

1996

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## Recommended Citation

David L. Faigman, *The Syndromic Lawyer Syndrome: A Psychological Theory of Evidentiary Munificence*, 67 *U. Colo. L. Rev.* 817 (1996).  
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**Author:** David L. Faigman  
**Source:** University of Colorado Law Review  
**Citation:** 67 U. Colo. L. Rev. 817 (1996).  
**Title:** *The Syndromic Lawyer Syndrome: A Psychological Theory of Evidentiary Munificence*

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# THE SYNDROMIC LAWYER SYNDROME: A PSYCHOLOGICAL THEORY OF EVIDENTIARY MUNIFICENCE

DAVID L. FAIGMAN\*

*Aristotle maintained that women have fewer teeth than men; although he was twice married, it never occurred to him to verify this statement by examining his wives' mouths.<sup>1</sup>*

## I. INTRODUCTION

The syndromic lawyer syndrome ("SLS") refers to a malady suffered by lawyers, judges, and, especially, legal academics.<sup>2</sup> SLS typically affects lawyers most severely when applying rules of evidence and, in particular, the rules governing the admissibility of expert testimony. Outwardly, it is a seemingly benign condition and appears on the surface to produce outcomes that are beneficent. Specifically, sufferers tend to suspend critical judgment in order to "assist" a wide range of participants in the American legal process who otherwise receive little assistance. Beneficiaries of the relaxed standards employed by sufferers of SLS are the most sympathetic participants in the legal system, including battered women, abused children, rape victims, and a variety of other victims of extreme trauma. SLS is marked by three stages:<sup>3</sup>

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1. BERTRAND RUSSELL, *THE IMPACT OF SCIENCE ON SOCIETY* 9 (1951).

2. My sardonic tone here should not be taken to mean that I fail to appreciate the seriousness of the underlying social issues that have led some commentators and courts to turn to syndrome solutions. They are very serious and profoundly troubling. In fact, much of my criticism against the syndrome mentality that infects legal analysis is that it clouds judgment and avoids real debate about the issues presented by these difficult cases. Moreover, I do not mean to suggest that Professor Raeder herself suffers from SLS, though I would criticize her for being too tolerant of SLS sufferers. See Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome by and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789 (1996).

3. Although the number three is chosen somewhat arbitrarily (it was all the stages I could think of), the concept of stages is essential to syndrome creation; it seems that a syndrome is not a syndrome unless its sufferers go through stages.

- (1) In the first stage, the sufferer generates a substantial number of empirical questions for which there is little or no substantial empirical work;
- (2) In the second stage, sufferers invite, encourage or demand answers to the empirical questions posed in the first stage from scientists, pseudoscientists, and virtually anyone else sporting an advanced degree (it need not be too advanced) in one of the dozens of the psychology-related specialties;
- (3) In the third stage, sufferers distort legal doctrine and, in particular, rules of evidence in order to accommodate the pseudoexperts sought in the second stage.

The most troubling symptom of SLS is that it clouds judgment and provides seemingly "easy" answers to difficult jurisprudential problems. In effect, SLS sufferers substitute facile pseudoscientific musings for difficult, often controversial, arguments on substantive law. Thus, we need not seriously discuss the imminence requirement of self-defense if battered woman syndrome ("BWS") produces constant fear in its sufferers;<sup>4</sup> we need not confront the difficult issues surrounding testimony of child witnesses if we can permit a clinician to testify that the child is suffering from rape trauma syndrome ("RTS"), post-traumatic stress disorder ("PTSD"), child abuse accommodation syndrome ("CAAS"), and so on and thus is a credible witness; and we need not face the difficulties of prosecuting batterers and protecting victims of domestic abuse if we can simply identify a batterers profile that will permit an expert to provide the needed proof. Moreover, and most troubling, the vague and unfalsifiable premises that constitute the typical syndrome or profile in use today, for ostensibly beneficent and liberal ends, can be easily reversed and used by the abusers. Thus, the fact that the woman does not suffer from BWS undermines her defense and the syndrome's adoption of a "learned helplessness" paradigm contributes to stereotypes about women; the absence of trauma symptoms in the alleged victim of a rape is a defense for a rape defendant and might result in a searching cross-examination of the alleged victim's past; and the fact that a defendant does not

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4. LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1984) [hereinafter WALKER, *BATTERED WOMAN SYNDROME*]; LENORE E. WALKER, *THE BATTERED WOMAN* (1979) [hereinafter WALKER, *BATTERED WOMAN*].

fit the batterer's profile is a defense to a charge of assault or murder.

Because of the necessary brevity of this essay, I can respond to only a couple of issues raised in Professor Raeder's article,<sup>5</sup> though these and many more deserve considerable attention. First, and most important, I discuss a miscomprehension among lawyers about both the difficulty of doing social science research and, more significantly, the law's proper response when social science is difficult to conduct. The law's understanding of what syndrome/profile evidence signifies is simplistic, with the typical response being nothing more than a superficial check that "something" was studied and, thereafter, an acceptance of whatever opinion the expert might proffer. Second, legal commentators have too long discounted, or entirely disregarded, the dangers associated with pseudoscientific social science. "Research" that is so vacuous that it explains everything poses the dangers of explaining nothing and being used by anyone.

## II. STUDYING HUMAN BEHAVIOR SCIENTIFICALLY

It has become a common refrain among many legal scholars that social science cannot be rigorous, or that it is not a "real" science.<sup>6</sup> There is some truth in the refrain, though not very much, and little that indicates how courts might best respond to this sort of science. Underlying this argument appears to be the superficial insight that studying human behavior is difficult. But so what? Most science, if it is any good, is difficult to conduct. Suppose, in 1980, someone asked which is more likely to be known through scientific study by the year 2000, either that scientists could map the DNA molecule or that we would know the percentage of battered women who suffered both a "cycle of

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5. See Raeder, *supra* note 2.

6. See David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 86 (1989); Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 331, 367 (1995). It should be noted that the claim that social science is not truly "science" is separate from the argument that jurors are unlikely to be overwhelmed by the aura of infallibility of social science due to its soft methodology. Although research on whether jurors can critically evaluate social science remains scarce, if legal scholars are any indication, we should be skeptical of jurors' abilities in this regard.

violence” and experienced “learned helplessness.” Surely the latter is “easier” to study.

Many legal scholars will respond by insisting that human behavior in areas such as domestic violence, rape, and child sexual abuse is “impossible” to study given the contexts involved. After all, in contrast to DNA, we obviously cannot carry out controlled experiments on such phenomena. This reaction, however, not only shows the lack of scientific imagination of the speakers but also is a testament to the lack of scientific training of most legal scholars. A science is not defined as such by virtue of its ability to be studied in controlled experiments. If that were the case, most areas of biology,<sup>7</sup> chemistry, and physics would not qualify. Part of a sophisticated understanding of science includes a complex appreciation of the difficulties of the subject. Legal scholars seem to assume that because a subject is difficult to study, any researcher who assumes the task should be recognized as an expert, whatever his or her true expertise. This perspective is not unlike consulting the Farmer’s Almanac for tomorrow’s weather. Meteorologists assume a difficult task, and much of their subject cannot be studied in the laboratory, but they have proved themselves enormously effective nonetheless. Most of the expertise offered under one or another syndrome is akin to the prognostications of the Farmer’s Almanac.

A fair question might be asked concerning whether, in the absence of meteorology, the Farmer’s Almanac should not be relied upon; this query implicitly raises the issue whether the law should not accept the best that is available.<sup>8</sup> This too, however, displays a simplistic appreciation of the law and science connection. The reason that the science of meteorology advanced beyond the Farmer’s Almanac stage is that consumers demanded more accurate information. Although much of the syndrome work is borrowed from therapeutic practices, the standards in the

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7. Evolutionary biology is a particularly good example. Although biologists increasingly use computer models, and some have experimented with the origins of life in the laboratory, they typically rely on natural experiments or quasi-experiments. See, e.g., JONATHAN WEINER, *THE BEAK OF THE FINCH: A STORY OF EVOLUTION IN OUR TIME* (1994) (The author won a Pulitzer Prize for his description of the fieldwork of Peter and Rosemary Grant. The Grants studied the evolution of finches on the isolated islands of the Galapagos archipelago.).

8. For an examination of the role “necessity” should play in the admissibility of expert testimony, see David L. Faigman, *Mapping the Labyrinth of Scientific Evidence*, 46 HASTINGS L.J. 555, 566-72 (1995).

therapeutic and legal contexts are entirely different. When used in the therapeutic process, syndrome work is not specifically concerned with legally relevant criteria, such as whether an alleged rape victim consented, or outcome characteristics, such as the relationship between cycles of violence and constant fear. The principal consumers for the forensic use of syndrome-styled social science are the courts. If judges do not expect and demand better science, the researchers will not provide it.

The law's gullibility in regard to syndrome evidence is profound; it displays the wishful desire to come to the correct political outcome, rather than any statement about the situation battered women confront. For example, Professor Raeder explicitly states that research does not support the "cycle theory," the main component of battered woman syndrome.<sup>9</sup> She then observes, however, that anecdotal reports indicate that violence is cyclical. She concludes, therefore, that if the particular case manifests a cycle of violence, expert testimony should be admitted. This argument is not sound.

First of all, anecdotal research is not science, it is literature.<sup>10</sup> Voluminous anecdotal research rarely produces more than

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9. Raeder, *supra* note 2, at 797.

10. In a 1989 article, I rhetorically likened some aspects of social science to literature and suggested that the work of Feodor Dostoevsky was at least as scientific as much Freudian-based psychology. David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1065 n.220, 1085-86 (1989). I observed as follows: "The Dostoevskian psychologist would have a rich literature from which to draw his opinions. For example Dostoevsky's masterpieces *Crime and Punishment* and the *Brothers Karamazov* provide robust examples and analyses of human psychology which could support much expert testimony." *Id.* at 1065 n.220. The somewhat tongue-in-cheek lesson of this statement is that courts must be prepared to admit testimony such as the "Karamazov syndrome" if they are to remain consistent with a liberal admissibility policy reflected in their approach to evidence such as BWS, RTS, and PTSD. Little did I anticipate that what I thought was an unlikely illustration might become a reality. In a recent news story regarding Timothy J. McVeigh, an alleged perpetrator of the bombing of the Oklahoma City federal building that killed 168 people, the *New York Times* described the sort of character that could commit such an act. The newspaper reported that "[i]t is a personality that a Seattle forensic psychiatrist, Kenneth Muscatel, has described as the 'Smerdyakov syndrome,' after the scorned half-brother in Dostoyevsky's 'Brothers Karamazov' who listens to the other brothers inveigh against their father until, finally, he commits patricide." John Kifner, *Oklahoma Bombing Suspect: Unraveling of a Frayed Life*, N.Y. TIMES, Dec. 31, 1995, at 1, 24. To date, neither party has indicated an intention to offer "Smerdyakov syndrome" at trial. It is a characteristic of this sort of evidence, however, that, assuming its admissibility, it is impossible to determine which side would be more likely to use it.

volumes of anecdotes. Both the "earth as the center of the universe theory" and the "flat earth theory" are well supported by anecdote. The point of science is to test, test, and test. Moreover, Professor Raeder's cycle example fails for a more basic reason. The fact that violence is cyclical is not, in and of itself, legally relevant. Its relevance derives from inferences that might be drawn from it. For example, if cycles of violence lead to a "constant state of fear" or "learned helplessness," then knowing about the cyclical nature of the violence would have meaning.<sup>11</sup> Unfortunately, the research does not come close to addressing this question.<sup>12</sup>

This issue offers a good illustration of legal scholars' lack of careful consideration when proclaiming the inevitable uncertainties of social science research. One hypothesis of battered woman syndrome theory is that a victim of cyclical violence is more likely to suffer from learned helplessness.<sup>13</sup> First, of course, the researchers must explicitly define what is meant by a cycle of violence and what clinical symptoms constitute "learned helplessness." Although subject to reasonable disagreement, this is not an impossible task.<sup>14</sup> Next, the researchers might study a population of battered women and, perhaps, also a population of women from discordant but nonviolent relationships. Suppose that of the women in the violent relationships, thirty-eight

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11. Of course, if the particular case evidences a "cycle" or pattern of violence that reasonably led the woman to anticipate a violent attack, this evidence is relevant to a defense of self-defense. But this evidence is unique to the individual case and expert testimony is not needed to explain its relevance to the triers of fact.

12. Lenore Walker employed a prescientific methodology that violated a score of basic requirements for conducting empirical research. See David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal Aid and Empirical Dissent*, 72 VA. L. REV. 619, 633-43 (1986).

13. Learned helplessness is adapted from the work of Martin Seligman. Seligman and his colleagues found that laboratory dogs, after being subjected to repeated shocks over which they had no control, "learned" that they were helpless. See Seligman et al., *Alleviation of Learned Helplessness in the Dog*, 73 J. ABNORMAL PSYCHOL. 256 (1968). When subsequently placed in an escapable situation, the dogs failed to escape. Walker explained her hypothesis as follows: "[T]he women's experiences . . . of their attempts to control the violence would, over time, produce learned helplessness and depression as the 'repeated batterings, like electrical shocks, diminish the woman's motivation to respond.'" WALKER, BATTERED WOMAN SYNDROME, *supra* note 4, at 87 (quoting WALKER, BATTERED WOMAN, *supra* note 4, at 49).

14. All the sciences must define their variables. For example, even something as straightforward as temperature can be variously defined as degrees of Celsius, degrees of Fahrenheit, degrees Kelvin, windchill factor, and so on.



percent suffered a cyclical pattern of violence.<sup>15</sup> Also suppose that thirty percent of the battered women studied suffered from "learned helplessness."<sup>16</sup> Of course, to examine seriously the hypothesis of interest we need to know what percentage of the women who experienced the cycle of violence also suffered from "learned helplessness." Based on the above statistics it could be zero percent or one hundred percent. Researchers on battered woman syndrome have not come close to examining seriously their hypotheses.<sup>17</sup>

The *sine qua non* of the scientific enterprise is testability. Importantly, however, Sir Karl Popper, the philosopher of science most closely associated with this insight, originally described it as "falsifiability."<sup>18</sup> The main point, he urged, was that scientific hypotheses gain strength and are corroborated through their ability to withstand attempts at falsification. Perhaps this is the primary weakness associated with syndrome research. The researchers have ceased to be scientists, if they ever were, for they are not interested in *truly* testing their hypotheses. They merely want to confirm them in order to fulfill a political agenda. The difficulty in doing social science research, therefore, does not lie in the complexity of the subject but rather in the condemnation that would follow unpopular results. Legal scholars can be sympathetic to this difficulty, but they should not participate in the fraud that these politically motivated observations are valid in any empirical sense.

### III. THE DARK SIDE OF LIBERAL ADMISSIBILITY STANDARDS FOR SOCIAL SCIENCE EXPERT TESTIMONY

For judges, lawyers and legal academics, the question raised by politically motivated science is whether the law should defer to the normative views held by a group of mental health professionals. To the extent that legal actors share these views, the

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15. Walker never provided the percentage of women in her study who experienced the violence as a "cycle." This is the best guess given the statistics she does provide. See Faigman, *supra* note 12, at 640 n.108.

16. Walker's study of learned helplessness is so hopelessly flawed that this statistic is made-up for illustrative purposes only. See *id.* at 640-43.

17. See *id.*

18. See generally KARL R. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 33-59 (1963) (In a clear and succinct fashion, Popper explains the development and import of his philosophy.).

answer might seem to be yes. Unfortunately, the question is not quite so simple, for there are numerous unintended consequences that follow such an abdication of responsibility. Specifically, by liberalizing rules of admissibility in order to admit the literary character of most syndrome work, the courts open the door to experts peddling much less palatable views. Hence, not only will the defense have the opportunity to introduce battered woman syndrome to show the defendant acted in self-defense, but the prosecution will be able to do so to refute such evidence and, in the process, require the defendant to undergo a psychiatric examination to make this determination.<sup>19</sup>

A particularly salient example of the doctrine of unintended consequences in the context of social science expert testimony is the evolution of the use of rape trauma syndrome in criminal prosecutions. Originally, RTS was employed by prosecutors to increase conviction rates in difficult prosecutions where the evidence often involves the defendant's word against the alleged victim's. RTS was offered to help jurors understand the behavior of the complainant, typically where the defendant claimed that her behavior was inconsistent with having been raped. In theory, however, the probative value of RTS is potentially available to any party. The relevance of prosecution use depends on the alleged victim exhibiting symptoms that rape victims exhibit with greater frequency than the general population. The relevance associated with defense use depends on the alleged rape victim failing to exhibit symptoms that most rape victims exhibit. Under general evidence principles alone, prosecution use of RTS would almost certainly mandate allowance of defense use of the evidence. In fact, in *Henson v. State*,<sup>20</sup> the Indiana Supreme Court held that the defense could introduce expert testimony that the complainant had acted inconsistently with having been raped largely on this basis: "It would be fundamentally unfair to allow the use of such testimony by the State . . . and then deny its use

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19. See, e.g., *State v. Hickson*, 630 So. 2d 172, 176 (Fla. 1993) (The court held that if a defendant proffers expert testimony on BWS that links the syndrome to the facts of her case, then "she waives her right to refuse to submit to an examination by the state's expert.").

20. 535 N.E.2d 1189 (Ind. 1989).

by a defendant here."<sup>21</sup> Defense use of RTS can be expected to become increasingly common.<sup>22</sup>

Rigorous research reveals the factual foundation upon which legal policy should be built. But to the degree that the research fails this test of rigor, it permits advocates to corrupt legal policy by manipulating the foundation. For some time, expert testimony based on RTS has been built on sand, being shaped at will by advocates for victims of abuse. However much we might support the sentiments underlying this manipulation, it is fraught with the danger of unintended consequences. Defense use of RTS illustrates this danger. Specifically, a psychological concept with origins in the desire to aid victims of sexual abuse may now be employed to subject those victims to compelled psychological examinations<sup>23</sup> and searching cross-examination regarding past sexual history. This is an unfortunate result of a well-intentioned policy. The best lesson that courts and commentators can draw from defense use of RTS is that the research should be scrutinized with care, whoever the proponent might be. The alternative is to

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21. *Id.* at 1193. In reality, the rules of evidence do not treat criminal defendants and the prosecution as similarly situated regarding evidence such as RTS. In general, the evidence rules give defendants greater leeway in introducing evidence, as indicated by the character evidence rules. *See, e.g.*, FED. R. EVID. 404(a). However, most jurisdictions have adopted protective legislation for alleged victim-witnesses of sexual assaults, thus nullifying some of the historical advantage defendants possessed in this context. *See, e.g.*, FED. R. EVID. 412. How courts strike the balance regarding defense use of RTS depends on both the values embodied in evidence codes and the Constitution, together with the validity of the science associated with RTS. Allowing unrestricted prosecutorial use of this evidence while, at the same time, completely foreclosing its use by the defense, would violate basic precepts of fairness. This is particularly true given the criminal justice system's commitment to guaranteeing defendants' due process. At the same time, most jurisdictions are committed to protecting alleged victims from the kinds of abuse that were commonplace prior to enactment of protective legislation. These considerations might lead courts to strike a balance whereby defense use of RTS is limited to rebuttal of prosecution use of this evidence. In particular cases, therefore, if the state opens the door to the "psychological state" of the alleged victim, the defense would be permitted to test rigorously in order to rebut this claim.

22. *See* Jennifer J. Hackman, Comment, *Henson v. State: Rape Trauma Syndrome Used by the Defendant as Well as the Victim*, 19 AM. J. TRIAL ADVOC. 453 (1995); Robert R. Lawrence, Note, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings*, 70 VA. L. REV. 1657 (1984).

23. *See, e.g.*, *People v. Wheeler*, 602 N.E.2d 826, 833 (Ill. 1992) ("[U]nless the victim consents to an examination by an expert chosen by the defendant, the State may not introduce testimony from an examining expert that the victim of an alleged sexual assault suffers from a 'recognized and accepted form of post-traumatic stress syndrome.'").

allow advocacy into the courtroom in the guise of science. This result is not sensible, and it is likely to lead to injustice.

#### IV. CONCLUSION

Many judges, lawyers, and legal scholars adopt a permissive attitude toward social science experts in part because they believe that their research is difficult to do with rigor. This essay suggests that this belief is incorrect in itself and leads to the unfortunate disposition among lawyers to accept any opinion dressed in the guise of social science expertise. While scientific research on human behavior offers many challenges, it is no less amenable to systematic study than many other complex subjects, such as evolutionary biology, astrophysics, meteorology, and so on. In any case, whatever the difficulty of doing this research, it does not excuse poorly designed methods and sloppily interpreted conclusions. The law must demand more; as the only consumer of the forensic use of syndrome-style research, courts should expect that the best research be done within the limitations imposed by the subject.

In accepting syndromes based principally on the creative efforts of the researchers, the courts increasingly will find that opponents seek to use these elastic concepts for their own purposes. One of the marks of pseudoscience is that anyone can turn it to his advantage. This is an unfortunate result, but one easily anticipated in a world in which the courts fail to impose even the most minimal scrutiny on syndrome evidence. As we enter the twenty-first century, it is an embarrassment that the legal system remains so shockingly ignorant of the scientific method. It is no time to return to prescientific paradigms or give in to our wish for easy answers from self-appointed experts who have responses to all of our questions and real answers to none of them. For lawyers suffering from the Syndromic Lawyer Syndrome, the only solution is therapy—not because therapy is likely to be effective but because it keeps them out of the courtroom.