Florida Law Review

Volume 37 | Issue 5 Article 5

December 1985

The Syndrome Syndrome: Problems Concerning the Admissibility of Expert Testimony of Psychological Profiles

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THE SYNDROME SYNDROME: PROBLEMS CONCERNING THE ADMISSIBILITY OF EXPERT TESTIMONY ON PSYCHOLOGICAL PROFILES

I. INTRODUCTION

In *Ohio v. Thomas*,[1] a jury found Kathy Thomas guilty of murdering her common law husband, Reuben Daniels. Thomas admitted firing the fatal shots,[2] but claimed she acted in self-defense.[3] A central feature of Thomas' self-defense theory was that she was a victim of the battered wife syndrome.[4] She claimed Daniels had repeatedly beaten and abused her for more than three years.[5]

At trial, the defense counsel called an expert on the battered wife syndrome.[6] The defense offered the expert testimony to aid the jury in assessing Thomas'

1. 66 Ohio St. 2d 518, 518, 423 N.E.2d 137, 138 (1981).

2. *Id.* The defendant shot Daniels once in the arm and once in the forehead. *Id.*

3. *Id.* The defendant reported three different versions of the facts to the police. In each version, a verbal argument was followed by some minor pushing and shoving. The victim never had control of the gun. *Id.* at 518-19, 423 N.E.2d at 138. In order to prove self-defense, the defendant had to show that she had reasonable grounds to believe she was in immediate danger of serious bodily harm or death at the hands of the victim, and that the killing was a necessary response to save herself from serious bodily harm or death. *Id.* at 520, 423 N.E.2d at 139.

4. *Id.* at 519, 423 N.E.2d at 138. The battered wife, or battered woman, syndrome describes a pattern of both psychological and physical abuse inflicted upon a woman by her spouse or mate. Note, *The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis*, 77 NW. U.L. REV. 348, 350 (1982). The foremost expert on battered women is generally recognized to be Dr. Lenore Walker. Walker has described the theory as a three-stage cycle of abuse: a tension-building stage, a period of acute violence, and a period of reconciliation. L. WALKER, THE BATTERED WOMAN XV (1979).

5. *Thomas*, 66 Ohio St. 2d at 519, 423 N.E.2d at 138 (1981).

6. *Id.* The court did not closely examine Mr. Buckley's qualifications. He is described as a "psychiatric social worker." *Id.* at 521, 423 N.E.2d at 140.

state of mind at the time of the shooting.[7] The trial court excluded the expert testimony.[8] The Ohio Court of Appeals reversed and ordered a new trial, holding that it was error to exclude Buckley's testimony.[9] The Ohio Supreme Court reversed and reinstated the conviction.[10]

The supreme court noted several reasons in approving the exclusion of the testimony. First, the expert testimony was "irrelevant and immaterial" to the defendant's self-defense argument.[11] Second, the subject matter of the proposed testimony was within the jury's understanding.[12] Third, the battered wife syndrome was not generally accepted as a scientific reliability to be admitted as expert testimony.[13] Finally, concern that such evidence would stereotype the defendant prompted the court's finding that the testimony's prejudicial impact would outweigh its probative value.[14]

Psychological profile, or syndrome evidence involves the correlation between groups of traits or characteristics and specific forms of behavior.[15] A syndrome is a set of signs or symptoms that tends to indicate a particular condition. It involves a class of actions, emotions or events that forms a characteristic pattern.[16] Expert testimony concerning a psychological profile can be used to explain past behavior, forecast future behavior, measure current capacity or discover the causes of a current condition.[17] In a battered wife syndrome case, for example,

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7. *Id.* at 519, 423 N.E.2d at 138.

8. *Id.*

9. *Id.*

10. *Id.* at 520, 423 N.E.2d at 140.

11. *Id.* at 521, 423 N.E.2d at 140. The court explained that "[t]he jury will base its decision upon the material and relevant evidence concerning the participants' words and actions before, at, and following the murder, including defendant's explanation of the surrounding circumstances." *Id.* at 521, 423 N.E.2d at 139.

12. *Id.* at 521, 423 N.E.2d at 140. "The jury is well able to understand and determine whether self-defense has been proven in a murder case without expert testimony such as that offered here." *Id.* at 521, 423 N.E.2d at 139.

13. *Id.* at 521-22, 423 N.E.2d at 140. The court noted that the testimony "is not distinctly related to some science, profession or occupation so as to be beyond the ken of the average lay person. Furthermore, no general acceptance of the expert's particular methodology has been established." *Id.* at 521, 423 N.E.2d at 139; *see infra* notes 60 & 105-06 and accompanying text.

14. *Id.* at 522, 423 N.E.2d at 140. The court was concerned that the jury "could decide the facts based upon typical, and not the actual, facts." *Id.* at 521, 423 N.E.2d at 140.

15. C. McCormick, McCormick on Evidence § 206(D) (E. Cleary 3d ed. 1984). McCormick explained:

> [W]e all evaluate information in the light of some such "profiles." Jurors, for example, can be said to bring to the courtroom their preconceived "profiles" which they then apply to decide who is lying and who is telling the truth, and who is likely to have committed an offense and who is innocent. Although there is no fundamental difference between the psychological and medical profiles and the more common, impressionistic ones, some of the former have been derived in a more or less systematic and structured way, and some may have been tested by verifying that they give correct diagnoses or predictions when applied to new cases. The correlations obtained in such prospective studies measure the validity of the profiles.

Id.

16. Webster's New Collegiate Dictionary 1174 (1981).

17. Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and its Implications for Expert Psychological Testimony*, 69 Minn. L. Rev. 395, 464 n.270 (1985).

the expert testifies as to whether the victim fits the profile of a battered woman.[18] If the woman fits the profile, the syndrome is used to reconstruct and explain her past behavior and mental state at the time of the incident in question.[19]

Thomas is representative of the ad hoc reasoning that characterizes cases involving the admissibility of psychological profile and syndrome evidence.[20] Without analyzing the underlying basis of the theory,[21] the *Thomas* court concluded the battered wife syndrome was not a generally accepted scientific theory.[22] Similarly, the court decided the theory was within the jury's understanding and was irrelevant to the self-defense issue.[23] The court's fear of stereotyping may reveal a belief that syndrome evidence is merely improper character evidence based upon unreliable probability evidence.[24] Additionally, a general distrust of psychological expert testimony may underly the decision.[25]

Decisions such as *Thomas* are not necessarily "wrong," but the reasoning they exhibit in denying the admissibility of syndrome evidence is frequently unclear or unsound.[26] The rules and tests governing admissibility of this type of evidence are broad and indefinite, allowing a great deal of judicial discretion.[27] This discretion has been exercised in an irrational manner because of the fears and myths surrounding the usefulness of psychological profile and syndrome evidence at trial. The unfortunate result of this uneven use of dis-

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18. *See* Note, *supra* note 4, at 351.

19. The battered wife syndrome can be used to support the reasonableness of a woman's belief that she is in imminent danger. *See supra* note 7 and accompanying text.

> This cycle of violence helps explain why battered women do not leave their abusers: simply put, the third stage of the cycle reaffirms the woman's hopes that her mate's behavior will change. In addition, since the woman cannot predict or control the occurrence of acute outbreaks of violence, she sinks into a "psychological paralysis" in which she feels helpless to change her situation. Battered women also stay with their abusers for a variety of other reasons, including financial dependence, children, guilt, and fear of reprisal by their husbands. Critically, the abused woman rarely reaches out for help to friends, family or the police, because of fear of reprisal and shame. Thus, the battered woman not only feels imprisoned, but also prevents the possibility of outside assistance by remaining silent. As a result, the battered women live with a sense of constant fear coupled with a perceived inability to escape their situation.

Note, *supra* note 4, at 351.

20. *See* Massaro, *supra* note 17, at 464.

21. The Ohio court did cite to Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979), a leading case in which battered wife syndrome testimony was held to be admissible, but declined to follow that decision. *Thomas*, 66 Ohio St. 2d at 521 n.3, 423 N.E.2d at 139 n.3; *see infra* notes 100-17 and accompanying text.

22. *Thomas*, 66 Ohio St. 2d at 521, 423 N.E.2d at 139. The court cited Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), but did not actually discuss the general acceptance standard. The court merely concluded that the test was not met. *Thomas*, 66 Ohio St. 2d at 521, 423 N.E.2d at 139; *see infra* note 60 and accompanying text.

23. *See supra* note 19.

24. *See infra* notes 91-94 and accompanying text.

25. *See infra* notes 76-90 and accompanying text.

26. The concept for this Note was suggested by Professor Massaro. *See* Massaro, *supra* note 17. She discussed the pattern of inconsistent evidentiary analysis among syndrome evidence in her paper on the rape trauma syndrome. *Id.*

27. *Id.* at 435; *see infra* notes 29-58 and accompanying text.

cretion is a body of case law characterized by inconsistency in evidentiary analysis.[28] Thus, practitioners must predict which evidentiary principles a particular court might deem important.

This Note will first consider the evidentiary rules and tests governing the admissibility of syndrome evidence, focusing on the broadness of the rules and the difficulties in applying the tests. Second, the nature of syndrome evidence will be examined, with special emphasis on the doubts surrounding this type of evidence. Third, a cross section of the case law will be analyzed, identifying inconsistencies as well as prevalent evidentiary bases for decisions. Fourth, several admissibility tests will be critically analyzed. Finally, a method for dealing with syndrome evidence will be proposed. This method is not a radical shift or even a "new rule"; rather, the proposal involves a back-to-evidentiary-basics approach.

II. Rules of Evidence and Tests of Admissibility

Federal Rule of Evidence 702[29] governing the admissibility of expert testimony is broad and therefore allows a great deal of judicial discretion.[30] Admissibility under Rule 702 essentially hinges upon whether the expert testimony will aid the factfinder in understanding certain evidence or in resolving a factual issue.[31] Some state rules of evidence adopt the federal rule's language,[32] while others employ different phraseology.[33] Although some commentators feel the

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28. *See* Massaro, *supra* note 17, at 464. When a case that is based upon unsound or unclear evidentiary principles is relied upon as precedent, that reliance lends support to the unsound reasoning of the original case. The questionable evidentiary principles used in the original case become more entrenched and more difficult to overturn with each additional case that cites to the original case as precedent.

29. Fed. R. Evid. 702. The rule provides: "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." *Id.*

30. Massaro, *supra* note 17, at 433. This Note will focus on the helpfulness requirement rather than the qualifications of the experts. However, a brief comment on the qualifications might be useful. *See generally* Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process The Case for Informed Speculation*, 66 Va. L. Rev. 427 (1980). Bonnie and Slobogin suggested that forensic training and practical experience, rather than education alone, should be the primary considerations in examining the qualifications of mental health professionals. *Id.* at 457.

31. Fed. R. Evid. 702.

32. By January 1981, the following twenty-one states had adopted a form of the Federal Rules in their codes: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Washington, Wisconsin, and Wyoming. 6 Fed. R. Evid. News (Callaghan) No 1, at 81-1 (Jan. 1981). By October 1981, Oregon had adopted the Rules bringing the total number to 22. 6 Fed. R. Evid. News (Callaghan) No. 10, at 81-109 (Oct. 9, 1981).

33. Many states that have chosen not to adopt the Federal Rules follow the three-part *Dyas* test. *Cf.* Dyas v. United States, 376 A.2d 827, 832 (D.C.), *cert. denied*, 434 U.S. 973 (1977). The first step of the *Dyas* test requires that the subject matter of the testimony be "so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman." The second step requires that the expert have "sufficient skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the

distinctions between the state and federal rules are crucial, this note assumes that the wide discretion afforded judges is responsible for uneven and unpredictable decisionmaking.[34]

As a general rule for admissibility, all jurisdictions require that expert testimony be "helpful."[35] The "helpfulness" requirement involves consideration of the following factors: whether the testimony is within the knowledge of the jury; whether the testimony will confuse, overawe, or prejudice the jury; whether the testimony is reliable; and whether admitting the testimony will result in a waste of the court's time.[36] Assuming the evidence is reliable, the central question is whether an untrained juror can approach the issue with the highest possible degree of competency without an expert's assistance.[37] The helpfulness of expert testimony regarding syndromes is dependent upon the premise that the expert is uniquely qualified to draw accurate conclusions from background data and behavior patterns.[38]

The rule governing admission of expert opinion testimony addressing ultimate issues is similarly broad.[39] Federal Rule of Evidence 704 permits experts to express an opinion even if it involves the "ultimate issue to be decided by the trier of fact."[40] The federal rule reflects a trend away from the unduly restrictive[41] traditional rule prohibiting such testimony.[42] Although this restriction has been eliminated in most jurisdictions,[43] fears that opinion testimony would invade the province or usurp the function of the jury are still alive.[44]

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trier in his search for truth." Finally, the theory upon which the testimony is to be based must be sufficiently developed to the point that an opinion can reasonably be drawn by an expert. *Id.*

34. *See, e.g.*, Commentary, *Expert Testimony and Battered Women: Conflict Among the Courts and a Proposal*, 3 J. LEGAL MED. 267 (1982). The author asserts that the *Dyas* test is more strict than the Federal Rule and that "[t]he conflict between the courts over the admissibility of expert testimony about the battered woman's syndrome in homicide trials could be resolved by uniform adoption of Federal Rule of Evidence 702." *Id.* at 292.

35. *See* J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1923 (3d. ed. 1940). "On *this subject* can a jury from *this person* receive appreciable help?" *Id.* (emphasis in original).

36. Massaro, *supra* note 17, at 432-33.

37. Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952). As Ladd explained:

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

Id.

38. *See* Bonnie & Slobogin, *supra* note 30, at 463.

39. FED. R. EVID. 704. The rule provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Id.*

40. *Id.*

41. *See* C. MCCORMICK, *supra* note 15, § 12. The traditional rule "can often unfairly obstruct the presentation of a party's case, to say nothing of the illogic of the notion that opinions on ultimate facts usurp the function of the jury." *Id.*

42. The trend away from the traditional rule began in 1942 and perhaps culminated with the adoption of FED. R. EVID. 704. *Id.*

43. *Id.*

44. *Id.* McCormick explained that "[o]bviously these expressions were not intended to be taken literally, but merely to suggest the danger that the jury might forego independent analysis

The test for relevancy is also quite liberal. Under Federal Rule of Evidence 401, evidence is relevant if it has any tendency to make a material fact more or less probable.[45] While the relevancy test appears to be an easy hurdle, it can be deceptive.[46] The test contains two components: materiality and probativeness.[47] A court which prefers to rely only on concrete facts, such as words and actions, may find that syndrome evidence does not relate to a material fact.[48] Similarly, a court which distrusts expert psychological testimony could find that syndrome evidence is not probative.[49] Additionally, the court may exclude relevant evidence if it finds the probative value of the evidence is substantially outweighed by risks such as undue prejudice and jury confusion.[50]

Federal Rule of Evidence 404, dealing with character evidence, appears to be more clearly defined and less discretionary than the other rules relating to syndrome evidence.[51] When used offensively against a defendant, syndrome evi-

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of the facts and bow too readily to the opinion of an expert or otherwise influential witness." *Id.* *See infra* notes 118-32 and accompanying text.

45. FED. R. EVID. 401. The rule provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* Rule 402 adds: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402.

46. Recall that the court in *Thomas* found the battered wife syndrome testimony to be irrelevant. *See supra* note 11 and accompanying text.

47. C. MCCORMICK, *supra* note 15, § 185.

48. This appears to have been the case in *Thomas.* The Ohio Supreme Court felt the only facts relevant to the issue of self-defense were the actions of the parties and the defendant's own statements as to the reasonableness of her belief. *See supra* note 11 and accompanying text.

49. The general distrust of psychological expert testimony may also have been a factor in *Thomas*. Such a distrust is implicit in the decision. *See infra* notes 78-90 and accompanying text.

50. FED. R. EVID. 403. The rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

51. FED. R. EVID. 404. The rule provides:

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
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> (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
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> (2) Character of victim. Evidence of a pertinent trait or character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
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> (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608 and 609.
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id.

dence may be inadmissible. Rule 404 bars character evidence offered for the purpose of proving the defendant acted in conformity with a trait on a particular occasion.[52] However, this general rule has several exceptions. The accused may offer evidence of a relevant personal trait or evidence of the victim's character; the prosecution may rebut such evidence with other character evidence.[53] Thus, a defendant is protected by the rule unless he first introduces such evidence.[54] Another exception is that evidence of other crimes, wrongs, or acts, while not admissible to prove character or action in conformity on a particular occasion, may be admissible for other purposes, such as to show absence of mistake or accident.[55]

The general prohibition embodied in Rule 404 rests on the premise that character evidence usually has low probative value and a high potential for jury confusion and prejudice.[56] Much syndrome evidence could be classified as scientific psychological evidence based upon character or behavioral traits.[57] Thus, Rule 404's basic premise suggests that if a particular category of syndrome evidence could be shown to be sufficiently reliable and accurate, then the evidence should be admissible.[58] This possibility, along with the established exceptions, leaves the effect of Rule 404 on syndrome evidence unclear.

When expert testimony is based on novel scientific theories, courts frequently apply special tests of admissibility which supplement the codified rules. These tests have developed primarily out of a concern that juries would be overwhelmed by novel scientific evidence, and would treat it as infallible.[59] *Frye v. United States*[60] established the most widely accepted test which conditions the admissibility of a theory on its general acceptance within the relevant scientific community. The philosophy behind the *Frye* test is that the burden of analyzing

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52. *Id.*

53. *Id.*

54. The state is permitted to rebut when the defendant offers a pertinent trait of his own character for the purpose of showing he did not commit the act in question. *Id.*

55. *Id.* In this situation, the court must determine whether the defendant's rights would be unduly prejudiced by the admission of the evidence. *Cf.* Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325 (1956).

56. *See* C. MCCORMICK, *supra* note 15, § 206(D).

57. *See supra* notes 15-17 and accompanying text.

58. *See* C. MCCORMICK, *supra* note 15, § 206(D). McCormick explained that "[i]f it were shown that the profile was both valid and revealing — that it distinguishes between offenders and non-offenders with great accuracy — then the balance might favor admissibility." *Id.* However, McCormick also noted that "[i]t is far from clear, however, that any existing profile is this powerful." *Id.*

59. *Id.* § 203.

60. 293 F. at 1014. The issue in *Frye* was whether to admit the results of a primitive polygraph test. The court in *Frye* suggested a new standard for the admissibility of novel scientific evidence:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id.

the reliability of a new theory should be shifted from the judge to the relevant scientific community.[61] Additionally, the belief is that the time required to achieve general acceptance enables a group of qualified experts who disagree with the theory to assemble, creating a pool of potential rebuttal witnesses at trial.[62]

Despite these advantages, the *Frye* test has met with considerable criticism.[63] Perhaps the most significant criticism involves the numerous difficulties courts encounter in applying the *Frye* standard.[64] A court utilizing the *Frye* test must make a number of important discretionary decisions in determining how to apply it. These decisions include identifying the relevant field,[65] defining the scope of the theory that must be accepted,[66] and selecting methods for establishing general acceptance.[67] For instance, a court must determine whether the relevant field should include all psychologists or only the group of psychologists who developed and researched a syndrome. The researchers are arguably the most knowledgeable, but they may also be biased by self-interest. Other psychologists may be more objective, but may not be in a position to understand the research.[68] As a result of this difficulty in application, one commentator has suggested that, in practice, judges use the *Frye* test as a label to justify their own views rather than as an analytical tool.[69] Thus, the *Frye* test is another source of broad and potentially arbitrary judicial discretion.

Several courts have rejected the *Frye* test and employed alternative tests.[70]

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61. *See* United States v. Addison, 498 F.2d 741 (D.C. Cir. 1974). "The requirement of general acceptance in the scientific community assures that those most qualified to assess the general validity of a scientific method will have the determinative voice." *Id.* at 743-44.

62. *Id.* at 744. The hope is that the test would guarantee that "a minimal reserve of experts exists who can critically examine the validity of a scientific determination in a particular case." *Id.*

63. *See, e.g.*, Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980); Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 28 VILL. L. REV. 554 (1982-83); Moenssens, *Admissibility of Scientific Evidence — An Alternative to the* Frye *Rule*, 25 WM. & MARY L. REV. 545 (1984); Note, *Expert Testimony Based on Novel Scientific Techniques: Admissibility Under the Federal Rules of Evidence*, 48 GEO. WASH. L. REV. 774 (1980).

64. *See generally* Gianelli, *supra* note 63 (Some of the problems in applying the *Frye* test include: determining what is the appropriate scientific community that must accept the offered scientific theory; determining what constitutes general acceptance; and deciding which offered evidence must meet the *Frye* test before being admissible.).

65. *Id.* at 1208-10. Some scientific techniques involve more than one scientific field. *Id.* at 1208. Other scientific techniques could fall under both a broad field and a subspecialty. *Id.* at 1209.

66. *Id.* at 1211-15. It is not clear whether the test requires acceptance of the underlying theory, the technique, or both. *Id.* at 1211-12. This question raises the issue of whether the expert testifying should be a scientific theorist or a technician. *Id.* at 1214.

67. *Id.* at 1215-19. The courts have recognized three methods of establishing general acceptance: (1) judicial opinions; (2) expert testimony; and (3) scientific and legal writings. Each one presents discretionary problems. *Id.* at 1215.

68. *See id.* at 1209.

69. *Id.* at 1221.

70. *See, e.g.*, United States v. Baller, 519 F.2d 463, 466 (4th Cir.) (the court should admit relevant scientific evidence in the same manner as other expert testimony "[u]nless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to

These courts responded to criticisms that the *Frye* test excluded potentially relevant and reliable evidence.[71] One alternative is the reliability test, which requires only that the scientific evidence be reliable, rather than generally accepted.[72] A second alternative is the hybrid test, which calls for either general acceptance or reasonable demonstrability.[73] Yet another test lessens the standard to substantial, rather than general, acceptance.[74] Unfortunately, these alternative tests do not escape the criticism that in reality the "test results" reflect and reinforce the viewpoints of individual judges.[75]

The rules of evidence permit broad judicial discretion, and the various tests of admissibility governing novel scientific evidence invite the uneven use of that discretion. The situation is further complicated because the nature of syndrome evidence triggers a variety of fears and biases. Together, these factors make the admissibility of syndrome evidence an area of great difficulty and uncertainty.

III. The Nature of Syndrome Evidence

Syndrome evidence requires the use of expert psychological testimony at trial.[76] The testimony is frequently based upon psychological and statistical correlations.[77] A number of courts and commentators have expressed dissatisfaction, in varying degrees, with the use of psychological opinion testimony in the courtroom.[78] The case law manifests this mistrust in various forms: fear of invading the province of the jury as to credibility determinations;[79] fear of the "battle of the experts";[80]

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mislead the jury"), *cert. denied*, 423 U.S. 1019 (1975); Coppolino v. Florida, 223 So. 2d 68 (Fla. 2d D.C.A. 1968) (general acceptance standard or technique must have passed from experimentation stage to stage of reasonable demonstrability), *appeal dismissed*, 234 So.2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927 (1970).

71. *See* Imwinkelreid, *supra* note 63, at 557. As Imwinkelreid explained:

> The impact of *Frye* is clear. Even if the world's leading scientific authority on a subject attests to a new theory, even if the Nobel prize winner in a specific field conducts a thorough, well-designed experiment to validate the technique, the courts cannot admit the evidence until most of the scientists in that specialized field know and approve of the theory.

Id.

72. McCormick supported the use of the relevancy standard. C. McCormick, *supra* note 15, § 203.

73. Massaro, *supra* note 17, at 435.

74. C. McCormick, *supra* note 15, § 203.

75. Massaro, *supra* note 17, at 435-36; *see supra* note 69 and accompanying text.

76. One exception is the battered child syndrome. The battered child syndrome is based on physical, rather than psychological evidence.

77. *See supra* notes 15-17 and accompanying text.

78. *See, e.g.*, Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. Cal. L. Rev. 527 (1978) (general distrust of expert psychological testimony); Comment, *The Psychologist as Expert Witness: Science in the Courtroom?*, 38 Md. L. Rev. 539 (1979) (general distrust of expert psychological testimony). *But see* Bonnie & Slobogin, *supra* note 30 (advocating the use of expert psychological testimony in controlled situations).

79. *See infra* notes 118-32 and accompanying text.

80. The fear of the "battle of the experts" reflects the courts' concern that lay jurors are not qualified or competent to weigh the relative value of competing experts' testimony. *See, e.g.*,

concern about a false aura of reliability;[81] and a tendency to shun psychological evidence in favor of physical evidence.[82]

Some commentators assert that most psychological opinion testimony is more akin to guesswork than to science and is usually "not more reliable than chance."[83] On this basis, they would exclude the evidence as irrelevant.[84] Similarly, they argue that even if the testimony could be shown to be somewhat reliable and hence minimally probative, psychology has not advanced to the level of reliability necessary to overcome evidentiary counterweights such as undue prejudice and jury confusion.[85]

Professor Morse has suggested that psychological expert testimony should essentially be limited to descriptions of behavior actually witnessed by the expert.[86] Probability or predictive data would be admissible only upon a showing that the opinion was based upon "hard probability data."[87] However, Morse noted that very little psychological data would meet this standard.[88] His primary con-

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Minnesota v. Saldana, 324 N.W.2d 227 (Minn. 1982). In *Saldana*, a rape trauma syndrome case, the court used the battle of the experts rationale to support its conclusion that the evidence should be excluded. *Id.* The court explained:

> Since jurors of ordinary abilities are competent to consider the evidence and determine whether the alleged crime occurred, the danger of unfair prejudice outweighs any probative value. To allow such testimony would inevitably lead to a battle of experts that would invade the jury's province of fact-finding and add confusion rather than clarity.

Id. at 230.

81. *See, e.g.*, United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973). The court noted:

> The countervailing considerations most often noted to exclude what is relevant and material evidence are the risk that admssion will 1) require undue consumption of time, 2) create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, 3) or unfairly and harmfully surprise a party who has not had a reasonable opportunity to anticipate the evidence submitted. Scientific or expert testimony particularly courts the second danger because of its aura of special reliability and trustworthiness.

Id. at 1152. The court did not recommend that the "aura" rationale be used as a distinct justification for excluding novel scientific testimony. Instead, the court suggested that the "peculiar risks" involved necessitate the use of additional tests of admissibility, such as the *Frye* test. *Id.*

82. Professor Massaro, writing about the rape trauma syndrome, asserts that under the broad FED. R. EVID. definition of relevancy, "psychological bruises" are as relevant as physical bruises in a consent rape trial. Massaro, *supra* note 17, at 439-40.

83. Comment, *supra* note 78, at 556. If psychological judgments and opinions are not more credible than probable determinations, then the trier of law should exclude such evidence due to the lack of probative value. *Id.* For instance, two researchers reviewed the reliability of psychiatric diagnoses and summarized that "[t]here are no diagnostic categories for which reliability is uniformly high." *Id.* at 378. They went so far as to conclude that "[t]he reliability of psychiatric diagnosis as it has been practiced since at least the late 1950's is not good." *Id.*

84. *Id.* at 556. Expert psychological testimony "must be excluded because it is irrelevant — it has no tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than the existence of such fact would be without it." *Id.*

85. *Id.*

86. Morse, *supra* note 78, at 601.

87. *Id.* Morse explains that "hard and methodologically reliable probability data bearing on the difficulty of the actor's choice should be heard when it is available." *Id.* at 617 Without this data, Morse contends that "experts should not be allowed to offer either theoretical views about why the actor behaved as he did or opinions concerning the difficulty of the actor's choice." *Id.* at 617-18.

88. *Id.* at 601.

cern was that, in the absence of hard data, expert psychological opinion testimony is based upon the expert's social and moral value judgments.[89] From this perspective, general acceptance may signal merely a concurrence of value judgments rather than an indication of reliability or helpfulness.[90]

A second fear concerning syndrome evidence involves the use of statistical probability data. An expert's opinion as to whether an individual fits into the class of persons affected by a syndrome will necessarily involve a probability determination.[91] When a probability determination is used against a defendant, the potential for error raises serious questions.[92] In presenting testimony as to whether a defendant fits within the battering parent syndrome, for example, the expert will base his opinion on whether the defendant's psychological and behavioral characteristics fit within the statistical profile of the typical battering parent.[93] If the expert is wrong, his testimony may lead the jury to convict an innocent defendant. With regard to predictions of future dangerousness, the defendant's record and behavioral pattern will similarly be compared to a profile of other violators.[94] A mistaken opinion could result in a jail sentence of unwarranted length. Thus, even if the syndrome evidence is statistically reliable, a defendant who deviates from the norm could be severely penalized.

A third concern about syndrome evidence is that the analysis of the particular syndrome may arouse personal biases or fears. Syndromes frequently involve important social or moral issues. A judge assessing the reliability of rape trauma syndrome evidence may be influenced, consciously or subconsciously, by some

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89. *Id.* at 602-03. Morse asserted:

> The use of experts encourages courts, legislatures and legal decisionmakers to avoid the hard social, moral, and legal questions posed by mental health laws by responding as if there were scientific answers to them. This tendency is exacerbated when mental health questions are often conflated with ultimate legal questions and experts are allowed to draw conclusions about legal issues.

Id. at 602.

90. *See supra* notes 59-62 and accompanying text. Morse contends that "the categories and theories of mental health science are at present too imprecise and speculative to help clarify legal questions." Morse, *supra* note 78, at 604.

91. *See supra* notes 15-17 and accompanying text.

92. These questions are similar to those surrounding the use of character evidence against a defendant: possibly low probative value coupled with potentially high prejudice. *See* People v. Collins, 68 Cal. 2d 319, 66 Cal. Rptr. 497 (1968) (mathematics professor testified as to the statistical probability that more than one couple matching the description of the robbery suspects might be in the area).

93. The battering parent syndrome involves the use of a profile of a typical battering parent. *See, e.g.*, Sanders v. Georgia, 251 Ga. 70, 303 S.E.2d 13 (1983) (expert testimony improperly implicated the defendant, even though the expert never expressly concluded that the defendant fit the profile of a battering parent); Duley v. Maryland, 56 Md. App. 275, 467 A.2d 776 (1983) (child battering profile irrelevant because it did not tend to prove that the defendant committed the act in question); Minnesota v. Loebach, 310 N.W.2d 58 (Minn. 1981) (battering parent syndrome testimony excluded as being in violation of MINN. R. EVID. 404(a)); *see also infra* notes 151-57 and accompanying text.

94. *See* J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 63-90 (1981); Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 117-19 (1984).

of the traditional myths surrounding the crime of rape.[95] The admissibility of battered child syndrome evidence or battering parent syndrome evidence may turn, in part, upon the judge's perception of the growing public awareness of the issue.[96] Similarly, a judge determining the admissibility of expert testimony on the Vietnam veteran's syndrome may be affected by the increasing public sympathy for the plight of the Vietnam veteran.[97]

Calculating the full effect of the judges' personal perceptions regarding the substance of the syndromes is difficult. Additionally, the perceived unreliability of expert psychological testimony and the concern about the effect of probability evidence upon the syndrome case law is difficult to measure. These issues are expressly addressed in some opinions and are implicitly treated in others.[98] The nature of syndrome evidence, however, clearly contributes to the inconsistencies in the relevant case law.

IV. The Case Law

The case law reveals no evidentiary principles upon which courts consistently rely to resolve the issues surrounding syndrome evidence.[99] Instead, the case law reflects a great deal of confusion. This confusion emphasizes the need for sound evidentiary principles upon which courts should decide.

A. *Helpfulness*

The helpfulness requirement[100] may be explored through *Ibn-Tamas v. United States*,[101] a case involving the battered woman syndrome. The defendant contended that she believed herself to be in imminent danger when she shot and killed her husband.[102] The defense offered expert testimony by Dr. Lenore

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95. Some of the traditional myths include:

> [G]ood women don't get raped; an unwilling woman cannot be raped; all rape victims are attractive, young women; the victim provokes the rape because she wants to be raped or because she puts herself in a dangerous situation; women's sexual fantasies prove they enjoy rape; women often make false accusations of rape because they are revengeful, feel guilty, or are pregnant; rapists are strangers to the victim; rapists rape because they are overcome by sudden, uncontrollable sexual impulses; rapes occur in dark alleys, rapes are interracial; rape only counts if the victim was a virgin.

Massaro, *supra* note 17 at 402.

96. *See* Case Note, *Battered Child Syndrome*, 10 Wm. Mitchell L. Rev. 339, 348 (1984).

97. This defense, which is essentially an insanity plea, "is based upon the surfacing of mental dysfunctions caused by extremely stressful situations such as active military duty during wartime." Note, *Post-Traumatic Stress Disorder — Opening Pandora's Box?*, 17 New Eng. L. Rev. 91, 91-92 (1981); *see also* Ford, *In Defense of the Defenders: The Vietnam Vet Syndrome*, 19 Crim. L. Bull. 434 (1983) (discussing the growing awareness of the problems of the Vietnam veteran).

98. *See e.g.*, Duley v. Maryland, 56 Md. App. 275, ___, 467 A.2d 776, 780 (1983) (battering parent case discussing the problems with probability evidence).

99. Massaro, *supra* note 17 at 464-66, 466 n.270.

100. *See supra* notes 29-38 and accompanying text.

101. 407 A.2d at 626.

102. *Id.* at 631. "Specifically, the defense proffered Dr. Walker for two purposes: to describe the phenomenon of 'wife battering', and to give her opinion of the extent to which appellant's personality and behavior corresponded to those of 110 battered women Dr. Walker had studied." *Id.*

Walker[103] on the battered woman syndrome to assist the jury in assessing the credibility of the defendant's testimony. The trial court excluded the expert's testimony.[104] On appeal, the District of Columbia Court of Appeals applied the *Dyas* test,[105] a variation on the helpfulness standard of Rule 702. This variation, established in *Dyas v. United States*, prohibits admission of expert testimony unless it is so clearly related to some profession, science, or field of study that it is "beyond the ken of the average layman."[106]

The defendant testified that her husband had abused her.[107] In response, the state attempted to trivialize the beatings, and suggested the "logical reaction" of a truly frightened woman would have been to "call the police from time to time or to leave [her husband]."[108] Dr. Walker's proffered testimony indicated that the cyclical nature of wife batterings includes periods of reconciliation and harmony,[109] and that women tend to blame themselves for the beatings.[110] Dr. Walker also stated that, in her opinion, the defendant represented a classic case of the battered woman syndrome.[111] The court found the state had accurately presented the ordinary lay perception of how a battered woman would act. Further, the court found that Dr. Walker's interpretation of the facts differed from the ordinary lay perception. Thus, the court of appeals

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103. *Id.*; *see* L. WALKER, *supra* note 4.

104. *Ibn-Tamas*, 407 A.2d at 631. The trial court cited three reasons why the evidence should be excluded:

> First, it would "go. . . beyond those [prior violent] acts which a jury is entitled to hear about, sift, and try to understand the circumstances under which they arose, and draw conclusions therefrom." Second, it would "invade. . . the province of the jury, who are the sole judges of the facts and triers of the credibility of the witnesses, including the defendant." Third, Dr. Walker, "of necessity, concludes that the decedent was a batterer. And that is not being tried in this case. It is the defendant who is on trial."

Id.

105. *Id.* at 632; *see also supra* notes 33-34.

106. *See* Dyas v. United States, 376 A.2d 827, 832 (D.C.), *cert. denied*, 434 U.S. 973 (1977).

107. *Ibn-Tamas*, 407 A.2d at 633.

> On direct examination, Mrs. Ibn-Tamas had testified that immediately before the shooting Dr. Ibn-Tamas had told her to pack and leave home by 10:00 a.m. When she replied that she could not, he hit her in the head, under the arms, and in the thighs, and kicked her in the stomach even though she was pregnant.

Id.

108. *Id.* at 633-34. The state suggested that Mrs. Ibn-Tamas' account of the pattern of beatings was greatly exaggerated, and that her testimony about being in imminent danger was therefore implausible. *Id.* at 633.

109. *Id.* at 634. Dr. Walker testified that:

> Because there are periods of harmony, battered women tend to believe their husbands are basically loving, caring men . . . . They also believe, however, that their husbands are capable of killing them, and they feel there is no escape. Unless a shelter is available, these women stay with their husbands, not only because they typically lack a means of self-support but also because they fear that if they leave they will be found and hurt even more.

Id.

110. *Id.* Dr. Walker explained that "the women assume that they themselves are somehow responsible for their husbands' violent behavior." *Id.*

111. *Id.*

held that her testimony was beyond the ken of the average layman and therefore admissible.[112] The state inadvertently aided the defendant's cause by clearly illustrating the common juror's perception of the situation. The majority found the testimony to be helpful because the expert, using her specialized knowledge, was able to present the counter-intuitive conclusion from the facts.[113]

Conversely, the dissent found the battered wife syndrome evidence to be irrelevant and unhelpful.[114] Rather than address Dr. Walker's testimony as a whole, the dissent divided the testimony into separate mini-opinions.[115] In this regard, the separate opinions on issues such as the defendant's passivity, low self-esteem, and lack of confidence were not individually relevant to the question of imminent danger.[116] The dissent reasoned that these issues were within the ken of the average layman and therefore the jury was capable of determining the reasonableness of the defendant's actions without the help of an expert.[117]

B. *Province of the Jury and Aura of Reliability*

Courts have reached inconsistent results in determining whether an expert's syndrome testimony improperly invades the province of the jury.[118] Some courts have held that expert testimony improperly reflects upon the credibility of a witness.[119] The debate on this issue is illustrated in several cases involving familial sexual abuse.[120]

In *Wisconsin v. Haseltine*,[121] the defendant was convicted of sexual contact with his sixteen-year-old daughter.[122] The prosecution's case included the tes-

112. *Id.* at 634-35. The court indicated that the issue in question was whether Dr. Walker's testimony purported "to shed light on a relevant aspect of their relationship which a layperson, without expert assistance, would not perceive from the evidence itself." *Id.* at 633.

113. *Id.* at 635; *see also* Smith v. Georgia, 247 Ga. 612, 277 S.E.3d 678 (1981) (battered woman's syndrome testimony helpful in explaining why woman did not leave her mate); New Jersey v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984) (syndrome testimony helpful in explaining why woman did not leave her mate); Washington v. Allery, 101 Wash. 2d 591, 682 P.2d 312 (1984) (syndrome testimony helpful in explaining why woman did not leave her mate).

114. *Ibn-Tamas*, 407 A.2d at 646 (Nebeker, J., dissenting).

115. The dissent felt that the component parts of the testimony were within the understanding of the average juror. *Id.* at 654.

116. The dissenting judge found that these separate findings "had no bearing on whether the appellant perceived herself in imminent danger when she shot her wounded husband." *Id.* at 653.

117. *Id.* at 654.

118. *See, e.g.*, Kansas v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982) (rape trauma syndrome testimony did not invade the province of the jury); New York v. Reid, 123 Misc. 2d 1084, 475 N.Y.S.2d 741 (Sup. Ct. 1984) (expert permitted to testify as to whether victim suffers from the rape trauma syndrome). *But see* Minnesota v. Saldana, 324 N.W.2d 227, 231 (Minn. 1982) (rape trauma syndrome testimony invades the province of the jury); Missouri v. Taylor, 663 S.W.2d 235 (Mo. 1984) (en banc) (rape trauma syndrome evidence not admissible as it relates to witness credibility).

119. *See supra* note 118.

120. The purpose of expert testimony on the familial sexual abuse syndrome is to show whether the victim in the particular case exhibits behavior consistent with having been an incest victim. Minnesota v. Danielski, 350 N.W.2d 395, 396 (Minn. App. 1984).

121. 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

122. *Id.* at 93, 352 N.W.2d at 674. He was also convicted of threatening to harm her if she

timony of a psychiatrist, qualified as an expert on incest, who testified that the daughter was an incest victim.[123] On appeal, the defendant alleged the testimony improperly bolstered his daughter's credibility.[124] Similarly, in *Oregon v. Middleton*,[125] the defendant was convicted of raping his fourteen-year-old daughter.[126] After the victim had been impeached with prior inconsistent statements, the state called an expert who testified that the daughter's behavior, including her inconsistent statements, was typical of incest victims.[127] The defendant appealed, asserting the jury should have determined the daughter's credibility without the aid of expert testimony.[128]

The court in *Haseltine*, noting that ordinarily the jury can assess the credibility of a witness without expert help, concluded the psychiatrist's testimony should have been excluded.[129] The court viewed the testimony that the victim fit the incest victim profile as evidence of the victim's credibility.[130] In contrast, the *Middleton* court held that if the expert testimony would assist the jury in determining whether or not the incident occurred, it should be admitted.[131]

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told about the incident. *Id.* at 93, 352 N.W.2d at 675. "The state sought to show that these two incidents were part of a pattern of sexual and physical abuse by Haseltine against family members." *Id.* at 95, 352 N.W.2d at 675.

123. *Id.* at 95-96, 352 N.W.2d at 675-76. The psychiatrist stated his opinion that there "was no doubt whatsoever" that the daughter was an incest victim. *Id.* at 96, 352 N.W.2d at 676.

124. *Id.* at 92, 352 N.W.2d at 674.

125. 294 Or. 427, 657 P.2d 1215 (1983).

126. *Id.* at 429, 657 P.2d at 1216. The child reported the rape to a friend's mother, to a Children's Services worker, and to a doctor at the hospital. *Id.* at 429, 657 P.2d at 1216. She also gave a statement to the police, wrote out a statement, and testified before a grand jury. All of these statements were consistent. Later, in the presence of her mother and defense counsel's wife, she wrote a statement saying that she had lied about the rape. At trial, the girl testified that she had been raped, and the defense impeached her with her prior inconsistent statements. *Id.*

127. *Id.* at 433 n.6, 657 P.2d at 1218 n.6. The pertinent portion of the expert's testimony is as follows:

> Q. Now, what about retracting reports before a Grand Jury or made to police? What about that?
>
> A. That is also a very common kind of thing to happen. When a child does do that, again because of guilt, that they felt responsibility, they realize this is my father or my stepfather or whatever, this is my parent and I still care for this person. And look what I'm doing to them. And look what I'm doing to my family. And the easiest thing to do, of course, is to say gee, I just made it all up and it isn't true after all. I think that kids would like that to actually be true. They wish it were true, that it hadn't happened.

Id.

128. *Id.* at 430, 657 P.2d at 1216. The defendant denied the rape, and suggested that his daughter had been pressured to testify against him by the Children's Service workers and her older sister. *Id.*

129. 120 Wis. 2d at 96, 352 N.W.2d at 676. The court explained that:

> Haseltine's conviction depended on the jury believing the daughter's testimony. While there was some medical evidence corroborating her testimony that Haseltine had threatened and beat her, her account of the sexual assault was not corroborated by independent evidence. Haseltine's entire defense consisted of witnesses who testified that the daughter was dishonest.

Id.

130. *Id.*

131. 294 Or. at 437, 657 P.2d at 1220-21. The court stated, however, that it would not have

Thus, the court in *Middleton* focused on whether the information would be helpful to the jury, rather than whether it would invade the province of the jury.[132]

A comparison of *Middleton* and *Haseltine* illustrates another concern about the effect of syndrome evidence on the jury. Courts have often stated that expert scientific testimony is surrounded by an unwarranted "aura of special reliability."[133] The fear is that unwarranted juries may rely too heavily upon the expert's opinion.[134] In *Haseltine*, the court expressed the fear that the psychiatrist's opinion testimony might cause the jury to "abdicate its fact-finding role" to the expert.[135] This concern contributed to the court's decision to exclude the testimony. The court in *Middleton* also noted the possibility that the jurors might place too much credence on the expert's testimony. However, the court held the testimony admissible because of countervailing factors: the expert had been qualified, her testimony concerned a proper subject for expert testimony, and the testimony was relevant.[136] The court reasoned the danger of excessive reliance on the expert could be addressed by effective cross-examination.[137] In *Haseltine*, the fear of excessive reliance on the expert by the jury affected the decision. Although this fear also affected the *Middleton* court's decision, the relevance and reliability of the expert testimony outweighed the fear and allowed admission of the evidence.

C. *Character Evidence*

The argument that syndrome testimony is merely character evidence offered to show conformity on a particular occasion may be addressed by using cases involving the battered child syndrome[138] and battering parent syndrome.[139] The two syndromes appear distinguishable because the battered child syndrome is victim-oriented while the battering parent syndrome focuses on the defendant.[140]

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permitted the expert to actually say whether or not he believed the victim. *Id.* at 437 n.11, 657 P.2d 1220 (familial sexual abuse case in which expert was permitted to testify whether or not he believed the victim).

132. "Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness's credibility." *Id.* at 436, 657 P.2d at 1220.

133. *See, e.g.*, United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973).

134. *See supra* note 81.

135. *Haseltine*, 120 Wis. 2d at 96, 352 N.W.2d at 676. The court reasoned that "the psychiatrist's opinion, with its aura of scientific reliability, creates too great a possibility that the jury abdicated its fact-finding role to the psychiatrist and did not independently decide Haseltine's guilt." *Id.*

136. 294 Or. at 437, 657 P.2d at 1221.

137. *Id.* "Opposing counsel will have an opportunity to attempt to discredit the testimony through cross-examination and show any possible bias the expert may have." *Id.*

138. The battered child syndrome involves the use of a parent's prior conduct toward the child. *See, e.g.*, Case Note, *Expert Medical Testimony Concerning "Battered Child Syndrome" Held Admissible*, 42 FORDHAM L. REV. 935, 935 (1974) (medical testimony on the battered child syndrome is admissible as circumstantial proof that the child's injuries were not accidental).

139. *See supra* note 93 and accompanying text.

140. The battered child syndrome is derived from the physical injuries of the victim, while the battered parent syndrome is based upon a psychological profile of the parent, the defendant.

Thus, Rule 404's prohibition against the use of character evidence to show conformity on a particular occasion should bar battering parent syndrome evidence, but not battered child testimony.[141] This distinction, however, is not always clear in application.

Expert opinion testimony regarding the battered child syndrome usually involves a medical doctor's judgment that the child's injuries were not accidental.[142] Although the expert does not directly testify as to the defendant's culpability, some courts have permitted jurors to infer from the syndrome evidence that the parent's story is a fabrication.[143] Further, if the parent is in sole custody of the child, the jurors may infer that the parent inflicted the injuries.[144] Yet, because the evidence is not offered to show the defendant's disposition to commit the crime, the testimony is admissible under the character evidence rule.[145]

Expert testimony on the battering parent profile is similarly offered to demonstrate the injuries were not accidental and to discredit the parent's story. However, expert testimony on the battering parent syndrome will be excluded to protect the defendant from prejudicial character evidence,[146] unless the defendant first raises the issue. While the two syndromes appear different on the surface, the disparate treatment they receive is difficult to justify. They are offered for similar purposes, and they are used in a similar fashion at trial. Thus, the character evidence rule appears to have been applied unevenly.

Some commentators argue that the underlying theory and methodology of a particular syndrome can be shown to be particularly reliable, the general prohibition embodied in Rule 404 should not apply.[147] In *Minnesota v. Loebach*,[148] the state supreme court held that expert testimony concerning the battering parent syndrome should be excluded unless the defendant first raises the issue.[149] The court explained in dicta, however, that this prohibition is required only until further evidence clearly establishes the scientific reliability and accuracy of the syndrome evidence.[150] Thus, the court left open the possibility of an exception to the general prohibitions against character evidence.

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141. *See supra* notes 51-58 and accompanying text.

142. The battered child syndrome has been defined "as encompassing non-accidental injuries perpetrated by a child's caretaker." North Carolina v. Mapp, 45 N.C. App. 574, 577, 264 S.E.2d 348, 352 (1980).

143. *See, e.g.*, United States v. Bowers, 660 F.2d 527, 529 (5th Cir. 1981); New York v. Henson, 33 N.Y.2d 63, 74, 304 N.E.2d 358, 364, 349 N.Y.S.2d 657, 665 (1973).

144. *See, e.g.*, United States v. Bowers, 660 F.2d 527, 529 (5th Cir. 1981); New York v. Henson, 33 N.Y.2d 63, 74, 304 N.E.2d 358, 364, 349 N.Y.S.2d 657, 665 (1973).

145. *See, e.g.*, Minnesota v. Loebach, 310 N.W.2d 58, 63-64 (Minn. 1981) (battered child syndrome evidence admitted, battering parent syndrome evidence excluded as being in violation of Rule 404).

146. *Id.* at 64.

147. *See supra* notes 56-58 and accompanying text.

148. 310 N.W.2d 58 (Minn. 1981).

149. *Id.* at 64.

150. *Id.*

D. *Probability Evidence*

All syndrome testimony involves, to some degree, a probability determination.[151] *Duley v. State*,[152] a child abuse case, demonstrates some of the problems that may arise when probability evidence is used. The prosecution offered expert testimony as to the profile of child batterers.[153] The expert testified that batterers are frequently young and immature, and under great economic or domestic stress. In addition, the batterers were sometimes beaten during their own childhoods.[154] The prosecution asserted the defendant fit the profile and was the type of individual most likely to commit the offense.[155]

The court conducted no inquiry into the reliability of the theory underlying the testimony. It nevertheless concluded the evidence should have been excluded. The court explained the testimony was equivalent to evidence that a majority of homicides are committed by men.[156] As such, the court found the evidence was irrelevant because it did not tend to prove the defendant committed the crime.[157]

E. *Reliance Upon Precedent*

Without consistent application of sound evidentiary principles, courts will rely on unclear, discretion-based decisions, resulting in additional ill-reasoned decisions. In *Minnesota v. Saldana*,[158] the Minnesota Supreme Court held rape trauma syndrome evidence inadmissible because it had not yet reached a level

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151. *See supra* notes 91-94 and accompanying text.

152. 56 Md.App. 275, 467 A.2d 776 (1983). The trial court convicted the defendant of both child abuse and manslaughter in connection with the death of his infant daughter. *Id.* at ___, 467 A.2d at 778.

153. *Id.* at ___, 467 A.2d at 779.

154. *Id.* The expert, Dr. Blackbourne, testified as follows:

> [Mr. Sengstack, State's Attorney]: All right. Can you tell me whether or not in your research of the matter, have you had occasion to determine whether or not a certain type of individual might be more prone to commit this type of [child] abuse?
>
> Mr. Cumberland [Defense Counsel]: Objection.
>
> The Court: Overruled. You may answer.
>
> A. [Dr. Blackbourne]: Yes. There is sort of a profile of common facts in a series of cases.
>
> Q. [Mr. Sengstack]: All right. Can you tell me what that profile consists of?
>
> Mr. Cumberland: Objection.
>
> The Court: Overruled.
>
> A. [Dr. Blackbourne]: The persons involved in the Battered Child Syndrome often are young, somewhat immature, unable to really handle their emotions in a socially acceptable fashion. Frequently they are in a stressful situation, either economic, domestic stresses on them, and subject to sort of flying off when certain added stress is presented. They sometimes have been victims of quite harsh punishment themselves as they were growing up, is sort of a pattern which they fall back into.

Id.

155. *Id.*

156. 56 Md. App. at ___, 467 A.2d at 780.

157. *Id.*

158. 324 N.W.2d 227 (Minn. 1982).

of reliability that would supplement the jury's common sense.[159] Finding rape and familial sexual abuse to be similar, the court in *Minnesota v. Danielski*[160] relied on *Saldana* in refusing to admit familial sexual abuse syndrome testimony.[161] The court was not persuaded that the familial sexual abuse syndrome testimony was more reliable than rape trauma syndrome evidence.[162]

Under the circumstances, the *Danielski* court could not have been persuaded that the familial sexual abuse syndrome evidence was reliable. The court did not independently consider or discuss the underlying theories and research pertaining to the syndrome. If the court had inquired, it would have discovered a body of research distinct from the rape trauma syndrome evidence, with different levels of reliability and accuracy. The inferences to be drawn from the two types of syndrome testimony are different, thereby affecting the relevance of the testimony.[163] Furthermore, had the *Danielski* court examined the *Saldana* case more closely, it would have found that the *Saldana* court made no meaningful inquiry into the underlying theory and method involved in the rape trauma syndrome.[164]

F. *Summation*

The case law indicates a need for consistent evidentiary analysis in the area of syndrome evidence. However, not all syndromes should be treated alike. In fact, important substantive distinctions exist. Yet, the syndromes are similar in nature and should be evaluated with a consistent evidentiary approach. A consistent approach would create important evidentiary principles for courts and practitioners to look to for guidance. When applied, these principles could harmonize decisions concerning the same syndrome and highlight important distinctions between different syndromes.

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159. *Id.* at 230. The expert had testified that in her opinion the complaining witness had not fantasized the rape, as the defense had suggested. *Id.* at 229.

160. 350 N.W.2d 395 (Minn. 1984). The facts in Danielski are as follows. Dean Danielski was charged with 17 various sex offenses, alleged to have been perpetrated against his step-daughter. *Id.* at 396. The state filed a motion in limine seeking to introduce the testimony of a licensed psychologist about the familial sexual abuse syndrome. "The purpose of this testimony would be to show that the victim in this case exhibited behavior consistent with her having been a victim of sexual abuse." The trial court denied the motion in limine and the state appealed. *Id.*

161. *Id.* at 397. The court explained:

> The reasoning in *Saldana* is equally applicable to this case. The elements of criminal sexual conduct and intrafamilial sexual abuse are similar, covering parallel types of criminal activities. . . . Danielski was also charged with criminal sexual conduct in the first degree; it would be absurd to conclude that while "rape trauma syndrome" testimony is not admissible, familial sexual abuse testimony is admissible, when it is clear the two involve substantially similar testimony.

Id.

162. *Id.*

163. The familial sexual abuse syndrome is used to infer that the victim has been abused and that the abuser was a family member. The rape trauma syndrome is used only to infer the victim has been raped.

164. The court concluded cursorily that the "[r]ape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred." *Saldana*, 324 N.W.2d at 229.

V. ANALYSIS

The broad judicial discretion exercised in cases involving syndrome evidence has caused many inconsistent and problematic decisions. In this section, the fears concerning syndrome evidence, the tests for admissibility, and the bases of significant decisions will be discussed and critically analyzed. This discussion should help to identify the important evidentiary principles upon which decisions should be based.

Professor Morse has raised serious questions about the usefulness of psychological opinion testimony at trial.[165] Despite these doubts, other commentators assert that the expert's "informed speculation" can indeed be helpful and is preferrable to unbridled judicial discretion or the uninformed opinions of lay jurors.[166] Although lay jurors are sometimes capable of drawing inferences from psychological data and other evidence, these commentators suggest the question is whether the expert testimony will assist the trier of fact, and not whether the trier of fact "can manage when left to his own devices."[167] This Note assumes that expert psychological testimony can be sufficiently reliable to be helpful to the trier of fact.

The helpfulness requirement, one recalls, was intended to be liberally applied.[168] If the underlying theory is reliable and the expert's opinion can provide useful insight that the trier of fact could not otherwise discover from the evidence, then the testimony should be admitted.[169] When applying this standard, the testimony should be considered as a whole, rather than examined in its component parts.[170] The strength of expert testimony rests in the expert's ability to tie the component parts of a theory together into a cohesive whole.

Even strong syndrome evidence retains some measure of doubt because of the element of probability involved.[171] Nevertheless, not all probability evidence is inherently prejudicial.[172] A syndrome expert's testimony involves the use of a probability determination, but the probability is based upon education and practical experience, as opposed to mere conjecture.[173] If the underlying theory

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165. *See supra* notes 86-90 and accompanying text.

166. Bonnie & Slobogin, *supra* note 30, at 463. Bonnie and Slobogin explain their position as follows:

> A defendant's past psychological functioning cannot be reconstructed with scientific precision. The truth will remain very much in the shadows whether or not mental health professionals are permitted to offer their opinions. In formulating an evidentiary test, then, we should begin by comparing the knowledge of mental health professionals not with the knowledge of physicists about the laws of motion, but with that of laymen about psychological aberration and criminal behavior. We should ask whether the observations, intuitions, and hypotheses of clinicians offer a useful and acceptable supplement to those of Everyman.

Id.

167. *Id.* at 463-64.

168. *See supra* notes 29-38.

169. *See Ibn-Tamas*, 407 A.2d at 633.

170. *See supra* notes 114-117 and accompanying text.

171. *See supra* notes 91-94 and accompanying text.

172. *See* MCCORMICK ON EVIDENCE, *supra* note 15 § 206(D).

173. Bonnie & Slobogin, *supra* note 30, at 461-62.

and method are reasonably reliable, the fact that the evidence involves some degree of uncertainty should not justify its exclusion.[174] The degree of imprecision can be analyzed and exposed on cross-examination, and arguments can be advanced as to the proper weight of the evidence.[175]

As with probability evidence, the admissibility of character evidence may turn on the underlying reliability of the syndrome evidence. Rule 404 protects defendants from minimally probative and possibly highly prejudicial character evidence.[176] Because the policy behind the rule is sound and its usefulness can only be protected through rigid application, exceptions should be granted only when evidence is highly probative and minimally prejudicial. Yet, if highly reliable and certifiably accurate syndrome evidence is offered against a defendant, then the purpose of Rule 404 is not furthered by excluding the evidence.[177]

The tests for admissibility of novel scientific evidence are intended to assist the judge in assessing the reliability of the theory.[178] Unfortunately, none of the several tests[179] underlying the evidence has proven effective in focusing attention on reliability, especially as applied to syndrome evidence. The existing tests are too open-ended to be functional.[180]

Professor McCormick has recommended a set of eleven factors to be considered when assessing the reliability and probative value of novel expert testimony. The new test directs the judge's attention to the following factors:

(1) the methodology's error rate;
(2) standards controlling the application of the methodology;
(3) safeguards built in to the theory;
(4) comparison to similar admissible techniques;
(5) the measure of acceptance in the relevant field of study;
(6) the inference to be drawn from the evidence;
(7) whether the theory could be easily explained to and understood by the jury;
(8) whether the underlying data are easily verifiable;

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174. *Id.*

175. *Id.* at 466. Bonnie and Slobogin explain:

> The imprecision of an expert's concepts, and the possible shortcomings of his evaluative techniques, may be explored through direct examination and cross-examination, and in arguments by counsel concerning the weight of his testimony. The court can confine the expert to his sphere of specialized knowledge, and exclude opinions on ultimate issues involving moral judgments. Cautionary instructions are also available. Even if the defense has offered the only psychiatric testimony, the natural skepticism of the jurors, coupled with the safeguards already mentioned, should virtually eliminate the danger of the jury abdicating its factfinding role.

Id.

176. *See supra* text accompanying note 56.

177. *See supra* note 58 and accompanying text.

178. *See supra* note 61 and accompanying text.

179. *See supra* notes 59-75 and accompanying text.

180. Moenssens, *supra* note 63, at 573. Moenssens asserts that "[a]fter the evidence has been gathered and the information reviewed, the judge should base his admissibility decision on considerations more clearly defined and articulated than the nebulous general acceptance standard or a loose relevancy concept." *Id.*

(9) whether other experts are available to evaluate the theory;
(10) the importance of the evidence to the case at hand; and
(11) whether the methodology and theory were properly applied to the case.[181]

The use of this new test would not solve all the problems that have surfaced in connection with the *Frye* test. In fact, the core of the *Frye* test remains; the level of acceptance in the relevant scientific community is still a factor.[182] Judicial discretion would continue to play a large part in determining the admissibility of syndrome evidence. However, the factors would control the use of judicial discretion by requiring judges to pay more attention to the facts which reflect upon reliability, such as the potential rate of error and the inference to be drawn from the evidence.[183] Additionally, the new test addresses the concern that juries might be overwhelmed by novel scientific evidence by taking into account the clarity with which the theory can be explained and the extent to which the data is verifiable.[184]

The new test reduces concern about the layman's ability to evaluate novel scientific evidence properly by characterizing capacity to evaluate as a factor to be considered rather than as a controlling consideration.[185] One commentator has recently concluded that lay jurors are not overwhelmed by scientific evidence.[186] Similarly, another commentator has opined that jurors are fully capable of comparing one expert's qualifications against another's[187] when more than one expert's testimony is offered as evidence. Even if these concerns are realistic, they should be addressed through measures such as effective cross-examination or cautionary instructions.[188] Reliable evidence should not be excluded because jurors may be overwhelmed.

Similarly, otherwise reliable evidence should not be excluded for fear that

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181. McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 911-12 (1982). The factors are:

> (1) the potential error rate in using the technique; (2) the existence and maintenance of standards governing its use; (3) presence of safeguards in the characteristics of the technique; (4) analogy to other scientific techniques whose results are admissible; (5) the extent to which the technique has been accepted by scientists in the field involved; (6) the nature and breadth of the inference adduced; (7) the clarity and simplicity with which the technique can be described and its results explained; (8) the extent to which the basic data are verifiable by the court and jury; (9) the availability of other experts to test and evaluate the technique; (10) the probative significance of the evidence in the circumstances of the case; and (11) the care with which the technique was employed in the case.

182. *Id.*

183. Regarding McCormick's approach, Moenssens asserts that the "[u]se of these standards would allow a judge to make a decision based upon significant factual information. The burden on the trial judge would be greater than it has been in the past, but such a solution is preferable to the *Frye* test." Moenssens, *supra* note 63, at 574.

184. McCormick, *supra* note 181, at 912.

185. *See supra* notes 133-137 and accompanying text.

186. Imwinkelreid, *supra* note 63, at 569-70.

187. *See* Younger, *A Practical Approach to the Use of Expert Testimony*, 31 CLEV. ST L. REV. 39, 40 (1982).

188. *See supra* note 175 and accompanying text.

it intrudes upon the province of the jury.[189] The usurpation argument reflects a general distrust of expert testimony and has been called "empty rhetoric."[190] Judges excluding expert testimony on this basis may be exercising their discretionary powers to exclude evidence which they find personally objectionable. Expert opinion testimony that a defendant or a victim fits a particular profile should not be excluded under the "province of the jury" argument.[191]

VI. A Proposal

This Note does not purport to offer an all-encompassing solution to the problems surrounding the admissibility of syndrome evidence. Nor is a "new rule" of evidence suggested. Instead, the proposal offered involves a back-to-basics approach, incorporating the priorities and organizing the concepts developed in the preceding section.

The proposal includes three parts. First, renewed emphasis should be placed on the underlying reliability of a particular theory. This includes replacing the *Frye* test with the eleven factors mentioned above. Second, the helpfulness requirement should be interpreted liberally. Third, arguments involving either the fear of invading the province of the jury or concern about the jury's ability to properly deal with expert psychological testimony should be directed to the weight of the evidence rather than its admissibility.

This reassessment of evidentiary priorities could help lessen some of the inconsistencies that plague the syndrome case law. The *Frye* test is unworkable. Adoption of the eleven factors would limit this traditional source of unchecked judicial discretion. De-emphasizing the province of the jury and the aura of reliability arguments, would also stabilize the case law. Additionally, liberal interpretation of the helpfulness requirement would facilitate reliable evidence reaching the finder of fact.

Implementation of this proposal could enhance predictability greatly. The reasons for the exclusion or admission of syndrome evidence would be more discernible because a court would presumably discuss the factors on which it is basing its decision. Reliance on precedent would therefore be an easier task for the practitioner.

Of course, the proposal would simply minimize rather than eliminate the problems associated with the admissibility of syndrome evidence. Judicial discretion would still play a large part in the admissibility decision. Judges determined to enforce their own personal values could still do so. However, the proposal would ensure that most discretionary decisions concerning the admissibility of syndrome evidence are at least more informed, more factually based, and more controlled.

VII. Conclusion

Kathy H. Thomas is a victim of the syndrome syndrome, the pattern of

189. *See supra* notes 118-132 and accompanying text.

190. J. Wigmore, *supra* note 35 § 1920.

191. *See Middleton*, 294 Or. at 432-35, 657 P.2d at 1218-19 (the jury's function cannot be usurped because the jury is not bound by the expert's opinion).

poor evidentiary analysis, which haunts syndrome cases.[192] Thomas is not the only victim. Judges must resolve difficult evidentiary questions without the benefit of adequate precedent. Additionally, practitioners are unable to prepare their clients' cases properly.

The proposal recommended in this Note, if implemented, could establish the consistency lacking in this area of the law. This consistency is needed not only to resolve existing anomalies, but also to evaluate new syndrome evidence as it arises.[193] The return to sound evidentiary principles is perhaps the only cure for the syndrome syndrome.

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192. *See supra* notes 1-25 and accompanying text.

193. The PreMenstrual Syndrome (PMS), a hormonal imbalance that can cause violent behavior, is recognized as a legal form of insanity in France. Nat'l L.J., Feb. 15, 1982, at 16, col. 1. In England, two women on trial for murder and attempted murder were released on probation after an expert testified that they suffered from PMS. *Id.* at 1, col. 4, 12, col. 1.