

The Admissibility of Social Science Evidence in Criminal Cases

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July 29, 2009

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Introduction

The rapid development of emerging scientific methods, especially the increased understanding of deoxyribonucleic acid ("DNA"), has had, and will undoubtedly continue to have, an almost stunning impact on our justice system, particularly at the trial level. The forensic applications of these new scientific discoveries have been most dramatically seen in the criminal trial court. They have also caused us to re-examine other forms of forensic evidence that have been rather routinely admitted in our courts. Forensic evidence from social scientists is certainly one of those forms. Which of these forms of scientific forensic evidence have sufficient validity to be used in a criminal proceeding that could take away a person's liberty or even their life? Who answers that question and how?

The Supreme Court of the United States has decided, first in the *Frye* case and then later in the *Daubert* trilogy of cases, that it is the trial judge who must decide these issues and be the "gatekeeper" who will determine which forms of scientific forensic evidence "get in" to the jury's consideration. The first part of this article defines and explores that expanded gatekeeper role, as it continues to be a task of increasing onus to trial judges. The next part considers the implementation of that gatekeeper role as it is applied to criminal proceedings. The third part of this article narrows the inquiry specifically the issue of the applicability of the *Daubert*, and even *Frye*, analysis to the admissibility of social science evidence generally. Finally, the article examines specific questions regarding testimony of experts about the reliability of eyewitness evidence and regarding the continued admissibility of certain types of forensic abuse syndrome evidence.

Admissibility Foundation Questions – Frye, Daubert, Joiner, and Kumho Analyses

The role of the trial judge as the “gatekeeper”, who will determine which forms of scientific forensic evidence are appropriate for consideration by the jury, is now firmly entrenched in our law. Although States differ as to the implementation of that role, all have adopted the gatekeeper concept. Some States still use the test established in *Frye v. United States*¹ that proposed scientific evidence needed to be sufficiently established so that it had gained “general acceptance” in the relevant scientific community.² Federal courts and most States, however, use a revised admissibility standard first announced by the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³ *Daubert* and two subsequent Supreme Court amplifications, *General Electric Co. v. Joiner*⁴ and *Kumho Tire Co. v. Carmichael*⁵, are commonly referred to as the *Daubert* trilogy and speak directly to the court’s role in the admissibility of scientific evidence as expert testimony.

In *Daubert*, the Supreme Court of the United States held that the newly enacted Federal Rules of Evidence superseded *Frye*’s general acceptance test, and directed courts to examine the

¹ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Despite *Frye*’s limitations and the subsequent federal cases, it remains the standard by which science is evaluated for courtroom use in several States. See Joseph R. Meany, *From Frye to Daubert: Is a Pattern Unfolding?*, 35 *Jurimetrics J.* 191, 193-94 (1995).

² *Frye*, 293 F. at 1014.

³ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-95 (1993). The standards governing expert testimony in the various states is described in Jane Campbell Moriarity, 2 *PSYCHOLOGICAL AND SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS*, app. 1 (2007). See generally Kenneth R. Foster & Peter W. Huber, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* (1999) (analyzing the criteria for the admissibility of scientific evidence).

⁴ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997)

⁵ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

principles and methodology of proffered scientific evidence and not just whether its conclusions were accepted in the scientific community.⁶ The Court described the role of the trial judge and suggested some considerations.⁷ The Courts held that when faced with a proffer of expert scientific testimony under Rule 702, the trial judge must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue.⁸ The Court suggested that the criteria for making that decision included whether the proffered theory has been tested, whether it “has been subjected to peer review,” its error rate, the existence of standards controlling its operation, and whether it has acceptance within the relevant scientific community.⁹ The Court made it clear that the focus is on principles and methodology of the scientific proposition and not on the proffered conclusions.¹⁰ Justice Blackmun specifically addressed any concern that *Daubert* would lead to a wholesale admission of questionably reliable scientific evidence:

Respondent expresses apprehension that abandonment of "general acceptance" as the exclusive requirement for admission will result in a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions. In this regard, respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the

⁶ *Daubert*, 509 U.S. at 589-92.

⁷ *Id* at 592-95

⁸ *Id* at 592-93

⁹ *Id* at 593-94

¹⁰ *Id* at 595

burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. . . . Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment . . . and likewise to grant summary judgment These conventional devices, rather than wholesale exclusion under an uncompromising "general acceptance" test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

. . .

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.¹¹

Subsequently, however, Justice Rehnquist seemed to muddy the waters of the trial judge's standards. In *Joiner*, the trial judges rejected the testimony of plaintiff's proffered experts that linked his cancer to polychlorinated biphenyls ("PCBs") manufactured by the defendants and granted summary judgment.¹² The trial judge held that the scientific studies upon which the evidence was based did not justify the expert's conclusions about the cause of

¹¹ *Id.* at 595-97 (citations omitted).

¹² *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 140 (1997).

plaintiff's injuries.¹³ The plaintiff claimed that the judge had focused on the experts' conclusions, rather than on their methodology, contrary to the clear admonitions of *Daubert*.¹⁴

The Supreme Court disagreed and upheld the trial judge's decision:

Respondent points to *Daubert*'s language that the "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."
. . . He claims that because the District Court's disagreement was with the conclusion that the experts drew from the studies, the District Court committed legal error and was properly reversed by the Court of Appeals. But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.¹⁵

Thus, *Joiner* clearly indicates that the trial judge gatekeeper has the discretion to totally reject and disallow an expert's opinion, even if based on an accepted methodology, if the judge finds that the expert's conclusion is not reliably based on that methodology – so much for the *Daubert* emphasis on methodology rather than conclusion.

¹³ *Id* at 140.

¹⁴ *Id* at 146.

¹⁵ *Id*. (emphasis added) (citations omitted)

In *Kumho*, the Supreme Court expanded its *Daubert* ruling and again indicated that significant deference was to be given to trial judges in the exercise of their gatekeeping role. In this defective tire case, the trial court had granted summary judgment for defendants after finding that the opinions of the plaintiff's expert engineer were not based on a method that the judge did not find to be "sufficiently reliable".¹⁶ In its opinion, the Supreme Court first upheld the gatekeeping role as applied to an engineering witness and made it clear that the *Daubert* analysis was to be applied to all experts evidence and not only to scientists.¹⁷ Second, the Court reinforced the *Joiner* holding that trial judges are permitted to examine whether an expert's conclusions are sufficiently reliable, even if based on a proper and accepted methodology.¹⁸ The Court upheld the trial court's conclusion that the expert's testimony about the cause of the failure of the particular tire in the case at issue was not reliable enough to be presented to the jury.¹⁹

While the *Daubert* case was originally thought to be a ruling that would allow for the admissibility of more scientific evidence before the jury and to express support for jurors' ability to weigh competing expert testimony²⁰, that assessment, at least in civil cases was short-lived. Indeed, when the *Daubert* case was remanded to the Court of Appeals, rather than sending the case back to the trial judge for the analysis the Supreme Court described, the Ninth Circuit

¹⁶ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 145-46 (1999).

¹⁷ *Id* at 141.

¹⁸ *Id* at 152-53.

¹⁹ *Id* at 142; see D. Michael Risinger, Michael J. Saks, William C. Thompson, & Robert Rosenthal. *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*. 90 CAL. L. REV. 1, 52-56 (2002); Michael J. Saks, *Banishing Ipse Dixit: The Impact of Kumho Tire on Forensic Identification Science*, 57 WASH. & LEE L. REV. 879, 899 (2000).

²⁰ See, e.g., James T. Richardson, *Dramatic Changes in American Expert Evidence Law*, 2 JUDICIAL REVIEW 13 (1994).

decided to “apply” the test itself and again affirmed the original exclusion of expert testimony and grant of summary judgment.²¹ While the *Daubert* analysis has ironically turned out to be regarded as mostly used by judges to exclude civil plaintiffs’ proffered scientific evidence, its application in criminal cases is more mixed.

Application of Daubert to Criminal Cases

The *Daubert* trilogy has imposed what some regard as a very difficult task on trial judges in criminal cases, especially as it has morphed into an obligation to decide the reliability of expert evidence:

The adoption of the reliability standard for expert evidence in federal courts and many state courts has created a daunting task for trial judges who must grapple with any number of complex, scientific, and technical forms of evidence. . . .

Because the Supreme Court, many state courts, and the Federal Rules of Evidence have extended proof of reliability to all forms of expert testimony, courts must grapple with questions concerning forensic expert evidence that is a part of many criminal prosecutions. Make no mistake—this is a challenging task, and many judges wrestle with the proper application of reliability standards to this type of evidence.²²

²¹ *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311 (1995).

²² Jane Campbell Moriarty, and Michael J. Saks, *Forensic Science: Grand Goals, Tragic Flaws, and Judicial Gatekeeping*, JUDGES’ J., 16, 17 (Fall 2005).

To fulfill this difficult gatekeeper role, Justice Breyer suggested in his concurring opinion in *Joiner* that trial judges may use their inherent power to appoint independent experts for advice.²³ Most trial judges in criminal cases, especially State judges lacking the public resources to afford such outside expert assistance²⁴, must become arbiters of science, at least in a particular case, regardless of our qualifications to do so. Unfortunately, *Daubert*'s application in criminal cases has raised serious issues about whether the courts apply the standards as rigorously when prosecutors introduce forensic evidence to prove guilt as when plaintiffs in civil cases use it to prove civil liability. And there may be some demonstrable validity to the charge.²⁵ That judges may utilize a "pro-prosecution" bias in making *Daubert* analyses in criminal cases does not come

²³ Gen. Elec. Co. v. Joiner, 522 U.S. 136, 149-150 (1997) (Breyer, J. concurring). The suggestion has been taken to heart by some judges and has led the American Association for the Advancement of Science to create the Court Appointed Scientific Experts ("CASE") service that assists federal and state judges in identifying qualified scientists, engineers, and health care professionals for court appointment as independent scientific experts. The "CASE" service is described online at <http://www.aaas.org/spp/case/case.htm> (last visited March 31, 2009). A COURT APPOINTED SCIENTIFIC EXPERTS HANDBOOK FOR JUDGES (2002) by the American Association for the Advancement of Science is available online at <http://www.aaas.org/spp/case/handbookjudgesv3.pdf>. See also 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY §§ 1:36-1:38 AT 110-117 (2008); Timothy Hillman, *Using Court Appointed Experts*, 36 NEW ENG. L. REV. 587 (2002).

²⁴ See Stephanie Domitrovich, *The Factors Affecting the Appointment of Experts by State Trial Judges: An Exploratory Study*, 123 (May 2006) (unpublished Ph.D. dissertation, University of Nevada, Reno) (on file with the author). This paper was presented at the annual meeting of The Law and Society Association, Berlin, Germany, July 25, 2007, and is available online at http://www.allacademic.com/meta/p181987_index.html (last visited March 31, 2009).

²⁵ For an overview of how *Daubert* has changed the way judges evaluate expert evidence, see generally Lloyd Dixon & Brian Gill, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE DAUBERT DECISION (2001); Margaret A. Berger, *Expert Testimony in Criminal Proceedings: Questions Daubert Does Not Answer*, 33 SETON HALL L. REV. 1125 (2003); Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for the Truth*, 38 SETON HALL L. REV. 893, 929-950 (2008), available at SSRN <http://ssrn.com/abstract=1144886>; Jennifer L. Groscup, et al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL., PUB. POL'Y & LAW 339 (2002); Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH 107 (2005); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99 (2000).

as a surprise to social scientists. *Daubert* allows considerable discretion and latitude to trial judges and the personal experiences of judges, many of whom are former prosecutors, in criminal cases plays a significant role in exercising that discretion.²⁶ As Sheila Jasinoff concluded:

When judges exclude expert testimony, appoint their own expert witnesses, or render summary judgments, they inescapably give up the role of dispassionate observer to become participants in a particular construction . . . of scientific facts. They help shape an image of reality that is colored in part by their own preferences and prejudices about how the world should work. Such power need not always be held in check, but it should be sparingly exercised.²⁷

The National Academy of Sciences recently completed a congressionally authorized study of the use of forensic science in the criminal justice system.²⁸ After examining the current use of forensic evidence in criminal prosecutions and the *Daubert* reliance on the adversarial process for determining the admissibility of such evidence, the researchers were extremely critical of the current system and stated:

²⁶ “[J]udges and attorneys participate in the social construction of science by interjecting their own prejudices and preferences about how the world should work into their views of what constitutes scientific fact”. Mara L. Merlino, Colleen I. Murray, & James J. Richardson, *Judicial Gatekeeping and the Social Construction of the Admissibility of Expert Testimony*, 26 BEHAV. SCI. LAW 187 at 205 (2008) (analyzing 195 post-*Daubert* federal district judge decisions on the admissibility of expert opinions).

²⁷ Sheila Jasinoff, *What Judges Should Know About the Sociology of Science*, 77 JUDICATURE 77 (1993) at 82.

²⁸ NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, at S-1 to S-24 (2009).

The report finds that the existing legal regime-including the rules governing the admissibility of forensic evidence, the applicable standards governing appellate review of trial court decisions, the limitations of the adversary process, and judges and lawyers who often lack the scientific expertise necessary to comprehend and evaluate forensic science-is inadequate to the task of curing the documented ills of the forensic science disciplines.²⁹

Adequate or not, *Daubert* is nevertheless the process that most criminal court trial judges must use, at least for the time being.

While some feel that judges do not take their gatekeeping role seriously³⁰, the challenge to trial judges is to fulfill the role visited upon them and to evaluate and control the evidence that is presented to the jury as worthy of their consideration and relevant to their fact finding. In the preface to the 2007 edition of *Modern Scientific Evidence: The Law and Science of Expert Testimony*, David L. Faigman aptly described the situation:

Judges and lawyers are not generally known for expertise in science and mathematics. Nor is science a subject given significant attention in American law schools. . . .

Ever so slowly, however, there are signs that a “third culture” is emerging in the law. This third culture is one that integrates a sophisticated understanding of science into legal decisionmaking. Perhaps the most visible sign of this

²⁹ *Id* at 3-1.

³⁰ “The single most important observation about judicial gatekeeping of forensic science is that most judges under most circumstances admit most forensic science. There is almost no expert testimony so threadbare that it will not be admitted if it comes to a criminal proceeding under the banner of forensic science.” Moriarity & Saks, *supra* note 22 at 28.

emerging integration is [the *Daubert* case]. The *Daubert* Court held that under the Federal Rules of Evidence trial court judges must act as “gatekeepers,” and evaluate the validity of the basis for proffered scientific expertise before permitting the expert to testify. . . .

Application of the *Daubert* standard requires an understanding of scientific research. . . . This revolution is one of perspective and it affects profoundly not only the judges who guard the gate, but also the lawyers who seek to enter through it.

. . . *Daubert* calls upon judges to assess the merits of scientific research supporting an expert’s opinion. . . . The *Daubert* perspective immediately raised the prospect, as Chief Justice Rehnquist decried it, of judges assuming the role of “amateur scientists.” The gatekeeping role, he feared, was one most judges were ill-suited to fill. . . .

Daubert, perhaps, represents nothing more, or less, than that the legal culture must assimilate the scientific culture. . . . We can confidently say, however, that science has become, and will forever more be, a tool upon which the law must sometimes rely to do justice.³¹

³¹ 1 FAIGMAN ET AL., *supra* note 23, at vii-ix (citations omitted)(footnote omitted); *see* Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 793-94 (2007) (arguing that the because of “the government’s domination of forensic science,” “rather than simply selecting and advocating for the theory that suits it best, the government should bear a burden of presenting evidence and disclosing results derived from all legitimate, competing theories”).

The Applicability of Daubert (or Frye) to the Social Sciences Generally

The so-called "soft sciences" have both developed and been called into serious question by modern scientific examination. On the one hand, eyewitness testimony, long considered by jurors to be the most important evidence they hear, is itself being challenged as unreliable and courts are being asked to admit expert testimony as to its fallibility.³² On the other, scientists are challenging the lack of a scientific foundation for such behavioral science claims of "battered woman syndrome" or "rape trauma syndrome".³³

There is an underlying question of whether *Daubert*, or even *Frye*, applies to the behavioral sciences at all. It is an interesting conundrum for many behavioral scientists. Many have fought the stigma of the sobriquet "soft" sciences for many years and insisted that behavioral science is based upon the same demanding standards reflected in the scientific method used by the physical sciences.³⁴ Now, however, some behavioral scientists are fighting equally hard to escape the gatekeeping standards of *Frye* or *Daubert* by arguing that the same principles of general acceptance or scientific validity and reliability should not apply to them.³⁵ They insist that behavioral sciences are "different" and should be treated differently by the courts.³⁶ One commentator stated the problem thus:

³² Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, at 125 (2008).

³³ Krista L. Duncan, Note, "*Lies, Damned Lies, and Statistics*": Psychological Syndrome Evidence in the Courtroom after *Daubert*, 71 Ind. L.J. 753,760-61,765-66 (1996).

³⁴ See Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 Duke L.J. 933, 970 (1998).

³⁵ See *id.* at 968.

³⁶ *Id.* at 968 (citing *Hadden v. State*, 690 So. 2d 573, 579-80 (Fla. 1997)).

Most expert testimony is based on the scientific method. Increasingly, however, experts trained in social science are being used in American courtrooms, and these witnesses do not uniformly rely upon the scientific method as the basis for their testimony. A curious problem arises, then, when expert testimony is not grounded in the scientific method. The problem arises out of the fact that both the *Frye* and *Daubert* approaches to expert testimony are based upon scientific method principles, principles that are not always compatible with social science.³⁷

This conflict arises directly in criminal cases when trial judges are confronted by prosecutors with a proffer of expert testimony in such areas as sexual abuse "syndromes" or when the defense wants to introduce expert evidence about the fallibility of eyewitness identification. The legal status of those particular types of forensic evidence are discussed later in this article, but first some comments are in order about the whether the court even has a *Frye* or *Daubert* gatekeeping role when it comes to behavioral science evidence.

After *Daubert*, there was some dispute about whether its gatekeeping requirements applied to what the Court of Appeals for the Eleventh Circuit, for example, characterized as "nonscientific," technical expert testimony.³⁸ In *Carmichael v. Samyang Tire, Inc.*, that court held that *Daubert* should not apply to expert testimony based on experience, as opposed to scientific theory.³⁹ The Supreme Court of the United States rejected the notion and reversed the

³⁷ *Id.* at 954 (footnotes omitted).

³⁸ *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1435 (11th Cir. 1997), *cert. granted sub nom. Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

³⁹ *Id.*

Eleventh Circuit in that case in *Kumho Tire Co. v. Carmichael*.⁴⁰ Similar distinctions used by other federal courts were also presumably invalidated by the broader requirements of *Kumho*.⁴¹

Obviously neither *Daubert* nor *Kumho* are controlling in the state courts where most criminal cases are tried. Some states that still use the *Frye* type test have held that it simply does not apply to testimony from behavioral science experts. In *People v. Beckley*,⁴² the Supreme Court of Michigan dealt with the issue of whether the testimony of an expert in the "child sexual abuse syndrome" was properly admitted. 85 The court held that the Michigan version of *Frye*, known as *Davis/Frye*, simply did not apply to behavioral science testimony:

Psychologists, when called as experts, do not talk about things or objects; they talk about people. They do not dehumanize people with whom they deal by treating them as objects composed of interacting biological systems. Rather, they speak of the whole person." Thus, it is difficult to fit the behavioral professions within the application and definition of *Davis/Frye*.

. . .

The ultimate testimony received on syndrome evidence is really only an opinion of the expert based on collective clinical observations of a class of victims. Further, the issues and the testimony solicited from experts is not so complicated that jurors will not be able to understand the "technical" details. The experts in each case are merely outlining probable responses to a traumatic event. It is

⁴⁰ *Kumho Tire Co.*, 526 U.S. at 157-58 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

⁴¹ Some of the earlier distinctions were made in *United States v. Bighead*, 128 F.3d 1329, 1330 (9th Cir. 1997); *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997); and *Berry v. City of Detroit*, 25 F.3d 1342, 1349 (6th Cir. 1994).

⁴² *People v. Beckley*, 456 N.W.2d 391 (Mich. 1990).

clearly within the realm of all human experience to expect that a person would react to a traumatic event and that such reactions would not be consistent or predictable in all persons. Finally, there is a fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences.

We would hold that so long as the purpose of the evidence is merely to offer an explanation for certain behavior, the *Davis/Frye* test is inapplicable.⁴³

It must be noted that Michigan more recently became a *Daubert* state,⁴⁴ and it remains to be seen if the Supreme Court of Michigan will exempt the behavioral sciences from its requirements as well.⁴⁵

In *Daubert* states, presumably there should have been little doubt after *Daubert* and *Joiner* that its prescription applied to social science evidence. In the *Daubert* opinion itself, Justice Blackmun cited with approval, several times⁴⁶, the decision in *United States v. Downing*, where the issue was the admissibility of testimony from a psychologist regarding the reliability of eyewitness testimony.⁴⁷ Nevertheless, some social scientists argued that the scientific analysis of *Daubert* should not be applied, or at least not very strictly applied, to the testimony of social

⁴³ *Beckley*, 456 N.W.2d at 404 (quoting Dirk Lorenzen, *The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033, 1035 (1988)). The Supreme Court of Michigan later affirmed its *Beckley* position, but modified the purposes for which such evidence could be introduced in *People v. Peterson*, 537 N.W. 2d 857,866 (Mich. 1995).

⁴⁴ *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 409 (Mich. 2004).

⁴⁵ The state also amended its rules of evidence to correspond with *Daubert*, and it may therefore be more difficult to carve out such an exemption. MICH. R. EVID.702.

⁴⁶ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, *** (1993).

⁴⁷ *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985)

science experts.⁴⁸ The problems, at least as perceived by behavioralists, with the application of *Daubert* to their testimony were summarized:

Application of *Daubert* criteria to behavioral and social science evidence, particularly psychological syndromes, is problematic for two reasons: (1) judges' level of understanding of scientific principles and methodology may ill prepare them to evaluate science, as now required by *Daubert*; and (2) the nature of certain social and behavioral science theories may be inherently inconsistent with *Daubert* criteria such as "falsifiability" and "error rates."⁴⁹

While the first stated concern about the lack of judges' scientific training is undoubtedly correct, it is not unique to the behavioral sciences and would not seem to pose a problem any different in kind or scope than a judicial role in the evaluation of any form of proffered scientific evidence. Whether social scientists agree with it or not, that argument was addressed, and ultimately dismissed by the majority, by the Supreme Court in the *Daubert* trilogy cases. Given all of its other options, the Supreme Court elected to make the judges the gatekeepers of scientific evidence in jury trials. Education of the judges as to the particular discipline or issue posed by a proffer of scientific evidence is, as in almost every other issue in our adversarial system, the responsibility of the proponents and opponents of the evidence. The second concern, that some social science theorists do not test their propositions for falsifiability or error by normal scientific methods utilized in all other disciplines, also seems to attack the basic premise that was adopted

⁴⁸ See, e.g. David L. Faigman 1995. *The Evidentiary Status of Social Science under Daubert: Is It "Scientific," "Technical," or "Other" Knowledge*. 1 PSY., PUB. POL'Y & LAW, 960 (1995);Teresa Renaker, *Evidentiary Legerdemain: Deciding When Daubert Should Apply to Social Science Evidence*, 84 CAL. L. REV. 1657 (1996).

⁴⁹ James T. Richardson, et al, *The Problems of Applying Daubert to Psychological Syndrome Evidence*, 79 *Judicature* 1 (1995) (footnotes omitted).

in *Daubert* and its progeny. Clearly aware of the use and attempted use of social science evidence in criminal courts,⁵⁰ the Supreme Court chose to deal with the “junk science” issue by establishing precisely the admissibility criteria that some behavioralists claim that they do not utilize. Several social scientists have embraced, or at least accepted, the judgment of the Supreme Court and have suggested that the behavioralists need to adapt their processes if they expect them to form the basis of admissible expert testimony, especially when that testimony may be a factor in a criminal case.⁵¹

Predictably, behavioral science experts have not fared as well in states that have applied *Daubert* or even *Frye* to them.⁵² Sound scientific theory is testable if its rate of error can be calculated and subjected to peer review and the test of general acceptance. Human behavior, on the other hand, is more difficult to duplicate and is often apparently incapable of providing appropriate testing and review. Several states have applied *Frye* and *Daubert* to behavioral science testimony and found it wanting.⁵³ A review of some of the particular applications follows.

⁵⁰ *Supra* note 46.

⁵¹ See, e.g. James Richardson and Gerald Ginsberg, “Brainwashing” Evidence in Light of *Daubert*, 1 LAW AND SCIENCE CURRENT LEGAL ISSUES 265 (Helen Reece ed.) (1998); Ralph Underwager and Hollida Wakefield, *A Paradigm Shift for Expert Witnesses*, 5 Issues in Child Sex Abuse Allegations 156 (1993); David T. Moore, *Scientific Consensus & Expert Testimony: Lessons from the Judas Priest Trial*, 17 Am. Psy. L. News 3 (1997).

⁵² “Not surprisingly, when social science-based testimony is subjected to the *Frye* test or to the *Daubert* factors, that testimony fails either standard.” Steele, *supra* note 34, at 956.

⁵³ *Newkirk v. Commonwealth*, 937 S.W.2d 690, 695 (Ky. 1996) (holding that child sexual abuse syndrome evidence offered for any use would fail to meet the standards set forth in either *Frye* or *Daubert*); *State v. Foret*, 628 So. 2d 1116, 1127 (La. 1993) (holding that child sexual abuse accommodation syndrome fails *Daubert* because it is not scientifically reliable); *Commonwealth v. Dunkle*, 602 A.2d 830, 832 (Pa. 1992) (holding that syndrome evidence does not meet *Frye* standards); *Fowler v. State*, 958 S.W.2d 853, 864 (Tex. App. 1997) (holding that testimony regarding domestic violence might satisfy state equivalent of *Daubert* and therefore be admissible, but that it did not meet the reliability requirements here).

Eyewitness Identification Experts

Unlike much of the forensic science evidence discussed herein, eyewitness identification experts are typically proffered by the defense in criminal cases to raise a reasonable doubt about the reliability of a government witness claiming to identify the defendant as a perpetrator. The defense may seek to present expert testimony based on scientific research that eyewitness testimony in general is not very reliable and may also want to elicit testimony that the particular conditions present at the particular identification in the case is scientifically suspect. The necessity for such testimony from the defense perspective is strong. Jurors appear to give great weight to the testimony of eyewitnesses, even at the expense of other forensic evidence in the case.⁵⁴

There is a significant body of scientific research to support the defense position. Studies going back over twenty five years have demonstrated the unreliability of eyewitness testimony generally.⁵⁵ These psychological studies have shown that humans are just not very good (some less than 50%) at identifying people they saw briefly during a traumatic incident.⁵⁶ They also

⁵⁴ In our study of the so-called CSI Effect, we found that jurors had high expectations that the prosecutor would produce scientific evidence *but* they were nevertheless willing to find a defendant guilty without any scientific evidence if the government had eyewitness testimony. The demand for scientific evidence as a prerequisite for a guilty verdict was prominent only in rape cases, or where the government was relying on circumstantial evidence. Donald E. Shelton, Young S. Kim and Gregg Barak, *A Study of Juror Expectations and Demands for Scientific Evidence: Does the "CSI Effect" Exist?*, 9 VANDERBILT J. ENT. & TECH. L 334 at 363-4 (2006); Donald Shelton, *The CSI Effect: Does It Exist?*, NAT'L INST. JUST. J., Mar. 2008, at 1, 5 (2008), available Mar. 2008, at 1, 5 (2008), available at <http://www.ncjrs.gov/pdffiles1/nij/22150I.pdf> (last visited March 30, 2009)

⁵⁵ See BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 6-7 (1995); 2 FAIGMAN ET AL., *supra* note 22, § 16: 1, at 479-80; EUZABETH F. LOFTUS ET AL., *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* § 4-18, at 112 (4th ed. 2007); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 19 (1983).

⁵⁶ CUTLER & PENROD, *supra* note 55, at 8.

indicate that identifications of persons of a different race than the witness are especially unreliable.⁵⁷ In the wake of DNA exonerations of persons convicted on the basis of eyewitness testimony, the Department of Justice convened a working group that had studied the issue of eyewitness identifications.⁵⁸ The Attorney General preface to the report of that group said:

Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory. This issue has been at the heart of a growing body of research in the field of eyewitness identification over the past decade.⁵⁹

Notwithstanding this research, some courts have been very reluctant to admit expert testimony about eyewitness identification. A few jurisdictions even have adopted a *per se* rule excluding it, most notably the 11th Circuit in *United States v. Holloway*.⁶⁰ A few States have also employed a *per se* exclusion.⁶¹ The 11th Circuit revisited its *per se* exclusion after *Daubert* in *United States v. Fred Smith* but did not change its position and relied on the trial judge's finding

⁵⁷ 2 MORIARTY, *supra* note 3, § 13:54, at 13-71 to -72.

⁵⁸ Janet Reno, *Introduction to NAT'L INST. OF JUSTICE, U.S. DEPT OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT*, at iii-iv (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf> (last visited March 30, 2009).

⁵⁹ *Id.* at iii.

⁶⁰ *United States v. Holloway*, 971 F.2d 675, 679 (11th Cir. 1992).

⁶¹ *See State v. Goldsby*, 650 P.2d 952, 954 (Or. Ct. App. 1982); *Commonwealth v. Simmons*, 662 A.2d 621, 631 (Pa. 1995); *State v. McKinney* 74 S.W.3d 291, 302 (Tenn. 2002), *cert. denied*, 537 U.S. 926 (2002); *State V. Coley*, 32 S.W.3d 831, 832 (Tenn. 2000).

that such testimony “would not assist the jury”.⁶² The 11th appears to be the only federal circuit to have a rule that such testimony is not admissible *per se*.

More generally, however, courts have held that the admissibility of expert testimony about eyewitness identification is to be decided by the same factors used in evaluating other proffered scientific testimony, whether under *Frye*, *Daubert* or general relevancy considerations. Courts have always focused on whether the accuracy of eyewitness identifications is a matter in which jurors need assistance. Even before *Daubert*, trial judges were required to consider many traditional admissibility factors in deciding the admissibility of such testimony, including how it might “fit” the facts of a particular case. In 1973, the 3rd Circuit in *United States v. Amaral*, for example, described a four part test for admissibility that is still used by many courts: 1) is the expert qualified; 2) is the expert’s testimony a proper subject in the particular case; 3) is it based in a generally accepted theory; 4) is its probative value outweighed by its prejudicial effect?⁶³ Several courts held that, contrary to the 11th Circuit position, the failure to make such an analysis and the blanket exclusion of eyewitness identification expert testimony was error.⁶⁴

Using these parameters, many courts however still exclude expert testimony about eyewitness identification in particular cases on the grounds that it is not a proper subject because it will not assist the jury. The rationale is that jurors are able to evaluate the credibility of an eyewitness using their common knowledge and experience after hearing competent cross

⁶² *United States V. Smith*, 122 F.3d 1355,1358 (11th Cir. 1997) (quoting the district court).

⁶³ *United States V. Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973).

⁶⁴ *See, e.g.*, *United States V. Downing*, 753 F.2d 1224, 1232 (3d Cir. 1985); *United States V. Smith*, 736 F.2d 1103, 1107-08 (6th Cir. 1984); *State V. Chapple*, 660 P.2d 1208, 1218-19 (Ariz. 1983) (en banc); *Echavarria V. State*, 839 P.2d 589, 597 (Nev. 1992); *State V. Hill*, 463 N.W.2d 674, 676-78 (S.D. 1990); *Pierce V. State*, 777 S.W.2d 399, 414-16 (Tex. Crim. App. 1989) (en banc).

examination, and that expert testimony is simply not useful in making the credibility decision.⁶⁵ Others, especially in more recent cases, have admitted the reject this “common knowledge” approach in favor of scientific research casting doubt on such “myths”.⁶⁶ In *United States v. Smithers*, the 6th Circuit specifically applied *Daubert* and required the trial court to make an assessment of the relevance and the scientific basis for eyewitness identification testimony, especially when such an identification is the only evidence offered to prove guilt.⁶⁷ After *Daubert*, the 9th Circuit held in *United States v. Rincon*,⁶⁸ and later reinforced in *United States v. Hicks*, that “the admissibility of expert testimony concerning eyewitness identification should be based on an individualized inquiry, rather than strict application of the past rule that summarily excluded such testimony”.⁶⁹

While some judges still insist that jurors are fully capable of understanding the dangers of eyewitness identification without the necessity of expert assistance, the trend appears to be the opposite direction. The spate of recent exonerations after post-conviction DNA testing has some lessons that appear not to be lost on judges when considering whether to admit expert testimony about eyewitness identification. The “Innocence Project” analysis of such cases led them to

⁶⁵ See, e.g., *United States v. Martin*, 391 F.3d 949,953-54 (8th Cir. 2004); *United States v. Hicks*, 103 F.3d 837, 847 (9th Cir. 1996); *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996); *United States v. Larkin*, 978 F.2d 964, 971 (7th Cir. 1992); *State v. Higgins*, 898 So. 2d 1219, 1240 (La. 2005).

⁶⁶ *United States v. Moore*, 786 F.2d. 1308, 1312 (5th Cir. 1986); see also *United States v. Mathis*, 264 F.3d 321, 335-42 (3d Cir. 2001) (providing a detailed analysis of whether an expert’s testimony should have been admitted), *cert. denied*, 535 U.S. 908 (2002); *United States v. Langan*, 263 F.3d 613, 624 (6th Cir. 2001) (allowing the jury to weigh eyewitness testimony without the aid of any expert); *People v. Lee*, 750 N.E.2d 63, 66-67 (N.Y. 2001) (holding the inclusion of eyewitness expert testimony was not an abuse of discretion); *People v. Radcliffe*, 764 N.Y.S.2d 773, 775 (Sup. Ct. 2003) (identifying the traditional safeguards of eyewitness testimony).

⁶⁷ *United States v. Smithers*, 212 F.3d 306, 313-16, 318 (6th Cir. 2000).

⁶⁸ *United States v. Rincon*, 28 F.3d 921, 923, 926 (9th Cir. 1994), *cert. denied*, 513 U.S. 1029 (1994).

⁶⁹ *United States v. Hicks*, 103 F.3d 837, 847 (9th Cir. 1996) (citing *Rincon*, 28 F.3d at 926).

conclude that “[m]istaken eyewitness identifications contributed to over 75% of the more than 220 wrongful convictions in the United States overturned by post-conviction DNA evidence.”⁷⁰

When eyewitness identification is a principal part of the government’s prosecution in a particular case, courts are increasingly recognizing the need to allow expert testimony about the limitations of human perception and recall and how situational factors affect the accuracy of such an identification.

Forensic Abuse Syndromes

Much of the debate about the application of legal standards of admissibility has arisen in the context of proffered expert testimony of psychiatrists and psychologists. Even before *Daubert*, some maintained that testimony from clinical psychologists and psychiatrists could rarely if ever meet the legal standard of reasonably certainty evidence that would aid the trier of fact.⁷¹ Nevertheless, over the last twenty years, prosecutors have sought to present expert testimony concerning various “syndromes” of symptoms or characteristics that the government claims are typical of, or at least consistent with, the behavior of victims of certain crimes. Various syndromes have been offered including child sexual abuse accommodation syndrome, battered child syndrome, battered woman syndrome, battering parent syndrome, separation

⁷⁰ The Innocence Project, Eyewitness Identification Reform, <http://www.innocenceproject.org/ContentJI65.php> (last visited March 31,2009).

⁷¹ “Studies show that professional [psychiatry and psychology] clinicians do not in fact make more accurate clinical judgments than laypersons. . . . We began by asking whether expert witnesses achieve reasonable certainty to aid the trier of fact. The scientific evidence clearly suggests that clinicians fail to satisfy either legal standard for expertise.” David Faust and Jay Ziskin, *The Expert Witness in Psychology and Psychiatry*, 241 Science 31, 32, 34 (1988).

trauma and rape trauma syndrome.⁷² The testimony is usually offered to corroborate the testimony of the complainant or to rebut certain claims of the defendant. Some preliminary legal issues that arise in these cases are common to the behavioral concept of a “syndrome”. Initially, as noted earlier, some courts have held that the *Frye* or *Daubert* admissibility analysis may not be applicable at all to testimony from experts in the behavioral sciences, and many of those cases arose in the context of proffered “syndrome” testimony.⁷³ A good description of syndrome evidence, and a criticism of its usage, was offered by Ian Freckelton:

The syndromes listed above have a number of shared characteristics. All of them psychopathologise conduct which is the product of stress. Many of them have a legitimacy within the therapeutic context, but attempts have been made to transfer each one of them out of their accustomed sphere into the courts to exculpate their sufferers from criminal conduct or to prove that criminal conduct (such as sexual assault) has occurred. This may be termed “the forensic abuse syndrome”: the propensity to classify conduct as an example of a socially unsatisfactory phenomenon (domestic violence, parent beating, child molestation, rape, etc) and for the purposes of a criminal trial to seek to draw inferences in respect of a particular individual from studies of victims’ or assailants’ reactions statistically compiled in the therapeutic context. The inferences sought to be

⁷² See generally Andrew Cohen, Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L. J. 429 (1985) (analyzing the use and admissibility of expert testimony in sexual abuse cases).

⁷³ See, e.g., *People v. Peterson*, 537 N.W.2d 857, 866 (Mich. 1995); *People v. Beckley*, 456 N.W.2d 391, 403-04 (Mich. 1990).

drawn may be ideologically alluring but in the case of syndromes are likely to be scientifically dubious.⁷⁴

Freckelton's position that social and political pressure to redress gender imbalance, and not good science, is the basis for forensic syndrome evidence is not shared by all but many agree that such social pressures are at least one of the factors leading to the production of such testimonial evidence and even to the willingness of the courts to accept it.⁷⁵

Regardless of its origins and basis forensically, the syndrome concept has a theoretical basis within the psychiatric parlance. The current American Psychiatric Association Diagnostic & Statistical Manual of Mental Disorders offers a general definition of "syndrome" as "a grouping of signs and symptoms, based on their frequent co-occurrence, that may suggest a common underlying pathogenesis, course, familial pattern, or treatment selection"⁷⁶ A "syndrome" is not necessarily a medical diagnosis but rather a collection of related symptoms.⁷⁷ A diagnosis depends on whether the pattern of symptoms the result of an underlying pathological process which is recognized as a "disorder".⁷⁸

⁷⁴ Ian Freckelton, *Contemporary Comment: When Plight Makes Right – The Forensic Abuse Syndrome*, 18 Crim. L. J. 29, 30 (1994).

⁷⁵ "Media attention to social issues (e.g. battering), or specific high profile cases, may facilitate the readiness of a legal culture to adopt evidence that addresses the social issue. Increased media attention to the problem of battering in each country has undoubtedly contributed to the education of the public regarding the prevalence of domestic violence, as well as to demands that domestic violence be taken into account in legal actions related to such evidence." Sophia I. Gatowski, et al, *The Globalization of Behavioral Science Evidence About Battered Women: A Theory of Production and Diffusion*, in 15 BEHAVIORAL SCIENCES AND THE LAW 285, 296 (1997).

⁷⁶ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS app. C at 771 (4th ed. 1994).

⁷⁷ Lorenzen, *supra* note 43, at 1046-48 (citing J. CHAPLIN, DICTIONARY OF PSYCHOLOGY 529 (1975)).

⁷⁸ *See id.* at 1048; Steele, *supra* note 22, at 942-46.

In *People v. Beckley*⁷⁹, the Michigan Supreme Court more bluntly described it in legal terms: “Syndrome type” testimony is behavioral characteristics collectively associated with the syndrome which would suggest that the victim was diagnosed as possessing the syndrome. The net result of syndrome type testimony is an opinion that abuse in fact occurred.”⁸⁰ That definition prejudices limitations on its admissibility as substantive evidence. Almost all courts agree that syndrome evidence is not necessarily probative of whether the act occurred, abuse those courts which allow it to be introduced restrict its use to rebuttal or rehabilitative evidence. The only apparent deviation is in rape trauma cases, where it has been held to be affirmatively admissible as to the complainant’s credibility.⁸¹ Even so, it is not admissible to directly prove that the act occurred and where courts have allowed syndrome evidence, it is admissible only to rehabilitate the victim's testimony.⁸² The balance is in not usurping the jury function as finder of fact on the one hand while allowing expert testimony concerning syndrome evidence to explain behavioral signs that may confuse a jury so that it believes that the victim's behavior is inconsistent with that of an ordinary victim.

The “battered woman syndrome” is a psychological and behavioral phenomenon that describes characteristics of women living in battering relationships.⁸³ Although expert testimony

⁷⁹ *Beckley*, 456 N.W.2d at 391.

⁸⁰ *Beckley*, 456 N.W.2d at 396 n.11.

⁸¹ *See State v. Kim*, 645 P.2d 1330, 1338-39 (Haw. 1982).

⁸² *See People v. Bowker*, 249 Cal. Rptr. 886, 890-91 (Ct. App. 1988); *Beckley*, 456 N.W.2d at 409-10; *State v. Hall*, 406 N.W.2d 503,504-05 (Minn. 1987).

⁸³ *See* LENORE E. WALKER, THE BATTERED WOMAN 31-35 (1979) [hereinafter WALKER, BATTERED WOMAN]; LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 7-8 (1984) [hereinafter WALKER, BATTERED WOMAN SYNDROME].

on the syndrome originated in self-defense cases, it has been proffered by prosecutors for a variety of reasons and by defendants claiming duress short of self defense.⁸⁴ The syndrome has been discussed for over thirty years and was originally described by its main proponent Lenore Walker.⁸⁵ It is regarded as a subcategory of post-traumatic stress disorder and has four principle elements: (1) the woman believes that the violence was her fault; (2) the woman has an inability to place the responsibility for the violence elsewhere; (3) the woman fears for her life and/or her children's lives; and (4) the woman has an irrational belief that the abuser is omnipresent and omniscient.⁸⁶

Prosecutors often offer evidence of the syndrome in prosecutions of alleged batterers to explain to the jury why the complainant may have changed her testimony to favor the

⁸⁴ NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NCJ 160972, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT 20-22 (1996), *available at* <http://www.ncjrs.gov/pdffiles/batter.pdf>.

⁸⁵ See WALKER, BATTERED WOMAN, *supra* note 186, at 31-35; WALKER, BATTERED WOMAN SYNDROME, *supra* note 186, at 7-8; LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 4 (1989) [hereinafter WALKER, TERRIFYING LOVE]; Lenore E. Walker, Roberta K. Thyfault & Angela Browne, *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 8-10 (1982); *see also* ERICA BEECHER-MONAS, EVALUATING SCIENTIFIC EVIDENCE 203-31 (2007).

⁸⁶ WALKER, TERRIFYING LOVE, *supra* note ***, at 48-49; Michael McGrath, *Psychological Aspects of Victimology*, in FORENSIC VICTIMOLOGY: EXAMINING VIOLENT CRIME VICTIMS IN INVESTIGATIVE AND LEGAL CONTEXTS 229, 241 (Brent E. Turvey & Wayne Petherick eds., 2009) (explaining that the four general characteristics of battered woman syndrome are often attributed to Walker's BATTERED WOMAN SYNDROME but that no such characteristics are in fact found in that text); *see* WALKER, BATTERED WOMAN SYNDROME, *supra* note ***, at 95-97.

defendant.⁸⁷ Yet, prosecutorial use of the syndrome raises substantial questions and some courts have held that it is impermissible character or “bad acts” evidence.⁸⁸

The battered woman syndrome has received more attention from, and greater acceptance by, courts than perhaps any other area of psychological research.⁸⁹ Courts applying *Frye* have admitted it.⁹⁰ Nevertheless, its underlying scientific basis has been the subject of criticism that neither the legal nor empirical bases for the syndrome are sound.⁹¹ At least one court has reviewed batter woman syndrome under a *Daubert* type standard and found that it was not based on a valid underlying scientific theory.⁹²

“Rape trauma syndrome” is “used to describe common responses to a sexual assault.”⁹³ The term was coined by Burgess and Holmstrom to describe two stages of recovery from rape.⁹⁴ Rape trauma syndrome evidence is usually offered to prove lack of consent. Courts are fairly clear about what the evidence cannot be used for. As with other syndrome evidence, it is not

⁸⁷ See, e.g., *Arcoren v. United States*, 929 F.2d 1235, 1240 (8th Cir. 1991); *People v. Brown*, 94 P.3d 574,583 (Cal. 2004); *Thompson v. State*, 416 S.E.2d 755, 757-58 (Ga. Ct. App. 1992).

⁸⁸ See, e.g., *Parrish v. State*, 514 S.E.2d 458, 462-63 (Ga. Ct. App. 1999); *People v. Howard*, 712 N.E.2d 380, 384-86 (Ill. Ct. App. 1999); *State v. Pargeon*, 582 N.E.2d 665,666 (Ohio Ct. App. 1991); *Ryan v. State*, 988 P.2d 46, 53-56 (Wyo. 1999).

⁸⁹ See MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, *supra* at §§15:1-15:30.

⁹⁰ See, e.g., *People v. Christel*, 537 N.W.2d 194, 199-202 (Mich. 1995).

⁹¹ See generally David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986) (criticizing the lack of legal and empirical foundation for the syndrome).

⁹² *Fowler v. State*, 958 S.W.2d 853,860-64 (Tex. App. 1997).

⁹³ 2 FAIGMAN ET AL., *supra* note 23, § 15:1, at 424.

⁹⁴ Burgess, Ann & Linda Holmstrom, “Rape Trauma Syndrome, 131 Am. J. Psychiatry 981 (1974). Generally see MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, *supra* at §§17:1-17:49; and *People v. Taylor*, 75 N.Y.S. 2d 277, 552 N.E. 2d 131 (1990).

probative that a rape occurred⁹⁵ and cannot be used simply to bolster the credibility of the alleged witness that the rape occurred.⁹⁶ The most accepted use of rape trauma syndrome is as evidence when the defense is consent and the prosecutor wishes to show that the complainant's behavior is consistent with that of a rape victim.⁹⁷ It usually speaks to post rape behavior.

Rape trauma syndrome clearly has primarily social and political origins. Shirley Dobbin and Sophia Gatowski examined those origins and attempted to place the resulting forensic syndrome in evidentiary context:

After examining the sociopolitical emergence and production of RTS [rape trauma syndrome] testimony and the development of the evidence industry that surrounds that production, the question remains one of whether or not RTS testimony has a place in court. Feminists, activists and others advocated for the introduction of RTS testimony in rape trials to give voice to women, to empower them and to combat negative myths and stereotypes about women and rape. However, while RTS was introduced into the court with the best of intentions, it has not had the intended consequences. Any perceived benefits of its introduction

⁹⁵ *Comm. v. Federico*, 425 Mass 844 N.E. 2d 1035 (1997); *People v. Seaman*, 657 N.Y.S. 2d 242 (1997); *State v. Kinney*, 171 Vt. 239, 762 A. 2d 833 (2000).

⁹⁶ *State v. Taylor*, 633 S.W. 2d 235 (Mo. 1984); *State v. Chul Yun Kim*, 318 N.C. 614, 350 S.E. 2d 347 (1986); *State v. Alberico*, 116 N.M. 156, 861 P. 2d 192 (1993)

⁹⁷ See *United States v. Smith*, No. 96-5385, 1998 WL 136564, at *2 (6th Cir. Mar. 19, 1998); *People v. Burkett*, No. 254996, 2005 WL 2401634, at *4-5 (Mich. Ct. App. Sept. 29, 2005); *People v. Stull*, 338 N.W.2d 403, 406 (Mich. Ct. App. 1983). But for examples of cases where defendant denies any sexual misconduct against minor victims, see *State v. Moran*, 728 P.2d 248, 252- 56 (Ariz. 1986); *People v. Bledsoe*, 681 P.2d 291, 300-02 (Cal. 1984) (en banc); *People v. Fasy*, 829 P.2d 1314, 1316-18 (Colo. 1992) (en banc); *State v. Spigarolo*, 556 A.2d 112, 121-24 (Conn. 1989); *Townsend v. State*, 734 P.2d 705, 707-09 (Nev. 1987); *State v. J.Q.*, 617 A.2d 1196, 1207-10 (N.J. 1993); *People v. Thompson*, 699 N.Y.S.2d 770, 772 (App. Div. 1999); *State v. Hall*, 412 S.E.2d 883, 885-92 (N.C. 1992); *State v. Middleton*, 657 P.2d 1215, 1220- 21 & n.8 (Or. 1983); *State v. Jensen*, 432 N.W.2d 913, 914-21 (Wis. 1988); and *Chapman v. State*, 18 P.3d 1164, 1169-74 (Wyo. 2001).

must be weighed against its negative impact. In deciding what place RTS evidence should have in court, we must recognize its social and political history and the social and political consequences of its use in court. We must question the legitimacy of a type of evidence that medicalizes and pathologizes women, that removes rape from its political and social context and potentially opens the door for the revictimization of women by the legal system.⁹⁸

They urge that social science is “science” and that the application of Daubert to rape trauma syndrome evidence is appropriate, at least to the extent of determining if it really is “good science”.⁹⁹

“Child sexual abuse syndrome” is the phrase often used to describe the profile of characteristics experienced by children after being sexually abused.¹⁰⁰ Originally, it was described as the “child sexual abuse accommodation syndrome” by Dr. Ronald Summit.¹⁰¹ His theory described five coping mechanisms commonly observed in sexually abused children: “(1) [s]ecrecy; (2) [h]elplessness; (3) [e]ntrapment and accommodation; (4) [d]elayed, conflicted, and unconvincing disclosure; and (5) [r]etraction.”¹⁰²

⁹⁸ Shirley A. Dobbin and Sophia I. Gatowski, *The Social Production of Rape Trauma Syndrome as Science and as Evidence*, in 1 *SCIENCE IN COURT: ISSUES IN LAW AND SOCIETY* 125, 140 (Michael D. Freeman and Helen Reece, eds.) (1998).

⁹⁹ *Id.* at 134-135.

¹⁰⁰ Steele, *supra* note 22, at 944.

¹⁰¹ Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 *CHILD ABUSE & NEGLECT* 177, 181 (1983).

¹⁰² *Id.*

The shorter phrase “child sexual abuse syndrome” is a broader term than Dr. Sutton’s original theory and includes a longer list of observed characteristics.¹⁰³ The American Medical Association has much more characteristics on its list, including: overt or subtle and indirect disclosures to a “relative, friend, or teacher”; highly sexualized play; withdrawal and excessive daydreaming; low self esteem, “feelings of shame or guilt”; falling grades; pseudo-mature personality development; sexual promiscuity; poor peer relationships; suicide attempt; positive relations exhibited toward the offender; and frightened or phobic reactions, especially toward adults.¹⁰⁴

Many courts have admitted expert testimony regarding child sexual abuse syndrome in light of the significant problems associated with the testimony of children in general and especially the testimony of children relating to sexual abuse. The challenges presented by such testimony were well summarized by one commentator:

The difficulty, however, in prosecuting cases of child sexual abuse goes beyond problems of delayed reporting, inconsistent recollection, or recantation. Even in the absence of these issues, the defense may use the mere fact of the child’s age or immaturity to portray the child as intrinsically less trustworthy than the adult defendant.³⁵ Even when a child is capable of testifying in court, she will rarely be a good witness by traditional standards. Both “developmentally and

¹⁰³ For an excellent description of the history and judicial reactions to the child sexual abuse syndrome, see generally Steele, *supra* note 22, at 933-73.

¹⁰⁴ Council on Scientific Affairs, *AMA Diagnostic and Treatment Guidelines Concerning Child Abuse and Neglect*, 254 I. AM. MED. ASS’N 796, 798 (1985); *see also* People v. Peterson, 537 N.W.2d 857, 863 & n.7 (Mich. 1995) (citing with approval the behavioral signs in the American Medical Association’s guidelines); *J.Q.*, 617 A.2d at 1201-02 (same).

psychologically,” a child is, at best, a less than ideal witness: she is frequently “unable to give consistent, spontaneous, and detailed reports of her sexual abuse.” In addition, the victim is likely to develop a “fear [for her] safety, fear of future sexual abuse, feelings of depression or anxiety, embarrassment at peers’ knowledge of happenings, and a negative view of sex,” all of which can handicap her “ability to give clear and consistent testimony.” The combination of these factors can result in a witness who appears frightened, anxious, and unwilling to testify. The jury, in turn, may be less likely to find such a child credible.¹⁰⁵

In light of these difficulties, expert testimony has been allowed for a variety of purposes.¹⁰⁶ In *State v. Kim*¹⁰⁷, the Hawaii Supreme Court adopted a very liberal approach to admissibility and even allowed the expert to testify that he found the specific complainant in that case to be “believable”.¹⁰⁸ Much more common among the courts that allow child sexual abuse syndrome testimony is the approach taken by the Michigan Supreme Court in *People v. Beckley*¹⁰⁹, and reaffirmed in *People v. Peterson*:

The question that arises in such cases is how a trial court must limit the testimony

¹⁰⁵ Steele, *supra* note 76, at 940 (alteration in original) (footnotes omitted).

¹⁰⁶ For a discussion on the use of expert testimony in child sexual abuse cases, see generally Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027 (1994); John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1 (1989); and Veronica Serrato, Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.D. L. REV. 155 (1988).

¹⁰⁷ *State v. Kim*, 645 P.2d 1330 (Haw. 1982).

¹⁰⁸ *Id.* at 1334-39 (quoting testimony at trial). *But see* *State v. Moran*, 728 P.2d 248,252-56 (Ariz. 1986) (prohibiting testimony of an expert's belief in the credibility of a witness).

¹⁰⁹ *People v. Beckley*, 456 N.W.2d 391 (Mich. 1990); *see* Steele, *supra* note 22, at 933-37 (providing an excellent discussion of *Beckley*).

of experts while crafting a fair and equitable solution to the credibility contests that inevitably arise. As a threshold matter, we reaffirm our holding in *Beckley* that (1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty. However, we clarify our decision in *Beckley* and now hold that (1) 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, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.¹¹⁰

On the other hand, a few courts have taken a very rigid stand against any child sexual abuse syndrome testimony and find that it does not meet the scientific requirements of *Frye* or *Daubert*.¹¹¹

Conclusion

The development of new forms of scientific evidence and the use of DNA makes us reexamine the types and purposes of evidence which is considered admissible in criminal proceedings. The trial court is firmly established as the gatekeeper for making that examination

¹¹⁰ *People v. Peterson*, 537 N.W.2d 857, 859 (Mich. 1995).

¹¹¹ *Newkirk v. Commonwealth*, 937 S.W.2d 690, 690-96 (Ky. 1996) (finding that child sexual abuse syndrome offered for any use would fail to meet the standards set forth in either *Frye* or *Daubert*); *State v. Foret*, 628 So. 2d 1116, 1121-27 (La. 1993) (finding that child sexual abuse accommodation syndrome fails *Daubert* because it is not scientifically reliable); *Commonwealth v. Dunkle*, 602 A.2d 830, 832-36 (Pa. 1992) (finding that syndrome evidence does not meet *Frye* standards).

to ensure that only “good science” and not “junk science” is presented to the jury as reliable. The *Daubert* requirements for determining that admissibility based on a scientific analysis by judges is well established in the federal courts and most of the state courts as well. The implementation of those standards in criminal proceedings is not so clear and some courts apply *Daubert* in a manner that appears to be biased in favor of prosecution evidence.

The implementation of *Daubert*, or even *Frye*, in the evaluation of proffered social science testimony is at best unpredictable and at least irregular across the many criminal jurisdictions. Some courts have held that neither form of scientific analysis is applicable to the social sciences and the only question is whether the evidence will “aid the jury”. Courts that apply a *Daubert* analysis are troubled by the deficiencies of social science evidence in the important *Daubert* criteria of falsifiability and error rates. Two contrasting examples demonstrate these difficulties. There is a demonstrable scientific basis for the testimony of social scientists as to the reliability of eyewitness evidence and yet some courts, before and after *Daubert*, have been reluctant to allow the jury to hear such testimony. On the other hand, expert evidence about forensic abuse syndromes has little demonstrable scientific basis but often continues to be admitted, perhaps because of the social and political origins and impetus for the production and use of such testimony.