

THE BETTER WAY: THE ROLE OF BATTERERS' PROFILES AND EXPERT "SOCIAL FRAMEWORK" BACKGROUND IN CASES IMPLICATING DOMESTIC VIOLENCE

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This essay is the companion piece to an article published in the last issue of this law review.¹ *The Double-Edged Sword* addressed the use of expert testimony regarding victims of domestic violence as suggested by the O.J. Simpson case. It discussed problems with the current formulation of Battered Woman Syndrome (BWS),² and the misuse of BWS as a conduit for teaching the jury about the dynamics of domestic violence. *The Double-Edged Sword* described the social science background that the jurors in the *Simpson* case never heard. It critiqued the doctrine of learned helplessness, which paints a portrait of female passivity that is belied by the reactions of many battered women, and that is easily turned around by the defense to its own advantage. *The Double-Edged Sword* acknowledged that the introduction of BWS evidence against batterers does implicate character rules of evidence. It explained that BWS is often offered to support the credibility of domestic violence survivors whose actions appear inconsistent with the stereotypical conduct of domestic violence survivors. In those cases, the defense typically has made claims that BWS evidence can rebut, thus opening the door to BWS evidence. However, when prosecutors

* Professor, Southwestern University School of Law. This work benefited from a presentation made to Professor Peter Arenella's Advanced Criminal Procedure class at the University of California at Los Angeles. The body of empirical evidence and research concerning domestic violence has grown inordinately in recent years. This data can no longer be dismissed as simply anecdotal. The model of domestic violence background evidence presented here now deserves courtroom consideration.

1. Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome by and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789 (1996) [hereinafter Raeder, *The Double-Edged Sword*].

2. Battered Woman Syndrome is a form of post traumatic stress disorder (PTSD) that is defined as a collection of behavioral and psychological characteristics commonly exhibited by victims of a prolonged, repetitive pattern of physical and emotional abuse at the hands of their partners. See *United States v. Johnson*, 956 F.2d 894, 899 (9th Cir. 1992).

offer BWS evidence to provide a necessary context for jurors to understand domestic violence, they subvert the traditional role of BWS evidence. Its employment in this fashion devalues authentic BWS testimony and leads to valid defense attacks demonstrating that the victim was not a classic BWS sufferer. *The Double-Edged Sword* concluded that prosecutors are tied to BWS because the evidentiary rules require this type of social science background to be presented via expert testimony. In the domestic violence arena, BWS is currently the only recognized manner of introducing such testimony. Thus, regardless of whether a victim suffered from BWS, prosecutors cannot provide the necessary contextual background that would enable jurors to analyze the case-specific evidence without claiming reliance on the syndrome. Simply redefining BWS will not solve this dilemma.

I. INTRODUCTION

The *Simpson* case promised, but failed to deliver, a battle of dueling experts crossing swords over BWS and batterers' profiles. However, *Simpson* raised issues with widespread ramifications for the use of experts by and against alleged batterers. The proposed misuse of BWS to provide domestic violence background was addressed in *The Double-Edged Sword*. This essay investigates the contemplated introduction of batterers' profiles as evidence supporting or attacking the defendant's capacity to commit abusive acts in the context of a family relationship.³ Batterers' profiles present a psychological picture of individuals who manifest abusive acts against their intimates in order to control their intimates' behavior. Profiles examine the causes for this antisocial behavior, often tracing them back to dysfunctional childhood interactions with parents. Exposing these root causes of male spousal abuse helps debunk the myth that battered women provoke male violence and, therefore, the abusive acts are unintentional.

3. Acts that implicate domestic violence typically include: stalking, assault, battery, destruction of property, kidnapping, rape, and murder. In some states, other types of emotional harassment may also be subject to criminal penalties. See Robert A. Guy, Jr., *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 998-99 (1993). In the context of this essay, spousal abuse is an encompassing term that includes relationships in which individuals live together but have never been married or are currently separated or divorced.

Prior to *Simpson*, the legal community paid little attention to such profiles because their admissibility is limited by the ban on character evidence and the lack of agreement about the existence or validity of any particular batterer's profile. While such profiles are of primary interest to the prosecution, the *Simpson* defense trumpeted its coup in obtaining one of the foremost experts on BWS, Lenore Walker. Dr. Walker was expected to testify that Nicole Brown Simpson was not a typical battered woman, that her death was not a typical spousal murder, and that O. J. Simpson did not have an antisocial personality typical of batterers. In response to such testimony, the prosecution stood ready to introduce its own expert, Dr. Donald Dutton, a psychology professor at the University of British Columbia who directs the Assaultive Husbands Program in Vancouver. Although not as widely known as Dr. Walker, Dr. Dutton is probably the most published psychologist currently treating and researching batterers.⁴ Dr. Dutton's writings are based on sixteen years of interviewing abusers, researching the backgrounds of 700 abusers, and counseling more than 600 batterers who were responsible for 1100 cases of wife assault.⁵ He was anticipated to lock horns with Dr. Walker; Dr. Dutton could have explained why the brutal slayings demonstrated the telltale signs of domestic violence, clarified that not all batterers suffer from antisocial disorders, and described a type of abusive personality that might have fit Simpson like a glove.

The proposed testimony of both experts in the *Simpson* trial starkly revealed how BWS was being distorted to permit social science background about domestic violence that had no relationship to the victim's state of mind or her actions. In contrast, the real value of this use of BWS was to explain the actions and state of mind of batterers. Moreover, the specter of rival batterers'

4. See, e.g., DONALD G. DUTTON, *THE DOMESTIC ASSAULT OF WOMEN* (1995); Donald G. Dutton, *The Origin and Structure of the Abusive Personality*, 8 J. PERSONALITY DISORDERS 181 (1994); Donald G. Dutton et al., *Intimacy-Anger and Insecure Attachment as Precursors of Abuse in Intimate Relationships*, 24 J. APPLIED SOC. PSYCHOL. 1367 (1994) [hereinafter Dutton et al., *Intimacy-Anger*]; Donald G. Dutton & Kenneth J. Hemphill, *Patterns of Socially Desirable Responding Among Perpetrators and Victims of Wife Assault*, 7 VIOLENCE & VICTIMS 29 (1992); Donald G. Dutton & Andrew J. Starzomski, *Borderline Personality in Perpetrators of Psychological and Physical Abuse*, 8 VIOLENCE & VICTIMS 327 (1993).

5. See DONALD G. DUTTON WITH SUSAN K. GOLANT, *THE BATTERER, A PSYCHOLOGICAL PROFILE* 12 (1995).

profiles being introduced at trial was remarkable. However, the jury was not destined to hear either expert testify. Only the judge heard Dr. Dutton's background information in order to help him decide the relevance of prior acts of domestic violence committed by Simpson.⁶ In other words, while the judge could not properly evaluate the significance of the acts without such background, the jury was expected to understand how any acts admitted into evidence related to the crime without the benefit of expert guidance. Indeed, the only trial reference to expert testimony was by counsel. In its opening, the defense told the jury that Dr. Walker, the "mother" of BWS, would testify that Simpson did not exhibit an antisocial personality disorder.⁷ Thus, while the jurors were without information explaining the significance of the domestic violence evidence, they could have inferred that Simpson's personality exempted him from habitual batterer status. If this was the case, the jurors may have dismissed any connection between his ex-wife's death and his previous behavior towards her.

Against this backdrop, the thesis of this essay is that the public, including jurors, does not understand the dynamics of domestic violence. People all too often believe myths about violent relationships that lead to incorrect analyses of evidence concerning domestic violence. Although an understanding of batterers' profiles would help correct domestic violence denial, and is key to formulating public policy, profiles can only play a limited courtroom role due to valid evidentiary restrictions. BWS is also not the answer for presenting a general social science background about domestic violence because it depends on a victim whose reactions to battering conform to the symptoms of the syndrome. To fill the void, jurors should be allowed to hear the domestic violence background testimony necessary to ensure their proper evaluation of the evidence. However, the use of expert testimony must be reformulated to avoid any requirement that the victim or batterer meets the definition of a single, rigid syndrome or profile.

6. See Testimony of Donald Dutton, *in* Motion in Limine-1101(B) (Resumed), *People v. Simpson*, No. BA 097211, 1995 WL 12059 (Cal. Super. Ct. L.A. County Jan. 12, 1995).

7. See Opening Statement by Mr. Cochran, *People v. Simpson*, No. BA 097211, 1995 WL 27396, at *20-24 (Cal. Super. Ct. L.A. County Jan. 25, 1995).

The first section of this essay presents contemporary social science data that elucidates the current state of the art as to batterers' profiles. The overwhelming attention paid to BWS has blinded the legal community from the seemingly self-evident proposition that we need to study batterers to best understand what makes them tick, how to control or cure their violent tendencies, and how to ensure that they receive the appropriate punishments for their crimes. Fixating on battered womens' images of their batterers does not guarantee the insights vital to revealing the psyches of batterers. Dr. Dutton's work concerning abusive personality is explained in detail, and critiqued in terms of the current standards for admitting character evidence and expert testimony. Given the current state of research, any claim that this theory should be considered as a medical diagnosis in order to escape the ban on character evidence is inappropriate. The *Simpson* case is employed as an archetypical illustration of defense reliance on a batterer's profile to demonstrate that the accused does not fit a particular profile. This essay explores the possibility that conformity with a batterer's profile might be argued as a mitigating factor. This essay further suggests that courts should interpret the "mercy rule" broadly, to permit the accused to offer batterers' profiles as evidence of a pertinent character trait.⁸ However, such defense use of profiles clearly opens the door to prosecutorial rebuttal based on existing batterers' typologies.

The final section of this essay proposes a reformulated model for the use of expert testimony in domestic violence related cases. Prosecutors should be permitted to introduce domestic violence social science framework evidence that is not syndrome or profile oriented in order to level the evidentiary playing field and provide a background against which domestic violence evidence can be understood at trial. The goal is to supply jurors with critical information about domestic violence patterns and batterers. In addition, such testimony will free prosecutors from the restraints imposed by rules governing BWS testimony. As discussed in *The Double-Edged Sword*, prosecutors are often forced to paint victims as suffering from BWS, regardless of whether the evidence warrants this appraisal, because, at present, BWS provides the only route for admitting expert testimony concerning

8. See FED. R. EVID. 404(a)(1).

domestic violence. As a result, the focus is on the battered woman, not the batterer. 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. However, given the character evidence restrictions and the tentative nature of the research supporting such typologies, batterers' profiles are not destined to be widely accepted by courts, despite their significance to issues of treatment and control of offenders.

The resulting inability to provide the jury with the insights gleaned from batterers' profiles and general background evidence about the dynamics of domestic violence leaves many jurors unprepared to evaluate the true relevance of prior domestic violence evidence. Therefore, qualified experts should be permitted to provide domestic violence background evidence regardless of whether the victim suffers from BWS, even though the testimony obliquely presents evidence of the group character of batterers. However, such background testimony must avoid direct references to batterers' profiles or BWS. Instead, it must focus on more generalized information describing the cycle of violence, explaining the role played by control in violent relationships, imparting general statistics concerning domestic violence, and detailing the classic signs of domestic violence murders. To the extent that the victim demonstrates the symptoms of BWS, or the defendant claims that he does not fit an established batterer's profile, such evidence should be admitted. However, the proposed introduction of background evidence functions independently from any syndrome or profile link.

II. BATTERERS' PROFILES: THE EVOLVING PSYCHOLOGICAL AND LEGAL FRAMEWORK

A. *The Psychological Prototypes*

Both prosecutors and defense counsel in domestic violence related cases have reasons why they would like the jury to hear about batterers' profiles: the former to argue that the defendant acted in conformity with his⁹ character, thus proving that he

9. While women may also become batterers, statistics demonstrate that women are the primary victims of serious injury due to domestic violence. Annually, more than one million women are victims of domestic violence. RONET BACHMAN & LINDA

committed the crime; the latter to argue that because the defendant does not fit the profile of a batterer, he was not the assailant. However, the first hurdle that must be faced is whether any profile exists against which the defendant's behavior can be compared. Currently, there is no agreement about the profile of batterers. Dr. Dutton, undoubtedly the best known expert concerning batterers, writes that the one note of agreement is that "[w]e just can't tell the perpetrators by looking at them."¹⁰ Contrary to popular belief, the public and private personas of the abuser often differ. The domestic abuser is not always an identifiable monster. Indeed, domestic violence is often not about "violence," but control.¹¹ For example, Dr. Dutton sees batterers' intimate violence as "about psychologically and physically trying to control their victims' use of time and space in order to isolate them from all social connection."¹² He claims that batterers "annihilate their wives' self-esteem, to enslave them psychologically."¹³ Dr. Dutton believes that abuse is "performed repeatedly in order to maintain and inflate the damaged self-identity of the abuser."¹⁴ The batterer's loss of his dominant role can result in murder when it appears to the batterer that his partner is finally severing the ties of the relationship.¹⁵ Ironically, death becomes what the *Simpson* prosecution called "the final act of control."¹⁶

Research on batterers reveals at least three identifiable types of batterers: men who are violent solely or primarily in their

E. SALTZMAN, U.S. DEP'T JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 3 (1995). "Each year nearly 1,500 women are killed by their batterers. Approximately 90% of women killed by husbands or boyfriends were stalked, and had previously called the police. . . . Women [who have suffered] violent victimizations are almost twice as likely to be injured if the offender was an intimate rather than a stranger. . . ." Raeder, *The Double-Edged Sword*, *supra* note 1, at 792-93 (footnotes omitted). Males commit nearly six times as many violent acts against female intimates as females commit against male intimates. Current domestic abuse batterers' profiles employ male typologies. See BACHMAN & SALTZMAN, *supra* at 1.

10. DUTTON & GOLANT, *supra* note 5, at 5.

11. See Raeder, *The Double-Edged Sword*, *supra* note 1, at 793-94.

12. DUTTON & GOLANT, *supra* note 5, at 13.

13. *Id.*

14. *Id.*

15. See Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1469-70, 1479-82 (1996) [hereinafter Raeder, *Simpson and Beyond*] (discussing control and its relationship to murder).

16. People's Response to Defendant's Motion to Exclude Evidence of Domestic Violence, *People v. Simpson*, No. BA 097211, 1994 WL 737964, at *26 (Cal. Super. Ct. L.A. County Dec. 14, 1994).

relationships with women; antisocial psychopathic batterers who display high levels of anger and jealousy and have criminal records that include crimes in addition to domestic violence; and sociopathic batterers who are "frequently and severely violent, both inside and outside the home," suffered severe abuse as children, and have lengthy criminal records.¹⁷ Distinctions exist within each of these three groupings. Overcontrolled batterers, who comprise about thirty percent of assaultive males, either actively dominate their spouses or passively isolate themselves from any emotional contact.¹⁸ Batterers who remain internally calm during heated arguments comprise roughly half of the total pool of persons with antisocial personalities.¹⁹ Dr. Dutton describes these as the "velociraptors of intimate violence,"²⁰ conjuring up visions of men totally distanced from their emotions. These batterers seek to dominate their intimates via their violent behavior.²¹ In other words, violence is not their objective, but a means through which they obtain control.

The Diagnostic and Statistical Manual of Mental Disorders Fourth Edition (DSM-IV), a publication of the American Psychiatric Association that is considered the clinician's bible, recognizes Antisocial Personality Disorder as a diagnostic category that can include batterers.²² The DSM-IV lists the essential feature of this disorder as "a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood."²³ This disorder is also characterized by deceit and manipulation.²⁴ The DSM-IV notes that these individuals "tend to be irritable and aggressive" and may repeatedly commit acts of physical assault and other acts that are

17. See Stephen D. Hart et al., *The Prevalence of Personality Disorder Among Wife Assaulters*, 7 J. PERSONALITY DISORDERS 329, 330 (1993); DUTTON & GOLANT, *supra* note 5, at 25-33. While batterers' profiles share similarities, not all are defined in exactly the same way. See, e.g., Daniel G. Saunders, *A Typology of Men Who Batter*, 62 AM. J. ORTHOPSYCHIATRY 264 (1992). Typologies based on experiences of battered women also propose comparable classifications. See, e.g., EDWARD W. GONDOLF & ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS* 64-66 (1988).

18. See DUTTON & GOLANT, *supra* note 5, at 29.

19. See *id.* at 28.

20. *Id.*

21. See *id.* at 29.

22. See AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION* 301.7, at 645-50 (1994) [hereinafter DSM-IV].

23. *Id.*

24. See *id.* at 645.

grounds for arrest.²⁵ Given O.J. Simpson's incredibly successful career and failure to exhibit violent behavior outside the home, it was a small wonder that Dr. Walker was prepared to testify that Simpson was not a dysfunctional individual who fit this description.

In contrast, most of Dr. Dutton's research focuses on "cyclical," emotionally volatile wife abusers,²⁶ who comprise about thirty percent of all habitually assaultive men.²⁷ This batterers' typology is the one psychologists appear to identify with the cycle of violence that is characteristic of BWS.²⁸ Such batterers are apt to be repeat offenders who injure their partners, both physically and psychologically, until courts intervene. However, these men are the least likely to be identified as abusers because their violent tendencies are directed primarily at their intimates.²⁹ In other words, while the world sees these men as normal, often charming individuals, their private demeanor is completely at odds with this public face. This Jekyll/Hyde quality can result in jurors not believing that these men committed any abuse, and in judges dealing leniently with them upon conviction because of the seemingly aberrational nature of their offense. Such men are not constantly violent, nor do they offend in exactly the same way. However, despite differences in their behavior patterns, most of these men share a number of commonalties. Although Dr. Dutton admits that "the abusive personality will not occur in exactly the same fashion in every cyclically abusive man," he also suggests that "[its] abiding elements (anger, jealousy, blaming, recurring moods, and trauma symptoms) are generally present in all cyclical abusers."³⁰ Thus, these shared features permit a characterization of symptoms that is integral to a batterer's profile that Dr. Dutton terms "abusive personality."³¹

Dr. Dutton's definition of abusive personality is closely linked to a well recognized personality disorder that appears in the DSM-IV: Borderline Personality Disorder.³² This disorder is

25. *See id.* at 646.

26. *See* DUTTON & GOLANT, *supra* note 5, at 24. The cyclical batterer is one who habitually resorts to violence. *Id.*

27. *See id.*

28. *See id.* at 39-50.

29. *See id.* at 17.

30. *Id.* at 140.

31. *Id.* at 39-52.

32. *See* DSM-IV, *supra* note 22, 301.83, at 650-54.

characterized by "a pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity."³³ Efforts to avoid real or imagined abandonment lie at the core of this disorder,³⁴ and result in unstable, intense relationships, which haphazardly vacillate between idealizing and devaluing intimates.³⁵ Dr. Dutton claims that Borderline Personality closely fits the cycle of violence associated with BWS, and requires only slight revamping in order to exactly fit cyclically abusive men.³⁶ For example, cyclical batterers commonly experience bouts of "profound depression, delusional jealousy, and disproportionate rage . . . in intimate contexts."³⁷ The main difference between these two disorders is that when an individual who has Borderline Personality Disorder suffers repetitive self-destructive thoughts, he "redeems his moody behavior by derogating himself," whereas the batterer with an abusive personality makes himself feel better by derogating a significant other.³⁸ Ironically, Dr. Dutton has raised the possibility that Post Traumatic Stress Disorder (PTSD), the general diagnostic category describing BWS,³⁹ is a "possible" feature of abusiveness because his research revealed that many cyclically abusive men exhibited symptoms that resembled those of PTSD.⁴⁰ The possibility that the abused can become the abuser has been of concern to domestic violence researchers for some time in the context of children who witness domestic abuse directed at their mothers.⁴¹

33. *Id.* at 650.

34. *See id.*

35. *See id.* at 650-51.

36. *See DUTTON & GOLANT, supra* note 5, at 145.

37. *Id.* at 73.

38. *See id.* at 144-45.

39. *See DSM-IV, supra* note 22, 309.81, at 424-29. 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. . . ." *Id.* at 424. The traumatic event is persistently revisited and the sufferer avoids stimuli associated with the trauma. Symptoms, which last more than one month and disturb normal functioning, include difficulty sleeping, irritability, or outbursts of anger, difficulty concentrating, hypervigilance, and exaggerated "startle response." *See id.* at 428-29.

40. *See DUTTON & GOLANT, supra* note 5, at 74-75.

41. *See, e.g.,* Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 369 (1995).

It is important to recognize the possible causes of this personality pattern to better identify the men likely to repeat their behavior, to devise ways to treat them, and to make clear that their female victims are not the cause of their violence. Dr. Dutton theorizes that the cyclical batterer's violent behavior is often the product of having been abandoned by a loved one at an earlier point in his life.⁴² Because such batterers are often "unaware that [their] dysphoria is intimacy produced,"⁴³ they commonly attribute their negative feelings to the real or perceived misdeeds of their partners, and retaliate with violence. Thus, domestic violence can be viewed as a batterer's attempt to diminish his anxiety about abandonment.⁴⁴ Dr. Dutton concludes that men with "early attachment problems" who did not bond well with their mothers during their youths may be more likely to experience anxiety and anger about intimacy.⁴⁵ When such individuals are also shamed, humiliated, and abused by their fathers, they become prime candidates for future batterers.⁴⁶

A cyclical batterer's evolving misogyny stems from his attempts to hide his feelings of shame from his female intimate.⁴⁷ Such batterers tend to deny their own aggressiveness. In essence, they do not think that they are to blame for their violent behavior; they deny accusations of abuse and view their partners as the wicked ones.⁴⁸ These batterers are jealous of their partners and often suspect sexual infidelity.⁴⁹ Cyclical abusers repeat two themes: first, "I feel bad. It's her fault"; second, "She's a bitch. She's always putting me down."⁵⁰ The abuser's intimacy with his partner angers him.⁵¹ Abuse is merely a mask for the batterer's dependency, which is based in part on the panic that he experiences in solitude.⁵² As a result, he seeks to maintain control over his partner and to dominate her physically. Dr. Dutton portrays batterers as being addicted to violence as a tension release from

42. See Dutton et al., *Intimacy-Anger*, *supra* note 4, at 1382.

43. *Id.*

44. See *id.*

45. See DUTTON & GOLANT, *supra* note 5, at 113-16.

46. See *id.* at 76, 83-84, 121.

47. See *id.* at 93, 138-39.

48. See *id.* at 105.

49. See *id.*

50. *Id.* at 44.

51. See *id.* at 109.

52. See *id.* at 45.

their anger.⁵³ When anger and violence fail to keep a batterer's partner from leaving him, he typically experiences deep depression and even suicidal feelings because he is terrified of being alone.⁵⁴ One study found that domestic homicides tended to occur at separation when men who were unable to face their dependence on their partners, killed them because they felt abandoned.⁵⁵

Dr. Dutton discusses neurological explanations for battering, citing a study in which "sixty-one percent of men assessed for outpatient treatment for wife assault had prior head injuries."⁵⁶ Similarly, men with previous head injuries were found to be six times as likely to display marital aggression as other men.⁵⁷ However, Dr. Dutton believes that something more than neurological damage is involved in creating batterers.⁵⁸ Their patterns of abuse are too similar for head injuries alone to be a complete explanation. Dr. Dutton also disputes the theory that abuse results from social conditioning because this does not explain why so many men do not become batterers.⁵⁹

It appears that Dr. Dutton's current popularization of "abusive personality" revises his earlier conclusion that "[d]espite strong prima facie evidence, there are [sic] no good data indicating that personality disorders are prevalent among wife assaulters."⁶⁰ Although Dr. Dutton previously found that eighty percent to ninety percent of the batterers who referred themselves for treatment suffered from personality disorders,⁶¹ he declined to extrapolate from this information that the same would be true of wife assaulters who did not refer themselves to treatment groups.⁶² Now, he appears willing to posit that enough batterers have an "abusive personality" to justify the adoption of this category for diagnostic purposes.

53. See *id.* at 47.

54. See *id.* at 103, 111.

55. See George W. Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 271, 279 (1982); see also Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE & VICTIMS 3, 11 (1993) (disclosing that many killings follow a marital separation or divorce).

56. DUTTON & GOLANT, *supra* note 5, at 63.

57. See Alan Rosenbaum et al., *Head Injury in Partner-Abusive Men*, 62 J. CONSULTING & CLINICAL PSYCHOL. 1187, 1191 (1994).

58. See DUTTON & GOLANT, *supra* note 5, at 64-65.

59. See *id.* at 120-22.

60. Hart et al., *supra* note 17, at 330.

61. See *id.* at 329.

62. See *id.* at 337-38.

Ultimately, personality studies of batterers seek to distinguish the most violent batterers from non-recidivist batterers that Dr. Dutton calls "single fender benders."⁶³ Today, all batterers are pigeonholed under a uniform domestic violence label. To the extent that a profile of men with abusive personalities can help identify batterers who are most likely to repeatedly harm their partners, the profile's importance exceeds any use it might ultimately have in the courtroom because evidentiary restrictions will always constrain profiles from being introduced freely in court.

However, the public policy implications of identifying how batterers are formed and how they behave are extremely significant for the criminal justice system. For example, prosecutors can better target these individuals for prosecution so that they do not fall between the cracks in the system. The threat of criminal sanction can deter violence by cyclical batterers because their ability to function normally in the outer world means that they have something to lose by being incarcerated.⁶⁴ Labeling them as having an "abusive personality" does not imply that they are incapable of changing their behavior.⁶⁵ Indeed, identifying cyclical batterers may lead to better treatment programs being devised to alter their underlying attitudes. Probation officers and judges can benefit from training to help them identify personality traits common among batterers and to better inform them in their sentencing recommendations and rulings. When faced with a charming defendant without any prior criminal record, profile information can influence a judge's decision concerning the defendant's release before trial and/or whether to impose a sentence that will give him a "wake-up call," instead of a mere slap on the wrist.

Moreover, myths that surround battered women and their batterers must be debunked at every level of society in order to properly address the root causes of battering. Educating battered women about how cyclical batterers evolve has the potential to empower victims who often blame themselves for the violence directed against them. Battered women need to understand that the cause of domestic violence is not female "provocation," but male insecurity. Similarly, the public requires education

63. DUTTON WITH GOLANT, *supra* note 5, at 22-23.

64. *See id.* at 175.

65. *See id.* at 175-77.

regarding the true forces behind domestic violence before we can hope to eradicate or, at the very least, control it.⁶⁶ Personality theory that focuses on batterers, rather than on their victims, may hold the key to ending the domestic violence "discount" which has long characterized the batterer's relationship with the criminal justice system.

B. The Character Ban Prohibiting Profile Evidence

Unlike BWS, which arguably has noncharacter uses for credibility purposes,⁶⁷ courts view batterers' profiles as explicit character evidence.⁶⁸ The weight of authority from case law concerning profiles of battering parents, pedophiles, and rapists unanimously agrees that the prosecution may not offer such evidence unless the defense "opens the door,"⁶⁹ or there is an applicable evidentiary rule that permits propensity evidence.⁷⁰

Generally, character evidence is barred because it violates societal concerns of fairness. As one court ardently asserted:

A criminal trial is by its very nature an individualized adjudication of a defendant's guilt or legal innocence. Testimony regarding a criminal profile is nothing more than an expert's opinion as to certain characteristics which are common to some or most of the individuals who commit particular crimes. Evidence of a "child battering profile" does not meet the relevancy test, because the mere fact that a defendant fits the

66. See Raeder, *Simpson and Beyond*, *supra* note 15, at 1482-85 (discussing ways to change attitudes towards domestic violence).

67. See Raeder, *The Double-Edged Sword*, *supra* note 1, at 804-05 & 808-10.

68. See, e.g., Thomas N. Bulleit, Jr., Note, *The Battering Parent Syndrome: Inexpert Testimony as Character Evidence*, 17 U. MICH. J.L. REF. 653, 670-73 (1984).

69. See, e.g., *Haakanson v. State*, 760 P.2d 1030, 1035-37 (Alaska Ct. App. 1988); *People v. Walkey*, 223 Cal. Rptr. 132, 137-39 (Ct. App. 1986); *Flanagan v. State*, 625 So.2d 827, 828 (Fla. 1993); *Sanders v. State*, 303 S.E.2d 13, 18 (Ga. 1983); *In re D.L.*, 401 N.W.2d 201, 203-04 (Iowa Ct. App. 1986); *Duley v. State*, 467 A.2d 776, 780 (Md. Ct. Spec. App. 1993); *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981); *State v. Cavallo*, 443 A.2d 1020, 1029 (N.J. 1982); *People v. Berrios*, 568 N.Y.S.2d 512, 513-15 (N.Y. Sup. Ct. 1991); *State v. Miller*, 709 P.2d 350, 353 (Utah 1985).

70. See, e.g., FED. R. EVID. 413-15. These recently enacted rules permit the prosecution to introduce evidence of the defendant's character concerning sexual assaults or child molestations in certain types of criminal and civil actions. See *id.* Elsewhere, I have extensively discussed character evidence concerns in domestic violence cases. See generally Raeder, *Simpson and Beyond*, *supra* note 15.

profile does not tend to prove that a particular defendant physically abused the victim.⁷¹

Courts see prosecutorial efforts to admit batterers' profiles in this same light. Professor Taslitz contends that "even the staunchest defenders of the idea that traits do exist and can be useful concede that psychologists cannot predict any individual instance of behavior with any degree of confidence based on knowledge of the 'trait' in question."⁷²

Taslitz argues that situational factors, not general traits, have predictive evidentiary value.⁷³ In domestic violence cases, the specific relationship provides the context in which to interpret the behavior. Thus, the argument that the profile is not improper character evidence is that the defendant's abusive personality produced a specific relationship in which his seemingly unrelated acts are linked by his attempts to dominate his mate. The focus is not on the fact that he is a bad person who has battered once and will batter again, but on the dynamics of the specific relationship. This view of specific propensity as being outside the character ban has recently been discussed by commentators in relation to introduction of prior bad acts by a defendant,⁷⁴ it has never been extended to actual batterers' profiles.

Undoubtedly, profiles create a standard against which the defendant is measured. Traditionally, this is considered a character use of evidence. Thus, present evidentiary policy prohibits batterers' profiles from playing a role in the prosecution's case-in-chief.⁷⁵ Only if the defense proffers profile evidence

71. *Commonwealth v. Day*, 569 N.E.2d 397, 399 (Mass. 1991).

72. Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 65 (1993).

73. *See id.* at 69. Interestingly, two psychologists have recently suggested that the concept of a stable personality can reconcile situational and trait analysis. *See Miguel A. Mendez, The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 229-32 (1996).

74. *See Raeder, Simpson and Beyond*, *supra* note 15, at 1490-92.

75. Character evidence is occasionally admitted erroneously. Despite the shared belief of commentators that such admission is devastating to the defense, courts often find it to be harmless error. *See, e.g., People v. Walkey*, 223 Cal. Rptr. 132, 139 (Ct. App. 1986); *Sanders v. State*, 303 S.E.2d 13, 18 (Ga. 1983). However, rather than winking at judicial errors that are based on a judge's dislike of these evidentiary restrictions, any modification of the character rules should be adopted on the basis of legitimate policy choices. While I argue to permit evidence that obliquely implicates batterers' profiles, I do not advocate a wholesale admission of such profiles by the prosecution, except to rebut evidence raised by the defense. Background

or other character evidence that may be contradicted by a profile is the prosecution able to introduce its own profile evidence without violating the character ban.⁷⁶

C. *The Expert Admissibility Divide*

Whether the focus is on character or on personality,⁷⁷ an expert's testimony creates a framework for predicting whether the defendant committed the crime with which he is charged. However, even if batterers' profile evidence is not barred by the character rules because introduced by the defense or in rebuttal thereto, it must overcome challenges to its admissibility as expert testimony. To date, attempts to introduce batterers' profiles by the defense have been relatively limited.⁷⁸ As a result, courts have not yet fully explored whether such profiles rest on sound empirical bases.⁷⁹ Judges can mask their distrust of syndrome or profile evidence by focusing on the inferior or inadequate credentials of the expert.⁸⁰

While academics have the luxury of musing about what the law should be, practicing attorneys must deal with the realities of admitting syndrome and profile evidence based on such standards as *Daubert*⁸¹ and *Frye*,⁸² which respectively require a showing of validity or general acceptance. The variation among court decisions regarding the admissibility of psychological syndrome and profile expert testimony is staggering.⁸³ For

information is sufficient to inform jurors without the potential prejudice inherent in profile testimony.

76. See FED. R. EVID. 404(a)(1).

77. Federal Rule of Evidence 404(a) excludes evidence of a person's character or a trait of character for proving action in conformity. Personality theory is prohibited because it uses character traits to predict behavior. See FED. R. EVID. 404(a).

78. See, e.g., *United States v. Banks*, 36 M.J. 150, 165 (C.M.A. 1992) (rejecting defense expert); *State v. Friedrich* 398 N.W.2d 763, 770 (Wis. 1987) (rejecting defense expert). But see *People v. Stoll* 783 P.2d 698, 714-15 (Cal. 1989) (excluding testimony of defense's psychologist was reversible error).

79. See, e.g., *United States v. Banks*, 36 M.J. 150, 164-66 (C.M.A. 1992).

80. See, e.g., *State v. Pargeon*, 582 N.E.2d 665 (Ohio. Ct. App. 1991) (reversing domestic violence conviction where court admitted testimony by a BWS expert who had no psychological or psychiatric training in case-in-chief).

81. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-95 (1993).

82. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

83. See David Hominik, *Expert Testimony: Daubert and the Changing Standard for Admission of Psychiatric, Psychological, and Other Evidence*, 19 MENTAL & PHYSICAL DISABILITY L. REP. 393, 394-95 (1995) (listing significant decisions by

example, California rejects the philosophy "that juries are incapable of evaluating properly presented references" by experts to this type of evidence.⁸⁴ As a result, California has virtually abandoned judicial restraints on the admissibility of psychological testimony, whether it is mainstream, far-fetched, untested, or misleading.⁸⁵ This total absence of a judicial gatekeeper is troubling. As Professor Berger has argued regarding expert testimony on child abuse:

Need alone does not warrant admissibility of profile evidence The danger lies in letting the expert testify at all if the expert has no basis for drawing a conclusion about the truth of what occurred, since the jury will assume, once the expert takes the stand, that this eminent authority endorses the witness's story.⁸⁶

A variant of this view is shared by most commentators.⁸⁷

In contrast to California, a number of other states are less favorably inclined towards syndrome or profile evidence, whether or not introduced by the defense.⁸⁸ Thus, courts commonly bar the use of expert testimony that a victim fits a syndrome to prove that an alleged rape, child abuse, or battering occurred.⁸⁹ However, many courts admit such evidence to disabuse the jury of myths and to explain why the victim's paradoxical conduct, such as delay in reporting the crime or recanting her claim that a crime was committed, does not mean that the charge was fabricated.⁹⁰

jurisdiction); see generally Laura Etlinger, *Social Science Research in Domestic Violence Law: A Proposal to Focus on Evidentiary Use*, 58 ALB. L. REV. 1259 (1995).

84. See *People v. Stoll*, 783 P.2d 698, 714 n.22 (Cal. 1989).

85. See *People v. McAlpin*, 812 P.2d 563, 570-72 (Cal. 1991); *People v. Kelly*, 800 P.2d 516, 534 & n.5 (Cal. 1990); *People v. Cegers*, 9 Cal. Rptr.2d 297, 301-06 (Ct. App. 1992); *People v. Phillips*, 175 Cal. Rptr. 703, 712-13 (Ct. App. 1981).

86. Margaret A. Berger, *United States v. Scop: The Common-Law Approach to an Expert's Opinion About a Witness's Credibility Still Does Not Work*, 55 BROOK. L. REV. 559, 612 (1989).

87. See, e.g., David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19 (1987).

88. See 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, *SCIENTIFIC EVIDENCE* § 9-5(B) (2d ed. 1993 & Supp. 1996); see also, e.g., *State v. Hulbert*, 481 N.W.2d 329, 332-33 (Iowa 1992).

89. See *People v. Bledsoe*, 681 P.2d 291, 297-301 (Cal. 1984); *State v. Ellis*, 656 A.2d 25, 30-31 (N.J. Super. Ct. App. Div. 1995).

90. See GIANNELLI & IMWINKELRIED, *supra* note 88, §§ 9-3(B), 9-4(B), 9-5(A);

The applicability of *Daubert* to psychological testimony is still unclear. The resultant uneasy union of these seemingly discrete disciplines may be likened to a shotgun marriage. The *Daubert* standard requires courts to focus on the methodology underlying expert testimony in assessing its scientific validity.⁹¹ Relevant factors include: potential for falsification of the hypothesis; peer review and publication; potential rate of error; and the general acceptance of the hypothesis within the relevant scientific community.⁹² One psychiatrist has recently argued that *Daubert* “provide[s] little guidance for dealing with psychiatric and psychological evidence”⁹³ because the opinion’s “general observations are essentially inapplicable to psychiatric opinions.”⁹⁴ For example, weighing the validity of syndrome and profile evidence requires criteria that are directed towards psychological and psychiatric methodology, not those utilized by the hard sciences. He contends that the differing theories of causality in major, generally accepted psychiatric theories, and varying methodologies for obtaining data and rendering diagnoses create serious questions in evaluating admissibility pursuant to *Daubert*.⁹⁵ In addition, social science data collection methods cannot accurately measure error rate and validity because they cannot be readily duplicated or objectively verified.⁹⁶

Despite these criticisms, to the extent that batterers’ profiles mirror DSM-IV categories, they will likely survive a challenge based on lack of validity or general acceptance. The DSM-IV is based on the collective opinion of the psychiatric and psychological fields that these typologies are indeed valuable.⁹⁷ In contrast,

Raeder, *The Double-Edged Sword*, *supra* note 1, at 808-10.

91. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993).

92. See *id.* at 593-94.

93. C. Robert Showalter, *Distinguishing Science from Pseudo-Science in Psychiatry: Expert Testimony in the Post-Daubert Era*, 2 VA. J. SOC. POL’Y & LAW 211, 213 (1995).

94. *Id.* at 235.

95. See *id.* at 212-13.

96. See *id.* at 234, 236-37.

97. The mere presence of a syndrome or profile in the DSM-IV does not exempt it from all other scrutiny. For example, the complaint can still be raised that a particular syndrome was designed to help treat an individual, not to assess the truth of what that person tells a doctor. Thus, to the extent it is used to prove causation of an event, the evidence is still suspect and current restrictions prohibiting use to prove causation, can still be applied. See, e.g., *People v. Bledsoe*, 681 P.2d 291, 297-301 (Cal. 1984) (prohibiting Rape Trauma Syndrome from being used to prove that rape occurred). This is particularly true of syndromes based on PTSD, which may be

new typologies based on standardized tests or personality theories not found in the DSM-IV will be subject to rigorous examination. At present, it remains unclear which, if any, of the newer theories can survive such scrutiny.

Like *Daubert*, *Frye*⁹⁸ is also a difficult standard to apply to psychological testimony. The *Frye* test, which requires general acceptance within the relevant scientific community, is usually viewed as a more conservative approach than *Daubert* because theories can be scientifically valid well before they are generally accepted. The relationship between *Daubert* and *Frye* is unclear because courts can use *Daubert's* criteria as a *Frye*-plus test, requiring not simply general acceptance but, in addition, the judge's own evaluation of scientific validity. While some courts that follow *Frye* disagree that the admissibility of psychological testimony is controlled by *Frye*, this view is not uniform.⁹⁹

Whether social science is subject to *Daubert* or *Frye* has consequences even once a psychological doctrine has been accepted. For example, BWS is now generally accepted by courts, even though it has come under withering theoretical attack.¹⁰⁰ Yet, reconceptualizing BWS to treat victims of domestic violence as survivors, rather than as fragile creatures paralyzed by learned helplessness,¹⁰¹ might require retesting under *Frye* or *Daubert*. Admissibility would depend on whether courts saw the revision as a *new* theory¹⁰² or merely as the same theory that reaches a different conclusion.¹⁰³ Thus, *Frye* and *Daubert* may constrain prosecutorial use of BWS to explain the dynamics of domestic violence, until the revised theories gain general acceptance or are validated. For the near future, the relative lack of consensus concerning batterers' profiles and personality theories relevant to identifying batterers not linked to DSM-IV typologies will likely prevent their admission in *Frye* states.

triggered by a variety of causes. Such syndromes will remain admissible to explain common symptoms, debunk myths and support credibility. *See id.* at 298.

98. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

99. *See* GIANNELLI & IMWINKELRIED, *supra* note 88, § 9-1, at 258.

100. *See* Raeder, *The Double-Edged Sword*, *supra* note 1, at 7-14.

101. *See id.*

102. *See* Melanie F. Griffith, Note, *Battered Woman Syndrome: A Tool for Batterers?*, 64 *FORDHAM L. REV.* 141, 194 n.299 (1995).

103. *See* A. Renee Callahan, *Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 *AM. U. J. GENDER & L.* 117, 141 (1994).

Valid policy grounds favor the imposition of judicial constraints on the admissibility of syndrome and profile evidence. Prosecutorial use of such evidence may unduly prejudice the jury,¹⁰⁴ whereas defense use may result in unwarranted acquittals or convictions for less serious offenses included in the charges. Ultimately, the question is whether bad social science is worse than no social science. At heart, I agree with Professor McCord that "the jury most likely has the ability to fairly and intelligently weigh the strengths and weaknesses of psychological evidence without being overwhelmed or overawed by it."¹⁰⁵ Similarly, when Professors Vidmar and Schuller investigated whether expert social science testimony is surrounded by an insurmountable aura of infallibility, they concluded that social framework expert testimony can be helpful to juries and can be confined to "the legally appropriate functions it is intended to serve."¹⁰⁶ Thus, so long as psychological evidence is filtered through the judicial gatekeeper and a qualified expert establishes that this evidence has probative value that will aid the jury, the evidence should be presumptively admissible. Psychological theories do not lend themselves to definitive confirmation in the same way that scientific theories do. Nor do they carry the same aura of certainty that surrounds scientific principles. The existence of several explanations for a given behavioral pattern should not disqualify the admission of empirically supported explanations that the expert uses to diagnose and treat batterers. Of course, theories that are not tested or have questionable support from the psychological community should be excluded. Otherwise, cross-examination will reveal that psychological theories and data are not infallible, and that not every person's behavior will fit into a particular mold.

As always, the court also may exclude evidence that is unduly prejudicial. Determining validity of social science data poses challenges, but as *Daubert* suggests, Rule 403 has a role to play when expert testimony would unduly confuse or mislead the jury. However, the manner of introducing such evidence can be designed to mitigate its prejudicial tendencies. For example, psychologists can be prohibited from definitively stating that the

104. See FED. R. EVID. 403.

105. McCord, *supra* note 87, at 86.

106. Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS., Autumn 1989, at 133, 176 (1989).

defendant does or does not fit a profile. The appropriate balance can be reached by giving the jurors information about the profile, so that the jurors themselves can evaluate whether the profile applies. Depending on the perceived prejudice, the psychologist can be allowed to opine whether the person's behavior is consistent with the profile, or simply let the jurors decide based on their assessment of the evidence in the specific case.

D. *Opening the Door to Batterers' Profiles*

1. Practical Limitations on Prosecutors

Batterers' profiles only escape the character evidence ban if the defense opens the door. However, they need not be relegated to the rebuttal case if the defense cross-examines prosecution witnesses in a manner that calls for character evidence. In that event, batterers' profile testimony should be admitted because the defense has clearly raised the issue and the prosecution has a great need for expert testimony. In contrast, a reference to profile evidence in the defense's opening statement should not open the door since such evidence ultimately may not be introduced.¹⁰⁷

Just what opens the door to character rebuttal is unclear. For example, psychiatric testimony concerning antisocial or sociopathic rapists has been admitted to rebut a claim of consensual intercourse.¹⁰⁸ In an attempted murder case, an expert was also permitted to testify in rebuttal that mental illness was not an important cause of wife-beating,¹⁰⁹ although he was unsure whether any research examined the relationship between insanity and abuser profiles.¹¹⁰ In contrast, testimony about the defendant's childhood was considered general background that did not open the door to character rebuttal.¹¹¹

107. This occurred in *Simpson*, where the defense referred to Dr. Walker in its opening statement, but never introduced her testimony.

108. See *State v. Hickman*, 337 N.W.2d 512, 516 (Iowa 1983).

109. See *State v. Baker*, 424 A.2d 171, 173 (N.H. 1980).

110. So far, such findings seem informal. See, e.g., Daniel J. Sonkin & William Fazio, *Domestic Violence Expert Testimony in the Prosecution of Male Batterers*, in *DOMESTIC VIOLENCE ON TRIAL* 218, 225 (Daniel J. Sonkin ed., 1987) (noting that researchers and clinicians appear to agree that emotional or behavioral problems of batterers cannot be described as insanity; in reality, they are learned and socially conditioned responses to anger, stress, and frustration).

111. See *United States v. Gillespie*, 852 F.2d 475, 480 (9th Cir. 1988).

The major deficiency of prosecutorial profile evidence is that the testifying psychologist or psychiatrist has not typically interviewed the defendant. Unless the defendant has raised an insanity defense or claimed that he is not an abuser, an assertion about his character which would invite rebuttal, the Fifth Amendment bars any attempt to obtain such information from the defendant.¹¹² Thus, the prosecution's expert will explain the characteristics common to batterers in order to assist the jury in deciding whether the defendant fits a batterer's profile. Ethical standards prohibit the psychologist from rendering a definite opinion about the defendant in the absence of a personal interview.¹¹³ However, the absence of an interview does not bar an expert's testimony, it just limits its scope.¹¹⁴ At most, the prosecution expert might be permitted to testify that the defendant's actions are consistent with those of an abuser,¹¹⁵ striking a balance between prosecutorial need and prejudice to the defendant. When the defense expert interviews the defendant, as in *Simpson*,¹¹⁶ and testifies based on those interviews that the defendant does not display an antisocial personality, this should open the door to a mental examination of the defendant by a prosecution psychiatrist or psychologist.¹¹⁷ Of course, even if a mental examination is granted, the prosecution will never be able to re-create the in-depth interviews available to the defense because it will only be granted limited access to the defendant.

Very little of the media-hyped expert testimony actually was admitted in *Simpson*. Dr. Dutton's brief pretrial testimony began

112. *Cf.*, *United States v. Marengi*, 893 F.Supp. 85 (D. Me. 1995) (stating that the government is not entitled to medical examination of defendant who seeks to introduce BWS testimony).

113. *See, e.g.*, American Psychological Ass'n, *Ethical Principles of Psychologists and Code of Conduct*, in *CODES OF PROFESSIONAL RESPONSIBILITY* 7.02 at 381 (3d ed., Rena A. Gorlin ed., 1994).

114. *See Barefoot v. Estelle*, 463 U.S. 880, 902-04 (1983). In fact, courts that prohibit reference to the individual victims in discussing syndrome evidence may even bar a mental examination of the victim. *See, e.g.*, *People v. Dillard* 53 Cal. Rptr. 2d 456, 467 (Ct. App. 1996).

115. *See, e.g.*, *People v. Phillips*, 175 Cal. Rptr. 703, 712 (Ct. App. 1981).

116. Marcia Clark's argument relied on a press release that stated that Dr. Walker spent some forty hours evaluating Simpson. *See Motion for Sanctions on Defense for Failure to Comply with Discovery (Resumed)*, Opening Statement by Mr. Cochran (Resumed), *People v. Simpson*, No. BA 097211, 1995 WL 34221, at *15 (Cal. Super. Ct. L.A. County Jan. 30, 1995).

117. *See, e.g.*, FED. R. CRIM. P. 12.2(c) (providing for mental examination of the defendant who raises an insanity defense).

to outline the characteristics of batterers and the earmarks of battering relationships.¹¹⁸ However, the jury, unlike the judge, never heard this tutorial on how to evaluate Simpson's prior acts of domestic violence. Moreover, defense counsel F. Lee Bailey's cross-examination pointed out a number of ways in which the actions of both Nicole and O.J. Simpson arguably fell outside the relatively inflexible mold of syndrome and profile evidence.¹¹⁹ The only trial reference to syndrome and profile testimony occurred when Ronald Shipp, a prosecution witness, testified that after Nicole Simpson was battered in 1989, he had talked to both Simpsons about the characteristics of battered women and batterers.¹²⁰ Shipp described O.J. Simpson as pointing to the "pathologically jealous" descriptor of a batterer's profile when asked if he fit any of the categories, and responding "maybe a little bit that one."¹²¹ Shipp's testimony did not pretend to be a comprehensive discussion of battering, and should have been excluded due to its highly prejudicial nature.¹²² Nevertheless, its admission permitted prosecutor Christopher Darden to refer to Shipp's testimony in his closing argument, rhetorically asking how anyone could be a "little bit" pathologically jealous.¹²³

2. Profile Evidence in the Absence of a Defense Expert

One unanswered question posed by *Simpson* is whether rebuttal batterers' profile evidence is appropriate if no defense

118. See Motion in Limine-1101(B) (Resumed), *People v. Simpson*, No. BA 097211, 1995 WL 12059 (Cal. Super. Ct. L.A. County Jan. 12, 1995).

119. For example, was O.J. Simpson's generosity inconsistent with controlling behavior or simply an aspect of control? Would someone with an abusive personality have walked away after seeing his wife engage in sexual acts with another man? Was he following orders of his attorneys in threatening to report his ex-wife to the IRS or was he demonstrating that she would never be rid of his financial control? Was Nicole Brown Simpson's slapping of a maid inconsistent with the behavior of a battered woman? See *id.* at **12-13, 22-23.

120. See Motion re Admissibility of Statements of Ronald Shipp, Examination of Ronald Shipp, *People v. Simpson*, No. BA 097211, 1995 WL 37667 (Cal. Super. Ct. L.A. County Feb. 1, 1995).

121. *Id.* at *33.

122. Although Simpson's jealousy was relevant, its juxtaposition with a batterer's profile was not. This additional fact was highly prejudicial.

123. See Closing Argument by Ms. Clark and Closing Argument by Mr. Darden, *People v. Simpson*, No. BA 097211, 1995 WL 672671, at *76 (Cal. Super. Ct. L.A. County Sept. 26, 1995).

expert testifies. *Simpson* prosecutors argued that expert testimony is a reliable tool in domestic violence trials; in order “for the jury to accurately understand the facts of this case, they must do so within the context in which the incidents occurred: a battering relationship.”¹²⁴ In *Simpson*, the defense mischaracterized the typical dynamics of domestic violence in several ways. It also presented evidence about Simpson’s demeanor before and after the time of the murders, and his relatives testified to Simpson’s pleasant relationship with his ex-wife. As a result, the prosecution argued that expert testimony rebutting such evidence was admissible even without a defense expert because the defense had opened a number of fronts concerning domestic violence evidence.¹²⁵ In particular, the prosecution wanted Dr. Dutton to rebut the following: evidence of Simpson’s pre- and post-homicide demeanor, which erroneously implied that a husband would react differently if he had been the person who killed his wife; evidence of Simpson’s relationship with his then-girlfriend Barbieri, which inaccurately connoted that no relationship existed between the victim and the defendant; defense demeanor evidence based on false propositions, for example, that batterers’ public acts mirror their private ones; and myths, such as the one which deems all batterers to be psychopathic. The prosecution also sought to have Dr. Dutton explain that a batterer’s various violent acts should not be seen as isolated, unrelated events, but rather as part of a pattern of domestic violence. This kind of evidence speaks to the defendant’s motive for killing the victim. Dr. Dutton would have depicted the characteristics of spousal murderers and batterers, disclosing that many batterers are not abusive toward persons other than their spouse. His testimony would also have cast doubt on the two-killer defense theory, which is at odds with what is known about spousal murders.¹²⁶ Although these were all legitimate points for rebuttal, the prosecution withdrew this motion from consideration. This withdrawal was inexplicable, except as a reflection of the mind-numbing fatigue and punchdrunk demeanor displayed by counsel and jurors as the trial lurched toward its abrupt conclusion.

124. People’s Motion To Introduce Expert Testimony Regarding Domestic Violence, *People v. Simpson*, No. BA 097211, 1995 WL 549121 at *6 (Cal. Super. Ct. L.A. County Sept. 11, 1995) [hereinafter *People’s Motion*].

125. *See id.* at **1-4, 11.

126. *See id.* at *4.

Some may argue that such expert testimony was no different from the standard BWS rebuttal, but this misses the point of how the prosecution intended to use the evidence. In *Simpson*, understanding the background of the defendant was arguably just as important to any fair and equitable judicial determination as understanding the background of the victim. Yet, little thought has been given to separating the aspects of expert testimony that focus on the batterer from those that focus on the victim. In part, this results from the fact that BWS is typically used when a domestic violence survivor testifies, not in cases where the victim is dead. Thus, the essence of BWS expert testimony is usually directed at the woman's conduct in relation to her credibility, not at the batterer's actions. In contrast, *Simpson* forced us to confront the use of expert testimony not only to explain the victim's behavior, but also to rebut specific images of domestic violence relationships and batterers fostered by the defense during trial. When I separated the proposed *Simpson* expert testimony that focused on the victim from testimony that focused on the batterer and his actions,¹²⁷ it became clear that such reliance on BWS was a subterfuge for introducing domestic violence background evidence.

Since the issues identified by the prosecution did not require adoption of a particular batterer's typology, but simply the presentation of a generally accepted domestic violence background, this social science framework should have been admissible. However, because the defense expert, Lenore Walker, never testified, the door had not been opened to comparisons of Simpson's behavior with Dr. Dutton's image of an abusive personality, regardless of whether it was central to understanding the prosecution's theory of Simpson's motive.¹²⁸ If Dr. Walker had testified that Simpson did not fit a batterer's profile, then Dr. Dutton's explanation of battering personalities would have been appropriate rebuttal material. Even so, Dr. Dutton could not ethically make any specific diagnosis of Simpson or his ex-wife because he had not interviewed them.¹²⁹

127. See Raeder, *The Double-Edged Sword*, *supra* note 1, at 810-11.

128. In fact, we do not know if Dr. Dutton ever reached any opinion about Mr. Simpson's personality.

129. See Motion in Limine-1101(B) (Resumed), *People v. Simpson*, No. BA 097211, 1995 WL 12059, at **8-9 (Cal. Super. Ct. L.A. County Jan. 12, 1995). Dr. Dutton acknowledged that this was true during the course of his pretrial testimony. See *id.*

E. Batterers' Profiles as Medical Testimony

One of the most intriguing questions suggested by the *Simpson* motion is whether any batterer's profile can transcend its classification as character evidence by metamorphosing into a medical diagnosis. This position was not entirely novel; the motion relied on a case that took a similar approach.¹³⁰ In *People v. Phillips*,¹³¹ a murder trial, the court admitted psychiatric evidence presented by the prosecution in its case-in-chief even though the defendant had not put her mental state in issue. The diagnosis was Munchausen Syndrome by Proxy, a syndrome in which a mother who is outwardly devoted to her young child simulates or fabricates physical illness in order to obtain attention and sympathy.¹³² The *Phillips* court allowed expert testimony on Munchausen Syndrome by Proxy, finding that the "rules of evidence do not preclude innovation."¹³³ The decision rested on the prosecution's need for motive evidence because, without expert testimony, the conduct ascribed to appellant was incongruous and apparently inexplicable.¹³⁴ Nevertheless, not all judges are sympathetic to Munchausen syndrome by proxy¹³⁵ since the syndrome is not predictive but is simply a retrospective explanation of behavior. In contrast, Battered Child Syndrome, based on an evaluation of a young child's physical injuries, has reached the level of medical diagnosis that takes it out of being perceived as character evidence,¹³⁶ although it clearly presupposes a batterer.¹³⁷ However, Battered Child Syndrome does not reveal who the batterer is, only that the injuries were intentional.¹³⁸ Of course, one could claim that psychiatric diagnoses of various forms of insanity are little more than masked character evidence, since they all compare a defendant to a common behavior pattern demonstrated by a particular group.¹³⁹

130. See People's Motion, *supra* note 124, at **10-11.

131. 175 Cal. Rptr. 703 (Ct. App. 1981).

132. See *id.* at 708-09.

133. *Id.* at 712.

134. See *id.*

135. See, e.g., *Commonwealth v. Robinson*, 565 N.E.2d 1229, 1238 (Mass. App. Ct. 1991).

136. See, e.g., *GIANNELLI & IMWINKELRIED*, *supra* note 88, at 292.

137. See *Estelle v. McGuire*, 502 U.S. 62, 68-69 (1991).

138. See, e.g., *id.*

139. The defense is entitled to raise character as a defense, which then opens the door to prosecutorial rebuttal. When the prosecution attempts to commit a

Admitting personality profiles in the prosecution's case without any opening of the door by the defense is simply too prejudicial, even if the theory is generally accepted by psychiatrists and psychologists. The character implications are strong, regardless of the underlying agreement about the diagnosis. However, we do not need to reach this issue in evaluating "abusive personality" because the data supporting this theory is too preliminary to support its metamorphosis into a medical diagnosis. Dr. Dutton's important and fascinating work may one day provide sufficient empirical support to allow this kind of evidence to surmount this hurdle, but that day has not yet come. More agreement must exist about the nature of abuse, and a critical eye must be turned toward the methodology underlying Dr. Dutton's findings. It also bears repeating that no absolute diagnosis can be made without interviewing the defendant. Yet, Dr. Dutton's insights about the abusive personality are well documented and helpful enough to support admission as rebuttal evidence. Ultimately, his work provides a needed wake-up call that research must be directed toward batterers themselves, not simply battered women's images of them.

F. Defense Use of Batterers' Profiles

1. "I Am Not a Batterer" Defense

Dr. Walker's agreement to testify on Simpson's behalf caused a furor.¹⁴⁰ Dr. Walker was described in defense attorney Johnny Cochran's opening as the "number one expert in America, perhaps in the world" on domestic violence and the "mother of the Battered Women's Syndrome."¹⁴¹ Cochran told the jury that Dr. Walker would testify that she did not see a pattern of life threatening violence preceding the homicide and that in interviewing and testing Simpson she found no evidence of Antisocial

person on the grounds of the person's impaired mental state, the person's sanity is directly in issue, thus escaping the character ban. See FED. R. EVID. 404(a), 405(b); cf. Addison v. Texas, 441 U.S. 418, 429 (1979) (stating that whether individual is mentally ill turns on facts that must be interpreted by expert psychiatrists and psychologists.)

140. See generally Griffith, *supra* note 102, at 141-43.

141. Opening Statement by Mr. Cochran, People v. Simpson, No. BA 097211, 1995 WL 27396, at *29 (Cal. Super. Ct. L.A. County Jan. 25, 1995).

Personality Disorder.¹⁴² Although Dr. Walker is familiar with literature on batterers, she has not participated in any research on men who batter. In fact, Richard Gelles, Director of the Center for the Study of Family Violence at the University of Rhode Island, was widely quoted for his observation that “[i]t’s only slight hyperbole to say that O.J. may be the first actual batterer she has interviewed.”¹⁴³ Gelles also questioned the relevance of Dr. Walker’s testimony since he pointed out that most batterers do not have Antisocial Personality Disorder and not all homicides follow escalating violence.¹⁴⁴ Indeed, Dr. Walker herself had previously asserted that men who batter often do not exhibit personality traits consistent with a psychological disorder.¹⁴⁵

Although the *Simpson* trial was not the first time Dr. Walker testified on behalf of a batterer, the extent of her expertise regarding batterers was debatable.¹⁴⁶ Dr. Walker previously testified that a defendant who killed his wife was insane and, therefore, his conduct was an accident or, at most, manslaughter.¹⁴⁷ This testimony inspired the victim’s father to brand Dr. Walker as a “domestic violence profiteer.”¹⁴⁸ Such testimony transformed Dr. Walker’s exalted status as the foremost BWS expert into a blanket expertise on batterers. This metamorphosis ignores the numerous dissimilarities in approach and theoretical constructs underlying these two specialties. The relevance of an antisocial personality diagnosis as a prerequisite for batterers who kill is problematic at best. BWS evidence does not help to predict which sorts of batterers may kill their wives. Thus, as one commentator aptly noted, extrapolating from the state of mind of the victim to determine the actions of the batterer is illogical and irrelevant.¹⁴⁹

At best, the use of BWS to define batterers’ profiles is reminiscent of the story where three blind men describe an elephant in vastly conflicting and mistaken ways as a result of

142. See *id.* at **22-24.

143. Alison Bass, *Women’s Advocate Takes Heat for Role in Trial: Sees Defense Testimony as ‘Teaching Moment’*, BOSTON GLOBE, Feb. 4, 1995, § 3, at 8.

144. See *id.*

145. See Griffith, *supra* note 102, at 191.

146. See *id.* at 185-187 & n.263.

147. See Ronnie Greene, *From Broward Trial to the O.J. Spotlight Abuse Expert Saved Wife Killer’s Life*, MIAMI HERALD, Feb. 2, 1995, at 1A.

148. *Id.*

149. See Griffith, *supra* note 102, at 183.

touching it in different places. Twisting BWS into a tool to discuss batterers' profiles is highly questionable. Studying women's reactions to batterers may shed light on the personality of batterers, but interviewing batterers will arguably yield better study results. The *Simpson* case dramatically drove this point home for me. While steeped in BWS lore for a number of years, I never truly understood how control made sense as a motive for murder until I read the extensive psychological research about batterers which had been assembled by Dr. Dutton and others.¹⁵⁰ The concept that a batterer would kill the object of his control only made sense if one understood that the batterer could not tolerate the victim finally leaving him. At that point, he reasons that if he cannot have her, neither can anyone else. Thus, his failure at control culminates in murder. This insight is not obvious when the focus is placed on the victim, rather than the batterer. The legal community's misplaced reliance on victims' portrayals of batterers has kept domestic violence law one step removed from the batterers themselves for much too long.

If BWS testimony is not the way to determine if a particular male has a batterer's personality, is there a legitimate way to present such evidence? The problem is easily stated: How can a defendant claim not to fit the profile of a batterer, if there is no definitive profile? Does the absence of a single batterer's profile doom defense attempts to refute a claim that the defendant's character corresponds with a batterer's profile? Must the defense's psychological expert negate every possible batterer's typology? Some psychologists have relied upon standardized tests that measure aggression and anger as a way around this dilemma. However, not all courts view these tests as a reliable tool to predict behavior, regardless of whether their results are offered by the prosecution or defense.¹⁵¹

To the extent that a defendant argues he does not have a disorder recognized in the DSM-IV, the question becomes one of the relevance of batterers' profiles. As Gelles said, "so what" if the batterer does not display an antisocial personality because, as discussed earlier, a large number of batterers do not fit this profile. Yet, is such testimony really very far removed from generally accepted character evidence that the defendant is

150. See e.g., sources cited *supra* note 4.

151. See, e.g., *United States v. Banks*, 36 M.J. 150 (C.M.A. 1992).

peaceable to rebut a charge of assault or murder? The answer lies in the expert's basis for making a batterer's profile claim. If different batterers' typologies are widely used by psychologists in their research, diagnosis, and treatment of patients, the mercy rule should be interpreted to permit testimony in favor of a defendant because due process concerns favor admissibility.¹⁵² However, the defense must recognize the perennial problem with character evidence.¹⁵³ Once the door is opened, the prosecution not only is free to dispute the relevance of the testimony, but is also free to present its own expert to counter whether the defendant fits the profile, and to explain that there is no lone batterer's profile. Thus, if Dr. Walker testified that Simpson did not manifest an Antisocial Personality, her testimony would have opened the door to a response that Simpson's personality was consistent with an abusive personality under Dr. Dutton's reformulation of borderline personality.¹⁵⁴ In addition, prior incidents of domestic violence that might not otherwise have been admitted become fair game during cross-examination.¹⁵⁵

2. "I Am A Batterer" Defense

A troubling question raised by defense use of batterers' profiles is whether any of the DSM-IV categories can be turned into mitigating defenses, such as insanity. For example, "Physical Abuse of Adult" is now a diagnostic category listed under the DSM-IV rubric of "Abuse and Neglect."¹⁵⁶ A defense based on possessing a batterer's personality would be a truly ironic twist. While Dr. Dutton sees batterers as victims, he claims that their prior victimization is not an excuse, but an explanation of their violent behavior.¹⁵⁷ Yet, findings that many men suffer from symptoms of PTSD and exhibit other recognized personality

152. Due process trumps evidentiary rules that prohibit trustworthy evidence necessary to proving the defendant's theory of the case. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284 (1973).

153. *See generally* *Michelson v. United States*, 335 U.S. 469 (1948).

154. This is a purely hypothetical scenario because, as previously mentioned, it is unknown whether Dr. Dutton ever reached any opinion about Mr. Simpson's personality.

155. *See* FED. R. EVID. 405(a).

156. DSM-IV, *supra* note 22, V61.1, at 682.

157. *See* DUTTON WITH GOLANT, *supra* note 5, at 20.

disorders¹⁵⁸ are bound to fuel defense attempts at insanity-like claims.

Using DSM-IV categories as the basis for a mitigating defense is not new. The classic case of *People v Berry*,¹⁵⁹ which reversed a lower court judge's refusal to instruct the jury on manslaughter because the defendant waited twenty hours for his wife to come home, employed this type of mitigating defense.¹⁶⁰ Berry's psychiatrist testified that the defendant had been emotionally victimized by numerous women, and had been convicted for stabbing his previous wife.¹⁶¹ He also portrayed the defendant's long wait as the result of pent-up passion, not premeditation.¹⁶² In other words, the defense employed a batterer's profile to portray Berry as a man who chose or gravitated toward women who provoked him to violence. The psychiatrist testified: "[W]e have this pattern of enormous dependency on these women and then rupture of the relationship with tremendous rage, almost uncontrollable."¹⁶³ This tactic transformed a factor that established the intentionality of his act into one that emphasized his rage and lack of malice, thereby blaming the victim for the batterer's repeated failure to come to grips with his assaultive personality. Sadly, the court did not understand the dynamics of domestic violence well enough to recognize that it was not the victim's previous sexual behavior, but her attempt to leave the defendant that provoked him to violence.¹⁶⁴

Generally, there is no easy way to resolve the conflict between the determinism that underpins syndrome and profile evidence and society's overriding belief in free will. However, pure determinism has no place in our criminal justice system. No advocate of batterers' profiles has claimed that an individual who fits one of these profiles is preordained to commit a crime. Personality profile evidence should not lessen the batterer's blame for his actions. Much like alcoholics who drive after drinking, most domestic violence defendants are aware that their actions are wrong. Domestic violence is not a status crime.

158. See *supra* text accompanying note 39.

159. 556 P.2d 777 (Cal. 1976).

160. See *id.* at 781-82.

161. See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 117 (1992).

162. See *id.*

163. *Id.* at 120 (excerpting from trial transcript).

164. See *id.* at 128.

Nevertheless, it is appropriate to require and provide counseling for convicted batterers. Dr. Dutton recognizes that therapy may inspire batterers to change,¹⁶⁵ and that external sanctions such as probation can suppress a batterer's resort to physical abuse.¹⁶⁶ Furthermore, Dr. Dutton estimates that for every group of 1000 batterers who complete treatment, 10,500 fewer attacks would be committed over a ten-year period than if they had not been treated.¹⁶⁷ Nevertheless, this inexact science has led even Dr. Dutton to admit: "I have learned to be humbled in my power of prediction" of whether abusive men can be cured.¹⁶⁸

III. A MODEST PROPOSAL TO PERMIT NONSYNDROME DOMESTIC VIOLENCE EXPERT TESTIMONY

A. *Justifying Nonsyndrome Domestic Violence Experts*

Numerous difficulties surround the introduction of BWS¹⁶⁹ and batterers' profiles in trials of batterers. BWS explains the experiences of women who have been subjected to terrorizing abuse, but its limitations may outweigh its advantages as it is currently construed. Dr. Walker once described women as "weaving a tale of patterns of events and feelings in the context of how they happened."¹⁷⁰ As a result, she railed against rules of evidence that call for the recitation of discrete events without allowing battered women to convey valuable information regarding their experiences.¹⁷¹ These valid criticisms reveal why expert testimony is necessary to supply the context of battered women's actions. However, the current formulation of BWS acts as an evidentiary straitjacket that pigeonholes all womens' experiences

165. See DUTTON WITH GOLANT, *supra* note 5, at 174.

166. See *id.* at 175.

167. See *id.* at 176.

168. *Id.* at 177; see also Melanie Shepard, *Predicting Batterer Recidivism Five Years After Community Intervention*, 7 J. FAM. VIOLENCE 167 (1992) (finding variables relating to intervention did not significantly predict recidivism while background variables were more helpful).

169. See, e.g., Raeder, *The Double-Edged Sword*, *supra* note 1, at 795-802.

170. Lenore E. Walker, *A Response to Elizabeth M. Schneider's Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 223, 224 (1986).

171. See *id.* Except for expert testimony, evidence is presented at trial through the use of discrete questions and answers that focus only on the specific incident in question, not on its context or underlying cause.

into one paradigm. Thus, victims who fail to meet BWS criteria cannot avail themselves of the explanation of domestic violence background that BWS provides. Similarly, evidentiary rules governing character and experts constrain prosecutors' use of batterers' profiles. Practical considerations limiting the ability of psychologists to interview the defendant are an additional obstacle to the admission of batterers' profiles.

Moreover, courts have unrealistically found that if expert testimony assists the trier of fact, it is immaterial whether the testimony is presented by the prosecution or by the defense.¹⁷² Superficially, it may sound compelling to claim that:

There is nothing about the testimony itself which makes it inappropriate for admission as part of the State's case in chief where the woman eventually asserts herself and reports her abuser to the authorities, before she becomes the defendant on trial for committing murder It would seem anomalous to allow a battered woman, where she is a criminal defendant, to offer this type of expert testimony in order to help the jury understand the actions she took, yet deny her that same opportunity when she is the complaining witness and/or victim and her abuser is the criminal defendant.¹⁷³

However, this claim completely ignores the differences between evidence introduced by the prosecution in the hope of convicting a defendant and evidence introduced by a defendant in the hope of obtaining an acquittal. Undoubtedly, the testimony of prosecution experts is much more likely to yield impermissible group character inferences and prejudice, thereby hindering the introduction of such evidence to help prove that the defendant committed the crime. Conversely, due process concerns favor the admission of reliable evidence presented by defendants.¹⁷⁴

In contrast, an approach that permits the admission of expert testimony regarding statistics and general background information about the dynamics of battering has two clear advantages: it is better suited to our present knowledge of domestic violence, and it is less prejudicial than profile evidence. Limiting back-

172. See, e.g., *Arcoren v. United States*, 929 F.2d 1235, 1240 (8th Cir. 1991).

173. *State v. Frost*, 577 A.2d 1282, 1287 (N.J. Super. Ct. App. Div. 1990). It should be noted that in New Jersey credibility does not have to be attacked before being bolstered.

174. See *Chambers v. Mississippi*, 410 U.S. 284 (1973).

ground information regarding batterers to jury instructions is not a workable solution because this evidence is not indisputable. Indisputability is a prerequisite for evidence to be judicially noticed as an adjudicative fact. Rather, this background is evaluative in nature and forms the basis of how jurors classify the evidence they receive. Moreover, jurors need this evidence to fully and fairly appraise the facts in trials that implicate domestic violence. Even after the media inundated the public with domestic violence experts following Nicole Simpson's murder, a national poll revealed that thirty percent of those polled believed that spousal abuse allegations were not relevant to the murder, and another ten percent were undecided as to the allegations' relevance.¹⁷⁵ While a juror could ultimately decide that the prosecution did not prove this was a spousal murder beyond a reasonable doubt, it is difficult to imagine how anyone could have completely rejected the relevance of prior spousal abuse. Yet, this rejection is consistent with our country's long history of down-playing domestic violence.¹⁷⁶ Even without conscious denial, the dynamics of domestic violence are not self-evident to either the public or the jurors chosen from among its ranks.

As Professor Tribe once cautioned regarding the use of statistics, a trial "is only in part an objective search for historical truth. It is also, and no less importantly, a ritual . . ."¹⁷⁷ As such, my approach toward statistics and general background information regarding domestic violence raises a number of viable policy and evidentiary questions. First, is the information methodologically sound? Second, even if this information is valid, will jurors misuse it to simply estimate the probability of the defendant's guilt, rather than to evaluate how it applies in light of all the evidence? Third, are these statistics too similar to inadmissible group profiles against which the defendant's conduct is evaluated? If so, some jurors might use it simply to buttress the existence of a battering relationship, rather than to establish a framework by which to evaluate the case specific evidence of abuse.

175. See Haya El Nasser, *For Many, Charges Hit Close to Home; "Typical" Behavior Pattern in Cases of Domestic Abuse*, U.S.A. TODAY, Jan. 16, 1995, at A3.

176. See Raeder, *Simpson and Beyond*, *supra* note 15, at 1477-79.

177. Laurence H. Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1376 (1971).

Nevertheless, the countervailing arguments for presenting background evidence are weightier. In the words of the *Simpson* prosecutors: "Not to employ expert testimony in this case such as ours [sic] exposes the court and public to verdict or decision [sic] based upon misconception, bias and ill founded belief."¹⁷⁸ For example, the *Simpson* defense team's argument that prior acts of domestic violence are not relevant because millions of women are battered, but few are murdered, was completely specious. The appropriate inquiry is how many of the total number of murdered women are killed by their batterers. Arguably, juries need to hear the answer to *this* question before they can render an informed verdict in a domestic violence case. Statistics agree that between one-third to two-thirds of all murdered women are killed by their batterers.¹⁷⁹ Indeed, an analysis of the twenty-nine percent of women killed in 1992 by their intimates that utilized the assumption that three-quarters of the killers had previously abused their mates,¹⁸⁰ "revealed that the probability that the abuser committed the crime absent any other individuating information, is 84%!"¹⁸¹ While one can argue that the inclusion of such assumptions in statistics introduced at trial interferes with the presumption of innocence,¹⁸² the assertion that spousal battering is unrelated to spousal murder invites rebuttal by an

178. People's Motion, *supra* note 124, at *8.

179. See *id.* at *4.

180. Statistics generally support the proposition that spouses who are murdered have been previously abused. See Raeder, *Simpson and Beyond*, *supra* note 15, at 1468 (gathering statistics related to domestic violence showing that 90% of women killed by intimates were previously stalked and that 90% had called the police). However, the exact extent of prior batterings of such women is unknown.

181. Jon F. Merz & Jonathan P. Caulkins, *Propensity to Abuse—Propensity to Murder?*, 8 CHANCE 14 (1995).

182. This type of analysis is referred to as Bayesian in nature, creating a mathematical model by which to evaluate the importance of a new piece of evidence assuming that one knows how the jury estimates the probability of guilt without it. Such statistics assume posterior odds that may contradict the presumption of innocence. For example, a paternity index calculates the odds that a defendant would produce a child with the same phenotypes as the child in question. This is converted into a likelihood ratio of the odds that the defendant is the father of the child by assuming that he is as likely as anyone else to be the natural father. In other words, it assumes a 50-50 chance that the defendant had sexual intercourse with the victim. Such statistics were held to violate the presumption of innocence in *State v. Skipper*, 637 A.2d 1101, 1104-07 (Conn. 1994). This is a controversial opinion. See Ronald J. Allen, et al., *Probability and Proof in State v. Skipper: An Internet Exchange*, 35 JURIMETRICS J. 277 (1995); see also *United States v. Shonubi*, 895 F. Supp. 460, 485-86 (E.D.N.Y. 1995) (discussing Bayesian analysis).

expert. General statistics that do not rely on any assumptions about the strength of previously admitted evidence also provide a compelling background when offered as part of a larger explanation of the dynamics of domestic violence. If other social science framework evidence does not overwhelm jurors,¹⁸³ they can also weigh this background evidence without abdicating their duty to decide the case based on the law and facts. Of course, the prosecution would have to establish a foundation showing that prior domestic violence existed in order to demonstrate the relevance of the framework discussed by the expert. Surmounting this additional evidentiary hurdle is worth the additional effort. Without the expert's input, the jurors' factual evaluation may very well be distorted by the numerous myths that envelop domestic violence in the public's mind.

Ultimately, the rationale for introducing statistics and explaining the dynamics of domestic violence is twofold. First, this evidence is less prejudicial than evidence that the victim suffered from BWS; BWS more directly implies that the defendant is a batterer and raises a host of issues about the validity of the syndrome. Second, despite the frequency of domestic violence, the uninformed juror runs a high risk of reaching an erroneous conclusion because popular conceptions regarding domestic violence are so often at odds with the truth.

While knowledge regarding certain issues is nearly universal, this is arguably not the case with domestic violence-related homicides. For example, few persons need to be told that when it is raining, streets are wet and travel may be more perilous. Were jurors not to have this background knowledge before considering evidence that the street was wet, they would be less likely to attribute fault correctly. Similarly, without a shared background regarding domestic violence, jurors are less likely to believe that batterers' admitted killings are premeditated¹⁸⁴ and may consider that the "overkill" associated with victims of domestic violence has no relevance to whether the murderer was her abusive mate or a stranger. In domestic violence, unlike most other types of crime, the shared history of the victim and defen-

183. See Vidmar & Schuller, *supra* note 106.

184. See Raeder, *Simpson and Beyond*, *supra* note 15, at 1477 (discussing Bureau of Justice statistics demonstrating the difficulty of obtaining first and second degree murder convictions in spousal homicide cases).

dant is often integral to understanding whether a crime was committed and, if so, the degree of the crime.

While BWS rebuttal evidence is appropriate in cases that fall within the realm of the classic PTSD diagnoses, the *Simpson* case is just one example of how pigeonholing the victim into a BWS model is, at best, strained. In these cases, evidentiary rules should not preclude the admission of background evidence regarding domestic violence. Other commentators have also argued in favor of the admission of background evidence as a matter of domestic violence policy. However, my analysis is argued against an evidentiary backdrop. The following types of evidence have been previously suggested as providing the necessary background. In arguing in favor of a reconceptualization of BWS, Dr. Mary Ann Dutton urged courts to allow experts to discuss battered women's experiences rather than just syndrome evidence. In this way, the diverse range of victims' reactions to battering can be explained without the limits imposed by learned helplessness, PTSD, or any other single reaction or profile.¹⁸⁵ In cases where the victim is not available or not cooperative, this brand of general background evidence could help explain to a jury why a battered woman might oppose the conviction of her batterer; or why other puzzling victim behavior does not necessarily conflict with allegations that the battering occurred or that it was intentional.¹⁸⁶ Similarly, Professor Fischer recommends that courts explicitly reject syndrome terminology in order to focus on the culture of battering, highlighting dissimilarities in the dynamics of normal and abusive relationships.¹⁸⁷ In an evidentiary vein, Professor Mosteller contends that courts should favor background expert testimony that jurors could choose to apply instead of testimony that explicitly labels the victim as a member of a group (e.g., battered women); this would eradicate the onus of a labeled "syndrome."¹⁸⁸ Even Professor Faigman, an

185. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1201 (1993).

186. See *id.* at 1202-03.

187. See Karla Fischer, et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2119 (1993). Professor Fischer examined multiple forms of abuse: emotional, physical, sexual, familial, and property. She also detailed the context of systematic patterns of control and domination by the abuser. See *id.* at 2120.

188. See Robert P. Mosteller, *Is the Jury Competent? Legal Doctrines Governing*

outspoken critic of BWS, advocates the admission of some "valid empirical evidence" that victims stay with their batterers because they lack other valid choices, as well as evidence regarding certain economic and social factors, in cases where victims claim that they killed their batterers in self-defense.¹⁸⁹ If this evidence is valid enough to be admitted in the defense contexts that Professor Faigman advocates, it should also be admitted when offered by the prosecution. Admittedly, we must consider prejudice in this analysis, but the evidentiary prohibition is against prejudice of an undue nature, which distracts jurors from evaluating the other evidence in the case.¹⁹⁰ In this context, distraction would occur if introduced by the defense, as well as by the prosecution. Therefore, in the absence of direct character references, the background evidence should be admitted because the prosecutorial need for domestic violence background is great, and its probative value is high enough to survive a Rule 403 challenge.

B. The Boundaries of Domestic Violence Background Testimony

Even if background evidence is admitted, courts must determine its appropriate boundaries in order to "level the playing field" so that jurors deciding cases implicating domestic violence have the same shared information as jurors deciding other cases. Although batterers' profiles should never be directly presented as part of background information, descriptions of batterers' control over their victims should be provided to jurors. In other words, expert testimony about abusive personalities must wait until the defense opens the door, but widely recognized aspects of the dynamics of domestic violence should be admitted in the prosecution's case when they are relevant.

Moreover, unlike cases that require an in-court foundation that the victim suffered from BWS, an out-of-court proffer that the woman was battered and the relevance of her being battered

the Admissibility of Expert Testimony Concerning Social Framework Evidence, 52 LAW & CONTEMP. PROBS. 85, 93 (1989).

189. See David L. Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 645-47 (1986).

190. See FED. R. EVID. 403.

would be required.¹⁹¹ Motions to admit statistical information would also be conducted in limine, as would motions to restrict the scope of the expert's presentation. The expert's qualifications could also be challenged at trial. For purposes of social science framework evidence, when batterers' profile evidence is not independently admissible, a prosecution expert should not opine whether the defendant's behavior was consistent with the picture presented by the expert. This diminishes the possibility of undue prejudice, while furnishing the background that jurors need to debunk myths and to understand evidence of prior domestic violence. In addition, a limiting instruction that background evidence is not proof that the woman was battered or that the defendant is a batterer would be mandatory. Jurors would be warned not to make those inferences, but instead to use the evidence as a framework for evaluating other evidence presented in the trial.

The most difficult question is whether such evidence should be allowed in the prosecutor's case-in-chief. Currently, courts allow it if the complainant's testimony is impeached on cross-examination; the theory being that the door has been opened to expert rehabilitation.¹⁹² When the victim has survived and testifies, the defense is likely to open the door. As a result, this restriction will not hobble the prosecution. However, in homicides where the evidence depends upon the defendant opening the door to its use, the testimony would only be admitted if the defendant claims the killing was an accident or a suicide, or that he lacked intent. If the defendant contests that he is the murderer, the background information might not be admissible unless he affirmatively claims to have had an amiable relationship with his murdered or missing partner. Yet, background evidence is critical in homicide cases because the victim cannot speak for herself. The absence of the victim's testimony hampers the prosecution's storytelling, which is designed to improve narrative coherence and assist the jury in its decisionmaking.¹⁹³ Even if rebuttal is appropriate, by the time the jury receives the background information, they likely will have disregarded or forgotten critical evidence because it seemed insignificant when originally presented. The final reason supporting the admission of a

191. See, e.g., *State v. Stringer*, 897 P.2d 1063, 1070 (Mont. 1995).

192. See e.g., *State v. Borrelli*, 629 A.2d 1105, 1110 (Conn. 1993).

193. See Taslitz, *supra* note 72, at 97.

domestic violence expert framework in the prosecution's case-in-chief in homicide cases is one I have argued in more detail elsewhere:¹⁹⁴ that is, the criminal justice system's long history of devaluing women and their concerns has resulted in its failure to address domestic violence adequately.¹⁹⁵ Background expert testimony regarding the realities of domestic violence is perhaps the best means through which to redress this imbalance in the law.

Several commentators have suggested that the prosecution should have a higher burden of proof in establishing the foundation of syndrome evidence.¹⁹⁶ In any event, courts will decide whether background testimony is probative, and whether Rule 403's prejudice concerns bar its admission in a specific case. Taslitz argues that jurors overvalue character and ignore situational factors,¹⁹⁷ but in the domestic violence setting it is the situational context that dictates the need for the social science background. Prosecutors can demonstrate their need for such evidence in the case-in-chief by citing the juror responses to voir dire questions.¹⁹⁸ In fact, this very approach was used by the *Simpson* prosecutors in their expert testimony motion. However, the motion was withdrawn before the judge could decide whether this evidence was sufficient to admit the testimony.

If the prosecutor can introduce background evidence, the defendant should also be able to demonstrate that he was not involved in a battering relationship. The problem with social science evidence is that turnabout is fair play. So long as the prosecution has introduced evidence that would make the absence of a battering relationship relevant, the defense should have equal access to general framework testimony.

Finally, a more radical proposal is to create new offenses that, by their nature, include elements which make the battering relationship provable. Once evidence of prior violence of the defendant is admitted, background evidence is relevant to explain its meaning. However, this should only be attempted when there is a justification for creating a new category of crime, such as

194. See Raeder, *Simpson and Beyond*, *supra* note 15.

195. See *id.* at 1477-79, 1513-14.

196. See Taslitz, *supra* note 72, at 116; McCord, *supra* note 87, at 98-99.

197. See Taslitz, *supra* note 72, at 111.

198. See Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219, 235 (1992).

domestic femicide.¹⁹⁹ Creating separate criminal offenses for relationally based assault, kidnapping, and sexual offenses could actually lower the gravity of those offenses in the eyes of a public who might then view these crimes as less serious than stranger violence or less deserving of punishment. To the extent that prior bad acts are admissible under the existing rules of evidence, expert testimony provides important background information against which the jury can evaluate how prior bad acts relate to issues of premeditation, motive, and even identity.

IV. CONCLUSION

The time has come to rethink domestic violence expert testimony. We must surmount the problems associated with the admission of syndrome and profile testimony if we are to overcome the criminal justice system's history of devaluing women's lives. Expert testimony about domestic violence that is not tied to the medical model is necessary to educate jurors about how to evaluate evidence when the prosecution's theory is based on the relationship between the victim and the defendant.

199. See Raeder, *Simpson and Beyond*, *supra* note 15, at 1485-87.

