The Gender Gap: Revealing Inequities in Admission of Social Science Evidence in Criminal Cases

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I. INTRODUCTION

The history of the admission of Battered Woman Syndrome and Rape Trauma Syndrome evidence reveals more than the favorable disposition of courts towards women as victims of violence. It reveals a more basic bias in the application of the rules of evidence in a criminal case. Whereas the evidentiary pendulum is in theory weighted to swing in favor of the accused's right to present witnesses, it is in practice weighted toward the interests of the participant perceived by society as having more political clout. In marked ignorance or disregard of the dictates of the Sixth Amendment of the United States Constitution, courts routinely reach out to deny the average criminal defendant—typically male and African-American—the right to present the same quality of evidence admitted on behalf of the victimized woman.

Neither Battered Woman Syndrome nor Rape Trauma Syndrome evidence can meet the requirements for admission under the rules of evidence as interpreted by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc. However, because the Court "emphasize[d]" that the test it set out was a "flexible one," lower courts have clung to that phrase and swung right past Daubert altogether, with barely a bow or a nod to its substance. Courts have embraced both syndromes as a matter of good social policy, rather than a matter of good social science.

Courts and commentators ignore the inequalities that acceptance of these two syndromes has made plain. Permitting prosecutors to proffer Rape Trauma Syndrome against criminal defendants when it does not meet the strictures of Daubert actually lowers the prosecution's burden...
of proof. Admitting into evidence either syndrome, whether it is Rape Trauma Syndrome by prosecutors or Battered Woman Syndrome by women defendants, while denying similar, or even more reliable, social science expertise on behalf of the typical criminal defendant, violates basic principles of fairness inherent in the neutral application of evidence rules, as well as the defendant’s Sixth Amendment rights. This article calls for a genuine evaluation of the admission of Battered Woman Syndrome and Rape Trauma Syndrome in light of the requirements of Daubert and urges that all reasonable doubts about the reliability of social science evidence in criminal cases be resolved in favor of the accused—not the cause, person, or matter which society deems politically preferable.

Part II of this article explores the admissibility of Battered Woman Syndrome and Rape Trauma Syndrome under Daubert and discusses why and how these two syndromes continue to find admission in criminal cases. Part III criticizes the feminist literature urging that evidence law move beyond the strictures of the two syndromes and allow a broader form of “social context evidence,” arguing that such evidence, if proffered by the prosecution in a criminal case, is a form of inadmissible character evidence which impermissibly undermines the presumption of innocence. Part IV discusses the bias in the courts’ admissibility decisions, illustrating how social science evidence which is very similar to the two syndromes is rejected when offered on behalf of the average criminal defendant. Finally, Part V proposes that a return to the proper balance in resolving evidentiary tensions means: (1) a substantive, and not nominal, application of Daubert to evidence offered by the prosecution; and (2) a principled and thorough evaluation of the defendant’s constitutional right to present a defense.

II. THE ADMISSION OF BATTERED WOMAN SYNDROME AND RAPE TRAUMA SYNDROME: TRUE STORIES

A. Gatekeeping Battered Woman Syndrome

The story of the origin of Battered Woman Syndrome (BWS) is oft-told. A lone researcher struck while the iron was hot, and, despite flawed methodology, the mostly unsubstantiated theory went from a flimsy toehold to nationwide acceptance in the courts to codification in some states’ rules of evidence. In 1979 Lenore Walker authored the
book, *The Battered Woman,*\(^4\) followed five years later by *The Battered Woman Syndrome.*\(^5\) She proffered in pencil a theory that has become an indelible signature.

The syndrome is an attempt to categorize and explain the behaviors of a "battered woman," defined as one who has repeatedly been physically, sexually, or seriously psychologically abused by a partner in an intimate relationship.\(^6\) In order to qualify for BWS, a particular cycle has to have occurred at least two times.\(^7\) That cycle has three phases. The first is a "tension building phase,"\(^8\) followed by "the acute battering incident,"\(^9\) and then the "loving contrition phase."\(^10\) Combined with the cycle theory is the theory of "learned helplessness," describing a woman's behavioral state after repeated random acts of violence, which cause her to believe there is nothing she can do to avoid the violence and no escape without further harm.\(^11\)

The publication of Dr. Walker's first book was in lock-step with the Women's Movement in the United States. By the time she published her first book, the movement had made tremendous strides in exposing the problem of domestic violence,\(^12\) and the problem of battered women was an issue that gripped society. After a few false starts,\(^13\) BWS entered courtrooms across the United States with a wink to the inadequacy of the underlying methodology and research.\(^14\) The admission of BWS

7. Id.
8. In this phase, which has no set duration, abuse occurs only in relatively minor forms such as pinching, slapping, and controlled verbal or psychological abuse. Id. at 42.
9. It is relatively short in duration. The abuse during this phase is severe, violent, and may be life-threatening. Id. at 43-44.
10. Here, the batterer apologizes, tries to make amends and promises to do better. Id. at 44-45.
11. Id. at 50-51.
14. By 1986, Lenore Walker had testified as an expert in sixty-five cases in which battered women had killed or hurt their abusers. Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 1, 28 (1991) (citing Lenore Walker, A Response to Elizabeth M. Schneider's Describing and Changing, 9 WOMEN'S RTS. L. REP. 223, 224 (1986)).
ultimately changed the landscape of self-defense law for women who struck back at their batterers.15

The first case to break the ice on admissibility was Ibn-Tamas v. United States,16 where the District of Columbia Court of Appeals recognized that BWS could be helpful to the finder of fact.17 The defendant in Ibn-Tamas was a battered woman who shot her abusive husband and claimed self-defense.18 For admissibility of expert testimony, the court employed the test of Dyas v. United States,19 a part of which was that the subject matter “must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman.”20 Unlike the courts before it, the District of Columbia court held that BWS was indeed “beyond the ken of the average layman,”21 and that BWS would have enhanced the defendant’s general credibility during cross-examination about the relationship with her husband and would have supported her testimony that her husband’s actions on the day of the shooting led her to believe she was in imminent danger.22 However, the court did not reach the scientific reliability of the theory. The court remanded the case to the trial court to decide whether BWS met a further criteria for admission: whether it was “sufficiently established to have gained general acceptance in the particular field in which it belongs.”23

Just two years later the supreme courts of Georgia and Maine accepted BWS into the courtroom with absolutely no analysis of its

15. See Christopher Slobogin, Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?, 40 WM. & MARY L. REV. 1, 29 (1998) (“[T]he ground swell of support for battered women has led courts and legislatures, implicitly or explicitly, to subjectify self-defense law in this type of case. In other words, substantive law has been changed in response to political pressures, and thus the syndrome no longer pushes the doctrinal envelope.”) (citations omitted).
17. Id. at 635.
18. Id. at 628.
21. Id. at 635.
22. Id. at 634.
23. Id. at 637 (quoting Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1910)).

Prior to the Supreme Court’s decision in Daubert in 1993, most courts employed the Frye test for admissibility of novel scientific evidence, while a minority used a more general relevance test based upon Federal Rule of Evidence 702. On remand, the trial court found that the defense had not shown that the methodology was generally accepted, a discretionary determination affirmed by the court of appeals. Ibn-Tamas v. United States, 455 A.2d 893, 894 (D.C. 1983).
scientific reliability. The only issues that were raised before each court, and overcome, were whether the evidence would be helpful to the finder of fact, usurp the jury’s function, or improperly embrace the ultimate issue in the case. Both courts relied on *Ibn-Tamas* and set the trend toward admissibility.

In 1984, the New Jersey Supreme Court directly addressed the scientific reliability of BWS in the influential case, *State v. Kelly*. The court interpreted New Jersey’s evidence rule to require that the “technique or mode of analysis used by the expert must have a sufficient scientific basis to produce uniform and reasonably reliable results so as to contribute materially to the ascertainment of the truth.” The court used three criteria to determine the general acceptance of BWS:

(1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis; (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and (3) by judicial opinions that indicate the expert’s premises have gained general acceptance.

The court found that the first prong was met through the testimony of the expert herself, who testified that BWS was “acknowledged and accepted” by practitioners and professors in psychology and psychiatry. The expert also testified that the syndrome had been discussed at several symposia. As to the second prong, the court noted that there were five books and around seventy-five articles on the topic, but did not analyze the nature of the literature, whether critical, salutary, or merely descriptive. Finally, the court noted that decisions on BWS had been split. With that analysis, the court held that BWS had “a sufficient scientific basis to produce uniform and reasonably reliable results.”

25. 277 S.E.2d at 683; 438 A.2d at 894.
26. 277 S.E.2d at 682-83; 438 A.2d at 894.
28. *Id.* at 380 (citations omitted).
29. *Id.* (citation omitted).
30. *Id.*
31. *Id.*
32. *Id.*
33. *Kelly, 478 A.2d at 380.*
34. *Id.*
That leap of faith, from self-serving expert testimony and the mere fact of publication to a conclusion of scientific validity, is unfortunately the norm in judicial analyses of BWS, as well as analyses of most other fields of social science research. The court made no attempt on its own to understand the methodology or the underlying bases for the conclusions. The courts to follow added no more to the analysis, but simply bowed to the testimony of the experts before them. By 1992, thirty-two states had allowed the use of BWS. In addition, numerous states have codified the admissibility of BWS in the courtroom. A few courts have even found that an attorney's failure to hire an expert in the field or explore a battered woman's defense met the almost impossible standards of an ineffective assistance of counsel claim. The courts have never

35. Professor Slobogin remarks that "few psychological theories or constructs proffered in criminal cases meet [Daubert]." Christopher Slobogin, The Admissibility of Behavioral Science Information in Criminal Trials from Primitivism to Daubert to Voice, 5 PSYCHOL. PUB. POL'Y & L. 100, 105 (1999). He recites error rates well above fifty percent for diagnoses such as antisocial personality and schizoid personality, and not much better for schizophrenia and organic disorder. Id. at 105-06.

36. That was one of the major criticisms of the Frye test. See, e.g., Paul Giannelli, The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later, 80 COLUM. L. REV. 1197, 1218-31 (1980) (critiquing courts' application of Frye by simply bowing to other courts' decisions). The acceptance of BWS is a mini-course on what was wrong with the "general acceptance" standard: it became a talismanic phrase invoked whenever all of the other courts had decided BWS was generally admissible or when one testifying expert said it was. It had little to do with actual reliability.

Upon careful reflection and analysis, it is the opinion of this court that the theory underlying [BWS] has indeed passed beyond the experimental stage and gained a substantial enough scientific acceptance to warrant admissibility. According to Dr. Blackman, numerous articles and books have been published about the battered woman's syndrome; and recent findings of researchers in the field have confirmed its presence and thereby indicated that the scientific community accepts its underlying premises. Id. at 363; see also State v. Koss, 551 N.E.2d 970, 972 (Ohio 1990) (noting that "[s]ince 1981, several books and articles have been written on this subject. In jurisdictions which have been confronted with this issue, most have allowed expert testimony on the battered woman syndrome"); State v. Allery, 682 P.2d 312, 315-16 (Wash. 1984) (discussing expert testimony that BWS is a "recognized phenomenon in the psychiatric profession and is defined as a technical term of art in professional diagnostic textbooks," thereby joining Ibn-Tamas).


looked back, and to date no court has earnestly evaluated the scientific validity of BWS. To the extent a party has attempted to show the methodology flawed, the response of the District of Columbia Court of Appeals in *Nixon v. United States*\(^4\) is typical. The court did not reanalyze the underlying foundation of BWS, but relied on the fact that the majority of jurisdictions have found that BWS is admissible.\(^4\)

In determining the reliability of BWS in the courtroom, all federal and most state courts today would have to apply the Supreme Court's decision in *Daubert*, which interprets Federal Rule of Evidence 702.\(^4\) The court decided *Daubert* against a backdrop of the older standard of admissibility articulated in *Frye v. United States,*\(^4\) which considered whether the technique or method had "gained general acceptance in the particular field in which it belongs."\(^4\) Rather than leaving the determination of admissibility to a random, ever-changing group of scientists, the Supreme Court, deciding that the Federal Rules of Evidence overruled *Frye,*\(^4\) shifted the determination to the courts and charged them to act as the gatekeepers of reliable scientific evidence.\(^4\) Courts were instructed to engage in a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue."\(^4\) In making this determination, the Court made a few "general observations" about four factors the courts could consider: whether the theory or technique can be (and has been) tested;

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Humphrey, 921 P.2d 1 (Cal. 1996); Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989)).

41. 728 A.2d 582 (D.C. 1999).
42. Id. at 589.
43. At the time *Daubert* was decided, Rule 702 read: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702 (2000). The Rule was recently revised to add three further criteria for admissibility in response to *Daubert": "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." FED. R. EVID. 702. Given the broad language of the new rule, it is unlikely to effect any changes in the courts' handling of expert evidence under *Daubert*.
44. 293 F. 1013 (D.C. Cir. 1910).
45. Id. at 1014.
47. Id. at 597.
48. Id. at 592-93.
whether the theory or technique has been subjected to peer review and publication; whether the known or potential rate of error can be determined; and whether the technique has been generally accepted within the relevant scientific community. In the next breath, the Court emphasized that the inquiry as to scientific reliability is "a flexible one."

The four factors of Daubert are easily applied to a social science theory such as BWS. As to the first factor (whether the theory can be and has been tested), one of the first principles of the social science method is "falsifiability," in which a researcher develops a hypothesis and then tests for the "null hypothesis." The null hypothesis is the opposite conclusion—in the case of BWS, that there is no identifiable syndrome which is unique to battered women. Testing that hypothesis would involve studying those who are not battered women—perhaps those who have suffered other kinds of trauma or none whatsoever—to compare against the observed traits of battered women. This was not done at the time BWS was accepted into the courtroom. Rather, Leonore Walker interviewed approximately 120 women who self-reported battery. Contrary to set procedures for conducting research,

49. Id. at 593-94.
50. Id. at 594. More recently, in Kumho Tire Co. v. Carmichael, the Court declared that Daubert applied to all expert testimony covered by Rule 702—not just "scientific" knowledge, but also "technical" and "specialized" knowledge. 526 U.S. 137, 147-49 (1999). Kumho thus put to rest any confusion over whether Daubert applied to the "soft sciences" such as social science.

51. A substantive application of Daubert involves applying the suggested factors where, and if, applicable—it does not mean randomly picking and choosing when it is convenient or desirable to apply those factors. Kumho Tire's decision to apply Daubert to fields other than those that are "scientific" suggests this proposition, and the Kumho Court agreed that the four factors should be employed where they are "pertinent in assessing reliability depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." 526 U.S. at 150. The factors are "pertinent" to social science research, which follows the scientific method of creating and rejecting hypotheses through testing, setting up controls and quality standards, and reducing the possibility of examiner bias and error.


53. The dictionary defines a "syndrome" as "a group of signs and symptoms that occur together and characterize a particular abnormality." MERRIAM-WEBSTER COLLEGIATE DICTIONARY (10th ed. 1998).

54. See Faigman & Wright, supra note 40, at 106 ("[R]esearchers of battered woman syndrome have not come close to a serious scientific examination of their hypotheses"; "failure to subject syndrome research to falsification attempts is perhaps the greatest weakness of the battered woman syndrome theory.")

55. WALKER, supra note 4, at xiii. Walker herself admits: "These women were not randomly selected, and they cannot be considered a legitimate data base from which
Walker never questioned or tested key assumptions: (1) these women were battered; and (2) the characteristics observed were unique to battered women. Further, Professor David Faigman and Amy Wright have observed that Walker's own studies do not show what they purport to show. For example, while Walker claims a three-phase cycle, only about thirty-eight percent of the women studied actually experienced all three phases.

On the second Daubert factor, peer review and publication, BWS likewise fails to impress. The fact that interest in the topic has generated articles and books does not adequately address this factor. The question to be answered is whether peers in the relevant fields have reviewed and commented on the methods and conclusions of the study or publication, and whether those peers validated or panned it. In the case of BWS, Walker's seminal books, and much of the commentary to follow, were printed in the popular press, not a peer-reviewed journal. Therefore, Walker's work was not meaningfully critiqued.

Third, to determine rate of error, the questions for courtroom purposes are the extent to which the syndrome accurately describes a woman who has been beaten, in order to use those attributes to help her make a claim of self-defense; and the extent to which the syndrome accurately pinpoints beating as the cause of the woman's behavior, when whether she was beaten is an issue. Neither can be accurately determined as long as the existence of the syndrome is in question. If the syndrome does not exist, there is no predictive value, and the error rate will be intolerably high. If it is argued that a syndrome of sorts exists, research could compare victims of other trauma or no trauma with victims of domestic violence to determine overlap and uniqueness. Those studies have not been conducted, as thus far research concerning BWS has been the sole province of those who are backers of the syndrome and who have little incentive to conduct confirmatory studies.

Finally, courts found that BWS was generally accepted by listening to the expert witness before them tell them so; by defining the field narrowly to those who study battered women, as opposed to social scientists or psychologists generally; and by finding that other courts to make specific generalizations." Id.

56. Id.
57. See Faigman & Wright, supra note 40, at 77.
58. Id. at 77-78.
59. See id. at 108 (observing that the "outlet of choice" for the principal research projects upon which the theory is based has been the public press).
found the syndrome generally accepted. To the extent that "general acceptance" is a proxy for reliability, the courts have not adequately and independently determined that BWS is generally accepted in the relevant scientific community.

Given the lack of demonstrated reliability, why have courts not seriously reevaluated BWS in light of Daubert and Kumho? Professor Robert Mosteller plausibly suggests politics:

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. . . . 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 women should generally be given some help in prevailing. 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.61

The argument for admissibility on political grounds is an appealing one. Additionally, allowing BWS in on behalf of the criminal defendant, despite lack of indicia of reliability, also has a legitimate legal basis—it comports with the defendant's Sixth Amendment right to present a defense.63

The rub, however, is two-fold. First, BWS is not always used defensively. It is sometimes proffered by the prosecution when the defendant is charged with causing physical injury or death to the victim, ostensibly to show that the victim acted consistently with a battered woman, but undeniably having the effect of showing the defendant to

60. See supra notes 29-36 and accompanying text.
61. Mosteller, supra note 39, at 486-87. Professor Taslitz endorses this theme and argues that these political results should be embraced and not apologized for. Andrew E. Taslitz, A Feminist Approach to Social Science Evidence: Foundations, 5 MICH. J. GENDER & L. 1, 71-72 (1998). See also Slobogin, supra note 35, at 118 (predicting an uproar if courts were to disallow BWS at this point: "To avoid such damage to the political viability of the system, one might conscientiously endorse continued admission of this syndrome testimony, despite its suspect nature.").
63. See infra notes 186-227 and accompanying text.
have acted consistently with a batterer. BWS is also used by the prosecution to counteract the testimony of the battered woman when she is the defendant, to show she acted inconsistently with BWS. As will be discussed, such prosecutorial use of the syndrome violates evidentiary rules and constitutional principles. Second, as will also be discussed, defensive use of BWS, while a laudable victory for women, has no spillover effect into the rights of the typical criminal defendant proffering similar kinds of social science evidence.

B. Gatekeeping Rape Trauma Syndrome

Like the evolution of the Battered Woman Syndrome, one study virtually propelled Rape Trauma Syndrome (RTS) to the forefront of the social science agenda and into the courtroom. Ann Burgess, a professor of nursing, and Lynda Holmstrom, a professor of sociology, coined the phrase and ascribed to it a two-stage process: an “acute phase,” consisting of impact, somatic, and emotional reactions, followed by a long-term “reorganization” phase, consisting of increased motor activity, rape-related phobias, nightmares, and difficulties maintaining close relationships. The study was limited in scope, the result of an interview of 146 persons reporting their rapes at the emergency room of Boston City Hospital; and, while calling it a “syndrome”—indicating some identifiable collection of symptoms—the research itself nonetheless revealed that there was not much of a pattern to the reactions of the self-reporting victims. For example, the acute stress reaction could either be expressed—as fear, anger, or anxiety—or it could be passive and controlled, showing an outwardly calm and quiet victim. Similarly, in the reorganization phase, some victims outwardly exhibited psychological or social problems, while others outwardly appeared unaffected. This would seem to leave the only commonality among the victims their self-expressed report of rape. As with Walker’s BWS

65. See id. at 294 n.14 (citing cases).
67. Id. at 982-984.
68. Id. at 981. Of the 146 victims reporting, 109 were adult women, 34 were female children, and 3 were male children. Id.
69. Id.
70. Id. at 982.
71. Id. at 983, 985.
study, the methodological problems with this study included lack of a control group, a small and potentially homogenous sample size, and self-selection by those willing to be interviewed.  

Later studies did little more to substantiate the existence of an identifiable syndrome. The studies found that victims’ reactions to rape vary from individual to individual with no predictable pattern, that victims of rape experience no set of symptoms that set them apart from victims of other traumatic events, and that there is little distinction between the reactions of a victim of rape and the reactions of the victim of any other sort of stressful sexual event. While the Fourth Edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) identifies rape as one of the potential stressors which causes post-traumatic stress disorder (PTSD), such a categorization does not render RTS any more reliable as an indicator that rape is the cause of the observed symptoms. The fact that a person is suffering from PTSD suggests a traumatic event of some kind at some point, but does not illuminate the cause or the timing.

Rape Trauma Syndrome emerged in the courtrooms in the early 1980s, on the heels of the Women's Movement and the acceptance of BWS, and, while meeting with mixed success at first, has passed muster with every court considering the evidence since 1989. The quality of the science did not increase, only the courts’ willingness to embrace the theory.

72. See Dean G. Kilpatrick et al., The Aftermath of Rape: Recent Empirical Findings, 49 AM. J. ORTHOPSYCHIATRY 658, 658-59 (1979) (describing flawed methodology of rape research to date).

73. “Each rape victim responds to and integrates the experience differently depending on her age, life situation, the circumstances of the rape, her specific personality style, and the responses of those from whom she seeks support.” Malkah T. Notman & Carol C. Nadelson, The Rape Victim: Psychodynamic Considerations, 133 AM. J. PSYCHIATRY 408, 409 (1976); see also Sedelle Katz & Mary Ann Mazur, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS, 215-31 (1979) (describing wide variety of responses of rape victims).

74. See Burgess & Holstrom, supra note 66, at 981-82 (noting that a sexually stressful event could include where the victim consented to certain sexual acts initially but the situation went beyond the victim’s expectations); Robert R. Lawrence, Note, Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony of Rape Trauma Syndrome in Criminal Proceedings, 70 VA. L. REV. 1657, 1673-80 (1984) (summarizing the studies on RTS).

75. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994) [hereinafter DSM-IV]. PTSD is described as “the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity.”
The only courts which seriously addressed the reliability and validity of RTS found it inadmissible, and the conclusions of those courts remain valid today. For example, in *State v. Saldana*, the Supreme Court of Minnesota excluded evidence of the syndrome because RTS "is not the type of scientific test that accurately and reliably determines whether a rape has occurred." The court wrote: "At best, the syndrome describes only symptoms that occur with some frequency, but makes no pretense of describing every single case." In a more in-depth analysis of the issue, the California Supreme Court in *People v. Bledsoe* agreed that RTS was inadmissible to prove that a rape had occurred, recognizing that the syndrome was developed as a treatment tool and not devised to determine the truth of the allegations. The court recognized that "as a rule, rape counselors do not probe inconsistencies in their clients' descriptions of the facts of the incident, nor do they conduct independent investigations to determine whether other evidence corroborates or contradicts their clients' renditions." Likewise, because the studies have emanated from the counseling process, "none of the studies has attempted independently to verify the 'truth' of the clients' recollections or to determine the legal implication of the clients' factual accounts." Finally, in *State v. Black*, the Washington Supreme Court also found RTS an unreliable means for proving lack of consent in a rape case. Reviewing studies on the syndrome, the court found that no "typical" response to rape emerges, that similar symptoms may be triggered by any traumatic event, and that peers have found the methodology of the studies thus far severely lacking.

Of the courts that have allowed RTS testimony, only one has even considered the issue of its scientific reliability. In a one-sentence

76. 324 N.W.2d 227 (Minn. 1982).
77. Id. at 229.
78. Id. at 230.
80. Id. at 300-01.
81. Id.
82. 745 P.2d 12 (Wash. 1987).
83. Id. at 19. The court used the Frye "general acceptance" test for admissibility. Id. at 15.
84. Id. at 16.
85. Id. Traumatic events that trigger such responses can include "bereavement, chronic illness, marital conflict, assault, military combat, natural disasters, automobile accidents, bombing or torture." Id. (citing AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236-38 (3d ed. 1980)).
86. Id. at 17.
analysis, the Supreme Court of Kansas answered the issue thus: “An examination of the literature clearly demonstrates that the so-called ‘rape trauma syndrome’ is generally accepted to be a common reaction to sexual assault.” In support, the court cited a handbook, a textbook, two Burgess and Holstrom books, and pages out of three other books which mention the syndrome. The court did not further analyze the cited materials or the underlying methodology: there are books, therefore the theory must be generally accepted.

The other courts which have admitted RTS have not analyzed the reliability of the syndrome, but, to the extent the issue is even mentioned, they rely on the decisions of other courts accepting RTS as evidence of its reliability. The only discussion of issues regarding admissibility involves a finding that RTS is helpful to the jury, that the testimony was not confusing or misleading, or, that the expert expressed no personal opinion on the credibility of the victim. By far the most popular reason for the introduction of RTS, even admitting its tentative reliability, is that it is not being offered to show that a rape occurred, but only to explain the behavior of the victim in the face of a defense challenge of her behavior. However, if RTS is unreliable to show that a rape occurred, then it is equally unreliable to show behaviors “consistent with” rape. The difference is purely semantic. The inescapable consequence of such testimony is that jurors understand that the described behaviors are consistent with rape because people who are raped exhibit these symptoms, collectively called “Rape Trauma Syndrome.” It would be virtually impossible for a juror to parse out the forbidden from the permitted inference. Agreeing that this is a distinction without a difference, the New Mexico Supreme Court, finding RTS reliable for either purpose, stated:

87. State v. Marks, 647 P.2d 1292, 1299 (Kan. 1982).
88. Id.
91. Id.
93. See, e.g., People v. Hampton, 746 P.2d 947, 951-53 (Colo. 1987); Ali, 660 A.2d at 351-52; Hutton v. State, 663 A.2d 1289, 1301 (Md. App. 1995); People v. Taylor, 552 N.E.2d 131, 138 (N.Y. 1990); see also Mosteller, supra note 39, at 464: Psychological syndrome evidence can almost never diagnose the cause, but when group character evidence is offered 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.”
Both of these purposes for which PTSD evidence is offered rest on the valid scientific premise that victims of sexual abuse exhibit identifiable symptoms. Either the PTSD diagnosis is a valid scientific technique for identifying certain symptoms of sexual abuse or it is not. Allowing PTSD testimony to explain a complainant's apparent inconsistent behavior after the alleged incident is no less prejudicial than allowing an expert to testify that the complainant's symptoms are consistent with sexual abuse. In the first instance, the jury can just as easily infer from the explanatory testimony that the complainant was raped because the expert is testifying that rape victims act a certain way and the complainant acted that way.  

Only one court has directly discussed whether RTS is admissible under Daubert. In what might be called the Daubert "two-step," the Supreme Court of Vermont invoked Daubert but then did not require the State to present any evidence on the four factors of the test. Rather, it held the trial court could find the evidence admissible "because its reliability equals that of other technical evidence we have given trial courts the discretion to admit and the evaluation of other courts allowing the admission of the evidence is complete and persuasive." Using a "flexible standard of admissibility that is fully consistent with Daubert," the court followed its earlier opinions finding PTSD (of which RTS may be considered a subcategory) generally admissible, with no analysis of the methodology.  

Were RTS to be substantively analyzed under Daubert, it would not pass the test. Research subsequent to Burgess's and Holmstrom's first study has borne out that there is no identifiable and predictable set of behaviors which describe a rape victim. While RTS may serve well its intended purpose—therapy and treatment—it falls short of a standard of reliability needed before jurors rely on it to help them evaluate a rape case in a court of law.

96. Id.  
97. Id. at 841.  
98. Id. at 841-42. Professor Slobogin has noted that Daubert has had "remarkably little impact on either the extent or the content of psychological testimony in criminal cases." Slobogin, supra note 35, at 106. He cites a massive study, which reviewed every appellate decision dealing with the admissibility of BWS and RTS since Daubert in 1993 through 1997 and which concluded, "[c]ourts are not generally engaging in scientific reviews of the proffered syndrome . . . . Most typically, the focus is on general acceptance and the qualifications of the expert, and even then the judicial review tends to be cursory." Id. (quoting study).
Neither BWS nor RTS pass evidentiary muster, but both have passed through the courtroom doors to aid the cause of female victims of violence. However, as the next section discusses, the syndromes are met with criticism by some feminists, who see syndrome evidence as too constricting to sufficiently aid the female victim of violence. Unfortunately, the feminist solution runs into evidentiary problems of its own.

III. FEMINIST EXPANSION OF THE RULES OF EVIDENCE: SOCIAL CONTEXT EVIDENCE

Feminist legal commentators want to push the boundaries of admissibility to evidence which will promote social change and, first and foremost, ensure that the woman's voice is heard. As a general goal, that may be legitimate. However, the strategy is unfair when expansion of one group's rights occurs at the expense of a less powerful and more socially disadvantaged group, such as the young African-American males who comprise the vast majority of criminal defendants. The evidence desired by this feminist group goes beyond the boundaries of BWS and RTS, and, unfortunately, enters territory that impinges on the rights of criminal defendants.

For a group of feminists who have critiqued evidence rules, BWS and RTS are socially dangerous and practically problematic. Socially, both syndromes portray women as victims, as less than equals in society, and, worse, as sick or mentally ill. Practically, both syn-

99. See, e.g., Taslitz, supra note 61, at 41-42. Patriarchal evidence rules permitting use of RTS to rebut rape myths but not to prove that a rape occurred improperly ban "bruise-like reasoning"—the claim that just as a bruise demonstrates that a punch occurred, rape trauma syndrome demonstrates a rape. Id.

100. See Andrew W. Taslitz, What Feminism Has To Offer Evidence Law, 28 Sw. U. L. Rev. 171, 184-85 (1999) ("The challenge is to identify legal and social strategies that will allow us to change law and culture simultaneously, by illuminating the context of power and control within which a woman lives and acts.") (quoting Mahoney, supra note 14, at 93-94).

101. There is a fairly recent surge of feminist analysis of evidentiary rules. Kit Kinport's article, Evidence Engendered, 1991 U. Ill. L. Rev. 413 (1991), is credited with being the first article of this kind.

102. See, e.g., DONALD A. DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW 192 (1996) ("A misplaced compassion degrades both the victims, who are reduced to objects of pity, and their would-be benefactors, who find it easier to pity their fellow citizens than to hold them up to impersonal standards, attainment of which would entitle them to respect.") (quoting Christopher Lasch, THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY 105 (1995)); Mahoney, supra note 14, at 25 ("Because the term 'battered woman' focuses on the woman in a violent
dromes are susceptible to character evidence challenges when proffered against the defendant\textsuperscript{103} and, by their nature, risk being used against women. For example, because each syndrome tries, unsuccessfully, to force a profile out of disparate effects and behaviors, some women may not fit the definition.\textsuperscript{104} In response to these difficulties, feminists propose either a broader definition of the terms of BWS and RTS\textsuperscript{105} or, more radically from the point of view of evidence law, "social context evidence."\textsuperscript{106}

Social context evidence would consist of statistics and general background information about either the dynamics of battering or the dynamics of rape.\textsuperscript{107} In a rape case, for example, Professor Aviva Orenstein suggests allowing an expert to testify to demographic, relationship rather than the man or the battering process, it creates a tendency to see the woman as the problem."); Peter Margulies, Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense, 51 RUTGERS L. REV. 45, 67 (1998) (BWS is a "stereotype\[\] of irrationality, pathology, and genetic deficiency."); 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, 152 (1997) ("Shoehorning women into the BWS model, which emphasizes the victim's helplessness, also reinforces a stereotypical portrait of females that the defense can easily exploit."); Taslitz, supra note 100, at 183 ("Many feminists ... believe that BWS creates images of women as flawed, even deranged.").

103. For example, BWS can be used as character evidence against a male defendant when prosecuting him for abuse and battery. By using it to show the victim was abused, it is indirectly showing the defendant as an abuser.

104. For example, it has been contended that African-American and lesbian women do not fit the profile. See Mahoney, supra note 14, at 30, 32-33; see also Raeder, supra note 102, at 178-79 ("T[he current formulation of BWS acts as an evidentiary straitjacket that pigeonholes all women's experiences into one paradigm. Thus, victims who fail to meet BWS criteria cannot avail themselves of the explanation of domestic violence background that BWS provides."). Professor Angela Harris calls this problem "gender essentialism": "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation and other realities of experience." Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 585 (1999).

105. See, e.g., Mahoney, supra note 14, at 56-57 (proposing a new definition of battered woman's syndrome as "separation assault," shifting emphasis to the batterer and his violent attempts at control in order to "focus on his motivations rather than the psychology of the victim").

106. In general, "[t]he various attempts by feminist scholars to define battering show some tension between breadth—reaching to include the many ways women are harmed—and precision in describing particular experience, which generally leads toward focus on incidents." \textit{Id.} at 30.

107. Social context evidence would allow juries to "construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case." Aviva Orenstein, No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials, 49 HASTINGS L.J. 663, 709 (1998) (quoting Laurens Walker & John Monahan, Social Frameworks: A New Use of Social Science in Law, 73 VA. L. REV. 559, 559 (1987)).
psychological, and sociological background about rape, including the frequency of rape and the wide range of victims and perpetrators. More specifically, in a given case, the expert could speak to pertinent facts such as: most victims are raped by people they know, most victims are less likely to report a rape where they are acquainted with the perpetrator, and rapists can be “nice boys,” not just desperate, dangerous-appearing people. In a similar vein, in battering cases, Professor Myrna Raeder suggests using the testimony of an expert on battering relationships. For example, in a murder case where the prosecution’s theory is that a battering husband killed his abused wife, an expert statistician might tell the jury that between one-third to two-thirds of all women murdered are killed by their batterers.

The admissibility problems of social context evidence cannot be overcome. The first problem is purely a matter of relevance. Many courts have found that showing a “profile” of the crimes of others to prove the defendant’s crime is not even relevant. The prosecution’s theory of relevance is that, from a profile of how rapes occur and how rapists act, a jury can find that this situation and this defendant fit that general profile. The problem is that using evidence that the defendant fits a profile to prove that he committed the act is inadmissible character evidence. Rule 404(b) of the Federal Rules of Evidence precludes

108. Id. at 711.
109. Id. at 707.
110. Raeder, supra note 102, at 181.
111. Id.
112. See, e.g., People v. Bradley, 526 N.E.2d 916, 921 (Ill. App. 1988) (finding that evidence showing characteristics of child abuse perpetrators was in no way probative or relevant to the question of whether the defendant committed the crime); State v. Clements, 770 P.2d 447, 454 (Kan. 1989) (stating that evidence which only describes the characteristics of the typical offender has no relevance to whether the defendant committed the crime in question); Duley v. State, 467 A.2d 776, 780 (Md. App. 1983) (finding evidence of child abuser profile totally irrelevant because it does not tend to prove that the defendant committed the acts of abuse attributed to him); State v. Hansen, 743 P.2d 157, 161 (Or. 1987) (en banc) (stating that whether child abusers use certain techniques to get near their victims has no bearing on whether a person who does those things is a child abuser); State v. Percy, 507 A.2d 955, 960 (Vt. 1986), (noting evidence that other rapists often excused their conduct the way defendant did was not relevant).
evidence of other bad acts of the defendant to prove his propensity to commit the charged crime.\textsuperscript{114} Offering statistics of other circumstances and other people to show that the scenario proffered by the prosecution fits this particular defendant and this particular case is as troublesome as the typical Rule 404(b) evidence. Allowing a prosecutor to argue to the jury that the bad acts of others show a general pattern in which this defendant’s actions fit is similar to, and as prejudicial as, the forbidden Rule 404(b) inference that the prior bad acts of the defendant form a pattern which the defendant is bound to repeat. Worse, in the absence of proof of a high level of reliability, the social context evidence poses an unacceptably high risk that persons who are not guilty will be sent to jail for very long periods, or even executed.

A second but related problem is that the use of statistics violates the presumption of innocence as well as the right to individualized judgment. It is the prosecution’s burden to prove this defendant committed this crime. Allowing the prosecution’s burden to be eased by trying to fit the defendant’s case into a “rape mold” is improper. The infamous case of People v. Collins\textsuperscript{115} is illustrative. In Collins, the prosecution offered a mathematician who testified that the probability of any other two people, besides the defendants, fitting the description given by the witnesses to this robbery was one in twelve million.\textsuperscript{116} The Supreme Court of California readily zeroed in on the problem: “The prosecution’s approach . . . could furnish the jury with absolutely no guidance on the crucial issue: Of the admittedly few such couples, which one, if any, was guilty of this robbery? Probability theory necessarily remains silent on that question . . . .”\textsuperscript{117} Similarly here, the fact that others have raped under similar circumstances, or that other rape victims have behaved similarly under similar circumstances, does not inform the jury whether this defendant raped this victim.\textsuperscript{118}

\textsuperscript{114} FED. R. EVID. 404(b).
\textsuperscript{115} Id. at 37. The expert arrived at his conclusion using frequency numbers assumed by the prosecutor. \textsuperscript{116} Id. at 36-37.
\textsuperscript{117} Id. at 40 (emphasis in original).
\textsuperscript{118} Probabilities may be appropriate in a criminal trial after significant scientific research has proven the reliability of the underlying assumptions and bases for the statistics. For example, probability statistics for DNA comparisons were put through a great deal of testing and challenges before finally being accepted into court in their
A third admissibility problem is that, for now, there is no indication that the statistics meet the demands of Daubert. The courts will have to engage in an analysis of the methods used for the collection of the statistics, the size of the sample pool, and the accuracy of the conclusions. This will be a very similar analysis to the one that the courts engaged in before accepting probabilities in DNA.\(^{119}\) Even if the statistical adequacy can be proved, however, the marginal relevance will remain substantially outweighed by the risk the jury will use the "profile" of the rapist community to convict this defendant.

The final admissibility problem with social context evidence is a broader systemic problem. If defendants' rights to present evidence are to approach equality with those of the prosecution, it would only be fair treatment to allow a defendant to present social context evidence in his own defense. For example, a defendant might wish to explain his actions by having an expert testify that males who grow up in a violent or abusive environment have difficulty controlling their behavior or recognizing it as wrong. However, as discussed in the next section, social context evidence on behalf of criminal defendants has little chance of recognition by the courts.\(^{120}\) As a class, African-American male criminal defendants are perhaps the least politically powerful group that appears before a tribunal.

Proponents of social context evidence make several arguments for its admission, all of which short-circuit arguments about its reliability or potential prejudice to the defendant. The first is that social context evidence must be admitted to ensure that the female voice is heard. This is not an argument based in tenets of law, but one of social justice.\(^{121}\)

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\(^{119}\) See \textit{id.} However, with DNA population studies, the scientist deals with fixed, objective data, as opposed to probabilities based on rapist characteristics, which are relatively amorphous and subjective criteria that may never satisfactorily reduce themselves to reliable statistics.

\(^{120}\) See \textit{infra} notes 162-85 and accompanying text (discussing Urban Survival Syndrome and Black Rage Syndrome).

\(^{121}\) The proposal is that the effect of the trial on society, not the individual, is primary. See Marguiles, \textit{supra} note 102, at 96 (observing that the core of feminist analysis is "the acknowledgment that social science in the courtroom does not merely describe, but also constitutes, our world" and "[j]udges' interpretations ... enter a broader stock of cultural knowledge that organizes people's experience and gives meaning to what we see") (quoting Vicki Schultz, \textit{Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument}, 103 \textit{HARV. L. REV.} 1750, 1757 (1990)) (alterations in original); Orenstein, \textit{supra} note 107, at 716 ("Belief in rape myths correlates with willingness to
While catering to one aspect of justice—social justice—the argument compromises another aspect—individual justice—which protects the accused from the formidable power of the state. This is not to say that the female voice should not be heard, but simply that it should not drown out the voice of the less empowered, such as the young African-American male criminal defendant. Regardless of the desirability of hearing the female voice, it must meet the prosecution’s burden of proof and evidentiary responsibilities in a criminal case.

The second argument for admission is that the evidence should not have to meet Daubert because the test is simply too rigid. Professor Taslitz argues that “the Daubert test and factors—or at least a particular reading of that test and those factors—reflect patriarchal assumptions about the nature of knowledge”: it is “a masculinist, market-based notion of truth: the fierce competition for dominance and reward in the free marketplace of ideas will weed out flawed conceptions of the one true objective reality that we seek to discover.” This leaves a void as to what is to replace Daubert as the standard. If rules of evidence break down into what might best be called “story-telling,” then nothing prevents the victim and her relatives from making a victim impact statement to the jury during the trial, or lay opinions on whether the victim acted like a woman who was raped, or, for that matter, testimony that the victim had a reputation for sleeping around. The evidentiary rules regarding character, reliability, and relevance, properly applied, enable a jury to focus its best efforts on the guilt or innocence of the defendant in the trial at hand.

In response to claims that social context evidence may be impermissible character evidence, Professor Orenstein opines that “[p]roviding statistics about the wide-spread nature of rape should not encourage the jury to engage in probabilistic reasoning that it is somehow likely that the accused committed the rape.” She claims that “[t]he purpose of such evidence is not to argue for propensity, but rather to undermine our culture’s limited understanding of rape, including rape and tolerance of rape. By educating the jury and perforce educating society at large, we protect women.”

122. Taslitz, supra note 61, at 2-3.
123. Professor Taslitz suggests replacement with an amorphous concept of “evidentiary richness”: “The answer lies in the narrative coherence of human lives.” Id. at 61.
124. See id. at 31-33 (acknowledging that the line between using profile evidence as evidence of mental state and as probability evidence is “thin” and that jurors are likely to improperly use the evidence despite instructions from judge).
125. Orenstein, supra note 107, at 707.
sexist and class-based notions about victims and racist and class-based notions about attackers." However, the "purpose" she proposes does not address a specific element in a rape case. The only purpose for which the jury could use such statistics would be to find that, because rape has occurred in a similar manner on so many occasions, it is more probably true in this case as well. Indeed, one suspects that this is the proponent's hope, lest the evidence have no probative value.

Professor Raeder recognizes there is an argument that such testimony "interferes with the presumption of innocence," but finds the overall value of the evidence a more compelling argument. In response to the issue of inadmissible character evidence, she responds that this evidence is less prejudicial than evidence that the victim suffered from BWS, and that any residual character issues could be dealt with by instruction that the jury is not to use the evidence as proof that the woman was battered, but instead "to use the evidence as a framework for evaluating other evidence presented in the trial." It will be difficult for jurors to follow or understand that instruction as, again, the question arises what relevance is the "framework" if not to make assumptions about the defendant?

While Professor Raeder recognizes that both the prosecution and the defense should be able to take advantage of such an expert, Professor Orenstein contorts her theory in order to prevent defense use of social context evidence in a rape case. She asserts that the purpose of the evidence is only for myth-debunking, which defendants cannot claim, and that defendants can have no use for this background evidence whose "message is the heterogeneity of victims and perpetrators and the variety of rapes and motives for rape." However, her own suggestions for use of the statistics show that the message to the jury is not what the numbers indicate about all rapes (indeed, that would be irrelevant), but about this rape. Why defendants cannot take advantage of the same

126. Id. at 714.
127. Raeder, supra note 102, at 181-82.
128. Id. at 185.
129. Orenstein, supra note 107, at 714.
130. For example, the idea that the expert will testify only about the heterogeneous nature of rape, rather than about a specific characteristic, is betrayed by Professor Orenstein's approval of the use of an expert in *Key v. State*, 765 S.W.2d 848 (Tex. Crim. App. 1989). She explains that in *Key*, a rape crisis counselor "testified about how rapists choose their victims, explaining that it was not uncommon [as in this case] for a rapist to establish a brief relationship with the victim, such as being seen in public with the victim before raping her so that she would not suspect any potential danger and so that her credibility would be diminished." Orenstein, supra note 107, at 708 (citing *Key*, 765 S.W.2d at 849).
sort of statistics and background evidence is a mystery. Her illogical sequence lays bare her political agenda.

In sum, the feminist goal of ensuring the inclusion of the woman's "voice" to the exclusivity of other ends of justice has the effect of perverting the criminal justice system. In the criminal justice arena, any attempt to strike an even balance between the defendant and the victim is misguided. The defendant and the victim are not the opposing parties. The State and the defendant are, and, in this contest, there is no question that the State has enormous power compared to the typically under-equipped, under-financed, and powerless criminal defendant. In recognition of this inherent inequity, certain constitutional provisions—such as the burden of proof and the Sixth Amendment guarantees—attempt in small ways to ameliorate the inequity. The feminist refusal to weigh the interests of the defendant in the balance does damage to the system, and it has been echoed in the courts, as the next section discusses.

IV. THE COURTROOM BIAS AGAINST ADMISSIBILITY OF SOCIAL SCIENCE EVIDENCE FOR THE DEFENSE

At the same time that Battered Woman Syndrome and Rape Trauma Syndrome have found comfortable niches in criminal cases, social scientific evidence helpful to the typical criminal defendant has met with only limited success in the courts. As much as the political impetus has been in favor of scientific evidence supporting claims of women as victims, it has been resoundingly against similar scientific evidence that could be helpful to the great mass of criminal defendants.

131. For example, a defendant in a case where the victim did not know her attacker could offer statistics that most women are raped by men they know. Unlike Rule 404(b), no evidence rule strictly precludes the introduction of profile evidence on behalf of the accused.

132. For example, while Professor Margulies at least acknowledges that "[t]he harm created by these stereotypes [of women as subordinate] is more diffuse and amorphous than the harm a criminal conviction creates for the defendant[.]." Margulies, supra note 102, at 61, much feminist literature passes right over the interests of the defendant, who, after all, is the rapist or the batterer.

133. Professor Bandes notes that, while former Chief Justice Burger frequently expressed that the rights of the victim must be weighed in the balance, commentators have shown that there is a "lack of authority for the concept that the victim has such rights, and . . . that such rights are used as a makeweight on the state's side of the balance." Susan Bandes, Taking Some Rights Too Seriously: The State's Right to a Fair Trial, 60 S. CAL. L. REV. 1019, 1049 (1987).

134. See infra Part V (discussing such features).
This section will consider three such areas: eyewitness reliability experts, false confession experts, and syndrome evidence proffered on behalf of the urban young African-American male.

Expert testimony as to eyewitness reliability is used almost exclusively by the criminal defendant. Of the social science expertise floating about in the courtrooms of the United States, eyewitness fallibility expertise is one of the most reliable forms. The few courts which have taken the time to study the scientific reliability of the expertise have found that it meets the requirements of Daubert. The field is an example of how “soft science” can be “good science.” The study of eyewitness reliability has far outpaced the studies of battered women and rape victims.

Nonetheless, the majority of courts reject the testimony, and not for lack of scientific reliability. As in other contexts, the courts wish to avoid the entire subject of science. Instead, the courts’ rationale behind denial of the evidence is most often that the expert is not “helpful to the finder of fact,” and therefore does not fulfill one of the requirements of Rule 702. The argument is that jurors are just as equipped as an expert to understand the fallibility of eyewitness testimony. However, the average layperson does, in fact, harbor common myths that would be rebutted by the testimony of the expert. Contrary to popular belief,

135. See Steven D. Penrod et al., Expert Psychological Testimony on Eyewitness Reliability Before and After Daubert: The State of the Law and Science, 13 BEHAV. SCI. & L. 229, 256 (1995) (concluding that the evidence meets the reliability requirements of Daubert); Gary L. Wells et al., Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22 LAW & HUM. BEHAV. 603, 604 (1998) (“The scientific study of eyewitness testimony has been one of the most successful applied research topics in scientific psychology over the last two decades.”).

136. See, e.g., United States v. Hines, 55 F. Supp. 2d 62, 71-74 (D. Mass. 1999); see also United States v. Smithers, 212 F.3d 306, 314-15 (6th Cir. 2000) (holding district court should have held Daubert hearing before rejecting expert testimony, and, reviewing Daubert factors, finding that the testimony may well have been found “scientifically valid”); State v. McClendon, 730 A.2d 1107, 1125-26 (Conn. 1999) (Berdon, J., dissenting) (finding, after exhaustive analysis, proposed expert testimony on eyewitness reliability meets Daubert).


138. See supra note 43 (setting forth text of Rule). For illustrative cases, see United States v. Hall, 165 F.3d 1095, 1104-06 (7th Cir. 1999), cert. denied, 527 U.S. 1029 (1999); McClendon, 730 A.2d at 1116; cf. United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999) (stating that expert testimony usurps jury’s role to assess credibility of witnesses).

139. Wells et al., supra note 135, at 619-20 (citing surveys which have clearly shown “people believe that there is a strong relation between eyewitness identification confidence and eyewitness identification accuracy”); see Neil v. Biggers, 409 U.S. 188,
there is no correlation between the eyewitness’s stated level of confidence and the accuracy of his or her identification,\textsuperscript{140} and an exceptional event, such as a robbery, makes memory of the details worse, not better.\textsuperscript{141} Another complaint courts have expressed is that the relevance of the evidence is not outweighed by the potential for prejudice, because it is only “general” testimony about the characteristics of eyewitnesses and is not directly applied by the expert to the facts of the case.\textsuperscript{142}

The courts’ conclusions in this regard stand in stark contrast to their evaluation of BWS and RTS. As to the “helpfulness” prong, here the courts are eager to conclude that jurors may have myths about battered women (“Why don’t they leave?”) or rape victims (“Why didn’t she report it right away?”),\textsuperscript{143} and therefore there is no question that the expert evidence will be helpful in debunking these myths. Similarly, the generality of the evidence has not been considered a problem, but a positive feature, the courts’ reasoning being the less the expert comments directly on the veracity of the victim, the better.\textsuperscript{144}

Why courts are so resistant to seeing the same phenomena at work in eyewitness reliability expertise can only be surmised.\textsuperscript{145} The most likely explanation is political: RTS and BWS are well-contained and specific only to women victims, a sympathetic group, while eyewitness reliability testimony theoretically could apply to a very large number of cases, potentially leading to acquittals of many criminal defendants.

\textsuperscript{140} Wells et al., \textit{supra} note 135, at 621-26 (reviewing studies which demonstrate the weak relation between witness confidence and accuracy). “Jurors appear to overestimate the accuracy of identifications, fail to differentiate accurate from inaccurate eyewitnesses—because they rely so heavily on witness confidence, which is relatively nondiagnostic—and are generally insensitive to other factors that influence identification accuracy.” \textit{Id.} at 624.

\textsuperscript{141} Handberg, \textit{supra} note 137, at 1035 & nn.130-31 (citing study findings showing subjects’ ignorance about the impact of stress on accuracy of identification).

\textsuperscript{142} See Slobogin, \textit{supra} note 35, at 107 (“[R]esearch-based testimony about the foibles of eyewitnessing, among the most valid psychological testimony, has often been excluded because its nomothetic nature does not directly address the accuracy of the eyewitness in question and because it is found to ‘usurp’ the jury’s role in credibility assessment.”).

\textsuperscript{143} Despite the fact that those myths may no longer be widespread, courts are unlikely to revisit the issue, given all of the attention on crimes against women in the media.


\textsuperscript{145} Professor Slobogin comments, “[O]ne often gets the sense that exclusion of evidence on lack of helpfulness or acceptance grounds is a smokescreen hiding a more pressing concern about substantive impact.” Slobogin, \textit{supra} note 15, at 30.
Whereas courts have given the benefit of the doubt on the reliability of the evidence to women in the former, courts have given the benefit of the doubt to the prosecution in the latter.

Another example of an area of social science expertise proffered by criminal defendants and generally rejected by the courts is the study of false confessions. While not as well-developed as eyewitness fallibility research, a significant amount of study has been conducted. Dr. Gisli H. Gudjonsson of the Institute of Psychiatry in London pioneered the false confession theory. He compiled case studies, developed a theory of false confessions, and wrote a book[^46] that traveled across the Atlantic to spur further research in the United States. Several other prominent researchers in the field have emerged to contribute to the development of a body of literature discussing case studies of false confessions.[^147] If allowed to testify, an expert in this area tells jurors the factors that may contribute to a person giving a false confession to a crime.[^148] Like the other areas of "group character" evidence, the evidence relies on a larger picture of those who have falsely confessed and then either the expert or the jury compares the factors at issue in the individual case with the overall picture.[^149]

False confession theory appears to have a reliability level on par with BWS or RTS. Each have produced a significant body of research,


[^148]: For example, police-induced false confessions may arise when a suspect's resistance to confession is broken down as a result of poor police practice, overzealousness, criminal misconduct, and/or misdirected training. Consequences of False Confessions, supra note 147, at 440; see also United States v. Hall, 974 F. Supp. 1198, 1203 (C.D. Ill. 1997) (citing the vastness of the studies in the area); Welsh S. White, False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions, 32 Harv. C.R.-C.L. L. Rev. 105, 118-31 (1997) (discussing empirical evidence showing interrogation techniques and unique susceptibilities of defendants which can produce false confessions).

[^149]: If allowed to testify, the expert is usually precluded from opining on whether the confession in the particular case is false. See Hall, 974 F. Supp. at 1205; State v. Wells, No. 93CA9, 1994 WL 497745, at *3 (Ohio App. Sept. 8, 1994).
albeit limited to a few researchers and not always placed in a peer-reviewed journal. Similar to the study of battered women or rape survivors, most of the research in the area of false confessions has involved the study of anecdotal evidence, as ethical considerations bar experiments replicating circumstances of extracting false confessions of a crime from innocent persons.\textsuperscript{150} Therefore, also similar to BWS and RTS, there is little evidence of the rate of error of the theory. However, at least one commentator has argued that false confession theory is generally accepted in the relevant scientific community as all who study it agree that false confessions exist\textsuperscript{151} and that certain factors can be isolated as contributors.\textsuperscript{152} While amassing a similar research background to BWS and RTS, however, most courts have disallowed false confession expert testimony.\textsuperscript{153}

One striking case admitting the evidence, however, demonstrates that the perceived innocence of a defendant may be the only loophole winning him the right to have reliable expert testimony. In \textit{United States v. Hall},\textsuperscript{154} the United States Court of Appeals for the Seventh Circuit claimed that the lower court had misapplied \textit{Daubert} in refusing to allow the false confession testimony.\textsuperscript{155} That error of law allowed for de novo review rather than a review for abuse of discretion.\textsuperscript{156} It is rare, if ever, that de novo review of an admissibility decision has been invoked;

\begin{quote}
\textsuperscript{150} There has been one laboratory experiment to date. \textit{See generally} Kassin & Kiechel, \textit{supra} note 147.

\textsuperscript{151} It is now demonstrably clear that false confessions can and do occur, as DNA exonerations have shown. \textit{See generally} BARRY SCHECK, PETER NEUFELD, & JIM DWYER, \textit{ACTUAL INNOCENCE} 92 (2000). Among DNA exonerations studied by the Innocence Project at Cardozo Law School, twenty-three percent of the convictions were based on false confessions or admissions. \textit{Id.} at 92.

\textsuperscript{152} Major James R. Agar II, \textit{The Admissibility of False Confession Expert Testimony}, \textit{ARMY LAW.}, Aug. 1999, at 26, 39-43 (applying \textit{Daubert} factors and concluding that false confession testimony needs more research before it is admissible).


\textsuperscript{154} 93 F.3d 1337 (7th Cir. 1996).

\textsuperscript{155} \textit{Id.} at 1342.

\textsuperscript{156} \textit{Id.} The trial court had found that the expert testimony would not be helpful to the finder of fact and did not discuss \textit{Daubert} at all. \textit{Id.} Of course, such an overlooking of \textit{Daubert} is unfortunately all too common.
review of lower courts' admissibility decisions has practically become a rubber stamp.\textsuperscript{157} Here, it appears that the court was taking the extraordinary step of reaching out to reverse the defendant's conviction because there were strong indicia of actual innocence and a false confession.\textsuperscript{158} The court found that the trial court misunderstood the "helpfulness" prong as requiring that the testimony be outside juror comprehension\textsuperscript{159} and remanded to the trial court for a \textit{Daubert} hearing on the evidence.

Taking its cue, the district court found that the field of study passed \textit{Daubert}: it was well-published and peer-reviewed and, while not tested, was hard to test.\textsuperscript{160} While not a particularly rigorous application of \textit{Daubert}, it appears that the district court made a decision that, in the particular case, admission suited the interests of justice, much as has been done in the cases allowing BWS and RTS. In light of the many other cases denying this evidence to the defendant, \textit{Hall} seems to distinguish itself only on its facts. The facts rendered by the court, baldly revealing its concern that an innocent defendant gave a false confession, appeared to be the sole factor that led the court to find that the expert testimony might be a reliable aid to the jury. It is highly unlikely that this case would have had the same result if the court had no particular thoughts about the innocence of the defendant.\textsuperscript{161} However, this is an unacceptable method for determining evidentiary reliability. Evidence is either reliable or it is not. If it is reliable enough to place

\textsuperscript{157} The cases demonstrating the toothlessness of "abuse of discretion" are legion. See, e.g., \textit{supra} notes 95-98 and accompanying text (discussing State v. Kinney, 762 A.2d 833 (Vt. 2000)).

\textsuperscript{158} The court's rendition of the facts takes pains to demonstrate the shakiness of the prosecution's case: the confession was the only evidence against Hall; Hall had mental health problems; the police already had a confession from someone else; and the confession was extracted after several days of questioning, including one session that lasted eighteen hours, and was written by the FBI agent, not Hall. \textit{Hall}, 93 F.3d at 1339-40.

\textsuperscript{159} See \textit{United States v. Downing}, 753 F.2d 1224, 1229 (3d Cir. 1985) (stating that Rule 702 helpfulness does not mean it must be beyond the ken of the average juror).

\textsuperscript{160} \textit{Hall}, 974 F. Supp. at 1203-05.

\textsuperscript{161} Indeed, this theme is played out in \textit{Hall} itself. After the case was remanded, the defendant again was convicted and appealed. This time, however, the government had found a few eyewitnesses. On appeal, the Seventh Circuit rejected Hall's claim that it was an abuse of discretion to disallow an eyewitness expert, on the grounds his testimony would not "assist the trier of fact" since it was within juror comprehension. 165 F.3d at 1106. The decision is a remarkable about-face, given its earlier decision on false confession testimony, and explained only by the fact that now Hall did not appear innocent to the court.
doubts in the jurors’ minds when a defendant immediately appears innocent to the court, it is reliable enough to admit in any case.

As a final example of the courts’ reluctance to embrace defense-oriented social science evidence, courts have uniformly rejected the attempt to admit “syndromes” that could potentially fit a large number of defendants. One of these is Urban Psychosis, or its variation, Urban Survival Syndrome. Its general theory is that the war-like features of inner-city living make African-American men fear other African-American men. More precisely, however, the theory depends upon factors that place it squarely in the realm of recognized post-traumatic stress disorders. Urban Psychosis depends upon continued and chronic exposure to real-life violence. There are numerous studies on the effects of real-life violence on individuals, which may lead to a variety of symptoms such as PTSD, depression and anxiety, suicide, and violence directed toward others. Some of these studies have focused specifically on the problem of minority youth witnessing chronic violence, whether street violence, or battery and abuse in their homes. Urban Psychosis, therefore, has a similar theory to BWS, and could potentially be utilized in a similar manner. For example, Urban Psychosis could explain why a defendant believed he was facing imminent bodily harm from another young African-American man who had his back to him across a courtyard. Nonetheless, Urban Psychosis barely saw the light of day. The popular press, stirred by Professor Alan Dershowitz’s influential book deriding “the abuse excuse,” trumped up charges of defendants taking advantage of the system with stories of abuse. With the extreme unpopularity of theories such as

163. See DSM-IV, supra note 75, at 424 (defining PTSD).
165. See id. at 762 & nn.183-86 (discussing studies).
167. Professor Falk cites to four cases where Urban Psychosis or Urban Survival Syndrome was introduced by the defense, as either evidence of insanity, PTSD, or self-defense, with limited success. Id. at 738-41; see also Wally Owens, Casenote, State v. Osby, The Urban Survival Defense, 22 AM. J. CRIM. L. 809 (1995).
168. ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994). He defined the “abuse excuse” as “the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation.” Id. at 3.
169. See Peter Arenella, Demystifying the Abuse Excuse: Is There One? 19 HARV. J.L. & PUB. POL’Y 703, 705 (1996) (describing the public’s decrying of the “abuse excuse,” despite the fact that actual legal practice employing such alleged “excuses” was
Urban Psychosis, it is unlikely that social scientists would pursue serious research in the area or attempt to find a niche for the theory in the DSM-IV. The true problem with Urban Psychosis is not its faulty scientific underpinnings, as there appears to be sufficient research on the study of the effects of violence to make its validity debatable. Rather, the problem with the theory, from its inception, was the "apocalyptic predictions of the demise of our criminal justice system because large segments of society will be able to obviate criminal liability." While that is a fear with little support, it is a fear which grips society and courts.

The "Black Rage" theory has met with a similar fate. Black Rage is characterized by "an uncontrollable rage precipitated by racism and unequal treatment." While not using precisely that terminology, the theory was employed in a number of cases, to show evidence either of mental illness or provocation, where the defendant's act was triggered by a specific racial incident. Again, as with Urban Psychosis, it was only offered to the extent it met the requirements of a traditional defense such as insanity. As with Urban Psychosis, there are studies to support the notion that racism has profound and deleterious effects on individuals, from paranoia to PTSD. Nonetheless, Black Rage theory is extraordinarily unpopular and criticized.

conventional, in that the mitigating evidence was brought in under entirely traditional rubrics, such as self-defense and insanity, and with no threatening level of success).

170. "[O]nly a few studies are specifically geared toward assessing the impact of living in a violent, urban environment; the greater portion of this research concerns the effects of other forms of violence, such as familial abuse, crime victimization, and combat." Falk, supra note 164, at 765. Unlike research into RTS and BWS, which may affect rich white women in large enough numbers to make treatment financially lucrative, developing treatment regimes for Urban Psychosis is unlikely to attend to a large number of wealthy clients for private treatment.

171. Professor Falk, after reviewing the research in the area, concludes that Urban Psychosis meets the threshold evidentiary requirements of Federal Rule of Evidence 702. Id. at 782.

172. Id. at 805; see also Slobogin, supra note 15, at 24 ("[T]he judges in these types of cases seem to be saying, almost everyone who commits a crime has been subject to some type of traumatizing condition; we cannot excuse them all.").

173. See Falk, supra note 164, at 805 (noting that there have been few cases presenting the theory and that, in most cases, it will not fit the requirements for insanity, self-defense, or diminished capacity).


175. See Falk, supra note 164, at 748-57 (describing cases).

176. See id. at 775-77 & nn.238-250 (describing studies in support); Goldklang, supra note 174, at 221-24 (reviewing the results of social science research).
While battered women are easily viewed as victims, young African-American men living in a world of violence are not. There is sympathy and a receptive audience for the belief of feminists that the ills of society must be dealt with in court by allowing social context evidence to come to light. On the other hand, the threat of the introduction of Urban Psychosis or Black Rage draws commentary that could just as easily be applied to social context evidence in rape and battering cases: it is not society that is on trial, but an individual. The difference in the courts' analysis and acceptance of social framework evidence aiding the cause of female victims of violence and the same kind of evidence offered by the more typical criminal defendant is no more than the desirability of the recipient.

Those who do propose a broadening of defenses to cover external psychological influences find a way to distinguish the "unpalatable" cases from the "palatable" to avoid helping the typical criminal defendant. For example, Professor Peter Margulies would allow psychological defenses that give respect to subordinated persons, but do not denigrate them. Therefore, his argument proceeds, Rotten Social Background and Black Rage defenses should not be admitted as "background" evidence for a crime, on the theory that they pathologize poor people and people of color and, in addition, the victim is likely to be a subordinated person as well—poor, elderly, or female. On the other hand, they should be allowed in for "interpersonal" situations where the defendant was faced with some subordinating act, such as a verbal or physical insult. His theme? "Evidence law should reject determinism, and engage with contingency, to promote justice not only for defendants, but for all constituencies with a stake in criminal trials." In other words, a criminal trial is transformed from an investigation of historical facts into a forum for promoting broader

177. For example, in United States v. Alexander, the leading case dealing with the defense of "Rotten Social Background," Judge McGowan, writing for the majority stated, "the issue before [the jury] for decision is not one of the shortcomings of society generally, but rather that of [appellant's] criminal responsibility." 471 F.2d 923, 968 (D.C. Cir. 1972). In Zamora v. State, 361 So. 2d 776 (Fla. Dist. Ct. App. 1978), where the court rejected the defense of television insanity, the court said, "[T]elevision was not on trial; Ronny Zamora was on trial." Id. at 784.

178. External psychological influences are to be distinguished from internal causes of mental health problems comprising traditional psychiatric testimony.

179. Rotten Social Background is another variation on Black Rage or Urban Psychosis. See Falk, supra note 164, at 781.

180. Margulies, supra note 102, at 121, 124 (citing Alexander, 471 F.2d at 959).

181. Id. at 126-27.

182. Id. at 140.
social agendas. In a similar vein, Professor Andrew Taslitz argues that the consequences of acquitting a battered woman are less than those of acquitting Bernhard Goetz and "[w]e should take these social costs into account in crafting rules governing whether to permit expert testimony in the battered woman and subway vigilante cases." These distinctions between desirable defenses and undesirable defenses draw a political line that is difficult to maintain legally. All criminal defendants should be accorded equal status under the law: all should be presumed innocent until proven guilty and all should have an equal opportunity to put on a defense. If Urban Survival Syndrome, Rotten Social Background, or any other broad-sweeping syndrome that contributed to an excusable mental state at the time of the crime is relevant just as Battered Woman Syndrome is, then the identity of the defendant should not impact admissibility. Much as defenders of the First Amendment must defend the white supremacist's right to march as well as the African-American's, defenders of the Sixth Amendment cannot pick and choose the defendants who receive its protections.

V. THE DEFENDANT'S SIXTH AMENDMENT RIGHTS AND THE PROSECUTION'S DUTY TO FOLLOW THE RULES OF EVIDENCE

There are both evidentiary and constitutional implications for the inequity between the courts' treatment of proffers of group character evidence on behalf of criminal defendants generally and those proffered by the prosecution. From an evidentiary point of view, Rule 702 and Daubert make no distinction between evidence proffered by the defense and evidence proffered by the prosecution. The rules of evidence are portrayed as neutral on their face, applying equally to both sides of a dispute, whether criminal or civil. Daubert is a civil case, so the

183. Bernhard Goetz, a white middle-aged man, was acquitted of charges stemming from his shooting and wounding of four black youth on a New York subway in 1984. He became a controversial figure and a "folk hero" of sorts. See Stephen L. Carter, When Victims Happen To Be Black, 97 YALE L.J. 420, 422-23 (1988) (describing the phenomenon).


185. After all, relevance is a very low threshold for admissibility of evidence. See FED. R. EVID. 401 (relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence"). Therefore, it will always be that "[o]ne man's relevance is another man's waste of time." Taslitz, supra note 184, at 1057.

Supreme Court decided it in the context of a civil dispute, where the parties in any individual case may not be equally situated but systematically there is no position of advantage. From an evidentiary point of view, the truth-seeking function of a trial is primary. Unreliable evidence proffered by either side means an opportunity for an erroneous verdict in that party's favor. An erroneous verdict on behalf of either party is equally undesirable.

However, constitutional law has recognized that the primary function of a criminal trial may not be truth-seeking, but the accused's right to a just and fair verdict. Reducing the risk of conviction of the innocent has been a paramount concern in constitutional criminal law. The overwhelming power of the State, the rationale that punishment must be perceived as just, and the desire for individualized justice led to the need to ameliorate the inherent inequity of power between the prosecution and the defense to assure fair and just verdicts. Hence, in \textsc{In re Winship}, the Supreme Court constitutionalized the accused's right not to be convicted on less than proof beyond a reasonable doubt. In the oft-quoted famous concurrence of Justice Harlan, the beyond a reasonable doubt requirement is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."

In this constitutional context the impact of evidentiary rules may be very different on a defendant than on the State. Professor Katherine Goldwasser explores the results of the application of the reasonable

\textit{Joiner}, 522 U.S. 136 (1997), the other two cases in the seminal \textit{Daubert} trio, are also civil cases.

187. The Sixth Amendment's trial-related rights of the accused are designed to ensure fair play. As Professor Bandes points out, the fair play model of justice is exemplified by Justice Douglas's comments in \textit{Wardius v. Oregon}: "The Bill of Rights does not envision an adversary proceeding between two equal parties . . . . But, the Constitution recognized the awesome power of indictment and the virtually limitless resources of government investigators. Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution." 412 U.S. 470, 480 (1973), \textit{quoted in} Bandes, \textit{supra} note 133, at 1032. Bandes describes the two competing interests of a trial as the search for truth model—equating a fair result with an accurate result—and the fair play model—rejecting the premise that the parties must be treated equally, and arguing that the defendant must be given the advantage. Bandes, \textit{supra} note 133, at 1037-40.


189. \textit{id.} at 364.

190. \textit{id.} at 372 (Harlan, J., concurring). Harlan was mimicking an idea that was as old as Blackstone himself, who stated that "the law holds, that it is better that ten guilty persons escape than that one [innocent] person suffer." 4 \textit{BLACKSTONE COMMENTARIES} 358 (1765).
doubt rule and concludes, "when viewed through the lens of the reasonable doubt rule, to exclude [relevant] defense evidence (and thereby increase the risk of an erroneous conviction) solely out of concern about the risk of an erroneous acquittal is flatly unacceptable." 191

The Supreme Court has explored this dynamic between the Constitution and the rules of evidence in its Sixth Amendment jurisprudence. 192 The Court has found the accused's Sixth Amendment right to present a defense overrides "arbitrary" evidentiary rules that particularly impact the defense. 193 In *Rock v. Arkansas*, 194 the Court had the opportunity to explicitly address admissibility of "shaky" scientific evidence 195 in light of the right to present a defense.

Vickie Rock was charged with manslaughter in the death of her husband. 196 Events leading up to the shooting of her husband indicated that she was a battered woman. 197 Apparently, Vickie and her husband Frank were having an argument. 198 Frank refused to let Vickie eat some pizza and prevented her from leaving the apartment to get something else to eat. 199 When she stood up to leave the room, Frank grabbed her

191. Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, 86 GEO. L.J. 621, 635-36 (1998). In contrast, Professor Taslitz argues in effect the opposite conclusion, putting no weight onto the defendant's side of the scale. He argues that if we are to assume that RTS creates a twenty percent chance of erroneous acquittal, that should be taken into account in favoring a rule of admissibility, whereas the error rate for erroneous convictions is not a concern when any error can be dealt with by traditional evidentiary weighing of probative value versus prejudicial impact. Taslitz, *supra* note 61, at 76-77. Further, he claims that social harm, and not just harm to the defendant, should play into the decision. *Id.* at 77.

192. Relevant here is the defendant's Sixth Amendment right to compulsory process, which, translated by the Supreme Court in *Washington v. Texas*, is, "in plain terms the right to present a defense." 388 U.S. 14, 19 (1967).


195. *See Daubert v. Merrell Dow Pharm s.*, 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").


197. *See id.* at 44-45.

198. *Id.* at 44.

199. *Id.*
by the throat and choked her and threw her against the wall.\textsuperscript{200} She picked up a gun, and when he hit her again, she shot him in the chest and killed him.\textsuperscript{201} When the police arrived, she was distraught, pleading, “don’t let him die” and “please save him.”\textsuperscript{202}

The issue in \textit{Rock} was the trial court’s denial of the introduction of her hypnotically-refreshed memory.\textsuperscript{203} It was only after hypnosis that Vickie was able to recall the circumstances of the shooting—that she had her thumb on the hammer of the gun, but had not held her finger on the trigger.\textsuperscript{204} The gun had then discharged when her husband grabbed her arm in the scuffle.\textsuperscript{205} This memory was subsequently corroborated by a gun expert’s examination of the handgun, which revealed that the gun was defective and prone to fire if hit or dropped, without the trigger being pulled.\textsuperscript{206}

On appeal, the Supreme Court of Arkansas affirmed the trial court’s ruling and found hypnotically refreshed testimony so unreliable as to require a per se rule of inadmissibility.\textsuperscript{207} In reversing, the United States Supreme Court admitted that “there is no generally accepted theory to explain the phenomenon, or even a consensus on a single definition of hypnosis”\textsuperscript{208} and “scientific understanding of the phenomenon and of the means to control the effect of hypnosis is still in its infancy.”\textsuperscript{209} Nonetheless, the Court held that the per se rule of inadmissibility arbitrarily denied Vickie Rock her Sixth Amendment right to present a defense.\textsuperscript{210} The Court described various procedures endorsed by other courts which would reduce the potential unreliability, and concluded that the State “has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.”\textsuperscript{211}

\begin{itemize}
  \item \textsuperscript{200} Id. at 45.
  \item \textsuperscript{201} Id.
  \item \textsuperscript{202} Rock, 483 U.S. at 45-46.
  \item \textsuperscript{203} Id. at 53.
  \item \textsuperscript{204} Id. at 47.
  \item \textsuperscript{205} Id.
  \item \textsuperscript{206} Id.
  \item \textsuperscript{207} Id. at 48-49.
  \item \textsuperscript{208} Rock, 483 U.S. at 59.
  \item \textsuperscript{209} Id. at 61.
  \item \textsuperscript{210} Id. The Court made its finding based on several sources in the Constitution, including the due process right to be heard and offer testimony, and the compulsory process clause, which includes the defendant’s right to testify. Id. at 51-53.
  \item \textsuperscript{211} Id. at 61.
\end{itemize}
Rock appeared to stand for a trumping of reliability-based exclusions of scientific evidence in favor of the Sixth Amendment right to present a defense. The holding of Rock is "a strong statement that defendants should be allowed to tell their story unless it is completely untrustworthy or so immune to the weapons of the adversarial process that its questionable nature is not likely to be exposed."212 Although the opinion appeared to have struck a major victory for criminal defendants proffering scientific evidence, Rock is an island, confined to its facts, isolated by a tide of decisions and sentiments crashing against it.

Eleven years later, the Supreme Court eroded any lasting significance of Rock in United States v. Scheffer.213 The Court made an about-face, coming to the polar opposite conclusion. This time the issue was not hypnosis but polygraphs, a technique with a potentially higher accuracy rate.214 Again, the Court was faced with a per se rule of inadmissibility.215 However, here, the Court stated that because "there is simply no consensus that polygraph evidence is reliable"216 and "no way to know in a particular case whether a polygraph examiner's conclusion is accurate,"217 the decision to enforce a per se ban on the evidence was not arbitrary or disproportionate.218

The Court in Scheffer distinguished Rock on two grounds. First, Rock dealt with an impact on the right of the defendant herself to testify, not a defense witness.219 Courts which have addressed the issue of the hypnotically enhanced testimony of defense witnesses have also decided that Rock only stands for a Compulsory Process Clause analysis of the hypnotically enhanced testimony of the defendant, not defense witnesses.220 However, as Professor Richard Nagareda points out, this distinction between the testimony of the defendant and that of defense

212. Slobogin, supra note 35, at 115.
214. Id. at 310 n.6 (citing a study of a ninety percent accuracy rate). In his concurrence, Justice Kennedy notes that "there is much inconsistency between the government's extensive use of polygraphs to make vital security determinations and the argument it makes here, stressing the inaccuracy of these tests." Id. at 318 (Kennedy, J., concurring).
215. Id. at 307.
216. Id. at 309.
217. Id. at 312.
218. Id.
219. Scheffer, 523 U.S. at 315.
220. See Burral v. State, 724 A.2d 65, 79-81 (Md. 1999), cert. denied, 528 U.S. 832 (1999) (holding Rock does not apply to defense witnesses and citing other states which have adopted per se rules of inadmissibility of hypnotically enhanced testimony of defense witnesses).
witnesses is arbitrary.\textsuperscript{221} The Compulsory Process Clause is the right of a defendant to present "witnesses in his favor,"\textsuperscript{222} drawing no distinction or hierarchy. The right to present witnesses is a fundamental right—"there is no category of 'superfundamental' rights."\textsuperscript{223}

Second, the \textit{Scheffer} Court claims a difference in that Vickie Rock was denied an opportunity to present facts, while polygraph testimony only goes to the issue of credibility.\textsuperscript{224} That distinction is meaningless here: Compulsory Process Clause analysis only requires that the particular item of evidence be "material,"\textsuperscript{225} and there is no question but that in a criminal case, evidence going to credibility is "material." For example, when determining whether the government has fulfilled its constitutional duty of producing all exculpatory evidence to the defense in discovery,\textsuperscript{226} the Court has declared impeachment evidence going solely to the issue of credibility as "material" to the defense.\textsuperscript{227} The outcome in \textit{Scheffer} seems to be explicable only through a political lens.

In retrospect, the more remarkable case is not \textit{Scheffer}, which appears to be the wave of the future, but \textit{Rock}. Currently, there is no more unpopular cause than the rights of the mass of criminal defendants. The real difference between \textit{Rock} and \textit{Scheffer} is Vickie Rock. The decision of the Court turned more on the sympathies of her predicament as a battered woman fighting for her life than on the law. The concern was raised—what if the hypnotically enhanced testimony \textit{was} reliable? It could have made the difference in the outcome of the case: without it, the jury would not hear her explain why the gun went off the very moment she fired. Airman Edward Scheffer was in no such sympathetic position—he was accused of using drugs and a chemical test indicated he had drugs in his system.\textsuperscript{228} Before the results of the chemical test were known, he agreed to a polygraph test administered by the Office of Special Investigations.\textsuperscript{229} The fact that he passed a test administered by the government with potential for a high degree of accuracy was of

\begin{itemize}
  \item \textsuperscript{221} Richard A. Nagareda, \textit{Reconceiving the Right To Present Witnesses}, 97 \textit{Mich. L. Rev.} 1063, 1095 (1999) Drawing such a distinction is illogical, as it would tend to make the right to present witnesses turn on the particular element in dispute, so that if the defense were misidentification—the defendant contends he was not there—he would have no right to present his defense in the form of witnesses who were there. \textit{Id.}
  \item \textsuperscript{222} U.S. CONST. amend. VI.
  \item \textsuperscript{223} Nagareda, \textit{supra} note 221, at 1094.
  \item \textsuperscript{224} 523 U.S. at 317.
  \item \textsuperscript{225} Washington v. Texas, 388 U.S. 14, 23 (1967).
  \item \textsuperscript{226} See Brady v. Maryland, 373 U.S. 83, 87-88 (1963).
  \item \textsuperscript{227} United States v. Bagley, 473 U.S. 667, 676 (1985).
  \item \textsuperscript{228} 523 U.S. at 306.
  \item \textsuperscript{229} \textit{Id.}
\end{itemize}
no moment for the Court. He was a drug user with an unpalatable "innocent ingestion"\textsuperscript{230} theory of defense.

Courts and many commentators fear the opening of the floodgates of social science evidence on behalf of defendants.\textsuperscript{231} Yet the prosecution is welcome to place the tentative theory of Rape Trauma Syndrome before the jury. While the equally tentative theory of Battered Woman’s Syndrome proffered on behalf of defendants has been allowed and embraced, it has been considered unique as it only applies to a small and sympathetic class of defendants. The biased application of evidence laws to favor a politically potent group, such as women, which includes a large number of wealthy, white, and voting members, disfavor the bulk of criminal defendants, who lack the political clout to have the jury hear their evidence.\textsuperscript{232}

The bottom line is that the rules of evidence cannot be seen as equalizing rules when viewed through the Sixth Amendment lens. When faced with proffers of social science evidence on behalf of defendants, the courts must faithfully apply the teachings of \textit{Rock} to all defendants, and admit the evidence, even if it is not \textit{Daubert}-reliable, as long as it does not rise to such a level of untrustworthiness that the traditional tools of advocacy—cross-examination and hiring a prosecution expert for rebuttal—are ineffective. Under this rubric, Battered Woman Syndrome, despite its lack of proven reliability, is still admissible on behalf of the defendant. As articulated by Professor Slobogin, if the goal of criminal justice system is to promote “a system which not only is fair but also appears fair, preventing criminal defendants from telling the best story they can—which might be the impact of a ban on

\textsuperscript{230} \textit{Id.}

\textsuperscript{231} \textit{See, e.g.}, Nagareda, \textit{supra} note 221, at 1067-70 (seeing the problem with conceiving the Compulsory Process Clause as a defendant’s right to exceptions is that there would be no end in sight to the exceptions). The perceived effect seems overstated given the fact that studies show that jurors are not overawed by the evidence and can put it in its proper perspective. \textit{See, e.g.}, Laurens Walker & John Monahan, \textit{Social Frameworks: A New Use of Social Science in Law}, 73 VA. L. REV. 559, 576-77 (1987) (citing studies showing that most jurors can utilize social framework evidence properly and do not give it undue weight).

\textsuperscript{232} Professor Nagareda points out that the government both makes the evidence rules and prosecutes: "The concern, in short, is that the government will skew the rules of evidence in such a way as to favor itself, as prosecutor. Indeed, the concern is all the stronger given that the interests of criminal defendants have never—certainly not today—been a cause with great political popularity." Nagareda, \textit{supra} note 221, at 1125.
nonscientific psychological testimony—would detract from the system’s legitimacy and its ability to extract compliance with the law."  

On the other hand, the courts must hold the prosecution’s evidence up to Daubert’s light and engage in the honest assessments of the reliability of evidence that they have been avoiding. Rape Trauma Syndrome does not meet the test, and, in a criminal case where the prosecution bears the burden of proof beyond a reasonable doubt, such unreliable evidence should not be admitted. All reasonable doubts should inure to the benefit of the accused. That much should be sacred.

233. Slobogin, supra note 35, at 117.

234. Professor Faigman agrees that Daubert, if “faithfully applied,” would generally favor criminal defendants and disfavor prosecutors. Faigman, supra note 64, at 292.

235. Other commentators have proposed such differing burdens of admission. See, e.g., Giannelli, supra note 36, at 1248 (suggesting a higher burden—beyond a reasonable doubt—for prosecutor than defense); David McCord, Sydromes, Profiles and Other Mental Exotica, 66 ORE. L. REV. 19, 105-06 (1987) (arguing that constitutional justifications call for imposing a higher burden of proof on prosecutor regarding reliability of nontraditional psychological evidence—preponderance of the evidence—than on the defendant—reasonable possibility); Slobogin, supra note 35, at 113 (contending that under certain circumstances, criminal courts should admit psychological testimony that does not meet Daubert if the testimony is attempting to explain a criminal defendant’s mental state at the time of the offense); Andrew E. Taslitz, Myself Alone: Individualizing Justice Through Psychological Character Evidence, 52 MD. L. REV. 1, 117-19 (1993) (proposing a clear and convincing standard for prosecutors and a preponderance of the evidence standard for defendants, due to the increased sense of individual and public respect for justice system that comes from admitting evidence that enhances prospect of individualized justice).