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# LAY WITNESS OPINION TESTIMONY ON MENTAL STATE & DEPRESSION: A CALL FOR REFORM

*Adam Santeusanio\**

## I. INTRODUCTION

The *Diagnostic & Statistical Manual of Mental Disorders*' section on "depressive disorders" recognizes eight subcategories of disorders.<sup>1</sup> Depressive disorders are caused by an array of environmental, genetic, and physiological factors, and symptoms of depression can range from "feelings of worthlessness" to psychomotor retardation and suicidal ideation.<sup>2</sup> Major depressive disorder is associated with "hypothalamic-pituitary-adrenal axis hyperactivity," and Magnetic Resonance Imaging (MRI) studies have linked the disease with "functional abnormalities in specific neural systems supporting emotion procession, reward seeking, and emotion regulation."<sup>3</sup> Medical professionals commonly treat depression with both psychotherapy and psychoactive medications, the most common category of which affects how the brain processes the neurotransmitter serotonin.<sup>4</sup> Though each depressive disorder has different causes and presentations, all depressive disorders are characterized by "somatic and cognitive changes that significantly affect the individual's capacity to function."<sup>5</sup>

In the medical community, the term "depression" refers to a clinical psychological illness, which can severely and detrimentally impact an individual's mental and physical well-being.<sup>6</sup> The general American public, however, has ascribed another meaning to the term "depressed," which effectively renders the term "depressed" ambiguous.<sup>7</sup> The average American most commonly uses the term "depressed" to refer not to the clinical psy-

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\* B.A., University of Pittsburgh; J.D., Boston University School of Law; Litigation Associate, Conn, Kavanaugh, Rosenthal, Peisch & Ford LLP. I would like to state at the outset that I am not a medical professional, and have absolutely no medical training. Any facts or opinions in this essay concerning medical conditions are drawn from research, and appropriate citations are included.

1. See AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS* 155–88 (5th ed. 2013).

2. *Id.* at 161, 166.

3. *Id.* at 165.

4. See LLOYD I. SEDERER, *THE FAMILY GUIDE TO MENTAL HEALTH CARE* 98–104 (2013).

5. AM. PSYCHIATRIC ASS'N, *supra* note 1, at 155.

6. Sederer, *supra* note 4, at 93.

7. *Id.*

chological illness, but rather to transient feelings of sadness or disappointment.<sup>8</sup> For example, Mark may comment to a co-worker that he is “depressed” because the New England Patriots lost in the playoffs. When used in this sense, the term “depressed” does not refer to a medical condition, but rather to a transient feeling of sadness.<sup>9</sup> When a witness testifying in court uses the term “depressed,” its ambiguity—as this essay will address at length—poses an important evidentiary issue.

In the American legal system, the existence, or not, of a depressive disorder is crucial to determining a person’s mental state, mental capacity, and motive.<sup>10</sup> Therefore, evidence concerning depression and its associated disorders commonly plays a key role in the course of civil and criminal litigation. For example, courts have considered evidence of depression as relevant to whether a testator has the capacity to make a will.<sup>11</sup> Courts also consider evidence of depression in cases where an insurer disputes an insured’s cause of death.<sup>12</sup> In other cases, courts have allowed plaintiffs to recover damages for depression caused by a defendant’s negligent or intentional actions.<sup>13</sup> Perhaps most importantly, a party may elicit witness testimony that another

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8. *See id.*

9. Unless specifically stated otherwise, the terms “depressed” and “depression,” when used in this essay, refer to the clinical psychological condition, not to general “sadness” or “disappointment.”

10. *See infra* notes 11-14.

11. *See, e.g.,* Kelley v. First State Bank of Princeton, 401 N.E.2d 247, 255 (Ill. App. Ct. 1980) (holding that a testator suffering from depression and impaired cognitive capacity lacked the capacity to create a will); Maimonides School v. Coles, 881 N.E.2d 778, 789 (Mass. App. Ct. 2008) (finding that, while “depression does not per se negate the testator’s mental capacity,” evidence of depression is relevant to evaluating capacity); *In re* Will of Priddy, 614 S.E.2d 454, 457 (N.C. Ct. App. 2005) (finding a genuine issue of material fact as to testamentary capacity where the testator was depressed); *In re* Estate of Blakes, 104 S.W.3d 333, 336–37 (Tex. Ct. App. 2003) (holding that the testator lacked capacity to make a will where he suffered from depression, pain, and other physical ailments).

12. Green v. William Penn Life Ins. Co. of N.Y., 902 N.Y.S.2d 542, 546–51 (N.Y. App. Div. 2010) (considering evidence of depression to determine whether insured committed suicide); Dixon v. United Illuminating Co., 748 A.2d 300, 301–02 (Conn. App. Ct. 2000) (weighing evidence of depression against evidence of a pre-existing work injury to determine the cause of the claimant’s suicide); Bickford v. Metro. Life Ins. Co., 317 A.2d 573, 575 (N.H. 1974) (considering evidence of decedent’s depression to determine if the decedent committed suicide).

13. Pinkham v. Burgess, 933 F.2d 1066, 1070 (1st Cir. 1991) (permitting the plaintiff to recover damages for emotional distress where the defendant’s professional malpractice caused the plaintiff to suffer from severe depression); Nelsen v. Research Corp. of Univ. of Haw., 805 F. Supp. 837, 848 (D. Haw. 1992) (allowing a plaintiff to recover damages under the Jones Act for depression caused by the defendant’s negligence in providing an unseaworthy vessel); Wrenn v. Byrd, 464 S.E.2d 89, 92 (N.C. App. Ct. 1995) (holding that depression can constitute “severe emotional distress” for purposes of a negligent infliction of emotional distress claim).

party is “depressed” in order provide a motive or a “story line” to explain why the party took a particular action or behaved a certain way.<sup>14</sup>

In light of the complexity, severity, and pervasiveness of depressive disorders, as well as the key intersections between depression and the law, the federal judiciary’s approach towards lay opinion testimony concerning depression is somewhat surprising. Federal Rule of Evidence 701 governs the admissibility of lay witness opinion testimony, and carefully circumscribes the admissibility of lay witness opinion testimony in several important respects.<sup>15</sup> In particular, Rule 701 prohibits a lay witness from offering opinion testimony where the opinion is based on “scientific, technical, or other specialized knowledge.”<sup>16</sup> In *Farfaras v. Citizens Bank & Trust of Chicago*, the United States Court of Appeals for the Seventh Circuit held that, under Rule 701, a lay witness—with no medical background, training, or experience—could testify that in her opinion the defendant was “very depressed,” over the defendant’s objection.<sup>17</sup> The court reasoned that, “[w]hile ‘depressed’ does have a medical definition, a reasonable jury can be expected to understand the difference between lay use of an adjective and an expert’s use of the same word to describe a specific psychological condition.”<sup>18</sup> The federal courts are not alone in this approach. In the majority of American jurisdictions, a lay witness who had the opportunity to interact with a person can give opinion testimony as to whether that person is depressed.<sup>19</sup>

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14. This practice is particularly common in the criminal context, for example, where a prosecutor elicits testimony that a defendant is depressed in order to prove that the defendant was capable of committing an egregious crime. See *State v. DePiano*, 926 P.2d 508, 513 (Ariz. Ct. App. 1995). For example, in *State v. DePiano*, the State of Arizona charged the defendant with child abuse for locking herself “and her [two] sons in defendant’s car, with the engine running, in the garage.” *Id.* at 510. At trial, the prosecution’s main tact was to paint the defendant as depressed and suicidal, in order to convince the jury that the defendant committed the acts of child abuse as part of a plan to kill herself and her children. *Id.* at 513. The *State v. DePiano* case appears to follow a pattern that is common among filicide prosecutions. See, e.g., Rebecca Leung, *Part 2: Mother Tried for Murder*, CBS NEWS (Feb. 5, 2002), <http://www.cbsnews.com/news/part-2-mother-tried-for-murder/> (discussing another prosecution for filicide where the prosecution alleged depression as a key motive for the defendant’s actions).

15. See generally FED. R. EVID. 701.

16. *Id.*

17. *Farfaras v. Citizens Bank & Trust of Chi.*, 433 F.3d 558, 563 (7th Cir. 2006).

18. *Id.* at 565.

19. COLO. REV. STAT. § 16-8-109 (2015) (“In any trial or hearing in which the mental condition of the defendant is an issue, witnesses not specifically trained in psychiatry or psychology . . . shall be permitted to give their opinions or conclusions concerning the mental condition of the defendant.”); *Phillips v. State*, 739 S.W.2d 688, 689–90 (Ark. 1987) (“We have held in an unbroken line of cases extending back for decades that a lay witness can testify to an opinion as to the competency of another if he or she has had an adequate basis for forming an opinion.”); *Bigby v. State*, 892 S.W.2d 864, 888 (Tex. Crim. App. 1994)

This essay will argue that the federal courts should reject the *Farfaras* approach, which allows lay witnesses to offer opinion testimony that a person is depressed, and instead adopt a rule whereby: (1) qualified experts under Rule 702, and only qualified experts, can testify concerning whether a person meets the clinical criteria for a depressive disorder; and (2) lay witnesses may testify to a person's appearance, behavioral patterns, and demeanor, or to any other facts observed about the person, but cannot offer the opinion that a person is "depressed," whether or not the lay witness is using the term "depressed" in a scientific or medical sense.<sup>20</sup>

This essay will present three main arguments against the current federal standard. First, the *Farfaras* Court erred in endorsing the societal misuse of the term "depression," and instead should have held that the term "depression" refers only to the clinical psychological illness, not to general feelings of sadness. If the federal judiciary takes the stance that the term "depression" refers only to the clinical psychological illness, then pursuant to Rule 701 a lay witness would be prohibited from offering her opinion—which would essentially amount to a medical diagnosis—on whether a person is depressed. Second, allowing lay witnesses to speculate about whether a person is depressed does not aid the jury in finding the facts, and in fact may cause a substantial amount of juror confusion. Third, from a public policy perspective, it is unfair to litigants to allow untrained lay witnesses to specu-

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(holding that a "lay witness may testify as to his opinion that an individual is legally insane" if the opinion is "based on the personal observations or experiences of the witness"); *Lebanon Cty. Hous. Auth. v. Landeck*, 967 A.2d 1009, 1016 (Pa. Super. Ct. 2009) (holding that the trial court erred as a matter of law by not permitting a lay witness to give his opinion that the plaintiff was depressed); *State v. Pittman*, No. 02-1318, 2004 WL 355886, at \*2-3 (Iowa Ct. App. Feb. 27, 2004) (allowing prosecution witnesses to testify to whether the victim was depressed before her death); see also *People v. Hulitt*, No. 1-09-2595, 2012 WL 6935609, at \*2 (Ill. App. Ct. June 18, 2012) (holding that expert testimony concerning the defendant's mental condition was "unnecessary because defendant's circumstances at the time of the victim's death were such that a jury would be more than capable of determining, based upon common knowledge, whether defendant was depressed").

20. As this essay will address in Part IV, Massachusetts has already adopted a similar approach. See MASS. GUIDE TO EVID. § 701 (2015); *Commonwealth v. Slicch-Brodeur*, 930 N.E.2d 91, 114 n.43 (Mass. 2010) (quoting *Commonwealth v. Monico*, 488 N.E.2d 1168, 1175 (Mass. 1986)) ("Although a lay witness may not testify about whether another person suffered from mental illness, such a witness is permitted to 'testify to facts observed.'"). Of course, if the person the witness is testifying about personally told the witness that he or she felt depressed, the witness could likely testify to that statement under Rule 801 or Rule 803. See FED. R. EVID. 801 (defining certain categories of statements as admissible non-hearsay); FED. R. EVID. 803 (establishing an exception to the rule against hearsay for statements concerning "the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)"). This essay is merely concerned about the common practice of allowing lay witnesses—who have no medical training and often limited experience interacting with the person—to speculate on the witness stand during a live trial as to whether a person is depressed.

late in open court about whether a litigant is depressed. Finally, this essay will consider the consequences of adopting the alternative rule proposed above, and conclude that the alternative approach preserves the ability of witnesses to testify accurately and descriptively while on the witness stand, while avoiding juror confusion and protecting parties to the litigation.

This essay will proceed as follows. Part II of this essay contains background information on Rule 701 and the rationale behind the *Farfaras* decision. Part III contains the main analysis section, and will argue against the current federal practice of allowing lay witnesses to testify that a person is “depressed.” Part IV presents an alternative approach to lay witness testimony on depression, and discusses some reasons for favoring such an approach. Part V provides a conclusion.

## II. BACKGROUND: FEDERAL RULES OF EVIDENCE 701-702 & THE *FARFARAS* DECISION

To understand the flaws in the *Farfaras* decision and its reasoning, one must first understand the applicable rules of evidence and the *Farfaras* decision itself. Section II.A discusses Federal Rules of Evidence 701 and 702, the evidentiary rules that establish the boundaries of lay and expert testimony. Section II.B discusses the *Farfaras* opinion, which allows lay witnesses to offer opinion testimony that a person is depressed.

### A. Federal Rule of Evidence 701 & 702

The *Farfaras* decision can only be understood in the context of Rule 701 and Rule 702—the evidentiary rules that delineate the boundaries of lay and expert testimony.<sup>21</sup> Rule 701, in its entirety, states:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.<sup>22</sup>

If a witness’s opinion testimony is based on scientific, technical, or other specialized knowledge, the witness must be qualified as an expert to state the opinion.<sup>23</sup> Otherwise, the federal rules preclude her from testifying

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21. See FED. R. EVID. 701; FED. R. EVID. 702; see also Anne Bowen Poulin, *Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule*, 39 PEPP. L. REV. 551, 556–57 (2012) (discussing the line between lay opinion testimony and expert testimony).

22. FED. R. EVID. 701.

23. See FED. R. EVID. 701 advisory committee’s note to 2000 amendment (“Under the [2000] amendment, a witness’s testimony must be scrutinized under the rules regulating

to the opinion.<sup>24</sup> Under Rule 702, a court may qualify a witness as an “expert witness” on a particular topic, but only if certain conditions are met.<sup>25</sup> Once qualified as an expert witness, the expert is permitted to share her opinions on the particular topic of her expertise.<sup>26</sup>

The overarching purpose of Rule 701 is to “put[] the trier of fact in possession of an accurate reproduction of the event” being litigated.<sup>27</sup> In effect, Rule 701 is a compromise. It allows lay witnesses to testify to certain opinions, but only in order “to express information that cannot be conveyed through a bare factual account”<sup>28</sup> or to describe “an endless number of items that cannot be described factually in words apart from inferences.”<sup>29</sup> For example, a lay witness can testify to her opinion that “the room was dark,” or that “the defendant appeared to be 6 foot 5 inches tall,” or that “the victim appeared frightened.”<sup>30</sup> The federal rules recognize that opinions of this nature are necessary to a live-testimony-based adversarial system, lest jurors be forced to endure a witness’s attempt to describe the reaction of “fright” solely based on objective facts.<sup>31</sup> However, where the opinion is based on “scientific, technical, or other specialized knowledge,” the opinion enters the province of expert testimony, and a layperson cannot testify concerning the opinion.<sup>32</sup> The following section discusses the *Farfaras* decision.

## B. The *Farfaras* Decision

The *Farfaras* case arose out of an employment dispute between the plaintiff, Jennifer Farfaras (“Farfaras”), and the defendants, Citizens Bank

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expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”)

24. *Id.*

25. FED. R. EVID. 702. An expert witness may testify in the form of an opinion when the following conditions are met:

(a) the experts scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

*Id.*

26. *See id.* This general rule is of course subject to other limitations set forth in the federal rules. *See id.* (setting forth conditions on expert witness opinion testimony); FED. R. EVID. 704 (limiting the admissibility of expert opinions on “ultimate issues”).

27. FED. R. EVID. 701 advisory committee’s note to 1972 proposed rule.

28. Poulin, *supra* note 21, at 564.

29. FED. R. EVID. 701 advisory committee’s note to 2000 amendment to rule.

30. *See id.*

31. *Id.*

32. *Id.*

and Trust of Chicago (“Bank”) and several of its employees.<sup>33</sup> Farfaras alleged assault, battery, sex discrimination, and sexual harassment claims against the Bank and its employees.<sup>34</sup> At trial, one of the disputed issues was the extent of Farfaras’s “emotional distress” damages.<sup>35</sup> Farfaras called her friend Yonia Yonan (“Yonan”) to testify to Farfaras’s emotional distress, and Yonan testified that, as a result of her treatment by the defendants, Farfaras had become “very depressed.”<sup>36</sup> Farfaras had never in fact “consulted a[ny] medical professional about her unhappiness.”<sup>37</sup> The district court overruled the defendant’s objection to Yonan’s use of the word “depressed,” and ultimately, the jury awarded Farfaras over \$350,000 in damages for loss of dignity, humiliation, emotional distress, and pain and suffering.<sup>38</sup>

The defendants appealed the district court decision, and argued on appeal that “the district court improperly allowed Yonia Yonan, a layperson, to describe Farfaras’s mental condition as ‘depressed.’”<sup>39</sup> On appeal, the Seventh Circuit affirmed the district court’s holding with regard to Yonan’s testimony, and held that the testimony was proper lay opinion testimony within the bounds of Rule 701.<sup>40</sup> The Seventh Circuit emphasized that there was “nothing in the record to indicate [that] the jury would have believed Yonan was offering a clinical opinion or professional evaluation” of Farfaras’s mental health.<sup>41</sup> Citing to Rule 701, the court determined that Yonan’s testimony was “rationally based on [her] perception of [Farfaras] . . . and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”<sup>42</sup> Though the Seventh Circuit recognized that “‘depressed’ does have a medical definition,” the court ultimately held that “a reasonable jury [could] be expected to understand the difference between lay use of an adjective and an expert’s use of the same word to describe a specific psychological condition.”<sup>43</sup>

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33. *Farfaras v. Citizens Bank & Trust of Chi.*, 433 F.3d 558, 560 (7th Cir. 2006).

34. *Id.*

35. *Id.* at 563–64.

36. *Id.* at 563.

37. *Id.*

38. *Id.* at 563–64.

39. *Farfaras*, 433 F.3d at 565.

40. *See id.* at 570.

41. *Id.* at 565. The court here is likely referencing a line of cases which held that, when a treating physician or medical specialist testifies concerning the “diagnosis and causation” of a patient’s “depression or other mental condition,” the physician or specialist must be qualified as an expert under Rule 702, and cannot offer opinions on diagnosis and causation as a lay witness. *See Ferris v. Pa. Fed’n Bhd. of Maint. of Way Emp.*, 153 F. Supp. 2d 736, 746 (E.D. Pa. 2001); *Hahn v. Minn. Beef Indus., Inc.*, No. Civ.002282, 2002 WL 32658476, at \*3 (D. Minn. 2002); *Dunlap v. People*, 173 P.3d 1054, 1097–98 (Colo. 2007).

42. *Farfaras*, 433 F.3d at 565.

43. *Id.*



In essence, the court in *Farfaras* held that a layperson can offer opinion testimony in the form of a conclusion that a person is or is not depressed where the opinion does not appear to be a “clinical opinion” or “professional evaluation.”<sup>44</sup> In so holding, the court delegitimizes a serious mental illness and violates basic principles that our evidentiary rules and adversarial system are designed to promote.<sup>45</sup> The rest of this essay addresses the shortcomings of the *Farfaras* decision.

### III. PROBLEMS WITH THE *FARFARAS* HOLDING

The *Farfaras* decision should be overturned because: (1) it creates logistical hurdles and delegitimizes depression; (2) it leads to juror confusion and the admission of non-probative evidence; and (3) it is contrary to sound public policy. The following sections discuss each issue in turn.

#### A. The Term “Depression” should be Confined to its Medical Definition When Used by a Testifying Expert Witness

Section III.A proceeds in two steps. First, Section III.A.1 discusses the *Farfaras* court’s endorsement of the societal misuse of the term “depression,” and concludes that the term should be limited to its medical definition. Second, Section III.A.2 argues that, if the term “depression” is limited to its medical definition, Rule 701 would prohibit a lay witness from testifying to whether a person is depressed.

##### 1. *The Farfaras Holding Creates Logistical Problems & Delegitimizes Depression*

In *Farfaras*, the court relies on the notion that the term “depression” has two meanings.<sup>46</sup> First, a witness may use the term “depressed” to suggest that a person is generally sad or upset.<sup>47</sup> Alternatively, a witness can use the term “depressed” to refer to the specific psychological condition.<sup>48</sup> Despite

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44. *See id.* at 565–66.

45. *See id.*

46. *Id.* at 565 n.1 (“A jury is capable of differentiating between the general definition ‘low in spirits’ and the more specific [definition] that involves psychological expertise.”).

47. *See id.*

48. *Farfaras*, 433 F.3d at 565. Notably, the United States Court of Appeals for the Seventh Circuit made the bizarre decision to cite to Webster’s dictionary—an English language dictionary—to prove that “depressed” has more than one meaning. *Id.* The court explained that Webster’s defines “depressed” both as “low in spirits” and “affected by psychological depression.” *Id.* at 565 n.1. This argument completely misses the point. The term “depressed” has undoubtedly been widely misused by the general population to refer to general feelings of sadness. *See Sederer, supra* note 4, at 93. That, however, is completely irrelevant to whether

hinging its holding on this distinction, the Seventh Circuit fails to explain how jurors and judges should decide which definition of depressed a witness is testifying to.<sup>49</sup> In light of the fact that substantial emotional distress damages were at stake in the case, it would seem inexpedient for the court to assume that the jury could simply intuit which meaning of “depressed” the witness intended. In a criminal case, where the defendant’s life and liberty is at stake, allowing a jury to speculate about which meaning of “depressed” a witness intended could have more severe consequences. The *Farfaras* holding raises an unnecessary logistical question: how, exactly, are juries to determine which meaning of “depressed” the witness intended?

Logistical issues aside, the *Farfaras* court’s willingness to embrace the societal misuse of the term “depression” represents an unfortunate judicial approval of American society’s continual delegitimization of psychological conditions.<sup>50</sup> Dr. Lloyd I. Sederer opines on this phenomenon in his book *The Family Guide to Mental Health Care*:

Unfortunately, “depression” has become an umbrella term for much of what ails (or even just upsets) us. People throw around the term “depressed” as if it has no clinical meaning at all. They are “depressed” after seeing a sad movie or “depressed” because the dry cleaner closed before they could get there. But depression is different from a bad day, or disappointment, or grief. Major depression is a disease, with hallmark symptoms, a clinical course, and dangers; it should not be confused with everyday stress, or minimized in its gravity.<sup>51</sup>

In American society, mental illness is trivialized on a daily basis by the use of incorrect and offensive terminology.<sup>52</sup> A forgetful person is a

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a lay witness should be permitted to share her opinion on whether someone is depressed in a court of law. As further discussed below, the American public has misused and misapplied a wide range of psychological and medical terms. See *infra* notes 49–56 and accompanying text. However, just because a layperson misuses a term in his everyday life does not—or should not—mean that he may enter a courtroom and misuse that same term. By citing to an English language dictionary to retrieve the definition of a medical term, the United States Court of Appeals for the Seventh Circuit suggests that, if a term is misused widely enough that the misuse makes it into the dictionary, laypersons can then misuse that medical term in a court of law.

49. See *Farfaras*, 433 F.3d at 565.

50. See Sederer, *supra* note 4, at 93.

51. *Id.*

52. Arthur Gallant, *Is the Way You Speak About Mental Illness Offensive?*, HUFFINGTON POST (Aug. 16, 2012, 5:42 PM), [http://www.huffingtonpost.ca/Arthur-gallant/mental-health-terms\\_terms\\_b\\_1787156.html](http://www.huffingtonpost.ca/Arthur-gallant/mental-health-terms_terms_b_1787156.html); Gary Nunn, *Time to Change the Language We Use About Mental Health*, GUARDIAN (Feb. 28, 2014, 4:00 AM), <http://www.theguardian.com/media/mind-your-language/2014/feb/28/mind-your-language-mental-health>.

“schizo.”<sup>53</sup> An eccentric person is a “psycho” or “insane.”<sup>54</sup> A moody person is “bipolar.” American society seems to have acknowledged, only very recently, that the term “retarded” is offensive, though use of the term continues unabated.<sup>55</sup> The American public has ascribed a colloquial meaning to each one of these terms, with the results being, in almost every instance, highly offensive.<sup>56</sup> The Seventh Circuit’s holding that the term “depression” can refer to “everyday sadness” delegitimizes and trivializes a severe and pervasive mental illness, and further ingrains the societal misuse of “depression” into the American language.<sup>57</sup> The federal judiciary is, of course, not responsible for policing the linguistic habits of American society. However, it should be responsible for ensuring that witnesses testifying in its own courtrooms refrain from using terms that delegitimize and actively mock mental illnesses.

## 2. *Rule 701 Prohibits a Lay Witness from Diagnosing “Depression” Properly Defined*

If, then, the federal judiciary takes the stance that the term “depression” refers only to the specific psychological condition, what are the consequences under the Federal Rules of Evidence? As discussed above, Rule 701 prohibits a lay witness from offering an opinion that is based on “scientific, technical, or other specialized knowledge within the scope of Rule 702.”<sup>58</sup> To offer an opinion based on “scientific, technical, or other specialized knowledge,” the witness must be qualified as an expert witness under Rule 702.<sup>59</sup> Consistent with Rule 701, a lay witness could offer opinion testimony that a person is generally sad or upset because such an opinion does not require “scientific” or “technical” knowledge.<sup>60</sup> However, if the term “depression” were limited to its clinical psychological definition, a witness would be offering a medical diagnosis by offering an opinion on whether a person is depressed.<sup>61</sup> An opinion concerning a medical diagnosis requires a wealth of scientific, technical, and specialized knowledge, and is well beyond the

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53. Gallant, *supra* note 52.

54. *Id.*

55. Perhaps surprisingly, this term is still used by more than just schoolchildren on the playground. During the 2012 election, after a debate between Mitt Romney and Barack Obama, Ann Coulter tweeted that Obama was a “retard.” Emanuella Grinberg, *Ann Coulter’s Backward Use of the ‘R-Word’*, CNN (Oct. 24, 2012, 8:06 PM), <http://www.cnn.com/2012/10/23/living/ann-coulter-obama-tweet/>.

56. *See generally* Gallant, *supra* note 52.

57. *See* Farfaras v. Citizens Bank & Trust of Chi., 433 F.3d 558, 565 (7th Cir. 2006).

58. FED. R. EVID. 701.

59. *See id.*; FED. R. EVID. 702.

60. *See* FED. R. EVID. 701.

61. *See id.*

ken of any layperson untrained in the practice of medicine.<sup>62</sup> In fact, courts nearly uniformly hold that opinions concerning medical diagnoses must be offered by qualified experts, and are inadmissible if offered by lay witnesses.<sup>63</sup> Therefore, if the federal judiciary took the stance that the term “depression” refers only to the clinical psychological illness, then pursuant to Rule 701 a lay witness would be prohibited from offering her opinion—which would essentially amount to a diagnosis—on whether a person suffers from depression.<sup>64</sup>

B. The *Farfaras* Holding Admits Non-Probative Evidence that is Confusing to Jurors

The *Farfaras* holding allows lay witnesses to offer opinion testimony on whether a person is “depressed,” and thereby opens the floodgates for a range of non-probative, confusing testimony to be presented to the jury.

Consider, for example, the case of *People v. Gindorf*.<sup>65</sup> In *Gindorf*, the State of Illinois charged the defendant with intentionally murdering her two children by feeding them an overdose of Unisom tablets.<sup>66</sup> The defendant confessed that she was guilty to the police, and the key issue at trial was whether the defendant was sane at the time of the murders.<sup>67</sup> One witness at trial—the defendant’s neighbor—drove the defendant to the store (unknowingly) to buy the sleeping pills, which the defendant used hours later to commit the crime.<sup>68</sup> That neighbor testified that the defendant was “normal and was not depressed.”<sup>69</sup> A different neighbor testified that the defendant seemed depressed around the time of the murders.<sup>70</sup> The defendant then called a clinical psychologist to testify that “persons afflicted with major depression can appear normal to lay people.”<sup>71</sup> By admitting the lay opinion testimony on whether the defendant was depressed, the court presented the jury with a morass of confusing and unhelpful testimony to sort through.<sup>72</sup> Though it is undoubtedly the province of the jury to sort through conflicting

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62. See, e.g., *Montoya v. Sheldon*, 286 F.R.D. 602, 614 (D.N.M. 2012) (“A treating physician’s opinions regarding diagnosis of a medical condition is almost always expert testimony, because diagnosis requires judgment based on scientific, technical, or specialized knowledge in almost every case.”).

63. *Id.*

64. See FED. R. EVID. 701.

65. 512 N.E.2d 770 (Ill. App. Ct. 1987).

66. *Id.* at 771–72.

67. *Id.* at 772.

68. *Id.* at 773.

69. *Id.*

70. *Id.*

71. *Gindorf*, 512 N.E.2d at 774.

72. See *id.* at 773–74.

testimony, the jury should not be required to do so when the conflicting testimony is not probative towards resolving disputed factual issues.<sup>73</sup> The *Gindorf* case is a simple, yet striking example of the juror confusion that results when lay witnesses are permitted to testify using medical terms like “depression.”

### C. The *Farfaras* Holding is Contrary to Public Policy

The *Farfaras* holding is contrary to public policy because it: (1) allows litigants to put non-probative, potentially prejudicial evidence to the jury, thereby diminishing access to fair trials; and (2) subjects litigants to unfounded speculation, in open court, about sensitive matters relating to mental health. The following subsections address each issue in turn.

#### 1. Evidence Concerning Depression can be Highly Prejudicial

Regardless of whether used to refer to a specific medical condition or to “everyday sadness,” the term “depression” can be highly prejudicial, and thereby obstruct access to fair trials. In the United States, the public perception of persons with mental disorders is driven by twenty-four-hour news coverage of murders and other violent crimes.<sup>74</sup> Many of the most high-profile crimes in recent memory—for example, the Columbine shooting,<sup>75</sup> the Aurora theater shooting,<sup>76</sup> and the Virginia Tech shooting<sup>77</sup>—were committed by persons with highly publicized depressive disorders.

The media cycle has fostered an American public that has vastly distorted opinions concerning violence and mental illness.<sup>78</sup> A national survey

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73. This general principle is embodied in Rule 403. *See* FED. R. EVID. 403 (permitting the exclusion of evidence if the evidence’s probative value is “substantially outweighed” by the danger of confusing or misleading the jury).

74. Heather Stuart, *Violence and Mental Illness: An Overview*, WORLD PSYCHIATRY ASSOCIATION (June 2, 2003), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1525086>.

75. Dave Cullen, *The Depressive and the Psychopath*, SLATE (Apr. 20, 2004, 11:59 AM), [http://www.slate.com/articles/news\\_and\\_politics/assessment/2004/04/the\\_depressive\\_and\\_the\\_psychopath.html](http://www.slate.com/articles/news_and_politics/assessment/2004/04/the_depressive_and_the_psychopath.html).

76. *James Holmes ill, Depressed Months Before Attack*, ASSOCIATED PRESS (May 29, 2015, 2:13 PM), <http://www.9news.com/story/news/local/aurora-theater-trial/2015/05/29/james-holmes-interview-family-faith/28154185/>.

77. Emily Friedman, *Va. Tech Shooter Seung-Hui Cho’s Mental Health Records Released*, ABC NEWS (Aug. 19, 2009), <http://www.abcnews.go.com/US/seung-hui-cho-mental-health-records-released/story?id=8278195>.

78. *See Mental Illness and Violence*, HARVARD MEDICAL SCHOOL (Jan. 1, 2011), [http://www.health.harvard.edu/newsletter\\_article/mental-illness-and-violence](http://www.health.harvard.edu/newsletter_article/mental-illness-and-violence) (“In fact, research suggests that this public perception does not reflect reality. Most individuals with psychiatric disorders are not violent.”); Stuart, *supra* note 74 (“Similarly, [the respondents to

conducted in 2006 found that thirty-two percent of people thought that persons with major depression were “likely to act violently toward someone else.”<sup>79</sup> Other studies have shown that the general public believes that persons suffering from mental illness are “dangerous” and “unpredictable.”<sup>80</sup>

Of course, the average American jury likely will bring these predispositions and perceptions with them into the jury room, and determine guilt and innocence based on both trial testimony and their background knowledge of human interactions and behavior, regardless of how distorted these perceptions may be. Therefore, a jury should only be presented with evidence that someone is “depressed” if that evidence comes from a medical expert who is actually qualified to testify to whether the person’s symptoms are consistent with the established clinical criteria for the condition.<sup>81</sup>

## 2. *Lay Opinion Testimony Concerning Depression is Unfair to Litigants*

Lay opinion testimony concerning a party’s mental health also subjects litigants to unfounded speculation, in open court, about sensitive matters relating to their mental health. Health related matters are, for various reasons, often very personal to people. Considering the substantial stigma associated with mental health,<sup>82</sup> it is reasonable to assume that many litigants would prefer, if possible, to leave speculation about their mental health out of the courtroom. Obviously, this cannot always be accomplished, because as discussed throughout this essay, mental health is often a key issue at tri-

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the survey] significantly overestimated the risk of violence among schizophrenia and depression.”); Jillian K. Peterson, *How Often and How Consistently Do Symptoms Directly Precede Criminal Behavior Among Offenders with Mental Illness?*, 38 L. & HUM. BEHAV. 439, 439 (2014) (finding that “psychiatric symptoms relate weakly to criminal behavior at the group level”).

79. Mental Illness and Violence, *supra* note 78.

80. Bruce G. Link et al., *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89 AM. JUR. PUB. HEALTH 1328, 1328 (1999).

81. Of course, even under the alternative rule proposed in this essay, jurors will still take their misconceptions concerning depression into the jury room in cases where an expert testifies that a person is depressed. However, by limiting the number of trials where the term “depression” is loosely thrown around by lawyers and witnesses, the federal judiciary could drastically limit the number of cases in which juror misconceptions about depression have an effect on the outcome. Moreover, in cases where an expert testifies concerning a person’s mental state, the expert can provide in-depth testimony concerning the person’s actual symptoms or perhaps even general opinion evidence concerning the intersection between depression and violence, which would help stem the general misconception that all depressed persons are “dangerous” and “unpredictable.”

82. See Peter Byrne, *Stigma of Mental Illness and Ways of Diminishing It*, 6 ADVANCES IN PSYCHIATRIC TREATMENT 65, 65 (2000) (“The stigma of mental illness, although more often related to context than to a person’s appearance, remains a powerful negative attribute in all social relations.”).

al.<sup>83</sup> Therefore, where witness testimony concerning depression is required, the best rule in terms of fairness to litigants is to forbid lay witnesses from sharing speculative and unfounded opinions about depression, and allow only qualified experts in a relevant medical field to share such opinions.

As Part III has demonstrated, the *Farfaras* holding is problematic. It created a rule that delegitimizes depression, confuses and misleads jurors, and is contrary to sound public policy. The following Part discusses an alternative to the *Farfaras* court's approach, which avoids the problems posed by the *Farfaras* decision and provides several additional benefits.

#### IV. AN ALTERNATIVE TO THE *FARFARAS* RULE

Rather than adhere to the *Farfaras* rule, the federal judiciary should adopt an alternative approach whereby: (1) qualified experts under Rule 702, and only qualified experts, can testify concerning whether a person meets the clinical criteria for a depressive disorder; and (2) lay witnesses may testify to a person's appearance, behavioral patterns, and demeanor, as well as to any other facts observed about the person, but cannot offer the opinion that a person is "depressed," whether or not the lay witness is using the term "depressed" in a scientific or medical sense.<sup>84</sup> The benefits of such a rule are readily apparent.

First, the alternative approach allows witnesses to present a rich and detailed account of a person's mental state, thereby providing the trier of fact with all of the information she needs in order to find the pertinent facts, while avoiding the juror bias and prejudice that may result from use of the term "depressed." As the advisory committee's note to Rule 701 explains, "the detailed account carries more conviction than the broad assertion."<sup>85</sup> The advisory committee is suggesting that conclusory opinions about an event are not as persuasive or helpful to the jury as a detailed factual account of the event.<sup>86</sup> This is precisely the premise the alternative approach relies on.<sup>87</sup> Under the alternative approach, a witness could still testify to the following statements: "Tom appeared sad," "Nancy stopped coming out to bars with us on Friday nights and typically just stayed in her apartment," "John stopped saying hello to me in the mornings," "I noticed that Jordan

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83. See *supra* notes 10–13 and accompanying text.

84. Massachusetts has already adopted a similar approach. See MASS. GUIDE TO EVID. § 701 (2015); *Commonwealth v. Slicch-Brodeur*, 930 N.E.2d 91, 114 n.43 (Mass. 2010) (quoting *Commonwealth v. Monico*, 488 N.E.2d 1168, 1175 (Mass. 1986)) ("Although a lay witness may not testify about whether another person suffered from mental illness, such a witness is permitted to 'testify to facts observed.'").

85. FED. R. EVID. 701 advisory committee's note to 1972 proposed rules.

86. See *id.*

87. See *id.*

began drinking more heavily than she previously had,” “I rarely saw Nate smile during the month of December,” “Steve became angry at the smallest slight.”<sup>88</sup> In effect, under the alternative approach, a witness could still testify to every aspect of a person’s appearance, demeanor, behavior, and temperament. The alternative approach merely excludes lay witnesses from using the prejudicial and ambiguous term “depressed” on the witness stand. Of course, where a person’s mental state is crucial to the case, litigants will always have the option of qualifying an expert to share her expert opinion on depressive disorders and conditions.<sup>89</sup>

Second, the alternative approach minimizes jury confusion. The *Farfaras* rule rests on the presumption that “a reasonable jury [could] be expected to understand the difference between lay use of [the] adjective [‘depressed’] and an expert’s use of the same word to describe a specific psychological condition.”<sup>90</sup> Undoubtedly, this will be true in some cases for some jurors, but in many cases lay witness use of the term “depressed” may simply confuse or mislead jurors. For example, a juror may hear a lay witness testify that a person was “depressed” and wonder whether the witness had knowledge that a medical professional clinically diagnosed the person with a depressive disorder. Others, on the same jury, may believe that there is no difference between the everyday “lay use” of “depression” and the clinical psychological condition, and assume that all depression is merely just “sadness.” Still other jurors may assume that the witness’s use of the term means that the person had a serious psychological condition, or alternatively, that the person was “dangerous” and “unpredictable.”<sup>91</sup> In contrast, the alternative approach avoids juror confusion, by ensuring that the term “depressed” is only used by qualified experts who can give jurors guidance on the particular depressive disorder at issue as well as its presentation and symptoms.

Third, the *Farfaras* rule diminishes a severe, pervasive, and complex medical condition.<sup>92</sup> The alternative approach recognizes that depression is a medical condition and that testimony concerning medical conditions is beyond the ken of the lay witness.

Finally, the alternative approach avoids all of the problems raised by the *Farfaras* rule,<sup>93</sup> and provides a workable alternative rule that comports with the language and purpose of Rules 701–702, as well as general principles of legal and public policy.

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88. See FED. R. EVID. 701 advisory committee note.

89. See *id.*; FED. R. EVID. 702.

90. *Farfaras v. Citizens Bank & Trust of Chi.*, 433 F.3d 558, 565 (7th Cir. 2006).

91. See *supra* notes 74–81 and accompanying text.

92. See *supra* note 50–57 and accompanying text.

93. See *supra* notes 46–83 and accompanying text.



## V. CONCLUSION

Congress enacted the Federal Rules of Evidence to aid courts in “ascertaining the truth and securing a just determination” of all litigated matters.<sup>94</sup> The *Farfaras* holding stands in opposition to the meaning and purpose of those rules, and violates basic principles of public policy that the American legal system should be committed to embracing.<sup>95</sup> More importantly, the *Farfaras* holding represents an unfortunate judicial approval of the delegitimization of psychological conditions.<sup>96</sup> In an era where, in many respects, American society has made impressive strides forward in its understanding of and relationship to psychological conditions, the *Farfaras* decision represents an unfortunate step backwards.<sup>97</sup> Moreover, the *Farfaras* rule is patently unfair to litigants and diminishes access to fair and unprejudiced trials.<sup>98</sup> Conversely, the proposed alternative approach solves all of these problems, while ensuring that witness’ testimony—the essence of the American adversarial system—can still paint a rich and detailed account of the events being litigated.<sup>99</sup> Therefore, the *Farfaras* decision should be overturned, and the federal judiciary should adopt the proposed alternative approach to lay opinion testimony concerning depression.

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94. FED. R. EVID. 102.

95. *See supra* notes 46–83 and accompanying text.

96. *See supra* notes 50–57 and accompanying text.

97. *See* Mark Anderson & Lynda Cannova, *50 Years of Mental Health Hope and Struggle: 1957–2007*, COUNCIL ON CRIME & JUSTICE, <http://www.crimeandjustice.org/councilinfo.cfm?PID=54>.

98. *See supra* notes 74–83 and accompanying text.

99. *See supra* notes 84–93 and accompanying text.