law and psychology. Gerald Young & Andrew W. Kane, *Causality in Psychology and Law*, in CAUSALITY OF PSYCHOLOGICAL INJURY: PRESENTING EVIDENCE IN COURT 13, 19 (Gerald Young et al. eds, 2007).

<sup>35</sup> DAN B. DOBBS, THE LAW OF TORTS 82 (2000) ("Section 1983 authorizes tort claims for deprivation of federal rights under color of state law."); see also *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986) ("We have repeatedly noted that 42 U.S.C. § 1983 creates 'a species of tort liability . . .'" (citation omitted)). The same analysis applies to damages claims sought under other civil rights statutes. See DOBBS, *supra*, at 81-82 ("Civil rights violations are torts. They have generated an important specialty, in which the courts look to common law tort rules as models without necessarily accepting their limitations.").

has often drawn from other fields (particularly philosophy) when attempting to formulate approaches to causation, there are limits to the usefulness of more abstract notions of causation in the context of assigning liability. As one commentator has noted:

It is tempting for a legal theorist to suppose that we should be able to supply judges and juries with an adequate and precise analysis of causal connection. This project, however, is probably doomed from the start. Philosophers have labored long and hard on the question of how to analyze causation, with a striking lack of success. . . . [I]f the law is waiting for philosophers to offer something better than a prephilosophical grasp of what is involved in one thing causing another, the law had better be very patient indeed.<sup>36</sup>

As a primary matter, a defendant is liable only for the harm it brought about in some respect. This is a counterfactual inquiry requiring a determination of whether the event or injury would have occurred without the actions (or inaction) of the defendant.<sup>37</sup> Generally this requires a “but for” analysis.<sup>38</sup> Thus, there is an initial indispensable requirement that the defendant’s actions (or omissions) are the “factual” cause of the plaintiff’s alleged injuries, and this burden is assigned to the party seeking to recover damages, usually the plaintiff.<sup>39</sup>

However, a defendant is not liable for any and all harm for which its actions are the factual cause. Rather, law further refines the notion of causation with the concept of “legal” cause, commonly referred to as “proximate cause.” Courts have developed several tests and concepts to distinguish factual cause from legal cause to “narrow[] the class of all tortious causal factors to the legally responsible tortious factors.”<sup>40</sup> For example, pursuant to the *Second Restatement of Torts*, many courts have held that the defendant’s actions must have been a “substantial factor” (but not necessarily the sole cause) of the damage in order to impose liability.<sup>41</sup> Conversely, liability is excluded where the link between the defendant’s actions and the result is too remote.<sup>42</sup>

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<sup>36</sup> Richard Fumerton & Ken Kress, *Causation and the Law: Preemption, Lawful Sufficiency, and Causal Sufficiency*, 64 L. & CONTEMP. PROBLEMS 83, 102-05 (2001).

<sup>37</sup> Richard Scheines, *Causation, Truth, and the Law*, 73 BROOK. L. REV. 959, 960-61 (2008).

<sup>38</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 cmt. B (Proposed Final Draft No. 1, 2005).

<sup>39</sup> Throughout this Article, I use the term “plaintiff” to describe the party asserting a claim for damages; in certain cases, such as where there has been a counter-claim or third-party claim, another party may be seeking to recover damages.

<sup>40</sup> Fumerton & Kress, *supra* note 36, at 87.

<sup>41</sup> RESTATEMENT (SECOND) OF TORTS §§ 431-32 (1965); see, e.g., *Chism v. White Oak Feed Co.*, 612 S.W.2d 873, 881 (Mo. Ct. App. 1981) (holding that it was “[b]eyond question” that an “unguarded auger was a substantial factor in bringing about the amputation” of the plaintiff’s leg and affirming judgment against defendant).

<sup>42</sup> See, e.g., *Lear Siegler, Inc., v. Perez*, 819 S.W.2d 470, 471-72 (Tex. 1991) (holding that causal connection between alleged defect in highway sign and driver’s death was too remote to

With respect to any event or condition there are of course theoretically infinite causes. Legal causation, as implemented through these rules, is a normative means to narrow these causes to a focused determination of whether and to what extent the defendant is liable. New York Court of Appeals Judge William Andrews noted in his dissent in *Palsgraf v. Long Island Railroad Co.* that by “proximate” cause we mean that “because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.”<sup>43</sup> Legal scholars such as Richard Wright strive to separate the nonnormative or empirical approaches to determining causation from the normative or value-laden tests.<sup>44</sup> More recently, a pair of commentators observed: “Traditionally, it is said that the proximate cause concept selects from among all actual causes the legally responsible causes by invoking policy considerations. But whether something is *a* causally relevant factor in producing some outcome may be nonnormative through and through.”<sup>45</sup>

Most courts do not expressly acknowledge and juries do not understand that the determination of legal, as opposed to factual, causation is a normative determination. Jurors, of course, are not required to resolve these philosophical questions of causation. Indeed, they have no sense of how carefully constructed causation is because they are instructed to consider all of the evidence they have received to determine causation, generally under the “substantial factor” formulation.<sup>46</sup> Thus, it is primarily through rulings on the admissibility of evidence that the legal system constructs causation on a trial-by-trial

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impose liability).

<sup>43</sup> *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting); see also DOBBS, *supra* note 35, at 443 (“The proximate cause issue, in spite of the terminology, is not about causation at all but about appropriate scope of responsibility.”).

<sup>44</sup> See generally Richard W. Wright, *Once More Into The Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071 (2001); see also Fumerton & Kress, *supra* note 36, at 84. Wright proposed an alternative to the traditional “but for” test of actual causation by expanding upon the “NESS” test, which states “that a particular condition was a cause of a specific consequence if and only if it was a *necessary* element of a set of antecedent actual conditions that was *sufficient* for the occurrence of the consequence.” Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1774, 1790 (1985) (emphasis altered). He proposed it as a way to address some of the issues for which the “but for” test is inadequate, such as overdetermined causes (when two or more causes act simultaneously, each of which could have been an actual cause). Some have criticized Wright’s approach as being inadequate to account for all questions of actual causation that may arise. Fumerton & Kress, *supra* note 36, at 95-102.

<sup>45</sup> Fumerton & Kress, *supra* note 36, at 88 (emphasis added).

<sup>46</sup> See, e.g., *Mitchell v. Gonzales*, 819 P.2d 872, 878-79 (Cal. 1991); N.Y. PATTERN JURY INSTRUCTIONS—CIVIL § 1:37 (Comm. on Pattern Jury Instructions Ass’n of Supreme Court Justices 2008) (“As the jurors, your fundamental duty is to decide, from all the evidence that you have heard and the exhibits that have been submitted, what the facts are.”); *id.* § 2:70 (“An act or omission is regarded as a cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable people would regard it as a cause of the injury.”).

basis. By ruling that something is “relevant” to the determination of causation, the court configures the causation question in a particular dispute, leaving for the fact finder the ultimate determination of the answer to the question.

The normative construction of legal causation thus presents many opportunities for creative advocacy; attorneys use the general concepts to argue for and against the admissibility of evidence. This is particularly true for defendants who may argue that they are offering certain evidence to demonstrate some alternative factual cause of the plaintiff’s injuries (whether it be another tortfeasor or an innocent cause).<sup>47</sup> There are few general rules that narrow the field of potential alternative factual causes and few instructions, other than the “substantial factor” language, to guide fact finders’ use of such evidence of alternative causes in determining whether or not the defendant’s actions were the legal cause.

Where a defendant offers evidence of allegedly alternative causes of the plaintiff’s injury, fact finders may be required to make additional findings regarding apportionment of the extent of the injury caused by the defendant’s actions. A fact finder may also conclude that the alternative cause is in fact the entire cause of the injury. Thus, if a defendant can demonstrate that the plaintiff would have continued to experience, or perhaps would have inevitably experienced, the same harm regardless of the defendant’s actions, such finding of causal preemption will mitigate or eliminate the defendant’s liability for such harm.<sup>48</sup>

A concept closely related to, but often confused with, alternative causation is the “thin skull” or “eggshell skull” plaintiff. Under this principle, a defendant is liable for all harm caused by its conduct even if the degree of harm experienced by the plaintiff was not foreseeable due to a preexisting (but perhaps latent) vulnerability or condition of the plaintiff.<sup>49</sup> Thus, a defendant is liable for aggravation of a preexisting injury regardless of whether such aggravation was itself foreseeable.<sup>50</sup>

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<sup>47</sup> Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1356 (1981) (“There are always forces and conditions other than the defendant’s conduct that must be considered in valuing an interest. Some of these forces will constitute contributing causes of the injury . . .”).

<sup>48</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 cmt. k (Proposed Final Draft No. 1, 2005).

<sup>49</sup> *Id.* § 31; King, *supra* note 47, at 1357 (“Generally, a preexisting condition may be defined as a disease, condition, or force that has become sufficiently associated with the victim to be factored into the value of the interest destroyed, and that has become so before the defendant’s conduct has reached a similar stage.”).

<sup>50</sup> There can be some confusion, however, in cases alleging negligent infliction of emotional distress and intentional infliction of emotional distress, because the question of *liability* turns on whether the defendant’s actions could have caused severe emotional distress to a person of “ordinary” sensibilities. See, e.g., *Poole v. Copland, Inc.*, 498 S.E.2d 602, 604-05 (N.C. 1998). Also in sexual harassment cases, some courts have concluded that the objective component of the

Even in cases where the thin skull rule applies, however, the defendant is liable only for the extent of the exacerbation of the preexisting condition and not the entirety of the plaintiff's injury; accordingly, fact finders may be required to determine apportionment in such cases. Similarly, if the evidence suggests that a preexisting condition (or some other agent) in fact entirely caused the harm complained of by the plaintiff, then the thin skull rule does not apply.<sup>51</sup> Some courts note a distinction between an asymptomatic or latent condition—for which the defendant is entirely liable—and a preexisting symptomatic condition which requires apportionment, if possible, because the defendant should not be held liable for the symptoms that the plaintiff was already experiencing at the time of the allegedly tortious action. One court explained the distinction as being between a “pre-existing condition” and “pre-existing injury,” holding that it is only with respect to the latter that apportionment is required.<sup>52</sup>

The principles of alternative causation and thin skull plaintiffs can be confused as their difference lies primarily in strategy. A plaintiff may invoke the “thin skull” principle as a basis to explain why her injuries may initially seem out of proportion to the initial injury and to recover for such aggravated injury.<sup>53</sup> However, even if the plaintiff makes no thin skull argument, a defendant can use evidence of a preexisting condition to argue that such condition, not the defendant's tortious actions, is a partial or substantial cause of the plaintiff's injuries.<sup>54</sup>

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test set forth in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)—whether the plaintiff's workplace was one that a reasonable person would find to be hostile or abusive—precludes the application of the thin skull rule to liability questions in sexual harassment cases. *Sudtelgte v. Reno*, No. 90-1016-CV-W-6, 1994 WL 3406, at \*14 (W.D. Mo. Jan. 3, 1994). Nonetheless, the thin skull rule itself can apply in such claims with respect to the extent of damages actually suffered by the plaintiff.

<sup>51</sup> Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 679-81 (2006); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 31 cmts. a, b (2005).

<sup>52</sup> *Lovely v. Allstate Ins. Co.*, 658 A.2d 1091, 1093 n.1 (Me. 1995) (Lipez, J., concurring).

<sup>53</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 28 cmt. d, reporters' note (2005); *see, e.g.*, *Freeman v. Busch*, 349 F.3d 582, 590 (8th Cir. 2003) (holding that plaintiff in tort case alleging sexual assault was entitled to thin skull instruction based on evidence that she had received prior psychiatric treatment for sexual abuse and that her condition was exacerbated by the alleged rape); *Hare v. H & R Indus.*, No. 00-CV-4533, 2002 WL 777956, at \*2 (E.D. Pa. Apr. 29, 2002) (holding in a sexual harassment case that, “[w]hile several other factors contributed to Plaintiff's [psychiatric] hospitalization [soon after the incident],” the defendant is still liable to the plaintiff for all of the medical expenses based upon the thin skull rule and the fact that the harms were impossible to apportion).

<sup>54</sup> *See, e.g.*, *McClelland v. Montgomery Ward. & Co.*, No. 95-C-23, 1995 WL 571324, at \*1-3 (N.D. Ill. Sept. 25, 1995) (holding that plaintiff's waiver of claim for exacerbation of preexisting injury did not provide basis to exclude evidence of prior psychological treatment); *see also* *King*, *supra* note 47, at 1361 (“The ‘take him as you find him’ rule does *not*, however, make the victim's preaccident condition irrelevant.”).

Generally, causation is a concept distinct from *valuation* of harm or injury; the former is generally an all-or-nothing determination.<sup>55</sup> Where there are multiple potential causes of harm requiring apportionment, the distinction is less clear. In determining the amount of compensatory damages to award a plaintiff, a fact finder may need to reduce the figure to reflect the causal role of alleged alternative causes to arrive at a figure that reflects the degree of the defendant's liability. The fact finder's task of determining causation of harm can become quite complicated where the plaintiff had a preexisting condition but there is also some harm, including exacerbation of such condition, attributable to the defendant. There is little consensus in the case law regarding which party has the burden of proving the extent of the aggravated harm as distinguished from the preexisting harm.<sup>56</sup>

Many courts note an exception to the rule requiring apportionment of the plaintiff's harm where there is evidence of alternative causes. A court may determine as a matter of law that the plaintiff's harm is not divisible or subject to apportionment between the various causes because of the very nature of that harm.<sup>57</sup> Where the damages between the preexisting condition and the aggravated condition cannot be apportioned, the defendant is liable for the full amount of the harm even if a preexisting condition was a cause in part.<sup>58</sup> In such instances, most courts will hold that the defendant is liable for the full extent of the harm because it is preferable to have a tortfeasor pay more than its share than to let an injured plaintiff receive less than full compensation.<sup>59</sup> Thus, when the court considers certain evidence offered to show apportionment to be inappropriate for a fact finder's consideration, the

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<sup>55</sup> King, *supra* note 47, at 1356-57.

<sup>56</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 28 cmt. d(2), reporters' note (2005). *See, e.g.*, Stoleson v. United States, 708 F.2d 1217, 1222-24 (7th Cir. 1983) (Posner, J.) (holding that it is plaintiff's burden to prove aggravation of preexisting medical or mental condition caused by defendant's conduct *and* to apportion the damages between the preexisting condition and the aggravation); Shippen v. Parrott, 553 N.W.2d 503, 507 (S.D. 1996) (holding that it is plaintiff's burden to show not only that the defendant's conduct was a substantial factor in causing the aggravation of a preexisting condition but also, that such damages must be apportioned from damages caused by nonactionable causes); *see also* King, *supra* note 47, at 1390 ("Generalization about the burden of proof in the context of preexisting conditions . . . is . . . difficult because of a failure of the courts adequately to distinguish and separate causation and valuation.").

<sup>57</sup> RESTATEMENT (SECOND) OF TORTS § 433A cmt. i (1965) ("Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division."); DOBBS, *supra* note 35, at 422-23.

<sup>58</sup> *Shippen*, 553 N.W.2d at 507. The exception was not triggered in *Shippen* because there was no evidence of aggravation of a preexisting condition.

<sup>59</sup> *Lovely v. Allstate Ins. Co.*, 658 A.2d 1091, 1092-93 (Me. 1995). Thus, the defendant generally assumes a functional burden of proof on apportionment since it is liable for the full extent of the plaintiff's harm if the plaintiff's harm is found to be indivisible. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 28 cmt. d(1) (2005).

court can render such evidence irrelevant by determining that the alleged injuries are not subject to apportionment.<sup>60</sup>

Courts generally apply all of these principles to claims for psychological injury. As with any other personal injury claim, it is the plaintiff's burden to establish that the factual and legal causes of her psychological injury are attributable to the defendant's actions. A defendant may argue in response that some other condition or event was in part or entirely the actual cause of the injury. Similarly, a plaintiff may raise a "thin skull" argument and claim that the defendant's conduct exacerbated a preexisting psychological condition giving rise to a far more serious psychological injury than might be expected.<sup>61</sup> In some cases, the issue is whether the preexisting condition or vulnerability is an indication that the psychological injury was inevitable and therefore the defendant should escape liability entirely.<sup>62</sup>

Determination of causation of harm requires courts and fact finders to make clear distinctions and quantification of a plaintiff's injury and its relation to the defendant's conduct. However, where the harm at issue is an alleged *psychological* injury, requiring the application of these concepts to causation of such injury moves the task far into the realm of legal (and psychiatric) fiction.

### B. *Psychiatry's View of the Causation of Mental Illness*

Before turning to an analysis of how courts apply these general concepts of causation to questions of the admissibility of psychiatric evidence, it is important to consider how the field of psychiatry<sup>63</sup> approaches the controversial question of causation of mental disorders. There are fundamental differences between the methods used in the law (in terms of civil personal injury litigation broadly defined) and in psychiatry to approach the issue of "causation." Indeed, in psychiatry, causation has no clear role.

In clinical practice, psychiatrists and psychologists (collectively, "clinicians"), have little concern for causation or etiology when

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<sup>60</sup> See, e.g., *Robinson v. Canon U.S.A., Inc.*, No. 99-0339-CV-W-3, 2000 WL 564203 (W.D. Mo. Apr. 6, 2000) (ruling that emotional distress claim in sexual harassment case was not subject to apportionment based upon alleged alternative stressors, and, therefore, plaintiff need not respond to discovery questions regarding alleged extramarital affairs).

<sup>61</sup> See, e.g., *Miley v. Landry*, 582 So. 2d 833 (La. 1991) (holding defendant liable for full extent of injury where plaintiff argued that a car accident triggered a recurrence of psychosis that had been in remission for several years).

<sup>62</sup> See, e.g., *Steinhauser v. Hertz Corp.*, 421 F.2d 1169, 1173-74 (2d Cir. 1970); *Salas v. United States*, 974 F. Supp. 202, 208-10 (W.D.N.Y. 1997).

<sup>63</sup> This discussion of the varying perspectives on the causation of mental illness also applies to the field of psychology. For simplicity reasons only, I use the term "psychiatry."

diagnosing and treating mental disorders, particularly under the current approach advanced in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM)*.<sup>64</sup> Clinical diagnosis can be done in a matter of minutes based upon a compilation of symptoms determined through a patient's self-report and the clinician's observations.<sup>65</sup> Psychiatric diagnoses are subject to repeated revisions during a course of treatment; they operate as "working theories" rather than definitive determinations.<sup>66</sup> Psychiatry is also less concerned with determining agents of cause in developing treatment plans, as compared with most other fields of medicine which often regard the identification of etiology as necessary to prevent further or future injury and to determine the appropriate treatment modality.<sup>67</sup>

The recent editions of the *DSM*, referred to by one pair of commentators as a "consensus document" rather than a "bible,"<sup>68</sup> have been atheoretical on the issue of causation,<sup>69</sup> with the exception of the criteria for post-traumatic stress disorder (PTSD).<sup>70</sup> The *DSM*, from the

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<sup>64</sup> AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, at xxxiii (4th ed. text rev. 2000) (*DSM-IV-TR*); see ALLAN V. HORWITZ & JEROME C. WAKEFIELD, *THE LOSS OF SADNESS: HOW PSYCHIATRY TRANSFORMED NORMAL SORROW INTO DEPRESSIVE DISORDER* 97 (2007).

<sup>65</sup> T.M. LUHRMANN, *OF TWO MINDS: THE GROWING DISORDER IN AMERICAN PSYCHIATRY*, 40-45 (2000); Terence W. Campbell, *Challenging the Evidentiary Reliability of DSM-IV*, in *PSYCHOLOGICAL INJURIES AT TRIAL*, *supra* note 28, at 436, 440-41; Abilash Gopal & Harold Bursztajn, *On Skepticism and Tolerance in Psychiatry and Forensic Psychiatry*, *PSYCHIATRIC TIMES* 1 (Apr. 15, 2007) (noting that due to time pressure and "conditions of uncertainty" many clinicians use shortcuts and "make premature cognitive commitments" when arriving at a psychiatric diagnosis, and concluding that "[a]s a result, diagnostic reliability is conflated with diagnostic validity").

<sup>66</sup> See Mary E. Stumo et al., *Using Psychiatric and Psychological Experts at Trial—Defense Perspective*, in *PSYCHOLOGICAL INJURIES AT TRIAL*, *supra* note 28, at 1309, 1312. By contrast, "the law has virtually no mechanisms for deferring the resolution of disputes until additional scientific information is gathered." Margaret A. Berger, *Expert Testimony: The Supreme Court's Rules*, 16 *ISSUES SCI. & TECH.* 57, 63 (2000), cited in Craig Haney & Amy Smith, *Science, Law, and Psychological Injury: The Daubert Standards and Beyond*, in *PSYCHOLOGICAL INJURIES AT TRIAL*, *supra* note 28, at 184, 187.

<sup>67</sup> See Izabela Z. Schultz, *Psychological Causality Determination in Personal Injury and Workers' Compensation Contexts*, in *PSYCHOLOGICAL INJURIES AT TRIAL*, *supra* note 28, at 102, 104 (noting the distinction between treatment-oriented and causation-oriented assessments of mental illness). But see Lars Noah, *Pigeonholing Illness: Medical Diagnosis as a Legal Construct*, 50 *HASTINGS L.J.* 241, 247 (1999) ("[Physicians] do not care much about the disease's etiology—the theory of its origin or cause—unless understanding causation would assist in diagnosis and treatment.").

<sup>68</sup> Renee L. Binder & Dale E. McNiel, *Some Issues in Psychiatry, Psychology, and the Law*, 59 *HASTINGS L.J.* 1191, 1197-98 (2008); Gopal & Bursztajn, *supra* note 65 (noting that some "ill-trained attorneys" erroneously believe that the *DSM* is the "bible of psychiatry" or that psychiatry "can be practiced from a cookbook").

<sup>69</sup> HORWITZ & WAKEFIELD, *supra* note 64; Jerry von Talge, *Overcoming Courtroom Challenges to the DSM-IV Part II: Preparing for and Overcoming Courtroom Challenges to DSM-IV*, in *PSYCHOLOGICAL INJURIES AT TRIAL*, *supra* note 28, at 427, 431.

<sup>70</sup> PTSD is one of the most controversial diagnoses, in large part due to this distinction. Robert L. Spitzer et al., *Revisiting the Institute of Medicine Report on the Validity of*

third edition forward, is largely a descriptive, symptom-based approach to diagnosis.<sup>71</sup> As of now, psychiatric disorders are considered idiopathic and “there is no method for externally validating current diagnostic constructs.”<sup>72</sup> One psychiatrist has suggested that there is insufficient tested, data-based analysis to support “reliable and valid statements regarding causation.”<sup>73</sup> He further suggests that psychiatry embrace a more “parsimonious application of ‘due to’ diagnoses in daily clinical practice.”<sup>74</sup>

During the heyday of psychoanalytic theory, clinicians gave much attention to the sources of neuroses, which were generally attributed to internal conflicts.<sup>75</sup> Contemporary observers also note that, during early days of psychiatry, a hallmark of mental disorder was that the symptoms did not appear to be in response to any sort of external cause, such as a trauma or loss,<sup>76</sup> but that the current diagnostic criteria do not exclude such reactions.<sup>77</sup> Some have recently criticized the *DSM*'s failure to account for the context in which the symptoms arose in the diagnostic criteria for major depressive disorder.<sup>78</sup> The label of “mental disorder,” they suggest, should be reserved for those individuals who continue to react to stressful events long after they have ended, suggesting the presence of “internal dysfunctions” as the pivotal causes of the persistent symptoms.<sup>79</sup>

Thus, psychiatry does not provide a stable, uncontroversial conception of causation that can be imported easily into the legal realm. However, notwithstanding the *DSM*'s generally agnostic stand on

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*Posttraumatic Stress Disorder*, 49 *COMPREHENSIVE PSYCHIATRY* 319, 319 (2008) (“[A] key distinguishing feature of PTSD is that it is not agnostic to etiology . . . PTSD rests on the assumption of a specific etiology, whereby a distinct set of events (criterion A) is assumed to be the uniformly most potent contributor to outcome.”). One other possible exception to the *DSM*'s general approach is the diagnosis of “Adjustment disorder”; some have criticized its broad criteria as pathologizing “a vast range of . . . normal loss responses.” HORWITZ & WAKEFIELD, *supra* note 64, at 115.

<sup>71</sup> HORWITZ & WAKEFIELD, *supra* note 64 (noting that, beginning with the *DSM-II*, diagnostic criteria were “*descriptive* rather than *etiological* and purged references to postulated psychodynamic causes of a disorder”).

<sup>72</sup> Eric D. Caine, *Determining Causation in Psychiatry*, in *ADVANCING DSM: DILEMMAS IN PSYCHIATRIC DIAGNOSIS* 1, 1 (Katherine A. Phillips et al. eds., 2003).

<sup>73</sup> *Id.* at 14. Dr. Caine specifically suggests that the field of psychiatry undertake such analyses.

<sup>74</sup> *Id.* at 17.

<sup>75</sup> *Id.* at 2.

<sup>76</sup> HORWITZ & WAKEFIELD, *supra* note 64, at 71 (“[T]here is a remarkably solid and well-elaborated tradition of distinguishing disorder from normal emotion via various versions of the ‘with cause’ versus ‘without cause’ criterion that goes back to ancient times.”); ALLAN V. HORWITZ, *CREATING MENTAL ILLNESS* 29 (2002) (“[T]hat depression is ‘without cause’ implies that symptoms of depression ‘with cause’ would *not* be considered signs of mental disorder.”)

<sup>77</sup> HORWITZ & WAKEFIELD, *supra* note 64, at 101.

<sup>78</sup> *Id.* at 101-03.

<sup>79</sup> HORWITZ, *supra* note 76, at 30.

causation and the unsettled views on PTSD,<sup>80</sup> the field of forensic psychiatry, in which psychiatrists render opinions on causation of psychological injuries in the context of legal disputes,<sup>81</sup> has flourished in recent decades.<sup>82</sup> One can assume that the development of the PTSD diagnosis, together with the increased availability of damages for emotional distress, has aided such expansion to a significant degree.<sup>83</sup> Forensic psychiatrists undertake an analysis—the determination of the extent to which an identified event caused a psychological injury—that is not generally included in clinical treatment.<sup>84</sup> Some psychiatric commentators are notably skeptical about the field’s ability to reach conclusions on causation.<sup>85</sup> One psychiatrist wrote: “Cause and effect relationships in psychiatry are more a product of speculation than

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<sup>80</sup> See, e.g., Gerald M. Rosen et al., Editorial, *Problems with the Post-Traumatic Stress Disorder Diagnosis and Its Future in DSM-V*, 192 BRIT. J. PSYCHIATRY 3 (2008); Steven Taylor & Gordon J.G. Asmundson, *Posttraumatic Stress Disorder: Current Concepts and Controversies*, 1 PSYCHOL. INJ. & L. 59 (2008).

<sup>81</sup> See James J. McDonald, Jr. & Francine B. Kulick, *Preparing the Case for the Expert*, in MENTAL AND EMOTIONAL INJURIES IN EMPLOYMENT LITIGATION, *supra* note 22, at 262-63.

<sup>82</sup> See Alan A. Stone, *The Ethical Boundaries of Forensic Psychiatry: A View from the Ivory Tower*, 36 J. AM. ACAD. PSYCHIATRY & L. 167, 167 (2008) (“Whatever the reasons, forensic psychiatry seems to be flourishing.”).

<sup>83</sup> In reference to PTSD, psychiatrist and former President of the American Psychiatric Association Alan Stone observed that “[n]o diagnosis in the history of American psychiatry has had a more dramatic and pervasive impact on law and social justice . . . . The recognition of this disorder by the medical community changed the nature of personal injury litigation . . . .” Alan A. Stone, *Post-Traumatic Stress Disorder and the Law: Critical Review of the New Frontier*, 21 BULL. AM. ACAD. PSYCHIATRY & L. 23, 23-34 (1993); see also Roger K. Pitman et al., *Legal Issues in Posttraumatic Stress Disorder*, in PSYCHOLOGICAL INJURIES AT TRIAL, *supra* note 28, at 861, 861-63 (“Perhaps more than any other psychological or medical disorder, [PTSD] has influenced, and been influenced by, the law. . . . [It] has become the most important diagnosis in the forensic psychology of personal injury . . . .”). Professor Shuman also notes that the development of the PTSD diagnosis occurred at a time when, coincidentally, the Federal Rules of Evidence shifted towards a bias of admissibility of relevant evidence and tort law expanded recovery for psychological injuries. Shuman, *supra* note 30, at 853. As one group of commentators observed: “The recognition of the diagnosis of posttraumatic stress disorder (PTSD) in *DSM-III* has transformed and expanded the horizons of tort litigation, resulting in the recognition of a host of new claims tied to the diagnosis.” Stuart A. Greenberg et al., *Unmasking Forensic Diagnosis*, 27 INT’L J.L. & PSYCHIATRY 1, 7 (2004) (internal quotation marks and citation omitted). The American Psychiatric Association is taking up many of the emerging questions about PTSD as it develops the Fifth Edition of the *DSM*. There is some movement to shift, substantially revise, or even eliminate the disorder. Gerald M. Rosen & Scott O. Lilienfeld, *Posttraumatic Stress Disorder: An Empirical Evaluation of Core Assumptions*, 28 CLINICAL PSYCHOL. REV. 837, 855-57 (2008). It is difficult to underestimate the impact on civil litigation if PTSD is fundamentally altered in *DSM-V*.

<sup>84</sup> See 1 JAY ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 30, 32-33 (5th ed. 1995) (describing what he terms as the “gap” between diagnosis of a mental disorder and other clinical findings, and the determination of a specific legal issue and quoting a psychologist who raised concerns about the use in the legal settings, without modification, of “assessment models” designed for clinical settings) (quoting Thomas Grisso, *The Economic and Scientific Future of Forensic Psychological Assessment*, 42 AM. PSYCHOLOGIST 831, 834 (1987)).

<sup>85</sup> *Id.* at 37 (“Forensic psychiatry is a field that is long on controversy and short on data.” (internal quotation marks omitted)).

scientific accuracy.”<sup>86</sup> He suggests that it is therefore not possible to determine to a “reasonable medical probability”<sup>87</sup> whether a person’s emotional distress is caused by exposure to harassment or the presence of a psychiatric condition that causes mere perception of harassment.<sup>88</sup> Forensic psychiatrists and psychologists, however, generally claim to be cognizant of the importance of staying within the bounds of their expertise and professional guidelines. Thus, one commentator discouraged forensic examiners from offering opinions beyond “whether the legally relevant incident . . . appears to have played a role in the claimant’s current mental injury” and added that experts “should identify other contributing factors . . . [to] best reflect[] the clinical view of causation and the limited ability of mental health professionals to disaggregate ‘cause.’”<sup>89</sup> Clinicians are also advised to restrict themselves to offering “more circumspect, less conclusory opinion[s] . . . [to] deter any tendency on the part of the legal decision-maker to abdicate responsibility for analyzing the causation issue and applying the relevant legal construct.”<sup>90</sup>

Many forensic examiners acknowledge that there are multiple factors that may have bearing on one’s psychological well-being. However, they maintain that, so long as they have access to a wide and deep range of background information about the subject, as well as an opportunity to perform a forensic examination, they can render scientifically-based opinions regarding whether and to what extent certain events were causal agents of psychiatric conditions.<sup>91</sup> Such opinions can then serve as evidence to support a factual determination of legal causation sufficient to allocate responsibility between the parties. Some commentators have developed analytical structures to assist forensic examiners in differentiating the various causal relationships (such as sole cause, major factor, aggravating factor, minor factor, and unrelated factor) between events and psychological injuries to encourage more precise use of the concept of causation.<sup>92</sup>

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<sup>86</sup> Eric H. Marcus, *Causation in Psychiatry: Realities and Speculations*, 1983 MED. TRIAL TECH. Q. 424, 428.

<sup>87</sup> *Id.* Reasonable medical “certainty” or “probability” are terms used by some courts as prerequisite to the admissibility of medical evidence, but they are increasingly falling out of use. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 28 cmt. e (Tentative Draft No. 5, 2007).

<sup>88</sup> Marcus, *supra* note 86.

<sup>89</sup> MELTON ET AL., *supra* note 9, at 413.

<sup>90</sup> *Id.*

<sup>91</sup> Gerald Young, *Psychological Injury and Law: Assumptions and Foundations, Controversies and Myths, Needed Directions*, 1 PSYCHOL. INJ. & L. 11, 17 (2008) (arguing that the “myths” include that “causality, causation and related concepts are hopelessly confounded” and that “even the most careful and comprehensive assessments cannot navigate the ‘quagmire’”).

<sup>92</sup> MELTON ET AL., *supra* note 9, at 420; Schultz, *supra* note 67, at 110.

However, there is no single standard or generally accepted approach to reaching opinions on causation.

One of the leading psychological commentators on the determinations of causation in the psychological and legal contexts, Izabela Z. Schultz, has noted that the philosophical conceptualizations of causation do not easily translate into the medical-legal context.<sup>93</sup> The “concept of causality in the medico-legal evaluation is a foreign, minefield-like territory” for most clinicians.<sup>94</sup> The chief difficulty, she observes, stems from the fact that “the legal concept of causality is binary (yes, no) and linear (Event A causes Condition B), whereas the clinical concept of causality, consistent with the nature of inquiry in the behavioral sciences, is multifactorial, multifaceted and includes interactions among various causative factors.”<sup>95</sup> Thus, rather than attempting to determine whether a specific event or agent was a substantial cause of a mental condition, “clinical causality determination stipulates how co-existing and pre-existing factors interact with the injury factors.”<sup>96</sup> The other primary difference between legal and clinical assessments of causation that Schultz notes is the relative levels of “certainty or confidence with which statements and opinions can be rendered,” where a determination of “more likely than not” in the legal context would be considered “overly lenient” in the behavioral sciences.<sup>97</sup>

In many instances, a forensic psychiatrist will attempt to determine the presence of specific psychological conditions and mental disorders in the past, particularly at the time of the alleged incident in question in the litigation. A pair of forensic psychologists explains that, in sexual harassment cases, “[t]o determine causation of injury, the psychologist must determine which conditions preexisted the alleged harassment,”<sup>98</sup> although they also note that a history of prior psychiatric diagnosis or prior trauma does not automatically establish an alternative cause for the current psychiatric difficulties.<sup>99</sup>

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<sup>93</sup> Schultz, *supra* note 67, at 103.

<sup>94</sup> *Id.* at 104. She also notes that the literature on causation in the “medico-legal and forensic contexts” places an overemphasis on “malingering and secondary gain detection, thus creating an impression that credibility assessment is at the core of causality determination.” *Id.*

<sup>95</sup> *Id.* at 106; *see also* Young, *supra* note 91, at 13 (“In mental health assessments, the multifactorial, biopsychosocial model serves to frame conclusions about causality. The full range of possible influences is considered, including preexisting and secondary or unrelated ones, not only those related to the index event and subsequent course.” (internal citation omitted)).

<sup>96</sup> Schultz, *supra* note 67, at 106.

<sup>97</sup> *Id.* at 107.

<sup>98</sup> WILLIAM E. FOOTE & JANE GOODMAN-DELAHUNTY, EVALUATING SEXUAL HARASSMENT: PSYCHOLOGICAL, SOCIAL, AND LEGAL CONSIDERATIONS IN FORENSIC EXAMINATIONS 86 (2005); *see also* David R. Price, *Clinical Evaluation and Case Formulation of Mental and Emotional Injury Claims*, in MENTAL AND EMOTIONAL INJURIES IN EMPLOYMENT LITIGATION, *supra* note 22, at 72, 82-83, 85.

<sup>99</sup> FOOTE & GOODMAN-DELAHUNTY, *supra* note 98, at 134, 136-38, 201.

In short, when forensic psychiatrists and psychologists attempt to address the questions posed in litigation that bear on causation and liability, they take an inclusive “total person” approach to the question.<sup>100</sup> They seek to acquire and assimilate as much information about the subject as possible including complete medical, psychiatric, and social histories.<sup>101</sup> In the absence of this full picture, the conclusion is considered to be vulnerable to attack.<sup>102</sup> As one psychiatrist notes: “Failure to explore all aspects of an evaluatee’s past and current history may prevent a credible evaluation of a variety of relevant psychological aspects of the legal issues in question. . . . Questions regarding alternative and proximate causation may also require evaluation of psychological, sexual, and trauma history.”<sup>103</sup> She also observes that “[l]egal relevance and psychological relevance are not equivalent concepts” and that, for an examiner, “relevance” is something that cannot be determined until a full evaluation is complete.<sup>104</sup> Examining psychiatrists, she argues, should have access to “all past and current medical and psychiatric records, even those that may ultimately not be psychologically or legally relevant, to provide complete evaluations.”<sup>105</sup> As a result of these guiding principles, many forensic psychiatrists resist legal constraints that limit their access to information that would permit them “to determine all potential causative factors that may account for some or all of the plaintiff’s psychological damages.”<sup>106</sup> Some have asserted that such information provides a “far more scientifically accurate model of causation” which would better serve “the interests of justice.”<sup>107</sup>

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<sup>100</sup> MELTON ET AL., *supra* note 9, at 415.

<sup>101</sup> See, e.g., *id.* at 414-15; Schultz, *supra* note 67, at 118-19 (discussing “best practices” for forensic examiners, including reviewing extensive information about the claimant-plaintiff and making a “[c]areful determination of premonitory levels of functioning”).

<sup>102</sup> MELTON ET AL., *supra* note 9, at 415.

<sup>103</sup> LIZA H. GOLD, SEXUAL HARASSMENT: PSYCHIATRIC ASSESSMENT IN EMPLOYMENT LITIGATION 110 (2004); see also Albert M. Drukteinis, *Understanding and Evaluating Mental Damages*, PSYCHIATRIC TIMES, Apr. 15, 2007, available at <http://www.psychiatristimes.com/display/article/10168/55241> (“[A] critical factor in making a proper diagnosis—and especially in determining causation in mental damages claims—is a longitudinal life history. . . . [The] onset of symptoms is an important consideration in order to objectify a mental damage claim.”).

<sup>104</sup> GOLD, *supra* note 103; see also Binder & McNiel, *supra* note 68, at 1193 (“In the medical care system, all evidence, including details about prior problems, is considered relevant to understanding a patient and to providing appropriate culturally-sensitive care. In the legal system, information is excluded if it is considered unfairly prejudicial.”).

<sup>105</sup> GOLD, *supra* note 103; see also FOOTE & GOODMAN-DELAHUNTY, *supra* note 98, at 86 (“When possible,” an examining psychologist should review records that “span the plaintiff’s whole life and should include material from all providers, not just mental health practitioners.”).

<sup>106</sup> See Mark I. Levy & Saul Rosenberg, *The “Eggshell Plaintiff” Revised: Causation of Mental Damages in Civil Litigation*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 204, 204 (2003); see also GOLD, *supra* note 103, at 114 (urging forensic examiners to “actively resist legal constraints on the scope or conduct of the psychiatric examination”).

<sup>107</sup> Levy & Rosenberg, *supra* note 106, at 206.

However, law differs from psychiatry in that it tends not to take a comprehensive, inclusive approach to resolving questions of fact but, rather, makes determinations of which evidence is relevant before its presentation to the fact finder. Indeed, one of the key functions of a trial judge is to control what evidence the fact finder may consider, rather than letting the fact finders make their own determinations of relevancy. In this respect, American courts have not adopted the system of “free proof” advocated by Jeremy Bentham and his followers.<sup>108</sup> While evidence rules have increasingly favored admissibility, permitting fact finders to determine the appropriate weight to assign evidence of questionable value and reliability, American law retains a rules-based system of evidence. And evidence law is but one part of a rules-based legal system: “[L]egal rules are themselves inherently exclusionary, and thus law is a pervasively exclusionary practice.”<sup>109</sup>

Professor Frederick Shauer observed that “a central feature of law is its rule-based commitment to instructing its decision-makers that not everything they believe material to making the best all-things-considered decision is something they can take into consideration when making a *legal* decision.”<sup>110</sup> Evidence law exemplifies this feature.<sup>111</sup> The rules of evidence are keyed, in part, to the fact that the legal system is a policy-based mechanism that allocates responsibility and, within trials, the risk of error.<sup>112</sup> To this end, some evidence rules consider the broader or aggregate impact on wider society and are based upon concerns that go well beyond (or may even be in conflict with) the goal of factual accuracy in specific trials.<sup>113</sup> There are also rules that address concerns about misuse of evidence by jurors, harassment of litigants in an adversarial proceeding, and even the wasting of time.<sup>114</sup>

These conflicting systems of “relevancy” and distinct notions of causation—that is, the psychiatric and the legal—are inherently at odds when fact finders consider questions of the legal causation of psychological injuries. It is at that juncture that courts must consider whether such fact finders may have access to the same kind of “whole person” evidence considered by forensic clinicians when arriving at

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<sup>108</sup> Frederick Shauer, *In Defense of Rule-Based Evidence Law . . . and Epistemology Too*, 5 *EPISTEME* 295, 296-97 (2008).

<sup>109</sup> *Id.* at 300 (citing JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS IN LAW AND MORALITY* (1978)).

<sup>110</sup> *Id.* at 301.

<sup>111</sup> *Id.*

<sup>112</sup> ALEX STEIN, *FOUNDATIONS OF EVIDENCE LAW* 16 (2005) (“Apportionment of the risk of error [in trials] is a moral and political decision with far-reaching consequences.”).

<sup>113</sup> *Id.* at 25. See generally Lisa Dufraimont, *Evidence Law and the Jury: A Reassessment*, 53 *MCGILL L.J.* 199, 240 (2008) (reviewing the various rationales ascribed to evidence law and concluding that it is not possible to identify a single, unifying “organizing principle” for the various rules).

<sup>114</sup> See, e.g., *FED R. EVID.* 403, 611(a).

their determinations of liability. Under the guise of “alternate causation” and relying upon the essentially unlimited complexity of the development of psychological states, civil litigation defendants have been largely successful in placing highly prejudicial evidence about plaintiffs into the hands of fact finders.

C. *Admissibility of Expert Psychiatric Evidence on Causation*

Notwithstanding this backdrop of uncertainty within the field of psychiatry regarding causation and the possibility of the introduction of prejudicial evidence, courts generally apply the basic rules of legal causation and apportionment to psychological injuries with little regard for the risks of such prejudice. With few exceptions, courts admit expert psychiatric or psychological evidence offered by the parties on the issue of causation of the plaintiff’s psychological injuries and permit the parties to argue causation and apportionment to the fact finder.

As a general matter, in civil litigation determinations of causation can range from the clear-cut (e.g., a car runs a stop sign and collides with another car resulting in property damage and injuries) to the complex, such as in the field of toxic torts. At the complex end of the spectrum, plaintiffs rely in large part on the testimony of expert witnesses to provide evidentiary support for a finding of proximate cause. In many instances, juries have little independent basis to understand a causal relationship, such as that between pharmaceuticals and rare birth defects. After *Daubert v. Merrell Dow Pharmaceuticals*,<sup>115</sup> federal courts and many state courts have expanded and refined their role as “gatekeepers” for the use of scientific and specialized evidence at trial.<sup>116</sup> Indeed, all three cases recognized as the “*Daubert* trilogy” concerned the admissibility of expert testimony on questions of causation in personal injury litigation.<sup>117</sup>

Causation determinations where the plaintiff alleges psychological injury of some kind may be based upon a plaintiff’s description of her injuries, other lay testimony, expert testimony, or a combination of all of these.<sup>118</sup> Allegations that go beyond a general description of an

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<sup>115</sup> *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

<sup>116</sup> David E. Bernstein & Jeffrey D. Jackson, *Daubert Trilogy in the States*, 44 JURIMETRICS J. 351 (2004) (reviewing the various responses of state courts to the *Daubert* decision); Daniel W. Shuman & Bruce D. Sales, *The Impact of Daubert and Its Progeny on the Admissibility of Behavioral and Social Science Evidence*, in PSYCHOLOGICAL INJURIES AT TRIAL, *supra* note 28, at 168, 169.

<sup>117</sup> *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), complete the trilogy.

<sup>118</sup> DOBBS, *supra* note 35, at 832 (“[M]edical testimony is not ordinarily required to demonstrate either the severity of the [emotional] distress or its cause.”); Jane Goodman-

emotional reaction to an incident, and specifically, claims alleging resulting psychopathology, generally require expert testimony.<sup>119</sup> In cases involving psychological injuries, therefore, the parties frequently offer expert testimony in support of or contrary to such claims,<sup>120</sup> either through the plaintiff's treating psychotherapist<sup>121</sup> or through a forensic psychiatrist who has been retained by the defendant to perform an examination of the plaintiff.<sup>122</sup> Although clinicians and forensic examiners testify frequently in civil trials, courts have failed to develop a coherent approach to determining admissibility of psychiatric opinions.

Expert testimony on the issue of causation of psychological injuries, whether offered by the plaintiff or defendant, must theoretically comport with all rules that govern the admissibility of expert testimony generally, including the applicable rules of evidence,<sup>123</sup> as well as any additional requirements such as those outlined in the *Daubert* trilogy in the federal courts. Specifically, these rules require a finding that the proffered expert testimony must "assist" the fact finder, meaning that it must offer something beyond what the fact finders could glean for themselves from lay testimony.<sup>124</sup> Further, expert opinions on causation and the extent of damages, must, in theory, be based upon expertise, training, experience, recognized methodology, and the various other requirements set forth in evidence rules and the relevant case law.<sup>125</sup>

Some commentators, however, have suggested that "overall, *Daubert* has not resulted in changes in the admissibility of behavioral or social science evidence."<sup>126</sup> Professor Christopher Slobogin has

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Delahunty & William E. Foote, *Compensation for Pain, Suffering and Other Psychological Injuries: The Impact of Daubert on Employment Discrimination Claims*, 13 BEHAV. SCI. & L. 183, 187 (1995).

<sup>119</sup> Drukteinis, *supra* note 103; Goodman-Delahunty & Foote, *supra* note 118, at 188-89.

<sup>120</sup> Schultz, *supra* note 67, at 102. There are generally recognized ethical guidelines for forensic examiners developed by the American Academy of Psychiatry and the Law and the American Psychology-Law Society. Binder & McNiel, *supra* note 68, at 1197.

<sup>121</sup> *But see* Shuman, *supra* note 30, at 855 ("[A] psychiatrist treating a claimant should not serve as a forensic examiner for that claimant." (citation omitted)); Stumo et al., *supra* note 66, at 1313. Goodman-Delahunty & Foote, *supra* note 118, at 199 ("[A] consulting therapist who provides testimony about causation in court runs a high risk of generating an impermissible dual relationship with the client.").

<sup>122</sup> Goodman-Delahunty & Foote, *supra* note 118, at 187-89 (explaining various benefits of offering expert psychological testimony at trial in sexual harassment cases).

<sup>123</sup> *See, e.g.*, FED. R. EVID. 702.

<sup>124</sup> *Id.* (permitting admission of expert testimony only if it will "will assist the trier of fact to understand the evidence or to determine a fact in issue"); 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE & PROCEDURE § 6262 ("The 'assist' requirement further demands that the expert's testimony contribute something to the trier of fact's considerations that it could not itself supply.").

<sup>125</sup> FED. R. EVID. 702; *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592-94 (1993).

<sup>126</sup> Shuman & Sales, *supra* note 116, at 170; *see also* ZISKIN, *supra* note 84, at 270 ("[T]here are virtually no appellate court opinions denying admission of psychiatric opinion.").

observed that courts have essentially grandfathered psychiatric evidence because it would invite trouble to subject it to a *Daubert* analysis,<sup>127</sup> and the likely result would be the exclusion of evidence that had been routinely admitted prior to the Supreme Court's decision.<sup>128</sup> As noted in the previous Part, although psychiatry is largely unconcerned with etiology, the sub-field of *forensic* psychiatry (and, correspondingly, the field of forensic psychology) does consider questions of causation. The causation determinations developed by the field of forensic psychiatry are sufficient in the eyes of the courts to permit the admission of psychiatric testimony on the issue of causation,<sup>129</sup> including testimony from defendants' experts regarding a plaintiff's psychiatric history.<sup>130</sup> However, there are no recognized reliable standards or guidelines for evaluating causation of psychological injuries.<sup>131</sup> Rather, "[a]n expert opinion on these matters rendered in the court system is therefore often based on an individual clinician's personal belief as to what constitutes a reasonable answer to the causality question, rather than on any particular scientifically validated and/or clinically agreed upon methodology."<sup>132</sup>

Professor Daniel Shuman suggests that the context has been a factor in courts' determinations of the admissibility of psychiatric evidence.<sup>133</sup> Shuman draws a distinction between descriptive clinical testimony (especially by treating psychotherapists), which does not

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<sup>127</sup> SLOBOGIN, *supra* note 5, at 28-29, 32-33. Professor Slobogin also argues that courts should be more willing to admit such evidence offered in the context of a criminal defense. *Id.* at 39-40.

<sup>128</sup> Bruce D. Sales & Daniel W. Shuman, *Science, Experts, and Law: Reflections on the Past and the Future*, in *EXPERT PSYCHOLOGICAL TESTIMONY FOR THE COURTS* 9, 24-25 (Mark Constanzo et al. eds., 2007) (noting "dilemma" faced by trial courts because applying *Daubert* criteria "rigorously" to "clinical opinion testimony" would likely result in the exclusion of such evidence "leav[ing] the courts without expert guidance in deciding many kinds of cases . . . that to date have relied upon clinical opinion experts"); Christopher Slobogin, *The Admissibility of Behavioral Science Information in Criminal Trials from Primitivism to Daubert to Voice*, 5 *PSYCHOL. PUB. POL'Y & L.* 100, 101 (1999); *see also* *Blanchard v. Eli Lilly & Co.*, 207 F. Supp. 2d 308, 316-17 (D. Vt. 2002) (noting that it would have to exclude plaintiff's expert's testimony if it were to apply the *Daubert* requirements and therefore opting to evaluate the reliability under a different approach); Stumo et al., *supra* note 66, at 1319 ("There is a danger that because psychiatric/psychological expert testimony has been generally admitted in the past, opposing lawyers may become complacent about challenging the expert's qualifications or opinions and judges may freely admit their testimony.").

<sup>129</sup> Daniel W. Shuman & Jennifer L. Hardy, *Causation, Psychology, and Law*, in *CAUSALITY OF PSYCHOLOGICAL INJURY*, *supra* note 34, at 517, 537 (noting that the few reported decisions regarding "psychological or psychiatric evidence of causation for psychological harm" indicate that courts are not inclined to demand "rigorous scientific proof" before admitting such evidence).

<sup>130</sup> *See id.*

<sup>131</sup> Schultz, *supra* note 67, at 102. As noted in *MELTON ET AL.*, *supra* note 9, at 418, a number of "specialized instruments designed to aid in the diagnosis" of PTSD have been developed. However, apparently none has emerged as a standard tool.

<sup>132</sup> Schultz, *supra* note 67, at 102.

<sup>133</sup> Shuman & Sales, *supra* note 116, at 172.

implicate *Daubert*, and specific causal attribution (such as that which often arises in testimony offered by forensic specialists), which does or at least should do so.<sup>134</sup> As some commentators have noted: “Courts may be reluctant to exclude pure, nonscientific clinical opinion testimony in fear that doing so would preclude too many litigants from having their day in court.”<sup>135</sup> However, there are no generally recognized principles in the case law used to differentiate such “pure, nonscientific clinical” opinions from others in forensic psychiatry or psychology.<sup>136</sup>

Courts rely largely upon a proffered expert’s credentials and clinical experience—neither of which is among the factors expressly suggested in the *Daubert* trilogy as appropriate indicators of reliability—as the essential bases to admit or exclude expert testimony on causation of psychological injury.<sup>137</sup> Thus, in *Ferris v. Pennsylvania Federation Brotherhood of Maintenance of Way Employees*, the trial court excluded the testimony of the plaintiff’s treating medical doctor on the issues of diagnosis and causation of psychiatric injury, as well as plaintiff’s own testimony on these issues, as neither had training in psychiatry.<sup>138</sup> Similarly, in *Hahn v. Minnesota Beef Industries*, the court granted the defendant’s motion *in limine* to exclude the testimony of the plaintiff’s treating psychotherapist who had diagnosed her with major depressive disorder and anxiety NOS (not otherwise specified)

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<sup>134</sup> Shuman & Hardy, *supra* note 129, at 540-43; *see also, e.g.*, SLOBOGIN, *supra* note 5, at 28-29 (noting that clinical psychiatric testimony is usually “left alone” because courts assume that jurors “will naturally treat it with skepticism” and “know what to do with it”); Noah, *supra* note 67, at 265 (“Disputes about medical causation typically pose scientific (usually epidemiological) questions subject to these strictures, but courts tend to review diagnostic (clinical) judgments about the nature of particular patients’ injuries under more forgiving standards.” (citation omitted)).

<sup>135</sup> BRUCE D. SALES & DANIEL W. SHUMAN, EXPERTS IN COURT: RECONCILING LAW, SCIENCE, AND PROFESSIONAL KNOWLEDGE 94 (2005); *see also* Campbell, *supra* note 65, at 442 (“Applying [the *Daubert* criteria] to the DSM-IV leads to rather sobering conclusions regarding its evidentiary reliability.”).

<sup>136</sup> *See also, e.g.*, Henry F. Fradella et al., *The Impact of Daubert on the Admissibility of Behavioral Science Testimony*, 30 PEPP. L. REV. 403, 423-25 (2003) (concluding, based upon empirical research, that courts generally admit expert psychological testimony on the issue of emotional distress in the absence of “methodological flaws” in assessing such distress); Haney & Smith, *supra* note 66, at 197 (“[I]t is difficult to discern any categorical rules or universally compelling logic from the Supreme Court’s expert testimony trilogy that would allow us to predict how evidence concerning psychological injury is likely to be handled by most courts most of the time.”).

<sup>137</sup> Shuman & Sales, *supra* note 116, at 176; *see also* Goodman-Delahunty & Foote, *supra* note 118, at 199 (suggesting that *Daubert*’s emphasis on the role of courts in assessing scientific trustworthiness will “increase the emphasis on the specific qualifications of the expert to render the proffered testimony” (citation omitted)). The *Daubert* opinion, however, provided that the list of considerations was non-exhaustive. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 593-95 (1993).

<sup>138</sup> *Ferris v. Pa. Fed’n Bhd. of Maint. of Way Employees*, 153 F. Supp. 2d 736, 743-46 (E.D. Pa. 2001).

but whose report and other records did not specifically analyze causation.<sup>139</sup> The court further ruled that because “[d]epression and anxiety disorder are complex injuries, requiring *expert* (as opposed to lay) testimony regarding diagnosis and causation,” and because the proffered expert testimony was excluded, “the Court will exclude all evidence of Hahn’s alleged emotional distress from the jury.”<sup>140</sup>

A significant problem with respect to the reliability of expert psychiatric or psychological testimony—but one that is rarely the basis for exclusion of such testimony—is the high risk of bias in arriving at opinions.<sup>141</sup> In the absence of clear standards for the determination of causation and the reliance on subjective assessment and “clinical judgment” in the inherently adversarial context of litigation, there is great potential for bias in the rendering of expert opinions on causation.<sup>142</sup> Specifically, there is a risk of “information bias” as a result of the referral source (often a plaintiff’s or defendant’s attorney).<sup>143</sup> Also “confirmatory bias” can occur when examiners develop initial hypotheses (perhaps suggested by the referral source) for causation which then influence the way in which the examiner considers the information reviewed when rendering a final opinion on the potential causes of an individual’s psychopathology.<sup>144</sup> For example, some have suggested that an over-diagnosis of PTSD in individuals with a history of some kind of trauma, such as a motor vehicle accident

<sup>139</sup> *Hahn v. Minn. Beef Indus.*, No. Civ. 002282, 2002 WL 32658476, at \*2-3 (D. Minn. May 29, 2002). There are several difficulties with the use of treating psychotherapists to render opinions on causation, and several commentators have suggested that such a role is likely improper or at least unadvisable. See Binder & McNeil, *supra* note 68, at 1197.

<sup>140</sup> *Hahn*, 2002 WL 32658476, at \*3.

<sup>141</sup> GOLD, *supra* note 103, at 37-39; Niall Crumlish & Brendan D. Kelly, *How Psychiatrists Think*, 15 *ADVANCES IN PSYCHIATRIC TREATMENT* 72, 74-78 (2009); Randy K. Otto, *Bias and Expert Testimony of Mental Health Professionals in Adversarial Proceedings: A Preliminary Investigation*, 7 *BEHAV. SCI. & L.* 267, 268 (1989) (“Insofar as it may go unnoticed by professionals because of its subtlety, unconscious or indeliberate bias may pose an even greater threat to the administration of justice than its purposeful counterpart.”).

<sup>142</sup> See ZISKIN, *supra* note 84, at 195-203 (reviewing studies evaluating the limitations of “clinical judgment”); Campbell, *supra* note 65, at 440-41 (arguing that research supports a conclusion that “clinical judgments of psychologists and psychiatrists [during the diagnostic process] are too often seriously flawed” and that such judgments “frequently rest on intuitive impressions that reveal more about themselves than the patients they evaluate”); David Faust & Jay Ziskin, *The Expert Witness in Psychology and Psychiatry*, *SCIENCE*, July 1988, at 31, 33-34 (listing several factors that limit clinical judgment of psychiatrists and psychologists in forensic settings); Stone, *supra* note 82 (“[E]very psychiatrist thinks he/she has very good clinical judgment. . . . [I]f forensic psychiatrists limited themselves to the standards of bench scientists . . . their lips would be sealed in the courtroom.”).

<sup>143</sup> Schultz, *supra* note 67, at 105; ZISKIN, *supra* note 84, at 399-400.

<sup>144</sup> Schultz, *supra* note 67, at 120; see also, e.g., MELTON ET AL., *supra* note 9, at 418 (“[R]esearch indicates that when evaluations focus on past mental states (which is always the case in . . . emotional injury cases), estimates of pathology are inflated . . . .”); ZISKIN, *supra* note 84, at 232-45.

or assault, may be attributable to confirmatory bias.<sup>145</sup> Thus, despite the presence of “high professional confidence levels” demonstrated by clinicians when offering expert opinions, Professor Schultz cautions that “causality determination in personal injury and workers’ compensation contexts constitutes research activity with a sample size of one, with serious, inherent methodological limitations and generous room for misattribution and error.”<sup>146</sup> However, as a general matter, courts regard questions of bias and judgment as fodder for cross-examination, rather than as bases for exclusion, although it is unlikely that the tool could effectively reveal such limitations in psychiatric expert opinions.<sup>147</sup>

Thus, despite widespread controversy within the field of psychiatry, courts generally admit expert psychiatric testimony by either party on the issue of causation of psychological injuries. It is notable that there are few cases discussing the issue of reliability in the context of a defendant’s use of psychiatric evidence. This may be because a defendant often will not (and cannot) use such evidence where a plaintiff does not herself offer evidence of causation and thus a plaintiff is not generally in a position to challenge the evidence. It may also be that some courts simply apply more scrutiny to plaintiffs’ use of evidence.<sup>148</sup> Indeed, by granting plaintiffs great latitude to offer expert psychiatric evidence in support of their claims, courts appear constrained to permit defendants nearly limitless use of psychiatric evidence in rebuttal. As a result, courts fail to consider the particular dangers presented by the admission of expert psychiatric testimony on the issue of alternative sources of causation.

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<sup>145</sup> Williams J. Koch, *Posttraumatic Stress Disorder Following Motor Vehicle Accidents: Clinical Forensic Guidelines*, in *PSYCHOLOGICAL INJURIES AT TRIAL*, *supra* note 28, 794, 803-04; *see also* Marilyn L. Bowman, *Problems Inherent to the Diagnosis of Posttraumatic Stress Disorder*, in *PSYCHOLOGICAL INJURIES AT TRIAL*, *supra* note 28, at 820, 834-35 (describing other potential biases in the diagnosis of PTSD).

<sup>146</sup> Schultz, *supra* note 67, at 106.

<sup>147</sup> *See, e.g.*, *Bachir v. Transoceanic Cable Ship Co.*, No. 98 Civ. 4625, 2002 WL 413918, at \*8 (S.D.N.Y. Mar. 15, 2002) (“Any shortcoming of a[n expert] witness’s actual testimony in a particular area is a subject for cross-examination, not a ground for exclusion under rule 702.”); *see also* Steven R. Smith, *Mental Health Witnesses: Of Science and Crystal Balls*, 7 *BEHAV. SCI. & L.* 145, 164-65 (1989) (noting “heavy reliance” of courts on cross-examination for assessing mental health testimony and the particular limitations of the technique in challenging the bases of clinical judgment).

<sup>148</sup> In the lower court proceedings discussed in *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1295-97 (8th Cir. 1997), the trial court expressed emphatic skepticism of the use of psychological evidence on the issue of causation of psychological harm, while nonetheless admitting and crediting the expert testimony offered by the defendants on the same issue.

D. *Alternative Causation and “Door-Opening”*

Defense counsel echo forensic psychiatrists when they argue that, given that anything in one’s life may have an impact on the development of emotional distress, courts should admit at trial a wide range of evidence suggesting *alternative* causation of damages where a plaintiff alleges psychological injuries. Courts consider exploration of other causes of psychological injury to be fair and appropriate routes to counter expert psychiatric opinions that support a plaintiff’s claim for emotional distress damages.<sup>149</sup> Thus, in order to assess the plaintiff’s claim and the defendant’s response, these courts reason that the jury itself must have direct access to evidence of any and all other potential factors that could have played a role in the development of a psychological injury.

Courts’ rationale when admitting evidence of a plaintiff’s psychiatric history is usually something to the effect that the plaintiff has “opened the door” to such evidence by making a claim for psychological injuries, particularly but not necessarily when the plaintiff offers testimony of a treating psychotherapist or forensic examiner.<sup>150</sup> Many courts adopting this reasoning are quite willing to permit discovery and admission at trial of a range of evidence that may suggest other “stressors” or sources of emotional distress, including prior or concurrent psychiatric illnesses, sexual trauma, marital problems, and the like.<sup>151</sup> As noted in a forensic psychology treatise: “The ‘total

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<sup>149</sup> See, e.g., *Moore v. Chertoff*, Civ. A. No. 00-953, 2006 WL 1442447, at \*1-3 (D.D.C. May 22, 2006); *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 657, 659-60 (D. Kan. June 2, 2004); *Bujnicki v. Am. Paving & Excavating, Inc.*, No. 99-CV-0646S, 2004 WL 1071736, at \*18-19 (W.D.N.Y. Feb. 25, 2004).

<sup>150</sup> See, e.g., *McClelland v. Montgomery Ward & Co.*, No. 95-C-23, 1995 WL 571324, at \*1-2 (N.D. Ill. Sept. 25, 1995) (holding that evidence of a plaintiff’s prior psychological treatment was admissible on issue of causation even where she makes no claim for exacerbation of preexisting injury).

<sup>151</sup> See, e.g., *Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815, 821 (6th Cir. 2007) (affirming admission of treatment notes that referenced the plaintiff’s feelings about her attorney and the litigation, reasoning that such notes suggested an alternative cause of emotional distress); *Gretzinger v. Univ. of Haw. Prof’l Assembly*, No. 97-15123, 156 F.3d 1236 (Table), 1998 WL 403357, at \*1-2 (9th Cir. July 7, 1998) (affirming admission of evidence of plaintiff’s prior rape and homosexuality based upon a finding of relevance to PTSD and damages claim because it revealed other potential sources of distress, which was probative of her emotional state, and the trial court gave limiting instruction that it was not character evidence); *Nichols v. Am. Nat’l Ins. Co.*, 154 F.3d 875, 884-85 (8th Cir. 1998) (affirming admission of evidence of abortion because plaintiff was Catholic, and therefore her abortion was a possible alternative cause of emotional distress); *Giron v. Corr. Corp. of Am.*, 981 F. Supp. 1406, 1408-09 (D.N.M. 1997) (ruling that discovery regarding plaintiff’s sexual history may be relevant to the issue of damages, but only to the extent that such sexual contact caused pain and suffering). Some cases require consideration of the applicability of Federal Rule of Evidence 412 which excludes evidence of sexual history in certain cases. See, e.g., *Delaney v. City of Hampton*, 999 F. Supp. 794, 796 (E.D. Va. 1997)

person' of the claimant will be considered when the claim for damages is adjudicated."<sup>152</sup> Thus, for example, in *York v. American Telephone & Telegraph Co.*, the appeals court held that the trial court correctly admitted testimony of the plaintiff's prior psychiatric hospitalization, along with evidence of her marital and financial problems.<sup>153</sup> The court reasoned that the jury must be permitted to consider such evidence of causation where a plaintiff seeks damages for emotional distress.<sup>154</sup>

The use of evidence of a plaintiff's psychiatry history at trial is no doubt far greater than the published case law suggests because controversies regarding the relevance of such evidence often arise during the discovery stage, albeit with the questions framed slightly differently. For instance, in my recent review of the law of implied waiver of the psychotherapist-patient privilege, I noted the significant number of decisions in which courts concluded that a plaintiff had waived such privilege merely by asserting a claim for emotional distress damages.<sup>155</sup> These courts reason that such claims entitle defendants to present evidence of any alternative causes of such emotional distress and, therefore, that such defendants are entitled to discover evidence of a plaintiff's prior psychiatric history. The extensive case law on this discovery issue demonstrates the prevalence of this practice by civil defendants and signals the general willingness of courts to admit such evidence under Federal Rule of Evidence 401's broad conceptualization of relevance.<sup>156</sup> It may be that the courts' indication that such evidence is not only subject to discovery but also ultimately admissible at trial may well discourage plaintiffs from pursuing their claims to trial, or at least from further contesting the relevancy of the evidence.<sup>157</sup>

Indeed, one can see how the broader the view of the plaintiff's pre-event state that one considers, the less solid the link between the psychological injury and the event appears to be. One psychologist noted that:

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(ruling on a motion *in limine* that evidence from plaintiff's psychiatric file indicating numerous stressors in her life besides the alleged incident, including a history of sex abuse, was "highly probative" as to both liability and damages and therefore admissible notwithstanding Rule 412).

<sup>152</sup> MELTON ET AL., *supra* note 9, at 415 (citation omitted).

<sup>153</sup> *York v. AT&T Co.*, 95 F.3d 948, 957-58 (10th Cir. 1996).

<sup>154</sup> *Id.*

<sup>155</sup> Smith, *supra* note 6, at 107-11, 114-21; *see, e.g.*, *Doe v. City of Chula Vista*, 196 F.R.D. 562, 569 (S.D. Cal. 1999).

<sup>156</sup> FED. R. EVID. 401 ("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.").

<sup>157</sup> As a general matter, evidentiary rulings are the subject of reported opinions in only a very small number of cases, such as where courts issue written decisions in pre-trial motions *in limine* or where evidentiary issues are addressed in bench trial opinions or post-judgment motions. Evidentiary issues are even rarer in appeals court opinions. Therefore, case law developed in the discovery context serves as guidance for courts and parties on admissibility issues.

Life events occur as part of a continuous stream in which acts, thoughts, and emotions are all events that can function simultaneously as stimulus, personal interpretation, response, and outcome, depending upon where the clinician sets the starting point. Causal explanations of PTSD try to pull out a specific unit of life that is set to begin with an event and end with a mental disorder (response) so it can be understood in a causal way.<sup>158</sup>

Thus, “[u]se of a longer perspective,” as is often attempted by defendants, “may show that focusing on that short-term event-PTSD unit distorts the meaning and diagnosis of the distress.”<sup>159</sup>

In light of this consideration, plaintiffs in personal injury cases generally aim to present a narrow, packaged view of their mental health, introducing into the trial record only as much evidence as is needed to show the extent of damages and a link to the defendants’ conduct.<sup>160</sup> Conversely, defendants want to provide fact finders with a broader scope of evidence about potential causes of psychological injuries due to two strategic benefits. First, the more stressor-laden the plaintiff’s history is, the easier it becomes for the defendant to show that the emotional impact of its conduct was minimal. And by offering selected portions of the plaintiff’s history as potential alternative causes, the defendant may gain an added benefit by raising questions or doubts about the plaintiff’s credibility and perhaps character, as discussed further *infra* in Parts II and III. Thus, defendants are alert to any potential opportunities to argue that the plaintiff’s own litigation strategies have permitted added scrutiny of the plaintiff herself.<sup>161</sup>

As a general matter of evidence law, courts base this “door opening” reasoning upon considerations of fairness and an assumption that permitting one kind of evidence properly balances or answers the evidence previously admitted to facilitate the truth-seeking functions of trials.<sup>162</sup> Under Federal Rule of Evidence 404(a)(1), for example, a criminal defendant’s offer of evidence as to his peaceful character opens

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<sup>158</sup> Bowman, *supra* note 145, at 832.

<sup>159</sup> *Id.*

<sup>160</sup> See James J. McDonald, Jr., *Preface* to MENTAL AND EMOTIONAL INJURIES IN EMPLOYMENT LITIGATION, at xxxvii (James J. McDonald, Jr. ed., 2d ed. 2008 Cumulative Supp.) (noting that plaintiffs in employment discrimination cases are increasingly foregoing the use of mental health experts, and instead relying on their own testimony exclusively to establish emotional distress damages to avoid being subjected to Rule 35 examinations and other discovery of potential alternative stressors).

<sup>161</sup> For example, in *Brocuglio v. Proulx*, 478 F. Supp. 2d 309 (D. Conn. 2007), the trial court permitted defense counsel to inquire about the plaintiff’s prior involuntary civil commitment during cross-examination of the plaintiff’s psychological expert. *Id.* at 329. The court had ruled prior to trial that the evidence of the commitment would not be admissible unless the “door was opened,” and apparently concluded that such door-opening requirement was satisfied when the psychologist testified about his examination of the plaintiff. *Id.* at 329-30.

<sup>162</sup> 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 1:12 (3d ed. 2008).

the door to evidence of his less-than-peaceful character, which would otherwise be inadmissible.<sup>163</sup> Indeed, some commentators have criticized courts' lack of scrutiny of the underlying admissibility of the "counterproof," often resulting in the admission of improper character evidence or other prejudicial evidence.<sup>164</sup> Moreover, in the context of preexisting conditions and alternative causation, courts fail to consider whether the evidence offered by each party truly amounts to two sides of the same question or in fact presents two entirely distinct questions.<sup>165</sup> It may well be that the complex nature of psychological causation and the claims of forensic psychiatrists that a wide range of events and conditions can be the underlying cause mask the distinction. Once a court agrees that the door is opened on the question of causation, it is difficult to set limits on what evidence concerning the plaintiff's past is *not* arguably probative of causation.

For example, in an excessive force case, *Bemben v. Hunt*, the trial court admitted evidence of the plaintiff's prior diagnosis of "organic delusional disorder with symptoms of paranoid ideations and irrational behavior" three years prior to the incident, as well as evidence of his preexisting and ongoing treatment for depression.<sup>166</sup> However, the plaintiff did not allege any specific psychiatric injury; rather, she sought damages only for "mental suffering which normally ensues from being arrested and/or physically abused."<sup>167</sup> Indeed, in a significant number of cases discussing the relevance of a plaintiff's psychiatric history to a defendant's theory of alternative causes of emotional distress, courts have been willing to grant defendants broad access to the records of prior psychiatric treatment, notwithstanding the psychotherapist-patient privilege.<sup>168</sup> Courts generally base these rulings upon an assumption that, because a plaintiff has included a claim for emotional distress damages, such evidence is essential or vital to a defendant's trial

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<sup>163</sup> FED. R. EVID. 404(a)(1).

<sup>164</sup> MUELLER & KIRKPATRICK, *supra* note 162. As this treatise observes, many courts regard the basic purpose of the "open door doctrine" as admitting evidence that would be otherwise excludable but for the "waiver" of any potential objections by the party offering the initial proof. *Id.* at n.3 (citing *Itin v. Ungar*, 17 P.3d 129, 132 n.4 (Colo. 2000)).

<sup>165</sup> Lewis R. Hagood, *Claims of Mental and Emotional Damages in Employment Discrimination Cases*, 29 U. MEM. L. REV. 577, 588 (1999) ("[A] plaintiff's prior psychological impairment may be more of a shield than a sword on the issue of damages, but not necessarily regarding liability.").

<sup>166</sup> *Bemben v. Hunt*, No. 93-C-509, 1995 WL 27223, at \*1 (N.D. Ill. Jan. 23, 1995).

<sup>167</sup> *Id.* at \*3. This would suggest that the plaintiff did not offer any expert psychiatric evidence herself.

<sup>168</sup> See, e.g., *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 657 (D. Kan. 2004); *Wynne v. Loyola Univ. of Chicago*, No. 97-C-06417, 1999 WL 759401 (N.D. Ill. Sept. 3, 1999); *Kirchner v. Mitsui & Co.*, 184 F.R.D. 124, 129 (M.D. Tenn. 1998); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127 (E.D. Pa. 1997); see also *Smith*, *supra* note 6, at 114-19 (critiquing courts' use of notions of "fairness" and "truth-seeking" when finding that a plaintiff has waived the psychotherapist-patient privilege by asserting a claim for emotional distress damages).

strategy, and therefore denying access to the records would be fundamentally unfair.

By contrast, some courts scrutinize defendants' arguments before admitting evidence of alleged alternate stressors. In *Rettinger v. IBP, Inc.*, for example, the court deferred ruling until trial on the admissibility of evidence proffered by the defendant to show preexisting causes of the plaintiff's emotional distress but noted that, by making a claim for emotional distress, the plaintiff had opened the door on the issue of alternative stressors.<sup>169</sup> The court explained that it would need to determine if there was a reasonable basis to conclude that these alleged stressors *could* contribute to emotional distress.<sup>170</sup> Similarly, in *Mendez v. Superior Court*, a defendant unsuccessfully sought discovery of the plaintiff's extramarital affairs to make an alternative causation argument.<sup>171</sup> The court rejected the request on several grounds, including a lack of expert psychological evidence that infidelity can lead to emotional distress.<sup>172</sup>

The decisions in *Rettinger* and *Mendez*, in contrast to the approach taken by most trial courts, underscore that courts can apply real scrutiny to rebuttal evidence offered by a defendant. While the stated basis for the discovery and admission of evidence of a plaintiff's psychiatric illness to rebut a claim for emotional distress damages appears, in the abstract, to be fair and reasonable, there can be little question but that such evidence can benefit a defendant. Specifically, the evidence may cast doubt on the plaintiff's assertion of causation of injury, while at the same time, casting the plaintiff herself in a negative light due to the stigmatizing effects of psychiatric diagnoses. Courts should consider whether it is fair to characterize the proof as "counter-proof" or whether the effect of such evidence would go beyond simply neutralizing the probative effect of the plaintiff's evidence. Similarly, a defendant's evidence cannot leave fact finders to make purely speculative inferences about psychological functioning.

#### E. *Quantification and Apportionment by Fact Finders*

The cases in which defendants succeed in presenting evidence of a plaintiff's preexisting or concurrent mental disorder also raise the question of how courts understand fact finders to use psychiatric evidence to *quantify* the causation of psychological injuries under the often complex rules of apportionment. Quantification of damages is

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<sup>169</sup> *Rettinger v. IBP*, No. 96-4015-SAC, 1999 WL 318153, at \*2 (D. Kan. Jan. 6, 1999).

<sup>170</sup> *Id.* at \*3-4.

<sup>171</sup> *Mendez v. Superior Court*, 206 Cal. App. 3d 557, 561-63 (Ct. App. 1988).

<sup>172</sup> *Id.* at 570-71.

one of the most challenging tasks of fact finders. And while courts show little reluctance to admit evidence on multiple and competing theories of causation of psychiatric injuries, they appear to give little regard to whether fact finders properly use such evidence in making apportionment determinations.

This issue of apportionment implicates the extensive debate among legal scholars regarding the legal principles that permit a party to recover money for “noneconomic” damages, including those intended to compensate a party for emotional distress and other psychological injuries. Professor Margaret Jane Radin described one dimension of the debate in terms of the “commodification” of noneconomic damages.<sup>173</sup> The absence of an accurate basis to assess psychological injury was one of the reasons that courts were initially resistant to allowing recovery for such injuries at all.<sup>174</sup> The traditional and still-predominant view is that even though such harm is essentially incommensurable, the argument that such incommensurability points in favor of the abolition of such damages should be rejected.<sup>175</sup> Most courts and scholars have concluded that it is better to offer some form of payment than no payment at all.<sup>176</sup> As the drafters of the *Restatement (Second) of Torts* noted:

When . . . the tort causes bodily harm or emotional distress, the law cannot restore the injured person to his previous position. The sensations caused by harm to the body or by pain or humiliation are not in any way analogous to a pecuniary loss, and a sum of money is not the equivalent of peace of mind. Nevertheless, damages given for pain and humiliation are called compensatory. They give to the injured person some pecuniary return for what he has suffered or is

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<sup>173</sup> See Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993).

<sup>174</sup> Call, *supra* note 28, at 40.

<sup>175</sup> Radin, *supra* note 173, at 75-76. For example, Professor Ronald Allen and his colleagues have argued that our current legal system does not demand rational fact-based decision-making by jurors with respect to noneconomic compensatory damages, which would include damages for psychological injuries (beyond the costs of treatment). They go so far as to suggest that such awards are based upon the subjective beliefs of jurors rather than on the rule of law, running afoul of the Due Process Clause. Ronald J. Allen et al., *An External Perspective on the Nature of Noneconomic Compensatory Damages and Their Regulation*, 56 DEPAUL L. REV. 1249, 1264-77 (2007); see also Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253, 325-26 (2006); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 208-09 (2004). Other arguments against emotional distress damages assert that payment of such damages amounts to commodification and “leads to a degradation of personhood and an inferior conception of human flourishing.” Radin, *supra* note 173, at 84. Radin also reviews some of the proposed alternatives to the present system of determining emotional distress damages. *Id.* at 80-81.

<sup>176</sup> Radin, *supra* note 173, at 70-72; see also Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1313-14 (2004) (demonstrating from empirical research that caps on noneconomic damages have a disproportionate impact on women, the young, and the old whose injuries are less likely to be measured in economic terms).

likely to suffer. *There is no scale by which the detriment caused by suffering can be measured* and hence there can be only a very rough correspondence between the amount awarded as damages and the extent of the suffering.<sup>177</sup>

Thus, these payments serve goals other than compensation—such as providing solace to victims, recognition for their rights, redress, and so forth—and, viewed in this regard, precision in calculation appears less critical.<sup>178</sup>

Some research suggests that jurors struggle with jury instructions regarding noneconomic damages, including when apportionment is required.<sup>179</sup> As one commentator has noted: “Irrespective of the instructions’ treatment of the elements of damages, jury instructions provide jurors with no guidance in the manner by which they are to convert their perceptions of the plaintiff’s condition into a dollar award.”<sup>180</sup> In essence, when we ask jurors to apportion emotional distress damages between those caused by the defendant’s conduct and those caused by a psychiatric condition (or any potential alternative cause), we ask them to calculate a specific measure where there is no scale. Admissibility of evidence of multiple causes of psychological injuries operates within the legal fiction that fact finders can accurately and precisely incorporate such evidence into the final calculation of loss.

In some cases where a court sits as fact finder, it will base its damages award on an amount it determines to reflect the extent of plaintiff’s injuries that are attributable to the defendant’s conduct aside from preexisting causes of emotional distress. In the opinions issued in these cases, we get a glimpse of the challenge of attaching dollar figures to these analyses. For example, in *McKinnon v. Kwong Wah Restaurant*, the trial court noted that it had difficulty determining the various causes of the plaintiffs’ emotional distress but ultimately concluded that an award of \$2500 for each plaintiff in that sexual harassment case was “appropriate.” An appeals court upheld the finding.<sup>181</sup>

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<sup>177</sup> RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979) (emphasis added).

<sup>178</sup> See Radin, *supra* note 173, at 70-75.

<sup>179</sup> See, e.g., NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 276 (2007) (discussing the eggshell skull rule).

<sup>180</sup> Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 *PSYCHOL. PUB. POL’Y & L.* 712, 718 (2000); see also VIDMAR & HANS, *supra* note 179, at 277 (noting that juries are sometimes reluctant to award noneconomic damages because proof of such harm “rest[s] almost exclusively on plaintiffs’ reports of their internal states of pain or emotional trauma”). However, the extent of jurors’ comprehension of current instructions has been subjected to little empirical testing.

<sup>181</sup> *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 506-07 (1st Cir. 1996). Similarly, in *Salas v. United States*, 974 F. Supp. 202, 206-07 (W.D.N.Y. 1997), a car accident case brought under the Federal Tort Claims Act, both parties offered extensive psychiatric evidence regarding

Courts differ in their approach to assessing juries' determinations of apportionment and causation of psychological injuries. In *Carter v. Blakey*, a sexual harassment case, the plaintiff's psychiatric expert conceded that the "original source" of the plaintiff's PTSD was sexual abuse by the plaintiff's father and that she could not quantify the extent to which such trauma contributed to the plaintiff's emotional harm.<sup>182</sup> The trial court rejected the defendant's argument that such testimony amounted to a failure of proof of causation for the plaintiff.<sup>183</sup> Instead, the court permitted the jury's verdict for the plaintiff to stand, reasoning that, if the extent to which other stressors contributed to her emotional distress was not really quantifiable, the defendant could be held liable so long as there was any evidence of direct causation between the defendant's conduct and the plaintiff's harm.<sup>184</sup>

By contrast, other trial courts have reduced plaintiffs' emotional distress jury awards in the face of evidence of other psychological problems, yet they offer no insight into their reasoning. For example in *Blakey v. Continental Airlines, Inc.*, a sexual harassment case, the trial court cut a jury's \$500,000 award in half on the basis of evidence presented at trial that the plaintiff had other stressors in her life and that she sought no treatment for her emotional distress.<sup>185</sup> In *Hurley v. Atlantic City Police Department*, another sexual harassment case, a trial court granted a defendant's post-trial motion for remittitur reducing the plaintiff's compensatory damages award from \$575,000 to \$175,000 due in large part to evidence that she had "emotional difficulties" prior to her employment by the defendant.<sup>186</sup>

A few courts have issued opinions suggesting that they lack confidence in jurors' ability to appropriately use evidence of alternate causation of emotional distress to reach a just apportionment of damages and therefore restrict defendants' proffer of such evidence on

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causation and the plaintiff's prior mental illness. After a bench trial, the court concluded that the accident had caused the plaintiff's somatoform disorder and the defendant had not established that the psychiatric symptoms were inevitable due to her preexisting personality disorder and other psychiatric diagnoses. *Id.* at 208-09; *see also* Broderick v. Ruder, 685 F. Supp. 1269, 1273 (D.D.C. 1988) (rejecting defendant's psychiatric expert witness on issue of exacerbation of plaintiff's preexisting psychiatric condition).

<sup>182</sup> *Carter v. Blakey*, No. 1:97CV00982, 1999 WL 1937226, at \*4 (M.D.N.C. Sept. 1, 1999).

<sup>183</sup> *Id.* at \*7.

<sup>184</sup> *Id.*; *see also* Steinhauer v. Hertz, 421 F.2d 1169, 1173-74 (2d Cir. 1970) (holding that jury was "ideally suited" for resolving the "taxing" question of whether the plaintiff's "latent psychotic tendencies" were bound to worsen or were triggered as a result of the motion vehicle accident that was the subject of the litigation).

<sup>185</sup> *Blakey v. Cont'l Airlines, Inc.*, 992 F. Supp. 731, 737-38 (D.N.J. 1998).

<sup>186</sup> *Hurley v. Atl. City Police Dep't*, 933 F. Supp. 396, 425 (D.N.J. 1996), *aff'd in part on other grounds*, 174 F.3d 95 (3d Cir. 1999), *cert. denied*, 528 U.S. 1074 (2000); *see also* Merriweather v. Family Dollar Stores of Ind., 103 F.3d 576, 581 (7th Cir. 1996) (holding that in a bench trial, a trial court should have remitted twenty-five percent of the plaintiff's damages award due to other stressors in her life).

relevancy grounds. In the *Mendez v. Superior Court* opinion, discussed *supra*, the appeals court noted: “[W]e have difficulty accepting the defendants’ basic notion that plaintiff’s claimed injury of severe emotional distress is somehow apportionable between preexisting anxieties and the mental trauma caused by the defendants’ alleged conduct.”<sup>187</sup> The court noted that, under such logic, anything in the plaintiff’s life (financial, medical, family) could have been the source of emotional distress.<sup>188</sup> Since emotional distress is a component of any sexual harassment case, it feared that permitting such extensive and invasive discovery whenever such distress is alleged would have a chilling effect on such claims.<sup>189</sup>

Similarly, in *Robinson v. Canon*, a sexual harassment case, the trial court excluded any reference to the plaintiff’s alleged extramarital affairs and rejected the defendant’s alternative causation argument.<sup>190</sup> As did the appeals court in *Mendez*, the *Robinson* court considered the assumption that extramarital affairs are a source of emotional distress to be mere speculation. More significantly, the court did not see how a fact finder could segregate and differentiate such stress from the emotional distress experienced by the plaintiff due to the defendant’s conduct.<sup>191</sup> The trial court conceded that “it may be impossible for any defendant to satisfy this burden because psychological considerations are not subject to such nice categorizations.”<sup>192</sup> Without a real basis for apportionment, the court concluded, the defendants could not “simply present evidence of alleged stressors and leave it to the jury to determine whether, and to what extent, the emotional damage attributable to Plaintiff’s various stress factors is divisible.”<sup>193</sup>

These cases exploring various aspects of apportionment of psychological injury reveal the challenges faced by fact finders—whether judges or jurors—in arriving at results that appear to be closely linked with the conflicting evidence presented by the parties on questions of causation of psychological injuries. Indeed, we should not be surprised given the reluctance of clinicians to arrive at causation

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<sup>187</sup> *Mendez v. Superior Court*, 206 Cal. App. 3d 557, 571 (Ct. App. 1988).

<sup>188</sup> *See id.* at 573.

<sup>189</sup> *Id.*

<sup>190</sup> *Robinson v. Canon*, No. 99-0339-CV-W-3, 2000 WL 564203 (W.D. Mo. Apr. 6, 2000).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* The court commented that it felt constrained to rule as it did by the reasoning in *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997). In that opinion, the U.S. Court of Appeals for the Eighth Circuit held that, because the special master at the trial level had held that the plaintiffs’ emotional distress injuries in that class action sexual harassment case were indivisible, the trial court had improperly considered evidence of the plaintiffs’ medical and sexual histories. *Id.* at 1294.

<sup>193</sup> *Robinson*, 2000 WL 564203. The court also concluded that such evidence was excludable under Rule 403 since it raised an inference that the plaintiff was a bad person.

conclusions themselves.<sup>194</sup> These challenges may suggest to some that noneconomic damages should be jettisoned as a form of relief. However, such challenges are at least equally indicative that there is a critical role for trial judges to play in ensuring that any evidence admitted on the issue of causation of emotional distress—whether provided through expert testimony or otherwise—is of a kind that is in fact reasonable, helpful, and appropriate for fact finders to consider. Since awards for psychological injuries are not based upon mathematical precision, courts have more latitude to shape the evidence fact finders consider to arrive at their determination of a fair and just damages award to compensate the plaintiff.

F. *Normative Determinations of Causation and Mental Illness*

As this review has demonstrated, courts rarely consider limiting the evidence of alternative causes of emotional distress. Rather, courts appear to conclude that fairness principles require admissibility of any evidence offered to support alternative causation and the apportionment of psychological injuries among various causes. Indeed, while the case law—through standards such as “proximate cause” and “substantial factor”—imposes limitations on what a plaintiff may offer in support of her claim of causation, there are few constraints on what a defendant may offer as evidence of an alleged *alternative* source of causation. However, there is no reason for courts to abandon normative constructions of causation simply because the opposing party advances a competing causation theory. By so doing, courts undermine the goals served by our rules-based system of evidence and permit fact finders to base their conclusions on evidence that falls outside of the principles developed to allocate responsibility between litigants in cases alleging personal injuries.

The concept of legal or proximate cause recognizes that there are potentially infinite causes that bring about particular events, but that only certain ones (due to temporal, physical, and foreseeability relationships to the injury at issue) are appropriate to impose liability under our legal system. In terms of alternative causation, the same is necessarily true; there are infinite potential alternative factual causes of an injury. If, before leaving the house, the plaintiff had not received a phone call that delayed her departure by 2.37 minutes, then she would not have been in the car accident with the defendant. “But for” the call, the accident would not have happened; but few would argue that it is an

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<sup>194</sup> See Goodman-Delahunty & Foote, *supra* note 118, at 191 (“Although preexisting psychopathology may produce work impairment and work stresses may induce psychopathology, the two probably interact in a complex manner.”).

“alternative cause” that would provide a basis to apportion damages or permit the defendant to escape liability. As a practical matter, defendants do not usually advance such tenuous arguments of alternate causation, other than perhaps in the context of psychological injuries. And while the causes of such injuries are widely varied and complexly interconnected, it appears from the case law that defendants’ theories of alternative causation often focus on the admissibility of evidence of purported alternative causes that also happen to cast plaintiffs in an unfavorable light.

The point here is not to subject psychological injuries and preexisting mental illness to an analysis to reach a nonnormative determination of causation, if such result is even possible. Rather, it is critical to regard these decisions about what evidence a fact finder may consider in making determinations of legal causes and alternative causes, as being in themselves normative determinations.<sup>195</sup> We should not delude ourselves into thinking that admitting evidence of alternative causes serves as an aid for the fact finders to find *the* truth; rather, such evidence leads them to *a* truth.

The decisions in *Robinson* and *Mendez* suggest that questions of causation of psychological injuries should rarely be resolved using evidence of a plaintiff’s preexisting emotional difficulties. To be sure, such exclusion would certainly strike many as patently unfair to civil defendants due to the widespread practice (based, to some extent, upon substantive law) of allowing defendants to challenge the cause of psychological injuries by offering evidence of alternative stressors.<sup>196</sup> However, close examination and re-evaluation of such practice, and the assumptions upon which it is based, are warranted, particularly in cases where such evidence is directly indicative of a past or concurrent mental illness (as opposed to evidence describing life events, such as divorce, financial stress, etc.).<sup>197</sup> The varying court approaches to the admissibility of such evidence reflect the courts’ disparate views of how causation should be constructed, and, by extension, how responsibility should be allocated. By including such mental illness in the causation analysis and permitting diminished recoveries to result, courts place such mental illness on one side of the equation, to the defendant’s

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<sup>195</sup> Fumerton & Kress, *supra* note 36, at 86 (“[While certain] determinations of law involve nonnormative matters of fact . . . our decision to make a given nonnormative fact *relevant* to a finding of law is itself grounded in normative considerations.” (emphasis added)).

<sup>196</sup> Some courts, of course, exclude *discovery* of a plaintiff’s psychiatric injuries on privilege, relevancy, or privacy grounds, thus eliminating any potential controversy over the admissibility of such evidence. See Smith, *supra* note 6, at 107-28.

<sup>197</sup> This is not to suggest that any evidence of life stressors should be admitted for this purpose. Evidence such as that concerning extramarital affairs, abortions, and other matters may well be unfairly prejudicial and properly subject to exclusion.

advantage. Moreover, psychiatry is itself value-laden.<sup>198</sup> Thus, where an expert ties or bases a causation opinion and analysis on the criteria of a *DSM* diagnosis, jury determinations may reflect, unwittingly, the underlying value choices of that diagnosis.

As discussed in the next two Parts, many courts have already determined that a plaintiff's psychiatric history is generally inadmissible on the issues of credibility and propensity. Given the risk that evidence purportedly offered solely on the issue of alternate causation could quite easily be used for either or both of these impermissible reasons, the long-standing use of such evidence bears more careful consideration, notwithstanding its prevalence.

## II. CREDIBILITY

In addition to offering evidence of a plaintiff's mental illness to support a theory of alternative causation, some civil defendants attempt to introduce such evidence on the issue of credibility, either to suggest that the plaintiff's trial testimony is not to be believed or that the plaintiff's original perception of events was inaccurate and the product of such illness.<sup>199</sup> There is no clear consensus in the courts regarding such use of psychiatric evidence. Several have yielded to the temptation of allowing mental health professionals to provide fact finders with scientific-sounding bases to discount plaintiffs' versions of events, while others are more cautious about the use of such evidence.

At common law, insanity could serve as a basis for a court's ruling that a witness was incompetent and therefore barred from providing testimony in court.<sup>200</sup> During the twentieth century, fact finder assessments of credibility replaced court determinations of competence in nearly all instances.<sup>201</sup> In the Federal Rules of Evidence enacted in 1975, for example, Rule 601 establishes a presumption of

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<sup>198</sup> Daniel W. Shuman, *Softened Science in the Courtroom: Forensic Implications of a Value-Laden Classification*, in DESCRIPTIONS AND PRESCRIPTIONS: VALUES, MENTAL DISORDERS, AND THE DSMS 217, 224-25 (John Z. Sadler ed., 2002).

<sup>199</sup> See, e.g., Mark S. Lipian, *Personality Disorders in Employment Litigation*, in MENTAL AND EMOTIONAL INJURIES IN EMPLOYMENT LITIGATION, *supra* note 22, at 212, 251 (asserting that, in employment litigation, "personality disorders typically are relevant to the credibility of the plaintiff's account of the events in question"); James J. McDonald, Jr., *The Legal Context*, in MENTAL AND EMOTIONAL INJURIES IN EMPLOYMENT LITIGATION, *supra* note 160, at 1, 22-24 (observing that courts may admit expert testimony "to show the plaintiff's perception of harassment or discrimination was not accurate"); Jonathan P. Rosman, *Malingering: Distortion and Deception in Employment Litigation*, in MENTAL AND EMOTIONAL INJURIES IN EMPLOYMENT LITIGATION, *supra* note 22, at 409, 417-20 ("There are certain psychiatric factors that predispose some plaintiffs to think unreasonably and be hypersensitive to others.").

<sup>200</sup> Michael D. Ermert, *Mental Disorder in Witnesses: An Overview of Competency and Credibility Issues*, 41 ALA. L. REV. 167, 167 (1989).

<sup>201</sup> See *id.* at 170.

competency.<sup>202</sup> One commentator noted that the language of that rule “converts all other issues that the common law regarded as going to competency into questions of witness credibility to be decided by the jury.”<sup>203</sup> Given the fact finder’s role in assessing credibility, parties present evidence regarding a trial witness’s credibility at trial along with evidence on liability and damages, rather than as part of a preliminary proceeding before the court.

Evidence law constructs credibility broadly.<sup>204</sup> Dean Wigmore observed that “[a]ny trait importing in itself a defective power of observation (at the time of the matter testified to), or of recollection, or of communication, is admissible, provided the power is substantially defective as judged by the average standard of mentality.”<sup>205</sup> Thus, proof of alleged mental incapacity with respect to credibility is “always relevant . . . [and] never collateral.”<sup>206</sup>

There is no single evidence rule addressing the admissibility of evidence on the issue of a witness’s credibility.<sup>207</sup> However, a number of rules do touch on credibility, particularly those that limit the admissibility of evidence of a witness’s character for untruthfulness. Under the Federal Rules of Evidence, a party may offer evidence of a witness’s character for untruthfulness through opinion or reputation testimony or, in the court’s discretion, on cross-examination.<sup>208</sup> Arguably, an expert witness could offer an opinion on an individual’s character for untruthfulness,<sup>209</sup> but it is unclear what kind of background

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<sup>202</sup> FED. R. EVID. 601 (“Every person is competent to be a witness except as otherwise provided in these rules.”). The rule also provides that in diversity cases, witness competency is a matter of state law. *Id.* Some states still have competency rules excluding people with mental illness from testifying entirely. ROGER C. PARK, TRIAL OBJECTIONS HANDBOOK § 7:23 (2d ed. 2007).

<sup>203</sup> 27 WRIGHT & GOLD, *supra* note 124, § 6097.

<sup>204</sup> 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 931 (Chadbourn rev. 1970) (emphasis omitted).

<sup>205</sup> *Id.*

<sup>206</sup> MUELLER & KIRKPATRICK, *supra* note 162, § 6:80 (internal quotation marks and citations omitted). Similarly, evidence—including extrinsic evidence—of a witness’s bias or impaired perception is generally considered to be highly relevant and is generally admissible. *See id.*; *see also* United States v. Abel, 469 U.S. 45, 50-52 (1984) (noting that, notwithstanding the absence of reference to “bias” in the Federal Rules of Evidence, evidence of bias is relevant and therefore admissible for impeachment purposes).

<sup>207</sup> Anne Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?*, 59 FLA. L. REV. 991, 997 (2007); *see also* Daniel David Blinka, *Why Modern Evidence Law Lacks Credibility* 6 (Marquette Univ. Law Sch. Legal Studies Research Paper Series, Research Paper No. 09-12, 2009), available at <http://ssrn.com/abstract=1372763> (“[E]vidence law is bereft of any systematic approach to determining credibility.”).

<sup>208</sup> FED. R. EVID. 608. For example, a plaintiff may be asked about prior instances in which she offered untruthful statements as evidence of a character for untruthfulness. Extrinsic evidence (that is, evidence offered other than through the witness whose credibility is being impeached) of specific instances of untruthfulness is not admissible, with the exception of evidence of a witness’s prior criminal convictions. FED. R. EVID. 608(b), 609.

<sup>209</sup> FED. R. EVID. 608(b). Professor Poulin makes such argument, *see* Poulin, *supra* note 207,

makes one an “expert” on a person’s *character* for untruthfulness, as that is an exceedingly subjective and value-based concept.<sup>210</sup> However, the line between offering impeachment evidence of a witness’s capacity to offer reliable testimony and attacking her general character for untruthfulness is not a bright one.<sup>211</sup>

The contemporary case law on the admissibility of evidence of a witness’s mental illness for purposes of impeaching her credibility has developed nearly entirely in the criminal realm, where criminal defendants seek to offer evidence of prosecution witnesses’ mental illnesses to generate reasonable doubt. In those cases, however, the courts admitting such evidence often base their rulings in significant part on Due Process and Sixth Amendment considerations, and few make reference to any specific rules of evidence other than perhaps Rules 401 and 403.<sup>212</sup> The most famous opinion on this issue (and one that is still cited) arose in the notorious 1950 perjury trial of Alger Hiss, in which Hiss sought to offer evidence that the prosecutor’s primary witness, Whittaker Chambers, was mentally ill.<sup>213</sup> The trial court commented that it was the first federal court to consider the question since “use of psychiatric testimony to impeach the credibility of a witness is a comparatively modern innovation.”<sup>214</sup> The court considered the state courts’ approach and concluded: “The existence of insanity or mental derangement is admissible for the purpose of discrediting a witness. Evidence of insanity is not merely for the judge on the preliminary question of competency, but goes to the jury to affect credibility.”<sup>215</sup> The psychiatrist listened to Chambers’ trial testimony and later offered his opinion, based upon his observations at trial, that Chambers had a “psychopathic personality.”<sup>216</sup>

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at 1008-21, although she notes a distinction between expert testimony on “truthfulness” and that regarding “credibility,” which would more accurately capture the gist of testimony regarding psychological conditions. *Id.* at 1017.

<sup>210</sup> Indeed, one psychiatrist opined: “Honesty is a value judgment and not psychiatrically relevant or determinable.” Marcus, *supra* note 86, at 430.

<sup>211</sup> 27 WRIGHT & GOLD, *supra* note 124, § 6097 (noting that evidence of mental illness may be offered for the purpose of raising questions not only about a witness’s “capacity” but also the “witness’s character for truthfulness or untruthfulness”).

<sup>212</sup> See, e.g., *United States v. Jimenez*, 256 F.3d 330, 343 (5th Cir. 2001) (“[A] defendant has the right to attempt to challenge [a witness’s] credibility with competent or relevant evidence of any mental defect or treatment at a time probatively related to the time period about which he was attempting to testify.” (internal quotation marks and citations omitted)), *cert. denied*, 534 U.S. 1140 (2002); *State v. Fichera*, 903 A.2d 1030, 1039 (N.H. 2006) (stating that the right to cross-examine adverse witnesses is guaranteed by the Sixth Amendment) (citing *Douglas v. Alabama*, 380 U.S. 415 (1965)).

<sup>213</sup> *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950). See generally ALLEN WEINSTEIN, *PERJURY: THE HISS-CHAMBERS CASE* (1997).

<sup>214</sup> *Hiss*, 88 F. Supp. at 559. Indeed, the court noted that the “value of psychiatry” to court proceedings came to be recognized only during the decades just prior to the decision. *Id.* at 560.

<sup>215</sup> *Id.* at 559.

<sup>216</sup> Edwin C. Conrad, *Psychiatric Lie Detection*, 21 F.R.D. 199, 205 (1957). Notwithstanding

In the years following *Hiss*, legal commentators' interest in the use of psychiatric evidence to impeach a witness's trial testimony widened. A series of articles written in the mid-twentieth century suggested that the fields of psychiatry and psychology could yield great benefits to the process of assessing witness credibility, particularly with respect to "pathological liars" or others with alleged personality disorders.<sup>217</sup> The arguments in some of those articles proved persuasive to the U.S. Court of Appeals for the Eleventh Circuit in its influential 1983 opinion in *United States v. Lindstrom*.<sup>218</sup> The panel there observed:

Mental illness may tend to produce bias in a witness'[s] testimony. A psychotic's veracity may be impaired by lack of capacity to observe, correlate or recollect actual events. A paranoid person may interpret a reality skewed by suspicions, antipathies or fantasies. A schizophrenic may have difficulty distinguishing fact from fantasy and may have his memory distorted by delusions, hallucinations and paranoid thinking. A paranoid schizophrenic, though he may appear normal and his judgment on matters outside his delusional system may remain intact, may harbor delusions of grandeur or persecution that grossly distort his reactions to events.<sup>219</sup>

Under the case law that developed as a result of these leading cases, a party may offer proof of a witness's mental illness through cross-examination of the witness, such as by asking the witness about prior psychiatric hospitalizations or other treatment or about the witness's symptoms.<sup>220</sup> Alternatively, some courts permit the defendant to offer evidence of the witness's mental illness through expert forensic psychiatric or psychological testimony, as in *Hiss*.<sup>221</sup> However, even in

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that testimony, the jury convicted Hiss. *Id.*

<sup>217</sup> David B. Saxe, *Psychiatry, Psychoanalysis, and the Credibility of Witnesses*, 45 NOTRE DAME L. REV. 238 (1970); see also Conrad, *supra* note 216, at 215 ("We can say that the science of psychiatry has advanced to such a stage of development that the use of expert psychiatric testimony on the issue of credibility is a sound principle of judicial proof."); Michael Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CAL. L. REV. 648, 651 (1960) ("The law needs a means by which psychiatry can make the jury aware of a witness's mental or emotional condition and, more important, of its effect upon his testimony."); *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324 (1950) (arguing for broad use of expert psychiatric testimony on the issue of a witness's credibility); Henry Weihofen, *Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53, 90 (1965) (discussing expanded use of psychiatric examination and testimony on the issue of witness credibility).

<sup>218</sup> *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983). The panel cited specifically to the Weihofen and Juviler articles, *supra* note 217, in its analysis. *Id.* at 1160-61.

<sup>219</sup> *Id.* at 1160.

<sup>220</sup> MUELLER & KIRKPATRICK, *supra* note 162, § 6:80; see also *Revels v. Vincenz*, 382 F.3d 870, 877 (8th Cir. 2004) (affirming admission of plaintiff's response to question on cross examination: "And you admit that there were times in the past that you've heard voices?"), *cert. denied*, 546 U.S. 860 (2005).

<sup>221</sup> Ermert, *supra* note 200, at 174-79. Courts generally do not permit the admissibility of expert evidence to bolster a civil plaintiff's credibility, such as to explain an apparent discrepancy in statements. See, e.g., *Westcott v. Crinklaw*, 68 F.3d 1073, 1075-77 (8th Cir. 1995) (reversing

the criminal realm, use of such evidence is not unlimited or uncontroversial.<sup>222</sup> Courts are more willing to admit testimony of psychiatric illness for purposes of impeachment where the illness is schizophrenia or some other form of psychosis, as opposed to depression or other mood disorders,<sup>223</sup> and many courts remain wary that the admissibility of expert testimony on the issue of credibility will unduly invade the province of the jury.<sup>224</sup>

Far fewer courts have addressed the issue of the admissibility of psychiatric evidence for credibility purposes in the civil context, and defendants seeking to introduce such evidence have had mixed results. As with the cases decided in the criminal context, however, courts usually base their decisions on general notions of relevance, rather than upon specific evidence rules, such as those regarding evidence of a witness's character for truthfulness. For example, the court in *Ramseyer v. General Motors Corp.* noted agreement among the courts—especially federal courts—that a “witness’[s] previous mental incapacity serves as a proper subject for cross-examination to determine credibility.”<sup>225</sup>

Similarly, the U.S. Court of Appeals for the Eighth Circuit in *Revels v. Vincenz* affirmed a trial court's entry of judgment on a psychiatric patient's § 1983 claim after a trial in which the court admitted evidence on cross-examination of plaintiff that he had “heard voices” in the past.<sup>226</sup> The appeals court accepted as well-settled that a party may make “use of a witness's mental condition to challenge his credibility.”<sup>227</sup> The court also rejected the plaintiff's Rule 403 argument. Because the case concerned sharply divergent versions of certain incidents, for which the parties were the sole witnesses, the court reasoned that “the credibility of each party and his ability to discern and tell the truth carried great probative value not substantially outweighed by the risk of unfair prejudice.”<sup>228</sup> Notably, however, the court required no evidence (and the plaintiff did not apparently argue this point) that “hearing voices” was in fact probative of the plaintiff's “ability to discern and tell the truth.”<sup>229</sup> Nor did the court require any showing of

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trial court's ruling admitting expert's testimony that plaintiff suffered from PTSD, which could have caused him to make “inaccurate, unreliable and incomplete statements” as impermissible bolstering of the plaintiff's credibility which invaded the jury's function).

<sup>222</sup> See Poulin, *supra* note 207, at 1013-14.

<sup>223</sup> *State v. Fichera*, 903 A.2d 1030, 1040 (N.H. 2006); *United States v. Butt*, 955 F.2d 77, 82-83 (1st Cir.1992).

<sup>224</sup> See Poulin, *supra* note 207, at 1001-04; see also *United States v. Barnard*, 490 F.2d 907, 912-13 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974).

<sup>225</sup> *Ramseyer v. Gen. Motors Corp.*, 417 F.2d 859, 863 (8th Cir. 1969).

<sup>226</sup> *Revels v. Vincenz*, 382 F.3d 870, 877 (8th Cir. 2004).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

how recently the plaintiff had heard voices so that such evidence would be in fact probative of his truthfulness at the time of trial. Rather, the court assumed that the fact finder could draw appropriate inferences about the plaintiff's credibility from the plaintiff's affirmative answer to the question.

Several courts have admitted expert psychiatric testimony on the issue of a civil plaintiff's testimony. The court in *Lanni v. New Jersey* ruled that the proffered testimony of defendant's forensic psychiatrist regarding the plaintiff's factitious and narcissistic personality disorders was relevant to "causation" in an employment discrimination case because it suggested a reason why the plaintiff felt he had been subjected to discrimination.<sup>230</sup> As noted *supra* in Part I, courts generally impose few limitations on defendants' use of a plaintiff's psychiatric history to argue a theory of alternative causation. But the court's reasoning in this case appears to include a misapplication of the concept of "causation" in the usual sense of the word in the litigation context. If the court means that the psychiatrist's diagnoses offer an explanation of what caused the plaintiff to make allegations of disability discrimination, then it is not an issue of legal "causation" but "credibility," in the same sense that bias, for example, can "cause" one to testify to something that did not happen.

In *Frazier v. Topeka Metal Specialties, Inc.*, a case in which the court entered partial summary judgment for the defendant, leaving some issues for trial, the court noted that there was evidence in the record that the plaintiff had been diagnosed with paranoid schizophrenia and an antisocial personality disorder.<sup>231</sup> The defendant's psychiatric expert had opined that the plaintiff's "problems at work were derived from his inability to perceive or process what was going on around him" and commented that "you cannot joke with schizophrenics," suggesting that what the plaintiff may have perceived to be racial harassment was actually "horsing around."<sup>232</sup> The court noted that the question of whether the plaintiff was in fact subjected to harassment or whether his perception of the same was the product of his mental illness was a "credibility issue to be determined by the jury," signaling that it would admit the psychiatric evidence for this purpose at trial.<sup>233</sup>

There can be little doubt that evidence of a party's mental illness can have a significant impact on fact finders' assessments of credibility. The analyses in bench trial opinions where evidence of a plaintiff's mental illness—particularly when presented through testimony of a

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<sup>230</sup> *Lanni v. New Jersey*, 177 F.R.D. 295, 302-03 (D.N.J. 1998).

<sup>231</sup> *Frazier v. Topeka Metal Specialties, Inc.*, No. 99-4029-DES, 2001 WL 138893 (D. Kan. Feb. 15, 2001).

<sup>232</sup> *Id.* at \*2.

<sup>233</sup> *Id.* at \*10.

defendant's forensic expert—leads the court to conclude that the plaintiff's account is not to be believed demonstrate the effectiveness of this evidence. These cases in which psychiatric evidence was offered ostensibly on the issue of credibility are also noteworthy because we can see the role such evidence can play in a fact finder's decision-making, not only strictly with respect to the credibility of the plaintiff's trial testimony, but also as evidence of the plaintiff's overall character.<sup>234</sup>

The decision in *Sudtelgte v. Reno* provides a clear example of how a lay fact finder may use psychiatric evidence to determine credibility, and therefore liability, issues.<sup>235</sup> The trial court entered judgment for the defendant in this sexual harassment case after hearing testimony that the plaintiff had received psychiatric treatment since the age of sixteen, and had been diagnosed with atypical bipolar disorder, psychosis, narcissistic personality disorder, and paranoid personality disorder.<sup>236</sup> Her employer's psychiatrist concluded, after examination, that the increase in the plaintiff's symptoms was due to an exacerbation of "a life-long vulnerability to either manic or hypomanic episodes or major depressive episodes due to an inherited vulnerability" by recent job-related stress.<sup>237</sup> The trial judge quoted extensively from the *DSM-III-R*'s<sup>238</sup> diagnostic criteria for paranoid personality disorder, which one examining psychiatrist opined had preexisted the plaintiff's employment by the defendant, noting with emphasis that the condition is commonly associated with "*occupational difficulties . . . especially in relating to authority figures or co-workers.*"<sup>239</sup> The court also quoted another examiner who had opined that the plaintiff "externalizes blames for her shortcomings. She uses repression and conversion to cope with her anxiety and confusion. . . . She has difficulty with a female sexual role. *She is narcissistic and hypersensitive. Individuals with similar profile worry constantly and are easily upset and hurt.*"<sup>240</sup> The court concluded in its findings that the evidence was undisputed that the

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<sup>234</sup> See, e.g., *George v. Frank*, 761 F. Supp. 256, 263 (S.D.N.Y. 1991); *Spencer v. Gen. Elec. Co.*, 697 F. Supp. 204, 211 (E.D. Va. 1988) (noting that expert testimony about plaintiff's "histrionic personality disorder" "r[a]ng true" when rejecting her testimony about an alleged sexual assault); *Davis v. U.S. Steel Corp.*, 539 F. Supp. 839, 840 (E.D. Pa. 1982) ("Plaintiff is an emotionally disturbed man who perceived discipline as harassment . . .").

<sup>235</sup> *Sudtelgte v. Reno*, No. 90-1016-CV-W-6, 1994 WL 3406 (W.D. Mo. Jan. 3, 1994).

<sup>236</sup> *Id.* at \*11-12.

<sup>237</sup> *Id.* at \*11.

<sup>238</sup> AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. rev. 1987) (*DSM-III-R*).

<sup>239</sup> *Sudtelgte*, 1994 WL 3406 at \*12 (quoting *DSM-III-R*). This opinion exemplifies many of the dangers noted by Professor Daniel Shuman who observed that, while the *DSM* was "not intended to be a forensic cookbook or lay medical guide . . . its diagnostic criteria are enticing to judges and lawyers as a lay guidebook to psychiatry for the unschooled and untrained." Shuman, *supra* note 30, at 854.

<sup>240</sup> *Sudtelgte*, 1994 WL 3406, at \*13.

plaintiff was “both paranoid and narcissistic (self-centered)” and that her testimony regarding harassment in connection with her employment was unreliable and not credible.<sup>241</sup>

*Pascouau v. Martin Marietta Corp.* provides a similarly stark example of how such evidence can influence fact-finding in precisely the manner that the character evidence rules were intended to prevent, as discussed further in the next Part.<sup>242</sup> The court’s findings of fact and conclusions of law after a bench trial in that sexual harassment case included an entire section with the heading “Plaintiff’s Psychological Profile.”<sup>243</sup> The defendant’s expert, whom the court found to be more persuasive, diagnosed the plaintiff with “mixed personality disorder with borderline histrionic and narcissistic characteristics.”<sup>244</sup> The court found, based upon this testimony: “The disorder leads to the formulation of implausible perceptions and thus different kinds of conclusions about what other people’s actions and behavior mean as distinguished from what a reasonable person not subject to such a disorder would perceive them to mean.”<sup>245</sup> The court’s findings then detailed the general characteristics of these two personality disorders such as: “makes judgments that are highly personalized and overly emotional,” “sees things in black and white terms rather than shades of gray,” “feels whatever goes wrong is someone else’s fault,” “take[s] no personal responsibility for what goes wrong in their lives,” and “over-evaluates and over-values other people, and then, when the slightest thing goes wrong, demeans those people and becomes angry and upset with them.”<sup>246</sup> Finally, the court referenced psychiatric testimony in concluding that “the [plaintiff’s] disorders are causes of the allegations. The incidents Plaintiff related were characterized by misinterpretations of events and interactions with fellow employees that were far more intense than would be interpreted by a reasonable person.”<sup>247</sup> It is not surprising, therefore, that the court found the plaintiff to be not credible and entered judgment for the defendant.<sup>248</sup>

While evidence rules allow admission of evidence on the issue of credibility, including certain kinds of opinion evidence of a witness’s character for truthfulness, the expert psychiatric evidence offered in each of these cases unquestionably extended beyond the issue of the

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<sup>241</sup> *Id.* at \*4 n.3.

<sup>242</sup> *Pascouau v. Martin Marietta Corp.*, 994 F. Supp. 1276 (D. Colo. 1998).

<sup>243</sup> *Id.* at 1278-80.

<sup>244</sup> *Id.* at 1278.

<sup>245</sup> *Id.* at 1279.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* The court rejected the plaintiff’s forensic psychiatric expert because he had attributed all of her “emotional difficulties” to problems in her workplace and did not consider her “profuse psychiatric history.” *Id.*

<sup>248</sup> *Id.* at 1282-83.

plaintiffs' *capacity* to provide reliable trial testimony and into the realm of character evidence, by suggesting that the plaintiffs' allegations stemmed largely from their predisposition to narcissism, paranoia, poor judgment, and inadequate social skills. The arguably probative value of such evidence for purposes of assessing the veracity of the plaintiff's trial testimony does not eliminate the possibility that such psychiatric evidence may also amount to impermissible character evidence, as discussed further in the next Part.<sup>249</sup>

Indeed, a recent series of cases reveals that some courts are wary of the use of psychiatric evidence, particularly by juries, for purposes of assessing witness credibility in civil cases for precisely this reason. The defendant in *O'Brien v. Chaparro* sought to introduce evidence that one of the plaintiff's witnesses had been diagnosed with bipolar disorder.<sup>250</sup> In response to plaintiff's arguments that such condition did not affect the witness's memory, the defense offered literature from the National Institute for Mental Health indicating that bipolar disorder *could* feature "symptoms of psychosis."<sup>251</sup> The court noted, however, that the literature said nothing about "distortions of memory," and that even occasional episodes of psychosis are not associated with memory loss.<sup>252</sup> Accordingly, the witness's diagnosis was simply irrelevant. The court also questioned the continued validity of *Lindstrom*, particularly because it relied upon scholarly articles written in the 1960s. The court further noted that "the remaining stigma in our society of mental illness makes admission of such evidence in this case to be substantially more prejudicial than probative," and therefore the evidence would in any event be inadmissible pursuant to Rule 403.<sup>253</sup>

Other federal courts similarly demonstrate reluctance to admit such testimony in the civil context, particularly where the primary evidence of such mental illness came through an expert forensic psychiatrist retained by the defendant rather than from current clinical treatment records of the plaintiff. For example, in *Bonner v. Falcon Drilling Co.*, the defendant in a personal injury case sought to introduce expert psychiatric testimony that the plaintiff had an anti-social personality

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<sup>249</sup> See *infra* notes 272-319 and accompanying text; cf. *Kelly v. Ward*, No. C-3-93-110, 1994 WL 1631041, at \*3-4 (S.D. Ohio July 6, 1994) (accepting plaintiff's argument that evidence of defendant's psychiatric history could be admissible on issue of "bias" and therefore credibility, even if it would not be admissible as character evidence).

<sup>250</sup> *O'Brien v. Chaparro*, No. 05-80342-CIV, 2005 WL 6011248, at \*2 (S.D. Fla. Dec. 8, 2005).

<sup>251</sup> *Id.* at \*3.

<sup>252</sup> *Id.*; see also *State v. Fichera*, 903 A.2d 1030, 1039 (N.H. 2006) ("The trial court may prohibit cross-examination [of a witness about her psychiatric history] if the defendant is unable to show that the mental impairment affects the witness's perception of events to which she is testifying.").

<sup>253</sup> *O'Brien*, 2005 WL 6011248, at \*3

disorder.<sup>254</sup> The defendant argued unsuccessfully that such evidence was probative of the plaintiff's credibility.<sup>255</sup> The court noted that "deceitfulness" was one of the "diagnostic criteria" for the personality disorder and excluded the testimony as inadmissible character evidence.<sup>256</sup>

The court in *Hodges v. Keane* excluded the defendant's expert who examined the prisoner-plaintiff in a case alleging a "systematic pattern of harassment, intimidation and retaliation" against him by prison officials and concluded that he had an anti-social personality disorder and a history of schizophrenia.<sup>257</sup> Although the court acknowledged that evidence of mental illness could be relevant to the issue of credibility, the psychiatric records were dated thirteen years prior to the trial and thus had minimal probative value to render them relevant to the plaintiff's credibility.<sup>258</sup> Moreover, because the records were replete with "negative characterizations" of the plaintiff, the court excluded them under Rule 403 as well.<sup>259</sup> Finally, because the expert's opinion was itself based in large part upon a review of these negative characterizations, it was similarly inadmissible.<sup>260</sup>

At least one court has expressly excluded expert psychological evidence offered to show a civil plaintiff's character for untruthfulness pursuant to Rule 608. In *Bastow v. General Motors Corp.*, the defendant in a products liability action sought to introduce evidence that the plaintiff "had an antisocial behavior disorder and hence a character for untruthfulness."<sup>261</sup> The U.S. Court of Appeals for the Eighth Circuit affirmed the trial court's exclusion of the evidence, but primarily out of concern that the effect of receiving psychologists' and psychiatrists' expert opinions on credibility "may cause juries to surrender their own common sense in weighing testimony [and] it may produce a trial within a trial of what is a collateral but important matter."<sup>262</sup>

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<sup>254</sup> *Bonner v. Falcon Drilling Co.*, No. 95-4077, 1997 WL 162042 (E.D. La. Apr. 4, 1997). The opinion itself does not describe the type of case but the federal court docket described it as "marine personal injury."

<sup>255</sup> *Id.* at \*1.

<sup>256</sup> *Id.* The court also dismissed the proffered testimony that the plaintiff was diagnosed with "malingering," which not only constituted inadmissible character evidence, but also raised potential concerns of unfair prejudice under Rule 403. *Id.*

<sup>257</sup> *Hodges v. Keane*, 886 F. Supp. 352, 356-57 (S.D.N.Y. 1995).

<sup>258</sup> *Id.* at 356.

<sup>259</sup> *Id.* at 357.

<sup>260</sup> *Id.*; see also *PARK*, *supra* note 202, § 7:23 ("Expert testimony that the witness has an emotional condition that makes the witness a liar is often objectionable. Such evidence may be . . . unhelpful to the jury in its special province of determining truthfulness; its scientific basis is often questionable; and it can amount to making a character attack under the guise of medical testimony.").

<sup>261</sup> *Bastow v. Gen. Motors Corp.*, 844 F.2d 506, 510 (8th Cir. 1988).

<sup>262</sup> *Id.* at 511 (quoting *United States v. Barnard*, 490 F.2d 907, 912-13 (9th Cir. 1973)); see also *Poulin*, *supra* note 207, at 1001-08 (criticizing courts' frequent invocation of the common

There are particular dangers of unfair prejudice when the witness whose testimony is being impeached is also a party. In such cases, the jury must make determinations not only about the individual's trial testimony but also about her conduct with respect to the events at issue in the litigation and, in the case of the plaintiff, whether to award monetary damages or other relief.<sup>263</sup> One pair of commentators has suggested that, because "[t]he potential for evidence of mental illness to inflict unfair prejudice is so great, a party may be precluded from asking a witness questions on the subject unless there is a good faith belief that this line of questioning might lead to evidence pertinent to credibility"; they urge particular caution where evidence of mental illness is offered through expert testimony.<sup>264</sup>

Where defendants offer the evidence of psychiatric disorders for the *express* purpose of impeachment, courts increasingly and correctly recognize the danger of such evidence.<sup>265</sup> However, we can also see from the bench trial opinions the great weight that laypeople give to mental health information in their credibility determinations, even in the absence of expert testimony explaining what specific link, if any, exists between a mental disorder and accurate perception, memory, and narrative.<sup>266</sup> Laypeople likely draw inferences about a witness's credibility when presented with evidence of the person's psychiatric diagnosis, regardless of whether an expert's opinion or an attorney's closing argument spells out a specific connection between such evidence and the issue of credibility. This suggests that fact finders use psychiatric evidence for the purpose of assessing credibility even when such use was not the defendant's stated theory of relevancy at the time it offered the evidence, such as when the defendant asserts that the evidence is probative of alternative causes of the plaintiff's psychological injuries.

The U.S. Court of Appeals for the Eighth Circuit in *Nichols v. American National Insurance Co.* vacated the judgment for the defendant in a sexual harassment case based on precisely this concern about misuse of psychiatric evidence.<sup>267</sup> The trial court had admitted the testimony of a defendant's expert forensic psychiatrist—purportedly

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law maxim "that an expert witness must not invade the jury's province of determining witness credibility").

<sup>263</sup> See 27 WRIGHT & GOLD, *supra* note 124, § 6097 (citing FED. R. EVID. 404, 405).

<sup>264</sup> *Id.*

<sup>265</sup> See, e.g., *Kelly v. Ward*, No. C-3-93-110, 1994 WL 1631041, at \*5 (S.D. Ohio July 6, 1994) (noting the danger that psychiatric evidence offered to impeach a litigant's testimony may be misused as character evidence by the jury).

<sup>266</sup> For example, a person diagnosed with schizophrenia has not necessarily experienced delusions and hallucinations, or such symptoms may be well-controlled with medication. See AM. PSYCHIATRIC ASS'N, *supra* note 64, at 312-13 (setting forth diagnostic criteria for schizophrenia).

<sup>267</sup> *Nichols v. Am. Nat'l Ins. Co.*, 154 F.3d 875 (8th Cir. 1998).

on the issue of alternative causation of damages—that the plaintiff had a personality disorder and an “undifferentiated somatoform disorder.”<sup>268</sup> The psychiatrist opined that the plaintiff “lacked psychiatric credibility.” The appeals court ruled that such evidence was not the proper subject of expert testimony under *Daubert* and instead addressed “the very question at the heart of the jury’s task—could Nichols be believed?”<sup>269</sup> The court expressed concern that such evidence could have confused or misled the jury, particularly because the psychiatrist’s testimony was not limited to the damages issues in the case but suggested that the plaintiff was not accurate in her descriptions of the central events in dispute.<sup>270</sup>

The key problem with the expert’s testimony in *Nichols* was that the psychiatrist had “used a psychological label to offer her evaluation of the truth of Nichols’s statements, the accuracy of which is a pure question of credibility.”<sup>271</sup> While the defense expert’s use of the word “credibility” in her testimony is likely what alerted the appeals court to the jurors’ potential misuse of the evidence, other elements of her testimony presented the same risk. Trial courts, therefore, must limit fact finders’ exposure to psychiatric evidence, which they could easily use to reach broad conclusions about the plaintiff’s credibility.

### III. CHARACTER

Civil litigation defendants may also use evidence of a plaintiff’s mental illness to suggest that such mental illness indicates that the plaintiff herself instigated or contributed to the incident at issue in the litigation.<sup>272</sup> Such use is more implicit than explicit since evidence rules generally exclude such use of “character evidence” in civil litigation. Where admitted, however, psychiatric evidence presents a particularly powerful form of character evidence since it also taps directly into the stigma associated with mental illness.

The basic prohibition on character evidence in the Federal Rules of Evidence, set forth in Rule 404(a), provides that: “Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.”<sup>273</sup> The character evidence prohibition is aimed at the use of evidence about a person, distinct from the incident in question, to

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<sup>268</sup> *Id.* at 882.

<sup>269</sup> *Id.* at 883.

<sup>270</sup> *Id.* at 883-84.

<sup>271</sup> *Id.* at 884 (internal quotations and citation omitted).

<sup>272</sup> See McDonald, *supra* note 22, 34-35.

<sup>273</sup> FED. R. EVID. 404(a).

suggest that the incident is more likely (or not) to have happened. Character evidence thus attempts to establish “a causal connection between personality and action.”<sup>274</sup>

Character evidence is highly persuasive because all humans make assumptions about other individuals’ likely conduct based upon their past behavior or particular attributes.<sup>275</sup> We assume that one’s “character”—which is not defined in the evidence rules but is generally considered to refer to one’s fixed traits—is predictive of one’s conduct on a particular occasion, such as an event at issue in litigation.<sup>276</sup> However, such an assumption about human behavior came under sharp attack from psychologists who challenged the “trait theory” that had developed in the early twentieth century.<sup>277</sup> Legal scholars cited to “situationist” psychological theories in support of arguments to limit the admissibility of character evidence.<sup>278</sup> As a result, contemporary evidence rules reflect concerns that fact finders will assign inappropriate weight to evidence—making a “fundamental attribution error”—that may not be highly predictive of behavior.<sup>279</sup> Alternatively, there is concern that jurors will use character evidence to conclude that a litigant is a “bad person” or otherwise unworthy and therefore rule against him on that basis in part or in whole.<sup>280</sup>

Because evidence of a person’s fixed traits can be powerful, evidence rules purport to limit fact finders’ access to it except under certain narrow circumstances, particularly in the civil context. Indeed, the only generally recognized exception to the admissibility of character evidence in civil litigation is reputation or, in the case of federal courts, opinion evidence on a trial witness’s character for “truthfulness,” as discussed *supra* in Part II.<sup>281</sup> However, courts admit such evidence, not

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<sup>274</sup> STEIN, *supra* note 112, at 227.

<sup>275</sup> State v. Martinez, 195 P.3d 1232, 1236 (N.M. 2008) (“Modern scientific research now confirms what human beings have always observed in their own family and community relationships, that the average person is able to explain, and even predict, a subject’s behavior with a significant degree of accuracy.”).

<sup>276</sup> David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 25 (1986); cf. Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1 (1993) (arguing in favor of admissibility of expert “psychological character evidence” on behalf of criminal defendants).

<sup>277</sup> Leonard, *supra* note 276, at 28-29; Edward J. Imwinkelried, *Reshaping the “Grotesque” Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 748-50 (2008).

<sup>278</sup> Imwinkelried, *supra* note 277, at 750-51. Professor Imwinkelried argues that more contemporary psychologists’ research has rejected the situationist approach as too extreme in favor of “Interactionism.” *Id.* at 752-54; see also Martinez, 195 P.2d at 1236 (observing that research has suggested that “[h]uman beings do behave more or less consistently across a multitude of similar situations” (internal quotation marks and citation omitted)).

<sup>279</sup> Imwinkelried, *supra* note 277, at 742; Leonard, *supra* note 276, at 18.

<sup>280</sup> Imwinkelried, *supra* note 277, at 741-42.

<sup>281</sup> See, e.g., FED. R. EVID. 608(a). The Federal Rules of Evidence also allow for the

as substantive evidence of “relevant conduct,” but rather for purposes of impeachment only.<sup>282</sup>

Notwithstanding this broad prohibition, evidence rules allow the admission of evidence for an alternative, permissible purpose, even if the evidence is also strongly suggestive of “character.” In other words, the rules do not prohibit a particular *type* of evidence, but rather a particular *use* of evidence. A recurring criticism of the character evidence rule as implemented is that courts often take a liberal view of admitting evidence under alternative bases. Where this occurs, courts assume they can avoid any unfair prejudice by offering a limiting instruction to the jury and ensuring that the party offering the evidence does not ask the fact finder to make an impermissible propensity inference based upon such evidence. As one commentator noted: “Often the real difficulty is that the distinction between the permissible purpose and the forbidden character inference is strained or nonexistent. . . . Civil litigation yields many . . . examples of abuse and mischief.”<sup>283</sup>

For example, defendants can use Rule 703 to circumvent character evidence rules where an expert bases an opinion on evidence that might be otherwise inadmissible but is nonetheless of the kind “reasonably relied” upon by experts in her field.<sup>284</sup> The 2000 amendments have made it more difficult for proponents to use the rule as a vehicle to get inadmissible evidence before the jury, albeit for a “limited purpose,” but they fall far short of establishing an outright prohibition.<sup>285</sup> Indeed, at least one commentator has suggested that the expectation that the evidence would be admitted only for a limited purpose and the opponent’s right to a limiting instruction combine to “defuse[] the presumption against disclosure,” and therefore the “burden is effectively shifted to opposing counsel to explain why she is not adequately protected by a limiting instruction.”<sup>286</sup>

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admissibility of certain evidence concerning prior sexual behavior, sexual assaults, and child molestation. *See* FED. R. EVID. 412-415.

<sup>282</sup> *See* *Martinez*, 195 P.2d at 1235-36 (explaining distinction between character evidence offered as substantive evidence and that offered for impeachment purposes).

<sup>283</sup> Daniel D. Blinka, *Ethical Firewalls, Limited Admissibility, and Rule 703*, 76 *FORDHAM L. REV.* 1229, 1241 (2007) (describing categories of evidence that would be inadmissible under a character evidence theory of relevancy but that are admitted when offered for other purposes). Some commentators have suggested that the admissibility of character evidence is the “most litigated” evidence issue. *Id.*

<sup>284</sup> Blinka, *supra* note 283, at 1254. Rule 703 provides, in pertinent part: “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.” FED. R. EVID. 703.

<sup>285</sup> Blinka, *supra* note 283, at 1256 (“Protestations to the contrary, amended Rule 703 performed like the legendary alchemist’s stone, transforming inadmissible evidence into a species of admissible evidence.”).

<sup>286</sup> *Id.* at 1260.

The prohibition on the use of character evidence requires the court to consider whether a defendant is offering evidence of a plaintiff's psychiatric history to prove "action in conformity therewith" on a given occasion, such as the incident at issue in the litigation. Thus, for example, if a personality disorder is associated with manipulative or paranoid behavior, a defendant may hope to use evidence that the plaintiff had such a disorder at the time of the incident in question to suggest that the person was engaging in manipulative and paranoid behavior on that particular occasion. If a court is to admit evidence of the disorder, however, it must be for some ostensibly permissible purpose, rather than for this overt purpose of suggesting that a fact finder infer a particular propensity.

Courts have not taken consistent approaches to the questions presented by the intersection of character evidence and psychiatric evidence. For example, in *Bemben v. Hunt*, the district court denied a plaintiff's motion *in limine* to exclude evidence of her psychiatric history in an excessive force case.<sup>287</sup> The defendant sought to introduce evidence that the plaintiff had been diagnosed with "organic delusional disorder with symptoms of paranoid ideations and irrational behavior" three years prior to the incident in question and had been treated for depression both before and after the incident.<sup>288</sup> The defendant also offered psychiatric records that referred to the plaintiff's "paranoia, hostility and combativeness," as well as evidence of "[a]ny other incident of depression or irrational behavior on the part of Plaintiff."<sup>289</sup> The trial court rejected the plaintiff's arguments that such evidence constituted inadmissible character evidence. Taking a categorical approach, the court reasoned that "[i]nsanity, or other medically diagnosed ailments are not generally thought of as character traits."<sup>290</sup> Further, such evidence was probative of the plaintiff's "state of mind . . . before, during and after" the arrest at the center of the incident.<sup>291</sup>

The court's reasoning is flawed for several reasons. Foremost, the court failed to note that evidence is classified (or not) as "character" evidence because of its purported use, not the nature or qualities of the evidence itself, such as whether or not the evidence consists of medical diagnoses. In *Bemben*, the defendant unquestionably offered the

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<sup>287</sup> *Bemben v. Hunt*, No. 93-C-509, 1995 WL 27223 (N.D. Ill. Jan. 23, 1995).

<sup>288</sup> *Id.* at \*1.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at \*2; *cf.* *State v. Oden*, No. 48066-9-I, 2002 WL 31082064, at \*3-4 (Wash. Ct. App. Sep. 16, 2002) (affirming criminal conviction in which the State called defendant's forensic psychiatrist as a rebuttal witness to testify about the defendant's paranoia prior to the alleged assault and concluding that such evidence was not character evidence, which is more a matter of "behavioral characteristics").

<sup>291</sup> *Bemben*, 1995 WL 27223, at \*2.

evidence of the plaintiff's diagnoses to suggest that the plaintiff was paranoid, hostile, and combative the night of the incident because of an underlying predisposition to such conduct. The court also incorrectly assumed that an excessive force plaintiff's state of mind is relevant to a determination of liability; rather, it is the defendant's state of mind that is probative of the reasonableness of his conduct towards the plaintiff.<sup>292</sup> Even assuming that plaintiff's state of mind was somehow relevant, it is hard to understand how a diagnosis three years earlier would be probative of her state of mind on the evening of her arrest.<sup>293</sup>

Similarly, in *Lowe v. Philadelphia Newspapers, Inc.*, a race discrimination in employment case, the plaintiff failed to convince the court to exclude two psychiatrists retained by the defense who offered to testify that the plaintiff had one or more personality disorders.<sup>294</sup> One of the psychiatrists was expected to testify that the "plaintiff suffers from a personality disorder known as the 'passive-aggressive personality' which tends to manifest itself in procrastination and intentional inefficiency making her procrastinate, dawdle and difficult to work with in that she is less likely to work at one hundred percent."<sup>295</sup> Obviously, the impact of such testimony on the central issues in an *employment* discrimination case such as *Lowe* would be quite significant.<sup>296</sup> The court, however, ruled that such testimony would be relevant to the plaintiff's "mental state," and specifically "whether plaintiff's perception of racial harassment is correct," and,

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<sup>292</sup> See, e.g., *Kee v. Ahlm*, 219 Fed. Appx. 727, 732 (10th Cir. Mar. 2, 2007) (reversing denial of motion for judgment as a matter of law in excessive force case where trial court analyzed the issue of the reasonableness of the defendant's actions from the "wrong perspective," namely the plaintiff's); *Smith-Walker v. Zielinski*, No. IP-01-0343-C-T/K, 2003 WL 21254221, at \*3 (S.D. Ind. Apr. 29, 2003) (rejecting defendants' arguments that evidence of plaintiff's state of mind was relevant to determination of liability for use of excessive force and specifically rejecting evidence of her psychiatric history on such issue).

<sup>293</sup> Generally, evidence offered of a person's "state of mind" consists of actions and statements that are contemporaneous with the incident for which such state of mind is relevant. See, e.g., FED. R. EVID. 803(3) (establishing exception to prohibition against hearsay for evidence of a declarant's "then existing state of mind" (emphasis added)). As noted *supra* notes 166-167 and accompanying text, the court accepted the defendant's assertion that the evidence was probative of the plaintiff's damages claim. *Bemben*, 1995 WL 27223, at \*3. The court also rejected the plaintiff's arguments that the evidence should be excluded under Rule 404 for unfair prejudice. *Id.* at \*2.

<sup>294</sup> *Lowe v. Phila. Newspapers, Inc.*, 594 F. Supp. 123, 125 (E.D. Pa. 1984). The defense sought to offer the psychiatric testimony on the issues of liability and damages. The plaintiff asked the court to bifurcate the liability and damages portions of the trial, apparently hoping that the psychiatric testimony would be excluded from the liability phase. *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> The plaintiff in *Lowe* alleged that she was "denied [a] promotion to an outside advertising sales position because of her race and that she was retaliated against for bringing an earlier administrative complaint of race discrimination." *Id.* at 124. Given such allegations, the quality of the plaintiff's job performance would be a primary issue at trial.

more significantly, the evidence would “corroborate” the testimony of various defense fact witnesses who interacted with the plaintiff.<sup>297</sup>

Other courts have been appropriately wary of the use of psychiatric evidence by civil defendants for the express purpose of suggesting that the plaintiff had a particular mental “state” at a given moment. For example, in *Parker v. Life Care Centers of America, Inc.*, the district court excluded the defendant’s proffered evidence of the plaintiff’s psychiatric history.<sup>298</sup> In that employment retaliation case, the defendant argued that such evidence would rebut the plaintiff’s assertion that she was a good employee. Offering no analysis, the court excluded the psychiatric history as inadmissible character evidence.<sup>299</sup>

In many cases in which defendants offer psychiatric evidence of a plaintiff for credibility or character purposes, and most particularly in employment discrimination cases, such evidence points to a plaintiff’s alleged “personality disorder.” The diagnostic criteria for personality disorders employ terminology that resembles negative characterizations of an individual, particularly with respect to social functioning, but are thinly veiled as medical evidence.<sup>300</sup> Personality disorders have an uncertain place in psychiatry.<sup>301</sup> Indeed, there is debate regarding whether personality disorders are in fact properly characterized as a form of “mental illness” or are really little more than groupings of

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<sup>297</sup> *Id.* at 126. Another example of a court’s expansive view of the relevancy of psychiatric evidence with little regard for the prejudicial nature of such evidence is in *Koch v. Koch Indus.*, 2 F. Supp. 2d 1385 (D. Kan. 1998), a shareholder suit brought by one brother against the corporation operated by the other brothers. The court denied the plaintiff’s motion *in limine* on relevance and Rule 403 grounds to exclude evidence of his psychotherapy treatment. The court ruled that the evidence was potentially relevant to show his “hatred and distrust” of his brothers and his “efforts or actions as a result of these feelings.” *Id.* at 1393.

<sup>298</sup> *Parker v. Life Care Ctrs. of Am., Inc.*, Civ. A. No. 04-1206-MLB, 2007 WL 1018802, at \*4 (D. Kan. Apr. 2, 2007).

<sup>299</sup> *Id.*

<sup>300</sup> See AM. PSYCHIATRIC ASS’N, *supra* note 64, at 685-729 (setting forth diagnostic criteria for personality disorders). For example, the diagnostic criteria for “Narcissistic Personality Disorder” include the following traits:

- (1) [A] grandiose sense of self-importance (e.g., exaggerates achievements and talents, expects to be recognized as superior without commensurate achievements) . . .
- (3) believes that he or she is “special” and unique and can only be understood by, or should associate with, other special or high-status people (or institutions) . . .
- (5) has a sense of entitlement, i.e., unreasonable expectations of especially favorable treatment or automatic compliance with his or her expectations
- (6) is interpersonally exploitative, i.e., takes advantage of others to achieve his or her own ends . . .
- (9) shows arrogant, haughty behaviors or attitudes.

*Id.* at 717. Trial courts admitted evidence of such disorder in *Lanni v. New Jersey*, 177 F.R.D. 295, 302-03 (D.N.J. 1998), discussed *supra* at note 230 and accompanying text, and *Sudtelgte v. Reno*, No. 90-1016-CV-W-6, 1994 WL 3406, at \*12-13 (W.D. Mo. Jan. 3, 1994), discussed *supra* at notes 235-241 and accompanying text.

<sup>301</sup> See Deirdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and The Americans with Disabilities Act*, 17 GEO. MASON U. CIV. RTS. L.J. 79, 81-92 (2006).

particular personality traits that have a negative impact on social functioning.<sup>302</sup> The diagnoses are arguably circular since, by the establishment of such diagnoses, psychiatry has pathologized those people who have personalities most of us find abhorrent, and then gives such pathology the badge of “science” and “medicine” because of its inclusion in the *DSM*.<sup>303</sup> In this respect, personality disorders provide an example of how psychiatric diagnoses are normatively defined and serve as little more than descriptions of “patterns of attitudes, emotions, behaviors, and personality traits.”<sup>304</sup>

Grouping clusters of personality and character traits into diagnostic criteria and offering them through a psychologist or psychiatrist lends these descriptions “an additional aura of objectivity” at trial.<sup>305</sup> We saw in *Bemben*, for example, how a court categorically excluded “diagnosed ailments” from character evidence.<sup>306</sup> Other courts, however, have noted that, notwithstanding the presence of a diagnosis, evidence of plaintiff’s personality disorder may run afoul of the character evidence prohibition. In *Bonner*, discussed *supra* in Part II, the court rejected evidence of a plaintiff’s personality disorder for purposes of raising questions about her credibility because the court concluded that it was essentially character evidence, due in part to the inclusion of “deceitfulness” in the diagnostic criteria.<sup>307</sup>

Where admitted, evidence of personality disorders is especially valuable for defendants because the inflexible nature of such disorders suggests that they are long-standing, and the diagnostic criteria can paint an especially unflattering picture of the plaintiff.<sup>308</sup> A defense-oriented treatise on litigating emotional and mental damages claims in employment discrimination devotes an entire chapter to “Personality Disorders in Employment Litigation.”<sup>309</sup> The author of that chapter

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<sup>302</sup> See *e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (commenting that the defendant, who had been diagnosed with antisocial personality disorder, was “not suffering from a mental disease or illness”); Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL’Y & L. 534, 557-58 (1995) (discussing the *Foucha* court’s refusal to consider antisocial personality disorder as a mental illness).

<sup>303</sup> As one group of commentators cautioned: “Psychiatric diagnosis provides a ‘Good Housekeeping Seal of Approval,’ which appears to validate the relevance and the reliability of expert testimony in a language that seems familiar, yet professional.” Greenberg et al., *supra* note 83, at 7.

<sup>304</sup> *Id.* at 9.

<sup>305</sup> *Id.*

<sup>306</sup> See *supra* notes 287-293 and accompanying text.

<sup>307</sup> *Bonner v. Falcon Drilling Co.*, No. 95-4077, 1997 WL 162042, at \*1 (E.D. La. Apr. 4, 1997); see *supra* notes 254-256 and accompanying text.

<sup>308</sup> AM. PSYCHIATRIC ASS’N, *supra* note 64, at 686 (noting that the “particular personality features” of personality disorders are “evident by early adulthood”); see also Lipian, *supra* note 199, at 220; Stumo et al., *supra* note 66, at 1315.

<sup>309</sup> Lipian, *supra* note 199, at 212-61.

outlines the particular benefits to defendants of raising a plaintiff's personality disorder:

Certain qualities inherent in the personality disorders mean that these disorders frequently have a pivotal role in the health (or ill health) of a workplace environment, and consequently in employment litigation. Personality disorders produce cognitive distortions and unreasonable expectations and demands that may impact liability issues in an employment lawsuit. They lead to social dysfunction, boundary violation and permeability, and a tendency toward passive-aggressive control that may undermine employee morale and create factions and alienation in the workforce. Certain personality disorders can give rise to intense rage, acute exacerbation of baseline characterologic tendencies, and heightened impairment of impulse control, leading to retaliatory behavior and even potential violence.<sup>310</sup>

Indeed, it is not uncommon in civil litigation to see dueling forensic psychiatrists where the plaintiff's expert has diagnosed PTSD or depression and the defendant's expert rejects such diagnoses (or alternatively asserts that such conditions pre-date the incident in question and are the true predominant cause of the plaintiff's mental injury) and instead offers a diagnosis of a personality disorder.<sup>311</sup> Empirical studies confirm that "advocacy bias" on the part of the examining expert may dictate diagnostic profiles. One study reviewed the diagnoses of plaintiffs by examining psychiatrists retained by the plaintiff and by the defense in forty-seven sexual harassment cases.<sup>312</sup> Remarkably, the defense experts diagnosed plaintiffs with a personality disorder in thirty-five of the forty-seven cases, compared with only five such diagnoses by plaintiffs' experts.<sup>313</sup> Moreover, some commentators

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<sup>310</sup> *Id.* at 219.

<sup>311</sup> See e.g., *Nichols v. Am. Nat'l Ins. Co.*, 154 F.3d 875 (8th Cir. 1998); *Katt v. City of New York*, 151 F. Supp. 2d 313 (S.D.N.Y. 2001); *Chrissafis v. Cont'l Airlines, Inc.*, No. 95-C-5080, 1998 WL 100307 (N.D. Ill. Feb. 23, 1998); *Burns v. Republic Sav. Bank*, 25 F. Supp. 2d 809 (N.D. Ohio 1998); *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988). There is reason to question arguments that a defendant is entitled to offer evidence of a plaintiff's personality disorder solely because the plaintiff offered evidence of PTSD or a similar diagnosis to support her claim for damages, akin to the door-opening argument discussed *supra* in Part I.D. A diagnosis of underlying personality disorder is not a clear rebuttal to a PTSD diagnosis offered by plaintiff's expert in support of a claim for damages.

<sup>312</sup> Barbara L. Long, *Psychiatric Diagnoses in Sexual Harassment Cases*, 22 BULL. AM. ACAD. PSYCHIATRY L., 195, 196-97 (1994).

<sup>313</sup> *Id.* Advocacy bias is also suggested by the plaintiffs' experts diagnoses of PTSD in seventeen cases compared with two such diagnoses by defense examiners. *Id.* at 197-98. While the examiners overlapped in diagnosing anxiety and depressive disorders, there was almost no overlap in the diagnosis of PTSD and personality disorders. *Id.* at 197. In *Spencer v. General Electric Co.*, the experts presented conflicting personality disorder diagnoses. 697 F. Supp. 204, 211 (E.D. Va. 1988). The plaintiff's expert opined that plaintiff had a preexisting personality disorder but it rendered her more susceptible to the defendant's harassment and led her to develop posttraumatic stress disorder. The defendant's expert, however, diagnosed her with "histrionic personality disorder" which, he explained, "develops over a lifetime and is characterized by

have suggested that the role of personality disorders in sexual harassment cases may be overestimated.<sup>314</sup> Another commentator noted that being subjected to sexual harassment (and participating in related litigation) can result in “personality changes” such that female plaintiffs are “observed to be unstable, histrionic and paranoid.”<sup>315</sup>

Another form of “personality” evidence offered by some defendants consists of results of “personality testing” such as the Minnesota Multiphasic Personality Inventory (MMPI-2).<sup>316</sup> In *Chrissafis v. Continental Airlines, Inc.*, a case in which the plaintiff alleged that the defendant subjected her to false arrest and imprisonment, the defendant obtained a court-ordered psychiatric examination of plaintiff, including the administration of the MMPI-2.<sup>317</sup> The defense expert’s report of the test results contained several negative characterizations of the plaintiff, including a statement that the results of the test were “typical of an individual who is defensive, lacks insight, may be an unreliable historian, and tends to deny the existence or importance of unfavorable traits.”<sup>318</sup> The court nonetheless accepted the defendant’s argument that such evidence was relevant and would assist the jury in determining damages, reasoning: “Dr. Grote’s testimony . . . will aid the jury in understanding that Chrissafis might have had other psychological problems unrelated to the July 1994 incident.”<sup>319</sup>

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immaturity, shallowness, self-centeredness, obsession with one’s personal appearance and exaggerated emotionality.” *Id.*

<sup>314</sup> FOOTE & GOODMAN-DELAHUNTY, *supra* note 98, at 109-10. Psychologists Foote and Goddman-Delahunty conclude from their review of the applicable data: “[T]he presence of personality disorder and severely disturbed behavioral traits may account for a few cases of false or unsubstantiated sexual harassment complaints. . . . However, these cases will be extremely rare and are easily distinguished from the more frequent experience of unwanted workplace sexual conduct . . . .” *Id.* at 110.

<sup>315</sup> GOLD, *supra* note 103, at 76, 188. Also, the dynamic present in forensic psychiatric or psychological examinations for the defense may result in a plaintiff’s appearing “surly and suspicious” during the examination. MELTON ET AL., *supra* note 9, at 414.

<sup>316</sup> See generally Smith, *supra* note 301, at 125-29. Cf. Dennis P. Saccuzzo, *Still Crazy After All These Years: California’s Persistent Use of the MMPI As Character Evidence in Criminal Cases*, 33 U.S.F. L. REV. 379, 400 (1999) (reviewing court rulings on the admissibility of MMPI results in criminal cases). Saccuzzo argues, “MMPI profiles were never meant to be used to determine the specific actions of any given individual at any given time.” *Id.*

<sup>317</sup> *Chrissafis v. Cont’l Airlines, Inc.*, No. 95-C-5080, 1998 WL 100307 (N.D. Ill. Feb. 23, 1998).

<sup>318</sup> *Id.* at \*1; see also *Sierra v. Little River Mem’l Hosp.*, No. CA91-474, 1992 WL 348419, at \*2 (Ark. Ct. App. Nov. 12, 1992) (affirming decision by workers compensation panel that considered evidence that MMPI-2 test of claimant revealed “manipulative tendencies” and led examining physician to conclude that he was malingering).

<sup>319</sup> *Chrissafis*, 1998 WL 100307, at \*1. The court, however, excluded any reference to the MMPI-2’s “lie scale” as being “more prejudicial than probative.” *Id.* at \*2. In contrast to the *Chrissafis* opinion, in *Usher v. Lakewood Engineering & Manufacturing Co.*, 158 F.R.D. 411 (N.D. Ill. 1994), the trial court granted a protective order to the plaintiff in that employment discrimination case, preventing the defendant’s forensic psychologist from administering a series of psychological tests, including the MMPI-2 and other personality tests, for use by its forensic

These cases illustrate how many courts set a low bar for defendants to assert a purportedly permissible use of psychiatric evidence—such as to impeach credibility or to suggest alternative causation of damages. This is frequently the case even where the evidence consists largely of descriptions of the plaintiff's negative character traits, often wrapped in the guise of expert diagnoses, that are highly suggestive of a predisposition to being a poor employee, troublemaker, or an otherwise unlikeable individual and, ultimately, therefore, an undeserving plaintiff.

#### IV. LAYPEOPLE, PSYCHIATRIC EVIDENCE, AND JUDICIAL DISCRETION

Our evidence rules contain few outright prohibitions on the admissibility of evidence of a plaintiff's psychiatric illness. Where a defendant can articulate any basis for the relevancy of the evidence for history of mental disorder, such evidence is admissible in principle and is usually admitted in fact. But can or should we trust fact finders, whether judges or jurors, to use psychiatric evidence appropriately, or is there something sufficiently unique about its use that requires an additional layer of caution before courts admit such evidence? My conclusion, based upon the foregoing review, is that three distinct and underappreciated dangers presented by such evidence warrant closer scrutiny of its use.

Perhaps the foremost danger is that, when presented with evidence of a plaintiff's psychiatric history or condition, regardless of the purported basis for its admissibility, the fact finder will draw inappropriate and prejudicial inferences regarding the plaintiff's character and credibility as a result of the persistent stigmatization of mental illness that continues to permeate American society. As one group of commentators warned with respect to the use of psychiatric evidence in litigation: "There is overwhelming evidence that being labeled with a psychiatric diagnosis changes people's view of individuals. There is no reason to believe that this prejudice does not transfer into the courtroom."<sup>320</sup>

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psychiatric expert. Without revealing the substance of the arguments, the court concluded that the plaintiff had demonstrated "the inadequacy of the correlation factors and the validity factors" of the tests at issue, and that, under a Rule 403 balancing test, the testimony that would result from such testing should be excluded. *Id.* at 413-14; see Theodore H. Blau, *Psychological Tests in the Courtroom*, in *PSYCHOLOGICAL INJURIES AT TRIAL*, *supra* note 28, at 1473, 1477 ("The issues and questions surrounding concerns about racial and cultural biases in the use of psychological tests are complex and as yet not yet settled."). For further discussion of personality testing see Smith, *supra* note 301, at 125-29 and ZISKIN, *supra* note 84, at 774-884.

<sup>320</sup> Greenberg et al., *supra* note 83, at 10 (internal citation omitted).

Psychologist Stephen Hinshaw recently reviewed and analyzed research across a broad range of fields including social psychology, history, sociology, and evolutionary psychology regarding the pervasiveness of the stigma associated with mental illness.<sup>321</sup> He observed: “During the past decade a consensus has formed among research and clinical experts, as well as policy and political leaders, that mental disorders are, in fact highly stigmatized, with far-reaching consequences.”<sup>322</sup> He also notes that the long-standing history and pervasiveness of such stigma is cause for pessimism as “[e]xclusion and dehumanization of those with mental disorder have been primary responses for far too long.”<sup>323</sup> In fact, some studies suggest that mental illness is even more stigmatizing today than it was in the middle of the last century,<sup>324</sup> and that the presence of a medical diagnosis does not in fact evoke the “empathic” (rather than blaming) responses we might otherwise expect.<sup>325</sup> Those with less severe forms of mental illness are not spared from stigma; it may simply appear in a different form since these otherwise “normal”-appearing individuals may be assumed to lack self-control and self-restraint.<sup>326</sup>

Sociologist Erving Goffman, in his classic study of stigma, noted that the term can be defined as “an attribute that is deeply discrediting.”<sup>327</sup> In other words, the essential effect of stigma is to be discredited, and therefore dehumanized and disempowered.<sup>328</sup> This is harmful in numerous aspects of a person’s life, of course, but it has a particularly profound effect on a person’s attempt to seek remedial relief through civil litigation, and particularly in civil rights and discrimination claims where witness credibility is quite often the central issue for a fact finder to resolve.

Legal scholars have written extensively on the impact of stigma associated with mental illness.<sup>329</sup> U.S. Court of Appeals Judge David L.

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<sup>321</sup> STEPHEN P. HINSHAW, *THE MARK OF SHAME: STIGMA OF MENTAL ILLNESS AND AN AGENDA FOR CHANGE* 28-52, 93-114 (2007).

<sup>322</sup> *Id.* at 140.

<sup>323</sup> *Id.* at 71-72.

<sup>324</sup> *Id.* at 102, 151.

<sup>325</sup> *Id.* at 33, 84-91; *see also* HORWITZ & WAKEFIELD, *supra* note 64, at 23 (“There is in fact scant scientific evidence on whether diagnosis does lead to beneficial relief from personal blame, in contrast to the vast evidence that it leads to harmful stigma.”).

<sup>326</sup> HINSHAW, *supra* note 321, at 155-56; *see also* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., *MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL* 6-8 (1999) (discussing the root causes and persistence of stigmatization of people with mental illness in the United States).

<sup>327</sup> ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 3 (1963).

<sup>328</sup> *Id.* at 5 (“[W]e believe the person with a stigma is not quite human.”).

<sup>329</sup> *See, e.g.*, MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* 21-24, 39-43 (2000) (describing the nature and pervasiveness of “sanism”); SUSAN STEFAN, *UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE*

Bazelon, writing for the U.S. Court of Appeals for the District of Columbia Circuit in *Smith v. Schelsinger*, observed:

A . . . reason for providing more stringent procedural safeguards in cases involving mental illness is that a finding of mental illness is unfortunately seen by many as a stigma. . . . The enlightened view is that mental illness is a disease similar to any physical ailment of the body and a condition for which there should be no blame or stigma. But we cannot blind ourselves to the fact that at present, despite lip service to the contrary, this enlightened view is not always observed in practice.<sup>330</sup>

Thus, there can be little question that presenting a fact finder with evidence of a litigant's current or prior mental illness triggers such stigma.

The second danger of admitting psychiatric evidence is that fact finders will assign inappropriate authority, weight, and significance to evidence of mental illness, and particularly to psychiatric diagnoses. Fact finders presented with evidence of such diagnoses are expected to consider it in reaching conclusions with respect to events, motives, credibility, causation, damages, and other specific factual disputes at issue in a given civil case. However, psychiatric diagnoses are ill-suited to serve as evidence in civil litigation. As discussed above, psychiatric diagnosis may reflect bias that is nonetheless undetectable by fact finders and untestable in litigation.<sup>331</sup> Some commentators have criticized the *DSM*, particularly as implemented by the psychiatric profession, as reflecting stereotypes and prejudices either towards groups of individuals (based on race or gender) or specific individuals.<sup>332</sup> Some regard the *DSM* as being "infused with value choices."<sup>333</sup>

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AMERICANS WITH DISABILITIES ACT 5 (2001) ("Social science research confirms that mental illness is one of the most—if not the most—stigmatized of social conditions."); Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1363-64 (2008) ("Individuals with psycho-social disabilities historically have been among the most excluded members of society. . . . Research firmly establishes that people with mental disabilities are subjected to greater prejudice than are people with physical disabilities."); cf. Karen M. Markin, *Still Crazy After All These Years: The Enduring Defamatory Power of Mental Illness*, 29 L. & PSYCHOL. REV. 155, 155-56, 158-60 (2005) (discussing the continuing "paradoxical" stigma associated with mental illness).

<sup>330</sup> *Smith v. Schelsinger*, 513 F.2d 462, 477 (D.C. Cir. 1975).

<sup>331</sup> Faust & Ziskin, *supra* note 142, at 35 ("[Psychiatric e]xpert evidence is readily subject to abuse due to its highly subjective nature and vulnerability to biases.").

<sup>332</sup> See Campbell, *supra* note 65, at 438 (noting studies that suggest "black patients are diagnosed as schizophrenic more frequently than white patients").

<sup>333</sup> Shuman, *supra* note 198, at 225; ZISKIN, *supra* note 84, at 142 ("It is important to realize that this infusion of values into the definition or identification of mental disorder represents a very serious problem."); see also *Smith*, 513 F.2d at 475 n.45, 477 (Bazelon, J.) ("The literature concerning the impact of social value judgments on psychiatric diagnoses is immense" and "psychiatric judgments may disguise, wittingly or unwittingly, political or social biases of the psychiatrist; and excessive reliance on diagnoses will pre-empt the primary role of decision-

Psychiatric diagnoses may also suggest a level of certainty and confidence that could mislead jurors who are unaware of the limited significance of such labels and instead base legal determinations upon them, as some courts have done in the cases discussed *supra*. The diagnoses are essentially descriptions of clinical symptoms for purposes of making treatment decisions, facilitating communication between professionals, and, in many instances, triggering insurance coverage.<sup>334</sup> Psychiatric diagnoses, on the whole, provide less reliable information than do other medical diagnoses.<sup>335</sup> The lack of consistency in diagnoses between examiners is well documented,<sup>336</sup> and the diagnostic categories do not, for the most part, “reflect a coherent progression of empirical research.”<sup>337</sup>

In successive drafts, the *DSM*'s editors have issued increasingly strong caveats about the use of the *DSM* in legal settings.<sup>338</sup> More recently, commentators have suggested that, unless a psychiatric diagnosis is required to fulfill a legal element of a claim or defense, courts and expert witnesses avoid altogether the admission of *DSM* diagnoses at trial “as circumstantial evidence of a condition or an event.”<sup>339</sup> In personal injury cases specifically, they explain:

[T]he fact finder is asked to assess damages including pain and suffering, as well the loss of ability to perform certain functions. A psychiatric diagnosis is not the physical and mental distress suffered

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makers.”).

<sup>334</sup> See, e.g., AM. PSYCHIATRIC ASS'N, *supra* note 64, at 1 (noting that the United States Health Care Finance Administration mandates use of the *DSM*'s codes “for purposes of reimbursement” and that many private insurers require use of the codes as well); HORWITZ & WAKEFIELD, *supra* note 64, at 99 (noting that the aim within psychiatry of creating a “valid diagnostic system” was to enable clinicians to “categorize different syndromes accurately and thereby . . . predict course and response to treatment”); ZISKIN, *supra* note 84, at 182 (noting that the stated purpose of the *DSM-IV* is “to provide clear descriptions of diagnostic categories to enable clinicians and researchers to diagnose, communicate about, study and treat people with mental disorders”); Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 601-04 (1978) (arguing that evidence offered by mental health expert witnesses should be limited because the goals of clinical evaluation are so different from those of legal decision-making).

<sup>335</sup> Greenberg et al., *supra* note 83, at 3. A relatively high rate of co-morbidity of mental disorders—that is, the association of two or more diagnoses with an individual patient—of forty-five percent provides an additional layer of complexity to psychiatric diagnosis. *Mental Disorders Exact Heavy Toll on Young People, According to the Second National Comorbidity Survey*, 56 PSYCHIATRIC SERVICES 885, 885 (2005), available at <http://www.psychservices.psychiatryonline.org/cgi/reprint/56/7/885>.

<sup>336</sup> Campbell, *supra* note 65, at 437; Faust & Ziskin, *supra* note 142, at 31-32.

<sup>337</sup> Greenberg et al., *supra* note 83, at 5.

<sup>338</sup> See, e.g., AM. PSYCHIATRIC ASS'N, *supra* note 64, at xxxvii; see also, e.g., ZISKIN, *supra* note 84, at 476-77 (arguing that psychiatric diagnoses and data drawn from psychiatric evaluations are not sufficiently reliable and valid for use in legal settings); Greenberg et al., *supra* note 83, at 6.

<sup>339</sup> Greenberg et al., *supra* note 83, at 11-13; see also Noah, *supra* note 67, at 303-05 (noting litigation's distorting influence on diagnosis and suggesting that medical diagnoses be kept out of court testimony to “delink” this effect).

from an injury, nor is it pain, suffering, and the inability to perform certain functions. Such diagnosis is, at best, a categorization of the pain, suffering, or distress. But it is in no way a measure of the inability to perform certain functions. To determine that issue, the fact finder must know the plaintiff's relevant pre- and postevent capabilities and performance.<sup>340</sup>

By admitting evidence of these tools designed for mental health professionals as part of legal fact finding (including credibility determinations), we are essentially asking laypeople to engage in analyses of which even those within the field of psychiatry are somewhat wary. We have already seen that the determination of causation in psychiatry is a process that has little in common with causation analyses in the law. Psychiatry's approach to causation is a complex inquiry, requiring highly specialized knowledge and which does not seek definitive conclusions. We certainly cannot expect jurors and judges to use evidence of alternate causation in a way that is consistent with psychiatric practice. But by permitting psychiatric history and diagnoses to be admitted at trial for causation and apportionment analyses, we trust fact finders to use such evidence appropriately, even in the absence of guiding principles.<sup>341</sup>

The use of expert psychiatric testimony at trial also exemplifies the twin hazards of expert evidence described by Professor Jennifer Mnookin; namely, that expert testimony may be highly biased but fact finders are generally unable to detect and to assess such bias.<sup>342</sup> She explains that, under our current system, parties select and retain the expert witnesses who testify at trial based largely upon an expert's potential ability to persuade the jury to rule for that party.<sup>343</sup> The assumption, which she labels as the "sporting theory of justice," is that such biases are not dangerous because the adversarial process will ultimately yield reliable evidence.<sup>344</sup> However, this mechanism is in fact quite limited since juries themselves lack the "epistemic

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<sup>340</sup> Greenberg et al., *supra* note 83, at 12; *see also* Daniel W. Shuman, *Persistent Reexperiences in Psychiatry and Law: Current and Future Trends for the Role of PTSD in Litigation*, in *POSTTRAUMATIC STRESS DISORDER IN LITIGATION: GUIDELINES FOR FORENSIC ASSESSMENT* 1, 7 (Robert I. Simon ed., 2d ed. 2003) ("Both *Daubert* and the DSM make clear that it is not appropriate to assume that a psychiatric diagnosis is relevant to, let alone dispositive of, an issue in a case.").

<sup>341</sup> *See* Greenberg et al., *supra* note 83, at 11 (noting difficulty in analyzing the potential role of prior trauma where plaintiff alleges damages from PTSD); Lawrence J. Raifman, *Problems of Diagnosis and Legal Causation in Courtroom Use of Post-Traumatic Stress Disorder*, 1 *BEHAV. SCI. & L.* 115, 123 (1983) (noting that, in cases of PTSD diagnosis, it is "extremely difficult to separate out the causal role" played by a preexisting condition).

<sup>342</sup> Jennifer L. Mnookin, *Expert Evidence, Partisanship, and Epistemic Competence*, 73 *BROOK. L. REV.* 1009, 1012-15 (2008).

<sup>343</sup> *Id.* at 1012 ("The marketplace for experts cannot... be trusted to produce reliable information.").

<sup>344</sup> *Id.* at 1015.

competence” to evaluate expert testimony,<sup>345</sup> and judges are similarly hampered when serving as gatekeepers of expert evidence pursuant to *Daubert*.<sup>346</sup> Thus, while psychiatric evidence is infused with bias and value judgments, laypeople are in a poor position to evaluate the weight to be given to such evidence.

The third unique danger presented by the admission of psychiatric evidence is that fact finders may misuse such evidence because of an assumption that they already have a good understanding of human behavior. We all know what a “personality” is, but how well do we understand “personality disorders” as that term is recognized in psychiatry? Similarly, the terms “depression,” “narcissistic,” “paranoia,” and even “PTSD” permeate common discourse but also appear in psychiatric assessment of individuals.<sup>347</sup> Many people likely hold common and fundamental misunderstandings about psychosis, such as that people with schizophrenia have “split personalities,” are persistently delusional, and often violent. One pair of commentators noted that psychiatric experts’ “persuasive effort may well succeed because [they] align[] so closely with common belief.”<sup>348</sup> Some studies have suggested that jurors are generally skeptical of expert psychiatric and psychological testimony, particularly on “syndrome evidence” and in criminal cases.<sup>349</sup> However, in the context discussed here, the expert evidence is sufficiently “scientific” to be admitted under Rule 702’s limitations, while at the same time its content may resonate with fact finders’ own life experiences and therefore be more persuasive than psychological or psychiatric evidence might be otherwise.

Professor Frank C. Keil, a professor of psychology and linguistics, observed that “it is not safe to assume that one’s novice intuitions about the complexity of phenomena are always accurate.”<sup>350</sup> Rather, the presence of “systematic biases . . . heavily distort one’s intuitions into thinking some classes of phenomena are much simpler than they really

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<sup>345</sup> *Id.* at 1012-13; *cf.* S. Rep. No. 98-225, at 230 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3412 (recommending enactment of FED. R. EVID. 704(b) to eliminate the “confusing spectacle” of conflicting psychiatric testimony on the “ultimate legal issue” in criminal trials).

<sup>346</sup> Mnookin, *supra* note 342, at 1019.

<sup>347</sup> Paul R. McHugh & Glenn Treisman, *PTSD: A Problematic Diagnostic Category*, 21 J. ANXIETY DISORDERS 211, 212 (2007) (observing that PTSD has become “a household word and courtroom plea”); LUHRMANN, *supra* note 65, at 20 (“[P]sychiatric knowledge seeps into popular culture like the dye from a red shirt in hot water.”).

<sup>348</sup> Faust & Ziskin, *supra* note 142, at 34. *But see* Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177 (2006) (demonstrating with an empirical study that, in several important respects, prospective jurors’ “common sense” understanding of how human memory works was in fact incorrect in light of psychological research on the same).

<sup>349</sup> SLOBOGIN, *supra* note 5, at 86.

<sup>350</sup> Frank C. Keil, *Getting To The Truth: Grounding Incomplete Knowledge*, 73 BROOK. L. REV. 1035, 1046 (2008).

are.”<sup>351</sup> Causation of psychological injuries, and indeed mental illness itself, certainly qualify as “phenomena” susceptible to biases regarding complexity. Keil explains:

Human cognition can cause both pitfalls and opportunities in our efforts to get at the truth in a causally complex world in which deference and trust are essential. The pitfalls revolve around the ways in which individuals can be quite poor at recognizing their own areas of weak understanding. . . . We may also introduce systematic distortions into our sense of where the deepest causal complexities in the world arise, with the result that we tend to underestimate the complexity of psychological phenomena relative to most physical ones.<sup>352</sup>

In short, our current understanding of basic cognitive processing gives us good reason to be especially wary of laypeople’s use of psychiatric evidence. Indeed, some courts, such as that in *Robinson v. Canon*,<sup>353</sup> simply do not trust jurors to make apportionment analyses in the context of psychological injuries.

These three dangers—namely, the stigmatizing effect of mental illness, the disconnection between legal and psychiatric concepts, and fact finders’ lack of appreciation of the complexity of evidence regarding mental illness—present a frank dilemma for courts. Unquestionably, evidence of psychological injuries, including that offered through expert witnesses, is a core element of types of civil litigation, including civil rights and discrimination claims. As other commentators have noted, it is not realistic to expect courts to entirely prohibit expert testimony on psychological injuries, notwithstanding the fact that such testimony may not always meet the requirements of *Daubert* and other tests of reliability.<sup>354</sup> And indeed, doing so would greatly limit the ability of plaintiffs to receive a full recovery for their injuries. Nor is it appropriate to preclude defendants entirely from challenging the opinions of plaintiffs’ forensic expert witnesses, which could skew judgments in precisely the opposite direction. A critical tension exists where some of the raw material that forensic psychologists and psychiatrists use to reach their conclusions about connections between events and psychological symptoms is susceptible to misuse by fact finders and unfair prejudice to litigants.

Nonetheless, the unique dangers presented by psychiatric evidence suggest that courts must revisit how they approach questions of admissibility of psychiatric evidence offered by a defendant to support his arguments on liability or damages. First, courts should note that the

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<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 1051-52.

<sup>353</sup> *Robinson v. Canon U.S.A., Inc.*, No. 99-0339-CV-W-3, 2000 WL 564203 (W.D. Mo. Apr. 6, 2000); see *supra* notes 190-193 and accompanying text.

<sup>354</sup> See *supra* notes 126-132 and accompanying text.

dangers discussed herein largely parallel those dangers that are already set forth in Rule 403 as appropriate bases for courts to exercise their discretion to limit otherwise relevant evidence: “unfair prejudice, confusion of the issues, or misleading the jury.”<sup>355</sup> Rule 403 sets up a comparative analysis of the relative probative value of evidence against these dangers.<sup>356</sup> The analysis necessarily begins with the question of relevance and courts must give far more scrutiny to the arguments for probative value than have generally been accepted.

The three concepts examined here—causation, credibility, and character—have particular meanings within the law. As the conflicting case law on each of these concepts demonstrates, a plaintiff’s mental illness is not a *necessary* part of the construction of any of the three concepts, and therefore is not necessarily “relevant.” Courts provide specific constructions in individual cases through the determination that a fact finder may consider certain evidence in reaching conclusions on disputes regarding alternate causation, witness credibility, and a plaintiff’s character. With respect to each of these concepts, certain courts have admitted psychiatric evidence while others have excluded it.

Courts should, for example, scrutinize a defendant’s arguments that the psychiatric evidence is necessary to rebut an assertion in the plaintiff’s case and should be particularly cautious about admitting such evidence on alternative causation theories. In some cases, the only proof offered by a plaintiff to support a claim for emotional distress is her own testimony, or perhaps that of a treating psychotherapist who describes her symptoms and treatment. If a plaintiff does not offer more than that, that should result in a corresponding limitation on the ability of the defendant to seize an opportunity to take an “anything goes” approach to attacking the plaintiff’s claim. If the plaintiff does not offer an expert opinion on causation, then the door is not opened for the defendant to offer expert testimony on that issue.<sup>357</sup>

Where a plaintiff offers a forensic expert who has conducted a comprehensive analysis of her psychological injuries, including a conclusion about the causal link between her symptoms and the event in question in the litigation, defendants may have a better relevancy

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<sup>355</sup> FED. R. EVID. 403.

<sup>356</sup> 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5214 (1978) (explaining the procedural means through which the policy of Rule 403 is to be carried out); cf. Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not To Junk?*, 40 WM. & MARY L. REV. 1, 29-30 (1998) (noting, with respect to the admissibility of psychiatric evidence in criminal trials, that while Rules 401, 403, and 702 provide a “coherent analytical framework,” courts nonetheless “often fail to take one or more of [the rules] seriously, or they add additional considerations that cloud the analysis”).

<sup>357</sup> This approach is consistent with the one I suggested with respect to determinations of waiver of the psychotherapist-patient privilege. A finding of waiver must be based upon the specific actions of the plaintiff, such as the evidence and arguments offered in support of her claim, rather than broader notions of relevancy. Smith, *supra* note 6, at 143-47.

argument for the admissibility of evidence that may challenge, question, or undermine that forensic opinion. However, even where a plaintiff offers expert evidence on causation, a court may nonetheless impose limitations on the evidence offered to rebut such testimony. For example, courts should not admit evidence of alleged alternative causation absent further proof that the proffered alternative cause in fact *could* account for the plaintiff's symptoms rather than leaving that for speculation and assumption. In most instances, a defendant can demonstrate this only through expert testimony. Courts should demand more precision from psychiatric expert witnesses on both sides with respect to causation arguments generally and should submit expert opinions of causation to at least some level of *Daubert* scrutiny to determine potential reliability.

Also, as discussed earlier, there is an important distinction between offering evidence of specific life *stressors* along with expert testimony explaining how such stressors could in fact account for the plaintiff's symptoms and offering evidence of a psychiatric label or a history of mental health treatment for the plaintiff. It is the latter forms of evidence that pose the greatest dangers, have the weakest probative value, and therefore are candidates for exclusion under Rule 403.

In addition, a court need not allow detailed exploration of an expert witness's causation analysis such that it admits testimony about a plaintiff's mental illness. Expert witness reports are generally not admissible as evidence because they are hearsay. Thus it is possible for an expert to provide a detailed explanation in her report of how she arrived at her conclusion, while providing far less detail in in-court testimony.<sup>358</sup> Indeed the mere fact that an expert witness uses certain facts or data in arriving at her conclusion does not render such information admissible, and courts may not admit such facts and data unless "their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."<sup>359</sup>

Turning to the defendant's offer of psychiatric evidence on the issue of the plaintiff's credibility at trial, courts should not admit such evidence for this purpose absent clear proof that a plaintiff has a psychiatric condition that, in her particular case, has a *specific* impact on her ability to perceive the events at issue and to recount those events

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<sup>358</sup> See FED. R. EVID. 703 (permitting expert witness to offer opinion testimony even if the underlying facts or data are inadmissible, and limiting the introduction at trial of such otherwise inadmissible facts and data). While mental health professionals are not immune to the effects of society's stigma of mental illness, we can assume that their choice of professions and immersion in the field enable them to reach conclusions that are less influenced by stigma and prejudice. Moreover, such examiners appreciate the complexities of human psychopathology when reaching such conclusions. Thus, the questions of what information may be provided to an expert witness and to a fact finder are distinct.

<sup>359</sup> *Id.*

at trial, a standard that very few could meet.<sup>360</sup> Psychiatric labels do not define a person's capacity to offer truthful testimony; they are descriptive classifications for use by the psychiatric field. As with causation inquiries, a psychiatric diagnosis or description of psychiatric treatment offers little probative value to fact finders on questions of credibility.

While modern evidence rules contain broad prohibitions on the use of character evidence in civil litigation to suggest propensities other than truthfulness, courts nonetheless admit a good deal of psychiatric evidence strongly suggestive of character and easily misused for the purpose of drawing inferences about the plaintiff's behavior and conduct based upon a psychiatric diagnosis. As discussed above, there are in fact few truly permissible uses of evidence of a plaintiff's past or current psychiatric illness, and therefore courts should generally exclude evidence that contains negative characterizations of the plaintiff, such as personality disorder diagnoses, even if—in fact, *especially* if—it is presented in the context of expert testimony.

If the proffered psychiatric evidence meets the low threshold of relevance under Rule 401, courts should nonetheless carefully evaluate the evidence to guard against the dangers delineated in Rule 403. Professor Aviva Orenstein has noted that Rule 403 “represents a key organizing principle for understanding the practical application and ethos” of the federal evidence rules, and that its “centrality to evidence law derives from the fact that it modifies almost every rule . . . and it epitomizes the trial judge's vast discretion in admitting or excluding evidence, a hallmark of our judicial system.”<sup>361</sup> Other commentators have suggested that one of the core functions of the rule has been to grant trial courts the discretion to exclude evidence that the common law's more restrictive approach might have required to be excluded.<sup>362</sup>

Psychiatric evidence exemplifies the dangers against which Rule 403's drafters intended to guard. The advisory committee's notes explain that the term “unfair prejudice” in the text of the rule means “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”<sup>363</sup> The pervasive stigma associated with mental illness is precisely the kind of “improper basis”

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<sup>360</sup> See, e.g., *Smith-Walker v. Zielinski*, No. IP-01-0343-C-T/K, 2003 WL 21254221, at \*2 (S.D. Ind. Apr. 29, 2003) (rejecting argument that evidence of psychiatric history is admissible on issue of credibility absent evidence that the condition has an impact on the plaintiff's ability to recount events); *Kelly v. Ward*, No. C-3-93-110, 1994 WL 1631041, \*3 (S.D. Ohio July 6, 1994) (same); 27 WRIGHT & GOLD, *supra* note 124, § 6097 (noting the many dangers of admitted evidence of a witness's mental illness for purposes of impeaching credibility).

<sup>361</sup> Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1512-13 (2005).

<sup>362</sup> 22 WRIGHT & GRAHAM, *supra* note 356, § 5212.

<sup>363</sup> FED. R. EVID. 403, adv. comm. notes.

for decision-making that judges should minimize through use of the rule.

Although the discussion arose in the context of a criminal case, the U.S. Court of Appeals for the Fourth Circuit's exhortation to lower courts in *United States v. Lopez* to invoke their discretion to limit the improper use of psychiatric evidence to gain an advantage in litigation makes an equally strong case for scrutinizing civil litigant's use of such evidence.<sup>364</sup> The appeals court noted: "One's psychiatric history is an area of great personal privacy which can only be invaded in cross-examination when required in the interests of justice."<sup>365</sup> Rule 403, the court held, provides courts with the discretion to deny a litigant's "free wheeling inquiry intended to stigmatize the witness," absent a showing of "real relevancy to his mental qualification as a witness."<sup>366</sup> Since mental illness can easily trigger sentiments of dissonance and fear, courts should not underestimate how such evidence will sway fact finders, including judges.

The risk of "misuse" of psychiatric evidence or "confusion of the issues" is also quite high and may well outweigh its probative value to a greater degree than is generally assumed by most judges.<sup>367</sup> The Supreme Court noted in *Daubert*, quoting an article by Judge Jack Weinstein: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses."<sup>368</sup> As demonstrated in the cases discussed *supra*, we see how fact finders can easily use evidence purportedly offered only with respect to causation issues to discount a plaintiff's credibility and to make assumptions about her character.<sup>369</sup>

Courts must also give due consideration to the fact that, while evidence may be admissible for one purpose rather than another (such as being admissible to suggest alternative causes of emotional distress damages rather than as character evidence, for example), such careful

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<sup>364</sup> *United States v. Lopez*, 611 F.2d 44, 45 (4th Cir. 1979).

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 46-47. Courts also have discretion to limit the use of psychiatric evidence pursuant to Rule 611(a) to "protect witnesses from harassment or undue embarrassment." FED. R. EVID. 611(a); *see also In re Lifschutz*, 467 P.2d 557, 572-73 (Cal. 1970) (noting that "court supervision" of the admissibility of psychiatric evidence at trial is important to prevent "substantially more harm than benefit" from the use of such evidence).

<sup>367</sup> Such misuse of evidence and/or confusion of the issues may be another source of "unfair prejudice." *See* MUELLER & KIRKPATRICK, *supra* note 162, at §§ 4:12-4:14 (observing that the three specific "dangers" identified in Rule 403 are not clearly defined and frequently overlap).

<sup>368</sup> *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993) (quoting Jack B. Weinstein, *Rule 702 of The Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

<sup>369</sup> *See supra* notes 149-172 and accompanying text.

distinctions are likely to be utterly meaningless in the minds of jurors and therefore in jury deliberations, regardless of the limiting instruction offered by the court. Indeed, research suggests that the stigma associated with mental and the cognitive processes such as those described by Professor Keil are likely immune to such limiting instructions.<sup>370</sup> In his caution about the use of limiting instructions seventy-five years ago, Justice Cardozo noted that “It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed.”<sup>371</sup> Although he did not issue this reminder with respect to psychiatric testimony specifically, Justice Cardozo’s point is particularly pertinent to instances where “ordinary minds” are essentially asked to think as psychiatric professionals by using psychiatric evidence for a strictly narrow analytic legal purpose. Courts should also ensure that, where they admit psychiatric evidence, they guard against cumulative evidence, which may increase the prospects of misuse.<sup>372</sup>

In addition to excluding evidence where limiting instructions would not avert the dangers presented by particular evidence, trial courts may use other mechanisms to minimize the dangers identified in Rule 403. If a defendant proposes to offer psychiatric evidence on the issue of alternative causation of damages, a judge can bifurcate the liability and damages portions of the trial. Federal Rule of Civil Procedure 42(b), for example, permits bifurcation in the discretion of the court “to avoid prejudice,” among other reasons.<sup>373</sup> The trial court in *Smith-Walker v. Zielinski*, an excessive force case, raised the issue of bifurcation of the trial between liability and damages after noting that the plaintiff’s psychiatric condition “was being magnified as a potential issue to the point that it was interfering with the initial appropriate focus of the trial, that is, whether the Plaintiff can prove that the Defendants used excessive force in arresting her on the night in question.”<sup>374</sup> The court rejected the defendants’ arguments that evidence of the plaintiff’s condition was relevant to her credibility, and therefore the defendants’ liability, but agreed that such evidence was relevant to the issue of

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<sup>370</sup> See RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 384 (2001) (“Empirical evidence as well as common sense suggests that courts greatly exaggerate the efficacy of limiting instructions.”); VIDMAR & HANS, *supra* note 179, at 162-64 (describing empirical research finding that jurors were unable to understand and follow instructions limiting use of evidence for credibility rather than character evidence purposes).

<sup>371</sup> *Shepard v. United States*, 290 U.S. 96, 104 (1933).

<sup>372</sup> See FED. R. EVID. 403 (evidence may be excluded to prevent the “needless presentation of cumulative evidence”); *Kelly v. Ward*, No. C-3-93-110, 1994 WL 1631041, \*5 (S.D. Ohio July 6, 1994).

<sup>373</sup> FED. R. CIV. P. 42(b).

<sup>374</sup> *Smith-Walker v. Zielinski*, No. IP-01-0343-C-T/K, 2003 WL 21254221, at \*1 (S.D. Ind. Apr. 29, 2003).

damages.<sup>375</sup> The court acknowledged that “[t]he ill-deserved but perceived taint of mental illness is not uncommon” but that bias in individual jurors would be almost impossible to detect.<sup>376</sup> Such “taint,” the court feared, may lead some jurors to “infer that a person suffering from a mental illness or emotional disturbance should not be believed,” and therefore the court ordered the bifurcation over the defendants’ objections.<sup>377</sup> The court ruled that evidence of the plaintiff’s psychiatric condition was irrelevant to the issues of liability and therefore would be excluded entirely from that portion of the trial.<sup>378</sup> Bifurcation is a particularly appropriate means to limit misuse and unfair prejudice since, as discussed *supra*, defendants offer and courts admit psychiatric evidence most often to support defendants’ arguments on damages while many of the dangers posed by the evidence occur when the fact finder uses it improperly to determine liability.

Trial court judges, therefore, have several tools available at their discretion to ensure that society’s problematic views of mental illness and human behavior do not influence the outcome in civil proceedings to the disadvantage of those who have been identified as mentally ill.<sup>379</sup> Plaintiffs’ attorneys should demand that judges use such tools more often so that our civil trials do not become occasions to exploit and perpetuate the stigmatization of those with mental illness, and defense attorneys should consider whether injecting the issue of a person’s mental condition is an ethical and appropriate trial strategy.<sup>380</sup>

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<sup>375</sup> *Id.* at \*2.

<sup>376</sup> The court was wary of including questions aimed at uncovering such bias during *voir dire*. *Id.* at \*4.

<sup>377</sup> *Id.*; cf. *York v. AT&T Co.*, 95 F.3d 948, 958 (10th Cir. 1996) (affirming trial court’s refusal to bifurcate trial where defendant sought to introduce evidence of plaintiff’s prior psychiatric hospitalization on the issue of alternate causation of damages and noting that such decisions “must be made with regard to judicial efficiency, judicial resources, and the likelihood that a single proceeding will unduly prejudice either party or confuse the jury”).

<sup>378</sup> *Smith-Walker*, 2003 WL 21254221, at \*6, \*8. However, the court indicated that it would admit such evidence during the damages portion of the trial. *Id.* at \*7. Another tool employed by many courts where there may be complex and conflicting psychological testimony at trial is to hold a judicial settlement conference with the parties or to order the parties to participate in mediation. Indeed, one forensic psychologist has suggested to me that, in part due to the dangers described in this Article, cases involving psychological injuries may be best resolved through alternative dispute resolution rather than trials. Telephone Interview with Dr. William Foote (Nov. 10, 2008).

<sup>379</sup> While the notion of unfair prejudice is usually associated with jury trials, research suggests that judges are little better than jurors at basing factual determinations on the evidence that they are legally permitted to consider. VIDMAR & HANS, *supra* note 179, at 164 (describing empirical research that revealed that “judges—like the rest of us—are affected by anchors and other cognitive illusions”); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 27 (1997).

<sup>380</sup> Professor Anthony Alfieri, for example, has written extensively on the improper use of racial imagery and rhetoric in criminal trials. Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1305-23 (1998).

## CONCLUSION

While there may be a long history of permitting fact finders to consider mental illness as part of the equation when resolving controversies in civil litigation, I suggest that we consider the broader question of whether, in light of our understanding of both the tenuous nature and the stigmatizing effect of psychiatric labeling, such practice should continue. Exclusionary rules of evidence, including Rules 403 and 404, are part of a normative system of legal rules. Such normative system assumes that we consider the impact of the rules not only in individual cases but also on a broader societal basis.<sup>381</sup> Courts' determinations of the relevance of an individual's mental illness to resolving legal questions regarding causation, credibility, and character have implications in terms of both the outcomes for the parties as well as the broader statements about mental illness emerging from our civil justice system.<sup>382</sup> Indeed, as I have argued previously, court rulings that permit discovery and potential admission of evidence of plaintiffs' psychiatric history undoubtedly have a chilling effect on such plaintiffs' ability to seek vindications of their rights through the courts.<sup>383</sup>

A recent decision by Judge Jack B. Weinstein, unquestionably the most respected contemporary jurist on the law of evidence,<sup>384</sup> exemplifies this point. In *McMillan v. City of New York*, Judge Weinstein rejected the use of race-based statistics regarding future earnings and life expectancy when calculating damages in tort actions.<sup>385</sup> Judge Weinstein concluded that employing a race-based analysis would violate the "normative constitutional requirements" of Due Process and Equal Protection.<sup>386</sup> He also noted the dangers presented with basing damage awards on an ambiguous label such as race—a social construct—which he deemed an unreliable basis for calculating damages awards.<sup>387</sup> "By allowing the use of 'race'-based life expectancy tables, which are based on historical data," he reasoned, "courts are essentially reinforcing the underlying social inequalities of

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<sup>381</sup> See Shauer, *supra* note 108, at 303; Stein, *supra* note 112, at 225 n.24 ("[The] egalitarian appearance of free proof is merely superficial.").

<sup>382</sup> Radin, *supra* note 173, at 83 ("[L]aw not only reflects culture, but also shapes it. The law is a powerful conceptual-rhetorical, discursive-force. It expresses conventional understandings of value, and at the same time influences conventional understandings of value.").

<sup>383</sup> Smith, *supra* note 6, at 135-39.

<sup>384</sup> Association of American Law Schools recently awarded Judge Weinstein the first Wigmore Award for Lifetime Achievement in Evidence. See Margaret Berger, *The Inaugural Wigmore Awards for Lifetime Achievement in the Area of the Law of Evidence and the Process of Proof, Introduction of Judge Jack B. Weinstein*, 38 SETON HALL L. REV. 861 (2008).

<sup>385</sup> *McMillan v. City of New York*, 253 F.R.D. 247, 256 (E.D.N.Y. 2008).

<sup>386</sup> *Id.* at 248, 255-56.

<sup>387</sup> *Id.* at 256.

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our society rather than describing a significant biological difference.”<sup>388</sup> His decision acknowledged the broader statement that the court would be making about the construct of race if the court were to consider the plaintiff’s “race” when calculating his losses.

While courts have not placed the equal protection rights of those with mental illness on par with those subjected to racial discrimination, the essential observation in the *McMillan* decision applies more broadly: The position of litigants as full citizens is undermined to the extent we allow legal decisions to be based upon evidence that expressly links them to groups that are traditionally disfavored, disempowered, and discredited. When a court permits a plaintiff to be labeled “mentally ill” over her objection for purposes of questioning her credibility and entitlement to compensation for injuries, it serves as an endorsement by our legal system of discounting plaintiffs, and others, by using such label. The validation of this practice by the very institution charged with ensuring justice necessarily undermines attempts to reverse the stigmatization of mental illness in our society and, indeed, serves to reinforce the stigma.

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<sup>388</sup> *Id.* at 250.