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# The Horror in Our Heads: Cultural Trauma Expert Testimony in U.S. Courts

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## THE HORROR IN OUR HEADS: CULTURAL TRAUMA EXPERT TESTIMONY IN U.S. COURTS

*Elizabeth Topolosky\**

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### ABSTRACT

*Over the past twenty years, the international criminal tribunals have increasingly relied upon expert testimony describing the intergenerational and cultural effects of mass trauma events in their decisions. The admission of such broad, generalized expert testimony is facilitated by permissive rules of evidence and the broad and complex scope of international criminal litigation. To date, few litigators have attempted to present American courts with similar expert testimony. This article explores the admissibility and uses of this kind of evidence in American legal forums and provides a how-to guide for practitioners hoping to use similar testimony to build their cases.*

“There is no doctor who can heal me. But I know that a man like Pol Pot, he is even sicker than I am. He is crazy in the head because he believed in killing people. He believed in starving children. We both have the horror in our heads.”<sup>1</sup>

Since the American Psychiatric Association (APA) released the fourth iteration of its Diagnostic and Statistical Manual of Mental Disorders (hereinafter DSM-IV) in 1994, the use of expert testimony on post-traumatic stress disorder (PTSD) has risen steadily in American litigation.<sup>2</sup> Courts have, however, admitted evidence of PTSD-like symptoms both in criminal and civil contexts for hundreds of years, accepting criminal defenses based on traumatic stress disorders<sup>3</sup> and awarding civil damages for purely mental pain and suffering<sup>4</sup> before PTSD<sup>5</sup> developed as a modern concept.<sup>6</sup> While traumatic stress disorders

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1. Dith Pran was a Cambodian photojournalist who endured starvation, torture, and forced labor but survived the Cambodian genocide. He was the subject of the American film, “The Killing Fields.” Over fifty of his family members, including all of his siblings, were killed by the Khmer Rouge. Bill Trott, *FACTBOX: Quotes from “Killing Fields” survivor Dith Pran*, REUTERS (March 30, 2008, 12:03 PM), <http://www.reuters.com/article/us-cambodia-dith-factbox-idUSN3033528720080330> [<https://perma.cc/M26H-USFD>].

2. Jim McGuire & Sean Clark, *PTSD and the Law: An update*, 22 PTSD RESEARCH QUARTERLY (2011), <https://www.ptsd.va.gov/professional/newsletters/research-quarterly/v22n1.pdf> [<https://perma.cc/TG7A-AGTG>].

3. Although PTSD-like symptoms have been recognized as a unique medical issue for over a hundred years, the modern concept of PTSD first appeared in the third edition of the APA’s DSM, (DSM III). In fact, DSM II, released in 1968, considered combat stress only under a general heading of “adjustment reactions of adult life.” Michael J. Davidson, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 420 (1986).

4. The first case to award pain and suffering damages for purely mental injury was *I de S et ux v. W de S*, Y.B.Lib.Ass. folio 99, placitum 60 (Assizes 1348). In the case, a man hoping to purchase wine late at night became irate when he found the shopkeeper’s door closed. After he had pounded on the door for some time, the shopkeeper’s wife stuck her head outside and told him to stop. In response, the man swung his hatchet at her head, missing her. The husband and wife sued, winning a monetary judgement. Although the short case facts do not include enough information to determine whether the shopkeeper’s wife developed a traumatic stress disorder, this case marks an important step in the march towards legal recognition of PTSD. After all, without cases like *I de S*, the railway trauma litigation of the 1880s may not have developed. George Mendelson, *Posttraumatic Stress Disorder as Psychiatric Injury in Civil Litigation*, 2 PSYCHIATRY PSYCHOL. & L. 53, 53-54 (1995).

5. Furthermore, before PTSD developed as a medical diagnosis, trial lawyers relied upon “traumatic neurosis.” Lawrence J. Raifman, *Problems of Diagnosis and Legal Causation in Courtroom Use of Post-Traumatic Stress Disorder*, 1:3 BEHAV. SCI. & THE L. 115, 126 (1983).

6. In their 2012 comprehensive review of LexisNexis case law, Berger, McNiel, and Binder

have long found legal acceptance, psychiatric conceptualizations of this medical phenomenon have deepened and transformed over the years. For example, the psychiatric field recently expanded its diagnostic criteria for some disorders to acknowledge that different cultures experience and cope with severe trauma in different ways.<sup>7</sup> This development may be tied to the increasing amount of research focusing on the long-term psychological effects that mass trauma events such as genocide, war, and severe natural disasters leave on large groups of people.<sup>8</sup> Such “mass trauma” scholarship often contains a large cultural component using comparative studies,<sup>9</sup> government sponsored surveys<sup>10</sup> and probability

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found 47 cases that cited and discussed the use of PTSD-symptoms as a criminal defense. The search also yielded two published and three unpublished cases in which trauma-based disorders were cited as the basis for criminal defenses that preceded the DSM conceptualization of PTSD. Omri Berger et al., *PTSD as a Criminal Defense: A Review of Case Law*, 40 J. OF AM. ACAD. PSYCHIATRY L. 509, 510 (2012).

7. The DSM-V, published in 2013, now identifies nine cultural concepts of distress: *ataque de nervios* (“attack of nerves,” Latinos); *Dhat* syndrome (“semen,” South Asians); *Khyâl cap* (“wind attacks,” Cambodians); *Kufungisisa* (“thinking too much,” a linguistic subgroup in Zimbabwe); *Maladi moun* (“sent sickness,” Haitians); *nervios* (“nerves,” Latinos); *Shenjing shuairuo* (“weakness of the nervous system,” Mandarin Chinese); *susto* (“fright,” Latinos); *Taijin kyofusho* (“fear between people disorder,” Japanese). Devon E. Hinton & Siddharth K. Joshi, *Khyâl Attack as a Cultural Concept in the DSM-V Manual (2013)*, KHYÂL ATTACK, <https://khyalattack.com/khyal-attack-as-a-cultural-concept-in-the-dsm-v-manual-2013> [<https://perma.cc/8VYN-DJA8>].

8. Daryn Reicherter & Alexandra Aylward, *The Impact of War and Genocide on Psychiatry and Social Psychology*, CAMBODIA’S HIDDEN SCARS 14, 20-24 (2nd ed., 2011).

9. One study by Rachel Yehuda performed a battery of psychiatric tests on 117 men and 167 women recruited from the community to identify the prevalence of mental health issues of the children of Holocaust issues. Of the class, 211 subjects were the adult offspring of Holocaust survivors and 73 were demographically comparable Jewish controls. Participants were further divided up by whether their father, mother, neither, or both parents met diagnostic criteria for lifetime PTSD. The researchers also controlled for traumatic incidents in the lives of the test subjects. See generally Rachel Yehuda et al., *Maternal, Not Paternal PTSD, is Related to Increased Risk for PTSD in Offspring of Holocaust survivors*, 42 J. PSYCHIATRIC RES. 1104 (2008).

10. In 2002, the government of Afghanistan conducted a multi-stage national survey by dividing the country into 50 districts, selecting household clusters from those districts, randomly selecting one village from each cluster and fifteen households from each village. In total, the study polled 750 households which contained 799 people. According to the survey, 67% of respondents reported symptoms of depression, 72.2% symptoms of anxiety, and 42% symptoms of PTSD. On average, women were found to have poorer mental health than men. Barbara Lopes Cardozo et al., *Mental Health, Social Functioning, and Disability in Postwar Afghanistan*, 292 JAMA 575, 575-584 (2004).

samples,<sup>11</sup> data recorded from short- and long-term private treatment,<sup>12</sup> and intergenerational testing<sup>13</sup> to study what proportion of an affected population has developed PTSD, how that PTSD manifests, and whether later generations are also impacted.

As this field of research has developed, lawyers have taken notice, pushing for the admission or exclusion of mass trauma expert testimony in several international courts. To date, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Court (ICC), and the Extraordinary Chambers in the Courts of Cambodia (ECCC) have admitted expert testimony describing the national and intergenerational impact of mass trauma events.<sup>14</sup>

American lawyers practicing in domestic courts—constrained by comparatively strict rules of evidence—have acted more slowly in adopting this particular type of expert testimony. In a literature search performed on Westlaw, only two relevant cases appeared after searching

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11. The Cambodian government conducted a national probability sample of 1,107 Cambodians in 2009. The report found that 11.2% of adult Cambodians living in Cambodia had probable PTSD. For those who would have been three years or older during the Khmer period, the rates of probable PTSD were 14.2%. Respondents with high levels of perceived justice for Khmer crimes were less likely to have PTSD symptoms than those who perceived low levels of justice (12.7% compared to 7.4%). Jeffery Sonis et al., *Probable Posttraumatic Stress Disorder and Disability in Cambodia*, 302 JAMA 527, 527 (2009).

12. One study questioned 586 Cambodian refugees between the ages of 35 and 75 living in Long Beach, CA, whom the researchers confirmed lived in Cambodia during the reign of the Khmer Rouge. Every person selected for the study had experienced trauma prior to immigration, with 99% nearly dying from starvation and 90% losing a friend or family member to a violent death. Researchers found high rates of PTSD and major depression within this group—62% and 51% respectively. The data also showed a high comorbidity rate between the two diagnoses. Grant N. Marshall et al., *Mental Health of Cambodian Refugees 2 Decades after resettlement in the United States*, 294 JAMA 571, 571 (2005).

13. See Yehuda, *supra* note 9.

14. See e.g. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on requests to present additional evidence on sentence and scheduling the sentencing hearing ¶ 22 (May 4, 2016); Prosecutor v. Milorad Trbić, Case No.: X-KR-07/386, at ¶ 848 (Nat'l. CT. of Bosn. & Herz. Apr. 29, 2010); Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1, Transcript of Hearing with Dr. Ibrahimfendić (Int'l Crim. Trib. for the Former Yugoslavia Dec. 16, 2002), available at <http://www.icty.org/x/cases/plavsic/trans/en/021216IT.htm> [https://perma.cc/MXB8-FV77]; Prosecutor v. Ratko Mladić, Case No IT-09-92-T, Transcript of Hearing with Dr. Ibrahimfendić, (Int'l Crim. Trib. for the Former Yugoslavia July 18, 2013), available at <http://www.icty.org/x/cases/mladic/trans/en/130718ED.htm> [https://perma.cc/6FZC-RUR6]; *Trial Chamber Concludes Evidentiary Hearings in Case 002/02, Schedules Closing Briefs and Closing Arguments*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, (Jan 11, 2017), <https://www.eccc.gov.kh/en/articles/trial-chamber-concludes-evidentiary-hearings-case-00202-schedules-closing-briefs-and-closing> [https://perma.cc/AT3W-2DAA].

for “cultural trauma”:<sup>15</sup> *United States v. Woody*<sup>16</sup> and *Swinomish Tribal Community v. Fornsbey*.<sup>17</sup> Both cases featured Native American defendants attempting to avoid criminal convictions by asking the court to view their actions through a lens of historical cultural trauma rather than personal choice. Although such testimony has many potential uses in American courts—especially in civil actions brought under the Alien Tort Statute (ATS), Torture Victim Protection Act (TVPA), Justice Against Sponsors of Terrorism Act (JASTA), and in environmental tort cases—few domestic litigators have pushed for its use in trial.

This paper examines the admissibility of expert testimony on culture-specific symptoms of PTSD produced by mass trauma events in U.S. courts. Section I describes the development of PTSD as a medical and legal concept, taking the reader from “railway spine” to the current DSM-V definition. Section II explains the current psychiatric theory on cultural differences in PTSD and cites several studies to give readers an idea about how researchers carry out trauma studies. Section III clarifies the difference between applied cultural trauma expert testimony and broad cultural trauma expert testimony. Section IV discusses past and potential uses for cultural trauma expert testimony in U.S. courts. It sets the stage for this discussion by contrasting and comparing the jurisprudence and rules of evidence underlying domestic civil litigation and international criminal law. Finally, Section V examines the post-*Kumho*<sup>18</sup> legal landscape on scientific evidence and argues that courts will find cultural trauma expert testimony admissible so long as counsel presents proper arguments.

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15. The author also completed searches on “mass trauma” and “mass trauma expert testimony” using Westlaw, but was unable to find any relevant cases. It is possible that other cases have used expert testimony to describe cultural differences in PTSD reactions or overviews of mass trauma events. This author, however, was not able to locate such.

16. *United States v. Woody*, No. CR-13-08093-001-PCT, 2015 WL 1530552 at \*1 (D. Ariz. Apr. 6, 2015), rev’d, *United States v. Woody*, F. App’x 519 (9th Cir. 2016). The Ninth Circuit appellate decision, which this paper will discuss later, is *United States v. Woody*, 652 F. App’x 519, 520 (9th Cir. 2016).

17. *Swinomish Tribal Community v. Fornsbey*, No. CRCO-2009-0124, 2009 WL 9125779 (Swinomish Tribal Ct. Oct 6th, 2009). This paper will not discuss this case further, as the author was unable to access the court documents necessary to determine whether the defendant attempted to admit expert testimony into court. In the case, a Native American defendant contended that because of his own mental disabilities and a history of cultural trauma caused by alcohol and drug use in Native American communities, his substance abuse was actually involuntary. The court rejected this argument.

18. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

## I. POST-TRAUMATIC STRESS IN THE WEST

PTSD has a long, chaotic history in Western culture. Although medical knowledge regarding trauma disorders did not develop a diagnosis until the late 1700s,<sup>19</sup> the literary world has linked trauma with modern PTSD symptoms for over 2,800 years.<sup>20</sup> In Homer's *Iliad*, after learning that his friend Patroklos was killed in battle, Achilles appears to develop survivor's guilt—wishing he could have taken his friend's place, claiming that he cannot die because he is already dead, and fixating on vengeance against Patroklos' killer Hector.<sup>21</sup> The Greek hero enters a berserker state, killing every Trojan in sight without regard to his own safety or the greater military strategy.<sup>22</sup> According to clinical psychiatrist Johnathan Shay, these behaviors matched PTSD symptoms he observed in Vietnam veterans.<sup>23</sup> In particular, Achilles exhibited “psychic numbing,” survivor guilt, the “shrinkage of [his] social and ethical horizon,” grief, and changes in levels of aggression, all of which are contained in the DSM-III's diagnostic criteria for PTSD.<sup>24</sup> Scholars have observed similar trauma-associated behaviors in characters from William Shakespeare's *Henry IV*, Charles Dickens's *A Tale of Two Cities*, and Stephen Crane's *Red Badge of Courage*.<sup>25</sup>

Developing a psychiatric definition for PTSD took longer than its literary counterpart, with medical knowledge increasing in leaps and bounds between long periods of stagnation. Medicine first considered PTSD in relation to the stresses of soldiering. Early trauma research first emerged in great scale during the American Civil War (1861-1865) and the Franco-Prussian War (1870-1871).<sup>26</sup> During that time, physicians used terms like “soldier's heart” to refer to a collection of symptoms closely resembling those reported by modern PTSD sufferers.<sup>27</sup> In 1886,

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19. The Austrian physician, Josef Leopold, was the first to develop a diagnosis linked to a collection of symptoms commonly experienced by soldiers and similar to the symptoms listed for PTSD in the DSM-V. In 1761, Leopold wrote about “nostalgia” among soldiers. He linked military trauma to homesickness, anxiety, sleep problems, and depression. Matthew J. Friedman, *History of PTSD in Veterans: Civil War to DSM-5*, NAT'L. CTR. FOR PTSD (Feb. 3, 2016), <https://www.ptsd.va.gov/professional/ptsd-overview/ptsd-overview.asp> [https://perma.cc/N2HW-5TNG].

20. Scholars have dated the creation of the *Iliad* back to roughly 800 B.C. *Id.*

21. Johnathan Shay, *Learning about Combat Stress from Homer's Iliad*, 4 J. OF TRAUMATIC STRESS 561, 579 (1991).

22. *Id.*

23. Note that DSM-IV had not yet been released when Shay wrote his 1991 article. *Id.*

24. American Psychiatric Association, *Posttraumatic Stress Disorder*, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 247-251 (3rd ed., 1980).

25. Friedman, *supra* note 19.

26. *Id.*

27. Those with “soldier's heart” often developed rapid pulse, trouble breathing, and heart problems. *Id.*

a medical diagnosis akin to PTSD entered court for the first time.<sup>28</sup> The plaintiff in *Victorian Railway Commissioners v Coultas: PC 21 Jan 1886*, alleged that she had suffered “nervous shock,” “railway spine,” and a miscarriage because a train had nearly struck the buggy in which she and her husband were traveling.<sup>29</sup> Although physicians associated “railway spine” with physical damage to the spine—usually from a sharp jarring motion—surgeons such as Herbert Page conceptualized “nervous shock” as a purely psychological malady as early as 1883.<sup>30</sup> Western medicine first recognized the development of a “nervous shock” traumatic syndrome in civilians, which led to civil courts hearing the first testimony about PTSD-like symptoms.<sup>31</sup>

As time and militaries marched forward, the medical community continued to diagnose the same set of symptoms under different names. Doctors treated soldiers returning from the trenches of the First World War for “shell shock” and “war neurosis,”<sup>32</sup> while World War II troops received treatment for “battle fatigue,”<sup>33</sup> “post-torture syndrome,” “concentration camp syndrome,”<sup>34</sup> or “survivor syndrome.”<sup>35</sup> In 1952, the APA bestowed a new name on modern-day PTSD, lumping the broad collection of symptoms under the heading “gross stress reaction” in their first diagnostic manual (DSM-I).<sup>36</sup> As this new name suggested, DSM-I limited this diagnosis to those who had suffered extreme traumatic events like combat or disasters.<sup>37</sup> Under the DSM-I, one could only suffer from a “gross stress reaction” for six months.<sup>38</sup> If symptoms persisted, doctors would have to issue a different diagnosis.<sup>39</sup> The second edition of the DSM took a large step backward, completely eliminating this diagnosis.<sup>40</sup> Instead, it created a disorder called “adjustment reaction to adult life.”<sup>41</sup> While the ailment carried symptoms similar to those of PTSD, DSM-II

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28. The case was litigated in Australia. Mendelson, *supra* note 4, at 53.

29. Mrs. Coulter maintained that from her fright she “received a severe shock, and suffered personal injuries, and still suffered from delicate health and impaired memory and eyesight.” *Id.* at 54.

30. *Id.*

31. *Id.*

32. Friedman, *supra* note 19.

33. *Id.*

34. Note that this syndrome was another example of medical professionals diagnosing civilians with a PTSD-like disorder. Patrick J. Bracken et al., *Psychological Responses to War and Atrocity: The Limitations of Current Concepts*, 40 SOC. SCI. AND MED. 1073 (1995).

35. Derek Summerfield, *War and Mental Health: A Brief Overview*, 321 BMJ 232, 232-235 (2000).

36. Friedman, *supra* note 19.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

limited its application to three traumatized groups: women who had unwanted pregnancies and were considering suicide, soldiers that had seen combat, and death row prisoners already diagnosed with Ganser syndrome.<sup>42</sup>

Then war erupted in Vietnam. Once more, soldiers returned home in droves, empty-eyed and with lingering psychological problems. This time, however, large feminist and Jewish movements were also sweeping through the country. Under pressure from three different advocacy groups,<sup>43</sup> the APA created a new diagnosis for post-traumatic stress in its third edition of the DSM: “post-traumatic stress disorder” or PTSD.<sup>44</sup> Like its predecessors, DSM-III limited the scope of the PTSD to those who had experienced traumatic events that “fall generally outside the realm of usual human experience [. . .and are] markedly stressing to almost anyone.”<sup>45</sup> Although ordinary stressors like “simple bereavement, chronic illness, business losses, and marital conflict” could not trigger PTSD,<sup>46</sup> the DSM-III found that “serious threat[s] or harm to one’s children, spouse, or other close relative and friends” or learning about such threats all met the severity threshold.<sup>47</sup> Other valid etiological factors included rape, assault, military combat, natural disasters such as floods and earthquakes, accidental disasters,<sup>48</sup> malnutrition and head injury, and “deliberately caused disasters” such as “bombings, torture, and death camps.”<sup>49</sup> As Richard McNally from Harvard’s Department of Psychology noted, DSM-III’s description of PTSD contained diagnostic requirements which were ambiguous in some areas, overbroad in others, and too limited elsewhere.<sup>50</sup> The APA evidently agreed with McNally’s

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42. *Id.* Note that “Ganser syndrome” is a rare dissociative disorder characterized by answering questions in a nonsensical or incorrect way, fugue, amnesia, and difficulty in completing tasks correctly. Patients may also experience visual pseudo-hallucinations and a decreased sense of consciousness. American Psychiatric Association, *Posttraumatic Stress Disorder*, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4<sup>th</sup> ed., 1994).

43. While veteran advocacy groups clamored for a diagnosis that addressed psychological breaks in those who faced the horrors of Vietnam, feminists demanded the same for women who had endured sexual assaults. Jewish groups likewise pressed for a diagnosis to address lingering psychological problems in Holocaust survivors. Friedman, *supra* note 20.

44. *Id.*

45. Richard J. McNally, *Conceptual Problems with the DSM-IV Criteria for Posttraumatic Stress Disorder*, POSTTRAUMATIC STRESS DISORDER: ISSUES AND CONTROVERSIES 1, 2 (Gerald M. Rosen ed., 2004).

46. American Psychiatric Association, *supra* note 24, at 247.

47. *Id.*

48. “e.g., car accidents with serious physical injury, airplane crashes, large fires, collapse of physical structures. . .” *Id.*

49. *Id.*

50. According to McNally, some members of the APA’s board were concerned that the PTSD guidelines in DSM-III would exclude people suffering symptoms due to events that did not meet the diagnostic threshold but were nevertheless subjectively traumatizing. These members advocated for

observations, changing the definition of PTSD several times before settling on the current definition contained in the fifth version of the DSM.<sup>51</sup>

Today, the DSM categorizes PTSD as a Trauma-Related and Stressor-Related Disorder rather than as an anxiety disorder<sup>52</sup> and requires that patients experience a traumatic event in a particular way and exhibit four main traits and behaviors to fit the diagnostic criteria of PTSD:<sup>53</sup>

- (A) The person was exposed to death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence by witnessing the trauma, learning that a friend or relative experienced such trauma, indirect exposure usually in the course of official duties, or direct exposure. (One Required);
- (B) The person persistently re-experiences the traumatic event through intrusive thoughts, nightmares, flashbacks, emotional distress after exposure to traumatic reminders, or physical reactivity after exposure to traumatic reminders. (One Required);
- (C) The person avoids trauma-related stimuli—i.e. trauma-related reminders or thoughts or feelings—after experiencing the trauma. (One Required);
- (D) The person experiences negative thoughts or feelings that began or worsened after the trauma and manifest in an inability to recall key features of the traumatic event, overly negative thoughts or assumptions about oneself or the world, exaggerated blame of self or others for causing the traumatic event, negative affect, decreased interest in activities, feelings of isolation, or difficulty in experiencing positive affect. (Two Required);
- (E) The person begins to exhibit irritability or aggression, risky or destructive behavior, hypervigilance, a heightened startle reaction, difficulty sleeping or difficulty concentrating after the traumatic event, or such behaviors or symptoms worsen. (Two Required).

Additionally, the patient must experience these symptoms for at least a month<sup>54</sup> and cannot receive a diagnosis until at least six months have

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a subjective test. Another faction, meanwhile, was concerned that if those guidelines were eliminated, over-diagnosis would occur. McNally also pointed out that it was unclear what constituted a “usual human experience.” McNally, *supra* note 45, at 2-3.

51. The APA altered the DSM definition in 1987 (DSM-III-R), 1994 (DSM-IV), 2000 (DSM-IV-TR), and 2013 (DSM-V) to reflect continuing research. Friedman, *supra* note 19.

52. This category was created by DSM-V in 2013. *Id.*

53. Note that this is a paraphrased version of the summarized list of DSM-V’s requirements provided by the National Center for PTSD. “PTSD and DSM-5.” NAT’L CTR FOR PTSD, [https://www.ptsd.va.gov/professional/PTSD-overview/dsm5\\_criteria\\_ptsd.asp](https://www.ptsd.va.gov/professional/PTSD-overview/dsm5_criteria_ptsd.asp) [<https://perma.cc/NNW8-WB4N>].

54. *Id.*

passed since the traumatic event.<sup>55</sup> Furthermore, the symptoms must create distress or functional impairment and must not be caused by medication, substance abuse, or another illness.<sup>56</sup>

DSM-V also recognizes that PTSD can last for decades, or even an entire lifetime, and can often manifest in periods of remission and relapse.<sup>57</sup> Experiences that closely resemble the original traumatic event may precipitate relapse, although this is not necessary.<sup>58</sup> The DSM-V further clarifies that individuals exposed to traumatic events may not exhibit PTSD symptoms until months or even years have passed.<sup>59</sup> Finally, the DSM-V formally acknowledges that although PTSD is a valid cross-cultural diagnosis, research has shown substantial cross-cultural variation in how affected persons express the disorder.<sup>60</sup>

## II. PTSD AS A CULTURAL PHENOMENON

Although still not perfect, the DSM-V addresses cultural differences in PTSD more completely than its predecessors. Where DSM-IV-TR included an appendix listing twenty-five “culture-bound syndromes,”<sup>61</sup> the DSM-V contains a “Glossary of Cultural Concepts of Distress,” breaking cultural trauma into three categories: “cultural syndromes,”<sup>62</sup> “cultural idioms of distress,”<sup>63</sup> and “cultural explanations of distress or perceived causes.”<sup>64</sup> Cultural psychiatrist Roberto Lewis-

55. Friedman, *supra* note 19.

56. Nat'l. Ctr. for PTSD, *supra* note 53.

57. Matthew J. Friedman. “PTSD History and Overview” NATIONAL CENTER FOR PTSD. <https://www.ptsd.va.gov/professional/ptsd-overview/ptsd-overview.asp> [https://perma.cc/VE5E-BUV4].

58. A former soldier suffering from combat-related PTSD may relapse after sending a child off to war, for example. *Id.*

59. The DSM-V changed the title of this diagnostic theory from “delayed onset” to “delayed expression.” *Id.*

60. *Id.* The DSM also specifically notes that “all forms of distress are locally shaped, including the DSM disorders.” American Psychiatric Association, *Posttraumatic Stress Disorder*, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 758 (5th ed., 2013).

61. Cultural psychiatrists like Roberto Lewis-Fernandez criticized this phrasing for making conditions appear too localized and confined. He also indicated that many of the syndromes included on the list represented everything from situational predicaments to general terms that covered several common ailments. Constance A. Cummings, *DSM-5 on Culture: A Significant Advance*, THE THEFPR.ORG BLOG (27 June 2013), <https://thefprorg.wordpress.com/2013/06/27/dsm-5-on-culture-a-significant-advance/> [https://perma.cc/45X3-SNRR].

62. Cultural syndromes are described as “clusters of symptoms and attributions that tend to occur among individuals in specific cultural groups, communities, or contexts . . . that are recognized locally as coherent patterns of experience.” *Id.*

63. *Cultural idioms of distress* are “ways of expressing distress that may not involve specific symptoms or syndromes, but that provide collective, shared ways of experiencing and talking about personal or social concerns.” *Id.*

64. The DSM-V defines *cultural explanations of distress or perceived causes* as “labels,

Fernandez used depression to explain the overlap among these three categories:

For western clinicians, major depressive disorder (MDD) can be considered a “syndrome,” or cluster of symptoms that appear to “hang together.” But depression can also be considered an “idiom of distress,” in the sense that westerners commonly talk of feeling depressed in everyday life. Finally, the label depression can imbue a set of behaviors with a particular meaning.<sup>65</sup>

Today, the DSM-V’s glossary lists nine of the best-studied concepts of distress around the world, “ataque de nervios (‘attack of nerves’); dhat syndrome (‘semen loss’); khyâl cap (‘wind attack’); kufingisisa (‘thinking too much’); maladi moun (lit. ‘human caused illness’); nervios (‘nerves’); shenjing shuairuo (re-glossed as ‘weakness of the nervous system’); susto (‘fright’); and taijin kyofusho (‘interpersonal fear disorder’).”<sup>66</sup> But other widely-studied and now-well-established disorders such as Baksbat, a PTSD-adjacent condition documented in Cambodia and Cambodian communities abroad, did not make it into the DSM-V.<sup>67</sup>

In 2012, the award-winning psychiatrist Sotheara Chhim<sup>68</sup> conducted a study to figure out why Cambodian outpatient clinics were finding that only 2-3% of visitors met the checklist criteria for PTSD.<sup>69</sup> Chhim ran his landmark study in two phases: the inventory phase and the inventory validation phase.<sup>70</sup> Two groups participated in the first part of

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attributions, or features of an explanatory model that indicate culturally recognized meaning or etiology for symptoms, illness, or distress.” *Id.*

65. “No single concept maps onto a specific psychiatric disorder, and, conversely, no single psychiatric disorder (e.g., MDD) maps onto a cultural concept (e.g., *nervios*.” *Id.*

66. *Id.*

67. See generally Sotheara Chhim, *Baksbat (Broken Courage): The Development and Validation of the Inventory to Measure Baksbat, a Cambodian Trauma-based Cultural Syndrome of Distress*, 36 CULT. MED. PSYCHIATRY 640-659 (2012).

68. Chhim received the Leitner Center for International Law and Justice’s Human Rights Award in 2012, and was the recipient of the 2017 Dr. Guislan “Breaking the Chains of Stigma” Award offered by Janssen Research & Development and the Dr. Guislain Museum in Belgium. *Dr. Chhim Sothea*, TPO CAMBODIA, <http://tpocambodia.org/dr-chhim-sothea> [<https://perma.cc/Q5NE-C9T9>].

69. *Id.* at 642.

70. *Id.* at 644.

the study: 53 experts<sup>71</sup> and 390 consecutive patients<sup>72</sup> who received mental health care at Transcultural Psychological Organization (TPO) treatment centers. Those with psychosis, dementia, or who were intoxicated during the initial interview were excluded from the second group.<sup>73</sup> Chhim called the 53 experts into a round of ethnographic interviews which were recorded and transcribed.<sup>74</sup> During the meetings, he asked the experts to describe the symptoms of Baksbat they had personally observed in others.<sup>75</sup> Through this method, the experts created an initial list of 56 symptoms.<sup>76</sup> Chhim then launched a second round of ethnographic interviews with 20 experts. Together, they parsed the list of symptoms down to 32 using a 5-point Likert Scale.<sup>77</sup> The research team then administered a test based around these 32 symptoms to the group of 390 patients.<sup>78</sup>

A second test took place with a new group of 159 students from the Royal University of Phenom Penh. The students had been selected because they were involved in a traumatic stampede on a bridge in 2010.<sup>79</sup> These participants were given a 24-question Baksbat inventory, which broke the questions down into three groups: (1) broken courage, (2)

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71. This group included “health and mental health professionals, psychiatrists, psychologists, counsellors, traditional healers, mediums, elderly people, priests, victims of the trauma/torture, teachers, linguists, historians and academics. The participants’ mean age is 56 (SD = 12.87), 35.8 % (N = 19) are female and 64.2 % (N = 34) are male. As far as the roles are concerned, 35.8 % (N = 19) are victims of torture who are eligible civil party members testified at the Khmer Rouge Tribunal, 15.1 % (N = 8) are psychologists, 11.3 % (N = 6) are psychiatrists, 11.3 % (N = 6) are religious leaders/traditional healers/mediums altogether, 9.4 % (N = 5) are university professors, 5.7 % (N = 3) are historians/linguists and the remaining 11.3 % (N = 6) are community leaders/ elderly and NGO leaders.” *Id.* at 645.

72. This group consisted of “(268 females, and 122 males), age (M = 53.40, SD = 12.96), marital status [64.4 % married (N = 251), 27.7 % widowed (N = 108), 3.3 % divorced/separated (N = 13), and 4.6 % never married (N = 18)], level of education [39 % never attended school (N = 152) and 36.9 % attended primary school (N = 144), 23.3 % attended high school (N = 91) and 0.8 % attended university (N = 3)], and type of work involvement [92.8 % unskilled workers (Farmer/worker/ housewife/seller, N = 362), 7.2 % skilled worker (teacher/civil servant/other professional, N = 28)].” *Id.*

73. *Id.*

74. *Id.* at 645.

75. *Id.*

76. *Id.* at 646.

77. The Likert Scale is a common psychometric scale wherein an assertion is made, and respondents are asked to select their level of agreement or disagreement with the assertion from a number of options. Some variations of this research model do not include neutral options like “neither agree nor disagree,” “neutral,” or “undecided.” Researchers can then examine the responses individually or in aggregate, performing statistical analysis. Chhim selected a Likert Scale because the civilian version of the PTSD checklist also used a Likert Scale. *Id.*

78. *Id.*

79. Chhim conducted the study over a year later so that the acute stress reaction symptoms would have dispelled. *Id.*

psychological distress, and (3) erosion of self.<sup>80</sup> They also received a 17-question test for PTSD.<sup>81</sup>

Chhim and his researchers then performed statistical analysis on the test results by using Cronbach's alpha coefficient—a measure of internal consistency of the response to the group of items to ensure reliability.<sup>82</sup> Pearson's correlation<sup>83</sup> was used to calculate the correlation between the Baksbat inventory, its symptom clusters, and results from the PTSD inventory.<sup>84</sup> The researchers also used multiple regression analysis to explore the relationship between symptoms of PTSD as dependent variables and the three symptom clusters of Baksbat as predictors.<sup>85</sup> The study ultimately found that from a statistical point of view, there is high correlation between PTSD and Baksbat ( $r = .65$ ,  $p \setminus .001$ ).<sup>86</sup> However, multiple regression analyses showed that only the psychological distress symptom cluster ( $r = .63$ ) of Baksbat contributed significantly to the total variance in symptoms of PTSD.<sup>87</sup> The other two symptom clusters, namely broken courage and the erosion of self, did not contribute to the variance in symptoms of PTSD.<sup>88</sup> Thus, although PTSD and Baksbat share some symptoms, the two are distinct disorders. Studies such as Chhim's indicate that trauma has a cultural component. The medical community has acknowledged this in a limited way through its adoption of a new section on cultural trauma in the DSM-V.<sup>89</sup> Courts too should acknowledge this cultural difference by admitting cultural trauma expert testimony that is relevant to cases under consideration.

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80. *Id.*

81. *Id.* at 647.

82. *Id.*

83. Also known as a bivariate correlation, this statistical coefficient measures the linear correlation between two variables X and Y. The correlation can hold any value between +1 and -1, with a value of +1 indicating a total positive linear correlation, a value of -1 indicating a total negative linear correlation, and a value of 0 indicating no linear correlation. "Correlation Coefficient: Simple Definition, Formula, Easy Steps", Statistics How To, <https://www.statisticshowto.datasciencecentral.com/probability-and-statistics/correlation-coefficient-formula/>.

84. *Id.*

85. *Id.*

86. *Id.* at 654.

87. *Id.*

88. "The 'broken-courage cluster' and 'erosion-of-self cluster' had medium ( $r = .50$ ,  $p \setminus .001$ ) and low ( $r = .33$ ,  $p \setminus .001$ ) correlation with symptoms of PTSD." *Id.* at 654.

89. Although the DSM-IV contained an outline on cultural trauma syndromes, the DSM-V includes an appendix that contains a "Glossary of Cultural Concepts of Distress"; a chapter on cultural formulation, which features an updated version of the outline introduced in DSM-IV; approaches to assessment; and a section discussing "Cultural Concepts of Distress". Cummings, *supra* note 61.

### III. TYPES OF CULTURAL TRAUMA EXPERT TESTIMONY

Cultural trauma expert testimony adopts two main forms: applied testimony and broad testimony. Applied cultural trauma expert testimony refers to a psychiatric expert's diagnosis of an individual person. In their diagnosis, the expert may refer to the DSM-V's Glossary of Cultural Concepts of Distress, another diagnostic source, or other trauma research. This kind of cultural trauma testimony tracks very closely with traditional PTSD expert testimony and is essentially a variation of PTSD. Given the wide acceptance of traditional PTSD expert testimony,<sup>90</sup> this paper assumes that courts will find this form of cultural trauma expert testimony admissible for the same reasons they accept traditional PTSD expert testimony, especially in cases where the cultural trauma symptoms about which the expert is testifying are included in the DSM-V's cultural appendix.

Broad cultural trauma testimony,<sup>91</sup> on the other hand, refers to an amalgamation of information about how a group or culture responds to trauma on a larger scale. Such testimony has traditionally included statistical data describing what percentage of a population suffers from a particular trauma-related disorder, comorbidity rates, research on intergenerational trauma, and other generalized information. Expert reports submitted to the ICTY, ICC, and ECCC on broad cultural trauma were drafted by performing comprehensive literature reviews, surveying statements made by local mass trauma survivors about their mental health, and sometimes applying broader cultural trauma information to specific victims or witnesses.<sup>92</sup> These broad reports cited not only large numbers of peer-reviewed articles,<sup>93</sup> but also articles that relied on multiple research methods—meta-analysis, single studies, review articles summarizing a large number of studies, and official reports from global health agencies.<sup>94</sup> The researchers who authored these reports excluded articles that were not peer reviewed or that dealt with trauma on a purely theoretical level.<sup>95</sup> Additionally, in each case the experts called to describe

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90. McGuire, *supra* note 2. Note: International courts have admitted applied expert testimony for a long time, often calling upon expert witnesses to discuss the mental health of individual victim-witnesses from particular cultures. American courts too have admitted applied cultural trauma testimony as long as they have admitted traditional PTSD testimony. After all, traditional PTSD diagnoses come from a Western understanding of the trauma-disorder.

91. Perhaps more succinctly known as "mass-trauma expert testimony."

92. The Mental Health Outcomes Resulting from Crimes Committed by the Khmer Rouge Regime E285/2.1, 326, HUMAN RIGHTS IN TRAUMA MENTAL HEALTH LAB., UNIV. OF STANFORD, (2016). [hereinafter Outcomes] (Report to the Extraordinary Chambers of the Court of Cambodia).

93. Elisabeth Schauer's report to the ICC on trauma in child soldiers cited roughly 254 research articles, while Daryn Reicherter's report to the ECCC cited about 159 separate studies. *Id.*

94. *Id.*

95. *Id.* at 327.

the report and testify in court were highly experienced, well-regarded practitioners, all of whom had treated trauma in members of the cultural groups about which they had written their reports.<sup>96</sup> Because applied cultural trauma expert testimony tracks so closely with traditional expert testimony on PTSD, the remainder of this paper will focus on broad cultural trauma expert testimony.

#### IV. CULTURAL TRAUMA EXPERT TESTIMONY IN U.S. COURTS

##### A. *Past Uses in International Tribunals and Domestic Courts*

###### 1. International Precedent

To date, at least three international tribunals have admitted expert testimony explaining trauma on a broader cultural level.<sup>97</sup> While each practitioner relied on similar credentials to justify their expert status — their education in relevant fields like psychiatry or psychology, their research on trauma-related issues, and their direct work with both traumatized populations generally and with the litigation-specific victim population—the focus and scope of their testimony varied. Teufika Ibrahimfendic’s testimony at the ICTY focused on explaining how the large numbers of Bosnian refugees accessing her non-governmental organizations (NGO) medical services first developed trauma-induced disorders.<sup>98</sup> Prosecutors asked Ibrahimfendic to describe common triggering events, initial symptoms, and the existence and form of those symptoms ten years later, especially in children.<sup>99</sup> She also discussed

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96. See pages 21 through 23 for fuller descriptions of the educational and professional backgrounds of these experts.

97. See *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08, Decision on requests to present additional evidence on sentence and scheduling the sentencing hearing ¶ 22 (May 4, 2016), available at [https://www.icc-cpi.int/CourtRecords/CR2016\\_03201.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_03201.PDF) [<https://perma.cc/BUA8-CGGG>]; *Prosecutor v. Trbić*, Case No.: X-KR-07/386, at ¶ 848 (Nat’l Court of Bosnia and Herzegovina, Apr. 29, 2010), available at [http://www.nuhanovicfoundation.org/user/file/trbic\\_milorad\\_1st\\_instance\\_decision\\_16-10-2009.pdf](http://www.nuhanovicfoundation.org/user/file/trbic_milorad_1st_instance_decision_16-10-2009.pdf) [<https://perma.cc/YB47-YPYB>]; *Prosecutor v. Plavšić*, Case No. IT-00-39 & 40/1, Transcript of Hearing with Dr. Ibrahimfendic (Int’l Crim. Trib. for the Former Yugoslavia Dec. 16, 2002), available at <http://www.icty.org/x/cases/plavsic/trans/en/021216IT.htm> [<https://perma.cc/B2JQ-LRNZ>]; *Prosecutor v. Mladić*, Case No IT-09-92-T, Transcript of Hearing with Dr. Ibrahimfendic, (Int’l Crim. Trib. for the Former Yugoslavia July 18, 2013), available at <http://www.icty.org/x/cases/mladic/trans/en/130718ED.htm> [<https://perma.cc/4VRA-RAEC>]; Press Release, Extraordinary Chambers in the Courts of Cambodia, Trial Chamber Concludes Evidentiary Hearings in Case 002/02, Schedules Closing Briefs and Closing Arguments (11 January 2017), <https://www.eccc.gov.kh/en/document/public-affair/press-release-trial-chamber-concludes-evidentiary-hearings-case-00202> [<https://perma.cc/JY4B-9LH8>].

98. *Plavšić*, Case No. IT-00-39 & 40/1 at 445.

99. *Id.* at 445-48.

common treatments for conflict-induced trauma disorders.<sup>100</sup> Ibrahimfendic never referenced statistics in her ICTY testimony.<sup>101</sup>

In contrast, both Elisabeth Schauer's expert report to the ICC and Daryn Reicherter's report to the ECCC relied heavily on statistics.<sup>102</sup> Schauer's report on the psychological impact of child soldiering detailed how often militias "recruit" child soldiers, why militias seek out children, what traumatic events child combatants experience, and how those traumatic experiences would affect their physical and psychological health and development.<sup>103</sup> The report also explained why communities stigmatized female refugees and child soldiers, the transgenerational effects of child-soldiering trauma, and how difficult it is for child combatants to secure work or return to school.<sup>104</sup> Reicherter's ECCC report takes a similarly broad, holistic approach, discussing cultural idioms of distress, how prevalent trauma disorders are among the current Cambodian population, comorbidity rates, and the effects of Khmer crimes on children and community relationships.<sup>105</sup> The Reicherter report also takes the cultural trauma symptoms it has explained and applies them to statements made by civil parties,<sup>106</sup> analyzing whether those parties suffer from trauma disorders.<sup>107</sup>

Overall, international criminal tribunals have used mass and cultural trauma expert testimony to provide background on how severe trauma affects individuals and the larger communities to which they belong. Moreover, these reports contextualize the testimony of individual victims and witnesses, potentially explaining gaps in the testimony<sup>108</sup> and helping judges develop a sense of scale.<sup>109</sup> Because these courts seek to provide symbolic justice,<sup>110</sup> mass and cultural trauma expert testimony is extremely relevant to their jurisdiction and jurisprudence.

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100. *Id.* at 450.

101. *Id.*

102. Outcomes, *supra* note 92; Elisabeth Schauer and Thomas Elbert, *The Psychological Impact of Child Soldiering*, in TRAUMA REHABILITATION AFTER WAR AND CONFLICT 311-360 (Erin Martz, ed., 2009) (quoting statistics on how many children are recruited into militias).

103. Schauer, *supra* note 102.

104. *Id.*

105. Outcomes, *supra* note 92.

106. Both the ICC and ECCC permit certain certified victims to join the criminal litigation as Civil Parties. Although Civil Parties have a more limited role than the defense and prosecution, they are nevertheless represented by counsel and can influence the outcome of the case.

107. Outcomes, *supra* note 92, at 345-360.

108. From both lay witnesses and other experts.

109. Developing a sense of scale is particularly important in the courts with mandates that allow judges to issue reparations. Article 75 of the Rome Statute, for example, grants the ICC the power to issue reparations. The ECCC may also issue reparations, so long as they are not monetary in nature.

110. This is because mass trauma events tend to have very large and ambiguously defined perpetrator groups. It would be too difficult and expensive to find and prosecute everyone involved in most genocides or wars. With this in mind, drafters place jurisdictional limitations into the

## 2. Domestic Precedent

Although U.S. courts have long accepted expert testimony about whether or not an individual suffers from PTSD,<sup>111</sup> American lawyers have so far largely neglected to push for the admission of expert testimony on broader cultural trauma in domestic courts. Those who have done so have tried in a criminal defense context, moving to have the courts admit expert testimony on the effects of “historical trauma” on the actions of their Native American clients. The opinion that includes the most extended discussion of the admissibility of cultural trauma expert testimony ultimately excluded the evidence because the expert was unable to link the characteristics about which he testified to the individual defendant.<sup>112</sup> This paper explores the legal reasoning underlying this court’s decision in Section V: “The *Joiner* Problem.”

### B. *Potential Uses in U.S. Law*

Given the different purposes underlying international criminal law and domestic litigation, it is not surprising that American lawyers have not pursued this type of expert testimony more aggressively at home. At first glance, cultural trauma expert testimony seems much more relevant to the jurisdiction and jurisprudence of international criminal tribunals. After all, the international community establishes these “courts of last resort” to prosecute criminals whose crimes have affected large victim groups.<sup>113</sup> But upon closer inspection, it becomes clear that several areas of domestic litigation could utilize cultural trauma expert testimony.

Courts could find broad cultural trauma testimony relevant to several types of domestic civil litigation—especially cases brought under the Alien Tort Statute (ATS), Torture Victim Protection Act (TVPA), Justice Against Sponsors of Terrorism Act (JASTA), or for claims alleging environmental damage. Several factors point to the conclusion that courts could react more permissively to broad cultural trauma expert testimony in these types of domestic litigation. First, claims brought under these causes of action can resemble international criminal law because the

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foundational documents of the courts. The jurisdiction of the ECCC, for example, is limited to only the “senior leaders of the Democratic Kampuchea and those who were most responsible for the crimes.” G.A. Res. 57/228 Khmer Rouge Trials (Feb. 27, 2003).

111. See *supra* notes 5 and 27.

112. *United States v. Woody*, 652 F. App’x 519, 520 (9th Cir. 2016).

113. Article 5 of the Rome Statute states that the ICC has jurisdiction only over “the most serious crimes of concern to the international community as a whole.” It lists those crimes as genocide, crimes against humanity, war crimes, and crimes of aggression. Each of these expressions have become terms of art in international legal lexicons. Rome Statute of the International Criminal Court, Art. 5, U.N. Doc. A/Conf. 183/9 (17 July 1998).

event(s) triggering suit often impact large numbers of people. Second, they tend to involve highly symbolic judgements.

Organizations like the Center for Justice and Accountability (CJA) and EarthRights have built entire legal portfolios representing the victims of large man-made disasters that occurred overseas, but whose perpetrators now live in or operate out of the United States. While EarthRights focuses on environmental accountability by suing large American companies for their roles in foreign conflicts, atrocities, and environmental disasters,<sup>114</sup> CJA targets individual war criminals who have slipped through cracks of the U.S. immigration system.<sup>115</sup> Both NGOs bring suit on behalf of victims and seek symbolic judgements. In most cases, CJA can only win symbolic judgements, as many of the defendants in their cases are judgement proof. Even when the defendants have assets that courts can attach, juries tend to award CJA clients damages that greatly exceed the defendants' wealth, usually in the millions of dollars.<sup>116</sup>

Given this, lawyers would likely have an easier time arguing the relevance of broad cultural trauma expert testimony to these causes of action. Plaintiffs' attorneys could argue for the inclusion of broad cultural trauma testimony on the basis that this testimony could inform the jury of the scope of damages. Broad cultural trauma testimony can set the stage for applied cultural trauma testimony, explaining concepts like comorbidity,<sup>117</sup> intergenerational trauma,<sup>118</sup> and secondary trauma<sup>119</sup> before an expert addresses a particular plaintiff's mental health. In addition to laying a foundation for more directly applied expert testimony, broad cultural trauma testimony has the capacity to somewhat expand damages because it implicitly implicates the mental health of others. This slippage could cause issues for some courts, while others would likely let

114. *How We Work*, Earthrights International, <https://www.earthrights.org/legal/how-we-work-courtroom> [ <https://perma.cc/5WHA-L67C>].

115. *Legal Strategy*, The Center for Justice & Accountability, <http://cja.org/what-we-do/litigation/legal-strategy> [ <https://perma.cc/HG84-Q47P>].

116. In their most recent trial, *Jara v. Barrientos Nunez*, CJA won an award of \$28 million for the wife and daughter of a musician killed by the Pinochet regime. The defendant in that case, Pedro Barrientos Nunez, was working as a dish washer in Florida when CJA initiated suit. No. 613CV1426ORL37GJK, 2015 WL 12852354, at \*1 (M.D. Fla. Apr. 14, 2015).

117. For example, in the West, PTSD has been linked to increased rates of drug and alcohol abuse. In Sri Lanka, meanwhile, researchers have linked PTSD to higher levels of child and intimate-partner abuse. Reicherter and Aylward, *supra* note 8.

118. A study produced by Rachel Yehuda found that the children of women who developed PTSD as a result of the Holocaust were more likely to exhibit PTSD symptoms than children whose mothers were not diagnosed with PTSD. Yehuda et al., *supra* note 9. For methodology, see footnote 7.

119. *Secondary trauma* is trauma caused by finding out a loved-one has been tortured, injured, or killed. The DSM now recognizes this as a possible PTSD trigger.

it slide. It may also raise issues of standing, depending on how attorneys argue relevance.

## V. EVIDENTIARY HURDLES

Although the evidentiary hurdles broad cultural trauma expert testimony must overcome will vary from case to case, several statutory and common law rules of evidence will pose the largest recurring threat to the admissibility of this evidence.

### A. *Proving Expert Status under FRE 702*

Rule 702 of the Federal Rules of Evidence (FRE) states that in order to qualify as an expert, a witness must have expert “knowledge, skill, experience, training, or education” in the field about which they intend to testify.<sup>120</sup> It further requires that:

- (a) the expert’s scientific, technical, or other specialized knowledge help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) testimony be based on sufficient facts or data;
- (c) testimony be the product of reliable principles and methods; and
- (d) the expert reliably apply the principles and methods to the facts of the case.”<sup>121</sup>

While later sections will address FRE 702’s other requirements,<sup>122</sup> this section focuses on the rule’s first requirement that expert witnesses have some form of expert knowledge.

While the international criminal tribunals have their own sets of rules and procedures which often differ significantly from those used in American courts, those rules and procedures still set out a number of requirements that a witness must meet to justify expert status.<sup>123</sup> A prudent attorney would look to the qualifications of the practitioners accepted by

120. Fed. R. Evid. 702.

121. *Id.*

122. Section (B)’s discussion of the *Joiner* Problem addresses Fed. R. Evid. 702 (a), and (d) to some extent, while the sections on *Frye* and *Daubert* address Fed. R. Evid. 702 (b) and (c).

123. Rule 87(3) of the ECCC’s Internal Rules (v. 8) requires that all evidence have “indicia of reliability.” There is no commonly accepted set of “indicia” for determining the reliability of a document. Case No. 002/19-09-2007-ECCC/TCA, Co-Prosecutors’ Rule 92 Submission Regarding Indicia of Reliability of the 978 Documents Listed in Connection with those Witnesses and Experts who May Be Called During the First Three Weeks of Trial (Public Redacted Version), ¶ 3 (December 23, 2011). A document’s reliability can generally be derived from its internal characteristics and/or external features. *Id.* In the case of expert testimony, this requirement translates into making sure that the court is informed of the expert’s education and work history and how involved they were in drafting written reports submitted to the court.

international tribunals as experts in cultural trauma to determine the common denominators between their professional backgrounds. Daryn Reicherter is a psychiatrist with a background in psychobiology.<sup>124</sup> In addition to heading the Human Rights in Trauma Mental Health Laboratory at Stanford, Dr. Reicherter is on the List of Experts for the Extraordinary Chambers in the Courts of Cambodia and for the United Nations' International Criminal Court.<sup>125</sup> He is also on the Fulbright Specialists Roster for his work in international trauma.<sup>126</sup> Much of Reicherter's work has focused on the treatment of Cambodian refugees for trauma disorders.<sup>127</sup>

Dr. Elisabeth Schauer, meanwhile, holds a Ph.D. in Clinical Psychology with a focus on trauma treatment in crisis regions, an M.A. in Education, and an M.P.H. with a focus on International Health. She has worked for UNICEF, UNIFEM, WHO, and UNAIDS, and holds certifications in client-centered counseling, gestalt counseling, and gender-specific counseling. Since 2001, she has served as the head of Vivo International—an international NGO that researches and treats trauma, and advocates for trauma prevention.<sup>128</sup>

Teufika Ibrahimfendic, whose expert testimony was admitted by the ICTY in two previous cases,<sup>129</sup> works as a psychotherapist for Vive Zene, a NGO run out of Tuzla.<sup>130</sup> She earned degrees in pedagogy and psychology from the University of Sarajevo in 1980 and certifications from the World Health Organization and Columbia University for her work in war trauma.<sup>131</sup> In addition to participating in over 800 hours of specialized training in trauma treatment, Ibrahimfendic boasts three years' experience working as a pediatric nurse and twenty-four years' experience as a psychiatric social worker.<sup>132</sup>

Upon review, three key experiences link Daryn Reicherter, Elisabeth Schauer, and Teufika Ibrahimfendic: (1) a graduate-level

124. Daryn Reicherter, M.D., STANFORD UNIVERSITY PROFILES, <https://profiles.stanford.edu/daryn-reicherter> [<https://perma.cc/BUD3-XUCT>].

125. *Id.*

126. *Id.*

127. Daryn Reicherter Publications, STANFORD UNIVERSITY PROFILES, <https://profiles.stanford.edu/darynreicherter?tab=publication> [<https://perma.cc/7WBA-959Z>].

128. Elisabeth Schauer, LINKEDIN, <https://www.linkedin.com/in/elisabeth-dr-kaiser-53764bb5/> [<http://perma.cc/RBA3-UQMC>].

129. Ibrahimfendic successfully admitted cultural trauma expert testimony in Prosecutor v. Ratko Mladić, Case No IT-09-92-T (ICTY, 2002) and Prosecutor v. Milorad Trbić, Case No.: X-KR-07/386 (ICTY, 2010).

130. Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1, Transcript of Hearing with Dr. Ibrahimfendić (Int'l Crim. Trib. for the Former Yugoslavia Dec. 16, 2002), *available at* <http://www.icty.org/x/cases/plavsic/trans/en/021216IT.htm> [<https://perma.cc/6N6D-UEH9>].

131. *Id.*

132. *Id.*

education in a trauma-related field, (2) past research on trauma-related topics, and (3) work experience treating trauma victims from the particular culture or social group on which their testimony focuses.<sup>133</sup> These characteristics clearly fulfill FRE 702's requirement that experts have specialized "knowledge, skill, experience, training, or education."<sup>134</sup> Domestic lawyers hoping to use cultural trauma expert testimony should likewise seek experts who have these attributes. Not only will courts recognize their expert status, but practitioners with experience in directly treating patients can better apply the general information in their reports to an individual plaintiff or defendant. This helps to avoid a *Joiner* problem.

#### B. *FRE 702(d) and the Joiner Problem*

In *General Electric Co. v. Joiner*,<sup>135</sup> the Supreme Court held that expert testimony claiming to show that a plaintiff's mild exposure to carcinogens through his line of work caused small cell lung cancer to develop failed the *Daubert* test.<sup>136</sup> The expert relied upon studies carried out on rodents exposed to high doses of carcinogens to justify his opinion that the plaintiff's exposure to the particular carcinogen had promoted his cancer.<sup>137</sup> Pointing to major differences between the conditions between the animal studies and the plaintiff's experiences, the Court excluded the expert testimony for drawing conclusions not supported by scientific research.<sup>138</sup> It explained:

[C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is

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133. Contrast *Trial Order at 1*, *United States v. Hernandez*, 2015 WL 10912345 (N.D.Ga., 2015) (No. 1:12-CR-322). (holding that a documentary filmmaker with a master's degree in media arts who had worked on filming Latino culture for 15 years did not qualify as an expert under Fed. R. Evid. 702 and *Daubert* because her experience in visiting Cantinas was not enough to make her an expert on Cantina culture).

134. Reicherter, Schauer, and Ibrahimfendic each has formal education and training in trauma, skill and experience in treating victims directly, and knowledge from years of research on trauma topics. They represent the gold standard of expert witnesses. Fed. R. Evid. 702.

135. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

136. *Id.*

137. *Id.*

138. *Id.*

simply too great an analytical gap between the data and the opinion proffered.<sup>139</sup>

Since this decision, problems with applying scientific research or theory to the facts of an individual case have become known as “*Joiner* problems.”<sup>140</sup> The only American case<sup>141</sup> to consider cultural trauma expert testimony ultimately excluded the evidence because of a *Joiner* problem. In *United States v. Woody*,<sup>142</sup> a Native American defendant accused of sexually abusing two children moved to exclude incriminating statements made during an FBI polygraph examination.<sup>143</sup> The defendant claimed that because he had a low I.Q. and was of Native American heritage, the conditions of his questioning had been more coercive to him than to the average suspect and therefore statements made during the examination should be excluded as involuntary.<sup>144</sup> To support this notion, the defense offered the expert testimony of Dr. David J. McIntyre.<sup>145</sup> According to Dr. McIntyre, the defendant’s ethnicity had affected the voluntariness of his statements in two ways: (1) historical trauma passed down through his Native American heritage caused him to capitulate more easily than non-Native suspects, and (2) because of cultural differences surrounding body language, the defendant perceived the interrogation session as more aggressive than non-Native suspects would.<sup>146</sup>

In his testimony, McIntyre drew on a line of historical trauma research pioneered by Dr. Maria Yellow Horse Brave Heart, and his personal experience in treating Native American patients at the Indian Health Service. He testified that:

[T]he theory of historical or intergenerational trauma suggests that some Native Americans experience depression, substance dependence, dysfunctional parenting, and unemployment as a result of unresolved trauma from historical losses (loss of people, land, and culture) that occurred to their forefathers (great-grandparents, grandparents, and parents) and transmitted to the younger generation.<sup>147</sup>

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139. *Id.*

140. At their root, *Joiner* problems are causation problems, and are linked to Fed. R. Evid. 702(d).

141. See footnotes 13 and 15.

142. *United States v. Woody*, 652 F. App’x 519, 520 (9th Cir. 2016).

143. *United States v. Woody*, No. CR-13-08093-001-PCT-NVW, 2015 U.S. Dist. LEXIS 44784 at \*1. (D.Ariz. April 6, 2015).

144. *Id.*

145. Dr. McIntyre is a licensed psychologist and holds a master’s and Ph.D. in psychology. He previously served as chief psychologist for the Pennsylvania Department of Corrections. *Id.* at 5.

146. *Id.* at 6-7.

147. *Id.* at 6.

The “cumulative wounding” resulting from these ancestral losses, he continued, “create[s] a sense of hopelessness and lack of control that permeate Native American culture.”<sup>148</sup> McIntyre stressed, however, that historical trauma does not affect all Native Americans equally and that he was not arguing that law enforcement should never interrogate Native American suspects.<sup>149</sup> Applying the voluntariness test,<sup>150</sup> the district court considered McIntyre’s testimony under the mantle of totality of the circumstances analysis.<sup>151</sup> However, the trial court assigned the historical trauma testimony only minor weight, reasoning: “That theory may well be sound, but regardless, his opinions are well supported by the other factors on which he relies. The effects of historical trauma appear to coincide to a large degree with those of cultural differences.”<sup>152</sup> Ultimately, the court excluded the statements, relying heavily on other evidence.<sup>153</sup>

Only a few months later, the ninth circuit reversed the trial court’s ruling on the admissibility of Dr. McIntyre’s historical trauma testimony.<sup>154</sup> In its decision, the court highlighted that Dr. McIntyre had acknowledged that “his ‘very broad generalizations about Native Americans’ could not be attributed to Woody specifically,” and had conceded that Woody had not been diagnosed with historical trauma because “[t]here is no such diagnosis.”<sup>155</sup> Thus, the trial court had clearly erred in admitting the historical trauma testimony.<sup>156</sup> The main problem, the court explained, lay in the fact that Dr. McIntyre could not attribute the historical trauma to the defendant individually.<sup>157</sup> However, the court continued, even if McIntyre had attributed the characteristics individually, it still would have excluded them “since the impact such attributes had on the voluntariness of [the defendant’s] statements remained only speculative.”<sup>158</sup> Because voluntariness falls under FRE 104(a)<sup>159</sup> and is thus excluded from scrutiny under other rules of evidence such as *Daubert*, the ninth circuit did not discuss or apply these frameworks to

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148. *Id.*

149. *Id.*

150. Reaffirmed by *Doody v. Ryan*, 649 F.3d 986, 1008 (9th Cir.2011) (en banc). *Id.* at 8.

151. *Id.*

152. *Id.* at 10.

153. *Id.* at 15.

154. *Woody*, 652 F. App’x at 521.

155. *Id.* at 520.

156. *Id.*

157. *Id.*

158. *Id.*

159. FRE 104(a) reads, “The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.” Fed. R. Evid. 104.

McIntyre's testimony. However, using analogical reasoning, it appears that the court excluded the testimony due to a *Joiner* problem.

The ruling in the *Joiner* case essentially bars lawyers from submitting broad cultural trauma expert testimony not linked to applied trauma testimony. FRE 702(d) and *Joiner* both require that expert testimony speak to an issue in the present case. The *Woody* case illustrates that without a strong connection, courts will exclude broad cultural trauma testimony as irrelevant and unreliable. This does not mean, however, that courts will always exclude broad cultural trauma testimony. Attorneys seeking to use broad cultural trauma testimony in U.S. courts should make sure that the research their expert cites relates to actual medical diagnoses in some way.

Because the DSM-V now recognizes a number of "cultural concepts of distress,"<sup>160</sup> experts can more easily tie their broad testimony to a widely-accepted diagnostic guide. If the experts are testifying to something not included in the DSM-V, they should still phrase their arguments either according to other diagnostic guides<sup>161</sup> or using clearly articulated, objective diagnostic criteria. The Feighner Criteria is a particularly good resource for showing how psychologists can describe mental health issues in an objective way.<sup>162</sup> Experts should also spend extra time reviewing relevant literature to collect as much evidence of scientific acceptance as possible, lest they pass the court's *Joiner* analysis only to fall victim to exclusion under the *Frye* or *Daubert* standard.

Attorneys must also ensure that their experts can adequately link broad descriptions of trauma-induced behaviors or statistics to the specific case. As *Woody* makes clear, courts will not admit broad cultural trauma evidence simply to create general context without connecting the information to the case at hand. It is unclear whether courts will permit experts to link broad cultural trauma testimony to case facts rather than to an individual. Although this remains a possibility given the broad nature of certain types of civil litigation, the growing application of *Daubert* factors to "softer" sciences like psychiatry after *Kumho Tire Co. v. Carmichael*<sup>163</sup> hint that this is a risky gamble.

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160. See footnotes 60-62.

161. Such as Cambodia's version of the DSM-V.

162. The Feighner Criteria are a set of diagnostic criteria for several mental illnesses developed by psychiatrists through empirical testing in the 1970s. These criteria helped set the standard of basing diagnostic criteria on empirical evidence where possible). John P. Feighner et. al., *Diagnostic Criteria for Use in Psychiatric Research*, ARCHIVES OF GEN. PSYCHIATRY, at 57(1972).

163. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

### C. *The Daubert Test*

Today, case law has well-established that the traditional diagnosis of PTSD meets the reliability prong of *Daubert* due to its widespread acceptance in the mental health profession and its inclusion in multiple editions of the DSM.<sup>164</sup> But unlike traditional PTSD diagnostic testimony and applied cultural trauma expert testimony, broad cultural trauma expert testimony could be less well-established. After all, broad cultural trauma testimony encompasses many different issues with varying levels of scientific acceptance.<sup>165</sup> Certainly, courts have admitted broad cultural testimony far less often than traditional PTSD testimony. Ultimately, however, *Daubert's* test turns not on how widely-accepted a test is by the scientific community, but in whether the theory is reliable.

Different kinds of broad cultural trauma testimony will fare differently under *Daubert*. Some areas of study, like intergenerational trauma, will pass with flying colors. Rachel Yehuda has spearheaded a number of studies on different victim groups using different empirical methods, the results of which all indicated that women can pass down an increased chance of PTSD to their children if they experience prenatal PTSD.<sup>166</sup> For example, Yehuda conducted a study in which she and her associates monitored 38 participants selected from a pool of 187 women who were pregnant and present at or near the World Trade Center during 9/11.<sup>167</sup> The women self-referred based on an ad promoting the study.<sup>168</sup> During the study, the women collected salivary samples from their children at wake-up and bedtime into pre-labeled tubes.<sup>169</sup> Saliva samples were immediately frozen and remained in that state until assay.<sup>170</sup> At the

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164. This wide acceptance also indicates that traditional PTSD testimony would pass Frye. Berger, Omri, Dale E. McNiel, and Renee L. Binder. *PTSD as a Criminal Defense: A Review of Case Law*, 40 J. AM. ACAD. PSYCHIATRY LAW 509, 510-511 (2012).

165. While some concepts such as intergenerational trauma and culture-specific stress reactions are backed by decades of clinical research, other areas of study such as historical trauma are less supported.

166. Yehuda, R. et al. "Transgenerational Effects of Posttraumatic Stress Disorder in Babies of Mothers Exposed to the World Trade Center Attacks During Pregnancy." *J. OF CLINICAL ENDOCRINOLOGY & METABOLISM*, 2005, at 4115-4118.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

nine-month check-in, mothers were also asked to leave saliva samples.<sup>171</sup> Researchers then tested the free cortisol levels<sup>172</sup> using an RIA.<sup>173</sup>

Controlling for maternal age, ethnicity, body mass index, hours of sleep and wakefulness, and breastfeeding by testing for associations with cortisol, the researchers conducted statistical analysis on log-transformed data.<sup>174</sup> The researchers found that salivary cortisol was significantly lower in the offspring of women with PTSD<sup>175</sup> ( $F = 8.0$ ,  $df = 1, 29$ ;  $P = 0.008$ ).<sup>176</sup> When researchers examined the data, including which trimester the pregnant women were in at the time of 9/11, maternal PTSD status remained significant ( $F = 11.20$ ,  $df = 1, 27$ ;  $P = 0.002$ ), with no effect of trimester.<sup>177</sup> However, an examination of PTSD effects in each trimester separately revealed a significant effect of maternal PTSD in infants born to mothers pregnant in the third trimester during 9/11 ( $F = 10.56$ ,  $df = 1, 8$ ;  $P = 0.012$ ), but not in infants born to mothers in the first or second trimesters.<sup>178</sup>

At its conclusion, the study found that babies of mothers who developed PTSD showed lower salivary cortisol levels in the first year of life.<sup>179</sup> Those lower cortisol levels were most apparent in babies born to mothers with PTSD in their third trimesters during 9/11, but PTSD symptom severity in the entire sample correlated with infant cortisol levels regardless of trimester.<sup>180</sup> In contrast, the cortisol levels in babies

171. *Id.*

172. Cortisol is a stress-related hormone that causes the body to increase the amount of sugar in the bloodstream, shut down non-essential functions to conserve energy in flight or fright situations. . Mayo Clinic Staff, "Chronic stress puts your health at risk", Mayo Clinic, <https://www.mayoclinic.org/healthy-lifestyle/stress-management/in-depth/stress/art-20046037>. It also helps regulate the catecholamine system by lowering adrenaline levels. Jain, Shaili, Cortisol and PTSD, Part 1: An interview with Dr. Rachel Yehuda, 15 June 2016, <https://www.psychologytoday.com/us/blog/the-aftermath-trauma/201606/cortisol-and-ptsd-part-1>. Cortisol levels have been associated with PTSD since 1986. John W. Mason et. al, *Urinary Free-Cortisol Levels in Posttraumatic Stress Disorder Patients*, J. OF NERVOUS AND MENTAL DISEASE, MONTH 1986, at 145, 148.

173. *Id.*

174. According to the report, "only mother's age was correlated with maternal and baby cortisol levels and was used as a covariate." *Id.*

175. Diagnosed before the test began using a checklist. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* Persons with PTSD have significantly lower cortisol levels on average than those without PTSD, although still within the normal endocrine range. Researchers like Yehuda have posited that "not having enough cortisol to completely bring down the sympathetic nervous system, at the time when it is very important for a person to calm down, may partially explain the formation of traumatic memory or generalized triggers." Jain, Shaili, Cortisol and PTSD, Part 1: An interview with Dr. Rachel Yehuda, 15 June 2016, <https://www.psychologytoday.com/us/blog/the-aftermath-trauma/201606/cortisol-and-ptsd-part-1>.

180. *Id.*

were unrelated to maternal depression.<sup>181</sup> The study also found that the correlation between maternal PTSD and cortisol levels in infants was remarkably similar to another Yehuda study that reported a correlation between parental PTSD and cortisol levels found in the urine of adult offspring of Holocaust survivors.<sup>182</sup> Despite these results, the study stressed that cortisol levels in the babies' saliva were at least partially affected by the children's own experiences and not solely controlled by their mothers' cortisol levels.<sup>183</sup>

Yehuda's saliva study clearly meets the *Daubert* standard—it was published in a peer-reviewed journal, contained standardized methods that other scientists could recreate (albeit with different traumatic events), and has been tested using similar methods in other traumatized groups. Given the admissibility of this type of study, theoretically, broad cultural trauma expert testimony resting on aggregated reports should satisfy *Daubert*. Meanwhile, broad cultural testimony based on fringe research that has not been widely accepted will fail *Daubert*. Even when methodologically-sound studies exist, if the expert fails to properly reference or cite them, her testimony will likely fail. Lawyers hoping to introduce broad cultural trauma expert testimony must be extremely careful in how they connect the case facts to the underlying research, because ultimately, the admissibility of this evidence hinges on the quality and the quantity of the research it has aggregated.

#### D. *The Frye Test*

Although *Frye* has been superseded by *Daubert* in most states, some courts still apply the *Frye* standard when deciding whether to admit expert testimony. The court in *Frye* held that in order to be admissible in court, “the scientific principle or discovery from which a deduction is made must have gained general acceptance in the particular field in which it belongs.”<sup>184</sup> Today, most courts would find the majority of broad cultural trauma expert testimony admissible. Experts develop broad cultural trauma testimony by aggregating peer-reviewed papers and studies in their field. Thus, their testimony is based on generally-accepted scientific knowledge from the relevant field. Furthermore, trauma researchers collect nearly all their data in the same way: through either

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181. *Id.*

182. A value of ( $r = -0.46$ ). *Id.* (citing Rachel Yehuda et al., *Cortisol Levels In Adult Offspring of Holocaust Survivors: Relation to PTSD Symptom Severity in the Parent and Child*, 27 PSYCHONEUROENDOCRINOLOGY 171 (2002)).

183. *Id.*

184. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

first-hand observation via treatment or through surveys and polls.<sup>185</sup> No matter what method they use, researchers must rely on self-reporting by patients to some extent. Thus, while some studies may be poorly executed, courts may recognize that the underlying methodology enjoys general acceptance in the field.<sup>186</sup>

Differences in methodology could cause a court to exclude expert testimony that relies on only a few studies, as in the *Joiner* and *Woody* cases. However, if experts follow the example of Elisabeth Schauer and Daryn Reicherter and cite a large number of relevant studies, courts will likely overlook weaknesses in the methodology of a single study. If an expert cannot aggregate a large number of studies on a particular issue, he or she should not pursue that issue in front of the court. By its nature, broad cultural trauma expert testimony provides an overview of modern psychiatric theory on different issues. Consequently, it is most persuasive when based on a large number of reports.

#### E. FRE 403 Balancing Test

FRE 403 permits courts to exclude relevant evidence “if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>187</sup> The notes of the advisory committee explain that “unfair prejudice . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”<sup>188</sup>

If broad cultural trauma expert testimony managed to survive inquiry under FRE 702 and *Daubert* or *Frye*, courts could still exclude this testimony under the unfair prejudice or misleading-the-jury prongs of FRE 403’s balancing test. Depending on how and why proponents seek to present this expert testimony, a defendant could face unfair prejudice. This kind of evidence often relates to highly stirring topics—rape, genocide, murder, and torture, among others. Moreover, in contrast to international criminal tribunals, where testimony about the statistical prevalence of PTSD or other trauma disorders is clearly connected to the subject matter of the cases, such connections are harder to draw in domestic cases. Meanwhile, testimony describing the broad psychological implications of traumatic events instigated by a perpetrator group whom the defendant worked for could skew the jury’s perception of the

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185. See *supra* notes 7-11.

186. Of course, it is highly preferable that experts putting together broad cultural trauma expert testimony use only peer-reviewed articles in order to avoid this problem altogether.

187. Fed. R. Evid. 702.

188. Notes of the Advisory Committee on Proposed Rules, Fed. R. Evid. 403.

defendant's liability, thus misleading the jury. Such testimony could also violate FRE 404 and 405's prohibition on improper character evidence.<sup>189</sup> Overly broad testimony could also sway the jury to vote based on their emotions. Furthermore, if the opponents present conflicting broad cultural trauma expert testimony, the court may choose to exclude both and focus only on applied cultural trauma testimony to avoid wasting time litigating subsidiary issues. However, in all three of these cases, judges could avoid these problems by either issuing limiting instructions or assigning very light weight to the broad cultural trauma testimony in bench trials.

## VI. CONCLUSION

Applied and broad cultural trauma expert testimony are types of evidence that risk overstepping the lines of admissibility and are ultimately only as convincing as the aggregated expert studies and reports upon which they rely. While applied cultural trauma testimony should overcome American evidentiary hurdles like *Daubert* and *Joiner* with ease, broad cultural trauma testimony has an uphill battle. *Joiner* poses the largest problem by far. With careful pleadings that emphasize that the overarching data contextualizes the facts of the case, however, savvy attorneys may yet succeed.

Ultimately, while the admissibility of this evidence lies in the eye of the beholder and the mouth of the advocate, the potential benefits reach far beyond the courtroom. By using experts to explain statistical trends and culturally-specific expressions of trauma, they can inform not only the judge and jury, but members of the public following the trial. The information contained in these reports can have a huge impact on communities – both cultural and professional. Therapists and doctors may adjust how they treat patients from particular cultural groups after viewing news articles detailing the findings of the expert testimony. Members of cultural communities could learn the origin of their maladies, and more importantly, that they are not suffering alone. This could lead to an increase in cultural minorities seeking treatment for trauma-related conditions and in more appropriate treatment thereof.

Moreover, legal recognition of culture-specific trauma disorders in one area of law will likely impact its recognition in other areas. Increased recognition in civil court could increase its recognition in criminal cases, by administrative bodies, and by legislatures. This could mean the difference between a traumatized member of a minority cultural group receiving unemployment or disability benefits or falling through

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189. Fed. R. Evid. 404-405.

definitional cracks. With the increasing numbers of refugees entering the United States, this issue will only become more important. American lawyers would do well to take another look in their litigation toolboxes to ensure that they are using everything at their disposal.