SYNDROMES AND POLITICS IN CRIMINAL TRIALS AND EVIDENCE LAW

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INTRODUCTION

The perceived misuse of syndrome evidence is a major focus of criticism of American criminal trials.¹ "Trash" syndromes, such as the "Urban Survival Syndrome,"² and the attempt by Lyle and Eric Menendez to use syndrome-like evidence of abuse to excuse the savage killing of their parents attract national attention.³ Oth-

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1. According to some critics, defendants or victims appear to claim that a legally relevant syndrome exists for every imaginable social malady. *See, e.g.*, ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* 18-19 (1994). I believe that, generally, claims regarding the widespread misuse of syndromes and abuse defenses are vastly overstated. *See generally infra* notes 113-49 and accompanying text; *see also* Peter Arenella, *Demystifying the Abuse Excuse: Is There One?*, 3 HARV. J.L. & PUB. POL'Y 703 (1996); Richard J. Bonnie, *Excusing and Punishing in Criminal Adjudication: A Reality Check*, 5 CORNELL J.L. & PUB. POL'Y 1 (1995).

2. *See, e.g.*, Jacquelyn Lynn Floyd, *Fort Worth Jury Deadlocks on Killings: 'Survival' Defense Prompts Questions*, DALLAS MORNING NEWS, Apr. 20, 1994, at 21A; Lori Montgomery, *Teen Killer Blames Fear of Other Blacks: His Survival Defense Troubles Neighbors as well as Legal Experts*, DETROIT FREE PRESS, Oct. 22, 1994, at 1A (describing "Urban Survival Syndrome" as an intense fear or "a heightened sense of danger created in areas where the cops don't come when you call and you better look out for yourself").

3. Although the defense at both Menendez trials was based on abuse, the claim was more effectively and fully presented at the first, which ended in a mistrial, than at the second. *See* Ann W. O'Neill, *Menendez Retrial Plays Differently*, L.A. TIMES, Mar. 3, 1996, at A1. The second criminal murder trial ended with guilty verdicts for both brothers. *See* Kenneth B. Noble, *Menendez Brothers Found Guilty of Killing their Parents*, N.Y. TIMES, Mar. 21, 1996, at A1.

er syndromes, such as Battered Child Syndrome, Child Sexual Abuse Accommodation Syndrome, and Battered Woman Syndrome, are more widely accepted.⁴ Even for this latter group, however, the scientific validity and dimensions of their legitimate use remain unclear and controversial.

In this Article, I put syndrome evidence into context as a type of proof designed, *inter alia*, to educate jurors about typical human behavior in response to specified conditions. Important similarities exist among types of evidence that connect a participant in a trial to the behaviors of the members of a purportedly similar group. Some authors have used the term "social framework" to describe this larger class of evidence,⁵ I prefer the term "group character."⁶

4. Battered Woman Syndrome is also known as "Battered Spouse" or "Battered Person" Syndrome. Each of these terms has advantages and disadvantages and each may carry important subtleties in meaning. See Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582, 620 (1996) (arguing against a single gender-neutral terminology and discourse with respect to battering, which tends to ignore an important element of context). "Battered person" appears to be a reasonable alternative and would cover non-traditional relationships and parricide, for example. Some have argued, however, that when others besides women in domestic relationships are included, the scientific basis for the syndrome becomes unclear. See Laura Huber Martin, Note, *Ohio Joins the Majority and Allows Expert Testimony on the Battered Woman Syndrome*, 60 U. CIN. L. REV. 877, 889 n.85 (1992) (recounting the history of Ohio's statute relating to BWS, in which a gender-neutral version of the statute was considered but rejected upon objection in the state senate that the applicability of the syndrome to men had not been scientifically established).

I use the term "Battered Woman Syndrome" for three reasons: it is by far the most extensively used terminology; women are overwhelmingly those who are subjected to the conditions giving rise to the reactions at issue, see V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 232 n.5 (noting that over 90% of the victims of domestic violence are women); and it is generally the label attached to the particular version of framework evidence I examine.

5. See Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 559-60, 570 (1987).

6. See Robert P. Mosteller, *Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence*, LAW & CONTEMP. PROBS., Autumn 1989, at 85, 109-12. My concept of group character is broader in the types of evidence covered, see *id.* at 85, than Walker and Monahan's concept, see Walker & Monahan, *supra* note 5, at 571-83, and I would not limit the method of introduction to jury instruction, see Mosteller, *supra*, at 110-12, as they would. See Walker & Monahan, *supra* note 5, at 592. Others have used the "group character" terminology as well. See, e.g., Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 25 (1993) ("'Group Character' is a handy label for testimony in which an explicit comparison is made between the personality traits of an individu-

The claim that a social phenomenon constitutes a "syndrome" suggests a particular power for the evidence and a corresponding need for special scrutiny. The term "syndrome," if it has any useful meaning, indicates a claim that physical or psychological markers reveal its cause, that it has significant and predictable effects on perceptions or behavior, or that experts can accurately identify individuals who fit within its boundaries. If "syndrome" has no such special meaning, its use is superfluous at best, and it should be removed from the vocabulary of criminal litigation.

The law regarding admissibility of group character and syndrome evidence is complex and conflicting. This confusion results in large part from the failure of judges and scholars to distinguish clearly between different uses of such evidence and to separate claims that a social phenomenon constitutes a syndrome from more general claims that some form of group character should be admissible. My argument in this Article is that the principal dangers to accurate factfinding posed by group character evidence vary considerably among the different uses and claims of such evidence, and that admissibility standards, including the level of scientific validity that must support admission, should vary accordingly.

One use of group character and syndrome evidence is to determine whether criminal conduct occurred, that is, to diagnose.⁷ Another is to establish the reasonableness of conduct according to a legal standard. A third is to support credibility by showing that apparently aberrational conduct was normal for indi-

al and those typical of members of a certain group.").

The term draws attention to the kinship between "group character" evidence and individual character evidence. I contend that similar general rules for admissibility should apply to group character evidence—although not to evidence of true syndromes—as apply to traditional individual character evidence. *See infra* note 33 and accompanying text.

7. When courts examine past events, as they do when guilt or innocence are being litigated, the task is one of "diagnosis." When courts are looking to the future rather than the past, the analogous use of syndrome or group character evidence is that of "prediction" of conduct. The similarity of the task involved when group conduct is used to determine how a person acted in the past—which I term a "diagnostic" use—and the task involved when group conduct is used to predict future conduct is well recognized. *See, e.g.,* Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1345-46 (1971) (noting that, where the relevance of probability concepts is concerned, "there is simply no inherent distinction between future and past events"); Walter & Monahan, *supra* note 5, at 573-74 (noting that the logic of inferences about individual behavior derived from group membership is equally valid as applied to future and past acts).

viduals who have had certain experiences. Rarely will the scientific basis of syndrome evidence be sufficient to sustain its most aggressive uses. A syndrome—particularly a psychological syndrome—can almost never successfully diagnose the causes of criminal conduct or determine whether that conduct occurred. On the contrary, a syndrome will rarely have enough specific meaning to give it any greater power in proving conduct than a more general social framework or group character evidence. Thus, ambitious claims for syndrome evidence are generally unsupported.

By contrast, when group character evidence is used for the limited purpose of supporting the credibility of a witness after that credibility has been attacked, the evidence is far more likely to be scientifically valid and sufficiently valuable to justify admission. In this context, the function of group character evidence is to correct erroneous stereotypes held by jurors. Both jurors and judges⁸ (indeed, all people) come to fact determination processes with a set of life experiences that shape their evaluation of evidence. These experiences are often simplified into convenient devices, sometimes called heuristics, that allow humans to categorize observations quickly and thereby make decisions in a complicated world.⁹ When these devices are inaccurate, expert testimony usefully serves to correct them.

The use of evidence regarding group behavior to correct stereotypes and thereby restore credibility may nevertheless distort the jury's analysis,¹⁰ even though such use is relatively unproblematic with respect to the requirement of scientific validity.¹¹

8. Although American law assumes that judges, as experienced factfinders, will be immune to the human frailties presumed to afflict lay jurors, empirical research suggests that judges are not fundamentally more adept at laying aside erroneous stereotypes than jurors. See, e.g., A. Daniel Yarmey & Hazel P. Tressilian Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?*, in EVALUATING WITNESS EVIDENCE 13, 15, 37 (Sally M.A. Lloyd-Bostock & Brian R. Clifford eds., 1983) (discussing research that reveals that lawyers and judges scored significantly lower than expert psychologists with regard to variables affecting reliability of eyewitness identifications).

9. See, e.g., Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 L. & SOC'Y REV. 123, 130-31 (1981).

10. Even this limited use of group character evidence constitutes an unusual role for evidence in American trials. Courts typically assume that the life experiences of jurors allow them to make proper judgments about general human reactions.

11. Indeed, all that is required to establish validity of the evidence is a showing of some degree of common response from a group of similarly situated individuals, rather than the diagnostic or causal relationship associated with a syndrome. See generally *infra* Section I.A.

Inherent in such evidence is the danger that it will accomplish more than a correction and will instead distort the jury's view, albeit in a different direction. Thus, beyond concerns about the label attached to such evidence, the use to which it is put, and the issue of scientific validity, evidentiary concerns regarding special forms of prejudice flowing from group character evidence must be examined.

The investigation of the above concerns does not lead to the conclusion that all or even most of what is currently termed "syndrome evidence" should be excluded. The generalized form of such evidence, particularly when used for less aggressive purposes, provides important assistance to the jury in evaluating evidence. My argument is principally that the term "syndrome" should not be used when it has no special meaning, and that the social sciences have not, except in rare instances, sufficiently defined syndromes to provide that term with a special meaning and particular evidentiary power.

Societal concerns about the excessive use of syndromes in conjunction with so-called "abuse excuses,"¹² although not entirely without foundation, are generally exaggerated and not explained by misuse of syndromes. Rather, such defenses are most successful—prized by some and reviled by others—because of our ambivalent attitudes toward self-help violence, particularly violence directed against "unworthy" victims.¹³ Much of our unease is the product of an excessive focus on sensational criminal prosecutions, particularly those that pit one social group against another and may consequently involve an especially controversial form of group character evidence.¹⁴ Syndromes and group character evidence are not at the heart of these problems.

Another subject of this Article is the increasing impact of political¹⁵ influences on evidence law.¹⁶ Reaction to the abuse of

12. See DERSHOWITZ, *supra* note 1, at 3.

13. Within the class of the "unworthy," I include both those who have committed past acts of violence against the defendant and those whose general behavior or personal characteristics render them unsympathetic to the average juror.

14. See generally Robert P. Mosteller, *Popular Justice*, 109 HARV. L. REV. 487, 489 n.10 (1995) (reviewing GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* (1995) and noting that the trials that receive the most publicity often involve clashes between social groups and a battle between conflicting images and stereotypes).

15. "Political" is a broad term that includes not only the exercise of self-interested power by groups but also the process by which a moral component may be identified

women and children in particular has led to the revision of evidentiary rules, including some in the field of syndrome evidence, in a belated effort to make amends for prior societal and legal insensitivity. Whether future evidence law revisions with origins in concerns about gender and violence will ultimately improve factfinding is an open issue. Such changes, however, are more likely to be properly directed if the political component of recent changes is recognized openly.

In Part I, I develop a general approach for judging the admissibility of group character evidence. I focus on the specific use of the evidence, the strong claim of syndrome evidence to describe and predict perceptions or conduct, and the quality of the science supporting the syndrome. These issues are interrelated, and recognizing their interconnection explains otherwise confusing judicial treatment of admissibility. I then examine three major syndromes in detail. The first two—Battered Child Syndrome and Child Sexual Abuse Accommodation Syndrome (CSAAS)—fit nicely into my proposed analytical scheme; some formulations of the third—Battered Woman Syndrome (BWS)—do not. I argue that the influence of politics explains the largely unrestrained admissibility of BWS. I then turn to the frequent judicial exclusion of expert testimony regarding eyewitness identification. Such exclusion can be explained largely by my general approach to group character evidence but, as with syndrome evidence, political considerations play an important role in the consistent decisions on admissibility.

In Part II, I evaluate the relationship between the admission of group character and syndrome evidence and the apparent increase in abuse-based defenses. I note some ways in which such evidence increases the effectiveness of abuse defenses, and identify

and incorporated into the law. See generally Andrew E. Taslitz, *Interpretative Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 353-95 (1995) (arguing that there is never a "single objectively valid interpretation" of the law, and that statutory interpretations are largely based on political reasons). Thus, the term is not necessarily pejorative, but its operation is quite different from either traditional evidentiary analysis or scientific evaluation.

16. I avoid use of the word "reform" when describing changes that affect criminal litigation because that term connotes improvement. Although many of the changes related to adjudicating crimes involving violence against women are worthy of being called "reforms," most changes in criminal litigation in the near-term will be motivated by little more than a desire to secure higher conviction rates and harsher punishment, such as recent changes in federal habeas corpus procedures contained in the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), that make obtaining relief for violations of constitutional rights more difficult.

types of cases in which a substantial danger of misuse exists. I conclude that, although the term "syndrome" should be largely removed from the legal vocabulary of criminal litigation, syndrome-type evidence plays a relatively small role in abuse-based defenses and can be managed with reasonable controls in those cases. Finally, I suggest the ways in which my analytical system should change the law in other areas, and examine the implications of the explicit recognition that, in admitting syndromes and other evidence in prosecutions involving violence against women, a political component is evident.

I. THE ADMISSIBILITY OF SYNDROMES: A RELATIONSHIP
BETWEEN THE LABELING AND USE OF SYNDROME
EVIDENCE AND THE UNDERLYING SCIENTIFIC
QUALITY OF THE SYNDROME

I begin by concentrating on group character evidence offered under the explicit label of a syndrome. "Syndrome" is an elastic term as used in the social sciences, and as used in criminal litigation it has little, if any, specialized meaning. The general definition of "syndrome" found in Webster's dictionary is: "a group of symptoms or signs *typical* of a disease, disturbance, condition, or lesion in animals or plants."¹⁷ Even in medicine, where the term originated and has been much more carefully developed, the concept is relatively amorphous.¹⁸ In that field, syndromes are contrasted with diseases with respect to causation; the causes of syndromes are generally more obscure.¹⁹ This obscurity of causes for syndromes serves as a useful starting point in highlighting an important distinction between syndromes, or perhaps more properly between true syndromes, on the one hand, and more generalized group character evidence on the other.

When courts decide whether to admit syndrome evidence such as Child Sexual Abuse Accommodation Syndrome, they often appear to focus in different cases on entirely different issues.

17. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2320 (Merriam-Webster 1986) (emphasis added). The general definition does not indicate an invariant relationship between a disease or condition and its symptoms.

18. See John E.B. Myers, *Expert Testimony Describing Psychological Syndromes*, 24 PAC. L.J. 1449, 1451-52 (1993) (explaining the difference between the concepts of syndrome and disease).

19. See *id.*

Sometimes admissibility turns on the quality of the research associated with the syndrome. In other instances the key issue, according to the court, is the use to which the evidence will be put. I contend that the requirements for admission should be (and, for the most part, are) based on a combination of two basic considerations: 1) the quality of the science, considered in light of 2) the claims being made for, and the use being made of, the evidence. My treatment relies on the simple but significant proposition that the test for "good science" should not be uniform for all uses of syndrome evidence and group character. Each use of such evidence requires science that is adequate for the task performed by the evidence; the requirements imposed on the science differ because the difficulty of the task differs.

In some instances, a high degree of validity is required, either because of the difficulty from a scientific perspective of accurately determining the link between the person and the syndrome or the impact of the syndrome upon conduct, or because of the potential from an evidentiary perspective for prejudicial misuse of the evidence. Specifically, when group character evidence is used in a criminal context to determine whether conduct has occurred, such as whether a child has been sexually abused, the science must be of the highest quality and should satisfy the standard set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁰ Here, the difficulty of the scientific task is the greatest, and the impact of misguided expert evidence, in terms of potential prejudice, can be the most devastating. By contrast, when the group character evidence is being used for credibility purposes—to correct human misunderstandings of the apparently unusual and therefore suspicious reactions of a trial participant—the requirements of validity are much less exacting from a scientific perspective, and the dangers of jury misuse of the evidence, while real, are typically less grave.

This basic analytical system explains why CSAAS is treated differently than one version of the Battered Child Syndrome, discussed below.²¹ The explanation for the admissibility of Bat-

20. 509 U.S. 579 (1993) (holding that the Federal Rules of Evidence, particularly Rule 702, limit the admissibility of proffered scientific evidence by requiring the judge to determine whether the expert's testimony is scientifically valid and relevant to the facts at issue). When used for a diagnostic purpose, the syndrome should rest on standard hypothesis testing and therefore should satisfy *Daubert's* most rigorous method of scientific validation. See *id.* at 592-94.

21. See *infra* text accompanying notes 27-29.

tered Woman Syndrome, however, is more problematic. When BWS is used in a domestic homicide as part of a self-defense claim to establish that the defendant's conduct was reasonable, it falls between the typical uses of CSAAS and Battered Child Syndrome in terms of the difficulty of the scientific and legal issues. Although scientific support for BWS as a true syndrome is weak, it is sometimes used in a way that is closer to the difficult task of determining that conduct occurred than to the simpler one of refuting an attack on witness credibility.²² Consequently, the very broad admissibility of BWS requires further and different explanation. Finally, this analytical system helps to explain the exclusion of expert testimony regarding eyewitness identifications.

A. *Child Sexual Abuse Accommodation Syndrome: Using Psychological Syndrome Evidence to Rehabilitate Credibility, Not to Diagnose*

Although conceptually a syndrome might be used diagnostically—to establish cause—most syndromes, particularly psychological syndromes, cannot be so employed. This observation leads to an important difference in the use of syndromes in criminal cases, illustrated by contrasting CSAAS with another syndrome used in child abuse cases, Battered Child Syndrome.²³

CSAAS was first described popularly by Roland Summit.²⁴ It is characterized by five features, principally related to the child's behavior: 1) secrecy; 2) helplessness; 3) entrapment and accommodation; 4) delayed, conflicted, and unconvincing disclosure; and 5) retraction or recantation.²⁵ Most courts now recognize that CSAAS is not diagnostic, since those five symptoms, either sepa-

22. See *infra* Section I.B.

23. Although two different syndromes are sometimes given the general label of Battered Child Syndrome, the one examined here depends upon markers of physical abuse, not psychological reactions. For discussion of the latter syndrome (which in many respects is similar to BWS), and its relevance in cases of parricide, see Michael K. Molitor, Note, *The "Battered Child Syndrome" as Self-Defense Evidence in Parricide Cases: Recent Developments and a Possible Approach*, 40 WAYNE L. REV. 237 (1993); Joëlle Anne Moreno, Comment, *Killing Daddy: Developing a Self-Defense Strategy for the Abused Child*, 137 U. PA. L. REV. 1281 (1989).

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

25. See *id.* at 181–88.

ately or in combination, do not point with any certainty to sexual abuse as the cause of the child's conduct.²⁶

In contrast, Battered Child Syndrome, developed by Henry Kempe, is diagnostic.²⁷ Although it may be characterized by additional symptoms, the archetypical symptoms of Battered Child Syndrome are multiple bone fractures in the legs and arms, at various stages of healing, and sometimes accompanied by subdural hematomas.²⁸ This pattern of injuries does not occur accidentally, and when these markers are found, the cause is physical child abuse.²⁹

Explicit in the above discussion, and implicit in courts' examination of the admissibility of these syndromes, is the requirement of a very high degree of scientific validity before a syndrome will be admitted to show that criminal conduct occurred.³⁰ That the syndrome or group character evidence increases the likelihood that a crime was committed is not sufficient. The scientific evidence must deliver a high level of confidence—it must support a diagnosis,³¹ not just a suggestion of a result.³² Multiple ratio-

26. See Myers, *supra* note 18, at 1456-57; see also Roland C. Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, 1 J. CHILD SEXUAL ABUSE 153, 156-60 (1992) (observing that this syndrome has sometimes been used beyond its intended purpose to diagnose abuse). Most courts recognize a basic distinction consistent with the conclusion that CSAAS is not diagnostic of abuse, excluding such evidence when it is offered to prove abuse but admitting it for the more limited purpose of rehabilitating a child's credibility. See, e.g., *Steward v. State*, 652 N.E.2d 490, 492-99 (Ind. 1995); *State v. J.Q.*, 617 A.2d 1196, 1203-05 (N.J. 1993); see also *Gier v. Educational Serv. Unit No. 16*, 845 F. Supp. 1342, 1351-53 (D. Neb. 1994) (holding that testimony by two psychologists and a psychiatrist that child had been abused did not meet *Daubert* standard), *aff'd*, 66 F.3d 940 (8th Cir. 1995).

27. See C. Henry Kempe et al., *The Battered Child Syndrome*, 105 JAMA 17 (1962).

28. See *id.* at 105-06.

29. See *United States v. Boise*, 916 F.2d 497, 503 (9th Cir. 1990) ("[E]vidence of the battered-child syndrome was . . . admissible as evidence of intent and the absence of accident."); *Landeros v. Flood*, 551 P.2d 389, 393 (Cal. 1976) (discussing history of Battered Child Syndrome); see also John E.B. Myers & Linda E. Carter, *Proof of Physical Child Abuse*, 53 MO. L. REV. 189, 190-93 (1988) (defining abuse as "nonaccidental physical injury"); Myers, *supra* note 18, at 1454 (stating that a child with Battered Child Syndrome is very likely to have suffered nonaccidental injury).

30. See generally Taslitz, *supra* note 6, at 26-28 (describing the potential uses of group character evidence in criminal trials).

31. See 1 J.E. SCHMIDT, *SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE* D-76 (1992) (describing "diagnosis" as "[t]he determination of what kind of disease a patient is suffering from, especially the art of distinguishing between several possibilities").

32. See Taslitz, *supra* note 6, at 26-27. As discussed below, research done "on the dependent variable" is not satisfactory to determine that features are diagnostic. See *infra* notes 43, 63 and accompanying text.

nales undergird the requirement of a high level of validity. They include a recognition of the extreme difficulty of the diagnostic task, the awe-inspiring nature of scientific evidence, and concerns similar to ones that animate rules excluding most character evidence about individuals.³³ The conclusion to be drawn from this

33. The concern which underlies the general prohibition against receipt of character evidence is that the jury will take the admittedly relevant evidence of character to be more powerful than appropriate, and that *the defendant* should be protected against such prejudice in criminal cases.

The analogy to the evidentiary principles governing admission of character regarding an individual is important in explaining the admissibility pattern of much group character and syndrome evidence. At least until the enactment of Federal Rules of Evidence 413 and 414, the basic principle regarding the character of the defendant or an alleged victim was that, when offered to prove conduct, it could be introduced by the defendant but could not be offered by the prosecution, except to rebut character evidence initially admitted by the defendant. Positive character for credibility purposes could be offered by either side once a witness' credibility was attacked. *See generally* 1 MCCORMICK ON EVIDENCE §§ 188, 191, 193, 194 (John W. Strong ed., Practitioner's 4th ed. 1992) (explaining the general rule of exclusion of character as circumstantial evidence and the exceptions to this rule: evidence of good character offered by a criminal defendant; evidence of the character of the victim in cases of assault and murder; and character evidence used to impeach a witness); *see also* FED. R. EVID. 404(a) & 608(a). By contrast, the more probative habit evidence can be introduced by any party. *See* MCCORMICK ON EVIDENCE, *supra*, § 195 (discussing the difference between evidence of habit and evidence of character and explaining that the former is generally admissible); *see also* FED. R. EVID. 406.

The limitations on CSAAS are consistent with the preceding principle and consistent with treating social framework testimony as group character generally. *See* Mosteller, *supra* note 6, at 111 (proposing that limitations placed on social framework evidence by Professors Laurens Walker and John Monahan, *see* Walker & Monahan, *supra* note 5, at 581, are similar to individual character evidence because social framework evidence is essentially a form of character evidence). CSAAS, like character evidence, is not admissible against the defendant to prove that the crime occurred. However, Battered Child Syndrome is admissible because the level of scientific certainty makes it far more probative, like habit evidence, and therefore admissible. *See supra* notes 27-29 and accompanying text.

This analogy explains why defendant profiles offered to prove criminal conduct are (and should be) generally excluded, at least until the scientific evidence demonstrates a highly invariant predictive link. *But see* Myrna S. Raeder, *The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147, 178-87 (1997) (arguing for broader admissibility of data regarding the phenomenon of battering, although not BWS itself, within a social science framework in the prosecution's case-in-chief). However, the enactment of Rules 413 and 414 breaks the historical pattern and allows the prosecution to use propensity evidence in the area of sex crimes to prove the defendant's guilt. *See* FED. R. EVID. 413, 414. If that development extends to other areas, the admissibility of group character evidence offered against the defendant could likewise be changed.

As developed below, the admissibility of CSAAS to rehabilitate credibility fits into the above described traditional pattern for character evidence. *See infra* text accompanying notes 35-49. Similarly, defense use of evidence regarding battered women when of-

discussion is worth repeating: a high degree of scientific validity is required for "diagnostic" uses of syndrome evidence, and the use of the evidence determines the degree of validity that is required.³⁴ As a corollary principle, use of the term "syndrome" should be restricted to situations where it possesses the type of special power that permits diagnosis or a similar predictive or explanatory capacity.

If a syndrome cannot be used diagnostically, however, as is true for most, what is its value to the social sciences or in criminal litigation? It is to describe general reactions to known or assumed causes.³⁵ For instance, in child sexual abuse prosecutions, testimony regarding CSAAS may assist the jury by explaining that many children who were *in fact* sexually abused delayed reporting the abuse or recanted their initial accusations; delay does not necessarily mean, as jurors might ordinarily suppose, that the child's testimony is to be heavily discounted because of the apparently impeaching conduct.³⁶

That the evidence serves a corrective function determines the issues social science must address. In order for such evidence to have theoretical value, three propositions must be established. First, the general public must misperceive the social reality regarding relevant group behavior, a misperception that presumably will afflict jurors and distort their attitudes. Second, the expert or the jury must be able to identify when a person is a member of the

ferred as group character or framework evidence fits the traditional pattern. *See infra* note 59 and accompanying text.

34. Courts do not make clear precisely why they impose this higher requirement of scientific proof. In addition to the reasons noted above, *see supra* note 33, courts may be requiring that the expert be able to testify to a reasonable degree of scientific certainty that a causal relationship exists, continuing a common law requirement that an expert must make such a claim regarding his or her opinion. *See* Edward J. Imwinkelried, *Evidence Law Visits Jurassic Park: The Far-Reaching Implication of the Daubert Court's Recognition of the Uncertainty of the Scientific Enterprise*, 81 IOWA L. REV. 55, 67-68 (1995). Or the exclusion may be based implicitly on a balancing of probativity versus prejudice, or on a belief that if such a claim of scientific certainty cannot be made, the scientific theory must be lacking validity. *See id.* at 68-69.

35. *See* Myers, *supra* note 18, at 1458.

36. *See infra* note 38. Some uses of BWS are virtually identical to the generally accepted use of CSAAS discussed *infra*. This is true when the evidence is offered by the prosecution to support the credibility of the battered woman in the prosecution of the batterer, and when BWS is offered to explain the apparently impeaching conduct of the complaining witness. *See, e.g.,* *People v. Christel*, 537 N.W.2d 194, 202-06 (Mich. 1995) (concluding that prosecutorial use of BWS to support complaining witness exceeded the proper boundaries because complainant's conduct was not incomprehensible to jurors).

relevant group (or that identification must be accomplished by other evidence). Third, consistent, stable, and well-defined group behavior—perhaps not a “syndrome” but at least “group character”—must exist in response to a set of conditions assumed or proven to be present in the case.

Answering the question of whether a general public misperception exists is theoretically the easiest of the three tasks. Although current research on public attitudes and knowledge regarding the precise “social reality” involved in a case is often not available,³⁷ in most important areas at least some research has been done that reveals a basic level of misunderstanding.³⁸ Even if the research does not resolve the issue, courts often assert a societal misunderstanding of social reality if the evidence is other-

37. Determining whether public misperception exists involves ascertaining what the reality is regarding a social condition and what public perception is regarding that same condition. Finding an accurate measure, particularly a current direct measure, of each is often not possible. With regard to the latter, not only is the exact state of public knowledge difficult to determine, it is also likely to change over time and to be internally inconsistent.

Although only an indirect indicator, a recent Justice Department study raises interesting questions about social reality regarding prosecutions of those charged with interspousal homicide and about current attitudes, particularly attitudes toward men and women defendants in such cases. See PATRICK A. LANGAN & JOHN M. DAWSON, U.S. DEPT OF JUSTICE, SPOUSE MURDER DEFENDANTS IN LARGE URBAN COUNTIES (1995). The study showed that of male defendants in interspousal homicide cases, 46% pleaded guilty, 41% were convicted, 11% were not prosecuted, and 2% were acquitted. Of the guilty, 81% were sent to prison, for an average of 16.5 years. Of female defendants, 39% pleaded guilty, 31% were convicted, 16% were not prosecuted, and 14% were acquitted. Of the guilty, 57% were sent to prison, for an average of six years. See *id.* at 1.

Do these figures reflect a rather sophisticated understanding of the social reality of spousal abuse and interspousal homicide by jurors, judges, and prosecutors? Or do they reveal the operation of erroneous stereotypes used against men or against women? The figures suggest that male murderers are generally treated more harshly than females: “In spouse murder cases, wife defendants were less likely to be convicted and to receive severe sentences than husband defendants.” *Id.* Beyond that rudimentary point, however, it is unclear what we can conclude from this data other than that the task of discerning the accuracy of both social reality and of juror stereotypes is likely to be difficult and complicated. See Bonnie, *supra* note 1, at 8–9 (finding in a related set of data, not an indication that abused women have been given a license to kill their abusers, but rather an increasing trend in victimization of women).

38. A group of studies have been conducted in a number of areas in which the researchers follow a general pattern of surveying experts in a field, such as those treating rape victims, about responses of victims and compare those results to the beliefs of laypersons. The studies generally reveal significant differences between the beliefs of experts, which are treated as accurately reflecting social reality, and laypersons. See, e.g., Patricia Frazier & Eugene Borgida, *Juror Common Understanding and the Admissibility of Rape Trauma Syndrome Evidence in Court*, 12 LAW & HUM. BEHAV. 101 (1988).

wise deemed admissible.³⁹ In terms of the social science, the more difficult issues are generally the determination of whether the trial participant "suffers from" a syndrome and the precise contours of this syndrome.⁴⁰ When CSAAS is introduced, however, these latter two issues are typically not difficult due to: 1) the procedural posture in which CSAAS is offered; and 2) the limited, largely generic, evidentiary use of the syndrome.

Instead of leading with evidence regarding CSAAS, the prosecution customarily begins by eliciting testimony by the child or other evidence that the defendant sexually abused the child. Then, in cross-examination, the defendant challenges that accusation based on apparently impeaching behavior, such as failure to report

39. See, e.g., *State v. Myers*, 359 N.W.2d 604, 610 (Minn. 1984) (asserting that "[t]he nature . . . of the sexual abuse of children places lay jurors at a disadvantage"); *State v. Kim*, 645 P.2d 1330, 1337-38 (Haw. 1982) (declaring that the common experience of jurors provides "a less than adequate foundation for assessing the credibility of [the child] witness").

My point is not that we have no research results regarding societal misperceptions; a body of research does exist. See *supra* note 38; *infra* note 58. However, this research rarely covers the precise issues in the case, and such research as exists may be out of date, particularly for syndromes that are the subject of intense public attention. See Regina A. Schuller & Neil Vidmar, *Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature*, 16 LAW & HUM. BEHAV. 273, 282-83 (1992) (suggesting that attitudes towards a syndrome may shift under these circumstances). Moreover, courts rarely analyze the research carefully. Instead, courts cite research casually, perhaps using such research only when it meets the courts' own stereotypes of a discord between social reality and public perception. For example, in *State v. Castro*, 756 P.2d 1033, 1044 (Haw. 1988), the court used the following quotation to justify special treatment for expert testimony regarding credibility of children: "[C]hild sexual abuse is a particularly mysterious phenomenon, often involving an unusual cast of characters who are involved in relationships that are seemingly inexplicable to most people" and cited for the proposition David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions*, 77 J. Crim. L. & Criminology 1, 44-45 (1986). However, McCord indicates elsewhere in his article that although there is scant research on the issue of the disinclination of jurors to believe child witnesses, the one study available concludes that for the most part potential jurors are surprisingly well informed. *Id.* at 35. The court, however, quoted only the above statement that fit its apparent need for support, which does not rest directly on empirical research, rather than the research findings that suggest a contrary conclusion.

40. For example, in discussing expert testimony regarding eyewitness identification evidence, of principal importance is the fit of the evidence to the case, which is related to whether a trial participant can be identified as suffering from the syndrome. See *infra* Section I.C. With regard to BWS, I contend that admissibility should be problematic for some uses of that syndrome precisely because both the determination of whether a participant suffers from the syndrome and the determination of the relevant contours of the syndrome may be beyond the present capabilities of social scientists. See *infra* text accompanying notes 74-76.

the incident promptly.⁴¹ Finally, in response,⁴² the prosecution offers evidence regarding CSAAS to show that children determined to have been sexually abused under independent criteria typically delayed reporting the incident. The instruction to the jury then states roughly that if the jury otherwise finds that the child was sexually abused, failure to report the abuse promptly should not change that judgment because delay is typical of those who have been sexually abused, and therefore not impeaching.⁴³

In addition to being offered in a favorable procedural posture, CSAAS is more easily admitted for credibility purposes because it makes only minimal claims that hardly require a specially-defined syndrome. The prosecution does not offer CSAAS to prove that the child was sexually assaulted by the defendant. Instead, it merely counters defense impeachment of the child by showing that a stereotype often fails to fit conduct under circumstances like those alleged in the case.

The claims based on CSAAS are so general that they can usually be sustained by a more generic condition—Post-Traumatic Stress Disorder (PTSD).⁴⁴ Although the psychological markers of

41. Waiting to admit the group character evidence until after defense attack also aids indirectly in resolving the first issue of whether societal misperception exists. Presumably the defense would not have attacked credibility based on variance from a stereotypical response to abuse unless it believed the jury accepted the stereotype. See Mosteller, *supra* note 6, at 120.

42. Typically, the evidence is received as a response by the prosecution to an attack by the defense. However, courts are either very liberal in their determination of the defense attack required, see, e.g., *Steward v. State*, 652 N.E.2d 490, 499 (Ind. 1995) (holding that either defense discussion or presentation of evidence regarding unexpected child behavior justifies admission), or they require no per se defense attack at all if the facts of the case, such as delayed reporting, combined with juror misconceptions, might lead to incorrect inferences. See, e.g., *People v. Peterson*, 537 N.W.2d 857, 861–62, 868–71 (Mich. 1995); see also John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 92 (1989) (arguing that although expert testimony to rehabilitate the child is generally admitted following defense cross-examination, it should be admissible as soon as the assault begins—even as early as the opening statement).

43. The basic substantive test for admissibility that courts should employ is to ask whether the jury can honestly be expected to use the evidence principally for credibility purposes, as opposed to using it as proof that the abuse in fact occurred.

As discussed below in connection with BWS, see *infra* note 63 and accompanying text, research limited to the group of children who are believed to have been sexually abused, which cannot definitively differentiate those children from non-abused children, is theoretically acceptable when CSAAS is not used for diagnostic purposes. See also *supra* notes 31–33 and accompanying text. This rehabilitative use of the evidence fits the pattern of admissibility for character evidence of individuals. See *supra* note 33.

44. PTSD is the term applied by the American Psychiatric Association's *Diagnostic*

PTSD have not been proven to be diagnostic of the precipitating event, PTSD's general characteristics are well-established through observations across a variety of situations, and neither CSAAS nor anything more specific regarding the reactions of children suffering from sexual abuse is required in most cases to support the child's credibility.⁴⁵ A court need not determine whether the precise dimensions of CSAAS, as opposed to PTSD, have been scientifically established. Indeed, labeling the group reaction a syndrome is superfluous—at least to the extent that “syndrome” has a meaning more specific than frequently observed behaviors in a group of individuals.

Thus, admission is easily justified when independent proof of abuse is offered in conjunction with limited claims made by CSAAS, and when CSAAS is used to counter defense impeachment of a child who has exhibited apparently suspicious behavior. However, dangers of misuse remain, even when CSAAS is used in this limited fashion. First, instead of having erroneous stereotypes neutralized, jurors may adopt new erroneous stereotypes that are overly supportive of the prosecution's position. For example, jurors may come to believe that a delay in reporting affirmatively proves that sexual abuse occurred or that all recanted allegations of sexual abuse are true. These new stereotypes may arise as a result of

and *Statistical Manual of Mental Disorders* to symptoms that may develop following direct personal experience with an extreme traumatic stressor, such as a threat of death or serious injury, or a threat to one's physical integrity. The types of traumatic events include “military combat, violent personal assault (sexual assault, physical attack, robbery, mugging), . . . natural or manmade disasters, severe automobile accidents, or being diagnosed with a life-threatening illness.” AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994). PTSD has six diagnostic criteria: 1) the person experienced an extreme stressor and responded through intense fear, helplessness, or horror; 2) the traumatic event is persistently reexperienced through nightmares, flashbacks, or similar experiences; 3) the person persistently avoids stimuli associated with the trauma and numbing of general responsiveness by behaviors, such as inability to recall an important aspect of the trauma or feelings and detachment or estrangement from others; 4) persistent symptoms of increased arousal are experienced, including difficulty sleeping or concentrating, or hypervigilance; 5) the symptoms have a duration of more than one month; and 6) the disturbance causes “clinically significant distress or impairment in social, occupational, or other important areas of functioning.” *Id.* at 427–29.

45. See Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027, 2036–51 (1994); cf. Karla Fischer, Note, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome*, 1989 U. ILL. L. REV. 691, 713–24 (discussing the use of either Rape Trauma Syndrome or PTSD to explain the apparently unusual post-assault conduct of the alleged victim).

a number of factors, including the apparent certainty of expert scientific testimony about syndromes and the use of terminology that suggests scientific proof of the crime.⁴⁶ Second, demonstrating that there are groups of people who exhibit conduct or reactions similar to the claimed behavior of the witness, victim, or defendant may appear to corroborate the content of the participant's story.⁴⁷ The jurors may come to believe that because that story resembles the experiences of many other people, it is likely to be true.

The dangers noted above may be addressed to some degree by instructing the jury to use the evidence for limited purposes and by restricting the extent and form of the testimony.⁴⁸ When CSAAS is used to counter impeachment by the defense, the combination of factors described above generally makes its receipt proper. Even then, appropriate control remains a practical challenge to trial court judges and an empirical challenge to social scientists.⁴⁹ The impact of the evidence must be carefully calibrat-

46. The terminology—Child Sexual Abuse Accommodation Syndrome or Rape Trauma Syndrome—may cause the jury to conclude that the expert reached a legal conclusion when the clinical evaluation of the behavior observed is not diagnostic or goes to a different issue. For example, the law of the state may define a defense to rape based on the defendant's reasonable but mistaken belief in the woman's consent. *See, e.g., People v. Mayberry*, 542 P.2d 1337, 1345 (Cal. 1975) (finding that defendant who holds a reasonable and bona fide belief that his sexual partner has expressed consent does not possess the wrongful intent required for the commission of forcible rape). In some instances under that definition, the woman will sincerely believe she was raped although the law would define the defendant as not guilty. In that situation, the expert, who has examined only the woman, might accurately conclude from her perspective that she suffered from the "rape trauma syndrome." *See Mosteller, supra* note 6, at 99.

47. The similarity between the conduct of those having the syndrome and a participant in the trial may occur because the participant is actually suffering from the syndrome, because he or she suffers from a related or broader syndrome with similar features (such as PTSD), or because of fortuity. In addition, the correspondence may be the result of a dishonest trial participant cleverly adopting a story that tracks the characteristics of the syndrome in hopes of achieving just this effect. Some believe that Lyle and Eric Menendez fall into this last category. *See O'Neill, supra*, note 3, at A22 (recounting prosecution's argument that defendants' abuse claims were fabricated).

48. The Minnesota Supreme Court, for example, limits BWS evidence to a general description of the syndrome and to the characteristics of a person who suffers from it, and does not allow the expert to specifically connect the defendant to the syndrome. *See, e.g., State v. Hennum*, 441 N.W.2d 793, 799 (Minn. 1989).

49. For example, some social science research indicates that only if the evidence is specifically connected to a trial participant will it be treated seriously by the jury. *See Neil J. Vidmar & Regina A. Schuller, Juries and Expert Evidence: Social Framework Testimony*, LAW & CONTEMP. PROBS., Autumn 1989, at 133, 152-53; *see also Margaret Bull Kovera et al., Expert Testimony in Child Sexual Abuse Cases: Effects of Expert*

ed so that the case is not decided on a newly generated, erroneous stereotype. As suggested above, prohibiting use of the term "syndrome" in this context is an obvious limitation that courts should impose.

B. *Battered Woman Syndrome: A Frequently More Ambitious Use of Syndrome Evidence that Challenges the Quality of the Social Science*

Battered Woman Syndrome is often offered in homicide cases where a woman has killed her male companion.⁵⁰ The syndrome evidence may be used for a number of purposes: dispelling myths that would damage the defendant's credibility as a witness;⁵¹ helping to establish the reasonableness of various elements of the defendant's conduct, such as her failure to leave the abuser, her fear that an assault by the abuser was imminent, or her belief that the impending assault would involve the use of deadly force;⁵² or proving the ultimate question of whether her act was reasonable.⁵³

The scientific challenge is greatest if the psychological BWS has been given a strong diagnostic meaning like that of physical Battered Child Syndrome, where the expert uses the syndrome to

Evidence Type and Cross-Examination, 18 LAW & HUM. BEHAV. 653, 668 (1994) (indicating that test participants were less influenced by experts testifying about general group characteristics than by testimony linked to individual case histories). However, the effort to connect the evidence to a trial participant runs directly counter to efforts to limit excessive impact. See *supra* note 48.

Some appropriate limitations, however, can be identified. Because the science reveals a societal misunderstanding of basic concepts but does not establish a true syndrome with precise dimension, courts should ensure that the evidence presented explicitly claims only to rebut and disavows an ability to define a positive reality. Thus, upon request by the opponent of the evidence, jurors should be instructed specifically regarding the limited validity and utility of CSAAS.

50. Battered Woman Syndrome may also be used in other contexts. For example, BWS may be used as the basis of a duress defense. See, e.g., *United States v. Homick*, 964 F.2d 899, 905 (9th Cir. 1992) (noting special application of duress defense in conjunction with BWS).

51. See, e.g., Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 430 n.183 (1991).

52. See *id.* at 421 n.146; Susan Murphy, *Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome*, 25 COLUM. J.L. & SOC. PROBS. 277, 282 (1992).

53. See Maguigan, *supra* note 51, at 430. As to the propriety of using expert testimony to prove that conduct was "reasonable," see *infra* text accompanying notes 122, 142-45.

establish that the injuries were non-accidental.⁵⁴ Furthermore, with more substantial claims for the power of the syndrome and with more aggressive legal uses of the evidence, dangers more legal than scientific in nature also increase. These law-related dangers concern the impact of the testimony on non-scientific issues of moral blameworthiness and social responsibility.

When BWS is used for the purpose of restoring the credibility of the defendant by countering prosecutorial impeachment, no specialized evidence showing BWS to be a "syndrome" is required. BWS performs the same role that the accepted use of CSAAS performs in child sexual abuse prosecutions. And, as with CSAAS, the claims of BWS are adequately supported by the more generalized reactions of PTSD.⁵⁵ Thus, the syndrome carries no special weight and breaks no new ground; the evidence, almost regardless of form, is readily accepted.⁵⁶

Empirical research has established that the experience of women in abusive relationships produces a set of unique responses,⁵⁷ and that the public, although not entirely ignorant of that social reality, has some major misperceptions about it.⁵⁸ As a way

54. See *supra* text accompanying notes 27-29.

55. Indeed, one reformulation of BWS conceptualizes it as a particular subset of PTSD—a psychological reaction to a particular type of violence. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1198 (1993); Regina A. Schuller & Patricia A. Hastings, *Trials of Battered Women Who Kill: The Impact of Alternative Forms of Expert Evidence*, 20 LAW & HUM. BEHAV. 167, 168 (1996); Krista L. Duncan, Comment, "Lies, Damned Lies, and Statistics"? Psychological Syndrome Evidence in the Courtroom After Daubert, 71 IND. L.J. 753, 765 (1996).

Although satisfactory to support the scientific validity of the evidence for credibility purposes, this reformulation is not an entirely adequate alternative for other purposes. Not all women who are believed to be battered meet the diagnostic criteria of PTSD. See Dutton, *supra*, at 1198; Duncan, *supra*, at 765. The solution to incomplete coverage is not so much a matter of recharacterizing BWS as PTSD as it is recognizing the fact that battered women fit no single profile, syndrome, or "disorder," whether it is BWS or PTSD.

56. See *supra* note 36.

57. See Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 59-64 (summarizing the agreement among researchers regarding consistently demonstrated behaviors of women who have been battered).

58. See, e.g., Edith Greene et al., *Jurors' Knowledge of Battered Women*, 4 J. FAM. VIOLENCE 105, 120-23 (1989) (discussing findings: 1) that jurors generally understood that women suffer anxiety, depression, and feelings of helplessness, and believe that leaving their abusive spouses will result in greater harm; 2) that jurors were less likely to be aware that battered women often blame themselves, feel dependent on their husbands,

of correcting society's basic misinformation about the reality of battering relationships, the social science is adequate.

The challenge to the adequacy of this research is also not great if the evidence is used simply as a basis for the jury to compare the situation of the defendant and that of other women to determine whether the defendant's reactions were reasonable, in the sense that they were normal. Although use of the evidence to prove reasonableness is different than use of CSAAS solely to rehabilitate credibility and requires a different legal justification, the demands of scientific validity are not substantially greater.⁵⁹ Frequency of observed behavior among similarly-situated women, rather than the presence of a true syndrome, should be sufficient for admissibility.⁶⁰

When BWS is used in a stronger sense, as a rigorously developed psychological syndrome through which the expert independently establishes that the particular woman's conduct was reasonable, or, perhaps more appropriately, excusable because of the impact of a true syndrome on her perceptions and conduct, the adequacy of the social science is put to a much more strenuous test.⁶¹ When BWS is used in this strong sense, the adequacy of

and predict when violence may occur); *Dunn v. Roberts*, 963 F.2d 308, 313-14 (10th Cir. 1992) ("The mystery in this case, as in all battered woman cases, is why Petitioner remained with [her batterer] despite repeated abuse.").

59. Although courts typically do not make this distinction explicit, the analogy to the rules admitting character evidence of individuals is very effective in explaining why group character evidence should be admissible when offered by the defense despite the fact that it is insufficiently powerful to have diagnostic effect. *See supra* note 33. Also, admission of BWS when offered by the defense has some constitutional support through the Due Process Clause. *See, e.g., State v. Kelly*, 478 A.2d 364, 376 n.11 (N.J. 1984) (noting due process support for admission of BWS to establish self-defense); *Commonwealth v. Kacsmar*, 617 A.2d 725, 730-31 (Pa. Super. Ct. 1992) (noting that the more generous standard for admissibility of exculpatory evidence as opposed to inculpatory evidence supports admission of battered person syndrome); *see also Dunn v. Roberts*, 963 F.2d 308, 313-14 (10th Cir. 1992) (finding that denial of funds for BWS expert who could have helped negate defendant's intent to aid and abet crimes committed by her batterer violated due process).

60. The fact that social framework evidence could provide a benchmark to help prove that the conduct in question was normal does not mean that it is necessarily admissible or that the conduct was necessarily legally reasonable. Common or frequent does not equal legally reasonable because the law incorporates elements of morality into that legal standard. *See infra* text accompanying note 144. However, there is a broad political consensus that the common response of women to domestic violence through self-help violence may be considered by the jury to be legally reasonable.

61. This formulation raises legal questions as well. The defense that is developed suggests mental abnormality, which is difficult to establish for most battered women, and

the science supporting the syndrome raises two types of questions. First, what are the precise, rather than general, dimensions of that social reality, that syndrome? Is there a precisely defined syndrome that establishes a causal relationship between the pattern of abuse suffered by the defendant, her psychological reactions, and her perceptions or subsequent conduct? Second, to what degree are experts able to diagnose a woman as "suffering from" or fitting within the precisely defined syndrome? The key questions are: 1) whether the scientific evidence supports the existence of a syndrome in any sense beyond a frequently observed, but hardly invariant, correlation between a complex series of behaviors;⁶² and 2) whether the expert can, in an individual case, independently certify that a particular woman fits within the syndrome.

Some of the difficulty in establishing the validity of social science related to this syndrome is a consequence of the virtual impossibility of conducting a controlled experiment. Using case studies of observed battering relationships is valuable, but such studies present problems in research design related to choosing subjects based on outcomes of the "dependent variable."⁶³ Case

fits best into the category of excuse defenses rather than the typical justification formulation of battered-women-self-defense cases. See Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 23-25, 43 (1986) (discussing rationale for treating battered woman self-defense as an excuse defense rather than as a justification defense despite the lack of a mental disability typically required for excuse defenses).

Two rough conceptualizations of the "syndrome" exist. One focuses on the psychological impact of abuse, suggests viewing the woman's conduct as the consequence of psychological dysfunction, and supports an excuse defense; the other focuses not only on the psychological impact of abuse but also on the broader view of the circumstances and alternatives of battered women, supports viewing the conduct as a reasonable response to an abnormal situation, and leads to a defense of justification. See Schuller & Hastings, *supra* note 55, at 168-71.

62. Determining whether the woman's conduct was reasonable may depend on whether BWS means that the woman is largely helpless or frequently resists, in the mold of a survivor. Is the response of battered women relatively uniform, is it dichotomous, or is it so variant that a single syndrome cannot be identified?

63. Instead of randomly sampling women, the specific characteristics of interest (independent variables) are examined for those women already identified as battered or as having responded in self-defense (the dependent variable of interest). Research limited by such selection techniques has frequently been found to bias the conclusions that are reached. Because the members of the group studied all have high or low scores on one variable, that variable may be assumed to be the cause of the behavior or to be uniquely linked to the behavior when in fact others who do not exhibit the behavior at all have similar scores on the independent variable. See Barbara Geddes, *How the Cases You Choose Affect the Answers You Get: Selection Bias in Comparative Politics*, 2 POL.

studies generally cannot define diagnostic syndromes because the researcher sees only the features present in the study group, and cannot determine, even from the frequent presence of that feature, that it differentiates the observed group from other normal individuals.⁶⁴ By contrast, when BWS (or CSAAS) is used only to rehabilitate a woman (or child) who has been shown by independent evidence to have been abused, the task facing the social scientist is much easier, and research on the dependent variable is quite acceptable.⁶⁵ Here, the evidence is designed simply to enrich the jurors' experience by providing them with information about a new context in which to evaluate unfamiliar conduct.

In a decade-old article,⁶⁶ Professor David Faigman challenged Dr. Lenore Walker's strong formulation of BWS⁶⁷ not only with respect to methodology but also as to fundamental theory.⁶⁸ Professor Faigman was particularly critical of the "learned helplessness" concept⁶⁹ Walker used to establish the reasonableness of remaining in an environment of severe battering.⁷⁰ In the main, the criticism of the learned helplessness concept has not been refuted.⁷¹ Indeed, many others, operating from various per-

ANALYSIS 131, 132-33, 136-37, 148-49 (1990); GARY KING ET AL., *DESIGNING SOCIAL INQUIRY* 129-39 (1994).

64. See Geddes, *supra* note 63, at 148-49; KING ET AL., *supra* note 61, at 129-30.

65. See *supra* text accompanying note 43.

66. David L. Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986).

67. See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1984).

68. See Faigman, *supra* note 66, at 633-43.

69. According to the theory of "learned helplessness," women often remain in environments of severe battering because they are constrained by the battering to do so. See WALKER, *supra* note 67, at 86-94.

70. See *id.* at 640-43. He also challenged Walker's theory of a cycle of violence. See *id.* at 636-40.

71. See Schopp et al., *supra* note 57, at 53-59 (continuing to rely heavily upon arguments of Professor Faigman to criticize the methodology and results of Walker's BWS studies). In addition to the "learned helplessness" concept, Walker's concept of a consistent cycle of violence has been questioned. See, e.g., Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789 795-802 (1996) (recounting criticisms of the basis of the cycle of violence theory); see also David L. Faigman, *Mapping the Labyrinth of Scientific Evidence*, 46 HASTINGS L.J. 555, 570-72 (1995) (reiterating criticisms of Walker's research when examined under *Daubert* analysis); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law*, 38 EMORY L.J. 1005, 1072-77 (1989) [hereinafter Faigman, *To Have and Have Not*].

My contention that the criticisms of Dr. Walker's formulation of the BWS have not been answered is not a claim that none of the weaknesses of the research have been

spectives, have challenged on both empirical and theoretical grounds the image of the battered woman as a person rendered helpless by her experiences.⁷² One particular criticism of Walker's paradigm is that, rather than being helpless, many battered women repeatedly and actively resist the violence against them.⁷³ In different ways, critics have broadly challenged Walker's strong theory of BWS.

Similarly, exactly what psychologists and other social scientists can diagnose regarding battering from clinical observations is uncertain. Most courts have limited the margin of error by requiring that independent evidence of a history of abuse be introduced as a precondition for admitting BWS.⁷⁴ Nevertheless, where this other evidence is ambiguous, and where there is genuine doubt as to whether the individual in question is in fact a "battered" person,⁷⁵ experts are not able to either diagnose battering or its ex-

addressed; nor does it challenge the existence of a consensus among researchers regarding the rough contours of the special "circumstances and situation" of battered women. See Schuller & Vidmar, *supra* note 39, at 281. For example, some studies have made an effort to compensate for the lack of a control group in Walker's studies. See Duncan, *supra* note 55, at 765-67 (describing recent research findings). However, the consensus view is not that a single clearly defined syndrome exists covering all battered women or that their conduct is consistently explained by the concepts of "learned helplessness" and a "cycle of violence." See, e.g., Schuller & Vidmar, *supra* note 39, at 281. Thus, the broad claim that the accepted social science research in fact supports the existence of BWS, see Duncan, *supra* note 55, at 763-67, rests on an imprecise statement of what exactly has been validated by the growing body of research.

72. Among the recent critics are two scholars writing about the particular plight of African-American women who have been battered. See Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1068-80 (noting that the learned helplessness paradigm is at odds with the empirical data and the imagery associated with African-American women and is potentially harmful to their legitimate defense); Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 317-21, 327-36 (1995) (discussing empirical studies that undercut both the learned helplessness and cycle theories and criticizing the impact of the syndrome on African-American women who often do not fit the stereotype).

73. See EDWARD GONDOLF & ELLEN FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* (1988); Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. REV. 2117, 2135-37 (1993) (critiquing the accuracy of the learned helplessness model in light of the actual experiences of battered women); see also Raeder, *supra* note 71, at 795-802.

74. See Maguigan, *supra* note 51, at 429, 464-67 (including table listing cases by state).

75. Often the existence of significant past abuse is abundantly proven by independent evidence. However, substantial proof outside the self-serving statements of the defendant

tent from its psychological markers, or confidently distinguish BWS from the more general symptoms of PTSD.⁷⁶ Accuracy of diagnoses, however, is important when the syndrome is used, not merely to support the woman's credibility as a witness or to give a benchmark of other women's behavior for comparison, but for the more ambitious purpose of establishing psychological determinants of the woman's perceptions and conduct.

Despite the failure of social science research to obtain the required level of certainty and sophistication, a syndrome is typically admitted either as a result of court ruling, or, more interestingly, as a consequence of a specific statutory authorization mandating admissibility of BWS evidence.⁷⁷ The Ohio statute, for example, exhibits the broad sweep of such legislation.⁷⁸ It states that BWS "currently is a matter of commonly accepted scientific knowledge"⁷⁹ and allows expert testimony regarding the syndrome to be introduced in support of self-defense "to establish the requisite belief of an imminent danger of death or great bodily

may be more frequently lacking in the particular cases which prosecutors choose to pursue; prosecutors often choose to pursue certain cases precisely because, in their judgment, the defense to be employed is especially questionable or most likely to be ineffective.

76. See Dutton, *supra* note 55, at 1222-23; Schuller & Vidmar, *supra* note 39, at 281-82. The imprecise fit between the definition of the syndrome and the range of reactions of women to repeated battering means that use of the syndrome methodology leads not only to the possibility of false positives in fitting women erroneously into BWS but also to the possibility of false negatives in erroneously excluding women from its legal benefits.

77. See CAL. EVID. CODE § 1107 (West 1995); GA. CODE ANN. § 16-3-21(d)(2) (1996); LA. CODE EVID. ANN. art. 404(A)(2) (West 1995); MD. CODE ANN., CTS. & JUD. PROC. § 10-916(b) (1995); MASS. ANN. LAWS ch. 233, § 23E (Law. Co-op. Supp. 1996); MO. ANN. STAT. § 563.033 (West Supp. 1996); NEV. REV. STAT. ANN. § 48.061 (Michie 1996); OHIO REV. CODE ANN. § 2901.06 (Banks-Baldwin 1994); OKLA. STAT. ANN. tit. 22, § 40.7 (West 1992); TEX. CRIM. P. CODE ANN. § 38.36(b)(2) (West Supp. 1996); WYO. STAT. ANN. § 6-1-203(b) (Michie Supp. 1996).

78. See, e.g., OHIO REV. CODE ANN. § 2901.06. These statutes vary in precise detail. For example, the chief function of the California statute is to clear the admissibility hurdle by establishing that expert testimony regarding the syndrome will not be "considered a new scientific technique whose reliability is unproven." CAL. EVID. CODE § 1107(b). The Nevada and Oklahoma statutes make expert testimony concerning the effects of abuse on beliefs, behavior, and perception admissible. See NEV. REV. STAT. ANN. § 48.061; OKLA. STAT. ANN. tit. 22, § 40.7. The first, brief paragraph of Missouri's statute flatly declares the syndrome admissible; the second requires the defense to notify the court if it intends to offer such evidence and allows the defendant to be examined by a private psychiatrist or psychologist upon motion by the state. See MO. ANN. STAT. § 563.033 (West Supp. 1996).

79. OHIO REV. CODE ANN. § 2901.06(A)(1).

harm that is necessary . . . to justify the person's use of the force in question."⁸⁰

I suggest an additional reason for broad admissibility, despite a debatable scientific foundation for the syndrome—politics.⁸¹ Society has arrived at a basic political judgment: the balance of advantage should be shifted in litigation in favor of battered women who respond violently to their batterers.⁸² Regardless of how it is

80. *Id.* § 2901.06(B). The Georgia, Massachusetts, Texas, and Wyoming statutes also explicitly provide that the expert's testimony is admissible to show the imminence of the threat, see MASS. ANN. LAWS ch. 233, § 23E(b); WYO. STAT. ANN. § 6-1-203(b), or the immediate necessity of the use of deadly force, see GA. CODE ANN. § 16-3-21(d); TEX. CODE CRIM. P. ANN. art. 38.36 (b).

81. I want to note an alternative set of explanations for the broad admissibility of BWS despite weak scientific support. Professor Taslitz has suggested that a lower level of certainty may be required of science when used to prove a mental state because, *inter alia*, a necessity argument supports less exacting requirements than are required when proving that an act was done. See Taslitz, *supra* note 6, at 28. Professors Bonnie and Slobogin similarly argue for flexibility in the receipt of expert testimony—what they term the need for informed speculation—regarding the veracity and significance of claims of aberrational mental functioning regarding past conduct, also in part based on an argument of necessity. Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 452-55, 492-95 (1980).

In my judgment, the necessity argument is far stronger for the insanity defense than for the use of BWS. Once the legislature authorizes the insanity defense, it makes little sense to deny the defendant a method of proving that defense, which requires admissibility of psychiatric evidence, even if such evidence lacks scientific certainty.

82. When legislatures make the decision to admit BWS, the operation of a political judgment is easily assumed. For some of the appellate adoptions of the syndrome, the political and social judgment is just as clear. For example, in *State v. Kelly*, 478 A.2d 364 (N.J. 1984), the court discussed the magnitude of the domestic violence problem as a backdrop to ruling BWS admissible. See 478 A.2d at 369-72. In later-generation cases, however, explicit political and social content of the case is largely absent. Instead, the court simply recounts the substantial acceptance of BWS research by other courts without noting the existence of any scientific uncertainty about the syndrome or its particular use in self-defense cases, and the political issues are left to an unreconstructed minority voice. See *State v. Koss*, 551 N.E.2d 970, 977-78 (Ohio 1990) (Holmes, J., concurring).

The group of eleven states that have enacted provisions that require courts to admit expert evidence regarding BWS is a strange mix. Among these eleven are states that are typically progressive regarding gender issues, such as Massachusetts and California, see *supra* note 77, but the group is made up principally of conservative and "law and order" states, such as Texas, Louisiana, Georgia, Missouri, Oklahoma, and Nevada, where, for example, executions in capital cases are commonplace. See Mark Potok, *Looking Death in the Eye in Texas: Law Lets Families View Executions*, USA TODAY, Feb. 1, 1996, at 3A (noting that since 1976, Texas has conducted 104 executions); Tony Mauro, *Pace of Executions Likely to Increase*, USA TODAY, Dec. 29, 1995, at 3A (listing the number of executions for these states since 1977 as follows: Louisiana 22, Georgia 20, Missouri 17, Oklahoma 6, and Nevada 5). I suggest that a combination of forces may be at work—a loose coalition of women's groups and the new brand of law and order sup-

technically labeled, my contention is that the substantive law of self-defense is being altered by changes in evidentiary rules designed, in large part, to aid women who have engaged in self-help.⁸³

The motivation for admitting BWS is quite understandable. Domestic violence by husbands and boyfriends against women is an enormous social problem in the United States.⁸⁴ In inter-spousal killings, well over half of those killed are women.⁸⁵ Of women who kill, a large percentage have been previously battered by the men they kill.⁸⁶ Society may justifiably believe that the vast majority of women who die at the hands of their male domestic partners are the ultimate victims of widespread battering and that these women are largely, if not entirely, guiltless. In contrast, many of the male homicide victims perpetrated violence against their female domestic partners in a way that contributed to their deaths. In a situation where precise proof of actual events and the survivor's state of mind will be difficult, the judgment is that women who kill and can show a history of battering should be aided in their legal defense; when marginal cases are tried, the woman should generally be given some help in prevailing.⁸⁷

porters for whom self-help or vigilantism has a positive value in light of their perception that the justice system has failed to convict and adequately punish the guilty.

83. The clearest changes in the substantive law through an evidentiary rule can be seen in those states that have enacted statutes that make the syndrome or expert testimony regarding past abuse admissible to show the perception of or belief in the imminence of the physical threat or the necessity of immediate use of deadly force. See *supra* note 77; *infra* note 92. The California statute asserts (futilely, in my judgment) that it does not intend to change the substantive law. See CAL. EVID. CODE § 1107(d).

84. One commentary estimates that between 1.6 and 4 million instances of such abuse occurred in the United States in a recent year. See Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 366 & n.15 (1992).

85. Figures from the nation's 75 largest counties from 1988 revealed 540 spouse murder cases, with 59% of the defendants being male. See LANGAN & DAWSON, *supra* note 37, at iii. The breakdown in 1982 was very similar—60% female victims and 40% male victims. See Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 121 nn.2 & 3 (1985). More recent figures show the carnage of domestic violence against women to be even more one-sided; in 1992, women were victimized by intimates at ten times the rate of men, and 70% of the victims of homicides by intimates were female. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DOMESTIC VIOLENCE: VIOLENCE BETWEEN INTIMATES 3 (1994); see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN 6 (1994).

86. See Maguigan, *supra* note 51, at 397.

87. Some feminist scholars will view my argument that courts and legislatures have

In this context, even though the precise elements of BWS are uncertain and some aspects of the syndrome's scientific foundation remain weak or unproven, judges and legislators believe BWS to be better than the existing ignorance of jurors. The social reality facing battered women is not a matter that can be excluded from jury consideration. With or without expert testimony, that reality—or a stereotypical distortion of it—will be part of the jury's reasoning process.⁸⁸ Leaving jurors to their untutored biases in this situation is not particularly inviting, and even an incomplete scientific examination of the issue is likely to be superior. The general perception is that the science is sufficient to support the intuition of judges, legislators, scholars, and much of the public that the experience of women who have been battered renders reasonable much that jurors often find unreasonable.⁸⁹

reached a political judgment that battered women are to be assisted in winning acquittal through admission of BWS as badly misstating reality. Professor Elisabeth Ayyildiz argues that America's favorable image of some vigilantes is limited to males; females are vilified. See Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U. J. GENDER & L. 141, 155-58 (1995). By contrast, I am offering the view that the mainstream legal system, including some legislatures, has begun to hold a more favorable view toward battered women who kill, even those whose conduct may go beyond the traditional dimensions of self-defense. In support of my position, I note that the conviction rates and sentences imposed in prosecutions of spousal killings are more favorable to female than to male defendants. See *supra* note 37.

Which image is accurate? I believe the dispute can never be clearly resolved because observers too often concentrate on a small set of notorious cases where the system has clearly failed, such as that of Judy Norman. See *State v. Norman*, 378 S.E.2d 8, 14-15 (N.C. 1989) (holding that woman who had been physically and mentally abused by husband over several years, and who had been diagnosed as suffering from BWS, was not acting in either perfect or imperfect self-defense when, out of alleged desire to prevent future abuse, she shot her husband while he slept). Broad data on how the criminal justice system handles most cases is difficult to obtain and evaluate, and individual stories about how the law handles cases correctly are of no real interest. I believe that, from a feminist perspective, the law deals better with cases of domestic homicide today than it did only a decade or so earlier.

I suggest the difference in which cases are being examined explains the very different views of the typical battered-woman homicide defendant held by some scholars who have examined the field. Professor Maguigan, for example, contends that, contrary to a frequently expressed stereotype among scholars, the vast majority of battered women who kill do so either during an ongoing attack or when an attack is imminent rather than during a period of peace and therefore outside the scope of traditionally defined self-defense. See Maguigan, *supra* note 51, at 384-85. Professor Maguigan has, I believe, examined typical cases instead of unusual ones. See *id.* at 464-78.

88. See NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW* 72-74 (1995) (arguing that, in constructing their view of the events at issue in a case, jurors by necessity use stereotypes, prototypes, and what they believe is typical, and that much of what jurors use in this way is predictably inaccurate).

89. Interestingly, the discord between the science and the law may be in the process

My point—that the substantive law is being changed—is, of course, technically inaccurate, since the law of self-defense has not been changed in most jurisdictions.⁹⁰ The feature that is new is the almost automatic admission of contextual information in cases where the defendant is a woman who has previously been battered.⁹¹ Despite the fact that change is coming through an evi-

of correcting itself as the understanding of the phenomenon of battering becomes more sophisticated and as *less*, rather than more, is claimed for the syndrome. The heavily theory-driven BWS of Dr. Walker—suggesting psychological abnormality, providing powerful explanation for conduct, and requiring the ability to define and diagnose a uniform pattern of behavior—is being replaced by a more general set of concepts that emphasize the significance of battered women's experiences, including not only psychological reactions, but also the circumstances and alternatives—the broad social reality—facing women. This latter reformulation includes focus on the lack of effective community alternatives as well as economic constraints. See Dutton, *supra* note 55, at 1201–03, 1233 (suggesting that expert witnesses on BWS should follow an assessment and evaluation process individualized to the particular victim, that general testimony on BWS requires balancing society's interests with the victim's wishes, and that economic issues may impact a woman's decision to press charges); Schuller & Hastings, *supra* note 55, at 171 (referring to various theories positing that a woman's circumstances and alternatives are integral to the testimony about BWS).

The lesser claims of this testimony make it easier to sustain from a scientific perspective. In particular, inability to diagnose a particular syndrome is largely eliminated as a significant difficulty. See Schuller & Vidmar, *supra* note 39, at 281–82 (discussing the accuracy of diagnosing BWS). However, the reformulation may exacerbate another problem—the difficulty of preventing group character or framework testimony from being used on behalf of others who have engaged in self-help violence. If the demands on the science are rather minimal, and if the evidence is admitted under an analogy to character evidence, see *supra* note 33, then limitations on use of this evidentiary doctrine by defendants in other situations may be easier to surmount. As discussed below, I believe this danger can be dealt with in the main by application of the remaining evidentiary requirements, see *infra* Section II.B., and by a more explicit recognition of the important role that politics has played in the decision to permit the admission of evidence regarding battered women. See *infra* Section II.C.

90. Depending on the rigidity with which a syndrome is defined, the change thus does not automatically entail the negative consequence, recognized by scholars, that the creation of a separate standard of reasonableness for battered women would likely lead to denial of a defense to women who differ from the stereotype. See Maguigan, *supra* note 51, at 443–45. Even more flexibility is available if the more general “group character” concept is employed. See *supra* note 87.

91. A focus on such contextual information is a hallmark of a feminist approach to law. See Aviva Orenstein, *That Same Old Voice Is Yelling Again: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. (forthcoming 1997) (manuscript at 25–30, on file with author).

The use of an evidentiary concept that broadly admits contextual information may offer a greater ability to adapt to differing factual situations, but it may generate limitations similar to those associated with a separate standard of reasonableness for battered women. See *supra* note 90. To the degree that BWS is limited to an erroneously defined or stereotypical battered woman, such as a helpless victim, it may improperly omit those

dentiary rule rather than a modification of self-defense law, my point remains: courts and legislatures are altering the substantive law by admitting a new class of evidence that will produce predictably different outcomes.⁹² Although in part a resolution of a factual issue, this determination is also based on a moral judgment about who should be punished in the context of domestic violence.

A sophisticated view of criminal law recognizes that it regulates both the determination of historical fact and the evaluation of moral guilt.⁹³ Changes in evidence law that alter the determination of historical fact can have the same effect as changes in the substantive law, both by giving the jury additional information and by providing a richer context for the jury's exercise of moral judgment. Professor Faigman has argued that the social framework regarding BWS, although often proffered in the guise of scientific fact, reflects in reality a "thinly disguised normative judgment"

who do not fit the type, such as those who have repeatedly offered active resistance. See, e.g., Ayyildiz, *supra* note 87, at 146.

92. The virtual equivalence between the admission of BWS and a change in the substantive law is most clear in the five states that have enacted statutes that declare the evidence admissible to show the imminence of the threat or the need for immediate use of deadly force. See GA. CODE ANN. § 16-3-21(d) (1996); MASS. ANN. LAWS ch. 233, § 23E(b) (Law. Co-op. Supp. 1996); OHIO REV. CODE ANN. § 2901.06(B) (Banks-Baldwin 1994); TEX. CODE CRIM. PRO. ANN. art. 38.36 (b) (West Supp. 1995); WYO. STAT. ANN. § 6-1-203(b) (Michie Supp. 1996). Presumably, the admissibility of BWS on these issues means that even if the killing occurred in a non-confrontational situation, such as when the decedent was sleeping, the defendant will be entitled to a self-defense instruction.

Admission of BWS is not always tantamount to a change in the substantive law. One of the most well-known and often criticized cases involving battered women who kill is that of Judy Norman, which was a case of incredible inhumane treatment and judicial intransigence. See, e.g., Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 66 n.333 (1994) (using Norman's story as archetype); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 89-93 (1991) (criticizing the *Norman* decision and suggesting "separation assault" theory as an alternative view to what the court in *Norman* found to be homicidal self-help for battered wives); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 372-76 (1993) (criticizing the *Norman* decision and advocating a change in the imminence requirement for self-defense cases). In terms of legal doctrine, the *Norman* case is known for its holding that, because under North Carolina law the threat of harm must be imminent, a battered spouse who kills her sleeping husband is not entitled to claim self-defense. See *Norman*, 378 S.E.2d at 12-13. The North Carolina Supreme Court recently reaffirmed that position in *State v. Grant*, 470 S.E.2d 1, 1 (N.C. 1996) ("The arguments the defendant advances . . . were answered in *Norman*. We see no reason to change our position.").

93. See Peter Arenella, *Rethinking the Function of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 197-98 (1983).

whereby the "established policy of legal rules becomes modified, and in some cases nullified."⁹⁴

To the extent that the social science research does not adequately support the use of BWS in all its uses, I believe the effective result is as Professor Faigman argues: that such results should be recognized in the interest of accuracy, and that a normative judgment was, at some basic level, likely understood and intended by many lawmakers.⁹⁵ The broad political consensus is both that social reality of the battering relationship is badly imbalanced and that the legal process has not appropriately responded to self-help violence by women.⁹⁶ As a result, and despite scientific uncertain-

94. Faigman, *To Have and Have Not*, *supra* note 71, at 1075.

95. *See id.* at 1072-74.

96. Judicial treatment of BWS in the context of a duress defense supports the general political nature of decisions to admit or exclude such evidence and, to a lesser extent, demonstrates an interplay between the admissibility and the form of evidence. Although not uniformly excluded, BWS is less accepted within the duress defense than when used in a self-defense context. *See, e.g.,* *United States v. Willis*, 38 F.3d 170, 177 (5th Cir. 1994) (ruling BWS is irrelevant to the exclusively objective test of duress); *State v. Riker*, 869 P.2d 43, 50 (Wash. 1994) (holding that expert testimony regarding BWS was inadmissible due to lack of scientific support regarding an intimate, non-battering relationship which did not meet the more rigorous requirements of the disfavored duress defense); *see also* Christine Emerson, Note, *United States v. Willis: No Room for the Battered Woman Syndrome in the Fifth Circuit?*, 48 BAYLOR L. REV. 317, 330-40 (1996) (criticizing the *Willis* decision); Ann-Marie Montgomery, Note, *State v. Riker, Battered Women Under Duress: The Concept the Washington Supreme Court Could Not Grasp*, 19 SEATTLE U. L. REV. 385, 405-20 (1996) (criticizing the *Riker* opinion).

The *Riker* court was particularly direct about its concerns. It argued that recognizing BWS within the duress defense would mean that "the evidentiary doors will be thrown open to every conceivable emotional trauma," *Riker*, 869 P.2d at 51 n.5, and noted that duress differs from self-defense in that the latter involves acts against the person abusing the defendant while the former frees the defendant from liability for harm to "an innocent third party." *Id.* at 51. Although placed in the context of the legal definition of duress, I believe this reticence to extend BWS to duress defenses reflects the absence of societal consensus that battered women should be supported when their conduct affects others beside the abuser or involves ordinary crime, such as drug distribution. As discussed *infra* Section II.A., I believe that "abuse excuse" defenses are most effective with juries when the victim is the abuser—not as a general excuse for criminality—and that this same political reaction operates when appellate judges shape the law. *Cf. Montgomery, supra* at 405-06 (criticizing the *Riker* court's analysis of evidentiary issues and attributing errors to a focus on policy and "acceptable" results). Furthermore, courts that accept the use of BWS within a duress defense attempt to draw a distinction between the plight of battered women and other psychological syndromes. *See, e.g., United States v. Homick*, 964 F.2d 899, 905 (9th Cir. 1992) (declaring "that the unique nature of battered woman syndrome justifies a somewhat different approach to the way we have historically applied [the principles of the duress defense]").

Although use of BWS or similar evidence under the duress defense will likely continue to meet resistance because of a lack of political consensus that women should

ty about the existence of a true syndrome, the judgment is that jurors should nevertheless receive such evidence to help redress the imbalance.⁹⁷

C. *General Exclusion of Expert Testimony Regarding the Weaknesses of Eyewitness Identification Testimony: A Focus on the Fit of the Evidence, Not the Validity of the Science*

Expert testimony regarding the weaknesses of eyewitness identification testimony, while not syndrome evidence itself, shares an essential feature with much syndrome evidence in that an expert offers information about how groups of people perceive and react as a basis for evaluating the claims of an eyewitness in a particular case. Although expert testimony regarding BWS is usually admitted, expert testimony regarding the weaknesses of eyewitness testimony is consistently rejected.⁹⁸ While ignoring the

be excused for acts against uninvolved third parties, recognizing more explicitly that admission of BWS-type evidence is a response to a unique social malady may make its use more palatable. See Emerson, *supra* at 338–39 (arguing that the feared extension of the defense to youth gang violence is already precluded by the requirement that the defendant has not recklessly placed himself in a situation likely to produce duress, a situation that society should acknowledge is different than the abusive relationship in which many women innocently find themselves). Finally, viewing the effects of battering on women as a “syndrome” that suggests psychological abnormality may inhibit admission of evidence of the effects of battering to support a duress defense, which is predominantly objective in character and imposes the requirement that the defendant resist the coercion as would a person of reasonable firmness. See *id.* at 334–36, 339.

97. Fortunately, some research indicates that the precise form of the corrective education may be unimportant. Proof in the form of a syndrome or in the form of group character evidence appears to have approximately the same impact on the jury’s analysis of the evidence and upon trial outcomes. See Schuller & Hastings, *supra* note 55, at 183 (detailing results of Canadian study involving parallel self-defense laws).

98. See Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1032 (1995) (finding that most courts are reluctant to admit expert testimony on eyewitness identification). Probably the best known of the appellate opinions that provided an opportunity for admission of eyewitness identification experts under specified circumstances is *People v. McDonald*, 690 P.2d 709, 727 (Cal. 1984) (allowing the testimony of eyewitness identification experts when the eyewitness identification of the defendant is not substantially corroborated and the defendant offers expert testimony on specific psychological factors that go to the accuracy of the identification but are unlikely to be understood by the jury). The negative attitude of courts toward admissibility is displayed in many ways, such as a recent decision holding that the conditions for admissibility under *McDonald* were not met. See *People v. Sanders*, 905 P.2d 420, 434–36 (Cal. 1995), *cert. denied*, 117 S. Ct. 115 (1996). See also *United States v. Kinie*, 99 F.3d 870, 883–85 (8th Cir. 1996) (giving a laundry list of reasons for excluding such testimony). As may be expected, an occasional court bucks the trend and admits such expert testimony. See, e.g., *United States v. Jordan*, 924 F.

weakness of expert testimony with respect to the former, courts find little significance in the strength of the social science research with respect to the latter. In excluding experts on eyewitness identifications, courts employ a number of rationales,⁹⁹ but recently they have tended to emphasize the "fit" of the evidence to the case.¹⁰⁰

Courts approach the issue of "fit" in two ways. First, following *United States v. Downing*,¹⁰¹ courts have required a showing by the defense that the content of the expert's testimony is sufficiently tied to the facts of the particular case.¹⁰² The result of such analysis is to leave the admissibility of the evidence within the discretion of the trial judge, who almost always decides to exclude it.¹⁰³ On a few occasions, appellate courts have found that the trial court improperly excluded expert testimony on eyewitness identification when the evidence was closely connected with the facts of the case involving an important and likely misunderstood issue.¹⁰⁴

Supp. 443, 448-49 (W.D.N.Y. 1996) (admitting expert testimony on memory, perception, and eyewitness testimony).

99. See Handberg, *supra* note 98, at 1033-41 (cataloging the different bases for rejection of such evidence).

100. This is a requirement of relevancy which has specific application to scientific evidence under Federal Rule of Evidence 702, as recognized in *Daubert*, 509 U.S. 579, 591-92 (1993).

101. 753 F.2d 1224 (3d Cir. 1985).

102. See *id.* at 1242.

103. *United States v. Harris*, 995 F.2d 532 (4th Cir. 1993), is typical. The *Harris* court affirmed the exclusion of the eyewitness identification expert, citing the general and the specific impact of *Downing*:

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." See *United States v. Downing*.

. . . .

These narrow circumstances such as described in *United States v. Downing* . . . were not present in the case *sub judice*.

Id. at 534-35 (citations omitted).

104. For example, in *United States v. Stevens*, 935 F.2d 1380, 1400-01 (3d Cir. 1991), the court reversed the trial court's exclusion of the expert testimony and ruled that it should have been permitted on the single issue of the lack of correlation between the confidence of a witness in his or her identification and the accuracy of that identification. Two witnesses in the case had expressed high confidence in their identification, and the appellate court recognized that the expert testimony would have rebutted "the natural assumption that such a strong expression of confidence indicates an unusually reliable identification." *Id.* at 1400.

The second application of "fit" is much more questionable in terms of evidentiary and scientific analysis. Some courts exclude the testimony because the expert has not examined or cannot give an opinion about the weakness of the particular identification.¹⁰⁵ This objection is rather extraordinary when examined in light of the social science. Although it is correct that experts cannot make the particular connection being demanded, this inability does not differentiate expert testimony on eyewitnesses from most syndromes. Except for the rare syndrome that is diagnostic, experts cannot establish the presence of a syndrome independently of the participant's generally self-serving claims.¹⁰⁶

Other courts expand this element of "fit" into what I believe is the true concern animating the general exclusion of expert testimony regarding eyewitness identification: that such testimony applies to too many cases and may broadly undermine jury acceptance of identification evidence.¹⁰⁷ Such courts argue that an expert's opinion concerning the unreliability of eyewitness testimony is based on statistical averages and that the eyewitness in a particular case may well not fit within the spectrum of these averages. In the judgment of these courts, it would be inappropriate for a jury to conclude, based on expert testimony, that all eyewitness testimony is unreliable.¹⁰⁸

105. See, e.g., *Ex parte Williams*, 594 So. 2d 1225, 1227 (Ala. 1992) (concluding that the trial court did not abuse its discretion in excluding expert testimony where that ruling appeared to be based upon the expert's unfamiliarity with the facts of the case and lack of personal contact with the victim); *Lewis v. State*, 572 So. 2d 908, 911 (Fla. 1990) (approving exclusion of testimony because "[t]he psychiatrist admitted he could not testify regarding the reliability of any specific witness, but could only offer general comments about how a witness arrives at his conclusions"); *State v. Gardiner*, 636 A.2d 710, 713-14 (R.I. 1994) (affirming trial court reliance, *inter alia*, on fact that expert had "no idea about this particular witness in this particular case, her level of stress").

106. Ironically, any claim by the expert to make the connection between the science and the witness is likely to add to the potential prejudice from such testimony by increasing the danger that the expert's testimony will be overvalued. See *supra* notes 48-49 and accompanying text.

107. See *People v. Enis*, 564 N.E.2d 1155, 1165 (Ill. 1990).

108. See *id.* at 1165. The court was also concerned with the general problem of the overuse of expert testimony:

We caution against the overuse of expert testimony. Such testimony, in this case concerning the unreliability of eyewitness testimony, could well lead to the use of expert testimony concerning the unreliability of other types of testimony and, eventually, to the use of experts to testify as to the unreliability of expert testimony. So-called experts can usually be obtained to support most any position. The determination of a lawsuit should not depend upon which side can present the most or the most convincing expert witnesses. We are concerned with the reliability of eyewitness expert testimony . . . , whether and to what degree it

When the very different treatments of expert testimony regarding BWS and expert testimony regarding eyewitness identification are compared, courts' striking indifference to variances in the quality of the research between the two areas is apparent. The research with regard to the former, as described above,¹⁰⁹ has been vigorously criticized, while the research regarding eyewitness identification, which is classic in its methodology, rests on very solid ground.¹¹⁰ However, when one examines the quality of the evidence in combination with its use, the focus on the "fit" of the evidence rather than its scientific validity is more sensible. For eyewitness identification experts, the quality of the science need not be exact, much like the research regarding CSAAS, because eyewitness expert evidence is being used only to explain reactions to known conditions, not to diagnose a pattern of behavior indicating that an event occurred. The science should be judged adequate for its purpose, but that judgment is not decisive; the adequacy of the science is a necessary but not a sufficient condition. The ultimate issue is the helpfulness of the evidence for what is a relatively limited purpose. When courts concentrate on the "fit" of the evidence, they are speaking to that relative degree of helpfulness and may be assuming that the science is adequate for that purpose.

Although the "fit" of the evidence to the case provides part of the explanation for the consistent exclusion of expert testimony on eyewitness identification, I believe that the more important factor is the perceived impact of the testimony on outcomes.¹¹¹

can aid the jury, and if it is necessary in light of defendant's ability to cross-examine eyewitnesses.

Id. (citations omitted).

109. See *supra* note 71-73 and accompanying text.

110. See Steven D. Penrod et al., *Expert Psychological Testimony on Eyewitness Reliability Before and After Daubert: The State of the Law and the Science*, 13 BEHAV. SCI. & L. 229, 256 (1995) (arguing that quality of science is such that eyewitness expert testimony meets *Daubert* requirements). In contrast, the courts have shown remarkable persistence in excluding such testimony, even by relying on the argument of scientific inadequacy. For example, in *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994), the Ninth Circuit excluded expert testimony regarding eyewitness identification evidence under *Daubert*, despite an apparent showing of general acceptance, because the defendant failed to establish scientific validity under the new standard. See *Rincon*, 28 F.3d at 924-25.

111. As expressed in cases like *United States v. Alexander*, 816 F.2d 164, 169 (5th Cir. 1987), courts also focus on the "overburdening" of the courts if such evidence were routinely admitted, which sounds like an objection regarding "waste of time." See FED. R. EVID. 403. This concern is different than the outcome-determinative focus that I am sug-

Group character evidence exists largely separate from the facts of the case, and so it may be used, and therefore might affect the outcome, in large classes of cases regardless of their particular facts. Furthermore, such evidence typically favors one side in the case, consistently aiding either the defense or the prosecution. In these circumstances, feelings about the correctness of the relative rate of convictions or about specific societal ills, such as the need to be more effective in protecting children from sexual abuse and women from domestic violence, play an important role in the general admissibility decision. The social judgment has been reached that, in light of unfavorable odds in the home, prospects at trial should be improved for battered women, who are typically true victims. In contrast, and despite lip service to the inherent weaknesses of eyewitness identification evidence, courts do not believe that innocent defendants are frequently convicted as a result of such evidence.¹¹² The greater perceived danger is that such expert testimony would too often produce acquittals of the guilty; this fear has led to its general exclusion. Judicial concern with impact on outcomes, although more traditional in form and less explicitly political than many decisions regarding BWS, is another manifestation of the operation of politics.

gesting, and certainly for some courts it is a sufficient independent reason. Nevertheless, the "overburdening," or "waste of time" rationale, absent concern about the impact on the outcome, would not produce the consistent pattern of exclusion observed. Important evidence is generally admitted despite concerns about consumption of time, and in many cases, expert evidence regarding eyewitness identification would prove important. Although it is generally not articulated, I suspect that the principal justification for exclusion is a fear by many courts that such expert testimony would prove effective in discrediting eyewitness testimony regardless of the merits. *Cf. People v. Enis*, 564 N.E.2d 1155, 1165 (Ill. 1990) (upholding exclusion of expert testimony concerning the unreliability of eyewitness testimony and suggesting that the trial judge should balance the probative effect of such expert testimony against its prejudicial effect).

112. A typical statement regarding the dangers of eyewitness testimony is found in *United States v. Wade*: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." 388 U.S. 218, 228 (1967) (footnote omitted). However, the Supreme Court's later statement in *Manson v. Brathwaite*, that "[w]e are content to rely upon the good sense and judgment of American juries," 432 U.S. 98, 116 (1977), more accurately captures the general feeling of courts that such evidence is not a real threat to an acceptable jury verdict. A number of defendants have been proven innocent since DNA testing became available in the late 1980s, *see Paula Span, The Gene Team: Innocence Project Fights Misjustice with DNA Testing*, WASH. POST, Dec. 14, 1994, at C1, occurrences which lend credence to the argument that truly innocent people are sometimes convicted. An archetypal erroneous verdict is that based on eyewitness identification where the victim is completely confident of her identification. *See id.*

II. DEFINING AN APPROPRIATE ROLE FOR GROUP CHARACTER AND SYNDROME EVIDENCE IN AMERICAN CRIMINAL LAW

A. *The Role of Syndrome Evidence in the Growth of "Abuse Excuses"*

Is there a crisis in contemporary criminal cases where syndrome evidence is used in defenses that are based on the fact that the defendant has been abused? Certain highly visible cases create the impression that there is, and several commentators suggest these cases reflect a dereliction of personal moral responsibility in the criminal law and in American society.¹¹³ The problems with which syndrome evidence is associated, however, have been part of our jury trial system at least since stories of successful trial lawyers have been recorded; with or without syndrome evidence, certain types of self-defense cases have always proved challenging to the prosecution. Although syndromes aid the defense in some of these cases, the use of such evidence does not constitute a watershed development in the defense arsenal.

The cover of the June, 1994 *American Bar Association Journal* asked: "Has a Talk-Show Mentality Softened Jurors to Accept Any Excuse?"¹¹⁴ To be sure, television talk shows bombard the public with tales of woe and abuse. However, the claim of the *Journal* cover is almost entirely fanciful. If there is a connection between talk shows and excusing the abused, the connection is precisely the opposite of that suggested—the public has heard so many claims of abuse that, if anything, it has become jaded.¹¹⁵

The real problem is not a tendency to accept a generalized claim of abuse as an excuse or defense for criminal conduct. Rather, it exists when the person believed by the prosecution to be the

113. Although they approach the problems with criminal trials in America with very different perspectives, Professors Alan Dershowitz and George Fletcher appear in basic agreement on this point. See DERSHOWITZ, *supra* note 1, at 6, 19, 41; GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 16-18, 255 (1995).

114. See Stephanie B. Goldberg, *Fault Lines*, A.B.A. J., June 1994.

115. Indeed, the ABA Journal cover story found that such defenses were not particularly successful. See *id.* at 40, 42; see also Arenella, *supra* note 1, at 703-05, 09 (arguing that successful "abuse excuses" are extraordinarily rare and that rather than broadly excusing conduct because of past abuse, our criminal law imposes moral accountability on all but the most severely disabled); Bonnie, *supra* note 1, at 15 (perceiving not a proliferation of excuses or a softening of public attitudes toward punishment, but rather a hardening of public attitudes and a general abandonment of individualizing features in punishment).

victim is presented by the defense as having acted violently toward the defendant or as having been generally "unworthy." Although American juries are not particularly impressed by an "abuse excuse" when the defendant claims that past societal wrongs justify criminal action against an uninvolved victim, I believe that juries resonate with defenses that paint that alleged victim either as generally unworthy or as deserving to die for particular wrongs done to the defendant.

Painting the alleged victim as one who deserved his fate is hardly new. Three decades ago, long before BWS was recognized, the colorful defense attorney Percy Foreman described his success in one case where, after he had sketched an impression of the "victim's" misdeeds, "the jury was ready to dig up the deceased and shoot him all over again."¹¹⁶ Almost accidentally, that feeling may comport with justice. Its predominant effect, however, is likely to be an acquittal, not because of what the victim did to the defendant during the legally relevant period, but because of who the victim was or, more problematically, who the defense portrayed him to have been.

Even without syndrome evidence, proof of some past acts of violence by the decedent, either acts against the defendant or acts the defendant knows of, is uniformly admissible in spousal killings.¹¹⁷ Furthermore, the "subjectifying" of self-defense law¹¹⁸ and the expansion of the "imperfect self-defense" defense¹¹⁹ provide excellent theoretical vehicles with which the defendant may introduce an expanded range of the decedent's vile acts. Such opportunities are available independent of developments in syndrome evidence.¹²⁰

116. Marshall Smith, *Attorney Percy Foreman Wins Another Big Case: His Lifetime Record—Won: 700, Lost: 1*, LIFE, Apr. 1, 1966, at 92, 96.

117. See Maguigan, *supra* note 51, at 421 n.145.

118. Self-defense standards for determining what is reasonable have become more subjective, taking into account more of the individual characteristics of the defendant, including her knowledge and the social context of the crime. See Murphy, *supra* note 52, at 279, 310.

119. Where perfect self-defense cannot be established, imperfect self-defense, which reduces the severity of the crime, may be proven in many jurisdictions. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.11(a) (2d ed. 1986). Imperfect self-defense occurs when the defendant committed homicide based on an actual but unreasonable belief that deadly force was required. See *id.*

120. As Professor Bonnie has observed, "[t]he contemporary trend . . . is to make the legal standard for excuse or mitigation more subjective and open-textured, thereby opening the door to more psychological evidence." Bonnie, *supra* note 1, at 8.

Syndrome evidence does, however, provide a number of advantages to a defendant set on vilifying the decedent. First, syndrome evidence lends credibility to the defendant's factual assertions, which may otherwise be of doubtful validity but nevertheless immune to direct refutation because the defendant killed the only other knowledgeable person. The jury is likely to give the defendant's story of abuse more credit than it otherwise would receive because many others have told the same or a similar story.¹²¹ Second, expert testimony regarding a syndrome may, in some instances, include testimony by the expert of the reasonableness of the defendant's conduct. If this type of testimony is permitted, then the defendant benefits from the weight of an expert's "not guilty" judgment.¹²² Third, syndrome evidence will usually permit an expansion of the scope of the victim's conduct that is admitted, both in terms of the period of time covered and the types of conduct included.¹²³

These advantages are generally available in cases where BWS evidence is introduced, and I would be distressed if these problematic aspects of BWS evidence were extended indiscriminately to other areas,¹²⁴ permitting a victim's history of violence or other misdeeds to be used to justify a defendant's homicidal act. The case of Daimian Osby threatened to produce such an expansion. In April, 1994, Osby was tried in Fort Worth, Texas for the murder of two men; he contended the killings were justified under the self-defense principle, as supplemented by, in his

121. The similarity may not be accidental but may rather be the result of a killer crafting a script that tracks the key features of a syndrome. See *supra* note 47.

122. Testimony that the defendant's conduct was reasonable should not be allowed. Such testimony represents a classic violation of the rule stating that use of unelucidated legal terminology by an expert is forbidden. See FED. R. EVID. 704 advisory committee's note. Also, the decision of a jury that the conduct of the defendant was reasonable incorporates both factual and moral elements. The expert is incapable of rendering an opinion regarding the legal reasonableness of the conduct. Such testimony should remain inadmissible regardless of whether syndrome testimony is received for other purposes. See *infra* text accompanying notes 144-45.

123. See James R. Acker & Hans Toch, *Battered Women, Straw Men, and Expert Testimony: A Comment on State v. Kelly*, 21 CRIM. L. BULL. 125, 146 (1985).

124. Others have recognized the threat of the concepts developed regarding BWS expanding into other areas. See, e.g., Mira Mihajlovich, Comment, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253, 1276 (1987) ("Soon . . . other victim[s] of repeated assaults or other crimes, may be able to claim self-defense based upon a victimization-syndrome."); Rosen, *supra* note 61, at 16-17, 32; see also *infra* note 141.

attorney's words, an "Urban Survival Syndrome."¹²⁵ Osby testified in the initial trial, which ended with a deadlocked jury, that he killed his 28-year-old and 19-year-old cousins after a year-long dispute over \$400 he had won from them in a dice game.¹²⁶ Osby, an African-American, contended that he shot the two unarmed men, also African-Americans, because they had threatened him a week earlier with a shotgun and he feared for his life.¹²⁷

Osby added to these claims the testimony of an expert who described general statistics regarding violence involving young African-American men.¹²⁸ The expert testified that members of this demographic group were statistically more likely to commit violent acts or to be victims of such acts than members of other groups. Osby's lawyer attempted to manipulate these facts into a syndrome with the argument that the perceived level of terror is greatly increased when a young African-American male is set upon by other young African-American men.¹²⁹

Another case illustrates the danger of expanding the self-defense doctrine developed in BWS cases to situations that may

125. See Floyd, *supra* note 2, at 21A. The action of defense counsel to attach a catchy name suggesting an element of scientific certainty is without justification, and, whether likely to have a significant impact on the jury or not, such labeling should be prohibited unless supported. The act of attaching a "syndrome" label to evidence is something that not only lawyers, but also experts, are growing more adept at doing, and in both situations, attaching a catchy title to a defense contributes to the erroneous perception that abuse defenses are widespread. See Bonnie, *supra* note 1, at 1-6 (describing how the use of the term "syndrome" leads to a perception of an explosion of such cases because that term appears in newspaper reports, which are in the modern age instantly electronically searchable on a national basis).

126. For a more detailed account of the facts of the case, see Wally Owens, Note, *State v. Osby, The Urban Survival Syndrome*, 22 AM. J. CRIM. L. 809, 809-11 (1995).

127. See *id.*

128. See Montgomery, *supra* note 2, at 1A. The expert was Jared Taylor, author of a recent book, *PAVED WITH GOOD INTENTIONS: THE FAILURE OF RACE RELATIONS IN CONTEMPORARY AMERICA* (1992).

129. See Floyd, *supra* note 2, at 21A. On retrial, Osby attempted to introduce the testimony not only of the expert on race relations, but also that of a psychologist. Both, however, were excluded by the trial judge. Osby was thereafter convicted. See Lori Montgomery, *Teen Guilty of Murder; Urban Theory Not Allowed*, DETROIT FREE PRESS, Nov. 12, 1994, at 6A.

The conviction on retrial may be explained by new evidence rather than exclusion of Osby's experts. At the second trial, the prosecution also produced two new eyewitnesses to the events. They testified that before the shooting they had broken up a fight between Osby and his two cousins and were restraining the cousins when Osby put a gun to one cousin's head and pulled the trigger. See Steven R. Reed, *Teen Gets Life Sentence in "Urban Survival" Case*, HOUSTON CHRON., Nov. 11, 1994, at 33.

present a more fundamental challenge to the law. In Durham, North Carolina, Michael Seagroves, a white male, claimed that he was lawfully defending his home when, in March 1993, he fatally shot an unarmed 15-year-old African-American boy four times and wounded the decedent's 17-year-old companion. The two had broken into Seagroves' garage to steal his motorcycle while he was at home caring for his ill infant son.¹³⁰

At trial, Seagroves called a psychiatrist who had examined him and found him to have suffered from an acute stress disorder during the break-in that subsequently matured into Post Traumatic Stress Disorder (PTSD).¹³¹ That evidence aided Seagroves' defense on two fronts—credibility and criminal responsibility.¹³² Seagroves' testimony regarding the defense of his home was impeached by prior damaging statements to the police and by his inability to explain his conduct fully: according to the police, Seagroves stated shortly after the fatal shooting that he fired several shots at the intruders as they ran away, even stepping outside the broken garage door and firing two more shots.¹³³ When he testified at trial, he stated that he had fired only when the teens ran toward him in the garage and denied firing as they ran away.¹³⁴ Seagroves' trial version supported his acquittal; his prior statement did not.¹³⁵

Regarding credibility, the psychiatrist testified that during the intrusion Seagroves was under acute stress and later suffered from PTSD;¹³⁶ that PTSD can affect the ability to remember; and that Seagroves suffered memory lapses when he was most fearful—when he felt he was under attack and fired the shots.¹³⁷ The ex-

130. See Jaleh Hagigh, *Closing Arguments Draw Tears in Court; Seagroves Jurors to Deliberate Monday*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 11, 1993, at A1.

131. See John Stevenson, *Expert: Seagroves' Reaction Typical; Shooting of Teen Burglars Could Rest with Jury Today*, HERALD-SUN (Durham, N.C.), Dec. 9, 1993, at A1.

132. See Jaleh Hagigh, *Psychiatrist Supports Seagroves*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 9, 1993, at A1.

133. See *Officer: Suspect Said Youths Running When He Fired*, CHARLOTTE OBSERVER, Dec. 3, 1993, at 4C.

134. See *Homeowner Blames Fear for Shots; Amount of Force at Issue in Trial of Durham Man*, CHARLOTTE OBSERVER, Dec. 8, 1993, at 1C.

135. The jury deadlocked eight to four for acquittal on the charge of manslaughter, and the state subsequently dismissed charges. See Danny Lineberry, *Seagroves Will Not Face Retrial: State Says It Could Not Win Guilty Verdict in Shooting*, HERALD-SUN (Durham, N.C.), Jan. 26, 1994, at A1.

136. See Stevenson, *supra* note 131, at A1.

137. See Hagigh, *supra* note 130, at A1. The psychiatrist testified that Seagroves' re-

pert also testified that when Seagroves fired at the intruders, he acted in "an understandable way,"¹³⁸ did "what a 'normal' person would have done in the same circumstances,"¹³⁹ and was "on automatic pilot, . . . firing reflexively out of terror."¹⁴⁰ This part of the expert's testimony, which went beyond credibility to criminal responsibility, is potentially of much greater significance.

Taken together, the Osby and Seagroves cases illustrate the potential danger of extending the doctrines developed from battered woman self-defense cases into other areas.¹⁴¹ The defendant may attempt to use expert testimony to paint the decedent as part of a feared group, as Osby did by introducing statistics regarding violence by young African-American males. The defendant may also attempt to introduce testimony that labels his own conduct as understandable, or even explicitly reasonable. In my judgment, the type of threat posed by the Osby case can be controlled relatively easily. The challenge of the Seagroves case to evidence law is subject to a limited control, but cannot be fully answered without resorting to measures that would sweep too broadly.

True "trash" syndromes should not threaten justice; they can and should be excluded as scientifically invalid. The Urban Surviv-

sponses were "absolutely characteristic" of PTSD. Estes Thompson, *Psychiatrist Says Homeowner's Reaction to Break-In Consistent*, CHARLOTTE OBSERVER, Dec. 9, 1993, at 1C.

138. See *id.*

139. See Hagigh, *supra* note 130, at A1.

140. See Stevenson, *supra* note 131, at A1.

141. The threat of expansion of the principles behind BWS is sometimes illustrated by such outrageous examples as to create the impression that BWS has fundamentally undermined criminal responsibility. In its brief to the court in *State v. Grant*, 470 S.E.2d 1 (N.C. 1996), the prosecution used a very colorful form of this argument.

The State argues that it would be impossible to confine such a standard to use in battered spouse cases and would lead to an application for other "identifiable psychological syndrome." For example, should Timothy McVeigh (the Oklahoma City bombing suspect) be allowed to have a "reasonable militant militia-person" standard applied to his actions[?] What if it could be shown (and it can) that such persons suffer from a syndrome identified by an extreme distrust of government, a heightened since [sic] of patriotism, "loner" traits, NRA membership, "barrel-sucking" (i.e. an unnatural fascination with guns), and excessive doses of ultra-conservative AM talk radio hosts? Would such a person not be entitled to an instruction on perfect self-defense if he took murderous action against "President Clinton's jack booted thugs" out of a belief in the imminence of bodily harm against him for his views? Are we to have a "reasonable former athlete/movie star" standard? How far could this go? The state argues that any modification is too far.

Brief for State at 24, *State v. Grant*, 470 S.E.2d 1 (N.C. 1996) (No. 67A95). See also *Under the Dome: Battered Militia Syndrome?*, NEWS & OBSERVER (Raleigh, N.C.), May 18, 1996, at A3 (quoting prosecution's argument).

al Syndrome should be excluded on the basis of well-established principles of evidence law. Admission of such evidence requires a showing that some real science exists to support the expert testimony;¹⁴² no reliable theory or methodology supports Urban Survival Syndrome. An essential element of the justification for admitting group character evidence is that it must correct jury misinformation and eliminate biases; Urban Survival Syndrome evidence fails that basic requirement as well. In the Osby case, the defense entirely failed to prove that it was correcting an erroneous stereotype. Instead, use of the Urban Survival Syndrome likely exacerbated a set of powerful, negative stereotypes held by the community regarding young African-American males and violence.¹⁴³

In a case like that of Seagroves, where syndrome evidence is used to establish affirmatively, albeit indirectly, the reasonableness of conduct, the expert should be required to: 1) demonstrate a present ability to diagnose the existence of a condition that would support an opinion regarding reasonableness; or 2) acknowledge that his testimony is merely an interpretation of the defendant's claims. In the Seagroves case itself, the expert did not and could not show that he was able to establish independently that the defendant's reactions at the time of the shooting were "normal" and "reflexive," rather than those of a homeowner who was traumatized by a break-in and/or its fatal aftermath but who overreacted when he fired the fatal shots. Particularly when the use of

142. See *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 594-95 (1993) (holding that the overarching subject of the inquiry envisioned by Federal Rule of Evidence 702 is "the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission").

143. I believe that the claims regarding the dangers of expansion to other areas are vastly overstated and that typically the extreme examples, like the Osby case, pose no real threat. In addition to the bases for rejection of these defenses developed below, factual limitations are very important, often making a successful defense virtually unthinkable. Unless the hypothetical defense has a real prospect of succeeding, it remains merely humorous.

The "Urban Survival Syndrome" defense is likely self-defeating in cases like Osby's, where a young black male is charged with killing other young black males, because the defense suggests that the jury should be very careful about acquitting the defendant. The "syndrome" creates not only a fear of the decedents, but also a fear of the defendant himself as a member of the vilified and dangerous group. Similarly, the examples given in the prosecutor's brief in the *Grant* case regarding the "reasonable militant militia-person" for Timothy McVeigh and the "reasonable former athlete/movie star"—apparently for O.J. Simpson—hypothesize a self-defense claim by both. See *supra* note 141. Self-defense was not offered for Simpson and has not been mentioned for McVeigh. Under the facts of these cases, self-defense claims would be ludicrous.

syndrome evidence moves beyond support of credibility, a lack of independent validation should impose an explicit limitation on the expert's claims.

Also, experts should not be permitted to testify that a defendant's conduct was "reasonable." The key point in the law of self-defense is that "typical" or "common" behavior is not the equivalent of that which is "reasonable."¹⁴⁴ Moral values that inform the legal definition of reasonableness are not part of a psychiatrist's or psychologist's expert view; they *are* built into the law. An expert's statement that conduct was reasonable provides a classic example of testimony that incorporates a legal concept used differently by the expert than it is in the law.¹⁴⁵ Nevertheless, a new blanket rule of exclusion is unnecessary, since the testimony should not be permitted under the standard analysis of Federal Rule of Evidence 704(a).

The expert in the Seagroves case, however, did not cross the line into the impermissible—his testimony was a step removed from the use of legal terminology, and would appear to be permissible under the Federal Rules or other bright-line prohibitions against testimony about ultimate mental states.¹⁴⁶ Whether the expert's testimony had a decisive impact, or merely provided a convenient explanation for the jurors who had reached a conclusion of innocence for other reasons, would be virtually impossible to determine. Even if such evidence was not decisive in the Seagroves case, evidence of this type is likely outcome-determinative in some other cases,¹⁴⁷ and effective control of its use is not easily accomplished.

Moreover, regardless of efforts to limit misuse, cases like Seagroves' will continue to trouble the legal system because the central problem lies not in syndrome evidence but in society's long-standing support for attractive instances of vigilantism.¹⁴⁸ I

144. See Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 788-90 (1994).

145. See *supra* notes 46, 122 and accompanying text.

146. See FED. R. EVID. 704.

147. See Jerry Allegood, *Verdict Might Not Quell Feud in Duplin*, NEWS & OBSERVER (Raleigh, N.C.), July 25, 1996, at A1 (expert testimony regarding post-traumatic stress disorder provided basis for insanity defense of defendant who ambushed and fatally shot his tormentor in community feud).

148. See Franklin E. Zimring, *Hardly the Trial of the Century*, 87 MICH. L. REV. 1307, 1309 (1989) (reviewing GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* (1988) and arguing that public support for

believe society's favorable reaction to such cases results from fear of crime, distrust in courts' and governments' ability to solve the crime problem and to make society safe, and visceral support for those who appear to have acted decisively against crime and criminals. Such a reaction no doubt supported the broad acceptance of BWS. Although this response to crime is largely understandable, it is also undesirable, regardless of its form, and should be constrained at least to situations where the reaction generally comports with basic justice, as it does with BWS.

B. The Difficult Task: Drawing Reasonable Distinctions to Admit and Exclude Classes of Group Character Evidence

Courts, and in some cases legislatures, have developed general rules for admission of several sorts of group character evidence, such as CSAAS, BWS, and expert testimony regarding eyewitness identification.¹⁴⁹ Except with regard to eyewitness identification experts, these rules are shaped roughly by the appropriate evidentiary doctrine and are generally satisfactory despite the critical influence of politics. Even with regard to eyewitness experts, exclusion may reflect a correct practical judgment regarding the substantial overall impact on criminal trials if such testimony were routinely admissible.¹⁵⁰ In an earlier article I called for an effort to screen group character evidence in an exacting fashion;¹⁵¹ I now believe that a precise sorting of such evidence is beyond the capability of courts in any more than rough categorical terms.

Admissibility, if precisely determined, rests on a set of discriminations, each of which requires delicate scientific judgments, careful conceptualization of the use of evidence, and precise information about the validity and impact of the evidence.¹⁵² In the

self-help violence against criminals is not a recent phenomenon but is "a standard American enthusiasm").

149. See, e.g., *supra* note 77 (listing state statutes mandating admissibility of BWS evidence).

150. See, e.g., *United States v. Alexander*, 816 F.2d 164, 169 (5th Cir. 1987) (suggesting that general admissibility of expert testimony regarding eyewitness identification would grossly overburden the trial process if permitted in every case where relevant).

151. See Mosteller, *supra* note 6, at 128-32.

152. Decisions on general admissibility and the second order decisions on the proper form and extent of such testimony require resolution of a set of issues: first, discerning the jurors' body of knowledge and stereotypes; second, determining what the true nature of social group action is; and third, gauging accurately the impact of the evidence so that it does not create equally erroneous stereotypes or prove entirely different facts. A rigor-

context of ordinary criminal litigation, which occurs mostly in overworked state courts and relies on individual lawyers barely adequate for tasks that do not require scientific sophistication, courts cannot realistically be expected to reach delicate and precise conclusions in individual cases on such complex issues. Given these constraints, one ought not object too strongly to categorical rules that respond to broad social judgments as long as the underlying analysis is reasonably honest and takes only limited license with evidentiary principles.¹⁵³

In spite of the difficulties of these precise admissibility determinations, we can hope that judges will sometimes exercise their discretion and rule against the general trend, admitting, for example, expert testimony regarding eyewitness identifications when

ous effort to resolve the issues noted above places unreasonable demands on trial courts, given our inadequate knowledge about public attitudes, the "truth" regarding the contours of syndromes, and the impact of various types of evidence upon jurors and their reasoning processes.

153. Courts presently attempt to "fine tune" the admission of such evidence through various restrictions on the form of the evidence that may be received. These efforts should be divided into two categories based on the justification for the restriction. In the first category are restrictions based on the limits of valid scientific research regarding group character evidence. Prohibiting the expert from using the term "syndrome," for example, may be justified on the scientific basis that the term suggests scientific certainty which is lacking, at least for most uses in criminal litigation. *See, e.g.,* *People v. Peterson*, 537 N.W.2d 857, 863 (Mich. 1995) (prohibiting expert from using term "syndrome"). Similarly, prohibiting experts from giving an opinion that a particular person fits within a syndrome is justified because experts are, at this point, unable to identify syndromes accurately on the basis of their psychological markers. *See, e.g.,* *State v. Hennum*, 441 N.W.2d 793, 799 (Minn. 1989) (limiting BWS evidence to a general description of the syndrome and to the characteristics of a person who suffers from it and prohibiting the expert from linking the defendant to the syndrome). Thus, restrictions on such broad-based scientific judgments are appropriate.

In the second category are restrictions based on the anticipated impact of the testimony on jurors. Attempts by courts to regulate the impact of such testimony as best they can are not improper. If impact is to be the determining factor, however, our empirical knowledge is not yet sophisticated enough to resolve clearly the multitude of issues that would have to be addressed before the conditions of admissibility could be fully specified. Because precise calibration of impact is likely not possible, any restrictions regarding the form of the evidence for that purpose would have to be broadly drawn.

By arguing that only broad, categorical rules are practical, I am not taking issue with the use of *Daubert* or other tests of scientific validity to screen such evidence regarding basic theory and methodology. Indeed, restrictions should be based on the limits of science. My argument is, first, that when applied to the facts and context of specific cases, our knowledge is limited and indeterminate despite the continued best efforts of social scientists and legal scholars and, second, that our current (or future) inability to fully resolve these uncertainties should not bar admission if the broader issues of basic scientific validity have been resolved.

circumstances support special treatment. Although my general view is that American courts should remain skeptical of and careful about the admission of syndrome and syndrome-like evidence in criminal cases, they should not reflexively reject all new group character evidence. In some areas, the increased use of such evidence should be encouraged, assuming the underlying social science research has been proven sound. In other areas, past admissibility decisions should be reversed or admission strongly resisted. An important determinant of whether expansion into a new area should be willingly entertained, even if skeptically, or strongly resisted is the old-fashioned concept of the prejudicial impact of the evidence: how likely is it that the new form of proof will encourage the jury to reach a verdict based on who the victim or defendant was rather than what he did in the particular violent encounter?

In light of the preceding discussion, I suggest two areas where expansion of group character evidence and recognition of a true syndrome may be appropriate in the future. The first area concerns judgments about witness credibility. Currently, jurors (and judges, for that matter) decide credibility issues based in part on the demeanor of witnesses. Those judgments are based on social experience. Although experts cannot yet determine with any certainty who is telling the truth based on demeanor, they may some day be able to educate jurors on what factors are more likely than others to be indicators of truth-telling; they may be able to correct the erroneous views of the general public about which demeanor factors are most salient.¹⁵⁴ If the scientific research is adequately developed, this evidence, like expert testimony regarding eyewitness identification, should improve the ability of jurors to evaluate credibility.

If the validity of these basic concepts can be established by social scientists, a second task will present itself to scientists, legal scholars, and courts: finding a form for such evidence that will, on balance, provide greater benefits than distractions and therefore be admitted categorically.¹⁵⁵ If a generally acceptable form for evi-

154. See Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1192-97 (1993) (noting the critical point derived from social science research that behaviors popularly believed to manifest deception are not in fact the ones that best reveal deception).

155. I believe the critical problem for eyewitness identification experts remains the

dence regarding credibility markers in demeanor is developed, admissibility should follow. The evidence would be used neither to diagnose—so the scientific task should not be extraordinarily demanding—nor to provide a platform for vilifying a party.

The second area for a potential expansion of group character evidence relates to the diagnosis of sexual abuse of children using psychological markers and the observations of physicians. Despite a history that does not inspire confidence, diagnosis of child sexual abuse by social scientists may, in the long run, reach a level of validity sufficient to warrant admission.

Most courts and commentators agree that CSAAS is not a proper tool for diagnosing the sexual abuse of children.¹⁵⁶ That does not mean, however, that social scientists cannot, for all time, diagnose child sexual abuse by relying upon behavioral patterns in combination with statements of children. Currently, some experts in the field believe that such a diagnosis is possible where a combination of specific factors are observed.¹⁵⁷ Courts should require the highest level of scientific validation in such situations, since use of group character evidence similar to CSAAS to “diagnose” child abuse presents the sternest challenge to scientific research, given that controlled experiments are not possible. Also, using science in this way entails the greatest dangers that scientific claims will overwhelm lay judgments as to the central issue in the case. Despite these obstacles, social scientists may someday meet the challenge.

development of a form that presents expert testimony in a way that has fewer negative consequences than traditional expert testimony but is nonetheless more effective than jury instructions, which have little impact. See Vidmar & Schuller, *supra* note 49, at 164–66 (summarizing empirical research regarding impact of jury instructions regarding eyewitness identification testimony).

156. Some authors not only believe that no present expertise allows a confident diagnosis of sexual abuse by mental health and child development specialists, but also doubt that there is hope that such an expertise will develop. See Thomas M. Horner et al., *The Biases of Child Sexual Abuse Experts: Believing is Seeing*, 21 BULL. AM. ACAD. PSYCHIATRY & L. 281, 286–89 (1993) (reporting that experts’ conclusions regarding a test case of alleged sexual abuse were extremely variable and therefore unreliable, and that no basis was shown for the proposition that experts are specially qualified to diagnose abuse); Thomas M. Horner et al., *Prediction, Prevention, and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made* (pt. 3), 26 FAM. L.Q. 141, 162–63 (1992) (discussing a wide range of judgments by experienced and inexperienced clinicians from the fields of clinical psychology and sociology in evaluating whether child had been sexually abused).

157. See Myers et al., *supra* note 42, at 73–78.

Today, on the other hand, courts permit without much analysis opinions rendered by medical doctors that differ little from those they almost universally exclude when offered by social scientists. A substantial percentage of sexual abuse cases lack physical markers that are diagnostic.¹⁵⁸ Nevertheless, doctors frequently diagnose sexual abuse using historical data to supplement supportive but non-diagnostic physical indicators.¹⁵⁹ American courts permit such diagnoses,¹⁶⁰ as well as others based on symptoms reported by the patient to medical doctors; courts do so because of a long-standing practice of admitting clinical findings of physicians that cannot be independently established by physical markers, such as the testimony of doctors in support of pain-and-suffering claims resulting from soft tissue injuries. Historical results should not, however, blindly guide future decisions if the science cannot establish the validity of the diagnosis.¹⁶¹

As argued above, the barriers to admitting syndrome and group character evidence should be high where the evidence is used to diagnose criminal conduct or where the strong form of a syndrome is claimed. In addition, courts should be reticent to admit such evidence where it provides new or more effective ways of bringing emotion into the trial—where it gives greater latitude to vilify or generate sympathy for a victim or defendant,¹⁶² and

158. See Jan Bays & David Chadwick, *Medical Diagnosis of the Sexually Abused Child*, 17 CHILD ABUSE & NEGLECT 91, 92 (1993) (reporting that findings diagnostic of sexual abuse are present in less than 20% of child victims); see also Myers et al., *supra* note 42, at 37 (noting that the lack of physical evidence may be due to the nature of the abusive acts, sexual dysfunction by the offender, or complete and rapid healing).

159. See Myers et al., *supra* note 42, at 37–38.

160. See *id.* at 48–51.

161. The *Daubert* decision may prompt a re-examination of the admissibility of evidence that has been historically received although not shown to rest on a scientifically valid foundation. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 n.11 (1993) (noting that newly established admission requirements are not restricted to “novel” scientific evidence). For example, one court has found evidence comparing hair samples, which was previously accepted as admissible, to be inadmissible under *Daubert*’s requirements. See *Williamson v. Reynolds*, 904 F. Supp. 1529, 1554–58 (E.D. Okla. 1995). But cf. *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1040–41 (S.D.N.Y. 1995) (ruling that *Daubert* standards are inapplicable to determination of admissibility of forensic document examiner). Broad re-examination of past practices is unlikely, however, for practical reasons.

162. The more typical problem is the vilification of the victim, in part because of rules prohibiting introduction of the character of the defendant. See, e.g., FED. R. EVID. 404. Nevertheless, vilification of defendants can occur indirectly in child sexual abuse cases through the use of syndrome evidence and under some uses of Rules 413 and 414 of the Federal Rules of Evidence. See *infra* notes 170, 183.

specifically where it helps defense attorneys persuade the juries to "dig up the deceased and shoot him all over again."¹⁶³ One possible way to handle this problem is through the use of categorical rules to exclude broad types of syndrome evidence for certain general purposes, such as proving a defendant's mental state.¹⁶⁴ Although not totally misguided, such an approach would likely prove ineffective in solving the problem. Moreover, the approach might be too rigid and might exacerbate the basic problem by suggesting that, if the evidence is not excluded by the categorical rule, it is admissible.

I believe the task is best handled by application of the well-established evidentiary principles noted above. First, the validity of the science must be demonstrated, a requirement that should be more exacting where the evidence is used to diagnose events or to establish affirmatively the reasonableness of conduct. Second, the evidence must refute rather than enhance societal misperceptions. Third, experts should not be allowed to give scientific statements on legal and moral issues. Abuses of the law not handled by these prohibitions should be corrected via the time-tested responsibility of the judge to exclude evidence that is substantially more prejudicial than probative.

C. *The Advantage, Challenge, and Uncertain Consequences of Acknowledging the Role of Politics in the Admission of Battered Woman Syndrome Evidence*

I now return to a key consideration—the consequences of an acknowledgment that politics have played a role in shaping evidence law regarding the admission of BWS evidence. I suggest that such recognition is likely to yield one specific benefit: it will

163. See *supra* text accompanying note 116.

164. See FLETCHER, *supra* note 113, at 254–55 (recommending that psychiatric experts should not be permitted to testify about issues of moral responsibility, which he would operationalize by extending Rule 704(b) of the Federal Rules of Evidence to the states and by radically altering judicial attitudes so that judges would generally "become more restrictive about the kinds of expertise that could inform or advise the jury about matters relevant to their task of judging responsibility"). However, some categorical restrictions on the effect of PTSD-type defenses are worth examining because such defenses appear particularly susceptible to fabrication or misuse of various types. See, e.g., Allegood, *supra* note 147 (defendant who ambushed and fatally shot his tormentor in community feud found not guilty by reason of insanity where only mental disability was post-traumatic stress disorder allegedly induced by amphetamines).

inhibit the expansion of the principles developed in battered woman self-defense cases to more problematic situations.¹⁶⁵ Proper limitation of the doctrines associated with BWS will likely be aided by an explicit recognition that those doctrines occur as a set of special evidentiary rules related to violence against women.¹⁶⁶ Society and the law have not dealt well with the plight of battered women outside the courtroom. With BWS (and some other general changes in the substantive law of self-defense), rules are being changed to assist those women who find themselves charged with killing their male companions.

The social reality relating to violence against women does not require admission of syndrome and group character evidence in other areas. I believe that American judges and legislatures will agree, as long as these new rules may be explained as part of a solution to a specific social problem rather than entirely neutral applications of basic evidentiary principles.¹⁶⁷ Recognizing the political nature of decisions regarding BWS should inhibit the extension of similar evidentiary treatment to other areas until

165. Some scholars disagree with my articulated goal of attempting to limit the concepts that benefited battered women to that particular social and political context. See, e.g., Jody Armour, *Just Deserts: Narrative, Perspective, Choice, and Blame*, 57 U. PITT. L. REV. 525, 547 (1996) (arguing for a necessary commonality and philosophical link between the criminal law's treatment of battered women and other socially marginalized groups).

166. Already, several Federal Rules of Evidence are based on similar categorical analyses. Under Rule 412, most evidence of the consensual sexual activity of alleged rape victims may not be offered by the defendant, who in other areas is allowed to prove a relevant trait of the alleged victim's character under Rule 404(a)(2). Similarly, in sexual assault and sexual molestation cases, Rules 413 and 414 allow admission of evidence of other sexual assaults that would otherwise be inadmissible under Rule 404's general prohibition against using the defendant's character to prove circumstantially his or her guilt.

167. Despite the fact that judicial decisions reflect political judgments, whether or not explicitly recognized, see *supra* note 82, there may be some advantages in overtly political decisions being made by the legislature. As noted earlier, see *supra* note 141, in the recent case of *State v. Grant*, 470 S.E.2d 1 (N.C. 1996), the prosecution argued that to recognize an impact of battering on the imminence requirement would undermine the basic fabric of moral responsibility in the law. Although that claim is overstated, the prosecution made another more subtle and more defensible point. It argued that if the substantive law of self-defense is to be changed, the legislature should do so. See Brief for State at 25-26, *Grant*, 470 S.E.2d 1. That argument has merit in the sense that the legislature is more able to declare that a rule is being enacted based on policy judgments, as has occurred with BWS, than the courts, whose lawmaking function is traditionally seen as more limited. Thus, preventing the extension of BWS into unwanted areas can more easily be accomplished when the legislature authorizes admission of a class of evidence, even where that enactment is an evidentiary rule, than when admission comes through a judicial ruling.

social and political forces demonstrate an equal claim to a change in the law, which rarely occurs.¹⁶⁸

Now is a good time to acknowledge officially that the evidentiary treatment of BWS reflects social and political judgments as much as (or more than) it reflects evidentiary analysis.¹⁶⁹ This recognition is particularly appropriate given the growing number of proposals to change other rules associated with adjudicating cases involving violence against women. In addition to the broad acceptance of BWS, recently enacted Federal Rules of Evidence 413, 414, and 415 reflect the impact of this political movement.¹⁷⁰ Additional proposed changes include the recognition of new hearsay exceptions for statements by victims of sexual violence¹⁷¹ by homicide victims who were previously victims of domestic violence at the hands of the defendant;¹⁷² receipt in domestic homicide cases of evidence of prior domestic violence perpetrated by the defendant against the victim;¹⁷³ broad admission of expert testimony regarding profiles of those who batter and those who are battered when offered in prosecutions of the batterer;¹⁷⁴ and creation of a first-degree murder statute for domestic homicides.¹⁷⁵

168. Candor may have a number of benefits. See Taslitz, *supra* note 15, at 399-401 (arguing that candor may cause decisionmakers to produce better decisions, as a result of requiring them to articulate more clearly the basis for their action, and may improve legitimacy).

169. The political decision, broadly described, is to give the jury the right to make the moral judgment of guilt in a more contextualized factual setting that is predictably more favorable to apparent victims of domestic battering.

170. See FED. R. EVID. 413 (allowing, in criminal sexual assault cases, evidence of defendant's prior commission of sexual assault); FED. R. EVID. 414 (allowing evidence of similar crimes in criminal child molestation cases); FED. R. EVID. 415 (allowing, in civil cases concerning sexual assault or child molestation, evidence of similar acts).

171. See Orenstein, *supra* note 91, at 61-68.

172. See Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1506-16 (1996).

173. See *id.* at 1488-1506. This result would be reached by defining a new category of "other crimes" evidence that would be admitted as an explicit exception to the general prohibition against receipt of character evidence to prove conduct circumstantially. See FED. R. EVID. 404(b).

174. See Raeder, *supra* note 33, at 178-87.

175. See Raeder, *supra* note 172, at 1477-88. Of these proposals, I find most troubling the recommendation that states create a new class of first-degree murder when the defendant has committed past acts of domestic violence. I believe that American criminal sentences are not currently too lenient and that new, harsher sentencing regimes should, in general, be carefully scrutinized. If the increase in penalty for domestic homicide can be shown to be justified by deterring future deaths or incapacitating beyond their crime-prone years men who are likely to kill again, then it is proper. If, however, the purpose

Most of these changes target evidentiary law rather than the substantive criminal law, but all intend to steer substantive outcomes in a specific direction. It is likely that many of them will soon become law. In retrospect, the broad admissibility of BWS, achieved principally through judicial action, and the implementation of "rape shield" rules, which resulted principally from legislation roughly a decade earlier, are now part of a powerful movement. The time has come to recognize that this body of legal changes is a response to a newly perceived social reality rather than simply an unrelated and neutral evolution of legal principles.¹⁷⁶

Cases that involve what I have termed "attractive vigilantism" should be understood, if not controlled, by another type of characterization. Such cases should be recognized for both the tragedy and the anomaly that they represent. Rather than signifying a deterioration of society's willingness to impose moral judgments, defenses based on attractive vigilantism reflect other, more prosaic concerns. Not guilty verdicts in such cases will occur as long as society fears senseless violence and as long as defense lawyers can paint a decedent as deserving of his or her fate. My argument is not that our most difficult and emotional cases are usually decided correctly—only that questionable results in some of these cases do

is chiefly to impose a harsh punishment for symbolic purposes, the effort is misguided. Increasing the number of defendants sentenced to mandatory life without parole or those eligible for the death penalty has consequences that are far too serious. Men in domestic homicide cases already are given substantial sentences, receiving on average sentences of 16.5 years in 1988, *see supra* note 37, and, given our nation's mood, these sentences are likely to grow longer without the straitjacketing effects of first-degree murder sentencing.

176. One reason I make this suggestion is that I do not support a wholesale change in the impediments to convictions and, more specifically, the character rules that are now largely favorable to criminal defendants. *See, e.g.*, FED. R. EVID. 404 (excluding, generally, evidence of character). How many guilty defendants should go free lest an innocent one be improperly convicted? The answer to that question is at the heart of our substantive criminal law and of much of criminal procedure. It is also near the heart of some evidentiary rules, specifically the rules regarding character. *See, e.g.*, FED. R. EVID. 404(a) advisory committee note (explaining that the basic rule in most jurisdictions rejecting circumstantial use of character evidence except when offered by the defendant "is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions"). The erosion of the strong bar against character evidence offered against the defendant, which began in the area of sexual violence against women and is now moving to domestic homicide and domestic violence prosecutions, may ultimately be generalized. We may have seen the beginning of the end of the character rules as they have been understood for most of this nation's history. Perhaps these rules are antiquated and misguided and should be changed, but I feel otherwise and believe they should be altered only in the area of violence against women, where the social justification is very substantial.

not represent a general demise of the justice system or society's loss of basic values.

Admittedly, the specific benefit of identifying and limiting the extension of BWS principles to more problematic areas is gained at a cost; the story of BWS's legal foothold inevitably provides a model for other political influences to affect evidence law. Political and social judgments motivate many, if not all, changes in law—whether they are made by legislatures or courts and whether they occur in the law of evidence or elsewhere. However, when a court makes changes based on political and social considerations while claiming the change is based on a more neutral basis, such as social science, the court may undercut its claim to legitimacy, which should rest on bases more neutral than political responsiveness.¹⁷⁷ With regard to BWS, however, any loss of legitimacy has been small, because the courts are in accord with community sentiment, and where democratically elected bodies have acted, they have been in agreement with those courts that broadly admit BWS.

From a long-term perspective, a more significant danger is that courts will be encouraged to abandon further their role as a brake on popular sentiment, becoming even more responsive to social and political forces and increasingly shaping legal doctrines to fit majority sentiment while claiming to be responding to neutral concerns.¹⁷⁸ Excessive political sensitivity is already a serious problem in criminal cases, particularly where the presiding judges are elected.¹⁷⁹ The ultimate danger is that the popular concern of the day will dictate not only the content of statutes but also judicial rulings and caselaw in general.¹⁸⁰ Recognizing the role of

177. See David L. Faigman, "Normative Constitutional Fact-Finding": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 601-02 (1991) (arguing that when properly used, empirical evidence aids the Supreme Court in exercising its discretion within accepted boundaries and therefore helps protect its legitimacy—a matter of concern because the Court is not a democratically elected body).

178. See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused*, 44 SYRACUSE L. REV. 1079, 1095-96 (1993) (contending that elective politics are unlikely to support measures to protect rights of criminal defendants, and courts need to be conscious of their unique role in providing such protection).

179. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760-80 (1995) (cataloging the impact of popular pressure in favor of the death penalty upon state court judges, most of whom face election either initially or through retention elections).

180. Mosteller, *supra* note 14, at 513-15 (suggesting that changes in laws affecting

politics in altering evidence rules is likely to have a minor effect, at most, given the powerful political pressures already at work.

At a more general level, my argument that politics have played a role in remaking certain evidence rules may reflect merely another postmodern insight, brought rather late to the field of evidence. No doubt politics in support of a dominant value structure have always played a major role in the shaping of evidence rules. Previously, these politics were not recognized as such because they were couched in the purportedly neutral value system of a professional elite who professed to seek only accuracy in factual adjudications. For many like myself, these values not only seemed to be neutral, but also had the additional benefit of producing results generally consistent with traditional liberalism. What I suggest in this Article may be nothing more than a recognition that political forces are now openly shaping a field of law—the law of evidence—where such forces have been previously less overt.

Overt political involvement is often most apparent when evidence rules affect criminal litigation. Since the making of criminal law—the determination of who should be punished, how, and for what types of activity—has long been recognized to reflect political judgments, a similar role for politics in the evidence law employed in criminal litigation is hardly shocking. Nevertheless, some may argue that the basic aspiration of evidence law—the determination of facts—is distinct enough from the value-laden issue of crime definition so that, even if political forces play a role in criminal law formulation, these forces should not be allowed to shape evidence rules. The argument clearly has some merit, but even at the technical level of distinguishing the functions of the two bodies of law, it is not sufficient to set evidence rules to one side. In some types of cases, such as many battered woman self-defense cases, the most appropriate way to achieve a desired substantive result may be to admit more contextual information about the defendant. It may be that no substantive change in the law can capture the complexity of a needed correction in self-defense law as efficiently and accurately as an evidentiary change can.

Even if it is agreed that politics have an inevitable role in shaping law, and that evidence law is not entirely immune to the

criminal trials are likely to be those supporting crime control in response to popular furor against violent crime).

effects of this role, critics of my position may argue that recognizing a role for politics is only appropriate as an attempt to criticize and correct the law retrospectively. I appear to do more—to suggest that good politics can turn bad evidentiary principles into good law and, prospectively, to welcome politics to the task of shaping of evidence rules.¹⁸¹ Critics may contend that even if one is convinced politics have played a role and therefore that accuracy and honesty support a recognition of that role,¹⁸² politics should continue to be resisted, and the appropriate *ex ante* position with regard to rule revision should be that politics remain an impermissible factor in shaping evidence law. I am attracted to this more negative view, and remain ambivalent that politics should be welcomed.

The more significant point, however, can be found in my observation that politics are now a major part of the shaping of some types of evidence law and my prediction that it will expand its influence.¹⁸³ Politics in the near and intermediate future will likely affect the law through the efforts of victims and other

181. That charge is a possible interpretation of my position that BWS, although methodologically flawed, was appropriately admitted given the social reality of domestic violence. What I am arguing, however, is that BWS evidence on balance helped produce more accurate results than would have resulted from its exclusion, given the limits of our ability to understand and describe social phenomena, the magnitude of the problem of domestic violence, and the requirement that cases be decided without delay.

182. A retrospective recognition of the role of politics has been very beneficial in the refinement of BWS admissibility rules. Helpful criticism that explicitly or implicitly recognized the political component of Lenore Walker's initial formulation has come from those who argue for scientific validity, such as Professor Faigman, *see supra* notes 66, 68–69 and accompanying text, and those who advocate using evidence rules more instrumentally, such as Professors Ammons and Moore, *see supra* note 72. Both argue against a rigid formulation of a syndrome and for admission of more flexible contextual information. The end product of both types of criticism may be group character evidence that is more validly formulated; such a development would also aid additional classes of victims. *See generally supra* note 81.

183. A continuing role for politics is virtually assured by Congress' realization, after enactment of Federal Rules of Evidence 413–15, that it can create new rules of evidence without the prior involvement, let alone blessing, of any professional evidence elite. *See* Katherine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 564–69 (1997) (tracing briefly Congress' passage of Rules 413–15, the post-passage submission of the new Rules to the U.S. Judicial Conference, and Congress' subsequent lack of response to the Conference's advice that the Rules not be adopted). *See also* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES, 159 F.R.D. 51, 51–54 (urging Congress to reconsider its policy determinations underlying the passage of Rules 413–15).

groups that support greater admission of evidence, often styled as "truth-in-evidence" movements. Concretely, such efforts are likely to lead to further admissibility of previously excluded classes of evidence regarding the defendant, especially evidence regarding the defendant's character and past bad acts. Indeed, a number of the proposed initiatives of the effort to curb violence against women would do just this.¹⁸⁴ Additional group character regarding defendants, victims, and witnesses may also be admitted. I expect that our *ex ante* perspective will quickly become an *ex post* perspective that must recognize the role political forces have played in promulgating some new evidence rules, particularly those rules regarding individual and group character.

If my predictions are accurate, I suggest a strategy for evidence traditionalists: provide the jury with a basis—a context—for understanding and evaluating these new types of evidence. To assist with accuracy and neutrality, juries will need a body of knowledge and methodology to accompany the new types of evidence regarding the defendant's character and past behavior and to assist them in distinguishing accurate indicators of guilt from evidence that merely produces prejudice. Some of this companion information should be group character evidence.

184. See *supra* notes 171–75 and accompanying text.