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CHAPTER

4

THE AUTHORITY OF THE RORSCHACH: AN UPDATE

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It has been a decade since Meloy, Hansen, and Weiner (1997) reported on the authority of the Rorschach in court between 1945 and1995. In their study of a half century of legal citations that appeared in federal, state, and military courts of appeal concerning the Rorschach, the test was cited in 247 published cases, and issues concerning the scientific nature of the test arose in 10.5% of the citations. After studying these particular cases, they concluded that "despite occasional disparagement by prosecutors, the majority of the courts found the test findings to be both reliable and valid" (p. 53).

Much has transpired over the past decade concerning the Rorschach, including both scientific and *ad hominem* attacks against its use, particularly in forensic settings (Wood, Nezworski, Lilienfeld, & Garb, 2003). Research concerning the test has also continued unabated, and the third edition of the advanced interpretation of the Comprehensive System was published (Exner & Erdberg, 2005) just prior to the 2006 deaths of two Rorschach pioneers, John Exner, Jr. and Paul Lerner. A search of PsycInfo indicates that during 2005 there were over 100 different scientific papers, dissertations, book chapters, and books published on the Rorschach both in the United States and Europe.

The question of legal weight of the Rorschach, moreover, remains central to its use in forensic settings. Weight is the "influence, effectiveness, or power to influence judgment or conduct" (Black, 1979, p. 1429), and for our purposes, it is the consideration the Rorschach test is given by the trier of fact in its decision making. This is the authority of the Rorschach, and a new study was conducted to see if the past decade has witnessed a change in the court's perspective on the test.

METHOD

The measures selected for study were the quantity and content of legal citations between 1996 and 2005 that mentioned the word *Rorschach*. Legal citations in this study were all published and unpublished federal, state, and military case law opinions written by various courts of appeal throughout the United States. The reference word *Rorschach* was entered into the Lexis computer database at the University of San Diego School of Law, and

all cases in which the word was mentioned were identified and printed in full text form. All cases were read to determine whether the reference word referred to the inkblot test or something else. Cases in which the test was utilized were studied for content and meaning, with a particular focus on whether or not the test's scientific status was accepted, challenged, or rejected.

RESULTS

There were 191 appellate cases between 1996 and 2005 in which the word *Rorschach* appeared. Twenty of these cases were unpublished (cannot be cited), and 21 additional cases did not refer to the test, but instead the word was used as a metaphor, adjective, or to name a person.[1] The Rorschach test was therefore cited in 150 appellate cases, averaging 15 times per year, three times the rate of citation during the previous half century (Meloy et al., 1997). The Rorschach test was utilized by forensic clinicians in a wide variety of civil and criminal case appeals, including death penalty, emotional disability, child custody, competency to stand trial, Miranda competency, workman's competency, termination of parental rights, habeas corpus petitions, conditional release and parole, alimony, sexually violent predator status, guardianship, family visitation, revocation of passport, SSI disability, child sexual abuse, and other criminal appeals. The test was most often cited in death penalty appeals. In the vast majority of all appeal cases, the test was mentioned by the court as one of several psychological tests utilized by examiners in their evaluation of the defendant, plaintiff, or subject of interest in the case. Other tests frequently mentioned included the Minnesota Multiphasic Personality Inventory–2 (MMPI–2), the Millon Clinical Multiaxial Inventory–III (MCMI–III), various measures of intelligence, and various measures of neuropsychological functioning. The Rorschach test was neither focused on, nor singled out, in these cases, but was treated, instead, as one test in a battery that provided useful psychological information to the court.

There were a minority of cases in which the Rorschach test received additional attention by the courts, and these cases fell into four categories: the definitions and functions of the test in the court's eyes, inappropriate use of the test, qualified use of the test, and criticism of the test.

Definitions and Functions of the Rorschach Test

The definitions and functions of the test were mentioned in 12 appellate cases. In *Hall v. State of Tennessee* (2005), the Court of Criminal Appeals defined the Rorschach as a "traditional inkblot test to test personality style and functioning" (p. 14). In *Rompilla v. Horn* (2004), the U. S. Court of Appeals, Third Circuit, drew on the definition of the test in *Stedman's Medical Dictionary* (27th ed.): "a projective psychological test in which the subject reveals his or her attitudes, emotions, and personality by reporting what is seen in each of 10 inkblot pictures" (p. 1808). In a death penalty appeal through the U.S. District

[1]Don J. Rorschach, the City Attorney of Irving, Texas, was mentioned by name in one case. In our first study, we contacted him and he told us that his father's great uncle was, indeed, Dr. Hermann Rorschach.

Court in Nebraska, Dr. Daniel Martell in *Ryan v. Clarke* (2003) explained that the method of scoring the Rorschach was standardized by Exner in the 1970s to validate the testing and eliminate the subjective results, and that absent such scoring, the test results are not reliable (p. 45). In *State v. Raiford* (2003), the Court of Appeals of Louisiana defined the Rorschach as "a projective personality test" (p. 11). In *Thompson v. Bell* (2001), another death penalty appeal, the Rorschach was defined as the "inkblot test" (p. 6). In a custody case in the Family Court of Delaware, the court in *Martin v. Martin* (2002) spelled out the function of the Rorschach: "This is a test that involves people's statements of reactions when looking at various ink blots. The responses are then compared to a large data base of the responses of others with various known characteristics" (p. 9). Likewise, the Supreme Court of California in a death penalty appeal noted that Dr. Don Viglione had used the test to determine whether the defendant's personality was more consistent with dependent traits or antisocial traits (*People v. Box*, 2000). That same year, the Court of Appeal in Louisiana in a termination of parental rights case found the Rorschach to be "an important diagnostic test" (p. 16) in *State of Louisiana in the Interest of Emma Hair* (2000). In Puerto Rico 3 years earlier, the U.S. District Court in *U.S. v. R.I.M.A.*, a juvenile transfer case to adult court, opined that the Rorschach's function was to "determine the individual's psychological profile and dynamics, that is, identify the decision making process and the meaning that an individual attributes to his surroundings" (p. 6).

Inappropriate Use of the Rorschach Test

Courts of appeal cited the inappropriate use of the test in four cases (2.6%). In *State v. Walker* (2005), the Court of Appeals of Ohio upheld a finding of a proper determination of a "sexual predator." However, a psychologist testified that solely on the basis of the Rorschach findings, the defendant had no sexual preoccupation, had no mental condition, excluding mental retardation, and was not a pedophile. The court noted that the psychologist did not use any other tests commonly geared toward addressing sexual issues, and he admitted under cross-examination that the Rorschach cannot yield diagnoses of sexual deviance.

In *Commonwealth v. DeBerardinis* (2004), the Superior Court of Massachusetts considered a motion to determine competency to stand trial. A psychologist administered the Rorschach using the Thought Disorder Index and also the vocabulary subtest of the Wechsler Adult Intelligence Scale–Revised (WAIS-R). She found moderately elevated formal thought disorder consistent with a chronic organic condition, presumably vascular dementia. She concluded that the defendant was psychotic. The court of appeal responded, "These conclusions are simply not supported by the factual evidence, and they appear to exaggerate the strength of her findings. Indeed, when asked to confirm her report's conclusion that DeBerardinis was psychotic, she amended her opinion by stating that he had the capacity to be psychotic or the propensity for psychotic thinking ... the court finds that the doctor's conclusions do not support a determination of incompetence to stand trial in this case" (p. 5).

In *State v. Parker* (2002), the Court of Appeals of Washington reviewed the trial court's exclusion of the testimony of a prominent neuropsychologist in a double sexual

murder case. In the trial, the neuropsychologist determined that the defendant had "generally low average to borderline mental ability" but was not mentally retarded. In addition, she testified that the defendant's responses to the Rorschach did not suggest a violent predisposition because no sexual associations were given, nor any associations suggesting violent or destructive activity (Footnote 8). During an interview with the prosecution before trial, she stated that what she knew about the defendant from her testing and interview and the details of the crimes—she did not review any police reports, lab tests, autopsy reports, or other discovery—did not "mesh." "He doesn't seem like the kind of person, or have the kind of capacity for mental elaboration and mental imagery and complexity that performing these two murders in such a similar manner would suggest" (Footnote 11). She further stated that his Rorschach responses did not indicate sexual pathology, aggression, or anger, and that she doubted he committed the murders because he didn't come across as an angry person (Footnote 15). She admitted, however, that the Rorschach test is not an accepted method of evaluating the likelihood that someone committed a crime. The court requested a detailed explanation from the neuropsychologist as to how her tests indicated the defendant was incapable of performing the acts committed by the murderer. She subsequently submitted a certified letter stating that she was unable to reach any conclusions about whether the defendant committed the murders. The trial court found her testimony irrelevant and speculative. The Court of Appeals affirmed the decision and, on the basis of Federal Rules of Evidence 401 and 702, ruled that she had not provided an adequate evidentiary foundation for her opinions, and therefore the trial court had not abused its discretion in excluding her testimony.

In the Supreme Court of Texas (*S.V. v. R.V.*, 1996), the judges agreed to review a case in which an adult child intervened in her parents' divorce proceeding, alleging that her father was negligent by sexually abusing her until she was 17 years old. A forensic psychologist testified during the subsequent court proceeding that the daughter's MMPI test showed that she fit the classic "V profile" of someone who had been abused, and that several aspects of the father's Rorschach test were also consistent with what one would expect to see in a child abuser. The Supreme Court did not comment directly on this psychologist's testimony, but ruled that expert opinions regarding recovered memories of childhood sexual abuse could not be objectively verified to extend the discovery rule, and thus the action was barred due to the passage of time.

Qualified Use of the Rorschach Test

In the Court of Appeal of Louisiana, a customer brought a personal injury action against a discount department store for injuries she sustained when a shelving display stocked with crawfish platters allegedly fell on her (*Green v. K-Mart Corporation*, 2003). The examining psychologist eventually diagnosed her with psychotic depression, but testified that her Rorschach test results were invalid because she only responded to three cards.

In *U.S. v. Battle* (2003), the U.S. District Court in Atlanta heard a petition for postconviction relief following a murder conviction and death penalty. The 133-page opinion included, among other things, a lengthy analysis of the use of the Rorschach *WSum6* score and *SCZI* in the determination of schizophrenia, relying most heavily on the testimony of

Mark Hazelrigg, at the time a psychologist from the Federal Bureau of Prisons. The court noted that the Exner scoring system was "widely accepted," reviewed several studies concerning the validity of these indices, and reiterated that the psychologists on the case agreed that the Rorschach scores were only suggestive of the presence or absence of schizophrenia. On a more stylistic note, the court opined that another defense psychologist's testimony at trial was "lengthy, repetitious, and obscure" (p. 110). "The court could tell that some of the jurors were struggling to stay focused on his testimony ... occasionally, a juror or two closed her eyes, but only momentarily. In the case of one juror, the intervention of the Court Security Officer was required occasionally to make sure that the juror did not fall asleep" (p. 110). The defense psychologist's testimony, likely causing the sleepiness of the jurors, resulted in a petition filed by the defense attorneys that a hearing should be held to determine jury misconduct. The court denied their motion.

In the Court of Appeals of Michigan, two minors petitioned for the termination of their father's parental rights (*In re Hamlet*, 1997). A psychologist who examined the father determined on the basis of the Rorschach test that he had an antisocial personality disorder. This finding was challenged by the father's counsel on the basis that the Rorschach is not a reliable determiner of narcissism. The court opined that both sides agreed the father would need years of therapy before he could adequately parent his children, therefore the outcome would be the same whether or not the psychologist's test findings were accurate. The termination of the father's parental rights was affirmed.

Criticism of the Rorschach Test

The appellate courts criticized the test in three cases (2%). The U.S. District Court in Atlanta heard a death penalty appeal in 2001 in the case of Anthony Battle (*U.S. v. Battle*), an inmate who had killed a federal corrections officer with a hammer in 1994. This hearing was 2 years prior to the postconviction relief hearing noted previously before the same court. The judges wrote, "The Rorschach is a test frequently used in diagnosing schizophrenia, but it does not have an objective scoring system. Rather, the Rorschach is scored by using the Exner guideline system which allows some discretion to the scorer" (p. 8).

In another criminal juvenile transfer case to adult court (*State ex rel. H.H.*, 1999), two psychologists examined the adolescent charged with murder. The Superior Court of New Jersey, Atlantic County, wrote, "It should be noted Dr. Witt testified that the Rorschach and house-tree drawing tests administered by Dr. Bogacki are somewhat controversial and considered to be of questionable validity in the field of psychology. During cross-examination, Dr. Bogacki admitted that there is disagreement about the effectiveness of the house-tree drawing test, and that many psychologists do not believe much in the validity or effectiveness of the Rorschach test" (p. 12).

The U.S. District Court for the Northern District of Indiana reviewed a denial of an application for supplemental security income (*Jones v. Apfel*, 1997). The examining psychologist used the Rorschach and attempted to use the MMPI. The court wrote in a footnote, quoting from the *Attorney's Textbook of Medicine* by Roscoe Gray: "The Rorschach test is the most widely used objective personality test. However, there is no obvi-

ous socially desirable answer to these tests, results do not meet the requirements of standardization, reliability, or validity of clinical diagnostic tests, and interpretation thus is often controversial" (93–76.2).

A Rorschach by Any Other Name

The word *Rorschach* continues to be widely used as a metaphor and adjective in courts of appeal throughout the United States. In a family trust case in California, the inconsistency of the Probate Code became a "Rorschach test for the parties" (*Huscher v. Wells Fargo Bank*, 2004). In *Baker v. Welch* (2003), a U.S. District Court wrestled with an action brought by a parolee because his female parole officer viewed his penis while taking a urine test, thus violating his right to privacy. The court opined that much of the Bill of Rights is a Rorschach test, wherein "what the judge sees in it is the reflection of his or her own values, values shaped by personal experience and temperament as well as by historical reflection ..." (p. 23). In *Harris v. City of Chicago* (2002), the Picasso statue in Daley Plaza cast a "Rorschach shadow" in an action against the city to prevent the reading of a prayer at a commemoration ceremony. In a firearm conviction appeal, the U.S. Court of Appeals for the First Circuit wrote, "Engaging in any mode of analysis without first establishing a statutory definition would be like administering a Rorschach test without any inkblots" (*U.S. v. Nason*, 2001, p. 6).

Increasingly, the word *Rorschach* is used to describe a process by which a jurist projects his individualized notion of justice into a particular matter before the court (*Michigan United Conservation Clubs v. Secretary of State*, 2001; *Temps by Ann, Inc. v. City State Services*, 2000; *Pallisco v. Pallisco*, 1999; *U.S. v. Epps, 1997; Kevorkian v. Thompson*, 1997). In one case, Fourth Amendment search and seizure law was at risk of becoming "one immense Rorschach blot" (*State v. Smith*, 1997). By far the most common recent use of the word *Rorschach* as judicial metaphor is to describe the shape of redistricting to rearrange voter demographics, often to the advantage of one political party over another (*Luidens v. 63rd District Court*, 1996; *Johnson v. Miller*, 1996; *Johnson v. Mortham*, 1996; *King v. State Board of Elections*, 1996). One court even referred to the process of creating a congressional district as "racial Rorschach-ism" (*Ray Hays v. State of Louisiana*, 1996).

The most striking quote found in this study, however, concerned an attorney's challenge to a psychologist after he testified that the Rorschach could measure what was unconscious (*In the Interest of M.C.M. et al.*, 2001). The Court of Appeals of Texas transcript read as follows:

> *Opposing counsel*: "Doctor, the unconscious that you previously say it measures, in part, the Rorschach Test, can you name one empirical study that has ever proven the unconscious to exist?"
>
> *Psychologist:* "Not off the top of my head."
>
> *Opposing counsel*: "So what you are telling the Court is that you use a test that measures something that doesn't ~~test~~ exist to determine that?"
>
> *Psychologist*: "I am sorry, what is your question?"

Court: "Before you finish that question, I don't know where we are going with what tests are proven what, but so it may help us on other examinations of this sort, this court is of the opinion that there is an unconscious whether it's been proven or not. I think it's empirically known that there is an unconscious state and I take judicial notice of the existence of such."

Opposing counsel: "The Court takes judicial notice of something that has never been proven to exist, Your Honor? Do I understand the Court to say that?"

Court: "However you are defining it. I am saying that the Court takes judicial notice of the fact that this Court believes there is an unconscious state." (pp. 7–8)

Another judge was appointed to hear this motion.

CONCLUSIONS

The Rorschach has been cited significantly more frequently (15 times compared to 5 times per year) and with significantly less criticism (2% vs. 10.5%) when this previous decade's appellate cases (1996–2005) are compared to the last half century's cases (1945–1995) (Meloy et al., 1997). There was not one case in which the Rorschach was ridiculed or disparaged by opposing counsel. More importantly, two earlier court decisions which completely devalued the Rorschach as a psychological test—in *Alto v. State* (1977) the Rorschach was labeled a technique, not a test; and, in *Usher v. Lakewood Engineering & Mfg Co.* (1994), a protection order was issued against all psychological testing due to questionable validity—did not serve as precedent for any subsequent case opinions in the last decade. There has been no Daubert challenge to the scientific status of the Rorschach in any state, federal, or military court of appeal since the U.S. Supreme Court decision in 1993 set the federal standard for admissibility of scientific evidence (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993). This does not preclude the existence of challenges at the trial court level, which quantitatively cannot be known, but it is reasonable to assume that such challenges, if they occurred, were not serious enough to rise to the level of an appeal.

These empirical findings invite two alternative explanations: first, the scientific criticism of the Rorschach, most notably the publications of Wood et al. (2003), which in turn stimulated a rigorous scientific debate and studies to measure and improve the reliability, validity, and norms for the test (Board of Trustees of the Society for Personality Assessment, 2005), have paradoxically resulted in a much firmer scientific footing for the Rorschach. Or, second, the swirling scientific debates in the academic journals have been a tempest in a teapot, and have largely gone unnoticed and unheralded by both forensic clinicians who regularly use the Rorschach and the appellate courts who consider the test one of several valid measures of personality and psychology. The word itself continues to be deeply embedded as a metaphor in the lexicon of the judiciary, rarely misused and often colorfully embellished.

When the test was mishandled by experts, the same pattern emerges as we found in our previous study. The psychologist's inferences and conclusions derived from the Rorschach went far beyond the data, and were considered unfounded and speculative by the court. It is frankly astonishing that an occasional psychologist will still attempt

to determine whether or not a crime was committed by studying a defendant's Rorschach. Other inferential leaps, although there were few in these appellate cases, were characterized by an attempt to criminally profile or diagnose a subject solely on the basis of his Rorschach test.

The recommendations from Meloy et al. (1997) are still applicable given the last decade's findings, and bear repeating:

> Psychologists who use the Rorschach in court should pay particular attention to the inferences that they develop from the data. These inferences should be closely linked to one another, previously validated in published research, and consistent with other findings in the case derived from other sources of evidence. These other sources of evidence should typically include self-report of the examinee, historical and contemporaneous data independent of self-report, and other administered tests. The decision to use the Rorschach in a forensic case should also have some bearing on the psycholegal question that is to be addressed. (p. 61)

The empirical findings of this new study substantiate and extend the findings from our previous work. Although judges are not scientists, and it is the obligation of psychologists who use the Rorschach to know the scientific parameters of the instrument, it is clear that the test continues to have authority, or weight, in higher courts of appeal throughout the United States.

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