RECENT DEVELOPMENT

THE ADMISSIBILITY OF EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS AFTER *KUMHO TIRE*

I. INTRODUCTION

In *Kumho Tire Co. v. Carmichael* (*Kumho Tire*),[1] the U.S. Supreme Court shifted the sand under social scientific expert evidence when it held that the guidelines for determining the reliability of expert testimony, as described in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[2] apply to all expert testimony and are not limited to scientific evidence.[3] This holding may significantly increase the number, if not necessarily the effectiveness, of challenges to the admissibility of expert testimony on domestic violence.[4] That said, one should not overstate *Kumho Tire*'s immediate impact on the majority of cases involving expert testimony on the effects of battering, as most of those cases are adjudicated in state, rather than federal, courts.[5] Nevertheless, it is

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1. 526 U.S. 137 (1999). In *Kumho Tire*, the plaintiffs brought a products liability action against a tire manufacturer and distributor for damages arising out of injuries sustained in a vehicle accident when a tire failed. The United States District Court for the Southern District of Alabama granted summary judgment for defendants after ruling that plaintiff's expert testimony that a defect in the tire's manufacture caused the tire failure was inadmissible under the *Daubert* guidelines. The Court of Appeals for the Eleventh Circuit reviewed de novo the district court's decision to apply *Daubert* and reversed and remanded the case, holding that the lower court "erred as a matter of law by applying *Daubert* in this case," Carmichael v. Samyang Tire, 131 F.3d 1433, 1436 (1997), *rev'd sub nom.* Kumho Tire v. Carmicheal*,* 526 U.S. 137 (1999), because the expert in question would be testifying to a "skill- or experience-based observation." *Id.* at 1435-36. The Supreme Court upheld the trial court's exclusion of the expert's testimony, holding that the *Daubert* guidelines were not limited to scientific testimony but rather apply to all expert testimony. 526 U.S. at 149. Justice Breyer delivered the majority opinion in which Chief Justice Rehnquist and Justices Ginsburg, Kennedy, O'Connor, Scalia, Souter, and Thomas joined. Justice Stevens joined Parts I and II and filed a concurrence in part and a dissent in part. Justice Scalia filed a concurrence in which Justices O'Connor and Thomas joined.

2. 509 U.S. 579 (1993) (interpreting FEDERAL RULE OF EVIDENCE 702).

3. *Kumho*, 526 U.S. at 138.

4. See *infra* Part III for a discussion of the contours of Battered Woman Syndrome (BWS), Battered Spouse Syndrome, and other ways of framing expert testimony about the effects of battering. *See also* Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 WIS. WOMEN'S L.J. 75, 78-80 (1996) (criticizing the characterization of expert testimony on battering as "syndrome" evidence and urging a more sophisticated approach to integrating expert testimony about battering and its effects into already existing jurisprudence).

5. As this Recent Development will discuss, the Federal Rules of Evidence and federal court interpretations of the rules often have a strong influence on state courts. *See* source cited *infra* note 44. However, particularly with regard to the admissibility of expert testimony on BWS, state courts are less likely simply to adopt federal approaches because a majority of states have passed statutes

important to consider the admissibility of expert testimony on the effects of battering both because a small but significant minority of cases involving domestic violence are adjudicated in federal court and because federal approaches to the admissibility of expert testimony have had a significant, if uneven, influence on state approaches.

Defendants have used expert testimony on the effects of battering in federal courts primarily to support claims of duress, coercion, or self-defense, while prosecutors have used it to explain victims' behavior, such as recantations.[6] Battered women have also proffered expert testimony to defend against charges of international and interstate kidnapping.[7] Furthermore, the significance of federal courts' treatment of expert testimony on the effects of battering has increased as Congress has enacted an increasing number of laws that allow for the adjudication of what were previously considered state causes of action in federal courts.[8] Although myths about battered women are still prevalent in the courtroom, expert testimony on domestic violence gives judges and juries more tools to overcome these prejudices.[9] This Recent Development attempts to draw out

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explicitly admitting such testimony.

6. This Recent Development focuses generally on the admissibility of expert testimony on battering whether offered in civil or criminal trials. However, special considerations arise when a criminal defendant offers such testimony. *See* Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, 86 GEO. L.J. 621, 623 (1998) (arguing that excluding a defendant's evidence on grounds of unreliability interferes not only with a defendant's right to present evidence, but also with a defendant's right not to be convicted except upon proof beyond a reasonable doubt and with a defendant's right to trial by jury).

7. Interview with Jane Murphy, Visiting Professor, Washington University School of Law, in St. Louis, Mo. (Jan. 27, 2000). *Cf.* Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999). In *Blondin*, the Court of Appeals for the Second Circuit rejected a father's claim that the children's mother was liable for international abduction where the trial court found the father was physically abusive to both the mother and children. *Id.* at 247. The mother conceded that she had "wrongfully abducted" the children under the relevent laws. *Id*. However, she established that the abduction fit an exception to the law requiring the defendant to show by clear and convincing evidence "a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." *Id*. Nevertheless, the court remanded the case for consideration of options for the return of the children to France under safe circumstances. *Id.* at 250. Although neither party presented expert testimony in *Blondin*, the case illustrates the potential usefulness of such expert testimony.

8. *See, e.g.*, 18 U.S.C. § 2262(a)(1), *amended by* Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (making the interstate violation of a protection order a federal offense). However, the Supreme Court has, at least in some cases, demonstrated hostility to Congress's attempts to bring new causes of action before the federal courts. For example, in *United States v. Morrison*, 529 U.S. 598 (2000), the Court held that Congress did not have the authority under the Commerce Clause to create a civil rights remedy for battered women as part of the Violence Against Women Act of 1994 (VAWA). Pub. L. No. 106-274, § 40302, 108 Stat. 1796, 1941 (codified at 42 U.S.C. § 13981 (1995)).

9. *See* Parrish, *supra* note 4; Audrey E. Stone & Karla M. Digirolamo, *Battered Women's Expert Testimony, Past and Present*, 271 PLI/EST 181 (1998); Joy Hannel, Note, *Missouri Takes a Step Forward: The Status of "Battered Spouse Syndrome" in Missouri*, 56 MO. L. REV. 465 (1991).

the implications of *Kumho Tire* for admissibility challenges of expert testimony on the effects of battering.

Kumho Tire is the most recent case that has reshaped the manner in which courts determine the admissibility of expert testimony under Federal Rule of Evidence 702.[10] In 1993, the Supreme Court set forth general principles guiding determinations of the reliability, and, thus, the admissibility of scientific expert testimony in *Daubert.*[11] The Court mentioned four factors that courts would ordinarily employ to determine admissibility under Rule 702: (1) whether the theory can be tested, (2) whether the theory has been subjected to peer review and publication, (3) the known or potential error rate of the technique, and (4) whether the relevant scientific community has generally accepted the theory.[12] Following *Daubert*, the circuit courts of appeals split as to whether the *Daubert* factors were limited to expert

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10. See General Electric Co. v. Joiner, 522 U.S. 136 (1997); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) (interpreting FEDERAL RULE OF EVIDENCE 702). *Cf.* United States v. Scheffer, 523 U.S. 303, 305 (1998) (holding that a per se rule against admission of polygraph evidence did not violate the Fifth or Sixth Amendment rights of the accused to present a defense despite *Daubert*).

In May, 2000, the Supreme Court approved an amendment to Rule 702 that became effective December 1, 2000. The new Rule 702 reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702 (2000).

The advisory committee's note explaining the 2000 amendment specifically states that the amendment was proposed in light of recent case law, namely *Daubert* and *Kumho Tire*. *See* FED. R. EVID. 702 advisory committee's note. The advisory committee's note also acknowledges additional gatekeeping factors such as whether proffered expert testimony is based on research that was created specifically for the purpose of litigation, whether an expert has reached an unsupported conclusion by unjustifiably extrapolating from an accepted premise, and whether an expert accounts for obvious alternative explanations. *See id*. *See also* William C. Smith, *No Escape from Science*, 86 A.B.A. J. 60, 66 (2000) (noting that industry and defense groups endorsed the proposed amendment). The advisory committee's note emphasizes that the rejection of expert testimony is the exception, not the rule under *Daubert,* that while all the *Daubert* factors are relevant to a reliability determination, "no single factor is necessarily dispositive," and that the amendment is not intended to justify automatic challenges to all expert testimony. FED. R. EVID. 702 advisory committee's note. Regarding nonscientific testimony, the advisory committee note explains:

> While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist.

FED. R. EVID. 702 advisory committee's note (amended 2000).

11. 509 U.S. at 593.

12. *Id*. at 593-94.

evidence addressing the "hard" sciences or were also applicable to expert testimony regarding "soft sciences" and "nonscientific" knowledge.[13]

In a related development, the Supreme Court, in *General Electric Co. v. Joiner*, enlarged the discretion of trial courts by adopting an "abuse of discretion" standard of review not only with respect to district courts' ultimate reliability determination but with respect to the way in which district courts determine reliability—that is, the abuse of discretion standard was extended into the realm of the district court's determination of the relationship between the reliability of scientific methodology and the reliability of scientific conclusions.[14] Finally in *Kumho Tire*, the Court held that the principles of *Daubert* apply to all types of expert testimony and thus are not limited to "hard" scientific evidence.[15] The *Kumho Tire* majority rejected unwieldy distinctions between "science" and "nonscience," stating that there is no bright line between the two.[16]

Since the ruling in *Daubert*, courts and legal commentators have voiced concern that the *Daubert* factors, specifically the focus on testability and error rates, may be difficult to apply to expert testimony in the areas of psychology and the behavioral sciences.[17] Examples of cases involving

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13. *Compare, e.g.*, Watkins v. Telsmith, Inc., 121 F.3d 984, 990-91 (5th Cir. 1997) (finding application of *Daubert* not limited to scientific expert testimony), *with* Compton v. Subaru of America, Inc., 82 F.3d 1513, 1518-19 (10th Cir. 1996) (finding application of *Daubert* factors unwarranted "in cases where expert testimony is based solely upon experience or training").

14. 522 U.S. 136, 146 (1997). *See also Kumho Tire*, 526 U.S. at 142.

15. *See Kumho Tire*, 526 U.S. at 138.

16. *Id.* Indeed, Rule 702, even prior to the December, 2000, amendment, does not seem to call for sharp distinctions. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702 (amended 2000). *See also* FED. R. EVID. 702 advisory committee's note (amended 2000). The Advisory Committee explained:

> The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training, or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

Id.

17. *See, e.g.*, Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997). *See also* James T. Richardson et al., *The Problems of Applying* Daubert *to Psychological Syndrome Evidence*, 79 JUDICATURE 10 (1995); Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE L.J. 933 (1999). *See also* Sheila Jasanoff, *What Judges Should Know About the Sociology of Science*, 77 JUDICATURE 77, 82 (1993). Jasanoff asserted that when judges are required to rule on the admissibility of expert testimony they "inescapably give up the role of dispassionate observer to become participants in a particular construction . . . of scientific facts" and in doing so "shape an image of reality that is colored in part by their own preferences and prejudices about how the world should

psychological testimony in which lower courts applied *Daubert* have borne out concerns that rigid applications of the *Daubert* factors may lead to sweeping dismissals of expertise from psychology and the social sciences, as well as expertise based on professional experiences.[18] In response to concerns about mechanistic applications of *Daubert*, the Court in *Kumho Tire* reiterated that the factors in *Daubert* are meant to be "helpful, not definitive,"[19] and emphasized that the factors "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony."[20]

Following *Kumho Tire*, courts must wrestle with the implications of discarding the admittedly false dichotomy between hard science, soft science, and nonscientific knowledge. The fiction that clear distinctions exist appears surprisingly simplistic taken out of context. However, lower courts following *Daubert* arguably reified such categories in reaction to the limited and limiting notion of science adopted by the Court.[21] While this demarcation did little to heighten the level of legal discourse about specialized knowledge, the distinctions may have protected useful evidence from possible exclusion under standards that appear to privilege the hard sciences at the expense of other disciplines. Against this background, the risks of deconstructing the distinction between science, soft science, and nonscience become apparent. Moreover, determining the reliability of "technical" knowledge, such as expertise based on applied physics, presents far different questions and challenges than determining the reliability of knowledge of human behavior. The question is whether the Court's invitation to employ flexibility is adequate to bring about a consistent, principled approach to social science evidence. This is especially true in light of the interplay between the "abuse of discretion" standard of review—in which the *Joiner* Court appears to have qualified the position that district courts are to determine the reliability of methodologies, not of conslusions—and the fact that the Supreme Court has not endorsed any alternative criteria to balance the *Daubert* factors, which are particularly well-suited for the hard sciences as opposed to other "softer" sciences.[22]

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work." *Id.* Therefore, she urged that this power "should be sparingly exercised." *Id*.

18. *See, e.g.,* Gier v.Educational Service Unit No. 16, 845 F. Supp. 1342 (D. Neb. 1994), *aff'd*, 66 F.3d 940 (8th Cir. 1995). *See also* United States v. Bighead, 128 F.3d 1329, 1331 (9th Cir. 1997) (Noonan, J., dissenting). Both of these cases are discussed *infra* Part IV.

19. *Kumho Tire,* 526 U.S. at 150.

20. *Id.* (quoting Brief for United States at 19, *Kumho Tire* (No. 97-1709)).

21. *See Daubert*, 509 U.S. at 598-601 (Rehnquist, C.J., concurring in part and dissenting in part).

22. Numerous articles explore the implications of *Kumho Tire. See* Judge Harbey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743 (1999); Edward J. Imwinkelried, *The Escape*

This Recent Development examines the current status and the future of the admissibility of expert testimony on the effects of battering in federal courts.[23] Over the past thirty years, the body of research on domestic violence has grown in depth and breadth. Courts have widely accepted the general idea that such testimony can be a trustworthy and helpful type of evidence.[24] However, as a component of the larger field of psychiatric, psychological, and social science research, knowledge of the effects of battering is potentially vulnerable in the face of some of the *Daubert* factors. *Kumho Tire*, which requires the application of a *Daubert* analysis to all types of expert testimony, raises the question of whether this adjusted focus on the admissibility of expert testimony will reopen what had been a relatively settled issue, the basic admissibility of expert testimony about the effects of battering. Because *Kumho Tire* requires that courts determine reliability on a case-by-case basis, this Recent Development is not concerned with drawing sweeping conclusions about the admissibility of all expert witnesses' opinions on the effects of battering. Rather, the goal here is to explore the implications of the *Daubert, Joiner,* and *Kumho Tire* line of cases for the previously existing legal perception of expert knowledge regarding domestic violence. Part II reviews the historical development of the admissibility of expert testimony on the effects of battering and addresses the dilemma surrounding the continued use of the label "Battered Woman Syndrome" (BWS). Part III reviews recent Supreme Court rulings on the admissibility of expert testimony. Part IV presents approaches to psychological and social science evidence that courts had adopted prior to *Kumho Tire* and evaluates the continued legitimacy and vitality of these approaches. Part V analyzes cases in which federal courts have applied *Kumho Tire* to resolve challenges to the testimony of witnesses who are experts in the social and behavioral sciences. Part VI summarizes lessons gleaned from the cases considered in Parts IV and V in order to predict the likely influence *Kumho Tire* will have

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Hatches from Frye *and* Daubert*: Sometimes You Don't Need to Lay Either Foundation in Order to Introduce Expert Testimony*, 23 AM. J. TRIAL ADVOC. 1 (1999); Patricia A. Krebs & Bryan J. De Tray, Kumho Tire Co. v. Carmichael*: A Flexible Approach to Analyzing Expert Testimony Under* Daubert, 34 TORT & INS. L.J. 989 (1999); Steele, *supra* note 17; K. Isaac deVyver, Comment, *Opening the Door but Keeping the Lights Off:* Kumho Tire Co. v. Carmichael *and the Applicability of the* Daubert *Test to Nonscientific Evidence*, 50 CASE W. RES. L. REV. 177 (1999); Robert W. Littleton, *Supreme Court Dramatically Changes the Rules on Experts*, N.Y. ST. B.J., July/Aug. 1999, at 8; Robert F. Reilly, *Implications of Recent* Daubert*-Related Decisions on Valuation Expert Testimony*, S.C. AM. BANKR. INST. J., June 1999, at 28.

23. The focus here is on federal courts' approaches to determining the reliability of expert testimony. Considerable diversity exists among state and federal courts regarding the purposes for which expert testimony on battering is admissible, for example, self-defense or duress. *See* Parrish, *supra* note 4, at 83.

24. *See* Parrish, *supra* note 4, at 83-87.

on the admissibility of expert testimony on domestic violence in federal courts. Part VII offers a brief conclusion about the potential contributions and limitations of the *Daubert, Joiner,* and *Kumho Tire* approach as applied to expert testimony on domestic violence.

II. THE ADMISSIBILITY OF EXPERT TESTIMONY ON BATTERING

This Part describes the development of expertise on the dynamics and effects of battering and the history of the admissibility of expert testimony on domestic violence in state and federal courts.

A. Evolving Knowledge: Redefining BWS in Light of Continuing Research

The recognition of domestic violence as a widespread social problem is quite recent.[25] Shelters for battered women simply did not exist before the 1970s.[26] Legislatures, law enforcement agencies, and prosecutors have implemented policies to respond to domestic violence in an uneven patchwork across the country.[27] Similarly, organized research on the dynamics of domestic violence is a relatively new phenomenon.[28] In 1984, psychologist Lenore Walker published her groundbreaking book on a model that she called the Battered Woman Syndrome.[29] Based on her own research, Walker formulated her BWS model to explain the seemingly contradictory behavior of victims of domestic abuse and to counter myths and misconceptions about battered women.[30] Although initally courts rejected attempts to admit expert testimony on BWS, finding that the

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25. *See* ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 182 (1987).

26. *See id.*

27. *See generally* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE (1988); PLECK, *supra* note 25; SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT (1982).

28. Research on domestic violence has now been proceeding for approximately the last thirty years. Recently, this research has received a new infusion of attention and funding with the passage of VAWA. *See, e.g.,* 42 U.S.C. § 14013 (1995); U.S. DEP'T OF JUSTICE, VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS (1996) [hereinafter DEP'T OF JUSTICE, VALIDITY AND USE OF EVIDENCE] (reviewing the theory, use, and acceptance of BWS in criminal trials submitted to Congress by interdepartmental working group of representatives from the Office of Policy Development, the Office of Justice Programs, the National Institute of Justice, the Bureau of Justice Statistics of the Department of Justice, the National Institute of Mental Health, the Administration for Children and Families, and the Office of the Assistant Secretary for Planning and Evaluation of the Department of Health and Human Services pursuant to § 40507 of VAWA, 42 U.S.C. § 14013).

29. LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984) [hereinafter WALKER, BWS].

30. WALKER, BWS, *supra* note 29, at 1-2. *See also* LENORE WALKER, THE BATTERED WOMAN (1979).

theory was not sufficiently developed and would not aid the jury,[31] numerous courts later admitted expert testimony on BWS for limited purposes in subsequent years.[32]

While later research affirmed many aspects of Walker's theory, her original BWS model proved to be overly rigid and contained a number of conceptual weaknesses.[33] Since the late 1980s, numerous commentators have noted the need for a more representative articulation of the dynamics and effects of domestic violence. For example, Janet Parrish called for the use of new terminology:

> Many battered women's advocates, experts and attorneys have expressed concern about the use of the term "syndrome" in connection with this issue. Although it may have been initially necessary to use the term to demonstrate the scientific validity of the proffered expert testimony and is a convenient way of describing a set of characteristics that are common to many battered women, the use of the term "syndrome" has also served to stigmatize the battered woman defendant, or to create a false perception that she "suffers from" a mental disease or defect (one court even referred to it as a "malady") . . . Rather than perpetuate such inaccuracies, we use (and urge others to use) the generic, inclusive language utilized by many expert witnesses and in a number of state statutes on the admissibility of expert testimony on battering and its effects.[34]

Nevertheless, as advocates and litigators convince the courts to hear evidence regarding the context of battered women's lives, legislators, courts, and some

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31. *See, e.g.,* Buhrle v. Wyoming, 627 P.2d 1374 (Wyo. 1981).

32. *See* Paula Finley Mangum, Note, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering*, 19 B.C. THIRD WORLD L.J. 593, 603-05 (1999).

33. Many proponents of the use of expert testimony on the effects of battering have heavily criticized the characterization in terms of what they see as an overly simplified BWS theory that perpetuates negative stereotypes of battered women and pathologizes predictable psychological reactions to abuse. In particular, critics call for abandonment of the framing of victims' behavior in terms of "learned helplessness." In general, critics object to the conception that battered women *suffer from* BWS as if it were a mental illness. *See, e.g.,* DONALD A. DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW (1996); EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS (1988); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Mangum, *supra* note 32; Pamela Posch, *The Negative Effects of Expert Testimony on the Battered Women's Syndrome*, 6 AM. U. J. GENDER & L. 485 (1998).

34. *See* Parrish, *supra* note 4, at 82-83.

expert witnesses often continue to frame such evidence in the language of the BWS.[35]

Writing after *Daubert*, David Faigman and Amy Wright foresaw a possible change in admissibility determinations involving expert testimony on BWS.[36] Indeed, they celebrated what they saw as the inevitable fall of BWS.[37] In *The Battered Woman Syndrome in the Age of Science*, Faigman and Wright echoed numerous critiques of the BWS model and explicitly acknowledged that the current state of expertise on domestic violence has progressed beyond the early explanations of BWS.

> Although the law has become fixated upon the syndrome model, many researchers are currently conducting excellent, sustained research on the psychology of both battered women and the men who batter them. Some of this work is relevant to legal decisionmaking and future work will undoubtedly provide substantial insights into the psychology of domestic violence.[38]

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35. Some states have adopted the gender neutral terminology of "battered spouse syndrome." *See, e.g.,* MO. REV. STAT. § 563.033 (1999). It is worth noting that the reference to a spouse is also problematic, as battering does not occur exclusively in marriage. Moreover, this attempt at gender neutrality fails on two counts. First, "battered spouse syndrome" suggests an equivalence between the battering of men and women. While men can be victims of domestic violence, men are the primary aggressors in the overwhelming majority of battering relationships between men and women. Therefore, the neutrality of the language serves to mask the extent to which this is a crime visited upon women. Second, one of the main disadvantages of using an exclusively feminine referant is that it fails to acknowledge domestic violence in same-sex relationships. Nevertheless, substituting "spouse" for "woman" produces the same negative effect.

36. *See* David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 69-71 (1997). Their disapproval of the BWS model focused primarily on weaknesses underlying Walker's original research in the early 1980s. For example, Faigman and Wright emphasized how BWS plays into negative stereotypes of battered women and put women who do not precisely fit the initial BWS model at a disadvantage. *See id.*

37. Faigman & Wright, *supra* note 36, at 70-71.

38. Faigman & Wright, *supra* note 36, at 69. *See generally* DONALD G. DUTTON, THE ABUSIVE PERSONALITY: VIOLENCE AND CONTROL IN INTIMATE RELATIONSHIPS (1998); JUDITH HERMAN, TRAUMA AND RECOVERY (1992); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN STUDY (1998); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, STALKING IN AMERICA: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (1998); DEP'T OF JUSTICE, VALIDITY AND USE OF EVIDENCE, *supra* note 28; Linda L. Marshall, *Effects of Men's Subtle and Overt Psychological Abuse on Low Income Women*, 14 VIOLENCE AND VICTIMS 69 (1999); Mindy B. Mechanic et al., *Intimate Partner Violence and Stalking Behavior: Exploration of Patterns and Correlates in a Sample of Acutely Battered Women*, 15 VIOLENCE AND VICTIMS 55 (2000); Christopher M. Murphy & Sharon A. Hoover, *Measuring Emotional Abuse in Dating Relationships as a Multifactorial Construct*, 14 VIOLENCE AND VICTIMS 39 (1999). *See also* JACQUELYN CAMPBELL, ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS (1995); Jacquelyn C. Campbell, *"If I Can't Have You, No One Can": Power and Control in Homicide of Female Partners*, *in* FEMICIDE: THE POLITICS OF WOMAN KILLING 99 (Jill Radford & Diana E.H. Russell eds., 1992); Desmond Ellis, *Post-Separation*

Relying on the availability of increasingly-reliable knowledge regarding the psychology of domestic violence, Faigman and Wright urge the application of the four *Daubert* factors, especially the testability and error rates.

Faigman and Wright clearly intended only to criticize "one line of scientific inquiry into the psychology of domestic violence."[39] Indeed, there is much to criticize in the way courts have understood and applied BWS. However, what Faigman and Wright have missed is that the residual problems with BWS stem less from the science that now underlies such testimony than from judicial interpretations of the role of such testimony. Faigman and Wright dismissed claims that the *Daubert* factors are unsuited to the behavioral sciences.[40] Faigman and Wright's failure to conceive of how the *Daubert* factors privilege the hard sciences caused them to dismiss the possibility that rigid applications of the testability and error rate factors could exclude useful evidence on the effects of battering as well as outmoded versions of the BWS model. Therefore, Faigman and Wright's unidimensional portrayal of BWS as distinct and isolated from the burgeoning knowledge about battering fails to address the complexity of the interaction between the experts and the courts.

B. The Admissibility of Expert Testimony on the Effects of Battering Before and After Daubert

Expert testimony on the effects of battering, in the name of BWS, debuted in the state courts,[41] primarily because state courts hear the overwhelming majority of cases involving domestic violence.[42] Although the Federal Rules of Evidence generally influence state rules of evidence, there is no simple

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Woman Abuse: *The Contribution of Lawyers as "Barracudas," "Advocates*," *and "Counsellors"*, 10 INTL. J.L. & PSYCHIATRY 403 (1987); Demie Kurz, *Separation, Divorce, and Woman Abuse*, 2 VIOLENCE AGAINST WOMEN 63 (1996); Aysan Sev'er, *Recent or Imminent Separation and Intimate Violence Against Women*, 3 VIOLENCE AGAINST WOMEN 566 (1997); Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE AND VICTIMS 3 (1993).

39. Faigman & Wright, *supra* note 36, at 69 n.11.

40. In doing so, they characterize criticisms of the rigid application of the *Daubert* factors to the social sciences as simplistic statements that "studying human behavior is difficult." Faigman & Wright, *supra* note 36, at 104. In response to this straw man of an argument, they argue that "[s]urely [the experience of battered women] is 'easier' to study" than DNA. *Id.*

41. *See* Ibn-Tamas v.United States, 407 A.2d 626 (D.C. 1979). In *Ibn-Tamas*, Dr. Lenore Walker testified at trial and the court applied the *Dyas* test. *See id.* at 631-39.

42. *See generally* Parrish, *supra* note 4; Steven I. Platt, *Women Accused of Homicide: The Use of Expert Testimony on the Effect of Battering on Women—A Trial Judge's Perspective*, 25 U. BALT. L. REV. 33 (1995).

correlation between state and federal admissibility tests.[43] While the majority of states have adopted rules mirroring Federal Rule of Evidence 702, only some of these states have also adopted the reasoning in *Daubert*.[44] Others apply variations of the *Frye* "general acceptance" test,[45] and many states' approaches to expert testimony are in flux.[46] For example, three months after the Supreme Court ruling in *Daubert*, the Supreme Court of Florida held in *State v. Hickson*[47] that expert testimony on BWS was admissible. Interestingly, the Florida court relied on a test derived from *Dyas v. United States,*[48] noting that the *Dyas* test encompassed the *Frye* test without mentioning the *Daubert* guidelines.[49] Particularly in light of the fact that a large number of states have enacted statutes explicitly admitting expert testimony on BWS for limited purposes, similarities between state and federal treatment of expert testimony on the effects of battering should not be overstated.[50]

Decided before *Daubert*, *Arcoren v. United States*[51] was the first federal appellate case to consider the admissibility of expert testimony related to BWS under Federal Rule of Evidence 702.[52] In *Arcoren*, the court admitted expert testimony on BWS in the prosecution of a defendant charged with sexual abuse to explain why the victim recanted her earlier testimony.[53] The *Arcoren* court held that expert testimony on BWS satisfied the *Frye*

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43. Federal Rules of Evidence and U.S. Supreme Court decisions on evidentiary issues only bind the federal courts. For surveys of states' approaches to the admissibility of evidence and comparisons to federal standards, see Parrish, *supra* note 4; John W. Parry, *Highlights & Trends*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 290 (1999).

44. *See* Parry, *supra* note 43, at 298.

45. *See id*. at 299.

46. *See id.*

47. 630 So. 2d 172 (Fla. 1993).

48. 376 A.2d 827 (D.C. 1977).

49. The court quoted the test as:

> (1) the expert is qualified to give an opinion on the subject matter; (2) the state of the art or scientific knowledge permits a reasonable opinion to be given by the expert; and (3) the subject matter of the expert opinion is so related to some science, profession, business, or occupation as to be beyond the understanding of the average layman.

Hickson, 630 So. 2d at 174 (citing Dyas v. United States, 376 A.2d 827 (D.C. 1977)). The Supreme Court of Florida held that expert testimony on BWS met the second and third prongs of this test. *Id.* at 175.

50. *See, e.g.,* MO. REV. STAT. § 563.033 (1999). *See also* Joy Hannel, Note, *Missouri Takes a Step Forward: The Status of "Battered Spouse Syndrome" in Missouri*, 56 MO. L. REV. 465 (1991); Matthew R. Niemann, Note, *Missouri's New Law on "Battered Spouse Syndrome:" A Moral Victory, A Partial Solution*, 33 ST. LOUIS U. L.J. 227 (1988).

51. 929 F.2d 1235 (8th Cir. 1991). By the date of the 1990 decision, while BWS may have been relatively new to the federal courts, such testimony had become familiar in the state courts. *See* Parrish, *supra* note 4.

52. 929 F.2d at 1240.

53. *Id.* at 1239.

requirement of general acceptance within the scientific community: "[T]he theory underlying the battered woman syndrome is beyond the experimental stage and has gained a substantial enough scientific acceptance to warrant admissibility."[54]

Since *Arcoren*, the overwhelming majority of jurisdictions have held that expert testimony on battering and its effects is admissible.[55] On occasion, the Supreme Court has also acknowledged the usefulness of expertise on the effects of battering, though these cases have not directly addressed admissibility standards.[56] Despite the adoption of Rule 702 and the ruling in *Daubert*, courts have not generally applied the full range of *Daubert* factors to such testimony. Rather, courts most often focus reliability inquiries on the qualifications of the expert and the general acceptance of expertise on the effects of battering within the scientific and medical communities.[57] Courts have been much more likely to exclude such evidence based on the particular

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54. 929 F.2d at 1240-41 (quoting State v. Hennum, 441 N.W.2d 793, 798-99 (Minn. 1989)). Notably, in *Arcoren*, the defendant did not challenge the reliability or the general admissibility of expert testimony related to BWS. 929 F.2d at 1241.

55. *See, e.g.,* State v. Koss, 551 N.E.2d 970, 976 (Ohio 1990) (finding "that the battered woman syndrome has gained substantial scientific acceptance to warrant admissibility into evidence"); Springer v. Commonwealth, 998 S.W.2d 439, 454 (Ky. 1999) (referring to "the emergence of the 'battered woman syndrome' as a phenomenon scientifically accepted in the medical community" and by the Kentucky legislature); People v. Torres, 488 N.Y.S.2d 358, 362-63 (N.Y. Sup. Ct. 1985) (holding expert testimony on BWS meets the New York and *Frye* standard for admissibility of expert scientific evidence). *See also* DEP'T OF JUSTICE, VALIDITY AND USE OF EVIDENCE, *supra* note 28, at ix ("Of the 19 federal courts that have considered the issue, all but three have admitted expert testimony on battering and its effects in at least some cases."); Parrish, *supra* note 4. *Cf.* State v. Copeland, 928 S.W.2d 828, 838 n.2 (Mo. 1996) (en banc.) In *Copeland*, the court noted that at the time of trial, BWS:

> had not been recognized as a distinct psychiatric diagnosis found in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-III and DSM-III-R). The phrase "battered woman syndrome" appears to have been coined by Dr. Lenore Walker, a psychologist, and popularized by Dr. Walker's 1979 book *The Battered Woman* and her subsequent appearances on television talk shows and newscasts.

Id.

56. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 890-95 (1992). Justice O'Connor cited Lenore Walker along with other researchers to support the proposition that because of the prevalence of domestic violence, a provision requiring women to notify their husbands before proceeding with abortions is invalid because it would represent an undue burden on women's choice to undergo an abortion. *See also* Neelley v. Alabama, 488 U.S. 1020 (1989) (Marshall and Brennan, J.J., dissenting). Justices Marshall and Brennan dissented from the denial of a writ of certiorari based on Brady violations. *Id.* at 1020. Marshall and Brennan noted that in *Neelley*, the trial judge overruled the jury's sentence and sentenced the petitioner to death, despite finding that the petitioner was substantially under the influence of her husband during the commission of the kidnaping and murder for which she was convicted. *Id.* Further, a clinical psychologist who testified as an expert at trial testified that the defendant "probably fits the battered women's syndrome to the most severe extent that [she had] seen." 488 U.S. at 1021. *Cf.* Estelle v. McGuire, 502 U.S. 62, 68 (1991) (acknowledging use of expert testimony on the "battered child syndrome" in criminal trials).

57. *See, e.g.,* Thompson v. State, 813 S.W.2d 249 (Ark. 1991); Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979).

use for which the testimony is being offered[58] and related conclusions about the relevance of the testimony.[59] The issue of reliability, in contrast, has not

58. It is helpful to analyze challenges related to the purpose for which the testimony is offered by noting the differences in the criminal defense, criminal prosecution, and civil contexts. *See generally* Goldwasser, *supra* note 6. Purpose-based exclusions are probably most problematic when they keep juries from hearing testimony in criminal defense cases. In *United States v. Madoch*, 149 F.3d 596 (7th Cir. 1998), the Court of Appeals for the Seventh Circuit upheld the exclusion of expert testimony on BWS where the purpose of testimony would be to support a duress argument. *Id.* at 599. The court emphasized that the decision was based solely on the lack of proper development of the argument below and the preservation of the points, stating: "We do not mean to minimize the significance of battered women's syndrome, or to exclude as a matter of law the possibility that some battered women may be able to prove either coercion, duress, or inability to form a specific intent." *Madoch*, 149 F.3d at 599. While the court cited cases holding against such a possibility, the court explicitly chose not to express an opinion on the issue. *Id. See also* United States v. Quintanilla, No. 97-10339, 165 F.3d 920 (9th Cir. Dec. 17, 1998) (unpublished decision) (full text available in Westlaw) (holding district court did not commit reversible error by precluding expert from expressing an opinion on subjective perceptions stemming from BWS where the court did consider subjective vulnerability at sentencing and court admitted expert testimony regarding "the psychology of human behavior with a particular emphasis on battered women" and "objective evidence of [petitioner's] fear and the circumstances she found herself in" during guilt phase of trial). *Cf.* Moran v. Ohio, 469 U.S. 948 (1984) (Marshall and Brennan, J.J., dissenting). Marshall and Brennan urged consideration of whether petitioner's constitutional rights were violated when jury instructions placed the burden of proving the defense of self-defense on the defendant. *Id.* Here the trial record in which defendant was convicted of killing her husband contained substantial evidence of severe domestic violence including testimony on the effects of battering. Marshall and Brennan noted, "Although traditional self-defense theory may seem to fit the situation only imperfectly, the battered woman's syndrome as a self-defense theory has gained increasing support over recent years." 469 U.S. at 950 (citations omitted). *See also* Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227, 228-29 (1986); *Developments in the Law—Legal Responses to Domestic Violence* (pt. V), 106 HARV. L. REV., at 1574 (1993). *Cf.* United States v. Rouse, 100 F.3d 560 (8th Cir. 1996). The Court of Appeals for the Eighth Circuit held the exclusion of expert testimony about the suggestibility of small children to specific practices by people in contact with the children amounted to abuse of discretion. *Id.* at 578. The court analogized such testimony to expert testimony that an abuse victim's symptoms are consistent with recognized syndromes including BWS. 100 F.3d at 573.

59. *See, e.g.,* People v. Morgan, 58 Cal. Rptr. 2d 772, 775 (Cal. Ct. App. 1997) (holding expert testimony on BWS was admissible as relevant to explain why victim would recant her story in a criminal prosecution); Commonwealth v. Crawford, 706 N.E.2d 289, 294 (Mass. 1999) (holding expert testimony on BWS and posttraumatic stress disorder was relevant evidence on the issue of the voluntariness of defendant's confession to police where expert testimony was admissible under state statute and *Frye* standard). *But see* People v. Gomez, 85 Cal. Rptr. 2d 101 (Cal. Ct. App. 1999). In *Gomez*, the court held expert testimony regarding BWS was inadmissible. The court concluded that such testimony was irrelevant to any explanation of the victim's recantation because the prosecution had not established that the victim "suffered from" the BWS. *Id.* at 108. The court based this determination on the conclusion that there was "no evidence" of a "'battering' relationship." In fact, the court recounted numerous pieces of evidence that the relationship was emotionally and physically abusive. *Id.* at 103-04. The court reached this decision based on a misconception of the usefulness of expert testimony on the effects of battering in the case. The court believed such expert testimony could not be useful if the victim could not be diagnosed with BWS. Unfortunately, the court failed to understand that expert testimony may have been useful, not to explain why the victim was afflicted with a particular mental disorder, but to explain why someone subjected to violence by an intimate partner might be reluctant to cooperate with prosecutors. *Gomez* demonstrates the dangers of courts' misconceptions about testimony regarding the effects of battering. *Gomez* suggests determinations

been among the most highly contested questions debated in the courts regarding expert testimony on the effects of battering since the 1980s.[60]

III. A REVIEW OF RECENT SUPREME COURT CASES

The holding in *Kumho Tire* that courts must apply a *Daubert* analysis to all types of expert testimony is deceptively simple. The nature and scope of the reliability analysis set forth in *Daubert* and refined in *Joiner* and *Kumho Tire* has allowed for a great deal of variation and, arguably, bias.[61] An understanding of courts' likely treatment of expert testimony regarding domestic violence requires an analysis of these seminal Supreme Court cases.

A. Setting the Stage: Daubert *and* Joiner

In *Daubert*, the Court considered the admissibility of expert evidence regarding medical causation based on a novel scientific methodology.[62] The *Daubert* Court held that Rule 702 overruled the *Frye* test for reliability, which focused solely on whether the relevant scientific community has generally accepted the scientific method.[63] Emphasizing that the Federal Rules of Evidence are rules of inclusion rather than exclusion, the Court in *Daubert* stated, "[A] rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony.'"[64] Rejecting the *Frye* test, the Court held that trial court judges must ensure that all scientific testimony admitted is relevant and reliable. To this end, the Court suggested

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about the relevance of expert testimony appear to be the most open to bias. *See* Christine Emerson, Note, United States v. Willis*: No Room for the Battered Woman Syndrome in the Fifth Circuit?*, 48 BAYLOR L. REV. 317 (1996) (criticizing decision that BWS testimony was irrelevant to defendant's claim of duress).

60. This is not to say that "syndrome" evidence, in the aggregate, has not been hotly contested in the popular media. *See, e.g.,* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994).

61. Laura Etlinger, Comment, *Social Science Research in Domestic Violence Law: A Proposal to Focus on Evidentiary Use,* 58 ALB. L. REV. 1259, 1276-78 (1995). Etlinger identifies the potential for bias in social science research and in judicial decision making. *Cf.* Natalie J. Gabora et al., *The Effects of Complainant Age and Expert Psychological Testimony in a Simulated Child Sexual Abuse Trial*, 17 LAW & HUM. BEHAV. 103, 115 (1993) (finding that in simulation jurors believed a thirteen-year-old sexual abuse complainant was more credible than a seventeen-year-old complainant when all other factors were the same).

62. Specifically, plaintiffs' moved to admit expert opinions based on unpublished reanalyses of epidemiological studies. *Daubert*, 509 U.S. at 588. The Court of Appeals for the Ninth Circuit had upheld a lower court's exclusion of the expert evidence based on a determination that the methodology had not been shown to be generally accepted by the scientific community as reliable. *Id.* at 584.

63. *Id*. at 587 (rejecting the *Frye* rule).

64. *Id*. at 588 (citations omitted).

a nonexclusive list of factors to be used in determining reliability including: testability, publication and peer review, error rates, and general acceptance in the relevant scientific community.[65]

Written to address the sweeping exclusion of new scientific techniques under the general acceptance test, *Daubert* shifted the authority for determining the reliability of novel scientific methods from the scientific community to judges. While *Daubert* offered "some general observations" to federal judges to guide them in this newly defined gatekeeping role, the Court stressed that "[m]any factors will bear on the inquiry, and . . . [the Court did] not presume to set out a definitive checklist or test."[66] The Court acknowledged that this expanded role for the judiciary called for restraint on the part of judges when it stated, "The inquiry is . . . a flexible one . . . [that] focus[es] . . . solely on principles and methodology, not on the conclusions that they generate."[67] The majority further limited the proper gatekeeping role of judges by endorsing judicial reliance on the conventional devices of the adversarial system to address "shaky but admissible evidence."[68]

Despite the Court's strong emphasis on the liberalizing influence of the Rules of Evidence, *Daubert* contained the seeds of a trend toward greater exclusion of expert testimony. The lack of clarity in *Daubert* led to a circuit split regarding whether the *Daubert* factors applied solely to scientific evidence or to all expert evidence.[69] On one hand, the majority opinion contained language hinting at the broad application of the guidelines to all expert testimony.[70] On the other hand, the Court derived its list of factors from a rather esoteric discussion of the nature of *scientific* knowledge and of reliability as a scientific concept.[71] The concern voiced by some courts that the *Daubert* factors would inappropriately constrain the admissibility of nonscientific evidence suggests the limitations inherent in the *Daubert* Court's choice of a traditional, conservative definition of science.[72] For those

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65. *Daubert*, 509 U.S. at 593-94.

66. *Id*. at 593.

67. *Id*. at 594-95.

68. 509 U.S. at 596-97.

> We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.

Id.

69. *See id*. at 600 (Rehnquist, C.J., concurring in part and dissenting in part). Chief Justice Rehnquist identified the question of whether the majority opinion applies beyond scientific expert testimony. *Id.*

70. *See id.* at 592.

71. *See id.* at 593.

72. *See id.* at 593 (citing K. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF

courts that interpreted *Daubert* to apply to all expert testimony, the result was often, in effect, a privileging of the methodology of the hard sciences.

Four years after *Daubert*, the Court broadened trial court judges' discretion to exclude expert testimony by adopting an "abuse of discretion" standard to review admissibilty determinations in *General Electric Co. v. Joiner*.[73] The *Joiner* Court endorsed an expansive approach to judicial gatekeeping, stating as follows:

> Respondent points to *Daubert*'s language that the "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." He claims that because the District Court's disagreement was with the conclusion that the experts drew from the studies, the District Court committed legal error and was properly reversed by the Court of Appeals. *But conclusions and methodology are not entirely distinct from one another*. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.[74]

Justice Stevens, dissenting in part in *Joiner*, criticized this broad conception of the "abuse of discretion" standard, arguing that it would result in the exclusion of reliable expert testimony.

> *Daubert* quite clearly forbids trial judges from assessing the validity or strength of an expert's scientific conclusions, which is a matter for the jury. Because I am persuaded that the difference between methodology and conclusions is just as categorical as the distinction between means and ends, I do not think the statement that "conclusions and methodology are not entirely distinct from one another," is either accurate or helps us answer the difficult admissibility question presented by this record.[75]

Justice Stevens further observed that the excluded experts' methodological approach in *Joiner* relied on the "weight of the evidence" for assessing causation. The district court, however, concluded that the expert evidence

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SCIENTIFIC KNOWLEDGE 37 (1989)).

73. 522 U.S. 136 (1997).

74. *Joiner*, 522 U.S. at 146 (1997) (citations omitted) (emphasis added). The majority's holding in *Joiner* was specifically integrated into the amendment to Rule 702. *See* FED. R. EVID. 702 (2000); *see also* FED. R. EVID. 702 advisory committee's note (2000).

75. 522 U.S. at 154-55 (Stevens, J., dissenting).

was insufficiently reliable by considering each piece of evidence in isolation.[76] Thus, according to Stevens, the trial court's opinion unjustifiably resulted in the exclusion of expert opinion based on a reliable "weight of the evidence" methodology, "not the sort of 'junk science' with which Daubert was concerned."[77] In the end, *Joiner* accentuated the exclusionary aspects of *Daubert* and raised the stakes in the debate as to whether courts should apply the criteria set forth in *Daubert* beyond the arena of the hard sciences.

B. A Closer Look at Kumho Tire

In *Kumho Tire*, the Supreme Court addressed a trial court's exclusion of an expert's opinion regarding the reasons for the failure of a tire.[78] The Court overruled the Eleventh Circuit's holding that a *Daubert* analysis was inapplicable as a matter of law because the nature of the testimony was "technical" as opposed to "scientific." The Court unambiguously stated "that Daubert's general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."[79]

The majority reinforced the flexibility that the *Daubert* Court had previously emphasized. Indeed, the language in *Kumho Tire* suggests even more leeway than was explicit in *Daubert*, spelling out the possibility of choosing only one of the factors, or even discarding all the specifically listed factors, depending on the expert testimony at hand.[80] However, reflecting the influence of *Joiner*, the Court framed its emphasis on the flexibility of the *Daubert* analysis in terms of the trial court's "broad latitude," stating that "the law grants a district court the same broad latitude when it decides *how to*

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76. *See id.* at 153 (Stevens, J., dissenting).

77. *Id*.

78. Initially, the trial court excluded the testimony reasoning that all the specific *Daubert* factors argued against the reliability of the expert's methodology. 526 U.S. at 137. On plaintiff's motion challenging the rigidity of the trial court's application of the *Daubert* factors, the trial court agreed that *Daubert* must be applied flexibly and conceded that the expert's general methodology was widely accepted for some purposes, but, nevertheless, held that the specific analysis employed by the expert was not sufficiently reliable. *See id.*

79. *Id*. at 141.

80. *Id*.

> We also conclude that a trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or every case.

Id.

determine reliability as it enjoys in respect to its *ultimate reliability determination*."[81]

The Court declined to draw any generalizations about the applicability of particular factors to certain types of evidence.

> [W]e can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.[82]

Certainly, the Court had reason to avoid sweeping dicta. However, this cautious approach differs sharply from the Court's willingness to set forth the four factors in *Daubert*. Instead, the *Kumho Tire* majority offered two illustrative anecdotes.[83] Each example referenced, at most, two of the *Daubert* factors.

> [S]ome of *Daubert*'s questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.[84]

The opinion reframed the purpose underlying the *Daubert* guidelines and articulated a concept of reliability closely related to the general acceptance test. However, rather than focusing on the general acceptance of a specific method, the Court alluded to a generally accepted level of "intellectual rigor."[85]

> The objective of [the gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, *employs in the courtroom the same level of*

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81. *Id*. at 142 (emphasis added).
82. *Joiner*, 522 U.S. at 150.
83. *Id.* at 151.
84. *Id*.
85. *Id.* at 152.

> *intellectual rigor that characterizes the practice of an expert in the relevant field.*[86]

The Court explained that the issue in *Kumho Tire* was not the reliability of the visual and tactile inspection of tires in general, but the reasonableness of using that approach together with the "particular method of analyzing the data thereby obtained, to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant."[87] Seemingly, the Court moved from the extremely flexible approach outlined in *Daubert* to a *Joiner*-style micro-level examination of the expert witness's methodology.

In a concurrence joined by Justices O'Connor and Thomas, Justice Scalia responded to the majority's generous language regarding flexibility. Justice Scalia warned trial courts that "discretion in choosing the manner of testing expert reliability" is neither the discretion to abandon gatekeeping nor the discretion to "perform the function inadequately."[88] In both an endorsement of the flexible approach and an exhortation to lower courts not to discard the *Daubert* factors lightly, Justice Scalia stressed the bounds of discretion, emphasizing that the "*Daubert* factors are not holy writ, [and] in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion."[89]

IV. POST-*KUMHO TIRE* REFLECTIONS ON THE PRE-*KUMHO TIRE* TREATMENT OF EXPERT TESTIMONY FROM THE SOCIAL SCIENCES

In the wake of *Kumho Tire*, it is useful to look back on lower courts' decisions under *Daubert* and *Joiner* regarding the admissibility of psychological expert testimony.[90] The overarching goal in this Part is to determine whether courts could apply similar reasoning to expert testimony on battering following *Kumho Tire*, whether courts are likely to adopt such approaches, and whether such approaches should be accepted as reasonably within a trial court judge's discretion.

The pre-*Kumho Tire* cases not only delineated between accepted and

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86. *Id.* (emphasis added).

87. *Joiner*, 522 U.S. at 154.

88. *See id*. at 158-59 (Scalia, J., concurring).

89. *Id*. at 159. Noticeably, the concurring Justices chose not to reinforce the parallel implication that the affirmative application of one or another *Daubert* factor may be unreasonable and an abuse of discretion. On one hand, they may have deemed such an assertion unnecessary, as it was implicit in the majority opinion. Conversely, the concurring Justices were possibly more concerned with reinforcing adherence to the listed factors.

90. While direct analogies between the various forms of psychological evidence discussed below and the specific expertise on domestic violence are somewhat problematic, the lack of case law directly addressing the reliability of expert testimony on the effects of battering forces the exercise.

rejected approaches to determining the admissibility of expert testimony, but they depicted a range of potentially legitimate ways of managing types of knowledge outside the "hard" sciences. Though the *Kumho Tire* Court rejected sharp divisions between the "hard" sciences and other expert knowledge, it made no declarations about whether "soft" sciences justify abbreviated or alternative measures of reliability. It is therefore unclear how post-*Kumho Tire* cases will address concerns regarding the difficulty of applying the *Daubert* factors to social sciences, and how appellate courts will respond to evidence of bias in decisions to exclude or include expert testimony.

Below is a comparison of four cases that apply, omit, or adjust the *Daubert* factors.[91] Two involve challenges to the admissibility of expert testimony regarding victims of child sexual abuse,[92] and two involve psychological expert testimony in the context of sex-based employment discrimination and harassment claims.[93] In *Gier v. Educational Service Unit No. 16*,[94] the United States District Court for the District of Nebraska (and later the Court of Appeals for the Eighth Circuit) limited expert testimony about child sexual abuse in the context of a civil action against a school.[95] *Gier* stands out less for the court's holding than for the court's rigid adherence to all the *Daubert* factors and for sweeping dicta about the suspect nature of all psychological expert evidence.[96] In *United States v. Bighead*,[97] the Court of Appeals for the Ninth Circuit allowed rebuttal testimony about typical characteristics of child abuse victims without any *Daubert* analysis.[98]

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91. Jenson v. Eveleth Taconite Co., 130 F. 3d 1287 (8th Cir. 1997); United States v. Bighead, 128 F. 3d 1329 (9th Cir. 1997); Butler v. Home Depot , 984 F. Supp. 1257 (N.D. Cal. 1997); Gier v. Educ. Service Unit No. 16, 845 F. Supp. 1342 (D. Neb. 1994), *aff'd*, 66 F.3d 940 (8th Cir. 1995).

92. United States v. Bighead, 128 F. 3d 1329 (9th Cir. 1997); Gier v. Educ. Service Unit No. 16, 845 F. Supp. 1342 (D. Neb. 1994), *aff'd*. 66 F.3d. 940 (8th Cir. 1995)

93. Jenson v. Eveleth Taconite Co. 130 F. 3d 1287 (8th Cir. 1997); Butler v. Home Depot, 984 F. Supp. 1342 (N.D. Cal. 1997).

94. 845 F. Supp. 1342, 1354 (D. Neb. 1994), *aff'd*, 66 F.3d 940 (8th Cir. 1995).

95. *Id.*

96. Despite the heavy rhetoric, while the court refused to allow the experts to present their opinions on whether the children had been abused, the court did allow the experts to testify as to general characteristics of children who have been abused. *Id*. at 1353.

97. 128 F.3d 1329 (9th Cir. 1997).

98. In *Bighead,* the Ninth Circuit held that a therapist's expert testimony regarding child sexual abuse was not subject to a *Daubert* analysis because the testimony involved "specialized knowledge rather than scientific theory." *Id.* at 1330. The court likened this testimony to expert testimony on drug traffickers' *modus operandi* that required no inference derived from a scientific method. *Id.* The expert had never interviewed the alleged victim and her testimony was limited to "typical characteristics she has observed among the more than 1300 persons she has interviewed who say they are victims of child abuse." *Id.* The court held that the "testimony had significant probative value in that it rehabilitated (without vouching for) the victim's credibility after she was cross-examined about the reasons she delayed reporting and about the inconsistencies in her testimony." *Id*. at 1330-31. In a vigorous dissent

In *Butler v. Home Depot*, an employment discrimination class action suit, the United States District Court for the Northern District of California denied challenges to expert testimony about workplace diversity and sex stereotyping after applying the *Daubert* guidelines with some flexibility.[99] In *Jenson v. Eveleth Taconite Co.*, the Eighth Circuit overruled a Special Master's blanket exclusion of psychological expert testimony regarding posttraumatic stress disorder arising from sexual harassment.[100] The court questioned the fit of the *Daubert* factors to psychological evidence, but nevertheless found the evidence, admissible under a flexible *Daubert* analysis.[101]

A. General Acceptance in the Scientific Community, Testability, and Error Rates

Gier illustrates the arbitrary and thus exclusionary potential of the general acceptance factor in *Daubert*. The court's statement, "The consensus among scholars is that there are as yet no scientifically reliable indicators of child sexual abuse,"[102] is difficult to reconcile with the distinct lack of "consensus" among scholars demonstrated by the evidence in the case. Similarly, the dissent in *Bighead* chose a very selective view of the relevant scientific "consensus" when considering whether the expert testimony was generally accepted.[103] Conversely, the *Jenson* court criticized such limited characterizations of the scientific communities' views.[104]

The crux of the disagreement over the application of the *Daubert* guidelines, however, lies in the application of the testability and error rate factors. In *Gier*, the trial court strictly applied the *Daubert* factor of testability and error rate. On one hand, one could view the *Gier* court's decision severely limiting the expert testimony as narrowly tailored to the court's identification of specific inconsistencies in the professionals' methods of assessing the children involved.[105] As the court conceded, "[C]urrent

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to the majority in *Bighead*, an appellate judge called for the complete exclusion of the testimony. *Id.* at 1331 (Noonan, J., dissenting).

99. 984 F. Supp. 1257, 1267 (N.D. Cal. 1997).

100. 130 F.3d 1287, 1297-98 (8th Cir. 1997).

101. *See id.*

102. 845 F. Supp. at 1348 (citations omitted).

103. *See Bighead*, 128 F.3d at 1336 (Noonan, J., dissenting).

104. *See Jenson*, 130 F.3d at 1297.

105. The court in *Gier* specifically questioned whether the assessment protocol was actually in place at the time the assessments were performed, whether the protocol was performed in a uniform manner by different practitioners, whether the protocol was sufficient to establish abuse, and whether a protocol subjected to peer review for use with nonretarded children could be viewed as reliable when used to evaluate retarded children. *See* 845 F. Supp. at 1349-50.

standardized methodologies, if . . . adhered to rigorously, might satisfy the *Daubert* requirements and meet the standards of Rule 702."[106] On the other hand, the trial court expressed a high level of distrust for all psychological testimony regarding child sexual abuse, and psychological evidence in general.

> [N]umerous courts and commentators have expressed concerns about the reliability of the type of expert testimony proffered by plaintiffs in this case. The underlying suspicions of such testimony is succinctly captured by the New Hampshire Supreme Court: "Generally speaking, the psychological evaluation of a child suspected of being sexually abused is, at best, *an inexact science*."[107]

While the *Gier* court disclaimed a sweeping rejection of psychological testimony, the court's criticism of the particular expert evidence suggests a potentially broad application, noting that "*the general nature of psychological testimony in abuse cases casts suspicion on its admissibility after Daubert*, [but the] case does not cast so broad a net as to encompass all such testimony."[108]

Focusing on the theme in *Daubert* that testibility is the essence of scientific knowledge, the *Gier* court found "[a] further 'inherent' difficulty in the use of this type of psychological evidence. . . . [I]t 'is essentially "irrefutable,"' . . . [that] the only way to test it is by proposing theoretical explanations for behavior and then testing the theories on patients."[109] The *Gier* court asserted that this "irrefutability" makes such testimony impervious to the conventional methods of the adversarial system. The court stated as follows:

> The difficulty in refuting the evidence is borne out by the resulting inability to cross-examine the witness' opinion. As in most cases, the witnesses' opinions are based on an interpretation of all of the factors before them as opposed to a single indicator or symptom.[110]

The *Gier* court's statement implies an overly simplistic notion of irrefutability. Scientific opinion that takes into account more than one factor is not necessarily irrefutable, nor does the fact that an opinion relies on a complex set of factors make it immune from attack through cross-

106. *Id*. at 1353.
107. *Id*. at 1347 (citations omitted).
108. *Id*. at 1349 (emphasis added).
109. *Id*. at 1348 (citations omitted).
110. *Id*.

examination and refutation by another expert.[111]

Rather than justifying the application of each *Daubert* factor based on the assertion that social science evidence is just as testable as other forms of science,[112] the *Gier* court assumed the relevance of the testability factor at the same time that it assumed this factor casts doubt on all expert opinion about human behavior. The court discarded the expert opinion by interpreting the testability factor as follows:

> As with any case such as this, the psychological techniques employed are essentially "untestable" because their "very nature as an opinion as to the causes of human behavior, and the fact that the methods for testing the results . . . are rife with potential for inaccuracy. Thus, the "key question" of testability cannot be conclusively answered."[113]

Expressing a markedly different tone than *Gier*, the Eighth Circuit in *Jenson* questioned the application of the *Daubert* factors to the "soft sciences." The court stated:

> There is some question as to whether the *Daubert* analysis should be applied at all to "soft" sciences such as psychology, because there are social sciences in which the research, theories and opinions cannot have the exactness of hard science methodologies.[114]

These doubts aside, the court found the proffered psychological testimony to be reliable and relevant under either a *Daubert* analysis or "the more general parameters of Rule 702."[115] The Eighth Circuit cautioned against "blanket evidentiary exclusions," reasoning that Rule 702 is a rule of admissibility rather than of exclusion.[116]

Decided three months before *Bighead*, *Butler v. Home Depot* exemplifies

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111. Indeed, this reaction against methodologies that consider more than one factor reinforces the validity of the concern voiced by Justice Stevens in his dissent in *Joiner* regarding the exclusion of expert testimony premised on a "weighing all the evidence" approach solely because the Court chose to evaluate each piece of evidence in isolation. *See Joiner*, 522 U.S. at 153 (Stevens, J., concurring in part and dissenting in part).

112. *See, e.g.,* Faigman & Wright, *supra* note 36, at 104.

113. 845 F. Supp. at 1351-52 (citing State v. Foret, 628 So. 2d 1116, 1125 (La. 1993)).

114. 130 F.3d at 1297.

115. *Id*. at 1297-98.

116. *See id*. at 1298 (citing Arcoren v. United States, 929 F.2d 1235, 1239 (8th Cir. 1991) (holding expert testimony on BWS admissible)). Referring to *Daubert*, the *Jenson* court stated, "It is clear the Court did not intend for a trial judge to automatically exclude relevant evidence if one of these conditions was not fully satisfied." *Id*. The court also quoted another Eighth Circuit opinion for the proposition that "[a] trial court should exclude an expert opinion only if it is so fundamentally unsupported that it cannot help the factfinder." *Id*. (quoting Hurst v. United States, 882 F.2d 306, 311 (8th Cir. 1989)).

a different approach to social science testimony within the Ninth Circuit.[117] The district court held that the *Daubert* guidelines applied to the testimony of social scientists.[118] The defendant argued that the testimony of plaintiffs' four expert witnesses was unreliable and irrelevant.[119] However, the court classified the testimony of Dr. Susan Fiske as "scientific" evidence and admitted it based on the factors of publication, peer review, testability, and general acceptance.[120]

> [T]he subject matter of Professor Fiske's testimony is clearly "scientific knowledge" within the meaning of Rule 702 and *Daubert I*. In particular, the theories underlying Professor Fiske's testimony have been tested in the laboratory and in the field. In addition, these theories have been subjected to peer review and have been published in reputable scientific journals. Plaintiffs have furthermore presented evidence that the theories in question have been generally accepted by experts in the field of psychology. In sum, the Court concludes that the scientific basis for Professor Fiske's expertise is well-established.[121]

Notably, the court did not specifically mention the error rate factor.[122]

Similarly, the court admitted the testimony of Dr. Bielby, an expert on gender stereotyping and sociology, social psychology, and organizational behavior, under a *Daubert* analysis, despite Home Depot challenges to the reliability of Dr. Bielby's testimony.[123] The Court rejected Home Depot's "methodological" arguments. It stated:

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117. The district court cited the Ninth Circuit for the proposition that "[s]pecial concerns arise when evaluating the proffer of scientific testimony that do not arise when evaluating the type of [nonscientific] expert testimony offered here." *Butler*, 984 F. Supp. at 1261 n.3 (quoting Thomas v. Newton Int'l Enters., 42 F.3d 1266, 1270 n.3 (9th Cir. 1994)).

118. *Id*. at 1263 (citing People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 534 (7th Cir. 1997)). The court termed the expertise of one expert to be "specialized knowledge" rather than scientific knowledge. *See id.* at 1260. With regard to this testimony, the court stressed that *Daubert* is flexible and all factors need not apply to every expert. *Id.* Although the broad distinction between specialized and scientific knowledge would not be favored following *Kumho Tire*, the testimony-specific application of the *Daubert* factors would arguably be consistent with *Kumho Tire*.

119. The witnesses' areas of expertise included organizational diversity program design and implementation, social psychology, social relations, stereotyping, sociology, organizational behavior, statistics, survey research, and job interests. *See Butler*, 984 F. Supp. at 1259. Dr. Susan Fiske is the expert that testified in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

120. 984 F. Supp. at 1263.

121. *Id.* (citations omitted).

122. *See id*.

123. 984 F. Supp. at 1265. Home Depot asserted "that Professor Bielby dr[e]w sweeping conclusions based on his selected review of deposition testimony. In addition, Home Depot argue[d] that Professor Bielby's testimony [wa]s unreliable because he ha[d] not reviewed applicant flow data, examined specific personnel decisions, or controlled for other factors which might explain any gender disparity." *Id*.

> Like Professor Fiske, Professor Bielby does not contend that he has conducted a systematic survey of female applicants' or employees' career interests based on a random sample; instead, he proffers his conclusions based on a limited set of information. To the extent that Professor Bielby offers conclusions which lack foundation, Home Depot may attack such statements through vigorous cross-examination, presentation of contrary evidence, and requests for limiting instructions.[124]

These pre-*Kumho Tire* cases do not merely depict a circuit split regarding whether the *Daubert* factors apply to psychological expert testimony at all. Instead, the more prominent debate even prior to *Kumho Tire* centered on the type of reliability screening required by *Daubert*, specifically the utility of the testability and error rate factors.

B. The Question of Bias

The risk of bias in admissibility determinations exists at two levels. On a macroscopic level, the *Daubert* standard is arguably biased against nonscientific knowledge.[125] On the microscopic level individual judges could strictly apply the *Daubert* factors to exclude expert testimony about human behavior when such testimony conflicts with their socio-political views. Significantly, these two levels can act together to disadvantage doubly expert evidence regarding human behavior. As the cases suggest, expert evidence on human behavior is inherently vulnerable to judicial political opposition in a way that testimony from the hard sciences is not, at least in the aggregate. This becomes particularly clear in light of the explicit use of social science testimony to counter popular myths and prejudices.

A few examples highlight the significance of the bias concern. In *Gier*, the district court relied upon highly controversial critiques of expertise on child sexual abuse to support statements about the lack of any reliability in the field.[126] The dissent in *Bighead* drew an analogy between allegations of incest and the Salem witch trials, arguing that: "'the general characteristics'" of children believed to be under the spell of a witch were the principal evidence that witchcraft had taken place."[127] Reaching far beyond the issue before the court, the dissent made sweeping statements about the validity of

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124. *Id*. (citations omitted).

125. *See* Jasanoff, *supra* note 17.

126. *See* 845 F. Supp. at 1349 n.13 (citing RICHARD A. GARDNER, M.D., SEX ABUSE HYSTERIA, SALEM WITCH TRIALS REVISITED (1991)).

127. 128 F.3d at 1337 (Noonan, J., dissenting).

claims based on repressed memories and satanic ritual child abuse.[128] Even more striking, the dissenting judge expressed discomfort with the "current climate" and "cultural changes" in a thinly veiled diatribe against the changing gender relationships that have made possible reevaluations of sexual violence. The dissent stated, "In this America of the so-called sexual revolution, traditional restraints have tended to be displaced by a kind of new puritanism. At the same time being a victim has become a popular calling; the most strategic role is that of victim."[129] Particularly vitriolic is the dissent's apparent attack on any acknowledgment of child sexual abuse, much less the existence of expertise in assessing and treating child sexual abuse.

> It is in the context of these cultural changes that statutes of limitations have been altered to benefit the delayed disclosures of childhood sexual abuse, *that a journal has appeared with the title Journal of Child Sexual Abuse, and that those who have complained of such abuse are identified by their therapists as "victims" or, more dramatically, as "survivors."*[130]

In contrast, in *Home Depot*, the judge refused an invitation to act on bias. Quoting the defendant's motion to exclude the testimony of Dr. Susan Fiske, the court highlighted defendant's sexually-laden attack on the witness's competence and objectivity: "'[T]he union of plaintiffs' counsel and Fiske as co-authors of the report suggests that it is more akin to the product of a *bordello* than a research laboratory.'"[131] *Jenson*, on the other hand, offers a rare insight into the existence of bias so blatant as to draw open disapproval. The Eighth Circuit found the Special Master's evidentiary ruling constituted an abuse of the broad discretion granted by the Supreme Court in *Joiner*.[132]

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128. Like the court in *Gier*, the dissent in *Bighead* cited literature that represented one pole in the spectrum of psychological authorities writing on repressed memories and ritual abuse. *See* 128 F.3d at 1337-38 (Noonan, J., dissenting) (citing GARDNER, *supra* note 126; RICHARD OFSHE & ETHAN WATTERS, MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY AND SEXUAL HYSTERIA (1994)). The dissenting judge also called into doubt the expert witness's objectivity based on the fact that she was the forensic director of the Children's Advocacy Center, "a position oriented to achieving results for the Advocacy Center in the courts." 128 F.3d at 1336. Scrutinizing the witness's employment at an agency that specifically addressed child abuse is not particularly relevant to objectivity. Indeed, under such reasoning, expertise in child abuse would in and of itself make the expert suspect.

129. 128 F.3d. at 1337-38.

130. *Id*. at 1338 (emphasis added).

131. 984 F. Supp. at 1263 n.9 (citing Defendant's Motion to Exclude Fiske Testimony at 10) (emphasis added).

132. *Jenson*, 130 F.3d at 1297 n.15.

The Eighth Circuit's frank commentary on the bias exhibited by the Special Master is striking:

> Upon a reading of the record, ineluctably we are led to conclude that the Special Master's exclusion of this testimony did not rest upon any recognized area of discretion. The record strongly suggests the Special Master foreclosed consideration of the evidence based on his own preconceived notions relating to psychiatric proof. The Special Master did not attempt to hide his hostility toward psychological evidence in sexual harassment claims, stating: "'Experts'. . . know no more than judges about what causes mental changes--which is to say that they know almost nothing."[133]

The court further noted its "disapprov[al] of such categorical exclusions by the same Special Master in a prior sexual harassment case which 'unfairly prevented' proof of plaintiff's claim."[134] Taken together, these cases suggest that the danger of bias in admissibility determinations has not been an idle consideration, particularly in the arena of sex-based violence.

In sum, although *Kumho Tire* clearly mandates some application of the *Daubert* guidelines to all expert testimony, it would be overly simplistic to conclude that the rigid approach adopted in *Gier* prevailed. Rather, *Gier* represents one approach lower courts may choose after *Kumho Tire*, once at odds with the principle of flexibility espoused in *Kumho Tire* and, to some extent, protected by the abuse of discretion standard enunciated in *Joiner*. Taken on its own terms, *Gier* did not commit itself to one unequivocal approach. On one hand, the court made strong statements suggestive of a general distrust of psychological testimony regarding the sexual abuse of children. On the other hand, the court's ruling was based on findings of specific inconsistencies in the expert evidence. Moreover, while the Eighth Circuit solidly affirmed *Gier*,[135] it offered a much different approach to determining the reliability of expert testimony in *Jenson*. More important

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133. *Id*. at 1297. Specifically, the Eighth Circuit found that the Special Master "made two questionable observations." *Id.* at 1296. "First, the court found: 'There is, therefore, no scientifically developed psychiatric model or procedure for determining whether a particular stress caused a particular symptom or mental state." *Id*. at 1296-97. Then the Special Master also found that from the "unanimous testimony of psychiatrists and psychologists, called by both sides, . . . there is no scientific method for determining the cause of a mental disorder or for allocating proportionate cause when more than one possible cause exists." *Id*. at 1297. The Eighth Circuit observed that "[i]ronically, the Special Master, . . . generally accepted the opinions of the expert witnesses produced by the defendants. The imbalance in its rulings is difficult to explain." *Id*.

134. *Jenson*, 130 F.3d at 1298 (citations omitted).

135. "The analysis that the District Court conducted is precisely the type of analysis the decision in *Daubert* contemplates." Gier v. Educ. Service Unit No. 16, 66 F.3d 940, 944 (8th Cir. 1995).

than representing two views on whether *Daubert* applies at all, these pre-*Kumho Tire* decisions represent divergent views on how *Daubert* should apply, that is, they offer strikingly different perspectives on whether such testimony is potentially reliable and what approaches are relevant to determining its reliability.[136]

V. AN ANALYSIS OF THE TREATMENT OF EXPERT TESTIMONY REGARDING THE SOCIAL SCIENCES FOLLOWING *KUMHO TIRE*

Whereas the pre-*Kumho Tire* battles often centered on whether courts were obliged to conduct a *Daubert*-style reliability analysis, the post-*Kumho Tire* debates will likely center on the form of the reliability inquiry.[137] At base, *Kumho Tire* does little to resolve substantive disagreements about the proper content of reliability determinations. This Part looks at how courts are applying *Kumho Tire* to social science evidence to identify trends relevant to expert testimony on domestic violence. The variety of post-*Kumho Tire*

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136. Commentators and judges provide conflicting judgments regarding the flexibility with which the courts are applying the *Daubert* factors. *See* Moore v. Ashland Chemical, Inc., 151 F.3d 269 (5th Cir. 1998). *See also* Krebs & De Tray, *supra* note 22.

In *Moore*, the dissent wrote a scathing critique of what it characterized as the majority opinion's "insistence on an inflexible, unthinking application of the *Daubert* factors to expert opinions based on knowledge and methodology outside the realm of hard science." *Moore*, 151 F.3d at 283. The dissent cited cases from other circuits taking a more flexible approach. *See, e.g.,* Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996). In *Tyus*, the court held that, at a general level, the *Daubert* framework was appropriate for all kinds of expert testimony. *Id.* at 263. Specifically regarding the framework for assessing the admissibility of social science expert testimony, the *Tyus* court stated:

> It is true, of course, that the measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise will also vary. Furthermore, we agree with the implication . . . that genuine expertise may be based on experience or training. In all cases, however, the district court must ensure that it is dealing with an expert, not just a hired gun.

Id. Notably, the advisory committee's note to Rule 702 cites both *Moore* and *Tyus* with approval. *See* FED. R. EVID. 702 advisory committee note (2000).

137. In the various admissibility determinations examined here, whether the courts adopted a flexible or rigid *Daubert* analysis, experts were often precluded from offering opinions as to the specific application of their theory in the context of the case. *United States v. Charley*, 189 F.3d 1251 (10th Cir. 1999), offers an interesting note on the influence *Kumho Tire* will have on limiting instructions. In *Charley*, the Court of Appeals for the Tenth Circuit reviewed a trial court's ruling on the admissibility of the testimony of pediatricians and mental health counselors regarding alleged child sexual abuse. *Id.* The Tenth Circuit held that the district court did not abuse its discretion by allowing a physician to testify to general and conditional opinions relaying that (1) a "normal physical examination is not necessarily inconsistent with a history of sexual abuse" and (2) the alleged victim's atypical history of physical complaints could possibly be explained by a unifying diagnosis of physical or sexual abuse. 189 F.3d at 1263. Declining to address the defense's argument "that these 'consistent with' statements were admitted by the district court without any kind of reliability finding, as required by *Daubert* and *Kumho Tire*," because the issue was raised for the first time on appeal, the court explained: "[W]e do not purport to make any kind of independent appellate determination that such 'consistent with' statements—or any other statements, for that matter—pass muster under *Daubert* or *Kumho Tire*." 189 F.3d at 1265 n.16.

determinations of the admissibility of psychological or social science expert testimony reflects the tension in *Kumho Tire* between the mandate to apply the *Daubert* guidelines and the endorsement of *Daubert*'s flexibility.

Applying *Kumho Tire* to an expert's opinion on the psychology of eyewitness identification and handwriting analysis, the Court, in *United States v. Hines*,[138] identified the "mixed messages" coming from the Supreme Court. The U.S. District Court for the District of Massachusetts stated:

> To some, *Daubert/Kumho Tire* have considerably raised the bar for the admissibility of expert testimony. In some ways that is true; in some ways it is not. It is true that *Daubert/Kumho Tire* have focused a great deal of attention on the judge's role as a gatekeeper for expert testimony under Fed.R.Evid. 104(a). To the extent that there is more pre-trial review of expert testimony, there are bound to be more exclusions. In other ways, however, the impact of *Daubert/Kumho Tire* has been the opposite—opening the door to testimony previously excluded.[139]

The Massachusetts district court interpreted *Kumho Tire* to call into question techniques which previous courts had assumed were reliable.[140] The *Hines* court found the expert testimony on handwriting analysis particularly vulnerable to the reliability inquiry suggested in *Kumho Tire*. The court opined:

> If I were to give special emphasis to "general acceptance" or to treat *Daubert/Kumho Tire* as calling for a rigorous analysis only of new technical fields, not traditional ones, then handwriting analysis would largely pass muster. Handwriting analysis is perhaps the prototype of a technical field regularly admitted into evidence. *But, if I were to apply the Daubert/Kumho Tire standards rigorously, looking for such things*

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138. 55 F. Supp. 2d 62 (D. Mass. 1999).

139. *Id*. at 64.

140. The court stated:

> Again, a mixed message: Apply *Daubert* to technical fields, even though the scientific method may not *really* fit, but be flexible. Moreover, in this setting, because few technical fields are as—firmly established as traditional scientific ones, the new science/old science comparison is less clear. *The Court is plainly inviting a reexamination even of "generally accepted" venerable, technical fields*.

Id. at 67 (emphasis added).

as empirical testing, rate of error, etc., the testimony would have serious problems.[141]

Nevertheless, the court did not find that the weaknesses in the handwriting analysis testimony required its complete exclusion.[142] The court admitted the handwriting analysis testimony to the extent the expert restricted the testimony to the similarities and differences between the handwriting specimens and did not offer on an ultimate conclusion.[143] In contrast, the court found that expert testimony on the psychology of eyewitness identification easily passed muster under the new standards.[144] Further, the *Hines* court reasoned that eyewitness identification testimony assisted the trier of fact by drawing an analogy to testimony about BWS.[145]

> [T]he rationale for the [eyewitness identification] testimony tracks that for battered women syndrome experts. The jury, for example, may fault the victim for not leaving an abusive spouse, believing that they are fully capable of putting themselves in the shoes of the defendant. In fact, psychological evidence suggests that the "ordinary" response of an "ordinary" woman are not in play in situations of domestic violence where the victim suffers from "battered woman syndrome." Common sense inferences thus may be well off the mark.[146]

In *Skidmore v. Precision Printing and Packaging,*[147] the Court of Appeals for the Fifth Circuit required that any psychiatric testimony given to conform to the methodology and rigor generally accepted in the field.[148] The

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141. *Id*. at 68 (emphasis added).

142. The court explained:

> [The handwriting expert's] account of what is similar or not similar in the handwriting of Hines and the robber can be understood and evaluated by the jury. The witness can be cross examined, as she was about why this difference was not considered consequential, while this difference was, and the jury can draw their own conclusions. This is not rocket science, or higher math.

Id. at 70.

143. *Id.*

144. The court stated:

> Unlike handwriting analysis, there is no question as to the scientific underpinnings of [the psychology of eyewitness identification] testimony. They are based on experimental psychological studies, testing the acquisition of memory, retention, and retrieval of memory under different conditions. Indeed, the central debate before the jury, eloquently articulated by [the government's expert] is the polar opposite of the debate in the handwriting field—whether conclusions obtained in an experimental, academic, setting with college students should be applied to a real life setting.

Hines, 55 F. Supp. 2d at 72.

145. *Id*. at 64-65.

146. *Id.* at 72 (citation omitted).

147. 188 F.3d 606 (5th Cir. 1999).

148. *Id*. at 617-18.

defendant argued that the trial court impermissibly admitted a psychiatrist's opinion on the plaintiff's post-traumatic stress disorder and depression brought on by sexually harassing conduct without requiring the establishment of a proper foundation under *Daubert*.[149] Noting the gatekeeping obligation imposed by *Daubert* and *Kumho Tire*, the court reasoned that *Kumho Tire* permitted a flexibile inquiry and recognized the trial court's broad discretion.[150] The court approved the district court's fact-specific determination to ensure that the experts exercise the "same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[151]

In *United States v. Romero*,[152] the Court of Appeals for the Seventh Circuit further demonstrated that the flexibility and broad discretion given to trial court judges in *Daubert*/*Kumho Tire*, could overcome the exclusionary possibilities of the reliability inquiry. In *Romero*, the plaintiff challenged the admissibility of expert testimony from an FBI agent as to the characteristics and methods of child molesters. [153] The court reviewed the trial court's reliability inquiry, which was based on the expert's experience, the witness's status as an expert in his field, and to some extent on the fact that the expert had described the traits to which he was testifying "in published materials long before the *Romero* case."[154]

The Seventh Circuit acknowledged that *Kumho Tire* requires courts to the apply the *Daubert* analysis to nonscientific expert evidence, but emphasized that the specific list of factors in *Daubert* need not apply in every case.[155]

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149. *Id*. at 617.

150. *Id*. at 618. "But whether *Daubert*'s suggested indicia of reliability apply to any given testimony depends on the nature of the issue at hand, the witness's particular expertise, and the subject of the testimony."

151. *Id*. (citing *Kumho Tire*). The district court in this case did not deviate from that standard. Dr. House [a psychiatrist who evaluated the plaintiff] testified to his experience, to the criteria by which he diagnosed Skidmore, and to standard methods of diagnosis in his field. Absent any indication that Dr. House's testimony amounted to the sort of "junk science" *Daubert* blocks, we see no abuse of discretion in the district court's admitting the testimony. *Id.*

152. 189 F.3d 576 (7th Cir. 1999).

153. The trial court excluded from the agent's testimony his opinion about the defendant's intent or culpability. *Id*. at 582.

154. *Id*. at 583. Specifically, the trial court stated:

> There was not any question really in my mind as to the propriety of his testimony as a general matter . . . highly relevant and, in fact, *in my judgment, superior to, I think, someone who might offer some psychiatric testimony* along the lines of characteristics and what people do and do not do given certain characteristics and impulses . . . Here is a man who studied the field extensively, *an acknowledged expert in the field*. And I do not think there is any question whatever that his testimony . . . is particularly helpful to the jury because he has an abundance of training and experience far beyond any lay person, certainly, and far beyond, I think, most experts in the field.

Id. at 582 (emphasis added).

155. *Id*. at 584.

Hence, the Seventh Circuit dismissed the need for specific consideration of the expert's underlying methods in terms of testability, error rates, or peer review. The Court rejected as "baseless" the defense's claims that the testimony was neither sufficiently reliable nor helpful to the jury for two separate reasons.[156] First, the court relied on precedent for the use of similar *modus operandi* evidence to show "how seemingly innocent conduct . . . could be part of a seduction technique."[157] Second, the court emphasized that such testimony would be helpful to a jury with little background for understanding the complex ways in which child molesters operate.[158]

A number of the cases following *Kumho Tire* that address psychological testimony highlight the interplay between an expert's general qualifications and his or her specific qualifications to offer an opinion on the issue at hand.[159] There is a fine line between the preliminary question of whether a witness qualifies as an expert at all and a court's exploration of the scope of a witness's expertise. For example, in *Smith v. Rasmussen*,[160] the plaintiff brought a 42 U.S.C. § 1983 claim and a Due Process claim against the Iowa Department of Human Services for denying his request for Medicaid benefits for sex reassignment surgery.[161] The court excluded the State's proffered expert testimony concerning the nature and effectiveness of sex reassignment surgery and whether the plaintiff could be diagnosed with gender identity disorder because the State's expert lacked familiarity with these topics.[162]

Similarly, in *Olsen v. Marriott International, Inc.*,[163] an Arizona district court confronted a large gap in the expert witness's area of knowledge and

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156. *Id.*

157. 189 F. 3d at 585.

158. *Id*. Notably, *Romero* suggests the re-emergence of the reasoning of the majority in *Bighead*, despite the fact that the Ninth Circuit in *Bighead* had held *Daubert* inapplicable, whereas the Seventh Circuit in *Romero* discussed and applied *Daubert*/*Kumho Tire*.

159. *See, e.g.,* Smith v. Resmussen, 57 F. Supp. 2d 736 (N.D. Iowa 1999); Olsen v. Marriot Int'l, Inc., 75 F. Supp. 2d 1052 (D. Ariz. 1999).

160. 57 F. Supp. 2d 736 (N.D. Iowa 1999).

161. *Id.* at 740.

162.

> Although Dr. Kavalier plainly has adequate education, training, and experience in general psychiatry to render opinions based on general psychiatric principles, just as plainly he lacks any first-hand "knowledge, skill, experience, training, or education" in the treatment of gender identity disorder, and thus lacks any qualification to render an opinion on diagnosis or treatment of that disorder. In other words, Dr. Kavalier's testimony lacks "a reliable basis in the knowledge and experience of [the relevant] discipline," which is not just general psychiatry, but the diagnosis and treatment of gender identity disorder.

Id. at 766 (citations omitted). In contrast, plaintiff's expert was a psychiatrist with an extensive background treating patients with gender identity disorder over the past twenty-seven years. *See id*. at 769.

163. 75 F. Supp. 2d 1052 (D. Ariz. 1999).

her testimony. In *Olsen*, a male massage therapist sued the defendant hotel under Title VII, claiming that the defendant refused to consider him for the position of a massage therapist because of his gender.[164] The defendant offered testimony from an expert in gender roles and the effects of sexual abuse.[165] Although the court found the expert was qualified and her general information on gender roles and sexual abuse was reliable, the court held that the defendant failed to establish the reliability of the expert's opinion about the impact of gender roles and sexual abuse on "the massage experience."[166]

VI. PREDICTIONS FOR THE TREATMENT OF EXPERT TESTIMONY ON DOMESTIC VIOLENCE AFTER *KUMHO TIRE*

Obviously, this collection of disparate cases does not suggest one clear outcome for the admissibility of expert testimony on the effects of battering after *Kumho Tire*. Indeed, rather than searching for the one likely approach to such testimony that will arise from *Kumho Tire*, it is more appropriate to highlight the wide variety of responses likely to come from federal courts. What is clear is that the *Daubert, Joiner,* and *Kumho Tire* line of cases should not result in the complete exclusion of this body of knowledge from the courtroom.

The reasoning of the court in *Hines* generally suggests that this district court would consider the current state of the methodology underpinning expert testimony on the effects of battering to be sufficiently reliable as to be admissible. First, the *Hines* court explicitly endorsed the use of BWS on the issue of whether such testimony assists the trier of fact.[167] Second, in contrast to the decision in *Gier*, the *Hines* court indicated that psychological research, in and of itself, is not suspect under *Daubert*.[168] Rather, the court expressed a tolerance for allowing debate about the meaning of psychological research to occur in front of the jury.[169] However, the type of psychological research examined in *Hines* differs from the psychological research on domestic violence. Unlike psychological research on eye witness identification, research on domestic violence cannot generally be performed in laboratory

164. *Id.* at 1056.

165. *Id*.

166. *Id.* at 1057. Additionally, the court held that the defendant failed to establish the reliability of portions of the expert's report by failing to provide full citations to referenced studies and by failing to provide evidence regarding the reliability of those studies. *Id*. The court also found the testimony irrelevant considering the defendant's argument that being female was a bona fide occupational qualification for the position. *Id.*

167. United States v. Hines, 55 F. Supp. 2d 62, 72 (D. Mass. 1999).

168. *See id.*

169. *See id.* at 73.

settings with college students. Outside of the laboratory, the determination of error rates is more complicated, if not impossible. Nonetheless, the loss of such measures in field research must be balanced by the gains of assessing the phenomenon of domestic violence in a more authentic setting. The general thrust of *Hines* implies that *Kumho Tire* allows such balancing.

Skidmore also bodes well for the admissibility of expert testimony on the dynamics of battering in the Fifth Circuit. The court rejected a rigid application of the specific *Daubert* factors in favor of a focus on whether the expert's criteria and methodology are of the level of intellectual rigor that characterizes the appropriate field of knowledge.[170]

In comparison, *Romero* does to provide clear guidance as to the Seventh Circuit's treatment of expert testimony on the effects of battering. On one hand, *Romero* sets forth an extremely flexible application of *Kumho Tire* that would assure the admissibility of expert testimony on domestic violence, given a qualified expert. On the other hand, the trial court's stated preference for the testimony of an FBI agent over that of a psychiatrist, implies a distrust of psychological expert testimony and suggests a danger of bias for testimony regarding domestic violence.

The interplay between the preliminary question of a witness's qualifications as an expert and a court's determination of the proper scope of the expert's expertise, exhibited in *Rasmussen* and *Olsen* suggests another danger. Courts may severly limit expert witnesses' testimony about domestic violence because of their microscopic views of exactly which aspects of an opinion are based on a sufficient foundation.[171] Conversely, the close examination of a witness's relevant experience in the specific area at issue could reduce distortions about the nature of scientific knowledge regarding domestic violence that results when mental health professionals inexperienced in the field testify about BWS.[172]

Finally, the debates expressed in the cases preceding *Kumho Tire* have largely retained their vitality in a way that will surely impact admissibility determinations regarding expert testimony on the effects of battering. The Eighth Circuit's affirmation of *Gier*'s rigid application of the *Daubert*

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170. *See* Skidmore v. Precision Printing and Pleg., Inc., 188 F.3d 606, 618 (5th Cir. 1999).

171. On this count, it would be interesting to explore the court's exclusion of specific testimony in *Charley,* where the court excluded testimony of licensed mental health counselors proffering that the children's symptoms were more consistent with children who have been sexually abused than with symptoms of children who have witnessed abuse of their mother, reasoning that there was insufficient foundation for such an opinion. 189 F.3d at 1269.

172. However, this possibility implicates an underlying problem regarding a lack of resources, not the least of which are geographic limitations on the availability of psychologists and psychiatrists with current, specialized expertise in domestic violence.

factors, standing alongside its flexible *Daubert* analysis in *Jenson*, defies simple predictions for domestic violence expert testimony in the Eighth Circuit. However, the flexible *Daubert* analysis applied to social science testimony in *Jenson* and *Butler* present a legitimate model for the treatment of expert testimony on the effects of battering. Nonetheless, the hostility against any expertise related to sexual victimization, expressed by the dissenting judge in *Bighead* and by the Special Master in *Jenson*, stands for the danger that judicial bias against expertise on domestic violence will infect at least some admissibility determinations both at the trial court and the appellate levels. In this vein, a distinct risk remains that new approaches to the gatekeeping role will disadvantage battered women in the federal court system.[173] In response to this risk, parties offering expert testimony on the effects of battering can reduce their vulnerability by ensuring that their expert witnesses have specific expertise in the field of domestic violence and are well versed in the most rigorous research available in the field.[174]

VII. CONCLUSION

The key question following *Kumho Tire* is how helpful the *Daubert* factors are in establishing the reliability of expert testimony regarding domestic violence. The answer to this question should come from the disciplines of psychology, psychiatry, social work, and the like. Otherwise, courts may increasingly exclude useful expert testimony on the effects of battering following *Kumho Tire*. Accusations that expertise on the effects of battering is "junk science" may very well increase. The special status afforded the methodology of the "hard" sciences in *Daubert* combined with broad judicial discretion to exclude expert testimony based on an inquiry into the relationship between methodologies and conclusions heightens the risk of such challenges.

Yet, as the cases discussed above suggest, the *Daubert, Joiner,* and

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173. The state courts may remain something of a "safe haven" from any negative effects of *Kumho Tire* on the admissibility of expert testimony on domestic violence. Decided by the Court of Appeals for the District of Columbia less than two weeks before *Kumho Tire, Nixon v. United States* rejected a challenge that characterized expert testimony on BWS as "junk science." 728 A.2d 582, 589 (D.C. 1999). *Cf.* Morgan v. Krenke, 72 F. Supp. 2d 980 (E.D. Wis. 1999); Commonwealth v. Crawford, 706 N.E.2d 289, 293 (Mass. 1999) (holding that expert testimony on BWS was relevant and helpful to the jury). In *Morgan*, the United States District Court for the Eastern District of Wisconsin overruled a trial court's exclusion of expert testimony on the defendant's posttraumatic stress disorder based on Wisconsin law. Notably, Wisconsin law did not premise admissibility on a distinct factor of reliability. *Id.* at 1011.

174. Such an approach would have the two-fold advantage of increasing the likelihood of admissibility, and reducing distortions and stereotypic portrayals of battered women sometimes proferred by expert witnesses less versed in the field.

Kumho Tire line of cases represent a highly indeterminate standard.[175] Because of the inherent indeterminacy and the broad latitude for discretion, the same battles that were ostensibly resolved by *Kumho Tire*'s wide application of *Daubert* have already begun to resurface. On the one hand, *Kumho Tire* may have an exclusionary effect in some courts, based less on the entirety of the opinion than on the impression that the Court's mandate that a *Daubert* analysis be applied to the social sciences tends to strengthen the exclusionary force of Rule 702. On the other hand, a trend toward the exclusion of expert testimony on the effects of battering is not inevitable under *Kumho Tire*, as the court's opinion itself confirms that a *Daubert* analysis is not the sum of the *Daubert* factors.

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175. *Cf.* Imwinkelried, *supra* note 22 (reasoning that a creative articulation of the purpose for which expert testimony is being offered can circumvent the need for laying a foundation).

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