

Behavioral Science Evidence in the Age of *Daubert*: Reflections of a Skeptic

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I. Introduction

“Both fields, those of Mental health and Law, ... speak two different languages [and] have different customs and casts of thought ...Diagnoses do not convey legal truth. Legal ‘truth’ and scientific ‘truth’ may have nothing to do with each other.”¹

From its earliest use in American courts, when a Dr. Brown offered his “scientific” opinion that the victims had been bewitched by the accused,² expert testimony has posed fundamental issues for our system of adjudication. At its most basic the quandary is: How can we utilize specialists to educate a lay jury about matters beyond their ken without at the same time intruding upon the jurors’ central role as ultimate fact-finder?

In recent years courts and commentators have focused considerable attention on one dimension of this problem-- assuring some degree of “reliability” regarding the principles and methodologies underlying the expert’s testimony before it is heard by the jury. While the *Frye*³ approach delegated this assessment to the practitioners in the particular field by way of the “general acceptance” standard,⁴ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁵ and its progeny

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¹ Lawrence Loeb, “Forensic Testimony: What Judges Want,” 24 Pace L. Rev. 211, 211-212 (2003).

² Howell, A Trial of Witches at Bury St. Edmonds, 6 STATE TRIALS 687, 697 (1665), discussed in Moenssens, et. al., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 6 (1995), and Jansonius & Gould, Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility, 50 Baylor L.Rev. 267, 270 (1998). “The accused were found guilty and hanged. No issue seems to have been raised in that case concerning the validity of the process for determining whether one was a witch.” Reed v. State 283 Md. 374, 385, 391 A.2d 364, 370 (Md. 1978). See generally Jane Campbell Moriarity, “Wonders of the Invisible World: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials,” 26 Vermont L. Rev. 43 (2001).

³ Frye v. United States, 293 F. 1013 (1923).

⁴ Under *Frye* the “court itself did not have to comprehend the science involved ... [it] only had to assure itself that among the people involved in the field, the technique was acceptable as reliable.” 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE §702.05[1] (2d ed. 1997). “[G]iven the impact of the *stare decisis* doctrine, once a court, relying on *Frye*, had ruled that a doctrine or principle had attained general acceptance, it was all too easy for subsequent courts simply to follow suit. Before long, a body of case law could develop stating that a methodology had achieved general acceptance without there ever having been a contested,

(as well as revised FRE 702) now assign the trial judge the enhanced role of “gatekeeper,” screening expert testimony based on certain reliability criteria. Evidence routinely admitted under the pre-*Daubert* regime—from forensic to epidemiological to economic—is now subject to close scrutiny and exclusion even before a jury is even impaneled.⁶ In the age-old contest between judge and jury, the balance has shifted dramatically toward the former in this regard.⁷

Daubert’s measure of reliability clearly reflects a traditional conception of “science,” envisioning a model driven by experimentation, replication, and validation.⁸ In the context of the “hard” sciences concerning physical phenomena, “scientific facts” (like the force of gravity) can be validated in these ways.⁹ But applying this model to the “social” (“soft”) sciences, the subject of this paper, is far more problematic.

The social sciences most often find their way into the courtroom as a tool to account for or predict human behavior.¹⁰ The evidence usually consists of general assertions about classes of persons (such as rape victims) and is offered “to provide a social and psychological context in which the trier can understand and evaluate claims about the ultimate fact.”¹¹ Expert testimony concerning “child sexual abuse accommodation syndrome (CSAAS),” “battered woman syndrome,” “learned helplessness,” and “rape trauma syndrome” is offered by prosecutors to explain conduct of the alleged victim which appears inconsistent with abuse, such as delay in reporting the events, recantation, or remaining in a relationship with the abuser. Battered woman syndrome evidence may also be offered by the defense for the purpose of establishing that the

detailed examination of the underpinnings of that methodology.” U.S. v. Horn, 185 F.Supp.2d 530, 554 (D.Md. 2002)

⁵ 509 U.S. 579 (1993).

⁶ See, e.g., Fradella, O’Neill & Fogarty, “The Impact of *Daubert* on Forensic Science,” 31 Pepperdine L.Rev. 323 (2004).

⁷ It has been suggested that *Daubert* reflected “a fundamental alteration of the relationships between judges, juries, lawyers, and experts.” Shuman and Sales, The Impact of *Daubert* and its Progeny on the Admissibility of Behavioral and Social Science Evidence,” 5 Psychol., Pub Pol & L 3, 4 (1999). In perhaps its most dramatic form, the new regime permits the trial judge to exclude a proponent’s expert witnesses before trial, and then grant summary judgment against it. See, e.g., Claar v. Burlington Northern Railroad Co., 29 F.3d 499 (9th Cir. 1994).

⁸ For a compelling argument that this conception of science is “unduly cramped,” see David Crump, “The Trouble with *Daubert*—*Kumho*: Reconsidering the Supreme Court’s Philosophy of Science,” 68 Missouri L. Rev. 1 (2003).

⁹ See Dean Hashimoto, Science as Mythology in Constitutional Law, 76 Ore L Rev 111, 112 n. 7 (1997).

¹⁰ For a good overview of the various forms of this evidence, see the recent symposium “Syndromes, Frameworks, and Expert Testimony: What Jurists Need to Know” in 24 Pace L.Rev. 187 et.seq. (2003).

¹¹ Neil J. Vidmar & Regina A. Schuller, “Juries and Expert Evidence: Social Framework Testimony,” 52 Law & Contemporary Problems 133, 135 (1989). See also Walker & Monahan, Social Frameworks: A New Use of Social Science in Law, 73 Va. L. Rev. 559 (1987). One writer has conceptualized the role of social science in judicial proceedings as “assisted sensemaking”: “the social sciences have been developed to assist and extend natural human

defendant believed she was in imminent danger even though the objective circumstances posed no apparent immediate threat justifying self-defense (as where the abuser is killed in his sleep).¹² “Future dangerousness” testimony is offered during the penalty phase of capital cases¹³ and in proceedings to commit sexual aggressors.¹⁴

Derived not from experimentation but observation, there is serious question as to whether much of this behavioral evidence can meet the *Daubert* definition of reliable science.¹⁵ Nonetheless, this evidence continues to be routinely admitted at trial,¹⁶ oftentimes with little apparent critical analysis on the part of the court and sometimes even after the evidence has been discredited in its own field.¹⁷ Indeed, researchers tracking *Daubert* have concluded that it has not resulted in significant changes in the admissibility of behavioral and social science evidence.¹⁸

abilities to observe, understand, and make judgments about social behavior, organizations, and the like.” Melvin M. Mark, “Social Science Evidence in the Courtroom: *Daubert* and Beyond,” 5 Psychol. Pub. Pol. & Law 175 (1999).

¹² See, e.g., Mass. G.L. 233, §23F; Calif. Evid. Code §1107.

¹³ *Barefoot v. Estelle*, 463 U.S. 880 (1983).

¹⁴ See generally Faigman, et. al. MODERN SCIENTIFIC EVIDENCE §36-1-36.26 (1999).

¹⁵ “Science” has been defined as “systematized knowledge derived from observation, study, and experimentation carried on in order to determine the nature or principles of what is being studied.” WEBSTER’S NEW WORLD DICTIONARY (current ed). An eminent social scientist described science as “essentially a method of controlled observation and verification for the purpose of reducing human errors of observation, judgment, or logic. Science begins with observation and ends by testing its assumptions against experience.” Kenneth B. Clark, *The Desegregation Cases: Criticism of the Social Scientist’s Role*, 5 VILL.L.REV. 224, 233 (1959).

¹⁶ See Sections B & C, *infra*.

¹⁷ Munchausen syndrome by proxy, for example, which purports to identify parents (mostly mothers) who feign or create illness in their children, “continues to carry weight in the judicial system” although it has been shown to be fundamentally flawed. See “The Bad Mother,” *The New Yorker*, August 9, 2004, at 62, 69. A forensic psychologist reports that in courtrooms “they’re treating [this profile] as probative when [it]s not.” *Id.* But compare *Adoption of Keefe*, 49 Mass.App. 818,824, 733 N.E.2d 1075, 1080 (2000) (Munchausen syndrome inadmissible as profile evidence).

Even some long-time staples of psychology like the Rorschach inkblot personality test are being re-evaluated and rejected in the field. See William M. Grove & R. Christopher Barden, “Protecting the Integrity of the Legal System: The Admissibility of Testimony from Mental Health Experts Under *Daubert/ Kumho* Analyses,” 5 Psychol., Pub Pol & L 224, 226-229 (1999); Frederick Crews, Review of “What’s Wrong with the Rorschach?: Science Confronts the Controversial Inkblot Test” by James M. Wood, et.al, in *The New York Review of Books*, July 15, 2004, at 22; and “Against Types,” *Boston Sunday Globe*, September 12, 2004, at D1. Although some psychologists assert the Rorschach is no more valid than “tea-leaf reading and tarot cards,” it continues to be relied upon during expert testimony in child custody disputes, sex offender evaluations, civil suits, juvenile delinquency cases, and other proceedings. “The Rorschach is routinely relied upon in the forensic realm.” *Id.*

For a scathing indictment of the entire realm of psychological testimony, see Margaret A. Hagen, *WHORES OF THE COURT: THE FRAUD OF PSYCHIATRIC TESTIMONY AND THE RAPE OF AMERICAN JUSTICE* (1997).

¹⁸ Shuman and Sales, *The Impact of Daubert and its Progeny on the Admissibility of Behavioral and Social Science Evidence*, 5 Psychol., Pub Pol & L 3, 5 (1999). “[B]ehavioral and social science evidence that was admitted before *Daubert* has been admitted after *Daubert*.” *Id.* Professor Slobogin comes to the same conclusion, and even detects some increase in admission rates. See Christopher Slobogin, “Doubts About *Daubert*: Psychiatric Anecdotes as a Case Study,” 57 Wash. & Lee L.Rev. 919, 940 (2000). Part of the explanation may be the “grandfathering in” of evidence previously ruled admissible, as discussed below.

It is submitted here, however, that the recent focus on reliability has distracted us from far more basic evidentiary problems with the admission of much behavioral science, particularly of the syndrome variety.. These concerns include:

- Whether the behavioral expert's testimony is "*helpful*" to the trier-of-fact in the sense required by FRE 702. Does the jury *need* assistance on the matters addressed by the testimony? And, if so, does the evidence approach the level of certainty and precision necessary to render it *of assistance* in resolving the case?
- Whether the expert testimony is truly *relevant* to the disputed issues in the particular case (what *Daubert* called "fit") and, if so, whether its *probative value* is nonetheless outweighed by the distinct risk that the jury will be confused, distracted, overwhelmed, or unfairly prejudiced by the evidence (the familiar FRE 403 balance)?
- Whether the expert testimony constitutes impermissible vouching for the credibility of the complaining witness, or bumps up against the prohibition on character and propensity evidence (FRE 404)?
- Finally whether the "costs" of the expert testimony to the parties and the judicial system outweigh the benefits, and if so what alternatives exist?

Exploration of these issues suggests a fundamental rethinking of the widespread admission of behavioral science evidence, a phenomenon which threatens the integrity of the fact-finding process.

II. The Reliability of Behavioral Science Evidence

A. The *Daubert* Standard

"It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment--often of great consequence--about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is

*struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.”*¹⁹

Daubert v. Merrell Dow Pharmaceuticals, Inc. provided the vehicle by which the Court reworked the doctrinal structure for weighing the admissibility of scientific²⁰ proof. The decision was written against the backdrop of dissatisfaction with the ubiquitous *Frye*²¹ standard, which pinned admissibility on whether the methodology was "generally accepted" as reliable in the particular scientific community.²² *Frye* produced results that were both *overinclusive* (in admitting dubious evidence merely because practitioners in the field rallied to its support) and *underinclusive* (in excluding reliable evidence merely because a consensus had not yet emerged accepting its validity). *Daubert* was portrayed in the popular media as the “junk science” case after the phrase from Peter Huber’s 1991 book *Galileo’s Revenge*.²³

The Dauberts alleged that their children’s birth defects were caused by the mother’s ingestion of Bendectin, an antinausea drug. Merrell Dow moved for summary judgment relying upon the affidavit of a physician/epidemiologist who had reviewed the 30 published studies concerning Bendectin, none of which connected the drug to birth malformations. Plaintiffs countered with eight experts of their own who connected the causation dots by reference to test tube and animal studies, pharmacological comparisons of Bendectin and substances known to

¹⁹ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993).

²⁰ A standard treatise observes:

In truth, much of the proof that is presented as “scientific” evidence involves very little science. Over the years, the term has come to be generically applied to a broad spectrum of expert opinion testimony that spans the sciences, the arts and all kinds of skilled professions. Even within a profession that rests on scientific underpinnings, in the sense that the discipline has definite rules and fixed concepts that govern its workings, the testimony offered by its specialists is frequently couched in terms of opinions, conclusions, and evaluations which, themselves, are not scientifically measurable.

Moenssens, Starrs, Henderson & Inbau, *SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES* 1 (4th ed. 1995). Thus a fingerprint expert who compares a latent crime scene print to the defendant’s is engaged not so much in science as in the skill and art of such comparison. See *United States v. Llera Plaza*, 188 F.Supp.2d 549 (E.D.Pa. 2002).

²¹ *Frye v. United States*, 293 F. 1013 (1923).

²² See generally Giannelli, “The Admissibility of Novel Scientific Evidence: *Frye v. United States*, A Half-Century Later,” 80 Colum L. Rev. 1197 (1980). Much of course depended upon identification of the relevant scientific community. Astrology may be generally accepted among the community of astrologers, but that would not make it reliable science. The Supreme Judicial Court of Massachusetts cautioned

that a judge ... must not define the “relevant scientific community” so narrowly that the expert’s opinion will inevitably be considered generally accepted. If the community is defined to include only those experts who subscribe to the same beliefs as the testifying expert, the opinion will always be admissible. A relevant scientific community must be defined broadly enough to include a sufficiently broad sample of scientists so that the possibility of disagreement exists.

Canavan’s Case, 432 Mass. 304, 314, 733 N.E.2d 1042, 1051 (2000).

cause birth defects, and a “re-analysis” of the previously published epidemiological studies. The district court (affirmed by the Ninth Circuit Court of Appeals) discounted plaintiffs’ experts because their methodologies were not “generally accepted” within the medical and scientific communities, and consequently granted summary judgment for Merrell Dow.

Vacating and remanding, Justice Blackmun’s opinion rejected *Frye*’s outward-looking and singular focus on “general acceptance” and concluded that FRE 702²⁴ imposed upon trial judges themselves the task of independently assessing the reliability of scientific proof. “[I]n order to qualify as ‘scientific knowledge’ [within the meaning of FRE 702], an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—*i.e.*, ‘good grounds,’ based on what is known.”²⁵

General acceptance within the scientific community becomes only one of several factors for the judge to consider under *Daubert*. In codifying the new standard in FRE 702, the Advisory Committee observed:

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are: (1) whether the expert’s technique or theory can be or has been tested—that is, whether the expert’s theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) the degree to which the technique or theory has been generally accepted in the scientific community.²⁶

As David Faigman has described the new concept of evidentiary reliability,

The key to being a good scientist is, of course, to be self-critical. Thus, Karl Popper and the Court in *Daubert* used the notion of falsification to describe the process of hypothesis testing. The underlying point is that only when hypotheses survive myriad attempts to falsify them do we gain enough confidence to believe them. Hence, if we believe that cross-racial identifications are less reliable than same-race identifications, research should rigorously test this hypothesis by subjecting it to tests that would falsify it. The

²³ See D. Michael Risinger, “Defining the ‘Task at Hand’: Non-Science Forensic Science After *Kumho Tire Co. v. Carmichael*,” 57 Wash. & Lee L. Rev. 767, 768 (2000).

²⁴ “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise” FRE 702.

²⁵ 509 U.S. at 590.

²⁶ Advisory Committee Note to FRE 702, Amendment effective December 1, 2000.

logic of the null hypothesis is that we should not accept our pet hypothesis - the alternative hypothesis - until we have no choice based on our rules of decision.²⁷

Other factors to weigh include whether the testimony grows naturally and directly out of research conducted independent of the litigation, or was prepared expressly for purposes of testifying; whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; whether the expert has adequately accounted for alternative explanations; whether the expert is being as careful in court as he would be in his regular professional work; and whether the field of expertise claimed by the expert is known to reach reliable results.²⁸

Daubert makes clear that the trial judge's task of screening expert evidence for reliability is not limited to *novel* scientific techniques (such as the systolic blood pressure lie detector device in *Frye*).²⁹ Nor, with *Kumho Tire Co., Ltd. v. Carmichael*,³⁰ is it limited to *scientific* proof but applies to *all* expert testimony. Carlson, a mechanical engineer and tire failure expert, opined that the right rear tire on plaintiffs' minivan blew out because of a latent manufacturing or design defect. His conclusion was founded upon visual inspection of the tire and exclusion (based on his observations and experiences over the years) of other possible causes (what a physician would refer to as a differential diagnosis). Certiorari was granted on the question of whether *Daubert* applied to such expert testimony which did not derive from "scientific" principles, and the Court answered in the affirmative. While thus expanding the judge's gatekeeping role to *all* expert testimony,³¹ Justice Breyer's opinion cautioned that the standard for measuring reliability must remain flexible and that "*Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case."³²

The premise of *Daubert* and *Kumho Tire* is that the expert, unlike an ordinary witness, is permitted wide latitude to offer opinions (even absent first-hand acquaintance with the events in question) because he or she brings relevant *knowledge* which will assist the trier of fact to resolve facts in dispute. "Knowledge," *Daubert* notes, means "more than subjective belief or

²⁷ Faigman, "The Law's Scientific Revolution: Reflections and Ruminations of the Law's Use of Experts in Year Seven of the Revolution," 57 Wash. & Lee L.Rev. 661, 673 (2000).

²⁸ Advisory Committee Note to FRE 702, Amendment effective December 1, 2000.

²⁹ 509 U.S. at 592 n.11.

³⁰ 526 U.S. 137 (1999).

³¹ In so doing, the Court answered what has been referred to as the "boundary" question, namely what evidence is subject to special scrutiny. See D.H. Kaye, "Choice and Boundary Problems in *Logerquist*, *Hummert*, and *Kumho Tire*," 33 Ariz. St.L.J 41 (2001).

³² 526 U.S. at 141.

unsupported speculation” and suggests instead a “body of known facts or ... ideas inferred from such facts or accepted as truths on good grounds.”³³ It is the trial judge’s task to assure (before the testimony is heard by the jury) that it derives from reliable sources and that the witness is employing “the same level of intellectual rigor” he would use outside the courtroom in conducting his professional activities.³⁴ Where earlier decisions placed great faith in the ability of lay jurors to assess the validity of expert testimony as tested by cross examination and met by contrary evidence,³⁵ the judge may now preempt their role.

Yet the laundry list of reliability factors set out in *Daubert* and *Kumho Tire* provides little concrete guidance to trial judges.³⁶ How much is each factor to be weighed? What constitutes an acceptable error rate? Can general acceptance of a methodology trump negative answers on the other factors? That “gatekeeping” is no small burden is reflected in the remarks of Chief Judge Kozinski in his opinion on the remand of *Daubert* (again excluding plaintiffs’ experts, under the new standard):

Federal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-*Daubert* world than before. The judge's task under *Frye* is relatively simple: to determine whether the method employed by the experts is generally accepted in the scientific community. Under *Daubert*, we must engage in a difficult, two-part analysis. First, we must determine nothing less than whether the experts' testimony reflects "scientific knowledge," whether their findings are "derived by the scientific method," and whether their work product amounts to "good science." Second, we must ensure that the proposed expert testimony is "relevant to the task at hand," i.e., that it logically advances a material aspect of the proposing party's case. The Supreme Court referred to this second prong of the analysis as the "fit" requirement.

The first prong of *Daubert* puts federal judges in an uncomfortable position. The question of admissibility only arises if it is first established that the individuals whose testimony is being proffered are experts in a particular scientific field; here, for example, the Supreme Court waxed eloquent on the impressive qualifications of plaintiffs' experts. Yet something doesn't become "scientific knowledge" just because it's uttered by a scientist; nor can an expert's self-serving assertion that his conclusions were "derived by the scientific method" be deemed conclusive, else the Supreme Court's opinion could

³³ 509 U.S. at 590.

³⁴ 526 U.S. at 152.

³⁵ See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 901 n.7 (1983): “We are unconvinced ... that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case. ... Petitioner’s entire argument, as well as that of Justice Blackmun’s dissent, is founded on the premise that a jury will not be able to separate the wheat from the chaff.”

³⁶ See Krauss and Sales, “The Problem of “Helpfulness” in Applying *Daubert* to Expert Testimony: Child Custody Determinations in Family Law as an Exemplar,” 5 *Psychology, Public Policy and Law* 78, 90-94 (1999).

have ended with footnote two. As we read the Supreme Court's teaching in *Daubert*, therefore, though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by the scientific method."

The task before us is more daunting still when the dispute concerns matters at the very cutting edge of scientific research, where fact meets theory and certainty dissolves into probability. As the record in this case illustrates, scientists often have vigorous and sincere disagreements as to what research methodology is proper, what should be accepted as sufficient proof for the existence of a "fact," and whether information derived by a particular method can tell us anything useful about the subject under study.

Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony because it was not "derived by the scientific method." Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.³⁷

As it is playing itself out, the multi-factor approach has both closed the door to some evidence previously admitted under *Frye*, and opened the door to some evidence previously excluded.³⁸ This has led one scholar to refer to *Daubert/ Kumho Tire's* "schizoid" character,³⁹ and a federal judge to its "competing vectors" of more rigorous scrutiny and more open admissibility.⁴⁰

B. Application of *Daubert* to Behavioral Science Evidence

*"Psychiatrists, psychologists, and social workers who base their testimony ... on behavioral science information are often, at best, engaging in informed speculation, not reporting data obtained through rigorous scientific methods."*⁴¹

*"It is meticulous standards that bring respect and credence to scientific testimony. When a social psychologist is called to serve as a 'friend of the court', he should be able to assume our belief that his best friend, his premier loyalty, is always the objective truth."*⁴²

³⁷ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315-1316 (9th Cir. 1995).

³⁸ See generally GIANNELLI & IMWINKELRIED, SCIENTIFIC EVIDENCE (3d ed. 1991)) §1-7-1-8.

³⁹ D. Michael Risinger, "Defining the 'Task at Hand': Non-Science Forensic Science After *Kumho Tire Co. v. Carmichael*," 57 Wash. & Lee L. Rev. 767, 768 (2000).

⁴⁰ See *United States v. Hines*, 55 F.Supp.2d 62, 66 (D.Ma. 1999) (Gertner, D.J.).

⁴¹ Slobogin, "The Admissibility of Behavioral Science Information in Criminal Trials: From Primitivism to *Daubert* to Voice," 5 Psychology, Public Policy & Law 100, 101 (1999).

⁴² Edmond Cahn, "Jurisprudence," 30 N.Y.U..L.REV. 150, 167 (1955).

Daubert, it has been observed, “represents a potential revolution in American expert evidence law in that it offers as guidelines rigorous criteria for ascertaining whether testimony claimed to be scientific is in fact scientific.”⁴³ *Kumho Tire* extends the revolution to evidence derived from experience and observation, thus answering in the affirmative any question about whether *Daubert* opinion applies to the social sciences.⁴⁴ What was not answered is the all-important follow-up: How does a court determine whether an expert opinion grounded in the social sciences rests on a valid methodology?⁴⁵ As the Seventh Circuit has acknowledged in understatement, “[s]ocial science in general, and psychological evidence in particular, have posed both analytical and practical difficulties for courts attempting to apply Rule 702 and *Daubert*.”⁴⁶

While *Kumho Tire* emphasizes the need to be flexible regarding application of the *Daubert* factors to testimony based on experience and observation, it nonetheless insists on *some* showing of validation beyond the witness’s own assurance. Can the wide variety of social science evidence (described in the introduction) that has customarily been admitted at trial meet

⁴³ Richardson, Ginsburg, Gatowski, & Dobbin, “The Problems of Applying *Daubert* to Psychological Syndrome Evidence,” 79 *Judicature* 10, 16 (1995). A RAND Institute for Civil Justice study concludes that *Daubert* has had the effect of narrowing the window of admissibility of expert testimony. See 27 ABA *Litigation News*, July 2002. See also “Less Expert Testimony Since *Daubert*, Study Says,” *Trial* (April, 2001), at 82. But compare Paul R. Rice & Neals-Erik William Delker, “Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence,” 191 *FRD* 678, 703 (2000), concluding that “[i]n fact, since the *Daubert* decision, admissibility decisions of scientific evidence have not been significantly different from pre-*Daubert* decisions under *Frye*.”

⁴⁴ It is now clear that in the federal courts the *Daubert* framework is applicable to social science experts. See Margaret A. Berger, “Evidentiary Framework,” in Federal Judicial Center, *REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* 32 (1994); *Tyus v. Urban Search Management*, 102 F.3d 256,263 (7th Cir. 1997) (& citations).

⁴⁵ Distinguishing between knowledge derived from controlled experimentation and that derived from experience, one court offered a helpful analogy:

The distinction between scientific and nonscientific expert testimony is a critical one. By way of illustration, if one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.

On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.

Berry v. City of Detroit, 25 F.3d 1342, 1349-1350 (6th Cir. 1994).

⁴⁶ *United States v. Hall*, 93 F.3d 1337, 1342 (7th Cir. 1996) (citations omitted).

what the Supreme Court has referred to as the new “exacting standards of reliability”?⁴⁷ Or has the admissibility bar been raised above it?⁴⁸

1) Social Science in the Courtroom—The Beginnings

It is instructive to consider the most famous example of social science evidence—Dr. Kenneth Clark’s doll studies in *Brown v. Board of Education*⁴⁹ documenting the injurious effect of segregated schools on the self-esteem of black children. The eminent sociologist testified that he had presented black and white dolls to sixteen black children attending an at-issue elementary school and inquired which doll they liked the best, which was the “nice” doll, which looks bad, and which “looks like you.”⁵⁰ Ten children preferred the white doll and eleven identified the

⁴⁷ *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000). Not everyone agrees that the new standards are all that rigorous. Some have raised questions about whether judges, untrained in scientific matters, will be able to independently assess reliability. See, e.g., Paul R. Rice & Neals-Erik William Delker, “Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence 191 FRD 678, 703 (2000). Others argue that *Daubert*’s emphasis on peer review publications ignores the reality that the sources of funding for research often itself compromises objectivity. See “Undisclosed Industry Ties of Scientific Authors Undercut Credibility,” *Trial* (July, 2001), at 16, citing “Conflict of Interest in Science and Medical Journals: Ethical Practices and Author Disclosures,” 7 *Sci. Engineering Ethics* 205 (2001); “A Stand for Scientific Independence: Medical Journals Aim to Curtail Drug Companies’ Influence,” *Washington Post*, Sunday, August 5, 2001, p. A1.

⁴⁸ Writing before *Daubert* in the context of a statistical study suggesting racial disparity in Georgia’s death-sentencing process, the Eleventh Circuit Court of Appeals cautioned with regard to the “soft” sciences:

The broad objectives for social science research are to better understand mankind and its institutions in order to more effectively plan, predict, modify and enhance society’s and the individual’s circumstances. Social science as a *nonexact* science is always mindful that its research is dealing with highly complex behavioral patterns and institutions that exist in a highly technical society. At best, this research “models” and “reflects” society and provides society with trends and information for broad-based generalizations. ... To utilize conclusions from such research to explain the specific intent of a specific behavioral situation goes beyond the legitimate uses for such research. ...

The judiciary is aware of the potential limitations inherent in such research: 1) the imprecise nature of the discipline; 2) the potential inaccuracies in presented data; 3) the potential bias of the researcher; 4) the inherent problems with the methodology; 5) the specialized training needed to assess and utilize the data competently, and 6) the debatability of the appropriateness for courts to use empirical evidence in decisionmaking.

McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), *aff’d* 107 S. Ct. 1756 (1987). Writing after *Daubert* and *Kumho Tire*, Professor Slobogin observed that “much behavioral science does not fare well under this standard.” Christopher Slobogin, “Doubts About *Daubert*: Psychiatric Anecdotes as a Case Study,” 57 *Wash. & Lee L.Rev.* 919 (2000).

⁴⁹ 347 U.S. 483 (1954). It should be noted that *Brown* represents the use of social science evidence on *legislative* facts (general propositions going to questions of policy) as compared to *adjudicative* facts particular to the case. See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §15:3 (2d ed. 1980); Dean Hashimoto, “Science as Mythology in Constitutional Law,” 76 *Ore L Rev* 111 (1997); Advisory Committee Note to FRE 201; *McCleskey v. Kemp*, 753 F.2d 877, 888 (11th Cir. 1985), *aff’d* 107 S. Ct. 1756 (1987). This article will focus on the latter use.

⁵⁰ *Briggs v. Elliot*, 98 F.Supp. 529 (E.D.S.C. 1951), *remanded* 342 U.S. 350 (1952), *modified* 103 F.Supp. 920 (1952), *rev’d sub nom.* *Brown v. Board of Education*, 347 U.S. 483 (1954). For excerpts of the transcript of the testimony and further discussion of the doll tests, see J. Beggs, “Novel Expert Evidence in Federal Civil Rights Litigation,” 45 *American U.L.Rev.* 1 (1995); Edmond Cahn, “Jurisprudence,” 30 *N.Y.U..L.REV.* 150, 161-163

black doll as “bad.” Dr. Clark testified that these were consistent with previous results he obtained involving hundreds of black school children that revealed negative stereotypes held by them as well as lasting psychological injuries.

The Court’s landmark decision relied on Kenneth Clark’s work to conclude that *Plessy v. Ferguson* was flat wrong in its assertion that “enforced separation of the two races [did not] stamp[s] the colored race with a badge of inferiority.”⁵¹

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system. [quoting the trial court]

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority [citing in footnote 11 the work of Kenneth Clark & others]. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.⁵²

Dr. Clark asserted that his doll tests were “generally accepted as indications of the child’s sensitivity to race as a problem,”⁵³ and neither his methodology nor conclusions were seriously challenged by defense counsel at trial.⁵⁴ Yet several attorneys for the plaintiffs (including William Coleman, former clerk to Justice Felix Frankfurter) reportedly had considerable doubt about the test’s validity.⁵⁵ Moreover, the results of the doll tests in northern schools *also*

(1955); John Monahan & Laurens Walker, *SOCIAL SCIENCE IN LAW: CASES & MATERIALS* (5th ed. 2002), at 185-205.

⁵¹ 163 U.S. 537, 551 (1896). “If this be so,” *Plessy* continued, “it is not by reason of anything found in the act [requiring segregation], but solely because the colored race chooses to put that construction upon it.”

⁵² 347 U.S. at 494 (citations omitted). Interestingly the Court did not cite to Dr. Clark’s testimony at trial, but rather to an earlier paper. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN v. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 315-321 (1976). The school board defendants in the Virginia case offered their own expert psychologist and psychiatrist who conceded that racial segregation harmed black school children’s personalities. Cahn, *supra*, 30 N.Y.U. L. Rev. at 160 [citing Trial Transcript].

⁵³ Cahn, *supra*, 30 N.Y.U.L.REV. at 161 n.25.

⁵⁴ Cahn, 30 NYU L. Rev. at 165: “The doll test was not analyzed in suitable detail by any of the cross-examiners, probably because they, too, realized that segregation does degrade and injure Negro school children.” Rather, the attack on cross-examination was an “old order” attempt to disparage Clark himself, including his parentage, place of birth, skin color, and Northern orientation. *Id.* See also John Monahan & Laurens Walker, *SOCIAL SCIENCE IN LAW: CASES & MATERIALS*, *supra*, at 193 (“Confronted with a determined and obviously quick-witted witness with expertise in the area that Figg knew relatively little about, the defense attorney did not force the issue.” citation omitted).

⁵⁵ Kluger, *supra*, at 321.

indicated a marked preference for the white dolls, seemingly undercutting any causal connection to a formally segregated environment.⁵⁶

The scientific validity of Dr. Clark's methodology was subsequently subjected to scathing criticism.⁵⁷ Doubters questioned the adequacy of the sample tested and whether the group was a representative cross-section, and noted the absence of both control tests on white children and precise standards for interpretation of responses.⁵⁸ Kenneth Clark himself later conceded that his studies could not isolate the effects of segregated schools and thus did not provide evidentiary proof that school segregation alone damaged the personalities of black children.⁵⁹ In short, it is highly unlikely that the legendary doll studies would meet the standards set by *Daubert*.⁶⁰ Having said this, the Court's long overdue abandonment of *Plessy v. Ferguson* stands firmly on its own constitutional footing even if Dr. Clark's evidence (which was, from a doctrinal point of view, arguably irrelevant) is discounted.⁶¹

⁵⁶ See J. Beggs, *supra*, 45 American U.L.Rev. at 13 (citations omitted). See also John Monahan & Laurens Walker, *supra*, SOCIAL SCIENCE IN LAW: CASES & MATERIALS at 189-192.

⁵⁷ See J. Beggs, *supra*, 45 American U. L. Rev. at 14-15 (& citations); Cahn, *supra*, 30 N.Y.U.L.REV. at 163-165; Ernest Van Den Haag & Ralph Ross, THE FABRIC OF SOCIETY 165-166 (1957). The critique of the social science evidence, and the Court's reliance upon it, persists to the present. See John M. Balkin, ed. WHAT *BROWN v. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (2001).

⁵⁸ Edgar Cahn also suggested that some of Clark's interpretations seemed predetermined: "For example, if Negro children say a *brown* doll is like themselves, he infers that segregation has made them conscious of race; yet if they say a *white* doll is like themselves, he infers that segregation has forced them to evade reality." 30 NYU L Rev at 163.

⁵⁹ Kenneth B. Clark, "The Desegregation Cases: Criticism of the Social Scientist's Role," 5 Vill.L.Rev. 224, 231 (1959).

⁶⁰ In *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998), for example, testimony offered by the Boston School Department to justify its race-conscious assignment policy was discounted because the sociologist, opining that teachers had low expectations for minority students, "conceded that the data he used was not of the quality necessary to satisfy the methodological rigors required by his disciple." 160 F.3d at 805. Among the "shortcomings" noted regarding Dr. Trent's testimony was that the "climate survey" of teacher attitudes and the multiple regression analysis connecting low expectations with racial achievement gap were performed in the Kansas City school system, not Boston. Unlike the Court in *Brown*, the First Circuit was unwilling to extrapolate results from one locality to another. 160 F.3d at 804. Nor was the court impressed with the witness' reliance on anecdotal evidence. 160 F.3d at 805-806.

⁶¹ The "modern authority" referenced in footnote 11 served as a counter to the outrageous assertion in *Plessy* that the stigma of segregation was only in the minds of black citizens. But, as the Court ruled in *Brown*, legally segregated schools were *inherently* unconstitutional (347 U.S. at 495) *without regard* to the actual effect on black (or for that matter white) school children. The "cruelty" of segregation was so "obvious and evident" that "the Justices of the Supreme Court could see it and act on it even after reading the labored attempts by plaintiffs' experts to demonstrate it 'scientifically'." Cahn, *supra*, 30 NYU L Rev at 159.

Chief Justice Earl Warren himself is reported to have expressed surprise at the attention paid to the Court's social science footnote, stating "It was only a note, after all," and stressing that it was "merely supportive" and not the "substance" of the decision. Richard Kluger, SIMPLE JUSTICE: THE HISTORY OF *BROWN v. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 706 (1976).. Similarly, E. Barrett Prettyman, Jr., law clerk to Justice Robert Jackson at the time of *Brown*, has remarked:

2) Syndrome Evidence

The legal philosopher Edmond Cahn perceptively predicted that *Brown* would invite social scientists into court as expert witnesses with increasing frequency,⁶² and that indeed has been the case. Decades later Judge Teague of the Texas Criminal Court of Appeals would observe with regard to the pervasive nature of one form of behavioral evidence:

Today, we have the following labels: "The Battered Wife Syndrome"; "The Battered Woman Syndrome"; "The Battered Child Syndrome"; "The Battered Husband Syndrome"; "The Battered Parent Syndrome"; "The Familial Child Sexual Abuse Syndrome"; "The Rape Trauma Syndrome"; "The Battle Fatigue Syndrome"; "The Viet Nam Post-Traumatic Stress Syndrome"; "The Post-Concussive Syndrome"; "The Whiplash Syndrome"; "The Low-Back Syndrome"; "The Lover's Syndrome"; "The Love Fear Syndrome"; "The Organic Delusional Syndrome"; "The Chronic Brain Syndrome";

It's so interesting, this Footnote 11 that became the huge mark of controversy in the opinion he has referred to here, which cites Ken Clark's studies and the other social studies, was a throwaway. We never paid any attention to it. The Chief I think just told Jerry Gunther or one of his law clerks to add something, add a footnote to his sentence here. Whatever may have been the extent of psychological knowledge at the time of *Plessy* this finding is amply supported by modern authority. That is the finding that segregation of colored children has a detrimental affect upon them. But he really didn't need anything to cite. He was just throwing in something to kind of, you know, bolster it up. It was no big deal at all. And none of the rest of us paid the slightest bit of attention to it. We should note that that was very bad judgment on our part because Ken Clark alone was a matter of great controversy, and these studies apparently in the sociological world were contested, shall we say. And so we were all stunned when that became the focal point of the lay dissent, this Footnote 11, that none of us had paid any attention to at all.

Symposium, "*Brown v. Board of Education*: An Exercise in Advocacy," 52 Mercer L. Rev. 581, 602 In sum, the Court's references to social psychology seem merely to have been a "convenient face-saver." Cahn, *supra*, 30 NYU L Rev at 168. See also Dean Hashimoto, "Science as Mythology in Constitutional Law," 76 Ore L Rev 111, 138-143 (1997).

Edmund Cahn aptly observed: "I would not have the constitutional rights of Negroes—or other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records." Jurisprudence, 30 NYU L Rev 150, 157-158 (1955). He lamented the prospect of having

our fundamental rights rise, fall, or change along with the latest fashions of psychological literature. Today the social psychologists—at least the leaders of the discipline—are liberal and egalitarian in basic approach. Suppose, a generation hence, some of their successors were to revert to the ethnic mysticism of the very recent past; suppose they were to present us with a collection of racist notions and label them "science." What then would be the state of our constitutional rights?

30 NYU L Rev at 159. More recently, Professor Kathleen Sullivan observed on the 50th anniversary of *Brown* that reliance on the social science "leaves open the possibility that separate education might be permissible in some other time, place, or set of social circumstances, if evidence from social science could demonstrate that it had different psychological effects, such as empowering minority students or improving their academic performance." Kathleen Sullivan, "What Happened to *Brown*?", New York Review of Books, September 23, 2004, at 48. Evidence of this kind is now available. See "Black Children's Self-esteem: A New Look," Boston Sunday Globe April 2, 2000, at A17.

⁶² Cahn, "Jurisprudence," 30 NYU L Rev 150, 159 (1955). "As the courts' exclusionary rules of evidence tend to relax more and more," Cahn predicted, "the [social] scientists will appear more frequently to testify as expert witnesses." *Id.* See also Kenneth B. Clark, The Desegregation Cases: Criticism of the Social Scientist's Role, 5 Vill.L.Rev. 224 (1959) (advocating greater integration of social science in the judicial process).

and "The Holocaust Syndrome." Tomorrow, there will probably be additions to the list, such as "The Appellate Court Judge Syndrome."⁶³

Another commentator has aptly coined the phrase "forensic abuse syndrome."⁶⁴

Syndrome evidence has been and continues to be widely admitted,⁶⁵ yet it does not come close to satisfying *Daubert/ Kumho* standards.⁶⁶ The concept of psychological syndromes was

⁶³ *Werner v. State*, 711 S.W.2d 639, 649 (1986) (dissenting) (citations omitted). Mr. Werner shot and killed another motorist following a minor traffic accident. The son of Holocaust survivors, he offered in support of his self-defense claim testimony from a psychiatrist asserting that survivors and their families had a heightened sense of fear whenever they were threatened in any way; thus what might appear to an outsider as an egregious overreaction during a conversation between two drivers was to Werner a reasonable response to perceived danger. The trial court excluded the testimony, and Judge Teague dissented from the appeals court's refusal to overturn that decision. For more on the proliferation of syndrome evidence, see Slobogin, *The Admissibility of Behavioral Science Information in Criminal Trials: From Primitivism to Daubert to Voice*, 5 *Psychology, Public Policy & Law* 100, 103-104 (1999) (& citations).

⁶⁴ Freckelton, "When Plight Makes Right—The Forensic Abuse Syndrome," 18 *Crim.L.J.* 29 (1994). To this already long list we should add Post Traumatic Slavery Disorder, Parental Alienation Syndrome, Compassion Fatigue, Secondary Traumatic Stress (STS), and Vicarious Traumatization (VT). See Bombardieri, "Theory links slavery, stress disorder," *Boston Globe*, Nov. 12, 2002, at B1; Alayne Katz, "Junk Science v. Novel Scientific Evidence: Parental Alienation Syndrome, Getting It Wrong in Custody Cases," 24 *Pace L. Rev.* 239 (2003); Andrew P. Levin & Scott Greisberg, "Vicarious Trauma in Attorneys," 24 *Pace L. Rev.* 245 (2003).

⁶⁵ See Giannelli & Imwinkelried, *SCIENTIFIC EVIDENCE* 427 (3d ed. 1999); Faigman, et al, *SCIENCE IN THE LAW: SOCIAL BEHAVIORAL SCIENCE ISSUES* (2002), §§4-1.0, 5-1.0, 6-1.0, 7-1.0; Jane Campbell Moriarity, "Wonders of the Invisible World: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials," 26 *Vermont L. Rev.* 43, 92-98 (2001); Fradella, Fogarty, & O'Neill, "The Impact of *Daubert* on the Admissibility of behavioral Science Testimony", 30 *Pepperdine L.Rev.* 403 (2003); Margaret A. Berger, *Evidentiary Framework*, in *Federal Judicial Center, Reference Manual on Scientific Evidence* 87-88 (1994) (collecting cases admitting syndrome evidence).

This is not to suggest that all courts are in accord. Some notable decisions rejecting the evidence as unreliable include *Gier v. Educational Service Unit No 16*, 845 F.Supp. 1342, 1353 (D.Neb. 1994); *State v. Cressey*, 137 N.H. 402, 628 A.2d 696 (N.H. 1993) ("Generally speaking, the psychological evaluation of a child suspected of being sexually abused is, at best, an inexact science ... [and] does not present the verifiable results and logical conclusions that work to ensure the reliability required in the solemn matter of a criminal trial."); *Newkirk v. Kentucky*, 937 S.W.2d 690 (Ky. 1996); *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982).

It must be noted that profile evidence offered by the prosecution regarding the *defendant* (unlike syndrome evidence regarding the *victim*) is generally not admissible, as it is viewed as unreliable and runs afoul of the character evidence prohibition against painting the defendant as a particular "criminal-type." See, e.g., *Com. v. Day*, 409 Mass. 719, 723, 569 N.E.2d 397, 399 (1991) (reversing conviction because evidence of "child battering profile" had been admitted against defendant); *People v. Robbie*, 112 Cal.Rptr.2d 479 (Ct.App. 2002) (rapist profile). See also *State v. Vue*, 606 N.W.2d 719, 723 (Minn.App. 2000) ("By asserting that Hmong men tend to abuse their wives, the expert testimony directly implied to the jury that because defendant was Hmong, he was more likely to have assaulted his wife. It is self-evident that this is highly prejudicial. It is impermissible to link a defendant's ethnicity to the likelihood of his guilt.). Compare *Dang Vang v. Vang Xiong X.* Toyed, 944 F.2d 476 (9th Cir. 1991) (expert permitted to testify regarding submissiveness of Hmong, women to explain failure complain of rape by government employee). See generally John Monahan & Laurens Walker, *SOCIAL SCIENCE IN LAW: CASES & MATERIALS* (5th ed. 2002), at 455-465; Liacos, Brodin & Avery, *HANDBOOK OF MASSACHUSETTS EVIDENCE* §7.8.5, at 437-438 (7th ed. 1999). Testimony offered by the defendant that he did *not* fit the sex offender profile has also been excluded. See *Idaho v. Parkinson*, 128 Idaho 29, 909 P.2d 647 (1996).

A few jurisdictions allow testimony as to whether the defendant is the type of personality who would commit the criminal act. See cases collected in Slobogin, "The Admissibility of Behavioral Science Information in Criminal Trials: From Primitivism to *Daubert* to Voice," 5 *Psychology, Public Policy & Law* 100, 103 (1999).

originally developed by practitioners for *therapeutic*, and certainly not truth-detection, purposes.⁶⁷ Mental health professionals are trained to assist patients, not judge their credibility. “While it may be entirely proper for a clinician to accept a patient report of sex abuse at face value and proceed to render treatment on that basis, for forensic purposes, such an assumption is,” as one court observed, “utterly inappropriate.”⁶⁸ It is far from self-evident that methodologies useful in choosing a course of psychotherapy are reliable enough “to provide a sound basis for investigative conclusions and confident legal decision-making.”⁶⁹ Indeed the American Psychiatric Association’s own Diagnostic and Statistical Manual (DSM) warns against using these categories for forensic purposes.⁷⁰

As one judge put it:

The [child sexual abuse accommodation] syndrome’s sole function was to start with a known child victim of sexual abuse, and then to explain the child’s behavioral reactions to the abuse. The syndrome cannot be used in reverse, which would be to start with the

⁶⁶ See Richardson, Ginsburg, Gatowski, & Dobbin, “The Problems of Applying *Daubert* to Psychological Syndrome Evidence,” 79 Judicature 10 (1995).

⁶⁷ Richardson, Ginsburg, Gatowski, & Dobbin, “The Problems of Applying *Daubert* to Psychological Syndrome Evidence,” 79 Judicature 10, 13 (1995). The originator of Child Sexual Abuse Accommodation Syndrome (CSAAS) has since described it as “clinical observation” which has become “elevated as gospel.” See Steward v. State, 652 N.E.2d 490, 492-493 (Ind. 1995) (citations omitted). “The syndrome was not intended as a diagnostic device and does not detect sexual abuse. Rather, the syndrome was designed for purposes of treating child victims and offering them assistance” *Id.* (citations omitted). See also Lisa R. Askowitz & Michael H. Graham, “The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions,” 15 Cardozo L. Rev. 2027, 2039-2040 (1994).

⁶⁸ Newkirk v. Kentucky, 937 S.W.2d 690, 694 (Ky. 1996).

⁶⁹ Gier v. Educational Service Unit No 16, 845 F.Supp. 1342, 1353 (D.Neb. 1994). See also Spencer v. General Electric Co., 688 F.Supp. 1072, 1075-1076 (E.D. Va. 1988) (“Evidence of PTSD [Post Traumatic Stress Disorder] occasioned by rape ... is not a scientifically reliable means of proving that a rape occurred. PTSD is simply a diagnostic category created by psychiatrists; it is a human construct, an artificial classification of certain behavioral patterns. RTS [Rape Trauma Syndrome] was developed by rape counselors as a therapeutic tool to help identify, predict, and treat emotional problems experienced by the counselor’s clients or patients. It was not developed or devised as a tool for ferreting out the truth in cases where it is hotly disputed whether the rape occurred.”); State v. Chauvin, 846 So.2d 697, 707 (La. 2003) (“the psychiatric procedures used in developing the diagnosis of PTSD are designed for therapeutic purposes and are not reliable as fact-finding tools to determine whether sexual abuse has in fact occurred.”); State v. Cressey, 137 N.H. 402, 411, 628 A.2d 696, 702 (1993) (“The child sexual abuse accommodation syndrome was not intended to be a diagnostic device capable of detecting whether a child has been sexually abused. Rather, it proceeds from the premise that a child has been sexually abused and seeks to explain the resulting behaviors and actions of the child.” citation omitted); Steward v. State, 652 N.E.2d 490, 493 (Ind. 1995) (child sexual abuse accommodation syndrome helps to explain reactions--such as recanting or delayed reporting--of children *assumed* to have experienced abuse); Newkirk v. Kentucky, 937 S.W.2d 690, 693 (Ken. 1996) (“Neither CSAAS syndrome nor the symptoms that comprise the syndrome have recognized reliability in diagnosing child sexual abuse as a scientific entity.”)

⁷⁰ DSM-IV xxxii-xxxiii (4th ed. Text Revision 2000) (“When the DSM-IV categories, criteria, and textual descriptions are employed in making legal judgments, there are significant risks that diagnostic information will be misused or misunderstood.”)

behavioral reactions identified by the syndrome, check off the ones that the child exhibits, and conclude that, on the basis of the checklist, the child was sexually abused.⁷¹

The very definition of a “syndrome” itself raises questions about reliability:

A syndrome is a cluster of symptoms that appear together regularly enough to be considered associated. Unlike diseases, syndromes have no specified temporal course, nor is a pathological nature necessarily clear. Therefore, syndromes vary in the certainty with which they allow inferences about etiology.⁷²

Although sometimes confused with one another, syndromes must be distinguished from Post-Traumatic Stress Disorder (PTSD), a generally recognized anxiety disorder (with more precise contours) that has been in the Diagnostic and Statistical Manual of Mental Disorders since 1980.⁷³ Syndromes are not recognized in the DSM.⁷⁴

Characterized by one court as “vague psychological profiles and symptoms, and unquantifiable evaluation results,”⁷⁵ there has been substantial criticism of the endeavor to compile a checklist that could serve as an accurate indicator of whether abuse has occurred:

There are no symptoms or behaviors that occur in every case of child abuse, nor are there symptoms or behaviors that are found exclusively in child abuse cases. ... The symptoms ... are far from establishing a clear profile by which an abused child can be accurately identified. Many of the symptoms considered to be indicators of sexual abuse, such as nightmares, forgetfulness, and overeating, could just as easily be the result of some other problem, or simply may be appearing in the natural course of the children’s development.⁷⁶

⁷¹ *People v. Peterson*, 450 Mich. 349, 384-385, 537 N.W.2d 857, 873 (1995) (Cavanagh, J., dissenting). The syndrome identifies five behavioral reactions commonly observed in victims: 1) secrecy, 2) helplessness, 3) entrapment and accommodation, 4) delayed, conflicted and unconvincing disclosure, and 5) retraction. These responses are equally consistent with other experiences, including poverty or psychological abuse. *Id.* (citations omitted). “Because children’s responses to sexual abuse vary widely, and because many of the characteristics identified by CSAAS, or by similar victim behavior groupings, may result from causes unrelated to abuse, diagnostic use of syndrome evidence in courtrooms poses serious accuracy problems.” *Steward v. State*, 652 N.E.2d 490, 493 (Ind. 1995).

⁷² Richardson, Ginsburg, Gatowski, & Dobbin, “The Problems of Applying *Daubert* to Psychological Syndrome Evidence,” 79 *Judicature* 10, 11 n. 3. (1995). See generally David McCord, Syndromes, “Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases,” 66 *OREGON L. REV.* 19 (1987). Even some courts that admit expert testimony in this area reject the use of the term “syndrome” because of its misleading nature. See, e.g., *People v. Peterson*, 450 Mich. 349, 362-363, 537 N.W.2d 857, 863 (1995).

⁷³ See generally Thornton, “*State v. Chauvin*: Determining the Admissibility of Post-Traumatic Stress Syndrome Diagnosis as Substantive Evidence of Sexual Abuse,” 78 *Tulane L.Rev.* 1743 (2004) (& citations).

⁷⁴ Donna A. Gaffney, “PTSD, RTS, and Child Abuse Accommodation Syndrome: Therapeutic Tools or Fact-Finding Aids,” 24 *Pace L.Rev.* 271, 284 (2003).

⁷⁵ *State v. Cressey*, 137 N.H. 402, 408, 628 A.2d 696, 700 (1993) (& citations).

⁷⁶ *State v. Cressey*, 137 N.H. at 408, 628 A.2d at 700. See also *People v. Peterson*, 450 Mich. 349, 381-382, 537 N.W.2d 857, 871 (1995) (Cavanagh, J., dissenting) (“the behavioral ‘symptoms’ of child sexual abuse are too varied

When, as is the case, the checklist includes behavioral reactions that may be caused by traumatic events unrelated to sexual abuse, we do not have a reliable diagnostic tool.⁷⁷ Indeed, testimony from syndrome “experts” often identifies such commonplace symptoms as poor self-esteem, family problems, association with an older peer group, depression, withdrawal, leaving home without permission, and problems with school behavior and performance.⁷⁸

In order to establish the clinical reliability of a syndrome identification, it would have to be shown first that its particular symptoms are distinguishable from those found associated with other syndromes or disorders, and second that different clinicians would agree on a diagnosis for the same patient.⁷⁹ Neither has not been demonstrated,⁸⁰ and instead we have what one forensic psychiatrist concedes is “some fuzziness in the diagnosis.”⁸¹ One might ask whether syndrome testimony (as has been suggested in the context of the “psychological autopsy” used to determine

and too unreliable to be used as accurate detectors of sexual abuse.”). “Research findings related to Child Abuse Accommodation Syndrome are limited and do not support sexual abuse syndrome or a CSAAS. These syndromes are [exploratory] and meet neither *Frye* nor *Daubert*.” Donna A. Gaffney, “PTSD, RTS, and Child Abuse Accommodation Syndrome: Therapeutic Tools or Fact-Finding Aids,” 24 Pace L.Rev. 271, 284 (2003) (citations and internal quotations omitted). See also David McCord, Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases, 66 OREGON L. REV. 19, 41 (1987) (& citations) (“Researchers have been unsuccessful in their attempts to find common reactions that children have to sexual abuse. In fact, research has indicated that children react in incredibly diverse ways to sexual abuse.”); Brett Trowbridge, “The Admissibility of Expert Testimony in Washington on Post Traumatic Stress Disorder and Related Trauma Syndromes: Avoiding the Battle of the Experts By Restoring the Use of Objective Psychological testimony in the Courtroom,” 27 SeattleU.L.Rev. 453 (2003).

⁷⁷ *People v. Peterson*, 450 Mich. 349, 383, 537 N.W.2d 857, 872 (1995) (Cavanagh, J., dissenting). See also *Com. v. Dunkle*, 529 Pa. 168, 174, 602 A.2d 830, 832 (Sup. Ct. Pa. 1992) (“The difficulty with identifying a set of behaviors exhibited by abused children is that abused children react in a myriad of ways that may not only be dissimilar from other sexually abused children, but may be the very same behaviors as children exhibit who are not abused.”)

⁷⁸ See, e.g., *Steward v. State*, 652 N.E.2d 490, 492 (Ind. 1995); *Com. v. Dunkle*, 529 Pa. 168, 175, 602 A.2d 830, 833 (Sup. Ct. Pa. 1992).

⁷⁹ See Patricia Frazier & Eugene Borgida, “Juror Common Understanding and the Admissibility of Rape Trauma Evidence in Court,” 12 Law & Human Behavior 101, 117 (1988); Lisa R. Askowitz & Michael H. Graham, The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions, 15 Cardozo L. Rev. 2027, 2029 (1994). As one court put it in regard to standard field sobriety testing (SFST): “[R]eliability means the ability of a test to be duplicated, producing the same or substantially same results when successively performed under the same conditions. Thus, for the SFSTs, if reliable, it would be expected that different officers, viewing the same suspect performing the SFSTs, would reach the same conclusion regarding the level of the suspect's impairment or intoxication. Alternatively, the same officer re-testing the same suspect with the same BAC as when first tested would reach the same conclusion.” *U.S. v. Horn*, 185 F.Supp.2d 530, 539 (D.Md. 2002).

⁸⁰ In the case of CAAS, for example, “it is difficult to determine whether delayed disclosure is a direct result of the abusive situation, a completely different stressful event, or the child's age and natural development.” Lisa R. Askowitz & Michael H. Graham, The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions, 15 Cardozo L. Rev. 2027, 2040 (1994).

⁸¹ Michael Welner, “Hidden Diagnosis and Misleading Testimony: How Courts Get Shortchanged,” 24 Pace L. Rev. 193, 204 (2003) (referring to battered women syndrome).

whether a suspicious death was a suicide) is just “another opportunity for social scientists to cloak an investigation concerned with the soft-data of attitudes and feelings in the mantle of exactitude conveyed by medical and physical science?”⁸²

While the literature is somewhat more persuasive in identifying common characteristics among victims of rape⁸³ and battering⁸⁴ than of child sexual abuse, serious questions of evidentiary reliability persist. As Professor Jane Moriarity has put it, syndrome evidence essentially “requires a belief in the meaningful relationship between the criminal activity (the cause) and the observable behaviors or symptoms in the victims (the effect).”⁸⁵ But the “empirical pillars” of that belief rest, in the words of one standard treatise, “on less than sound foundations.”⁸⁶ To the extent the conclusions are based on anecdotal evidence, the reliability

⁸² David Ormerod, “Psychological Autopsies: Legal Applications and Admissibility”, 5 *International J. Evid. & Proof* 1, 2 (2001). See also *State v. Guthrie*, 627 N.W.2d 401 (S.D. 2001) (suicidologist’s testimony on risk factors for suicide was properly admitted, but not his conclusion that based on profile victim did not commit suicide).

⁸³ See McCord, “The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions,” 26 *B.C.L.Rev.* 1143, 1199-1202 (1985); Robert R. Lawrence, “Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony of Rape Trauma Syndrome in Criminal Proceedings,” 70 *Virginia L. Rev.* 1657, 1667-1680 (1984).

⁸⁴ U.S .Dept. of Justice, *The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials* (1996), at <http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/Valid/>. Although this report concludes that “[e]xpert testimony on battering and its effects can be based on and supported by an extensive body of scientific and clinical knowledge on the dynamics of domestic violence and traumatic stress reactions,” it nonetheless rejects the simplistic notion of a “battered woman syndrome”: “A singular construct, such as the term ‘battered woman syndrome’ is not adequate to encompass the scientific and clinical knowledge about battering and its effects that is germane to criminal cases involving battered women. The term ‘battered woman syndrome’ portrays a stereotypic image of battered women as helpless, passive, or psychologically impaired, and battering relationships as matching a single pattern, which might not apply in individual cases.”

⁸⁵ Jane Campbell Moriarity, “Wonders of the Invisible World: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials,” 26 *Vermont L. Rev.* 43, 45 (2001).

⁸⁶ Faigman, et al, *SCIENCE IN THE LAW: SOCIAL BEHAVIORAL SCIENCE ISSUES* §4-1.0, at 172 (referring to battered woman syndrome). “No court or commentator has defended the methodology used to develop [battered woman] syndrome or has suggested that adequate research methods were employed in its development. Unfortunately, courts have almost uniformly failed to examine in any detail whatsoever the empirical support, or lack thereof, for battered woman syndrome. [B]attered woman syndrome remains little more than an unsubstantiated hypothesis that ... has yet to be tested adequately or has failed to be corroborated when adequately tested.” *Id.*, §4-1.5 at 203-204. See also Faigman & Wright, “The Battered Woman Syndrome in the Age of Science”, 39 *Ariz. L. Rev.* 67 (1997).

Regarding the reliability of the research methods underlying battered woman syndrome, the following candid remarks of its originator, Dr. Lenore Walker, are cause for concern:

Lawyers, in cross-examination, said “She is biased because she starts with a premise that a woman who say’s she’s battered is a battered woman. She should start with a premise of neutrality.” First of all, that is not appropriate using the scientific method. But, it is also important to know that you can’t be neutral when dealing with somebody who has been abused and still collect reliable and valid data. The psychology of an abuse victim tells us that one of the most significant damages that happens, at least to a woman but I think for men as well, is that victims lose the capacity to understand neutrality and objectivity. Because of the need to protect oneself from further abuse, the abuse victim learns to judge that you are either “with” her or you are considered “against” her. If you are not observably “with” her, then she needs

problems are self-evident-- such broad generalizations about social phenomena, without empirical confirmation, have been rejected when asserted by social scientists in court in other contexts.⁸⁷

As noted above, a key factor in the *Daubert* formulation is the ability to verify or disprove a theory: "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry."⁸⁸ Behavioral science constructs such as psychological syndromes obviously do not lend themselves to testing upon patients and control groups.⁸⁹ Unlike at least some of the predictions and assumptions of economists,⁹⁰ syndrome theory cannot usually be validated in retrospect.⁹¹ Even the recognition of a condition such as Post-Traumatic Stress Disorder in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) gives no assurance of scientific reliability in the *Daubert* sense of empirical validation.⁹²

A second *Daubert* factor, computation of the known or potential error rate (including calculation of false positives and negatives), is equally problematic when applied to syndrome

to protect herself from you, and she'll use whatever methods that she has developed to cope with repeated danger and repeated abuse to make sure you have less of a chance to cause her harm.

Now, what I have described is not bias to the psychologist. I would be biasing the information I gather if I did not recognize the way a battered woman reacts to an interview.

Lenore E.A. Walker, Psychology and Law Symposium: Women and the Law, 20 Pepperdine L Rev 1170, 1171-1172 (1993).

⁸⁷ *Wessman v. Gittens*, 160 F.3d 790, 806-807 (1st Cir. 1998), discussed above at n. 60.

⁸⁸ 509 U.S. 579, 593 (citation omitted).

⁸⁹ See generally Richardson, Ginsburg, Gatowski, & Dobbin, "The Problems of Applying *Daubert* to Psychological Syndrome Evidence," 79 Judicature 10 (1995) (& citations). See also *Gier v. Educational Service Unit No 16*, 845 F.Supp. 1342, 1348 (D.Neb. 1994); *State v. Foret*, 628 So.2d 1116, 1125 (La. 1993); Lisa R. Askowitz & Michael H. Graham, The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions, 15 Cardozo L. Rev. 2027, 2040 (1994) (scientists cannot "recreate or control [sexual abuse] for scientific experiment.").

⁹⁰ See, e.g., *Saia v. Sears Roebuck & Co.*, 47 F.Supp.2d 141, 148 (D. Ma. 1999) ("Many of the predictions or assumptions of economists in damages testimony can be validated in retrospect, if not otherwise. For instance, predicted rates of inflation, predicted salary escalations, average life expectancies, average work life expectancies, average interest rates, can all be looked at years down the line to determine if we were correct in allowing expert estimates of economic loss No such retrospective validation is possible ... [with] hedonic damages. Speculative assumptions remain speculation." citation omitted).

⁹¹ Similarly, empirical research on the theory of "repressed memory," the notion that memories of abuse or trauma may be suppressed and later can be revived during therapy or hypnosis, has not progressed to the point where the concept realistically can be tested. See Richardson et.al., *supra*, 79 Judicature at 13-14; Elizabeth Loftus, *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* (1994).

⁹² Richardson et.al., *supra*, 79 Judicature at 14 (& citations). "Many mental disorder categories contained in the DSM also lack reliability, such that two psychiatrists or psychologists can diagnose the same client as suffering from two different disorders." *Id.*

and other social science evidence.⁹³ The question posed by *Kumho Tire*-- how often has the expert's methodology produced an erroneous result⁹⁴-- is usually unanswerable in this context.

Even if the two other factors enumerated in *Daubert* (existence of a peer review literature and general acceptance among people in the field) were satisfied with regard to certain types of syndrome evidence, neither assures evidentiary reliability under the new standard. Where, for example, a discipline itself lacks reliability as in the case of astrology, general acceptance among practitioners carries little weight.⁹⁵

The Court has emphasized that "the test of reliability is 'flexible,' and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination."⁹⁶ Yet syndrome evidence has not been shown reliable under any meaningful scientific or legal standard.

Syndrome evidence must be distinguished from other forms of psychological testimony admitted where the subject's state of mind is directly in issue. Qualified psychiatrists routinely testify on the issue of a criminal defendant's insanity or diminished mental state (where the defendant opens the door by raising the defense). Their opinions are based upon psychiatric examination of the subject and reflect years of scientific investigation (including epidemiological studies and biomedical research) of the major psychotic disorders, the clinical course of which have been charted with some precision and generally accepted in the fields.⁹⁷

In pondering the admissibility of syndrome testimony it is instructive to look at another form of behavioral "science" which, although of even more dubious reliability, is regularly admitted in the trial of capital cases.⁹⁸ Thomas Barefoot was sentenced to death (and ultimately

⁹³ Richardson, *supra*, 79 Judicature at 14–15 (& citations).

⁹⁴ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. at 151.

⁹⁵ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. at 151.

⁹⁶ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. at 141.

⁹⁷ See generally Faigman, Kaye, Saks, & Sanders, *SCIENCE IN THE LAW* (2002) §1-2.0-1-2.1.3; David McCord, "Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases," 66 *Oregon L. Rev.* 19, 35-38 (1987). Professor Slobogin advocates admission of such evidence as a matter of necessity, there being no better method for exploring criminal responsibility. See Christopher Slobogin, "Doubts About *Daubert*: Psychiatric Anecdotes as a Case Study," 57 *Wash. & Lee L.Rev.* 919, 922-923 (2000).

Similarly, in civil cases psychological experts testify as to the emotional distress damages suffered by the plaintiff. See, e.g., Jansonius & Gould, "Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility," 50 *Baylor L.Rev.* 267, 287-290 (1998).

⁹⁸ See generally Erica Beecher-Monas and Edgar Garcia-Rill, "Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-*Daubert* World," 24 *Cardozo L.Rev.* 1845 (2003); Eugenia T. LaFontaine, "A Dangerous

executed) for the murder of a Texas police officer after two psychiatrists called by the State during the penalty phase told the jury that he would commit further acts of violence and represented a continuing threat to society. Dr. Grigson testified that there was a “one hundred percent and absolute” chance that Barefoot would commit future acts of criminal violence.⁹⁹ Neither witness had examined (or requested to examine) Barefoot; each merely responded to hypothetical questions about him posed by the prosecutor.

In its amicus brief in *Barefoot v. Estelle*¹⁰⁰ the American Psychiatric Association roundly debunked the accuracy of such predictions, asserting that “[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.”¹⁰¹ Studies acknowledged by the Court indicated that these predictions were wrong two out of three times.¹⁰² The best that Justice White could come up with to support the holding that admission of the evidence did not violate Barefoot’s constitutional rights was (what Justice Blackmun described as the “remarkable observation”¹⁰³) that “[n]either petitioner nor the Association suggests that psychiatrists are *always* wrong with respect to future dangerousness, *only most of the time*,” and thus the Court was “not persuaded that such testimony is *almost entirely* unreliable”¹⁰⁴

Preoccupation With Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases Are Unconstitutional,” 44 B.C.L.Rev. 207 (2002).

⁹⁹ 463 U.S., at 919. One of the witnesses, James Grigson, was dubbed “Dr. Death” because of his testimony for the prosecution in over 100 death-penalty cases. In every one, he had diagnosed the defendant as an untreatable antisocial personality bound to commit further violence; and the jury invariably agreed. Alan Stone, LAW, PSYCHIATRY AND MORALITY 107 (1984) (quoted in D.H. KAYE, SCIENCE IN EVIDENCE 276 (1997)). The Barefoot jury deliberated for one hour before returning with answers requiring a death sentence. 463 U.S., at 919. In 1995 Dr. Grigson was expelled from both the American Psychiatric Association and the Texas Society of Psychiatric Physicians because of his unprofessional and unethical testimony in death cases. See *Flores v. Johnson*, 210 F.3d 456, 467 (5th Cir. 2000) (Garza, C.J. concurring).

¹⁰⁰ 463 U.S. 880 (1983).

¹⁰¹ 463 U.S., at 920.

¹⁰² 463 U.S. at 901 n. 7; 920—921. See generally Grant H. Morris, “Defining Dangerousness: Risking a Dangerous Definition,” 10 J.Contemp.Legal Issues 61, 85 (1999).

¹⁰³ 463 U.S., at 928 (Blackmun, dissenting).. For Blackmun, Brennan and Marshall this was simply too much to swallow: “In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist’s words, equates with death itself.” 464 U.S., at 916 (dissenting).

¹⁰⁴ 463 U.S. at 899-901 (italics added). For a recent critique of the decision, see Thomas Regnier, “*Barefoot* in Quicksand: The Future of ‘Future Dangerous’ Predictions in Death Penalty Sentencing in the World of Daubert and Kumho,” 37 Akron L. Rev. 469 (2004). See generally John Monahan, “Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility,” 57 Wash. & Lee L.Rev. 901 (2000).

The *Barefoot* Court did distinguish the narrow constitutional question before it from what it saw as the separate matter of reliability under evidence doctrine. 463 U.S. at 899 n.6. See also D.H. Kaye, “Choice and Boundary Problems in *Logerquist*, *Hummert*, and *Kumho Tire*,” 33 ARIZ.ST.L J 41, 58 (2001). Moreover, the decision may reflect the pragmatic reality that where the jury is required by statute to determine dangerousness,

“Future dangerousness” evidence continues to be admitted even after *Daubert* in capital cases,¹⁰⁵ civil commitments,¹⁰⁶ and proceedings to commit “sexually dangerous persons.”¹⁰⁷ Psychiatrists routinely testify in Texas courts (without even the benefit of an examination of the defendant or his psychological records) that in their unequivocal “expert opinion,” the convicted murderer poses a future danger.¹⁰⁸ Yet nothing in the years since *Barefoot v. Estelle* has even remotely established the reliability of this evidence,¹⁰⁹ which “virtually compels” juries to choose the death penalty.¹¹⁰

Ironically, the form of social science evidence which is most solidly founded in “hard” empirical science has met with perhaps the most resistance in the courts. Expert testimony concerning the limitations and weaknesses of eyewitness identification¹¹¹ is firmly rooted in an experimental foundation, deriving from decades of psychological research on human perception and memory as well as an impressive peer review literature.¹¹² Like syndrome evidence, this testimony purports to educate the factfinder about reasons a witness at trial should be believed or

expert testimony no matter how unreliable may be all that is available to assist them. See *People v. Murtishaw*, 29 Cal.3d 733, 631 P.2d 446, 469 (1981).

¹⁰⁵ See generally Faigman, Kaye, Saks, & Sanders, *SCIENCE IN THE LAW* (2002) §2-1.1 et.seq; 3-1.1, et.seq; Thomas Regnier, *supra*, “Barefoot in Quicksand: The Future of ‘Future Dangerous’ Predictions in Death Penalty Sentencing in the World of *Daubert* and *Kumho*,” 37 Akron L. Rev. at 501-502.

¹⁰⁶ See generally Alexander Scherr, “*Daubert* & Danger: The ‘Fit’ of Expert Predictions in Civil Commitments,” 55 Hastings L.J. 1 (2003).

¹⁰⁷ See generally Robert F. Schopp, Mario J. Scalora, & Marc Pearce, “Expert testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator After *Hendricks*,” 5 Psychology, Public Policy & Law J. 120 (1999).

¹⁰⁸ See *Flores v. Johnson*, 210 F.3d 456, 458 (5th Cir. 2000) (Garza, C.J. concurring) (affirming denial of habeas relief on other grounds). The “expert,” Dr. Griffith, “is frequently the state’s star witness,” testifying (at that time) in 97 capital murder trials. 210 F.3d, at 462.

¹⁰⁹ Judge Garza wrote in *Flores*: “Such testimony lacking objective scientific testing or personal examination defies scientific rigor and cannot be described as expert testimony. It is simply subjective testimony without any scientific validity by one who holds a medical degree.” 210 F.3d, at 458. Citing *Daubert* and *Kumho Tire*, Judge Garza observed: “The inadequacy of the science underlying Dr. Griffith’s testimony become[s] strikingly apparent when considered relative to scientific evidence generally admissible at trial.” *Id.*, at 464. Indeed “it appears that the use of psychiatric evidence to predict a murderer’s ‘future dangerousness’ fails all five *Daubert* factors.” *Id.* See also Faigman, Kaye, Saks, & Sanders, *SCIENCE IN THE LAW* §2-1.1, at 78 (“This area of the law thus presents a paradox in which judges seemingly take the most lenient approach toward scientific evidence involving some of the most controversial science to enter the courtroom.”)

¹¹⁰ *Flores v. Johnson*, *supra*, 210 F.3d, at 458.

¹¹¹ By far the most common error found by researchers studying exonerations after wrongful convictions is faulty eyewitness identification testimony. See Connors, Lundregan, Miller & McEwen, *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL* (1996); Sheck, Neufeld & Dwyer, *ACTUAL INNOCENCE* (2000).

¹¹² See Giannelli & Imwinkelried, *SCIENTIFIC EVIDENCE* (3d ed) §9.2, at 428-430 (& citations); G. Wells & E. Loftus, *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES* (1984); Neil J. Vidmar & Regina A. Schuller, “Juries and Expert Evidence: Social Framework Testimony,” 52 Law & Contemporary Problems 133, 160-

disbelieved. The expert is prepared to testify about the factors that adversely affect accuracy (such as stress, “weapon focus,” and confusion of post-event information) and to contradict assumptions likely to be shared by jurors, such as the equation of the witness’ level of certainty with the accuracy of the identification.¹¹³

Despite its clearly “scientific” (in the *Daubert* sense) foundations, expert testimony on eyewitness identification is very often excluded at trial.¹¹⁴ Courts rejecting it typically conclude it is unnecessary because an unassisted jury is perfectly capable of weighing the weaknesses of an eyewitness’ testimony after cross examination by defense counsel,¹¹⁵ a conclusion belied by the empirical data,¹¹⁶ or that it invades the exclusive province of the jury to assess the credibility of witnesses.¹¹⁷

166 (1989). For recent decisions making the case for reliability, see *Newsome v. McCabe*, 319 F.3d 301, 305-307 (7th Cir. 2003) and *United States v. Hines*, 55 F.Supp.2d 62, 71 (D. Ma. 1999) (& citations).

¹¹³ See, e.g., *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985). See also Neil J. Vidmar & Regina A. Schuller, “Juries and Expert Evidence: Social Framework Testimony,” 52 *Law & Contemporary Problems* 133, 161-162 (1989).

¹¹⁴ See generally Giannelli & Imwinkelried, *SCIENTIFIC EVIDENCE* (1999) 9.2(C), at 434-439 (& citations); Faigman, Kaye, Saks, & Sanders, *SCIENCE IN THE LAW: SOCIAL BEHAVIORAL SCIENCE ISSUES* (2002) 370 n. 3. See also *United States v. Hall*, 165 F.3d 1095, 1107 (7th Cir. 1999) (such evidence is strongly disfavored); *United States v. Smith*, 156 F.3d 1046, 1052-1053 (10th Cir. 1998) (“Until fairly recently, most, if not all, courts excluded expert psychological testimony on the validity of eyewitness identification. But, there has been a trend in recent years to allow such testimony under circumstances described as narrow.” citation omitted); *Com. v. Francis*, 390 Mass. 89, 453 N.E.2d 1204 (1983) (collecting state and federal cases). There has been somewhat more judicial receptivity to this evidence in recent years. See Faigman, et. al., *supra*, at 369.

The research into eyewitness identification has had its impact outside the judicial forum, most notably in the promulgation of reform guidelines by the U.S. Dept. Of Justice (adopted in New Jersey and other jurisdictions). See *Eyewitness Evidence: A Guide for Law Enforcement* (1999).

¹¹⁵ See Faigman, et. al., *SCIENCE IN THE LAW: SOCIAL BEHAVIORAL SCIENCE ISSUES* 8-1.3.1, at 375-379 (cases collected); *State v. Coley*, 32 S.W.3d 831 (Tenn. 2000); *Com. v. Francis*, 390 Mass. 89, 453 N.E.2d 1204 (1983). But compare *United States v. Smithers*, 212 F3d306, 316 (6th Cir. 2000) (“Today, there is no question that many aspects of perception and memory are not within the common experience of most jurors, and in fact, many factors that affect memory are counter-intuitive.”); *United States v. Hines*, 55 F.Supp.2d 62, 72 (D. Ma. 1999) (“While jurors may well be confident that they can draw the appropriate inferences about eyewitness identification directly from their life experiences, their confidence may be misplaced, especially where cross-racial identification is concerned.”).

¹¹⁶ See Cutler, Penrod, & Stuve, “Juror Decision Making in Eyewitness Identification Cases,” 12 *Law & Human Behavior* 41 (1988), concluding that laypersons are not knowledgeable or critical about the variables that influence eyewitness memory such as stressfulness of the confrontation, time delay, and level of confidence of the witness. See also *Newsome v. McCabe*, 319 F.3d 301, 305-307 (7th Cir. 2003).

¹¹⁷ See, e.g., *U.S. v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) (“By testifying that confidence bears little or no relationship to accuracy in identifications, Dr. Lieppe would effectively have inserted his own view of the officers’ credibility for that of the jurors, thereby usurping their role. Indeed, by our estimation, the added aura of reliability that necessarily surrounds expert testimony would have placed the officers’ credibility here in jeopardy. As a result, we find Dr. Lieppe’s proposed testimony intrudes too much on the traditional province of the jury to assess witness credibility); *U.S. v. Hall*, 165 F.3d 1095, 1107 (7th Cir. 1999) (“the credibility of eyewitness testimony is generally not an appropriate subject matter for expert testimony because it influences a critical function of the jury--determining the credibility of witnesses.”). But compare *United States v. Hines*, 55 F.Supp.2d 62, 72 (D.Ma. 1999)

In any event the frequent exclusion of expert testimony on eyewitness identification despite its scientific reliability, contrasting sharply with the widespread admission of evidence of such dubious reliability as “future dangerousness” and the various syndromes discussed above, strongly suggests that factors *other than* reliability are playing the determinative role. We will turn to those matters in section III, below.

C. Judicial Rationales for Admission of Behavioral Science Evidence

*“If courts allow the admission of long-relied upon but ultimately unproven analysis, they may unwittingly perpetuate and legitimate junk science.”*¹¹⁸

Despite heightened reliability standards, courts persist in admitting much behavioral science evidence.¹¹⁹ In explaining this paradox, it has been suggested that media attention and public sentiment surrounding certain kinds of cases, particularly those involving abuse of children and women, have influenced courts in this regard.¹²⁰ Researchers in the fields may have failed to critically test their hypotheses for fear of being labeled politically incorrect.¹²¹ Also

(“All that the expert does is provide the jury with more information with which the jury can then make a more informed decision.”).

¹¹⁸ U.S. v. Lewis, 220 F.Supp.2d 548, 554 (S.D.W.Va. 2002)

¹¹⁹ See n. 65, *supra*.

¹²⁰ Richardson et al., *supra*, 79 Judicature at 11. Referring to battered woman syndrome, Faigman et al observe: “The reasons for this positive reception lie more in the policies and values implicit and explicit in the law, rather than the quality or force of the science. In particular, courts have been justly outraged at the rate of domestic violence, and the very poor record of the legal system in responding to this violence.” SCIENCE IN THE LAW: SOCIAL BEHAVIORAL SCIENCE ISSUES, *supra*, at 172. See also Slobogin, “The Admissibility of Behavioral Science Information in Criminal Trials: From Primitivism to *Daubert* to Voice,” 5 Psychology, Public Policy & Law 100, 117-118 (1999) (arguing that continued admission of battered woman syndrome evidence, despite its suspect reliability, may be necessary to “avoid damage to the political viability of the [criminal justice] system.”).

As one forensic psychiatrist put it recently, “[i]f they make a play out of a case, that is a clear indication of how much political pressure can be attached.” Michael Welner, “Hidden Diagnosis and Misleading Testimony: How Courts Get Shortchanged,” 24 Pace L. Rev. 193, 197 (2003). Certainly the notorious child care center abuse cases of the 1980’s and the accompanying public hysteria played a role in encouraging courts to admit evidence of questionable validity from children and “experts.” See Lisa R. Askowitz & Michael H. Graham, The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions, 15 CARDOZO L. REV. 2027, 2028-2029 (1994).

In an apparent example of the power of media attention, U.S. District Judge Lewis Pollak reconsidered and vacated an order excluding fingerprint identification evidence as unreliable only two months after he issued it, after an avalanche of national coverage. See *United States v. Llera Plaza*, 179 F.Supp.2d 492, *vacated* 188 F.Supp. 549 (E.D.Pa. 2002).

¹²¹ David Faigman has observed that “[i]n our time, the rape trauma syndrome, the battered woman syndrome, repressed memories, post-traumatic stress disorder, and child abuse accommodation syndrome all represent accession to holy writ.” Faigman, “The Law’s Scientific Revolution: Reflections and Ruminations of the Law’s Use of Experts in Year Seven of the Revolution,” 57 Wash. & Lee L.Rev. 661, 674 (2000).

More direct and transparent political pressure on and within Congress produced the controversial amendments that appear as FRE 413, 414, and 415, which suspend in sexual assault and child molestation cases both

playing a part is the reluctance¹²² or inability¹²³ of trial judges to conduct the critical analysis envisioned in *Daubert* and *Kumho Tire*, a problem anticipated by Justices Rehnquist and Stevens.¹²⁴ And in cases like *Barefoot v. Estelle*,¹²⁵ the courts seem willing to skirt the reliability question in order to permit statutory schemes like Texas' death penalty, premised on future dangerousness, to operate.

It is also important to note the prevalence, despite the renewed focus on reliability, of "grandfathering in" evidence previously admitted in the jurisdiction under less stringent standards. As one court put it (apparently without seeing the irony), "[t]he fact that handwriting comparison analysis has achieved widespread and lasting acceptance in the expert community gives us the assurance of reliability that *Daubert* requires."¹²⁶ This circular reasoning,¹²⁷ which

the usual prohibition against "bad act" evidence and the trial judge's power under FRE 403 to exclude such proof when unfairly prejudicial. See generally Joseph A. Aluisse, "Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules 413, 414, and 415?," 14 J.Law & Politics 153 (1998).

¹²² In large part because of their sympathy towards battered women who kill their abusers, "courts have almost uniformly failed to examine in any detail whatsoever the empirical support, or lack thereof, for the battered women syndrome." Faigman, Kaye, Saks & Sanders, SCIENCE IN THE LAW: SOCIAL AND BEHAVIORAL SCIENCE ISSUES (2002).§4-1.5, at 203-204

¹²³ Richardson, *supra*, 79 Judicature at 15; Margaret Kovera, "The Effects of Peer Review and Evidence Quality on Judge Evaluations of Psychological Science: Are Judges Effective Gatekeepers?," 85 J.Appl.Psychol. 574 (August, 2000) (concluding untrained judges had difficulty rating the validity of scientific studies); Margaret Kovera, Melissa Russano, & Bradley McAuliff, "Assessment of the Commonsense Psychology Underlying *Daubert*," 8 Psychol. Pub. Pol'y & L. 180 (2002).

¹²⁴ "I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its 'falsifiability,' and I suspect some of them will be, too." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 600 (1993) (Rehnquist, C.J., concurring in part and dissenting in part).

¹²⁵ 463 U.S. 880 (1983), discussed above at n. 100 et seq.

¹²⁶ U.S. v. Crisp, 324 F.3d 261, 271 (4th Cir. 2003). Another federal judge admitted the testimony of a pediatrician who had examined the alleged victim and was prepared to testify that her behavior was consistent with abuse: "Well, I'm not going to hold a *Daubert* hearing. I've had this testimony before in trials, and it's not new and novel...." *United States v. Velarde*, 214 F.3d 1204, 1207 (10th Cir. 2000). In an influential opinion, Supreme Judicial Court Justice Greaney opined that "in the absence of specific, concrete evidence suggesting unreliability, *Lanigan* [adopting *Daubert* analysis] should not be used to revisit areas where we have validated expert testimony based on properly conducted personal observations and clinical testing applying generally accepted scientific techniques." *Canavan's Case*, 432 Mass. 304, 317, 733 NE2d 1042, 1053 (2000) (concurring). See also *Com. v. Frangipane*, 433 Mass 527, 533, 744 N.E.2d 25, 33 (2001).

¹²⁷ As has been well documented with regard to fingerprint identification, courts initially admitted the evidence without any meaningful consideration of reliability and then, having been judicially accepted, it was welcomed by other courts. See Simon A.Cole, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION (); Robert Epstein, "Fingerprints Meet *Daubert*: The Myth of Fingerprint 'Science' is Revealed", 75 S.Cal.L.Rev. 605, 615-617 (2002)

A more enlightened view suggests "a court faced with the present task of deciding the admissibility of scientific evidence must exercise care to consider whether new developments or evidence require a reevaluation of the conclusions previously reached by courts that did not have the benefit of the more recent information. In short, neither science and technology may rest on past accomplishments-- nor may the courts." *United States v. Horn*, 185

directly contradicts the entire thrust of *Daubert and Kumho Tire*, nonetheless has supported the admission of much evidence which could not survive contemporary scrutiny.

Several other judicial rationales have been invoked to avoid meaningful reliability testing of social science evidence.¹²⁸ Some states continue to follow *Frye* and admit such evidence under the more lenient “general acceptance” standard.¹²⁹ Others have concluded that expert testimony concerning syndromes is not *novel* science and thus need not be specially scrutinized.¹³⁰ Still other decisions except from screening expert testimony that is based on observation and experience.¹³¹ Finally, some courts have held that where the social science evidence is not offered as *direct proof* of what happened, but only as explanation of victim’s behavior, a reliability showing is not necessary.¹³²

The Supreme Court of Arizona relied upon several of these rationales in an influential opinion regarding testimony on “repressed memory.”¹³³ Plaintiff Kim Logerquist called a clinical psychiatrist to support her belated claim that she was sexually abused by her pediatrician as a child, but had developed amnesia and only recovered the memories years later as an adult. The witness had conducted studies on the effect of trauma on memory, and was conversant with the extensive literature in the field of repressed memory. In moving to exclude the testimony, the defendant doctor presented a research psychologist who testified that there were “serious flaws” in many of the studies relied upon by plaintiff’s expert. The trial judge excluded Logerquist’s expert on the grounds that his evidence did not meet the *Frye* general acceptance test, pointing to the cautionary note in the Diagnostic and Statistical Manual of Mental Disorders IV, relied upon

F.Supp.2d 530, 536 n.15 (D.Md. 2002). See also Wright & Gold, FEDERAL PRACTICE AND PROCEDURES §6266: “*Daubert’s* focus upon multiple criteria for scientific validity compels lower courts to abandon long existing per se rules of admissibility or inadmissibility grounded upon the *Frye* standard.”

¹²⁸ For an inventory of the various state’s approaches, see *Steward v. State*, 652 N.E.2d 490, 495-498 (Ind. 1995).

¹²⁹ See, e.g., *Nixon v. United States*, 728 A.2d 582, 588-589 (Dis.Col.Ct Appls. 1999) (methodology in diagnosis of battered women based on work of Dr. Lenore Walker is generally accepted in community of mental health experts); *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993) (“PTSD is generally accepted by psychologists and psychiatrists as a valid technique for evaluating patients with mental disorders. The existence of DSM III-R and its general acceptance in psychology indicate that PTSD has been exposed to objective scientific scrutiny and empirical verification.”).

¹³⁰ See, e.g., *State v. Vumback*, 68 Conn. App. 313, 327-332, 791 A.2d 569, 578-580 (2002), *aff’d on other grnds* 262 Conn. 215, 819 A.2d 250 (2003); *Logerquist v. McVey*, 196 Ariz. 470, 475, 1 P. 3d 113, 118 (2000).

¹³¹ See, e.g., *Canavan’s Case*, 432 Mass. 304, 317, 733 N.E.2d 1042, 1053 (2000) (Greaney, J. concurring); *Logerquist v. McVey*, 196 Ariz. 470, 477, 1 P.3d 113, 120 (2000).

¹³² See, e.g., *People v. Beckley*, 434 Mich. 691, 721, 456 N.W.2d 391 (1990).

¹³³ *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000). For a critique of the court’s reasoning, see D.H. Kaye, “Choice and Boundary Problems in *Logerquist*, *Hummert*, and *Kumho Tire*,” 33 Ariz.St.L.J 41 (2001) and Tomika Stevens, “The Admissibility of Expert Testimony on Repressed Memories of Childhood Sexual Abuse in *Logerquist v. McVey*: Reliability Takes a Backseat to Relevancy,” 46 Vill.L.Rev. 385 (2001).

by the expert, that “[t]here is currently no method for establishing with certainty the accuracy of such retrieved memories in the absence of corroborative evidence.”

Reversing, the Supreme Court of Arizona exempted observational and experience-based expert testimony from reliability screening. Rejecting the “judge-as-gatekeeper” model, the court opted instead to leave it to the jury to weigh the expert’s testimony.¹³⁴ Rejecting both *Daubert* and *Kumho Tire, Logerquist* asserts that the we need only be concerned about reliability where the testimony is based on a “*scientific*” principle, process, theory, or formula; and only then when it is also “*novel*.”¹³⁵ In those limited situations we distrust the jury’s ability to evaluate the evidence because they are out of their element and may be unduly impressed with “the infallibility” of the science. But no similar obstacles prevent the jury from assessing an expert who is relying merely on observations and experience. Overriding its own “skepticism” about the plaintiff’s repressed memory claims, the Arizona Supreme Court chose to rely on the adversary system (particularly cross examination) to expose the flaws in the psychiatric expert’s testimony.¹³⁶

Logerquist relied on an earlier decision holding that a dog handler’s opinion on the ability of his tracking dog to identify human scent long after it was laid down was admissible without pre-screening under *Frye*:

The evidence here was not bottomed on any scientific theory. In fact, it appears that no one knows exactly how or why some dogs are able to track or scent, or the degree to which they are able to do so. No attempt was made to impress the jury with the infallibility of some general scientific technique or theory. Rather, this evidence was offered on the basis that it is common knowledge that some dogs, when properly trained and handled, can discriminate between human odors. Preston's testimony was premised upon this simple idea and was not offered as a product of the application of some accepted scientific process, principle, technique or device. It was offered as Preston's opinion of the meaning of his dog's reaction; that opinion was based upon Preston's training of and experience with the dog. The weight of the evidence did not hinge upon the validity or accuracy of some scientific principle; rather, it hinged on Preston's credibility, the accuracy of his past observation of the dog's performance, the extent of the training he had given the dog, and the reliability of his interpretations of the dog's reactions. It was not the theories of Newton, Einstein or Freud which gave the evidence weight; if so, the *Frye* test should have been applied. It was, rather, Preston's knowledge, experience and integrity which would give the evidence weight and it was Preston who

¹³⁴ 1 P.3d at 119.

¹³⁵ 1 P.3d at 119, 121. Quoting decisions in other jurisdictions, the court noted that “testimony concerning general characteristics of child sexual abuse victims is not ‘new, novel or experimental scientific evidence’ and therefore does not require the additional screening provided by *Frye*.” *Id.* at 121 (citations omitted).

¹³⁶ 1 P.3d at 134.

was available for cross-examination. His credentials, his experience, his motives and his integrity were effectively probed and tested. Determination of these issues does not depend on science; it is the exclusive province of the jury.¹³⁷

Michael Saks has described this reasoning as follows: “Because [such testimony] flunks *Daubert*, it is not science. Because it is not science, it need not pass the *Daubert* test. [T]he weakest fields, with the most tenuous commitment to real science, recategorize themselves as nonsciences to remain expert witnesses in a post-*Daubert* world.”¹³⁸ And the *Logerquist* court seemed oddly unperturbed by its own admission that the witness presenting the dog-scent evidence in the case it relied on as it turned out to be a “charlatan” who had been permitted to give false testimony in several criminal cases before he was exposed.¹³⁹ Was that not the natural consequence of exempting such testimony from reliability screening?.

Logerquist also relied on another Arizona precedent which rejected a DNA expert’s opinion based on probability and statistics (because they were not found to be generally accepted by scientists in the field) but permitted him to testify to his own “*personal opinion*” (based on his experience) that the two samples matched. Because no scientific principle was invoked in the latter testimony, no reliability showing was required.¹⁴⁰ Yet as Justice McGregor noted in his dissent in *Logerquist*, it is hard to see how the truth-finding function of the trial is served by permitting an expert to expound an opinion, not shown to be based on reliable science, simply because he expresses it as his “personal” opinion.¹⁴¹

*Kumho Tire*¹⁴² rejects the notion that expert testimony based upon observation should be immunized from judicial scrutiny. In explaining its own ruling to the same effect, the Supreme Judicial Court of Massachusetts wrote:

There is no logical reason why conclusions based on personal observations or clinical experience should not be subject to [reliability] analysis. That a person qualifies as an expert does not endow his testimony with magic qualities. Observation informed by experience is but one scientific technique that is no less susceptible to [reliability] analysis than other types of scientific methodology. The gatekeeping function ... is the same regardless of the nature of the methodology used: to determine whether "the process or theory underlying a scientific expert's opinion lacks reliability [such] that [the] opinion

¹³⁷ 1 P.3d at 120, quoting *State v. Roscoe*, 145 Ariz. 212, 219-220, 700 P.2d 1312, 1319-1320 (1984).

¹³⁸ Michael J. Saks, “The Aftermath of *Daubert*: An Evolving Jurisprudence of Expert Evidence,” 40 *Jurimetrics* 229, *** (2000) (ellipses omitted).

¹³⁹ 1 P.3d at 120.

¹⁴⁰ *State v. Hummert*, 188 Ariz. 119, 124-125, 933 P.2d 1187, 1192-1193 (1997).

¹⁴¹ 1 P.3d at 142.

¹⁴² See n. 30, et. seq., *supra*.

should not reach the trier of fact." Of course, even though personal observations are not excepted from [reliability] analysis, in many cases personal observation will be a reliable methodology to justify an expert's conclusion. If the proponent can show that the method of personal observation is either generally accepted by the relevant scientific community or otherwise reliable to support a scientific conclusion relevant to the case, such expert testimony is admissible.¹⁴³

A final rationale courts have articulated for admitting social science evidence without reliability screening concerns the role played by the evidence at trial. "*Frye*-ing," the argument goes, is necessary only when the evidence is "likely to have an enormous effect in resolving completely a matter in controversy."¹⁴⁴ When the expert gives testimony that "only helps a trier to interpret the evidence ... it will be received on a lesser showing of scientific certainty."¹⁴⁵ Since testimony from behavioral experts regarding the various victim syndromes is "not offered as direct proof that sexual abuse occurred but as an explanation of behavior that would help the jury understand the evidence and determine whether the charge was true," the protection against misuse lies in cross examination and not exclusion.¹⁴⁶ Whether reliability screening should turn on this distinction, which may have more significance to the legal professional than the lay juror, is open to serious question.¹⁴⁷

¹⁴³ *Canavan's Case*, 432 Mass. 304, 313-314, 733 NE2d 1042 (2000) (citations & internal quotes omitted) (personal observations and clinical experience of a physician regarding patient's "multiple chemical sensitivity"). In a concurring opinion, Justice Greaney sought to distinguish "the so-called 'soft' sciences, such as psychology and sociology, which are highly dependent on information derived from such sources as personal observations, clinical assessments, and statistical data. It is here, more than anywhere else, that an appellate court will defer to a trial judge's exercise of discretion, once the judge makes a decision as to the reliability of the process or theory underlying the proffered opinions and the relevance of the opinion to a matter in issue." 432 Mass at 317, 733 N.E.2d at 1053.

¹⁴⁴ *Logerquist*, 1 P3d at 121.

¹⁴⁵ 1 P3d at 121. See also *People v. Peterson*, 450 Mich. 349, 365, 537 N.W.2d 857, 864 (1995) ("as long as the purpose of the [syndrome] evidence is merely to offer an explanation for certain behavior, the *Davis/Frye* test is inapplicable."); *Frenzel v. Wyoming*, 849 P.2d 741 (Wyo.1993) (although CSAAS is not generally accepted, testimony based on the syndrome may be admitted to explain the behavior of an alleged victim such as delayed reporting); *Wilson v. Philips*, 73 Cal.App.4th 250, 86 Cal.Rptr.2d 204, 206 (1999) (refusal to apply *Frye* or *Daubert* to screen expert's opinion that plaintiffs' behavior was "consistent with other individuals who had repressed their memories of childhood sexual abuse.");

¹⁴⁶ 1 P3d at 121.

¹⁴⁷ Indeed, in ruling admissible testimony about the "typical" behavior of sex abuse victims, the New Mexico Supreme Court blurred the distinction by explaining: "If a complainant suffers from PTSD symptoms, it indicates that she might have been sexually abused. Thus, *testimony regarding a complainant's PTSD symptoms has the tendency to show that she might have been sexually abused.*" *State v. Alberico*, 116 N.M. 156, 173, 861 P.2d 192, 209 (1993) (emphasis added).

Even if these various rationales for admitting social science evidence without (or with minimal) scrutiny were persuasive, it is submitted that the evidence runs afoul of the threshold requirements for admission of expert testimony, as set out in the next section.

III. Threshold Foundational Issues Regarding Behavioral Science Evidence

As a witness permitted to expound opinions in court,¹⁴⁸ the expert holds great potential sway over factfinder. The trial judge has always (long before *Daubert*) served as gatekeeper to assure that the expert is “qualified” by virtue of “knowledge, skill, experience, training, or education;” that the subject matter to be addressed concerns “scientific, technical, or other specialized knowledge;” and that the testimony will “will assist the trier of fact to understand the evidence or to determine a fact in issue.” FRE 702. It is also of course the judge’s responsibility to determine that the expert’s evidence is relevant, FRE 401, and that its probative value is not substantially outweighed “by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FRE 403.

A survey of federal district judges recently conducted by the Federal Judicial Center determined that the reasons most often cited for exclusion of expert testimony have to do with these basic foundational requirements for admission, and not concerns about reliability.¹⁴⁹ The most frequent ground for exclusion was that the evidence is not relevant (47%), followed closely by the conclusion that the proffered testimony would not assist the trier of fact (40%). 21% of the exclusions were based on FRE 403 concerns that the prejudicial nature of the testimony outweighed its probative value. Reliability concerns accounted for approximately 20% of the exclusions.

It is submitted below that behavioral science evidence does not fare well measured against these threshold requirements for admission¹⁵⁰

¹⁴⁸ Lay witnesses are of course allowed some limited opportunity to state an opinion. See FRE 701.

¹⁴⁹ Johnson, Krafka, & Cecil, “Expert Testimony in Federal Civil Trials: A Preliminary Analysis” (Federal Judicial Center 2000) (www.fjc.gov).

¹⁵⁰ For the contrary conclusion see Walker & Monahan, “Social Frameworks: A New Use of Social Science in Law,” 73 VA. L. REV. 559 (1987) and Robert P. Mosteller, “Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence,” 52 Law & Contemporary Problems 85 (1989).

A. “Helpfulness” and “Fit”

*“[T]he separate fields of behavioral science and criminal justice are different enough in their foundations and goals that what may be considered helpful information in one may not be so valued in the other.”*¹⁵¹

A prime consideration with regard to the admissibility of expert testimony is, as Wigmore put it, whether “[o]n This subject can a jury receive from This person appreciable help?”¹⁵² While the traditional formulation required the subject matter to be beyond the ken of average juror, the federal standard of “helpfulness” is more lenient.¹⁵³ Although the matter is one not *wholly* outside the jury’s knowledge, an expert may still be permitted to testify if it will “assist” in resolving the disputed issues. Moreover, as one court explained in a case involving testimony regarding defendant’s susceptibility to making a false confession, “[e]ven though the jury may have had beliefs about the subject, the question is whether those beliefs were correct. Properly conducted social science research often shows that commonly held beliefs are in error.”¹⁵⁴

On the other hand, if the jury is in as good a position to resolve the disputed issues as the expert, the testimony should not be admitted.¹⁵⁵ When the lay juror would be able to make a common sense determination of the issue without the aid of an expert, the testimony is superfluous.¹⁵⁶ Indeed, too pessimistic a view of the jury’s capabilities would lead to substitution of professional “expertise” for common community wisdom.¹⁵⁷

¹⁵¹ State v. Cressey, 137 N.H. 402, 407, 628 A.2d 696, 699 (1993).

¹⁵² 7 Wigmore, Evidence § 1923 (Chadbourn rev. 1978). As Prof. Ronald Allen has put it, “Does the expert in fact possess knowledge useful to this trial that is being brought to bear upon it in a way that increases the probability of accurate outcomes?” Ronald J. Allen, “Expertise and the Supreme Court: What is the Problem?”, 34 Seton Hall. L.Rev. 1, 8 (2003).

¹⁵³ See generally Krauss and Sales, “The Problem of ‘Helpfulness’ in Applying *Daubert* to Expert Testimony: Child Custody Determinations in Family Law as an Exemplar,” 5 Psychology, Public Policy and Law 78 (1999) and Robert P. Mosteller, “Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence,” 52 Law & Contemporary Problems 85, 96-97 (1989) (& citations).

¹⁵⁴ United States v. Hall, 93 F.3d 1337, 1345 (7th Cir. 1996). See also Tyus v. Urban Search Management, 102 F.3d 256, 263 (7th Cir. 1997) (“Social scientists in particular may be able to show that commonly accepted explanations for behavior are, when studied more closely, inaccurate. These results sometimes fly in the face of conventional wisdom. The court below erred insofar as it assumed that only evidence completely inaccessible to the jury could come in under Rule 702. [A] trial court is not compelled to exclude expert testimony just because the testimony may, to a greater or lesser degree, cover matters that are within the average juror’s comprehension.”); United States v. Hines, 55 F.Supp.2d 62, 64 (D.Ma. 1999) (“even if the inferences may be drawn by the lay juror, expert testimony may be admissible as an ‘aid’ in that enterprise. For example, the subject *looks like* one the jury understands from every day life, but in fact, the inferences the jury may draw are erroneous.”).

¹⁵⁵ State v. Saldana, 324 N.W.2d 227, 229 (Minn. 1982).

¹⁵⁶ See Advisory Committee Note to Fed.R.Evid. 702.

¹⁵⁷ See Melvin M. Mark, “Social Science Evidence in the Courtroom: *Daubert* and Beyond,” 5 Psychol. Pub. Pol. & Law 175, 179 (1999).

Courts have allowed expert testimony concerning the “typical” conduct of abuse victims on the assumption that jurors need assistance in understanding why a battered woman does not leave the abusive relationship, or a rape victim fails to report the crime or tell anyone about it, or a child represses the memory of the traumatic sexual encounter. *State v. Lindsay* is a representative example:

The trial judge has discretion to allow such expert testimony where it may assist the jury in deciding a contested issue, including issues pertaining to accuracy or credibility of a witness' recollection or testimony. The trial judge may exercise this discretion where there is a reasonable basis to believe that the jury will benefit from the assistance of expert testimony that explains recognized principles of social or behavioral science which the jury may apply to determine issues in the case. Testimony of this type is not to be permitted in every case, but only in those where the facts needed to make the ultimate judgment may not be within the common knowledge of the ordinary juror.

[T]he court of appeals correctly concluded that the trial court did not abuse its discretion in permitting ... testimony on general patterns of behavior. We cannot assume that the average juror is familiar with the behavioral characteristics of victims of child molesting. Knowledge of such characteristics may well aid the jury in weighing the testimony of the alleged child victim. Children who have been the victims of sexual abuse or molestation may exhibit behavioral patterns (e.g. recantation, conflicting versions of events, confusion or inarticulate descriptions) which jurors might attribute to inaccuracy or prevarication, but which may be merely the result of immaturity, psychological stress, societal pressures or similar factors as well as of their interaction.¹⁵⁸

¹⁵⁸ 149 Ariz. 472, 473-74, 720 P.2d 72, 74-75 (1986) (citations omitted). In a similar vein, the Supreme Judicial Court of Massachusetts has ruled that testimony on the general behavioral characteristics of sexually abused children may be admitted because the behavioral and emotional characteristics of these victims is beyond the jury's common knowledge:

While jurors may be capable of personalizing the emotions of victims of physical assault generally, and of assessing witness credibility accordingly, tensions unique to the trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. As the expert's testimony demonstrates the routine indicia of witness reliability-- consistency, willingness to aid the prosecution, straightforward rendition of the fact-- may, for good reason, be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion.

Com. v. Dockham, 405 Mass 618, 630, 542 NE2d 591, 598 (1989). See also *Mindombe v. U.S.*, 795 A.2d 39, 46 (D.C. Ct Appeals 2002) (“We believe there is a difference, however, between an adult witness narrating his or her story of abuse and a young child recounting and expressing his or her recollection of abuse. There are special cognitive issues that relate to children who are victims of sexual abuse that usually are not at issue when the witness is an adult.”); *State v. Cressey*, 137 N.H. 402, 411-412, 628 A.2d 696, 702-703 (1993) (several common behaviors, such as child's delayed disclosure of abuse, recantation, and inconsistent statements “may be puzzling or appear counterintuitive to lay observers” and may present a defendant an opportunity to “superficially attack the testimony of a child victim witness during cross-examination or to argue against the child's credibility in closing statements before the jury. Therefore, expert testimony explaining the peculiar behaviors commonly found in sexually abused children [without offering an opinion as to whether a certain child has been sexually abused] may aid a jury in accurately evaluating the credibility of a child victim witness.”); *People v. Peterson*, 450 Mich. 349, 352, 537 N.W.2d 857, 859 (1995) (“an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim”); *Com. v. Richardson*, 423

Most jurisdictions allow testimony based on child abuse accommodation syndrome to explain the child complainant's apparently self-impeaching conduct such as delayed reporting or recantation.¹⁵⁹ Testimony concerning both battered woman and rape trauma syndrome is admitted on the same rationale—to “dispel common myths and misunderstandings about domestic violence that may interfere with the factfinders’ ability to consider issues in the case.”¹⁶⁰

But how valid is this nearly universal (but untested¹⁶¹) assumption that the jurors *need* assistance because they are not sophisticated enough to recognize that victims sometimes recant,

Mass 180, 667 N.E.2d 257, 260 (1996) (police officer qualified as expert to testify that it was highly unusual for child victim to remember dates, times, and sequences).

In an involuntary servitude prosecution, the First Circuit made the same assumption of juror ignorance in ruling that a “victimologist” was properly allowed to testify as an expert to refute the principal defense—that the victim had many opportunities to escape:

Based on her general research and her personal interaction with hundreds of victims of sexual abuse, Burgess testified that Gedara's behavioral response to the non-sexual abuse administered by the Alzankis was *consistent with the behavior of abuse victims generally*. It seems to us that expert testimony on this subject—which the defense was free to contradict—was “reasonably likely” to assist the jury in understanding and assessing the evidence, in that the matter at issue was highly material, somewhat technical, and beyond the realm of acquired knowledge normally possessed by lay jurors.

United States v. Alzanki, 54 F.3d 994, 1006 (1st Cir. 1995).

¹⁵⁹ Lisa R. Askowitz & Michael H. Graham, “The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions,” 15 Cardozo L. Rev. 2027, 2040 (1994).

¹⁶⁰ U.S. Dept. of Justice Report, The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials, <http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/Valid/>. See, e.g., Nixon v. United States, 728 A.2d 582, 590 (Dis.Col.Ct.Appls. 1999) (“Actions sometimes speak louder than words, and a lay juror might well wonder whether Ms. Boyd's actions (and inaction) at the time of the alleged abuse were consistent with the narrative which she provided in the courtroom long after the events occurred. Dr. Dutton's testimony was designed to apprise the jurors of certain repeated patterns of behavior on the part of many battered women. With that information, the jurors were in a better position to determine whether these patterns of behavior might explain any perceived discrepancy between Ms. Boyd's words and her deeds. This court and other courts have held that testimony of the type provided by Dr. Dutton may assist the jury in understanding the evidence and is ‘beyond the ken’ of the average lay juror.”); State of Minnesota v. Grecinger, 569 N.W.2d 189, 195 (Sup.Ct. Minn. 1997) (& cases collected) (“expert testimony on battered woman syndrome would help to explain a phenomenon [staying with the batterer, recantation, inconsistent stories, delayed prosecution] not within the understanding of an ordinary lay person.”); State v. Jensen, 147 Wis.2d 240, 252, 432 N.W.2d 913, 918 (1988) (“Because a complainant's behavior frequently may not conform to commonly held expectations of how a victim reacts to sexual assault, courts admit expert opinion testimony to help juries avoid making decisions based on misconceptions of victim behavior.”); Pratt v. Wood, 210 A.D.2d 741, 620 N.Y.S.2d 551, 553 (App.Div. 1994) (child custody case) (“[I]t has come to be recognized that expert testimony in the field of domestic violence is admissible since the psychological and behavioral characteristics typically shared by victims of abuse in a familial setting are not generally known by the average person.”).

For the admission of similar evidence in civil actions alleging sex harassment, see Donna Shestowsky, “Where Is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials,” 51 Stan.L.Rev. 357, 380-383 (1999).

¹⁶¹ “[C]ourts do little more than cite the recurring fear that juries hold these ‘common myths’ about battered women. They do not cite any research indicating that such myths are commonly held, nor do they express chagrin that such research does not exist.” Faigman, et al, SCIENCE IN THE LAW: SOCIAL BEHAVIORAL SCIENCE ISSUES

give conflicting versions of the event, fail to report promptly, forget details, etc.¹⁶² Serious question must be raised about the willingness of courts to take for granted that jurors, left unaided, will misinterpret such behavior.¹⁶³ Should we not take into account the increasing sophistication of lay people regarding abuse and its victims due to constant news accounts, movies, TV shows, and other information sources?¹⁶⁴ Is there any real doubt that the general

§4-1.1.3, at 181. One notable exception is *People v. Taylor*, 75 N.Y.2d 277, 288-289, 52 N.E.2d 131 (Ct.App. 1990):

[R]ape is a crime that is permeated by misconceptions. Society and law are finally realizing that it is an act of violence and not a sexual act. ... The stigma and other difficulties associated with a woman reporting a rape and pressing charges probably deter most attempts to fabricate an incident; rape remains a grossly under-reported crime. Studies have shown that one of the most popular misconceptions about rape is that the victim by behaving in a certain way brought it on herself. For that reason, studies have demonstrated that jurors will under certain circumstances blame the victim for the attack and will refuse to convict the man accused.. Studies have also shown that jurors will infer consent where the victim has engaged in certain types of behavior prior to the incident. ... Because cultural myths still affect common understanding of rape and rape victims and because experts have been studying the effects of rape upon its victims only since the 1970's, we believe that patterns of response among rape victims are not within the ordinary understanding of the lay juror. For that reason, we conclude that introduction of expert testimony describing rape trauma syndrome may under certain circumstances assist a lay jury in deciding issues in a rape trial. (citations omitted).

¹⁶² By way of example is the unannotated assertion in *Newkirk v. Com.*, 937 S.W.2d 690, 698-699 (Sup.Ct.Ken. 1996): "When a jury of lay adults, hearing the horrible details in a typical child sexual abuse case, is confronted with a child victim recanting his or her previous allegations of sexual abuse, it is understandable that they would tend to apply an adult standard to the child victim's behavior in an effort to understand what motivates the victim to recant his or her allegations." (Willett, J., dissenting opinion).

Occasionally courts point to the fact that a party is seeking to exploit a perceived misconception to support the proposition that jurors *must have* that misconception. In ruling that the juvenile defendant, convicted of shooting and killing his mother, should have been permitted to offer the testimony on "battered child syndrome," the Supreme Court of Ohio reasoned:

Absent corroborating evidence, a trier of fact is likely to believe that the abuse allegations are fabricated in response to the charges levied against the child-defendant. The existence and prevalence of such misconceptions are evident in the transcript of this trial. The prosecution repeatedly stressed that Brian could have left the house again, that he could have gone to his father or grandparents, that he was not in actual imminent danger at the time of the killing, and implying that he must have created the allegations of abuse after the fact because, otherwise, more people would have known about it.

State v. Nemeth, 82 Ohio St.3d 202, 209, 694 N.E.2d 1332, 1337 (1998).

¹⁶³ Edgar Cahn complained many years ago of social scientists' "flabby attempt[s] to demonstrate an assertion that on its face would seem entirely plausible to the lay mind." Cahn, 30 NYU L Rev at 166, n. 31.

¹⁶⁴ As Justice Herbert Wilkins has observed, the "line between common experience and knowledge and matters known only to experts varies with time and circumstances. At any one time, the transition from one type of knowledge to the other is often gradual and cannot be defined precisely." *Com. v. Francis*, 390 Mass 89, 99, 453 N.E.2d 1204, 1209 (1983). It was suggested in 1994 that "many of the myths and misconceptions that gave rise to the need for expert testimony more than a decade ago have today largely been dispelled or have disappeared altogether, perhaps, ... in large part due to media attention." Lisa R. Askowitz & Michael H. Graham, "The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions," 15 Cardozo L. Rev. 2027, 2095 (1994) (& citations).

Defense counsel in one domestic violence case argued unsuccessfully that battered woman syndrome was "common knowledge ... the average laymen in the real world have [been] inundate[d] with a person getting beat up, a person ... not being able to leave, they read about [it] every day, they hear about and they know about it." *Nixon v. United States*, 728 A.2d 582, 589 n.15 (Dis.Col.Ct.Appls. 1999). Some courts have recognized, but discounted the

public is more knowledgeable today about sexual harassment than they were when Anita Hill's credibility was challenged, during the widely-publicized 1991 Senate confirmation hearing of now-Justice Clarence Thomas, because she did not report her allegations and continued to work for him?¹⁶⁵

Professor Mosteller's observations in 1989 are even more valid today: "It is hardly obvious that jurors would have great difficulty understanding why, for example, a child would retract a valid allegation of sexual abuse in the face of the prospect that 'daddy' would otherwise be jailed. It is equally unclear [why jurors would have trouble] understanding the fact that an adult female who claimed to have been raped by an acquaintance did not flee upon the first opportunity or delayed reporting the crime."¹⁶⁶ What little empirical data has been developed presents at best a mixed picture of jury knowledge vs. ignorance on these matters.¹⁶⁷ Even some

learning curve. See, e.g., *Nixon v. United States*, 728 A.2d 582, 591 (Dis.Col.Ct.Appls. 1999) ("a great deal of information about battered women is reported by the media and has found its way into the public domain.").

¹⁶⁵ For discussion of the confirmation proceedings from the perspective of evidence doctrine, see Stephan Landsman, "Who Needs Evidence Rules, Anyway?," 25 *Loyola L.A.L.Rev.* 635 (1992).

¹⁶⁶ Robert P. Mosteller, "Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence," 52 *Law & Contemporary Problems* 85, 125 (1989).

¹⁶⁷ There is some empirical evidence from the 1980's suggesting that potential jurors (particularly males) may hold erroneous beliefs regarding abused women. See Neil J. Vidmar & Regina A. Schuller, "Juries and Expert Evidence: Social Framework Testimony," 52 *Law & Contemporary Problems* 133, 151-154 (1989). Yet the researchers conclude:

[S]everal studies on beliefs about the social and psychological contexts in which battered women exist suggest that the average juror may have an understanding on some issues that varies from conclusions of experts who have studied the phenomenon. However, it appears that jurors may be better informed than critics have suggested. Thus, while there are grounds for concluding that jurors might be helped by expert testimony on battered woman syndrome, the data are not overwhelming.

Id., at 152 (citations omitted). While there were statistically significant differences between the views of experts and laypersons regarding rape, the latter were well informed on matters such as the prevalence of acquaintance rape and the fact that victims often do not report rapes. *Id.*, at 156. Laypersons were less informed regarding the behavioral changes following a rape and were more inclined to be suspicious about delays in reporting. *Id.*, at 157.

Based on a comparison of responses on a sexual assault questionnaire between experts and laypersons, two researchers in the late 1980's documented some significant gaps between "common knowledge" and expert knowledge regarding the effects of rape as well as the prevalence of certain false myths among the laypersons. They concluded (albeit with several caveats) that expert testimony on rape trauma "could be helpful in educating jurors about rape and rape victim behavior." See Patricia Frazier & Eugene Borgida, "Juror Common Understanding and the Admissibility of Rape Trauma Evidence in Court," 12 *Law & Human Behavior* 101, 115 (1988). The authors conceded, however, that the average score of laypersons (58% as compared to the expert score of 84%) still indicated considerable "common knowledge" on the subject. *Id.*, at 116.

For other empirical studies (also reaching conflicting conclusions) of the ability of the average juror to fairly appraise a complainant's version of events in rape and child abuse cases, see Robert P. Mosteller, "Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence," 52 *Law & Contemporary Problems* 85, 116-126 (1989) (& citations); Lisa R. Askowitz & Michael H. Graham, "The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions," 15 *Cardozo L. Rev.* 2027, 2094-2095 (1994) (& citations).

There is probably more empirical basis for concluding that jurors need assistance in understanding the limitations of eyewitness identification testimony. See Steven Penrod & Brian Cutler, "Eyewitness Expert testimony

enthusiasts for syndrome evidence concede there is serious question as to whether such testimony tells the jurors anything they do not already know,¹⁶⁸ or (as some courts have put it) "explodes common myths" the jurors may have.¹⁶⁹ Yet courts rarely recognize that these may be matters of common knowledge.¹⁷⁰

We would not need (nor would we allow the prosecution to present) a criminologist to inform a jury in a bank robbery case that persons like the defendant, who are in substantial debt to bookmakers or loansharks, may commit robbery to pay their debts—this is clearly in the realm of "common knowledge."¹⁷¹ Nor does a jury need an expert to tell them that crime victims sometimes recant their testimony or feign forgetfulness on the witness stand. We leave it to them to "sort out the truth"—to determine for example whether the witness changed his

and Jury Decisionmaking," 52 *Law & Contemp. Prob.* 45 (1989); John C. Brigham & Robert K. Bothwell, "The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications," 7 *Law & Human Behavior* 19 (1983).

¹⁶⁸ David McCord, "Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases," 66 *OREGON L. REV.* 19, 31 (1987). McCord cites one study finding a potential jury pool "surprisingly well-informed about the topic of child sexual abuse." McCord, "Expert Psychological Testimony about Child Complainants in Sexual Abuse Prosecutions: A Foray in to the Admissibility of Novel Psychological Evidence," 77 *J.Crim.L. & Criminology* 1, 35 (1986). For more on the question of "helpfulness" of social science testimony, see the discussion of the employment discrimination cases in sec. IV.

¹⁶⁹ *United States v. Shay*, 57 F.3d 126, 133 (1st Cir. 1995) (citation omitted).

¹⁷⁰ An exception can be found in *Com. v. Oliveira*, 431 Mass 609, 613, 728 N.E.2d 320, 323 (2000):

The defendant complains that the prosecutor improperly commented on a subject reserved for expert testimony: "There's a variety of reasons why, social and economic reasons why women stay with men who abuse them and abuse their children." However, the judge observed: "It is a matter of common knowledge that men and women remain bound in abusive relationships." Thus, in the context of this case, the argument was grounded in common sense, not expertise.

See also *State v. Vue*, 606 N.W.2d 719, 723 (Minn.App. 2000) ("Both sides addressed [the victim's] delay in bringing the allegations. The prosecutor offered the testimony of a park policeman to bolster M.V.'s story by 'explaining' why a Hmong immigrant who had been raped by her husband would be reluctant to go to the police. There is little in this record suggesting cultural testimony was necessary. The complainant was a grown woman; she was bilingual and educated; and she had been in the United States for many years. A lay jury would not have had trouble understanding or believing her testimony simply because she was Hmong. It is patronizing to suggest otherwise.").

¹⁷¹ As the Seventh Circuit has observed: "Because the fields of psychology and psychiatry deal with human behavior and mental disorders, it may be more difficult at times to distinguish between testimony that reflects genuine expertise-- a reliable body of genuine specialized knowledge-- and something that is nothing more than fancy phrases for common sense." *United States v. Hall*, 93 F.3d 1337, 1343 (7th Cir. 1996).

Courts have allowed experts to testify on more esoteric matters, such as that gun owners often conceal their firearms in the engine compartment of their car to avoid detection, see *United States v. Webb*, 115 F.3d 711 (9th Cir. 1997) and that street gangs usually impose a code of silence on members. See *United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000). But experts have been deemed unnecessary to educate New York jurors "in today's climate, flush with daily news of the latest drug bust, ... as to such elementary issues as the function of a scale or index card in a drug deal," *United States v. Castillo*, 924 F.2d 1227, 1232 (2d Cir. 1991), or the sharing of proceeds from illegal kickback schemes. *United States v. Long*, 917 F.2d 691, 702 (2d Cir. 1990).

testimony out of fear or an honest reappraisal of the facts.¹⁷² The rules of evidence are designed to facilitate this decision by permitting counsel to confront the witness with his previous statement and explore the discrepancies on cross-examination.¹⁷³ And jurors certainly need no expert to educate them that people sometimes lie to protect family or friends.¹⁷⁴

Structurally it is unclear how trial judges are to make the call that jurors do or do not need expert guidance concerning the conduct of an abuse victim. Is it a determination to be made per individual case or more generically (*i.e.*, by venire panel, by region, etc). Should jurors be asked on voir dire what they believe about abuse victims? In holding that the prosecution may present experts to explain the “common postincident behavior of children who are victims of sexual abuse,” the Supreme Court of Michigan gave the following “guidance” to trial judges:

This expert testimony, however, may be introduced only if the facts as they develop would raise a question in the minds of the jury regarding the specific behavior. The behavior must be of such a nature that it may potentially be perceived as that which would be inconsistent with a victim of child sexual abuse, *i.e.*, delay in reporting, recantation, accommodating the abuser or secrecy. The court must determine whether the particular characteristic is one that in fact calls for an expert explanation. MRE 702. The expert is then only allowed to testify regarding the behavior at issue and may not testify regarding CSAAS characteristics that are not at issue.¹⁷⁵

The court went on to create what appears to be a presumption in favor of admissibility by adding: “It is a logical argument that the jurors would have made an improper inference upon learning [during direct examination] that the victim failed to report the sexual assault for five or six years.”¹⁷⁶

A few courts departing from the herd have refused to simply assume the ignorance of jurors regarding these matters. The Supreme Court of Pennsylvania has concluded that it is “[commonly] understood [by lay people] why sexually abused children do not always come forward immediately after the abuse: They are afraid or embarrassed; they are convinced by the abuser not to tell anyone; they attempt to tell someone who does not want to listen; or they do

¹⁷² See, e.g., “Recanted testimonies not unusual,” *Boston Globe*, September 27, 2002, B1, B4. In the assault trial reported, several witnesses for the prosecution recanted their prior grand jury identifications of defendant at trial. The prosecutor argued in closing: “What’s different is this-- The grand jury is a secret proceeding. The difference is [defendant] was seated 5 feet away from the witness at trial. *I suggest you don’t need a road map to figure out what’s going on here* (emphasis added).” *Boston Globe*, October 3, 2002, at B4.

¹⁷³ See FRE 613, 801(d)(1).

¹⁷⁴ See *State v. MacDonald*, 718 A.2d 195, 198 (Me. 1998) (excluding proffered testimony on “adult children of alcoholics syndrome”).

¹⁷⁵ *People v. Peterson*, 450 Mich. 349, 374, 537 N.W.2d 857, 868 (1995).

¹⁷⁶ *Id.*, 450 Mich. at 379-380.

not even know enough to tell someone what has happened. [Such conduct is] “easily understood by lay people and [does] not require expert analysis.”¹⁷⁷

A second equally dubious assumption (in addition to that of juror ignorance) underlies the admission of behavioral science evidence, namely that the factfinders can receive meaningful assistance from it. In order to be helpful to a jury deliberating whether *this* complaining witness was in fact abused by *this* defendant, an expert would have to bring to bear knowledge sufficiently definitive to be readily applicable to the particular case. As the Court observed in *Kumho Tire*:

[T]he specific issue before the [district] court was not the reasonableness *in general* of a tire expert's use of a visual and tactile inspection to determine whether overdeflection had caused the tire's tread to separate from its steel-belted carcass. Rather, it was the reasonableness of using such an approach, along with Carlson's particular method of analyzing the data thereby obtained, to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant*. That matter concerned the likelihood that a defect in the tire at issue caused its tread to separate from its carcass. ... The relevant issue was whether the expert could reliably determine the cause of *this* tire's separation.¹⁷⁸

Daubert similarly emphasizes (as did Wigmore long ago) the need to assure that the testimony “is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute,” what the Court refers to as “fit.”¹⁷⁹

But as the Minnesota Supreme Court observed twenty years ago, syndrome evidence (there referring to rape trauma syndrome) is

not the type of scientific test that accurately and reliably determines whether a rape has occurred. The characteristic symptoms may follow *any* psychologically traumatic event. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 236 (3d ed. 1980). At best, the syndrome describes only symptoms that occur with some frequency, but makes no pretense of describing every single case. The jury must not decide this case on the basis of how most people react to rape or on whether Fuller's reactions were the typical reactions of a person who has been a victim of rape.

¹⁷⁷ *Com. v. Dunkle*, 529 Pa. 168, 181, 602 A.2d 830, 836-837 (Sup. Ct. Pa. 1992) (reversing conviction because expert was permitted to testify about the behavior patterns of sexually abused children). See also *State v. Saldana*, 324 N.W.2d 227, 230-231 (Minn. 1982) (rape trauma syndrome expert's testimony concerning complainant's story was improperly admitted because the subject matter was not beyond the ken of the jury).

¹⁷⁸ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 153 (1999). “[T]he question before the trial court was specific, not general. The trial court had to decide whether this particular expert had sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case.” *Id.*, at 156 (citations and internal quotes omitted).

¹⁷⁹ 509 U.S., at 591. “Rule 702’s ‘helpfulness’ standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.” *Id.*

Rather, the jury must decide what happened in *this case*, and whether the elements of the alleged crime have been proved beyond a reasonable doubt.¹⁸⁰

The court concluded that the “scientific evaluation of rape trauma syndrome has not reached a level of reliability that surpasses the quality of common sense evaluation present in jury deliberations.”¹⁸¹ Indeed, the non-specific nature of their “symptoms” led the Pennsylvania Supreme Court to conclude that syndrome evidence did not even meet the minimal threshold for relevance.¹⁸²

Syndrome theory lacks the precision necessary to truly assist the trier of fact in determining what happened on the occasion in question. Illustrative are the following examples of testimony at trial:

DEFENSE ATTORNEY: You’ve testified regarding the number of actions that you believe illustrate post-traumatic stress disorder. And one of those that you emphasized I recall was, that it is not inconsistent with that disorder to try to act normally?

WITNESS (Psychologist): That’s correct. Rape trauma victims will often try to appear normal so that other people’s suspicions won’t be aroused and they won’t have to bear the shame and humiliation.

DEFENSE ATTORNEY: It would also be consistent for them to act upset, wouldn’t it?

WITNESS: It could be. If they...

DEFENSE ATTORNEY: Sure.

WITNESS: I think I described the expressed versus the controlled way of reacting in the acute phase of rape trauma syndrome. So yes, both of those are consistent.

DEFENSE ATTORNEY: Both would be consistent?

WITNESS: Right. Not in the same person. But, both modes of behaving would be consistent.

DEFENSE ATTORNEY: And it would be consistent with that disorder to actively pursue conversations and meetings with the other person?

WITNESS: Could you clarify, do you mean with the assailant?

DEFENSE ATTORNEY: With the accused assailant, yes.

WITNESS: Yes.

DEFENSE ATTORNEY: And it would also be consistent to avoid that person?

WITNESS: Yes, it would.

DEFENSE ATTORNEY: And it would be consistent to mask the symptoms, and go to a party? Yes?

¹⁸⁰ State v. Saldana, 324 N.W.2d 227, 229-230 (Minn. 1982) (citations omitted). The Department of Justice Report concludes more recently that “battered woman syndrome” is an oversimplification of a much more complex set of phenomena. U.S.Dept. of Justice, The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials (1996),

<http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/Valid/>.

¹⁸¹ *Id.*, at 230. See also State v. Ballard, 855 S.W.2d 557, 563 (Tenn. 1993) (“The symptoms of the syndrome are not like a fingerprint in that it can clearly identify the perpetrator of a crime.”).

¹⁸² Com. v. Dunkle, 529 Pa. 168, 177, 602 A.2d 830, 834 (1992).

WITNESS: Let me explain that. It's more consistent with rape trauma syndrome, where in the case of an acquaintance rape, to mask those symptoms, to pretend as if the relationship hasn't changed, as if there hadn't been the trauma of the sexual assault. Certainly, that's much more often the case with a sexual assault that's with an acquaintance. With a stranger, of course, there isn't the opportunity for that.¹⁸³

WITNESS (Director/ caseworker of group residential treatment facility)

(Asked whether, based on his experience, kids who have experienced sexual abuse exhibit certain traits or characteristics or behavior patterns)

Yes. Anything for medical reasons, from bladder infections to abnormal medical problems, and more of the characteristics, the girls can be anything from promiscuous, they can be very timid, they can come in with extremely low esteem. Almost exclusively, that is going to be a major characteristic. Some of the different cues can range in areas from being really over timid to different kind of touches and approaches, where you would approach them in different directions or from different manners or methods. You might even put your hand on their shoulder and that might freak them out or something. There is a lot of different areas where just working with them it becomes really quite evident. You can see that behavior demonstrated quite plainly.¹⁸⁴

Q. And why would a child delay reporting of sexual abuse.

A. Well, there's a multitude of reasons and it depends on several variables, depending on the relationship between the child and the perpetrator, the relationship between them, the living arrangements between them. There's a lot of contingencies.¹⁸⁵

The state proceeded with the direct examination of Mr. Bosman, as follows:

"Q: In your opinion, based on your experience, and based upon your training, are the kinds of acting out behavior that the teachers described to you that they were seeing in L consistent with children who were victims of sexual abuse?

"A: Yes.

"Q: The answer is yes?

"A: Yes. One of the, we call them in the workshops that I have attended, in the seminars that I have attended we call them red flags, they are indicators.

"Q: Of a problem?

"A: Of a problem. Dealing with sexuality, because it's an abnormal thing for a 11 or 12-year old student.

"Q: Is it also your experience, or you also know, you also have an opinion, I guess I should ask you, based on your experience and training that some children who are victims of sexual abuse do not tell anyone about it for a long period of time?

"A: Correct.

On cross-examination, witness Bosman further testified:

"Q. So those things led you to conclude that she may have been--

"A. (Interposing) Not conclude, suspicion and belief.

¹⁸³ Schallock v. Heinz, a sex harassment civil action tried in Arizona state court in 1995, transcribed from Court TV Video.

¹⁸⁴ Steward v. State, 652 N.E.2d 490, 492 (Sup.Ct.Ind. 1995).

¹⁸⁵ People v. Peterson, 450 Mich. 349, 360, 537 N.W.2d 857, 862 (1995).

"Q. Those are red flags?

"A. Yes. And particularly the time that we were talking about protective behavior in the classroom.

"Q. Were you in the classroom?

"A. Yes, I was.

"Q. And let me ask you a couple of questions. You indicated that children who had been victims of sexual abuse commonly or frequently exhibit the types of characteristics that you were aware of in L, is that right?

"A: In not [sic] all cases. Frequently in cases you will see that type of person, withdrawn behavior, you will see oppressive behavior, you will see preoccupation with what you would call sexual type.

"Q: You also had occasion to see that in children who have not been sexually abused, however, is that true?

"A: Correct.

"Q: It is also true that the awareness of a child or the curiosities of a child about sexual matters does not indicate necessarily that she was a victim of sexual abuse?

"A. I suppose that would be true.

"Q. One more question. There are other avenues for children to become aware of sex than by the parents?

"A. Absolutely.

"Q. Among those would be experimentation with other children, is that true?

"A. Yes."¹⁸⁶

Dr. Ornelas then testified that L. had a "normal" physical exam, which was, she opined, "consistent with what [L.] said happened." Dr. Ornelas testified that a normal exam is "the most common physical findings for a child who has been sexually abused." This is so, Dr. Ornelas opined, because "the type of contact that most commonly occurs between adults and children that's sexual is oral kinds of contact, touching, and what's called labial coitus."

Dr. Ornelas also testified that "L.'s behavior of withdrawing from her family, staying inside of her room, not being communicative, not being her regular bubbly, running-around kind of self, and ... waking up at night and touching her mother to make sure that her mother was there in bed with her, ... having sleep disturbances and some behavioral changes," was "consistent with child sexual abuse." Finally, she testified as follows:

Q. Doctor, if you had those symptoms or some of those symptoms and a report by a child of sexual abuse, are you comfortable forming a diagnosis of child sexual abuse in such a case?

A. I would base that diagnosis on the child's statements about what had happened to them.¹⁸⁷

It is submitted that evidence of this character suffers from the very same subjectivity and imprecision that condemned Dr. Carlson's testimony in *Kumho Tire*.¹⁸⁸ Adding to the problem is

¹⁸⁶ State v. Jensen, 147 Wis.2d 240, 246-248, 432 N.W.2d 913, 916-917 (1988).

¹⁸⁷ United States v. Velarde, 214 F.3d 1204, 1209 (10th Cir. 2000).

¹⁸⁸ Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. at 155:

the fact that most courts (as discussed in sec. B, below), in order to avoid the perception that the expert is vouching for the credibility of the complaining witness, carefully limit the behavioral expert to testimony about the *general* nature of the syndrome and preclude testimony about *the particular* victim witness. But at that level of generality, the testimony is singularly unhelpful in resolving the fact issues in dispute.¹⁸⁹ Again, a look at a representative sample of the testimony is instructive:

Q. [To abuse expert] You mentioned that [she] appeared angry to you.

A. Yes.

Q. Is anger a typical response in adolescents for someone who has been subjected to sexual molestation?

A. Yes, it is. They carry their anger on their shoulder like a flag.¹⁹⁰

Can it be seriously contended that anger in an adolescent is a forensic “red flag” of anything other than adolescence?

On the question of whether expert testimony on the weaknesses of eyewitness identification would be helpful to a jury, the Nebraska Supreme Court noted that

the knowledge of behavioral scientists, such as psychologists, is probabilistic, couched in terms of averages, standard deviations, curves, and differences between groups. A court, however, is not concerned with the average eyewitness' reliability but with the reliability of the specific eyewitness before it, who may vary from the average in probabilistic but ultimately unknown ways. It is not the research behavioral social scientist who is in a position to assess a specific witness' reliability; the jury, which views the witness as an individual, is best able to collectively determine, on the basis of common human experience as yet unsurpassed by laboratory research, how to weigh what an individual

The court could reasonably have wondered about the reliability of a method of visual and tactile inspection sufficiently precise to ascertain with some certainty the abuse-related significance of minute shoulder/center relative tread wear differences, but insufficiently precise to tell "with any certainty" from the tread wear whether a tire had traveled less than 10,000 or more than 50,000 miles. And these concerns might have been augmented by Carlson's repeated reliance on the "subjective[ness]" of his mode of analysis in response to questions seeking specific information regarding how he could differentiate between a tire that actually had been overdeflected and a tire that merely looked as though it had been.

See also *State v. Cressey*, 137 N.H. 402, 409-410, 628 A.2d 696, 701-702 (1993) (court troubled by the interpretive and subjective steps involved in psychological profile testimony).

¹⁸⁹ “Expert testimony that does not add either precision or depth to the jury's ability to reach conclusions about [a] subject which is within their experience does not meet the helpfulness test and the trial court is within its discretion to exclude it.” *State v. Ritt*, 599 N.W.2d 802, 811 (Minn. 1999) (internal quotations omitted) (expert testimony on the coercive effects of certain interrogation procedures).

¹⁹⁰ *State v. Moran*, 151 Ariz. 378, 383 n.5, 728 P.2d 248, 253 n.5 (1986). The testimony was deemed properly admitted to give the jury an alternative explanation for the victim's anger, which the defense claimed was prompted by parental discipline. The “good common sense of jurors will discern that which is true from that which is false,” the court concluded. 151 Ariz. at 254, 728 P.2d at 384. But why was that “good common sense” not adequate to resolve the credibility question without the “expertise” of the prosecution's witness?

witness has to say.¹⁹¹

These observations are equally applicable to syndrome evidence, which at best (and without the empirical foundations of the eyewitness identification experts¹⁹²) describes patterns of behavior applicable to *some*, but certainly not *all or perhaps even most*, victims of abuse. Dr. Lenore Walker (who in 1979 originated the theory of battered woman syndrome) concluded that only about half the victims studied actually exhibited BWS.¹⁹³ In her later writings she conceded that not all relationships follow the pattern and that inconsistencies and variations can be found.¹⁹⁴ In fact victim conduct defies characterization as common or typical, and the considerable research that has been conducted in the past decades has failed to provide support “for a single profile that captures the impact of abuse on a woman.”¹⁹⁵ The originator of child sexual abuse accommodation syndrome has criticized its use by prosecutors in a similar vein:

There has been some tendency to use the CSAAS as an offer of proof that a child has been abused. A child may be said to be suffering from or displaying the CSAAS, as if it is a malady that proves the alleged abuse. Or a child's conspicuous helplessness or silence might be said to be consistent with the CSAAS, as if not complaining proves the complaint. Some have contended that a child who retracts is a more believable victim than one who has maintained a consistent complaint.¹⁹⁶

Expert testimony must achieve a requisite level of certainty in order to provide assistance to the factfinder. In the medical context this means the physician must testify “to a reasonable

¹⁹¹ State v. Trevino, 230 Neb. 494, 432 N.W.2d 503, 520 (1988). In a similar vein, see State v. Coley, 32 S.W.3d 831, 837-838 (Tenn. 2000):

[W]e find that expert testimony concerning eyewitness identification simply offers generalities and is not specific to the witness whose testimony is in question. Moreover, we are of the opinion that the subject of the reliability of eyewitness identification is within the common understanding of reasonable persons. Therefore, such expert testimony is unnecessary. It may mislead and confuse, and it could encourage the jury to abandon its responsibility as fact-finder. Such responsibility is a task reserved for and ably performed by the jury, aided by skillful cross-examination and the jury instruction promulgated in *Dyle* when appropriate. For these reasons, we find that general and unparticularized expert testimony concerning the reliability of eyewitness testimony, which is not specific to the witness whose testimony is in question, does not substantially assist the trier of fact. Thus, we hold that such testimony is inadmissible under Tenn.R.Evid. 702 and that the trial court, therefore, properly excluded Johnson's testimony.

See also Saia v. Sears Roebuck & Co., 47 F.Supp.2d 141, 150 (D. Ma. 1999) (excluding plaintiff's hedonic damages expert because his testimony was derived from broad generalizations and was “simply not sufficiently plaintiff-specific to make it helpful to the jury”).

¹⁹² See text accompanying n. 111, et seq.

¹⁹³ See Faigman, et al, SCIENCE IN THE LAW: SOCIAL BEHAVIORAL SCIENCE ISSUES §4-2.1.1, at 212 (& citations).

¹⁹⁴ See Lenore E.A. Walker, “Psychology and Law Symposium: Women and the Law,” 20 Pepperdine L Rev 1170, 1184 (1993). See also See Faigman, et al, SCIENCE IN THE LAW: SOCIAL BEHAVIORAL SCIENCE ISSUES §4-2.1.1, at 213-234. .

¹⁹⁵ See Faigman, et al, SCIENCE IN THE LAW: SOCIAL BEHAVIORAL SCIENCE ISSUES §4-2.1.1, at 233.

¹⁹⁶ Steward v. State, 652 N.E.2d 490, 493 (Ind. 1995) (citation omitted).

degree of medical certainty.”¹⁹⁷ Courts have similarly required scientific experts to be able to testify “to a reasonable degree of scientific certainty.”¹⁹⁸ Syndrome theory, however, defies such exactitude both because it operates at a level of meaningless generality and makes contradictory claims.

By way of example, indicia of abuse include such commonplace behavior as biting lips, clenching fists, tapping fingers, and biting nails,¹⁹⁹ stomachaches and nightmares,²⁰⁰ and “fatigue, poor sleep and headaches, emotional changes including anxiety, irritability, depression and hopelessness, and behavioral manifestations including aggression, cynicism, and substance abuse, leading to poor job performance, [and] deterioration in interpersonal relationships.”²⁰¹

¹⁹⁷ See, e.g., *Klein v. Vanek*, 86 F.Supp.2d 812, 818 (N.D.Ill. 2000); *Rotman v. National Railroad Passenger Corp.*, 41 Mass App 317, 320 (1996) (medical expert must testify that causation is probable, not merely possible, conceivable, or reasonable); *Resendes v. Boston Edison*, 38 Mass App 344, 352 (1995). See generally Jeff L.Lewin, “The Genesis and Evolution of Legal Uncertainty About ‘Reasonable Medical Certainty’”, 57 Maryland L.Rev. 380 (1998).

¹⁹⁸ See, e.g., *Linnen v. A.H. Robins Co., Inc.*, 11 Mass L Rptr 40, 47-48 (Super. Ct. 1999) (level of certainty must be greater than merely “more likely than not”).

¹⁹⁹ See Donna A. Gaffney, “PTSD, RTS, and Child Abuse Accommodation Syndrome: Therapeutic Tools or Fact-Finding Aids,” 24 Pace L.Rev. 271, 285 (2003).

²⁰⁰ *Com. v. Hudson*, 417 Mass. 536, 631 N.E.2d 50 (1994).

²⁰¹ See Andrew P. Levin & Scott Greisberg, “Vicarious Trauma in Attorneys,” 24 Pace L. Rev. 245, 248 (2003). The following is a checklist for diagnosis of rape trauma syndrome:

Subjective:

- Shock Fear Anxiety Anger
- Embarrassment
- Shame
- Guilt
- Humiliation
- Revenge
- Self-blame
- Loss of self-esteem
- Helplessness
- Powerlessness
- Nightmare and sleep disturbances
- Change in relationships
- Sexual dysfunction
- [Changes in lifestyle (change in residence; seeking family support; seeking social network support)]

Objective:

- Physical trauma (e. g., bruising, tissue irritation)
- Muscle tension and/or spasms
- Hyperalertness
- Confusion
- Disorganization
- Inability to make decisions
- Mood swings
- Vulnerability
- Depression

If a child is calm during a genital examination, that may be taken as evidence that she is used to being handled in that way; but a child who resists during the exam may *also* be viewed as having experienced sexual trauma.²⁰² A victim's relating of *conflicting* versions of the events is considered a sign of abuse,²⁰³ but so is the *consistency* of the victim's story over time.²⁰⁴ Even courts that admit rape trauma syndrome concede that "the behavior exhibited by a rape victim after the attack can vary. While some women will express their fear, anger and anxiety openly, an equal number of women will appear controlled, calm, and subdued."²⁰⁵ Behavioral response checklists include such opposites as increased or decreased eating or smoking,²⁰⁶ and preoccupation with or aversion to sex.²⁰⁷

-
- Dependence
 - Agitation
 - Aggression
 - Denial
 - Phobias
 - Paranoia
 - Substance abuse
 - Suicide attempts
 - Dissociative disorders

NURSING DIAGNOSES: DEFINITIONS AND CLASSIFICATIONS (as quoted in Donna A. Gaffney, "PTSD, RTS, and Child Abuse Accommodation Syndrome: Therapeutic Tools or Fact-Finding Aids," 24 Pace L.Rev. 271, 290 (2003).

²⁰² Richardson, Ginsburg, Gatowski, & Dobbin, "The Problems of Applying *Daubert* to Psychological Syndrome Evidence," 79 Judicature 10, 13 (1995).

²⁰³ One jurist complains that there is "something fundamentally strange about saying that since the story is inconsistent, it must be true." Duckett v. State, 797 S.W.2d 906, 924 (Tex.Crim.App. 1990) (Teague, dissenting).

²⁰⁴ People v. Peterson, 450 Mich. 349, 383 n.2, 537 N.W.2d 857, 872 n.2 (1995) (Cavanagh, dissenting) (& citations).

²⁰⁵ People v. Taylor, 75 N.Y.2d 277, 285, 552 N.E.2d 131 (Ct.Appels 1990). The court continued: "We realize that rape trauma syndrome encompasses a broad range of symptoms and varied patterns of recovery. Some women are better able to cope with the aftermath of sexual assault than other women. It is also apparent that there is no single typical profile of a rape victim and that different victims express themselves and come to terms with the experience of rape in different ways. " *Id.*, at 286. Summarizing the numerous studies of rape victims that have been conducted over the years, one writer concludes they:

fail to establish any specific psychological sequelae for rape victims. Instead, the studies find that rape victims experience psychological reactions similar to victims of other crimes, or they find that RTS varies significantly from individual to individual, thus indicating that there is no syndrome unique to rape. These problems question the reliability of RTS as circumstantial evidence that a rape occurred.

Robert R. Lawrence, "Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony of Rape Trauma Syndrome in Criminal Proceedings," 70 Virginia L. Rev. 1657, 1673 (1984).

²⁰⁶ Donna A. Gaffney, "PTSD, RTS, and Child Abuse Accommodation Syndrome: Therapeutic Tools or Fact-Finding Aids," 24 Pace L.Rev. 271, 285 (2003).

²⁰⁷ Lisa R. Askowitz & Michael H. Graham, "The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions," 15 Cardozo L. Rev. 2027, 2068-2069 (1994) (& citations).

This “have-it-both-ways”²⁰⁸ nature of syndrome evidence distinguishes it from well-recognized medical diagnostic techniques such as that used to determine whether a child’s physical injuries are inconsistent with a claim of accidental harm.²⁰⁹ Instead syndromes look more like drug courier profiles, which have a “chameleon-like way of adapting to any particular set of observations.”²¹⁰

Even assuming that behavioral evidence may sometimes aid the jury in understanding conduct that may appear inconsistent with abuse (especially where the defense has pressed the late reporting or retraction to undermine the witness’s credibility),²¹¹ such testimony remains problematic. First, expert opinions that “merely tell the jury what result to reach” (like that abuse occurred) are, for obvious reasons, neither “helpful” nor appropriate. See Fed.R.Evid. 704 Advisory Committee’s Note.²¹² Second, where the expert’s opinion is based largely or solely on the alleged victim’s statements and the testimony therefore translates into a reassertion of the victim’s story, the testimony should not be admitted.²¹³ Third, syndrome evidence may simply

²⁰⁸ Judge Teague has complained that Child Sexual Abuse Syndrome “is whatever the particular expert wants it to be, based upon elements he himself has created or manufactured, or has plagiarized from other’s works.” *Duckett v. State*, 797 S.W.2d 906, 925 (Tex.Crim.App. 1990) (dissenting).

²⁰⁹ In *State v. Moran*, 151 Ariz. 378, 381, 384 n.6, 728 P.2d 248, 251, 254 n.6 (1986), the court contrasted syndrome evidence with “expert testimony [like battered child syndrome] as to the occurrence of an event when that testimony is based on physical findings rather than psychological evaluation” and “medical testimony that certain observable physical facts indicate penetration.” A radiologist may, for example, testify that the victim’s injuries were of a type most likely inflicted deliberately rather than accidentally, or that the infant victim died as a result of severe shaking. See Martha Coakley, “Child Abuse and the Law II: The Radiologist in Court,” in Kleinman, Paul K. *DIAGNOSTIC IMAGING OF CHILD ABUSE* (2d ed. 1998). See also *Com. v. Day*, 409 Mass. 719, 724, 569 N.E.2d 397, 400 (1991); *Steward v. State*, 652 N.E.2d 490, 493-494 (Ind. 1995) (citations omitted).; *Com. v. Dunkle*, 529 Pa. 168, 179-180, 602 A.2d 830, 835-836 (Sup. Ct. Pa. 1992).

²¹⁰ *United States v. Sokolow*, 490 U.S. 1, 13 (Marshall and Brennan, JJ., dissenting). The justices cited cases in which opposite characteristics were considered suspicious, including being the first passenger to deplane, the last to deplane, and deplaning in the middle of the crowd; holding a round-trip ticket and holding a one-way ticket; traveling nonstop and changing planes; carrying no luggage and carrying luggage; traveling alone and traveling with companions; acting too nervously and acting too calmly. See also Jane Campbell Moriarty, “Wonders of the Invisible World: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials,” 26 Vermont L. Rev. 43, 88-92 (2001).

²¹¹ See, e.g., *Steward v. State*, 652 N.E.2d 490, 496 (Ind. 1995) (citations omitted).

²¹² *State v. Alberico*, 116 N.M. 156, 861 P.2d 192, 211 (1993) (excluding testimony that alleged rape victims suffered from post-traumatic stress disorder consistent with sexual abuse because “When the only evidence consists of the victim’s accusation and the defendant’s denial, expert testimony on the question of who to believe is nothing more than advice to jurors on how to decide the case.”).

²¹³ *U.S. v. Whitted*, 11 F.3d 782, 785-786 (8th Cir. 1993) (doctor could not base his diagnosis solely on victim’s allegations of abuse); *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir.1987) (doctor’s opinion based solely on patient’s oral history is nothing more than patient’s testimony “dressed up and sanctified”); *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir.1988) (expert opinion lacking objective factual support cannot help jury and thus is inadmissible under Rule 702); *State v. Cressey*, 137 N.H. 402, 407, 628 A.2d 696, 699-700 (1993) (“Expert psychological evidence can only be admissible in a [prosecution for child abuse] if it is at least partly based on factors in addition to and independent of the victim’s accounts. Otherwise, the expert’s conclusions are of no value

and (ironically) substitute one set of stereotypes (e.g., abused women are all passive and helpless) for another (e.g., abused women do not stay with their abusers).²¹⁴

It has been recognized that “helpfulness is a matter of degree, and expert evidence involves costs and risks--too obvious to need recounting--that distinguish it from lay evidence about ‘what happened here.’”²¹⁵ One such risk is the topic of the next section: syndrome testimony’s tendency to infringe on the jury’s exclusive role to assess credibility of witnesses.

B. Vouching for Credibility and Invading the Province of the Jury

*[E]xpert testimony ... is not, as some current practice suggests, a mechanism for having someone of elevated education or station engage in a laying on of hands, placing an imprimatur, upon the justice of one's cause.... Experts are not, in theory, called to tell the jury who should win. They are called, instead, to provide knowledge to the jury to permit the jury rationally to decide the case before it.*²¹⁶

It is axiomatic that assessing the credibility of witnesses is the sole prerogative of the jury. Indeed, it has been said that the genius of the jury trial system is to have twelve laypersons, bringing their common sense and experience, weigh the evidence, rather than a single judge.

It is thus universally recognized that expert testimony directly vouching for (or attacking) the credibility of another witness at trial is inappropriate.²¹⁷ Courts vigilantly guard against

to the jury because they present no new evidence and are merely vouching for the credibility of the child victim witness.”).

²¹⁴ DOJ Report, The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials, at text accompanying footnotes 65-75, <http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/Valid/>.

²¹⁵ U.S. v. Brien, 59 F.3d 274, 277 (1st Cir. 1995) (excluding expert testimony on eyewitness identification, given the “risks of confronting the jury with battles of experts on areas within the common-sense competence of jurors”).

²¹⁶ State v. Moran, 151 Ariz. 378, 385 n.7, 728 P.2d 248, 255 n.7 (1986) (citation omitted).

²¹⁷ U.S. v. Hall, 165 F.3d 1095, 1107 (7th Cir. 1999) (eyewitness identification expert); U.S. v. Kime, 99 F.3d 870, 884 (8th Cir. 1996) (eyewitness identification testimony) (“It is the exclusive province of the jury to determine the believability of a witness.... An expert is not permitted to offer an opinion as to the believability or truthfulness of a victim's story.”); United States v. Dorsey, 45 F.3d 809, 815 (4th Cir. 1995), cert. denied, 515 U.S. 1168 (excluding testimony of two defense witnesses in field of forensic anthropology who were to have testified about their analyses of the bank surveillance photographs: “[E]xpert testimony can be properly excluded if it is introduced merely to cast doubt on the credibility of other eyewitnesses, since the evaluation of a witness' credibility is a determination usually within the jury's exclusive purview.”); U.S. v. Azure, 801 F.2d 336, 339-340 (8th Cir. 1986) (& citations) (pediatrician and child abuse expert's testimony that story of victim was believable and that expert could see no reason why victim was not telling truth was not admissible); Com. v. Dunkle, 529 Pa. 168, 602 A.2d 830, 836-837 (Sup. Ct. Pa. 1992) (expert should not have been permitted to explain why sexually abused children might delay reporting or omit details of abuse because such testimony infringes on the jury's right to determine credibility). As one federal judge put it in excluding the testimony of a defense psychiatrist to the effect that the plaintiff suffered from a mixed personality disorder causing him to blame others when something goes wrong and to lie to explain their failures, we cannot “allow trials to degenerate into swearing contests between opposing psychiatrists claiming

invading the province of the jury on matters they are capable of resolving without the benefit of expert opinion,²¹⁸ and the credibility of witnesses is such a matter. Thus an expert generally may not testify to the damaging effects on perception and memory caused by prolonged use of drugs when the testimony is offered to attack the credibility of a witness.²¹⁹ Even an eminently qualified expert conversant with the literature will not be permitted to render an opinion that a child is likely to falsely accuse a parent of sexual assault when the subject of a stressful custody dispute.²²⁰ Experts have been precluded from testifying that children rarely lie about sexual

to have insight into whether a particular person is telling the truth.” *Klein v. Vanek*, 86 F.Supp.2d 812, 817 (N.D.Ill. 2000). See generally Michael W. Mullane, “The Truthsayer and the Court: Expert Testimony on Credibility,” 43 *Me.L.Rev.* 53 (1991); David McCord, “Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases,” 66 *Oregon L. Rev.* 19, 45-46 (1987) (& cases collected).

While FRE 608(a) allows evidence “in the form of opinion or reputation” on the credibility of a witness, is limited to general character for truthfulness or untruthfulness, and the rule envisions lay, not expert, testimony. FRE 608(a) does not allow opinion as to whether the witness spoke truthfully on a specific occasion. See *United States v. Azure*, 801 F.2d 336, 341 (8th Cir. 1986); *State v. Kim*, 64 *Hawaii* 598, 610 n.14, 645 P.2d 1330, 1339 n.14 (& citations) (1982).

There are only rare exceptions to the prohibition against testimony on credibility. In the 1949 perjury prosecution of Alger Hiss two defense psychiatrists were permitted to render an opinion (based on his writings and courtroom demeanor) that Whittaker Chambers, the prosecution’s chief witness, was a psychopathic personality type disposed to making false accusations. *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950), *aff’d*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951). See Alistair Cooke, *A GENERATION ON TRIAL: U.S.A. V. ALGER HISS* 304-313 (1950); David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, *supra*, 66 *OREGON L. REV.* at 46. And in *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995), the court permitted a defense psychiatrist to testify that defendant suffered from a mental disorder (*pseudologia fantastica*) that had caused him to make grandiose but false statements implicating himself in a bomb plot. See also *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996) (district court erred in excluding expert psychiatric testimony regarding defendant’s personality disorder which made him susceptible to giving false confession). On the related issue of voluntariness of a confession, see *Com. v. Crawford*, 429 Mass. 60, 706 N.E.2d 289 (1999) (defendant entitled to present expert testimony on battered woman syndrome and PTSD to support claim she was incapable of resisting police interrogation).

²¹⁸ See, e.g., *Robertson v. Norton Co.*, 148 F.3d 905, 907 (8th Cir. 1998) (citation omitted) (ceramics expert erroneously allowed to testify that safety warnings were inadequate, when jurors could read them for themselves).

²¹⁹ See, e.g., *Com. v. Perry*, 432 Mass 214, 733 N.E.2d 83, 103 (Sup Jud Ct 2000) (& citations). But see *Com. v. Lord*, 45 Mass App 931 (1998) (suggesting that defense counsel might have been permitted to offer expert testimony to explain the effects of Prozac on the memory of the victim).

²²⁰ See *Com. v. Ianello*, 401 Mass 197, 199-203 (1987). The testimony had been offered by the accused, who argued unsuccessfully that mental health professionals had been able to document the phenomenon of false allegations in this context and that this subject matter was beyond the common knowledge of the average jury. The Supreme Judicial Court viewed the testimony as “no more than the expert’s over-all impression of the truthfulness of members of a class (children in custody disputes) of which the specific complainant was a member,” noting that “[w]hile the proposed testimony fell short of rendering an opinion on the credibility of the specific child before the court, we see little difference in the final result.” 401 Mass at 201-202. “It would be unrealistic to allow this type of expert testimony and then expect the jurors to ignore it when evaluating the credibility of the complaining child. Since we believe that Dr. Sacco’s opinion ultimately would have been applied to the child alleging sexual abuse, we rule that the judge was correct in excluding the expert testimony. If the testimony had erroneously been allowed, Dr. Sacco would have impermissibly intruded upon the vital function of the jury.” 401 Mass at 202. See also *Com. v. Montanino*, 409 Mass 500, 504, 567 NE2d 1212 (1991) (commanding officer of police department sexual assault unit should not have been permitted to testify that most victims reveal details of the assault only gradually over the

abuse,²²¹ or women about rape.²²² And virtually all jurisdictions prohibit a behavioral expert from testifying to the ultimate issue that a rape or assault occurred, whether based on consistency with a syndrome or interviews with the alleged victim.²²³

course of several interviews: “[T]here is little doubt that [the officer’s] comments relating to the credibility of ‘most’ sexual assault victims would be taken by the jury as [his] endorsement of [the victim’s] credibility.”); *Com. v. Bougas*, 59 Mass App 368, 795 NE2d 1230 (2003) (exclusion of testimony that children embroiled in family controversy often fabricate allegations of sexual abuse).

State v. Kim, 64 Hawaii 598, 645 P.2d 1330 (1982) permitted a child psychiatrist who had interviewed the thirteen-year-old complaining witness in a statutory rape case to testify that her conduct, account of the incident, and mental and emotional condition approximated that of other child rape victims he had interviewed. Dr. Mann, qualified as an expert in pediatrics and child psychiatry, interviewed the complainant, her mother, and the accused, and testified as follows:

Q Based upon your experience, Dr. Mann, have you had an opportunity to-- in the past-- to assess the credibility of reported rape cases by children involving family members?

A Yes.

Q Approximately how many times have you done this?

A I would say about 70 times, 70 cases.

Q And, as a result of your interviews and examinations of these witnesses, have you arrived at conclusions with respect to the truthfulness of these reported rape cases involving family members?

A Yes.

Q Upon what do you base your conclusions as to the credibility of such claims?

A There are several factors. One is the consistency of the account of the alleged sexual abuse. There are some common emotional reactions we frequently find in victims, which consists of a fear of safety, fear of future sexual abuse, feelings of depression or anxiety, embarrassment to have the alleged happenings known to peers or other people around them, a negative view of sex, some doubts that one parent might be strong enough to protect further sexual abuse. It's also important to see whether the mental status is basically normal. That means there is no disturbing thinking. That memory functions are intact, and that there is a good sense of right or wrong or fairness and no excessive fantasizing.

Q Now, as a result of your experience and training in this area, did you come to the conclusion as to the truthfulness of the rape case reported by (the complainant) regarding the incident of July 2nd or 3rd, 1979?

A Yes. I found her account to be believable.

Q And was this a result of your interviewing not only (the complainant) but also the defendant and Mrs. Kim in this case?

A Yes.

Q Now, in arriving at that conclusion, what factors did you consider?

A Many of the factors I listed before. I found (the complainant's) account quite consistent. She was very much preoccupied with a fear of safety, which took on some almost phobic dimensions, telling me that she locked herself in her room and shut the windows when she was alone out of fear that the alleged might come back and she might be re-abused. She was quite depressed, showed a negative attitude to sex and seemed somewhat naive in sexual matters, which made it very unlikely that she would have fantasized acts in that specific manner. Also sense of fairness, I think, made it unlikely that she would make up a story just to get back at somebody.

64 Hawaii at 600-601, 645 P.2d at 1333-1334. But the court renounced *Kim* eight years later when it reversed a conviction where the clinical psychologist had been permitted to testify implicitly that the complainant was believable and had been abused. *State v. Batangan*, 71 Hawaii. 552 (1990) (“[C]onclusory opinions that abuse did occur and that that child victim’s report of abuse is truthful and believable is of no assistance to the jury, and therefore, should not be admitted.”)

²²¹ *People v. Peterson*, 450 Mich. 349, 375-376, 537 N.W.2d 857, 869 (1995) (testimony that children lie about sexual abuse at a rate of only two percent, and that their veracity rate is eighty-five percent, was deemed improper vouching).

²²² *State v. Kinney*, 762 A.2d 833 (Sup.Ct.Vt. 2000) (improper to permit expert to testify that false reporting rate for rape was only two percent).

Even some of its strongest proponent's concede that syndrome evidence potentially runs afoul of the prohibition against vouching for the credibility of another witness.²²⁴ Sometimes it is patently obvious, as in the trial where the following exchange occurred:

Q. Doctor, if you had those symptoms or some of those symptoms and a report by a child of sexual abuse, are you comfortable forming a diagnosis of child sexual abuse in such a case?

A. I would base that diagnosis on the child's statements about what had happened to them.²²⁵

But many courts have recognized that syndrome and similar behavioral science evidence is likely to be perceived by the jury as underwriting the credibility of the witness in question even when not so obviously presented. In fact, that is precisely the relevance of such testimony—"Unless the evidence is probative of credibility, it is utterly immaterial to any aspect of the case."²²⁶ A few courts exclude syndrome evidence for the very reason that it may lead the jury to abdicate responsibility and defer to the expert's judgment on whom to believe.²²⁷ And psychotherapists, "who purport to know the workings of the human psyche, pose an even greater risk than other experts of jeopardizing the independent decision-making functions of the jury when they comment on witness credibility."²²⁸ The concern (as the Vermont Supreme Court put it) is "that the psychological expert [may] be perceived by the jury as a 'truth detector'—

²²³ See, e.g., *Com. v. Federico*, 425 Mass 844, 849 (1997); *State v. Foret*, 628 So.2d 1116 (La. 1993); *State v. Saldana*, 324 N.W.3d 227, 230-231 (Minn. 1982). See also Pamela K. Sutherland and Delia J. Henderson, "Expert Psychiatrists and Comments on Witness Credibility," *TRIAL* (July, 1998), at 83 (cases collected).

²²⁴ See, e.g., David McCord, "Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases," 66 OREGON L. REV. 19, 32-34 (1987). McCord, however, dismisses such concerns as "legal bromides [that] have diverted the legal system from a complete and correct analysis of the admissibility of [syndrome] evidence," referring specifically to the phrases "invades the province of the jury" and "improper comment on witness credibility." In light of the centrality of the jury in our judicial system and our rules of evidence, this dismissal is perplexing.

For some empirical data suggesting that the risk of prejudicing the jury may be more potential than actual, see Neil J. Vidmar & Regina A. Schuller, "Juries and Expert Evidence: Social Framework Testimony," 52 *Law & Contemporary Problems* 133, 174-176 (1989).

²²⁵ *United States v. Velarde*, 214 F.3d 1204, 1209 (10th Cir. 2000). As the Tenth Circuit observed, an expert who bases her conclusion on the alleged victim's allegations is merely vouching for the complainant's credibility, which is impermissible. *Id.*, at 1210. A clinical psychologist who had interviewed the child and her mother had also been allowed to testify that the child's nightmares, bed-wetting, and angry outbursts were "consistent with" sexual abuse, and that she found no evidence that the child "was subject to either lying or overexaggerated fantasizing in her life." *Id.*, at 1211. The Tenth Circuit reserved judgment on this testimony as it remanded it for a reliability determination.

²²⁶ *Newkirk v. Kentucky*, 937 S.W.2d 690, 693 (Sup.Ct.Ken. 1996) (excluding CSAAS testimony).

²²⁷ See, e.g., *State v. Ballard*, 855 S.W.2d 557, 561 (Tenn. 1993).

²²⁸ Pamela K. Sutherland and Delia J. Henderson, *Expert Psychiatrists and Comments on Witness Credibility*, *TRIAL* (July, 1998), at 83. The writers continue that it "has not been demonstrated that the art of psychiatry has yet developed into a science so exact as to warrant such a basic intrusion into the jury process." *Id.* (citation omitted).

someone who, by application of scientific method, determines whether the victim is telling the truth about whether the abuse occurred and the abuser's identity."²²⁹

Nonetheless, we have seen that syndrome evidence is widely admitted. A few courts like the Supreme Court of Michigan admit it explicitly *because it* aids the jury resolve the credibility question (especially where the complaining witness has recanted her testimony): "To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat."²³⁰

Nearly all courts permit expert testimony about the common patterns of victim behavior to serve a rehabilitative purpose when defendant seeks to impeach the complaining witness by showing delay in reporting, recantation, and the like.²³¹ Some allow elaborate testimony on the

²²⁹ State v. Wetherbee, 594 A.2d 390, 393 (Vt. 1991). Sometimes the expert testimony operates overtly as a lie detector. In State v. Pizzillo, 2002 WL 75936 (Ohio App. 2002), the court reversed a conviction after a trial in which a social worker who had interviewed the alleged minor victim was permitted to testify regarding the child's initial denial that any abuse had occurred:

Ms. Cross then went on to explain how she managed to divine that the victim had been lying on June 16, 2000:

"A. [The victim] was very difficult. She uh, her body language. She turned her back to me most of the time. Uh she was silent on a lot of the questions that I asked. Uh she was figidity. (sic) She just wanted me outa there, uh and eye contact was just awful. It was down. Uh never wanted to look at me. Just very angry that I was there and I knew by that she knew something, something was happening to her that she wanted to tell but she wanted me outa there because I was pressing." (Tr. p. 184).

While her ten years as a social worker may have allowed Ms. Cross to develop many skills, mind reading is not one of them.

2002 WL 75936, at 6.

²³⁰ People v. Beckley, 434 Mich. 691, 721-722, 456 N.W.2d 391 (1990). The characterization of a witness called by the prosecution, or indeed any litigant, as "objective" appears somewhat disingenuous. And the court was apparently untroubled that when "the only evidence consists of the victim's accusation and the defendant's denial, expert testimony on the question of who to believe is nothing more than advice to jurors on how to decide the case." State v. Moran, 151 Ariz. 378, 383, 728 P.2d 248, 253 (1986).

The Eighth Circuit Court of Appeals was similarly candid in ruling that expert testimony concerning battered woman syndrome was properly admitted in a sexual abuse trial precisely *because* it went to the veracity of the complaining witness:

A jury naturally would be puzzled at the complete about-face she made, and would have great difficulty in determining which version of Brave Bird's testimony it should believe. If there were some explanation for Brave Bird's changed statements, such explanation would aid the jury in deciding which statements were credible.

Maicky's expert testimony regarding the battered woman syndrome provided that explanation to the jury. As the witness told the jury, the syndrome is a psychological condition, which leads a female victim of physical abuse to accept her beatings because she believes that she is responsible for them, and hopes that by accepting one more beating, the pattern will stop. Maicky's testimony provided the jury with information that would help it to determine which of Brave Bird's testimony to credit. If the jury concluded that Brave Bird suffered from battered woman syndrome, that would explain her change in testimony--her unwillingness to say something damaging against her husband.

Arcoren v. U.S., 929 F.2d 1235, 1240 (8th Cir. 1991).

²³¹ See Robert P. Mosteller, "Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence," 52 Law & Contemporary Problems 85, 119-120, 130 (1989) (such evidence is universally admitted). See, e.g., Chapman v. State, 18 P.3d 1164, 1172 (Wy. 2001); People v. Peterson, 450 Mich. 349, 373-

characteristics of “typical” abusive relationships, including the statistical national average for the number of times a woman goes back and forth before ultimately leaving.²³² But not all jurisdictions limit admissibility to situations where the defendant opens the door by way of attempted impeachment, or to use for rehabilitative purposes only. Some will admit it as substantive evidence during the prosecution’s case-in-chief if the trial judge determines the victim’s conduct may be misinterpreted, notwithstanding defendant’s strategy.²³³

The Massachusetts’ courts struggle to define the “narrow”²³⁴ line between proper use of an expert and impermissible bolstering of credibility is representative. A qualified witness may testify to the general behavioral characteristics and common clinical phenomena of sexually abused children²³⁵ or other victims,²³⁶ but may not directly or indirectly refer to or compare the behavior of the specific complainant because that intrudes on the jury’s province of assessing credibility.²³⁷ The decisional law emphasizes that:

It is one thing to educate the jury to understand that child abuse victims may act in counter-intuitive ways, and that excessive weight should not be given to factors such as failure to disclose when the child victim's credibility is weighed. It is quite another to suggest to the jury that the events and feelings expressed by the child witnesses are the same as those experienced by other victims of abuse. That this has the effect of buttressing the witnesses' credibility seems impossible to deny.²³⁸

374, 537 N.W.2d 857, 868 (1995); *State v. Cressey* 137 N.H. at 412, 628 A.2d at 702-703 (1993) (& citations); *State v. Jensen*, 147 Wis.2d 240, 251-252, 432 N.W.2d 913, 918 (1988). But compare *Newkirk v. Kentucky*, 937 S.W.2d 690, 693 (Sup.Ct.Ken. 1996) (expert testimony that it is common for children to report sexual abuse and then retract such allegations was not admissible as rebuttal evidence to respond to defendant's evidence that alleged ten-year-old victim had recanted accusations against defendant).

²³² See *State v. Rodriquez*, 636 N.W.2d 234, 245 (Iowa 2001). The witness, a supervisor in the Sexual Assault and Domestic Violence Abuse Advocacy Program, told the jury that abused women try seven times before finally leaving, and that statistically she is in the most danger when she tries to leave. *Id.*

²³³ See, e.g., *Mindombe v. U.S.*, 795 A.2d 39, 44-48 (D.C. Ct Appeals 2002) (& cases collected); *People v. Peterson*, 450 Mich. 349, 373-374, 537 N.W.2d 857, 868 (1995); *Minnesota v. Grecinger*, 569 N.W.2d 189, 193 (Sup.Ct. Minn. 1997) (battered woman syndrome testimony can come in during prosecution’s case-in-chief). For civil cases see *S.M. v. J.K.*, 262 F.3d 914, 920-922 (9th Cir. 2001); *Isely v. Capuchin Province*, 877 F.Supp. 1055 (E.D.Mich. 1995).

²³⁴ *Com. v. Rather*, 37 Mass App 140, 148 (1994).

²³⁵ See *Com. v. Dockham*, 405 Mass 618 (1989).

²³⁶ See *Terrio v. McDonough*, 16 Mass App 163, 175-176 (1983) (rape trauma syndrome testimony that it would “not necessarily” be remarkable for a rape victim to return to the scene with her attacker or to feel safe in his company after the event).

²³⁷ See *Com. v. Federico*, 425 Mass 844, 849 (1997) (& citations); *Com. v. Rather*, 37 Mass App 140, 147-148 (1994). See also *Hoult v. Hoult*, 57 F.3d 1, 7 (1st Cir. 1995) (“We think Dr. B***’s testimony may have crossed the line in commenting upon the plaintiff’s credibility. Dr. B*** did not limit her testimony to psychological literature or experience or to a discussion of a class of victims generally. Rather, she came perilously close to testifying that this particular victim/witness could be believed.”); *United States v. Rosales*, 19 F.3d 763, 766 (1st Cir. 1994) (“Dr. Slicner’s testimony sent an implicit message to the jury that the children had testified truthfully, and this might therefore have interfered with the jury’s function as the sole assessor of witness credibility.”).

²³⁸ *Com. v. Deloney*, 59 Mass. App. 47, 59, 794 NE2d 613, 623 (2003) (citations omitted).

The witness must not have actually examined or treated the child because the risk of impermissible vouching is obviously highest there.²³⁹ And when the expert is asked to respond to hypothetical questions, care must be taken not to suggest that the expert has concluded that the complainant is telling the truth.²⁴⁰

²³⁹ In *Com. v. McCaffrey*, 36 Mass. App. 583, 591-592, 633 N.E.2d 1062, 1067-1068 (1994), the psychologist first testified that she counseled sexually abused children and that such children exhibit certain general behavioral characteristics. She then was permitted to testify, over McCaffrey's objections, that Erin was currently her patient; that she had been treating Erin for about a year; that at the beginning of the therapy Erin had revealed that she had been sexually abused by her father; and that Erin had been placed in therapy groups for sexually abused children. The expert further described Erin's conduct during the early course of treatment in terms that the jury could not have failed to note resembled the behavior the expert had earlier testified to as characteristic of sexually abused children. ...
 Allowing the psychologist here to testify as both behavioral expert and treating therapist may well have approached too closely the forbidden issue of the victim's credibility. The fact that she had accepted Erin as a patient to be treated as a sexually abused child could easily give rise to the jury's inference that she had accepted Erin's allegations against her father as true and was providing her professional services as a result, thereby endorsing Erin's credibility as a victim of parental sexual molestation.

See also *Com. v. Rather*, 37 Mass App 140, 148 (1994). For a similar approach in other jurisdictions, see *Nixon v. United States*, 728 A.2d 582, 592 (Dis.Col.Ct Appls. 1999) (collecting cases). Some courts have merely cautioned judges to "carefully scrutinize the treating professional's ability to aid the trier of fact" given the inevitable "emotional inclination toward protecting the child victim." *People v. Beckley*, 456 N.W.2d 391, 408 (Mich. 1990).

²⁴⁰ The following questions posed by the prosecution to its psychiatric expert were found to create an unacceptable risk of vouching for the credibility of the complaining witness:

Q.: "I would ask you to assume for purposes of this hypothetical, Doctor, that two sisters living with their mother and stepfather had sexual relations with the stepfather on a regular basis since the ages of twelve and nine. Further assume that neither sister disclosed those relations for six years while it was ongoing. I would ask you further to assume that at age fifteen the younger sister disclosed the sexual activity to her mother the following day on which the stepfather had intercourse with her in the afternoon and in the evening scolded her, yelled at her, and lectured her for failing to fold towels and finish dishes in the sink.

I would ask you further to assume that the morning after that incident, the fifteen-year-old girl became upset and told her mother the Defendant had been having sexual relations with her for years. Do you have an opinion, to a reasonable degree of medical certainty, as to whether or not those assumed facts are consistent with the girl who had been having sexual relations with an adult since the age of approximately nine-and-a-half?"

Based on that hypothetical question, Dr. B*** opined as follows:

"Well, I have described the circumstances in which the sexual relations can be maintained as a secret for a very long time. Then, comes the question about what the circumstances are under which a child who has had ongoing sexual relations will tell someone about it.

Those circumstances can include, first of all, a child growing up and growing into adolescence and having a changed awareness of what their situation is, that more and more they might have wishes to have relationships outside the family. To the extent that they are limited in doing that and having sexual relationships within the family, that can become more and more bothersome to a child and create more conflict.

It is often in the context of a family argument and anger that a child will, for the first time, tell someone about what has happened. Also, I think that what you described in terms of the child having sexual relationships at one point in time and then being reprimanded for not folding clothes in the proper sort of way, I think there can be a lot of strong feelings, a lot of conflict about, on the one hand, being treated in a more adult fashion; on the other hand, being reprimanded as a child or a servant, that can give rise to anger. The anger in some way can counteract the fears that have led a child to keep the sexual relations secret.

Some courts discount the danger of intruding on the jury's prime function where the expert is limited to testimony that the alleged victim exhibited symptoms and behavior "*consistent with*" those of abused children.²⁴¹ But others see no meaningful difference between this and testimony that, in the expert's opinion, the children were sexually abused.²⁴² "Where a

I think that by virtue of the argument, the anger, a child going into adolescence, that those are the kinds of circumstances in which it is very typical that a child might for the first time disclose a secret that they have been keeping for many years."

Com. v. Federico, 425 Mass. 844, 853, 683 N.E.2d 1035, 1041-1042. Similar testimony was found to have crossed the line in Com. v. Rather, 37 Mass App 140, 143-145 (1994):

"Q. Ms. Tempesta [Therapist called by the defense to contradict the victim's testimony about the specific alleged abuse. On cross-examination by the prosecutor:]

I would like you for the following three questions to make an assumption. Assume that you have a child under the age of ten who has been sexually abused, physically abused, and threatened with severe bodily harm if the child discloses that abuse. My first question is, do you have an opinion to a reasonable degree of psychological certainty as to whether it is uncommon for such a child to fail to disclose that abuse for a substantial period of time?

"A. I think a child who has been sexually abused and who has been threatened with bodily harm would have a very difficult time disclosing the abuse at all. And quite often children who have experienced that type of abuse and those types of threats very often do not disclose. When they do disclose they normally disclose in stages.

²⁴¹ In *State v. Jensen*, 147 Wis.2d 240, 432 N.W.2d 913 (1988), for example, the complainant's school guidance counselor (who happened to be the first person told of the alleged assault) was permitted to testify, as an expert on sexually abused children, that the "acting out behavior" of the victim was "consistent with children who are victims of sexual abuse" and a "red flag" or "indicator" of abuse. 147 Wis.2d at 246, 432 N.W.2d at 916. See cases collected at *Bachman v. Leapley*, 953 F.2d 440, 441 (8th Cir.1992); *State v. Chauvin*, 846 So.2d 697, 704-706 (La. 2003); *State v. Steward*, 652 N.E.2d 490, 495-498 (Ind. 1995).. See also *United States v. Alzanki*, 54 F.3d 994, 1006 (1st Cir. 1995) ("victimologist" allowed to testify that alleged victim's behavior in not seeking to escape was consistent with someone held in involuntary servitude).

²⁴² *State v. Cressey*, 137 N.H. 402, 407, 628 A.2d 696, 699-700 (1993). See also *State v. Moran*, 151 Ariz. 378, 385, 728 P.2d 248, 255 (1986) ("the [impermissible] inference offered the jury is that because this victim's personality and behavior are consistent with a molest having occurred, the crime must have been committed."). See also *People v. Peterson*, 450 Mich. 349, 376, 537 N.W.2d 857, 869 (1995); *State v. J.Q.*, 130 N.J. 554, 582, 617 A.2d 1196 (1993). The Massachusetts courts have detected no meaningful distinction in a related context. See *Com. v. Day*, 409 Mass. 719, 725, 569 N.E.2d 397, 400 (1991) ("The fact that Dr. Newberger did not specifically state that the defendant fit the profile is not significant, since a reasonable jury could have inferred that the Commonwealth was implying that the defendant fit the 'child battering profile,' and, as a result, that the defendant was responsible for the child's fatal injuries.").

In his dissent in *People v. Peterson*, supra, Justice Cavanagh argued for use of the phrase that the child's behavior was "not inconsistent with" sexual abuse instead of the familiar affirmative "consistent with" testimony:

"C]onsistent with" testimony is fundamentally different from testimony that a given set of behavioral reactions are not inconsistent with child sexual abuse. "Not inconsistent" is rebuttal-type testimony; it merely states that it could be true. "Consistent with" is positive testimony that it is true. "Not inconsistent" testimony can convey to the jury all the information that it needs to assess the issues in the case.

To illustrate, suppose the facts of the case indicate that the child has withdrawn, is exhibiting severe depression, initially reported the abuse to a school counselor, but has now recanted her story in fear that her stepfather- abuser will be taken away from the family, and her mother will be very sad. This information will be placed before the jury by the child's own testimony or through witnesses with personal knowledge of the child's behavior. If the defense then focuses on the recantation and argues that her initial allegations were made in retaliation or rebellion to house rules, an expert could testify that child sexual abuse victims have been known to withdraw, become depressed, and recant their allegations when they realize that the family may be torn apart. If appropriate, the prosecutor could pose a hypothetical question to the expert

jury is confronted with evidence of an alleged child victim's behaviors, paired with expert testimony concerning similar syndrome behaviors, the invited inference-- that the child was sexually abused because he or she fits the syndrome profile-- will be as potentially misleading and equally as unreliable as expert testimony applying the syndrome to the facts of the case and stating outright the conclusion that a given child was abused."²⁴³ As another court summed it up:

An expert witness may not testify that a defendant is guilty. When, as in this case, an expression of opinion as to credibility is the equivalent of an opinion as to guilt or innocence, it is of no consequence that the testimony was presented in a general manner rather than as specific to the case or on rebuttal rather than as evidence in chief.²⁴⁴

Syndrome and other behavioral science evidence clearly presents us with a quandary. The more general the expert's testimony, the less intrusive into jury's traditional role, but also the *less helpful* in resolving disputed facts. Conversely, the more specific the testimony the more helpful, but the greater the risks the jury will defer to the expert's judgment. Resolving this dilemma against the admission of such testimony, the Supreme Court of Pennsylvania concluded:

In the final analysis, the reason for the delay [in reporting by the victim] must be ascertained by the jury and is based on the credibility of the child and the attendant circumstance of each case. We believe that the evidence presented through the fact witnesses, coupled with an instruction to the jury that they should consider the reasons why the child did not come forward, including the age and circumstances of the child in the case, are sufficient to provide the jury with enough guidance to make a determination of the importance of prompt complaint in each case. Not only is there no need for testimony about the reasons children may not come forward, but permitting it would infringe upon the jury's right to determine credibility.²⁴⁵

Various devices have been proposed over the years to determine the truthfulness of a subject's account, ranging from "truth serum" to polygraphs that measure blood pressure and pulse to counting the rate of eye blinks.²⁴⁶ But even if we were satisfied with the scientific reliability of a particular method, it is inconceivable that we would permit its use at trial to test

paralleling the facts of the case, and ask whether such testimony is "inconsistent with" sexual abuse behavioral reactions. The expert could reply, "No, it is not inconsistent." At that point, the jury has all of the information that it needs to evaluate the child's credibility.

450 Mich. at 388-389, 537 N.W.2d at 874-875.

²⁴³ Steward v. State, 652 NE2d 490, 499(1995).

²⁴⁴ Newkirk v. Com., 937 S.W.2d 690, 694 (Sup.Ct.Ken. 1996).

²⁴⁵ Com. v. Dunkle, 529 Pa. 168, 183, 602 A.2d 830, 837 (1992) (footnotes omitted).

the truthfulness of a witness' testimony. As Judge Easterbrook explained (in a case excluding expert testimony on eyewitness identification):

Jurors may believe that witnesses who hesitate, perspire, or fidget during cross-examination are hiding the truth. This is the view that underlies polygraph examinations, but without the precision of measurement. Is it true? Calm and collected liars deceive polygraph examiners (and thus jurors too); other witnesses grow restless or testy although they have nothing to hide. Suppose one of the litigants offers an expert in physiology to explain to jurors the (weak) correlation between lying and the appearance of discomfort on the stand. Or an expert in group dynamics to explain to a potential dissenter on the jury how to resist the pressure of the majority to go along-- or for that matter how to see through lawyers' rhetorical tricks. Because trials rest on so many contestable empirical propositions, including those about eyewitness recollection, it always would be possible to offer expert evidence along these and related lines.

Yet a trial about the process of trials not only would divert attention from the main question (did Hall kill Jessica Roach?) and substantially lengthen the process but also would not do much to improve the accuracy of the outcome. Social science evidence is difficult to absorb; the idea of hypothesis formulation and testing is alien to most persons. That's one reason why the training of social scientists is so extended. Delivering a graduate level statistical-methods course to jurors is impractical, yet without it a barrage of expert testimony may leave the jurors more befuddled than enlightened. Many lawyers think that experts neutralize each other, leaving the jurors where they were before the process began. Many lawyers think that the best (= most persuasive) experts are those who have taken acting lessons and have deep voices, rather than those who have done the best research. Perhaps that is too pessimistic a view; but then the effect of experts is itself a question open to empirical inquiry, which might be added to the agenda for trial.²⁴⁷

Easterbrook's astute observations should give equal pause regarding the admission of syndrome evidence.

C. Probative Value and Prejudicial Harm: The FRE 403 Calculus

*"The teaching of the evidence doctrine is that unreliable scientific testimony creates a serious and unjustifiable risk of an erroneous verdict, and that the adversary process at its best does not remove this risk."*²⁴⁸

The potential risks of expert testimony have been widely acknowledged. The *Daubert* Court noted:

²⁴⁶ See "Blinking Indicates Stress," NEWSWEEK October 21, 1996 (reporting on work of Boston College Professor Joseph Tecce). A summary of Professor Tecce's work can be found in McGraw-Hill Yearbook of Science & Technology (6th ed. 1992), at 375-377.

²⁴⁷ U.S. v. Hall, 165 F.3d 1095, 1119-1120 (7th Cir. 1999) (Easterbrook, concurring).

²⁴⁸ Barefoot v. Estelle, 463 U.S. 880, 931 (1983) (Blackmun, J., dissenting).

Rule 403 permits the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” Judge Weinstein has explained: “Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.”²⁴⁹

As discussed above, the probative value of behavioral science evidence (especially syndrome testimony) is often questionable, and a few courts have even excluded it on grounds of relevancy “for failure to make the existence of any fact of consequence more probable or less probable than it would have been without the evidence.”²⁵⁰ If the symptoms associated with a particular syndrome also appear with frequency in the population generally, the testimony adds little to the resolution of the dispute.²⁵¹ Moreover, since the diagnosis of disorders like PTSD and CSASS is based in part on the victim’s version of events, there is a troubling circularity to the logic of this evidence.²⁵² Someone once warned that “low probative worth can often be concealed in the jargon of some expert.”²⁵³

On the other side of the FRE 403 balance, the risk of jury overvaluation (which the common law handled clumsily by operation of the now discredited “ultimate issue” rule²⁵⁴) pervades the evidentiary rules controlling opinion testimony. The concern is particularly acute for testimony carrying a scientific aura,²⁵⁵ but has been identified as well in the case of non-scientific clinically-based testimony.²⁵⁶ Moreover the very terminology used by the witness such

²⁴⁹ 509 U.S. at 595 (citation omitted). See also *Usher v. Lakewood Eng’g & Mfg. Co.*, 158 F.R.D. 411, 413-414 (N.D. Ill. 1994) (federal courts have enhanced authority under *Daubert* to exclude expert opinion under 403).

²⁵⁰ *Newkirk v. Com.*, 937 S.W.2d 690, 693 (Sup.Ct.Ken. 1996).

²⁵¹ *Id.*

²⁵² Thornton, “*State v. Chauvin*: Determining the Admissibility of Post-Traumatic Stress Syndrome Diagnosis as Substantive Evidence of Sexual Abuse,” 78 Tulane L.Rev. 1743, 1751-1752 (2004) (& citations). Battered women syndrome, for example, is a “history-driven diagnosis,” depending on the accuracy of perception of the very person who was abused. Michael Welner, “Hidden Diagnosis and Misleading Testimony: How Courts Get Shortchanged,” 24 Pace L. Rev. 193, 205 (2003). Similarly the behavioral characteristics of CSAAS “assume abuse rather than provide evidence of it.” Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 Cardozo L. Rev. 2027, 2039-2040 (1994).

²⁵³ 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5217, at 295 (1978).

²⁵⁴ See FRE 704 and accompanying Advisory Committee Notes.

²⁵⁵ “[A] certain patina attaches to an expert’s testimony unlike any other witness; this is ‘science,’ a professional’s judgment, the jury may think, and give more credence to the testimony than it may deserve.” *U.S. v. Hines*, 55 F.Supp.2d 62, 64 (D.MA. 1999). See also *U. S. v. Fosher*, 590 F.2d 381, 382 (1st Cir. 1979) (excluding proffered expert testimony on eyewitness identification because, inter alia, it would raise a substantial danger of unfair prejudice given the aura of reliability that surrounds scientific evidence).

²⁵⁶ See Krauss & Sales, *The Problem of “Helpfulness” in Applying Daubert to Expert Testimony: Child Custody Determinations in Family Law as an Exemplar*, 5 Psychol., Pub. Poli. and Law 78, 87 (1999). Justice Blackmun referred to “the inevitable untouchability of a medical specialist’s words” in the eyes of an impressionable jury.

as *rape* trauma syndrome or *battered* woman syndrome may itself unfairly prejudice the defendant's case.²⁵⁷

In excluding expert testimony concerning eyewitness identification despite its impressive scientific foundation,²⁵⁸ courts have worried that the "minimal probative value of the proffered expert testimony is outweighed by the danger of juror confusion."²⁵⁹ Such testimony has the potential to confuse and mislead the jury and create "prolonged trials by battles of experts."²⁶⁰ Several courts have similarly concluded regarding syndrome testimony:

Permitting a person in the role of an expert to suggest that because the complainant exhibits some of the symptoms of rape trauma syndrome, the complainant was therefore raped, unfairly prejudices the appellant by creating an aura of special reliability and trustworthiness. Since jurors of ordinary abilities are competent to consider the evidence and determine whether the alleged crime occurred, the danger of unfair prejudice outweighs any probative value. To allow such testimony would inevitably lead to a battle of experts that would invade the jury's province of fact-finding and add confusion rather than clarity.²⁶¹

Barefoot v. Estelle, 463 U.S. 880, 916 (1983) (dissenting). He continued: "Indeed, unreliable scientific evidence is widely acknowledged to be prejudicial. The reasons for this are manifest. The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny. Where the public holds an exaggerated opinion of the accuracy of scientific testimony, the prejudice is likely to be indelible." *Id.*, at 926-927 (citations & internal quotations omitted).

²⁵⁷ Neil J. Vidmar & Regina A. Schuller, "Juries and Expert Evidence: Social Framework Testimony," 52 Law & Contemporary Problems 133, 143 (1989) (& citations).

²⁵⁸ See text accompanying n. 111, et seq.

²⁵⁹ See U.S. v. Kime, 99 F.3d 870, 884 (8th Cir. 1996).

²⁶⁰ U.S. v. Brien, 59 F.3d 274, *277 (1st Cir. 1995).

²⁶¹ State v. Saldana, 324 NW2d 227, 230 (Minn.1982). See also State v. Ballard, 855 S.W.2d 557, 561-562 (Tenn. 1993) ("This 'special aura' of expert scientific testimony, especially testimony concerning personality profiles of sexually abused children, may lead a jury to abandon its responsibility as a fact finder and adopt the judgment of the expert."); State v. Cressey, 137 N.H. 402, 405, 628 A.2d 696, 698 (1993) ("The reliability of evidence is of special concern when offered through expert testimony because such testimony involves the potential risks that a jury may disproportionately defer to the statements of an expert if the subject area is beyond the common knowledge of the average person, and that a jury may attach extra importance to an expert's opinion simply because it is given with the air of authority that commonly accompanies an expert's testimony."); State of Minnesota v. Grecinger, 569 N.W.2d 189, 198 (Sup.Ct. Minn. 1997) (Stringer, J, concurring) ("The admission of the expert testimony on battered woman syndrome could have a profound influence on the jury in its determination as to whom to believe on the basic issue of whether the battering occurred at all-- even though the court prohibited the expert witness from testifying as to whether the complainant was in fact a battered woman. The right to a presumption of innocence would soon be an empty epithet unless the trial court exercises extraordinary vigilance in applying Rule 403 under circumstances such as we have here, where guilt or innocence turns solely on which of two accounts to believe, and expert testimony, that arguably implies that the criminal conduct charged actually did occur, is offered to explain inconsistent conduct by the complainant. Careful inquiry must be made under Rule 403 as to all aspects of the need for, and value of, the expert testimony as rehabilitative of the witness' credibility and its helpfulness to the jury, and these factors must be balanced against the clear potential for unfair prejudice to the defendant.").

The concern is that the expert's credentials will displace the jury's own common sense and intuition about the way people behave in certain circumstances.²⁶²

The danger of jury overvaluation is particularly acute where the expert presents his or her testimony with great confidence and assurance. In the notorious trial of John Hendrickson, convicted of murdering his wife Maria in Albany, N.Y. in 1853, the crucial evidence of guilt came from three young doctors who testified they had devised a method of identifying the presence of a poison previously undetectable by medical science. The evidence was ultimately discredited by practitioners, but unfortunately for Hendrickson not until after he was convicted and hanged.²⁶³ A prominent pathologist observed at the time that the "confident and positive" demeanor of the prosecution witnesses carried more weight with the jury than the more considered and scientifically reliable testimony of the defense experts: "foolhardy confidence seemed to triumph over professional caution."²⁶⁴

It has been argued that the risk of overestimation of psychological testimony has been exaggerated, particularly since human behavior (unlike the opaque box of DNA science) is not a subject foreign to jurors.²⁶⁵ And certainly some of the risk can be addressed in obvious ways, as

²⁶² See Neil J. Vidmar & Regina A. Schuller, "Juries and Expert Evidence: Social Framework Testimony," 52 Law & Contemporary Problems 133, 142 (1989). Social framework evidence is also likely to have some "spillover effects" on all the other evidence heard by the jury, causing jurors to credit the complainant's credibility and moral character. *Id.*, at 148, 160. See also Robert R. Lawrence, "Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony of Rape Trauma Syndrome in Criminal Proceedings," 70 Virginia L. Rev. 1657, 1700-1702 (1984).

²⁶³ James C. Mohr, DOCTORS AND THE LAW: MEDICAL JURISPRUDENCE IN NINETEENTH-CENTURY AMERICA 122-139 (1993).

²⁶⁴ *Id.*, at 134 (citation omitted). Mock jurors have similarly been found more willing to convict on basis of *confident* eyewitnesses than fingerprint evidence. See Elizabeth Loftus, "Psychological Aspects of Courtroom Testimony," 347 ANNALS N.Y. ACAD. SCI. 27, 32-33 (1980).

²⁶⁵ Neil Vidmar & Shari Seidman Diamond conclude that "[e]mpirical data do not support a view that juries are passive, too-credulous, incompetent, and overawed by the mystique of the expert." See "Juries and Expert Evidence," 66 Brooklyn L.Rev. 1121, 1180 (2001). They reviewed the research on the various forms of social framework evidence and found that jurors used it "by incorporating the information into their decision-making processes. However, the jurors were not seduced by it. They critically evaluated the information and did not accord it an unwarranted aura of trustworthiness and reliability or allow the expert's opinion to substitute for their own judgment. In addition, the accumulated data from the studies showed only a very modest spillover effect on the way the jurors evaluated other evidence in the case, including judgments about the credibility or character of other witnesses." *Id.*, at 1166. See also Neil J. Vidmar & Regina A. Schuller, "Juries and Expert Evidence: Social Framework Testimony," 52 Law & Contemporary Problems 133, 166-176 (1989) (reviewing studies of the impact of expert testimony on jurors, several concluding they do not generally suspend judgment in deference to expert testimony); Lisa R. Askowitz & Michael H. Graham, "The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions," 15 Cardozo L. Rev. 2027, 2095-2096 (1994) (& citations). More generally see Imwinkelreid, "The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology," 28 Vill L Rev 554, 566-68 (review of studies showing jurors are not overly influenced by scientific proof); Scott Sundby, "The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay testimony," 83 Va.L.Rev. 1109 (1997); American Bar Association Report of a Special Committee of the ABA

for example by not referring to witness as “expert” in front of the jury.²⁶⁶ Nonetheless, as Justice Blackmun noted in his dissent in *Barefoot v. Estelle*,²⁶⁷ there is considerable evidence that suggests that juries “are not effective at assessing the validity of scientific evidence.”²⁶⁸ Boilerplate instructions to the jury regarding the assessment of expert testimony could very well exacerbate the problem.²⁶⁹

Moreover, the adversary system cannot be counted on to reveal the defects in behavioral testimony because it rests on “psychiatric categories and intuitive clinical judgments not susceptible to cross-examination and rebuttal.”²⁷⁰ Even skilled opposing counsel may have difficulty exposing the flaws because as the Supreme Court of New Hampshire recognized, the methodology used in psychological evaluations often puts the evidence “effectively beyond reproach.”²⁷¹ The conclusions of the expert

do not rest on one particular indicator or symptom, but rather on [the] interpretation of all the factors and information before her. So even though the defendant may be able to discredit several of the indicators, symptoms, or test results, the expert’s overall opinion is likely to emerge unscathed. An expert using this methodology may candidly acknowledge any inconsistencies or potential shortcomings in the individual pieces of evidence she presents, but can easily dismiss the critique by saying that her evaluation relies on no one symptom or indicator and that her conclusions still hold true in light of all the other available factors and her expertise in the field. In such a case, the expert’s conclusions are as impenetrable as they are unverifiable.²⁷²

Chief Justice Warren Burger observed nearly forty years ago:

The very nature of the adversary system ... complicates the use of scientific opinion evidence, particularly in the field of psychiatry. This system of partisan contention, of

Litigation Section, Jury Comprehension in Complex Cases 40-43 (1989) (noting examples where juries rejected expert testimony as hired gun evidence). For a brief survey of the empirical studies on juror comprehension of expert proof, see Imwinkelreid & Schleuter, “Evidentiary Tactics: Selecting the ‘Best’ Evidence to Simplify the Case,” *Criminal Justice*, Summer, 2004, at 24-25.

²⁶⁶ See Charles R Richey, “Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Civil and Criminal Jury Trials,” 154 F.R.D. 537 (1994).

²⁶⁷ See text accompanying n. 98, et seq.

²⁶⁸ 463 U.S. 880, 929 (citation omitted).

²⁶⁹ By way of example:

Your power with regard to an expert witness is exactly the same as it is with regard to a lay witness. You may accept what an expert witness says, you may accept the opinion of an expert witness, you may reject the opinion of an expert witness, you may accept it in part and reject it in part. *It's entirely up to you to deal with that evidence as you are persuaded to deal with it. But it is offered because, in the general run of things, you would not be expected to have the special knowledge that the expert has.*

Com. v. Rather, 37 Mass App 140, 146-147 (1994) (emphasis added).

²⁷⁰ *Barefoot v. Estelle*, supra, 463 U.S. at 931 (dissenting).

²⁷¹ *State v. Cressey*, 137 N.H. 402, 409-410, 628 A.2d 696, 701-702 (1993).

²⁷² *State v. Cressey*, supra, 137 N.H. at 409-410, 628 A.2d at 701-702.

attack and counterattack, at its best is not ideally suited to developing an accurate portrait or profile of the human personality, especially in the area of abnormal behavior. Although under ideal conditions the adversary system can develop for a jury most of the necessary fact material for an adequate decision, such conditions are rarely achieved in the courtrooms in this country. These ideal conditions would include a highly skilled and experienced trial judge and highly skilled lawyers on both sides of the case, all of whom in addition to being well-trained in the law and in the techniques of advocacy would be sophisticated in matters of medicine, psychiatry, and psychology. It is far too rare that all three of the legal actors in the cast meet these standards.²⁷³

In certain trials expert testimony is obviously essential in order for the factfinder to reach a rational decision on the issues in dispute. Neither a lay jury nor judge untrained in medicine could determine whether a highly sophisticated surgical procedure had been performed competently or negligently, or whether a nurse had deliberately killed her patients by injections that sent their hearts into “accelerated ideo-ventricular rhythm.”²⁷⁴ But in many trials in which social science evidence is offered it serves a collateral role, such as explaining the behavior of a witness which (it is feared) may otherwise be misinterpreted by the jury. Given this more tangential function there is serious question about whether its probative value outweighs the downside risks, including distraction from the actual issues in dispute to a focus on the expert’s pedigree, poise and presentation. As Justice Cavanagh observed:

The marginal probative value of allowing the [behavioral] expert to further testify with respect to the particular complainant is substantially outweighed by the danger of unfair prejudice that the jury will misuse the testimony. It invades the province of the jury to assess credibility. It invites the jury to give undue weight to testimony that is foundationally and fundamentally unreliable merely because it is cloaked with the

²⁷³ Burger, *Psychiatrists, Lawyers, and the Courts*, 28 Fed.Prob. 3, 6 (June 1964). See also Stephen J. Morse, “Carzy Behavior, Morals, and Science: An Analysis of Mental Health Law,” 51 S.Cal.L.Rev.527, 626 (1978) (“Many of the cases are not truly adversarial; too few attorneys are skilled at cross-examining psychiatrists, laypersons overweigh the testimony of experts, and, in any case, unrestricted use of experts promotes the incorrect view that the questions are primarily scientific.”).

²⁷⁴ See “Life, Death, and Uncertainty to the Judge in Charge, the Murder Trial of Kristin Gilbert,” by Hon. Michael A. Ponsor, *Boston Sunday Globe*, July 8, 2001, p. D2 (2001 WL 3941573). As the Seventh Circuit has explained:

Suppose, for example, it were relevant for a jury to decide whether a person’s use of foul or abusive language was intended to harm another person. Most of the time, the jury would be able to assess the circumstances without the need for expert testimony, since foul language is an unfortunate part of everyday life. In some cases, however, the individual might be suffering from Gilles de la Tourette’s syndrome, which is a rare disorder manifested by grimaces, grunts, and in about half of all cases, episodes of the use of foul language. A defendant wishing to explain his behavior by showing that he had Tourette’s syndrome would need expert testimony both on the condition itself and his own affliction. In other cases, the question whether a person has voluntarily joined certain activity may be central. If a possible explanation is that the person is suffering from post-traumatic stress disorder, the jury would need expert testimony to allow it to take this possibility into account.

United States v. Hall, 93 F.3d 1337, 1343 (7th Cir. 1996) (citations omitted).

expertise of an expert. It also invites the jury to believe that the expert knows more than he is telling, by letting the jurors infer that the expert, who works with sexually abused children every day, must believe this child's story or else the expert would not be testifying.²⁷⁵

Since abuse cases often come down to a credibility contest between the accused and the alleged victim, it is acknowledged that expert behavioral testimony presented by the prosecution may very well be determinative,²⁷⁶ and its impact has been empirically documented as producing significantly more guilty verdicts (particularly where the testimony refers specifically to the victim in the case, and where no opposing defense expert is presented).²⁷⁷ And admitting social science evidence of dubious reliability on the untested assumption that it is necessary to counteract jurors' false beliefs about victims may, ultimately, result in the substitution of another set of false beliefs, this time coming from the "expert."²⁷⁸

Where the defendant himself has initiated a significant attack on the credibility of the complaining witness by emphasizing behavior like delayed reporting or recantation,²⁷⁹ the

²⁷⁵ *People v. Peterson*, 450 Mich. 349, 391, 537 N.W.2d 857, 875-876 (1995) (dissenting). See also *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996).

²⁷⁶ See Lisa R. Askowitz & Michael H. Graham, "The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions," 15 *CARDOZO L. REV.* 2027, 2028 (1994); Mary Ann Dutton, "Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women" (1994) and Janet Parrish, "Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases" (1994), at <http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/Valid/>.

In ruling that the admission of expert testimony from two prosecution witnesses was not harmless error, one circuit recognized that where there is little evidence beyond that of the victim's allegations, such testimony is likely to have a substantial effect on the trial's outcome. See *United States v. Velarde*, 214 F.3d 1204, 1212 (10th Cir. 2000). Along similar lines, the court in *Mukhtar v. California State University, Hayward*, 299 F.3d 1053 (9th Cir. 2002), *amended* 319 F.3d 1073 (9th Cir. 2003), observed: "Dr. Wellman drew the inference of discrimination for the jury in a case otherwise based entirely on less-than-convincing circumstantial evidence. Thus, it is hard for us to see how Dr. Wellman's testimony, which addressed the central issue of Elsayed's case, was harmless; rather it 'more probably than not was the cause of the result reached.'" 299 F.3d 1068.

²⁷⁷ See Margaret Kovera, Robert Levy, Eugene Borgida, & Steven Penrod, "Expert Testimony in Child Abuse Cases," 18 *Law & Human Behavior* 653 (1994); Neil J. Vidmar & Regina A. Schuller, "Juries and Expert Evidence: Social Framework Testimony," 52 *Law & Contemporary Problems* 133, 158-160 (1989) (rape trauma syndrome); Robert P. Mosteller, "Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence," 52 *Law & Contemporary Problems* 85, 91 (1989). See also Regina A. Schuller, "The Impact of Battered Woman Syndrome Evidence on Jury Decision Processes," 16 *Law & Human Behavior* 597 (1992) (defense offer of such evidence in support of self-defense leads to moderate increase in favorable defendant's verdicts).

²⁷⁸ See Robert P. Mosteller, "Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence," 52 *Law & Contemporary Problems* 85, 92 (1989).

²⁷⁹ In *Nixon v. United States*, 728 A.2d 582 (Dis.Col.Ct App. 1999), for example, defense counsel persistently argued that the complainant's testimony was not credible because for a long period she failed to report, and even denied, the alleged abuse, and that this conduct belied her allegations. He pursued this line during his opening, cross of the complainant, and closing. 728 A.2d at 590.

balance may shift in favor of allowing testimony explaining in general terms why such behavior is not inconsistent with abuse. Even in this situation, however, the testimony should meet minimal *Daubert/ Kumho Tire* standards, and great care must be taken to avoid expert pronouncements about the particular victim.²⁸⁰ Given that FRE 403 protects a litigant only from evidence that is *unfairly* prejudicial, reliable rebuttal evidence from a qualified expert restricted to educating the jury regarding the behavior of abuse victims would not appear to fall into that category.²⁸¹ In all other contexts, FRE 403 should generally screen out syndrome testimony.

IV. Costs and Benefits of Admitting Behavioral Science Evidence

One might ask: Even if there are troubling issues regarding the use of social science in the courtroom, what is the harm in admitting it for whatever value it has to the factfinder?

In this regard it is instructive to note that the Federal Judicial Center survey²⁸² of judges and attorneys found that the problem most frequently cited by both groups regarding expert testimony was that “experts abandon objectivity and become advocates for the side that hired them,” followed closely by the “excessive expense” of expert witnesses. Other recurrent observations were that the conflict among the experts at trial often “defies reasoned assessment,” and the “disparity in level of competence of opposing experts.” All of these concerns should inform our assessment of social science evidence in the courtroom.

Illustrative of the cost/benefit issues are several employment discrimination cases in which social science evidence was utilized.²⁸³ In *Price Waterhouse v. Hopkins*,²⁸⁴ Ann Hopkins

But as one judge has aptly warned, “simple cross-examination will disclose some inconsistencies in the child's testimony. This leaves the defendant the dubious decision of either not cross examining the child witness or cross examining the child witness, thereby allowing the State to pull its ‘expert’ out of the hat to testify that each inconsistency the child gave is typical of a sexually abused child.” *Duckett v. State*, 797 S.W.2d 906, 923 (Tex.Crim.App. 1990) (Teague, dissenting).

²⁸⁰ “Once the jury has learned the victim's behavior from the evidence and has heard experts explain why sexual abuse may cause delayed reporting, inconsistency, or recantation, we do not believe the jury needs an expert to explain that the victim's behavior is consistent or inconsistent with the crime having occurred.” *State v. Moran*, 151 Ariz. 378, 385, 728 P.2d 248, 255 (1986).

²⁸¹ As one court put it, “[syndrome] evidence may harm defendant's interests, but we cannot say it is *unfairly* prejudicial; it merely informs jurors that commonly held assumptions are not necessarily accurate and allows them to fairly judge credibility.” *State v. Moran*, 151 Ariz. 378, 381, 728 P.2d 248, 251 (1986). See also *Steward v. State*, 652 NE2d 490, 499 (Ind. 1995). But compare *State v. Petrich*, 101 Wash.2d 566, 576, 683 P.2d 173, 180 (1984) (marginal benefit of child abuse expert testimony is insufficient to outweigh substantial prejudice to defendant).

²⁸² Johnson, Krafka, & Cecil, *Expert Testimony in Federal Civil Trials: A Preliminary Analysis* (Federal Judicial Center 2000) (www.fjc.gov.), at p.6.

²⁸³ See generally Jane Goodman & Robert T. Croyle, “Social Framework Testimony in Employment Discrimination Cases,” 7 *Behavioral Sciences & the Law* 227 (1989).

²⁸⁴ 490 U.S. 228 (1989).

asserted that her accounting firm employer had denied partnership because of gender. Her evidence established what the Court characterized (in understatement) as “clear signs” of gender bias—to wit, comments from the partners’ evaluations that described Hopkins as “macho,” as “a lady using foul language,” as someone who needed to take “a course at charm school” and who had “matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate.”²⁸⁵ An influential partner had advised Hopkins that she could improve her chances for promotion if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”²⁸⁶ Together with the statistical picture-- 662 partners at the firm, only 7 of whom were women; of the 88 persons proposed for partnership that year, only plaintiff was female-- and Hopkin’s very impressive record of success at the firm (including a \$25 million contract with the Department of State that she had secured), this made for a compelling case of discrimination.

Yet the centerpiece of Hopkin’s case was the testimony of Dr. Susan Fiske, a social psychologist, who had reviewed the partners’ comments and opined that the promotion process at Price Waterhouse was likely influenced by sex stereotyping.²⁸⁷ Fiske explained that since Hopkins was the only woman in the pool of candidates, even gender-neutral remarks (she is “consistently annoying and irritating”) were probably the product of gender bias (although Fiske admitted she could not identify which particular of these comments were sexist.) Dr. Fiske testified that although she had not met any of the people involved in the decision-making process, it was commonly accepted practice for social psychologists to base their opinions on a review of documented comments in this kind of employment context.²⁸⁸

Price Waterhouse surprisingly did not object to Fiskes’ testimony at trial,²⁸⁹ relieving the courts from having to rule on its admissibility. Justice Brennan’s opinion nonetheless discounts the evidence as “merely icing on Hopkin’s cake:”

²⁸⁵ 490 U.S. at 235.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*, at 236. Dr. Fiske also provided key testimony in a highly-publicized sex harassment case (*Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D.Fla. 1991)) alleging that the prominent display of pictures of nude women at a shipyard created a hostile work environment for the few female employees. See Donna Shestowsky, “Where Is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials,” 51 *Stan.L.Rev.* 357, 370-371 (1999).

²⁸⁹ *Id.*, at 255. See also Jane Goodman & Robert T. Croyle, “Social Framework Testimony in Employment Discrimination Cases,” 7 *Behavioral Sciences & the Law* 227, 235 (1989).

It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor, turning to Thomas Beyer's memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.²⁹⁰

The dissenters (Kennedy, Rehnquist, and Scalia) questioned how Fiske could discern stereotyping in comments that were gender neutral, like "overbearing" and "abrasive," without "any knowledge of the comments' basis in reality and without having met the speaker or subject."²⁹¹ And there is of course the question of the reliability of Fiske's methodology (although the decision predates *Daubert* and *Kumho Tire*). But more to the point, did her testimony meet the "helpfulness" and "fit" standards of FRE 702-- was the factfinder²⁹² really in need of specialized assistance to determine the import of the "walk more femininely"-type comments before them in evidence? And could a social psychologist who has merely read the comments herself provide them meaningful assistance?²⁹³

Addressing this very question in an age discrimination case the district court in *Flavel v. Svedala Industries, Inc.*²⁹⁴ answered in the affirmative, refusing to bar the testimony of plaintiff's industrial psychologist concerning age stereotypes allegedly contained in company documents. Defendant argued that the proposed testimony would "not be helpful to the jury, which is capable of identifying age discrimination without expert opinion." Disagreeing, the court ruled that "[e]xpert testimony on age stereotyping would make the jurors aware of [the fact that age discrimination may arise from an *unconscious* application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the workforce] in evaluating the evidence. Moreover, in a pattern and practice case, evidence of discriminatory conduct is often

²⁹⁰ *Id.*, at 256.

²⁹¹ *Id.*, at 293 n. 5. They added that the "plaintiff who engages the services of Dr. Susan Fiske should have no trouble showing that sex discrimination played a part in *any* decision." *Id.* (emphasis added).

²⁹² The *Hopkins* case was tried to the district judge without a jury, pre-dating the 1991 amendments to Title VII providing for jury trials in actions filed under that statute (now codified at 42 U.S.C. 1981a(c)).

²⁹³ Dr. Fiske's evidence must be contrasted with the kind of statistical evidence routinely admitted to prove or disprove discriminatory patterns and practices, based on the established devices of binomial distribution, standard deviation, and multiple regression. See ZIMMER, SULLIVAN, & WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 210-251 (6th ed. 2003); Jansonius & Gould, "Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility," 50 Baylor L.Rev. 267, 282-286 (1998).

²⁹⁴ 875 F.Supp. 550, 557-558 (E.D. Wis. 1994).

widely-dispersed and difficult to evaluate; expert testimony as to age stereotyping may again aid jurors in assessing liability.”²⁹⁵

Where the issue in another trial was whether the plaintiff had been discriminated against when denied tenure, the district court in *Mukhtar v. California State University, Hayward*²⁹⁶ admitted the testimony of a sociologist who had developed eight criteria for “decoding”²⁹⁷ white behavior towards minorities.²⁹⁸ Based on the presence of all eight, Dr. Wellman testified that race was a factor in Mukhtar’s tenure denial. Reversing on the ground that the district judge failed to make a reliability determination with respect to the testimony, the Ninth Circuit also raised the question of whether it was “helpful” in assisting the jury in matters beyond their common knowledge.²⁹⁹ Indeed, Dr. Wellman’s “criteria” appear little more than just common sense clues to evaluating whether any personnel decision is based on covert illegitimate factors,³⁰⁰ and have been incorporated into the structure for circumstantial proof of individual disparate treatment cases since *McDonnell Douglas Corp. v. Green*.³⁰¹

²⁹⁵ 875 F.Supp., at 558.

²⁹⁶ 299 F.3d 1053 (9th Cir. 2002), amended 319 F.3d 1073. For an insightful treatment of this case see Comment, “Expert Testimony and ‘Subtle Discrimination’ In The Workplace: Do We Now Need A Weatherman to Know Which Way the Wind Blows,” 34 Golden Gate U. L. Rev. 37 (2004).

²⁹⁷ Police officers have similarly been permitted to present expert testimony purporting to translate narcotics jargon and code for the jury. See, e.g., *U.S. v. Plunk*, 153 F.3d 1011 (9th Cir. 1998).

²⁹⁸ The criteria include: “a. The University’s justification for denying tenure lacked ‘credence;’ b. Tenure criteria were applied inconsistently; c. Inconsistent tenure criteria advantaged whites and disadvantaged blacks; d. Tenure criteria shifted when challenged; e. Statistical evidence showed disparate treatment; f. Procedural violations occurred in the tenure process; g. University officials trivialized and dismissed [plaintiff’s] qualifications and accomplishments; and h. University officials failed to follow procedures for reducing racial inequality.” 299 F.3d at 1061.

²⁹⁹ 299 F.3d at 1065 n.9. The trial judge also recognized the risk that the experts would be “substituting their judgment for what the jury ultimately has to find, which is whether, in fact, this decision was based on race discrimination or based on legitimate academic concerns. ... I don’t want to hear them each go through all the evidence and say ‘this means this and that means that,’ and ‘I read this testimony and that testimony.’ That will take too long and it really will invade the province of the jury.” 299 F.3d at 1065.

³⁰⁰ Compare the expert testimony offered in *Tyus v. Urban Search Management*, 102 F.3d 256, 263-264 (7th Cir. 1997), a Fair Housing Act suit alleging racially discriminatory advertising. Dr. Tarini, a psychologist, statistician, and chair of the department of marketing communication at a university, was prepared to testify to how advertising sends a message to its target market and how an all-White advertising campaign affects African-Americans. Tarini relied upon peer-reviewed articles and a focus group methodology.

³⁰¹ 411 U.S. 792 (1973). See generally Comment, supra, “Expert Testimony and ‘Subtle Discrimination’ In The Workplace: Do We Now Need A Weatherman to Know Which Way the Wind Blows,” 34 Golden Gate U. L. Rev. at 45-49; Mark S. Brodin, “The Demise of Circumstantial Proof in Employment Discrimination Litigation: *St. Mary’s Honor Center v. Hicks*, Pretext, and the ‘Personality Excuse,’” 18 Berkeley J. Employment & Labor Law 183 (1997). The jury will usually be instructed regarding this structure of proof.

For more on the use (and rejection) of experts in employment discrimination cases, see Jansonius & Gould, “Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility,” 50 Baylor L.Rev. 267, 297-309 (1998).

While it might appear that plaintiffs in civil rights cases would benefit from increased receptivity of courts to social science evidence,³⁰² in the long run it may very well work to their disadvantage. For one thing, it raises the expectations bar-- a plaintiff who does *not* have the wherewithal to develop and present such evidence may be at a disadvantage in the eyes of judge and jury (as has occurred in the prosecution of criminal cases lacking DNA evidence³⁰³). Such testimony (and the employer's response to it) may also distract jurors from the more compelling factual and statistical foundation of plaintiff's case. And, of course, defendant employers will usually have more resources to expend on *their own* social science experts.

Indeed, it did not take defense counsel long to get into the expert witness game. In *EEOC v. Sears, Roebuck & Co.*³⁰⁴ the Equal Employment Opportunity Commission presented compelling statistical proof (in the form of regression analyses) that the defendant retailer had engaged in systemic nationwide discrimination against women, specifically the concentration of female employees in the lower-level sales jobs paid hourly while male employees dominated the higher-paying commissions positions. Sears focused its response in large part on several social science experts who made out a "lack of interest" defense: American society has socialized women with a set of values that sets them apart from men in the workplace; they are less competitive, less aggressive, and less willing to accept risk; consequently women generally are not attracted to rough-and-tumble commissions sales positions. Sears asserted, and both the district and circuit courts accepted, that "lack of interest" and not discrimination was the real reason women were underrepresented in the better jobs.³⁰⁵ The employer's experts included two

³⁰² One writer goes so far as to suggest that "[e]xpert testimony is so useful for correcting the substantial misperceptions and biases of the jurors or judges--the lay people--who decide sexual harassment cases that this testimony should be regarded as necessary for the just adjudication of sexual harassment claims." Donna Shestowsky, "Where Is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials," 51 Stan.L.Rev. 357, 359 (1999).

³⁰³ See "'CSI effect' has juries wanting more evidence," USA Today, August 5, 2004, at p.1.

³⁰⁴ 628 F.Supp. 1264 (N.D. Ill. 1986), aff'd 839 F.2d 302 (7th Cir. 1988). See generally Vicki Schultz, "Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument," 103 HARV. L. REV. 1749 (1990); Zimmer, Sullivan, Richards, & Calloway, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION (5th ed. 2000), at 278-280 (& citations).

³⁰⁵ In his separate opinion Judge Cudahy complained: "Perhaps the most questionable aspect of the majority opinion is its acceptance of women's alleged low interest and qualifications for commission selling as a complete explanation for the huge statistical disparities favoring men." 839 F.2d at 360-361 (concurring in part and dissenting in part).

noted feminist scholars³⁰⁶ who might have been expected to be on the opposite side of the litigation.

EEOC v. Sears, Roebuck & Co. was reportedly the longest trial in the history of the Seventh Circuit, generating more than 20,000 transcript pages of testimony.³⁰⁷ “Each side called numerous expert witnesses, some of whom contributed book-length reports to the trial record....”³⁰⁸ And in the process Sears “had created, and prevailed with, a potent new defense for employers in Title VII cases.”³⁰⁹

For years it was gospel among most liberals and progressives that an activist Supreme Court was a good thing. But as the Warren Court gave way to the Burger Court and then the Rehnquist Court, views changed dramatically. The weapon of the social science expert could be, and has now certainly been, turned against civil rights plaintiffs.³¹⁰ “Hired guns” can be pointed in any direction.

The fair and proper use of social science evidence would require that both litigants have relatively equal access to such experts,³¹¹ to related resources, and to skilled counsel. This is not always (or even often) the case. Particularly in criminal cases (and certainly where defendant is indigent) it is not likely the defense will be able to retain either a testifying expert or one who may be consulted for purposes of challenging the testimony of the government’s expert.³¹² Not surprisingly, the most dramatic increase in guilty verdicts has been documented where the prosecution expert is not countered by a defense expert.³¹³

³⁰⁶ Dr. Rosalind Rosenberg, an associate professor of history at Barnard College specializing in American Women's history, and Juliet Brudney, a consultant and writer on employment issues involving women. 628 F.Supp. at 1307-1308.

³⁰⁷ Zimmer, Sullivan, Richards, & Calloway, *supra*, at 278.

³⁰⁸ *Id.* (quoting Thomas Haskell & Sanford Levinson, “Academic Freedom and Expert Witnessing: Historians and the *Sears Case*,” 66 *Tex.L.Rev.* 1629, 1636-1637 (1988)).

³⁰⁹ Zimmer, Sullivan, Richards, & Calloway, *supra*, at 278.

³¹⁰ Along similar lines, one writer has argued that if rape trauma syndrome evidence is admitted when offered by the prosecution to establish guilt, defendants must be permitted to offer evidence that an alleged victim did *not* exhibit indicia of the syndrome to establish innocence (which might necessitate a compulsory psychiatric examination of the victim). Robert R. Lawrence, “Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony of Rape Trauma Syndrome in Criminal Proceedings,” 70 *Virginia L. Rev.* 1657, 1702 (1984). At least one court has agreed. See *Henson v. State*, 535 N.E.2d 1189 (1989).

³¹¹ Professor Marilyn Berger has argued that judges should consider “whether both sides to the controversy have reasonably comparable access to scientific authorities” in deciding to admit expert testimony. Symposium on Science and the Rules of Evidence, 99 *F.R.D.* 187, 231 (1983).

³¹² See *United States v. Crisp*, 324 F.3d 261, 273 (4th Cir. 2003) (Michael, C.J., dissenting).

³¹³ Neil J. Vidmar & Regina A. Schuller, “Juries and Expert Evidence: Social Framework Testimony,” 52 *Law & Contemporary Problems* 133, 159 (1989).

In sum, as the First Circuit put it in a case involving expert eyewitness identification testimony, there is good reason to avoid imposing upon the parties “the time and expense involved in a battle of experts.”³¹⁴ This is particularly so given alternative ways to educate jurors and improve the accuracy of decision-making. Perhaps the most obvious is through use of specialized jury instructions. Judge Easterbrook has suggested that judges in identification cases

inform jurors of the rapid decrease of accurate recollection, and the problem of suggestibility, without encountering the delay and pitfalls of expert testimony. Jurors are more likely to accept that information coming from a judge than from a scholar, whose skills do not lie in the ability to persuade lay jurors (and whose fidgeting on the stand, an unusual place for a genuine scholar, is apt to be misunderstood). Altogether it is much better for judges to incorporate scientific knowledge about the trial process into that process, rather than to make the subject a debatable issue in every case.³¹⁵

Obviously the matters of *what* instruction to give, under what circumstances it is to be given, and how it is to be phrased are not inconsequential and must be resolved. But jury instructions on eyewitness identification have worked quite well in some jurisdictions,³¹⁶ and

³¹⁴ United States v. Foshier, 590 F.2d 381, 384 (1st Cir. 1979). As another court cautioned,

The result [of admitting psychological evidence offered by defendant] must necessarily be a "battle of experts" concerning the validity of the expert evidence. This would consume substantial court time and cost both parties much time and expense. Much of the trial would focus on the tangential issue of the reliability of the expert evidence rather than the central issue of what the defendants did or did not do. The inevitability of a "battle of the experts" in this type of case is clear. In so subjective a field as psychiatry, the experts are bound to differ. The parties will spend untold time and money locating experts and preparing to cross-examine opposing experts. Court time will then be spent presenting the experts. With so much attention paid to the expert testimony, it is likely that the attention of the jury will be similarly diverted.

New Jersey v. Cavallo, 88 N.J. 508, 519, 443 A.2d 1020, 1025 (1982). Such battles also engender cynicism about the courts, leading observers to wonder

whether or not one or more of these experts have been compromised by the people who hired them to testify, since it's hard to look at one set of facts and see such divergent opinions and determinations drawn from the opposing sides from those facts. This is particularly true when applying the same theoretical criteria to those facts and where the only apparent difference is the desired outcome each side was able to find an expert to support. ... Such expert presentations, in a very real way, do not facilitate but rather, complicate the cognitive skills of the fact-finder that are absolutely essential when searching for truth.

Ronald B. Aldrine, "Forensic Testimony: What Judges Want," 24 Pace L. Rev. 215, 218-219 (2003). The perception of the courtroom expert as a "hired gun" has become quite prevalent. The District Attorney character in Barry Reed's popular novel THE INDICTMENT, for example, cynically defines an expert witness as "a guy who's fifty miles from home with slides." *Id.*, at p. 35.

³¹⁵ United States v. Hall, 165 F.3d 1095, 1119-1120 (7th Cir. 1999) (concurring).

³¹⁶ For a compelling argument in favor of judicial instructions over expert testimony, see Walker & Monahan, "Social Frameworks: A New Use of Social Science in Law," 73 VA. L. REV. 559, 592-598 (1987). For several empirical studies of the effect of such instructions, see Neil J. Vidmar & Regina A. Schuller, "Juries and Expert Evidence: Social Framework Testimony," 52 Law & Contemporary Problems 133, 164-166 (1989).

Cautionary instructions on eyewitness identification go back at least to United States v. Telfaire, 469 F.2d 552 (D.C.Cir. 1972). In Massachusetts, a defendant who fairly raises the issue of mistaken identification is entitled

similar instructions (drafted with the assistance of social scientists³¹⁷) could be devised, for example, to assist jurors in understanding the way a victim of abuse might respond in particular circumstances.

IV. Conclusion

to an instruction on the factors relevant to reliability. See generally Liacos, Brodin & Avery, HANDBOOK OF MASSACHUSETTS EVIDENCE §10.3.3, at 698-701 (7th ed. 1999). It is crafted as follows:

"One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of proving identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

"Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

"In appraising the identification testimony of a witness, you should consider the following:

"Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

"Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

"In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight but this is not necessarily so, and he may use other senses.

"Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

"If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant, as a factor bearing on the reliability of the identification.

"You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.

"You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.

"Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

"I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty."

Com. v. Rodriguez, 378 Mass. 296, 310-311, 391 N.E.2d 889, 897-898 (1979). Specific instructions may also be provided regarding the decreased reliability of so-called cross-racial identifications. See Com. v. Hyatt, 419 Mass. 815, 818-819, 647 NE2d 1168, 1171 (1995); State v. Cromedy, 158 N.J. 112, 727 A.2d 457 (1999) (mandating instruction).

³¹⁷ Judge Easterbrook noted that the pattern instructions of both the Federal Judicial Center and the Seventh Circuit were formulated with such assistance. United States v. Hall, 165 F.3d 1095, 1119-1120 (7th Cir. 1999) (concurring).

*“It is a fundamental principle of our system of criminal justice that we do not convict people of crimes on the basis of statistics or models; it appears equally that we do not attempt to determine whether someone has been a victim of crime on the same basis.”*³¹⁸

*“In the final analysis, the more that courts permit experts to advise the jury based on probability, classifications, syndromes and traits, the more we remove from the jury its historic function of assessing credibility. While a criminal may be facile with his denials and explanations and a child may be timid and halting, we entrust to the wisdom of the twelve men and women who comprise the jury the responsibility to sort between the conflicting versions of events and arrive at a proper verdict.”*³¹⁹

Social scientists have made undeniably important contributions to our understanding of human behavior, and mental health professionals perform an invaluable service to patients every day of their professional lives. But a courtroom is not a sociology class, and a trial is not a therapy session. The task of litigation is dispute resolution, determining guilt in criminal cases and liability in civil matters. The players (judge, jury, lawyers, witnesses) are assigned narrowly defined roles, and the data employed in the process must pass through evidentiary filters designed to minimize distortion and maximize the accuracy of the fact-finding. The goal of the entire enterprise is to ascertain the truth while at the same time avoiding “unjustifiable expense and delay.”³²⁰

Because the fact-finders are amateurs (lay jurors), they will sometimes need help from specialists. But before such a person testifies it must be demonstrated that the jurors truly *need* assistance on the matter, that the witness is qualified to assist them, and that the theories and methodologies employed by the witness are valid and reliable. Where the “assistance” amounts to little more than telling the jurors which witness to believe, the expert has intruded into the very area where the laypersons reign supreme. And where the jurors will likely be confused, distracted from the main issues, or unduly impressed by and focused upon the expert’s pedigree or confidence level, such testimony should be avoided. It is submitted that all of this argues against the admission of behavioral evidence, particularly of the syndrome variety.

There can be no denying the prevalence of horrific crimes in our society, particularly against children. A casual perusal of the morning newspaper provides chilling confirmation of the magnitude of the problem. There is equally no denying the great difficulties prosecutors face when attempting to prove abuse:

³¹⁸ Com. v. Deloney, 59 Mass. App. 47, 59, 794 N.E.2d 613, 623 (2003).

³¹⁹ Newkirk v. Kentucky, 937 S.W.2d 690, 696 (1997).

³²⁰ FRE 102.

Often these cases pit the word of a traumatized child against that of an adult. Child sexual abuse typically occurs in private, when the abuser is confident that there will be no witnesses. Therefore, the child victim is usually the only eyewitness. The prosecution's case is severely hampered if the court finds the child to be too young to be a witness or incompetent to testify. Even if the child does testify, several factors often limit the effectiveness of this testimony. The child's cognitive and verbal abilities may not enable her to give consistent, spontaneous, and detailed reports of her sexual abuse. A child who must testify against a trusted adult, such as a parent or relative, may experience feelings of fear and ambivalence, and may retract her story because of family pressures or insensitivities in the legal process.

Prosecutors face another dilemma when offering the child victim as a witness if the child has delayed reporting the abuse. Jurors may interpret delayed disclosure as evidence of fabrication, especially if defense counsel suggests this conclusion during cross-examination of the child. Further, jurors may hold misconceptions that the child has memory deficits, is suggestible, cannot distinguish between fact or fantasy, or is likely to fabricate sexual experiences with adults. These problems are compounded by the lack of corroborative physical or mental evidence in many child sexual abuse cases.³²¹

Yet the daunting challenge in these and other prosecutions (notably rape and battering) can only *explain* the temptation for prosecutors to offer, and courts to admit, evidence of dubious reliability, helpfulness, and probative value. It certainly cannot *justify* the admission of testimony carrying a misleading scientific cache that may undercut the accused's presumption of innocence³²² and result in a wrongful conviction (and sometimes the consequent exoneration of the actually guilty party). It is not only *Daubert* but fundamental principles of evidence doctrine that demand considerably more skepticism than has been shown towards this mode of proof.

³²¹ Lisa R. Askowitz, "Restricting the Admissibility of Expert Testimony in Child Sexual Abuse Prosecutions: Pennsylvania Takes it to the Extreme," 47 U.Miami L.Rev. 201, 201-03 (1992) (footnotes omitted).

³²² It has been observed, for example, that "[m]ore and more, the biggest consumers of the battered woman syndrome over the last several years are prosecutors who are using it to elude the character evidence rules in their prosecutions of alleged batterers." Faigman, "The Law's Scientific Revolution: Reflections and Ruminations of the Law's Use of Experts in Year Seven of the Revolution," 57 Wash. & Lee L.Rev. 661, 674 (2000). See also Newkirk v. Kentucky, 937 S.W.2d 690, 695-696 (Ky. 1997); Steward v. State, 652 N.E.2d 490, 494 (Ind. 1995); Com. v. Dunkle, 529 Pa. 168, 184, 602 A.2d 830, 838 (1992).