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The Impact of *Daubert* on the Admissibility of Behavioral Science Testimony¹

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1. An earlier version of this article was presented at the annual meeting of the Academy of Criminal Justice Sciences in Anaheim, CA in March of 2002. The article was collaboratively researched and written as part of a year-long independent study conducted by Professor Fradella and his two undergraduate research assistants during the 2001-2002 academic year at The College of New Jersey. The authors gratefully acknowledge the assistance of the following other students at The College of New Jersey who assisted in the briefing of cases analyzed in this paper: Dorian Collins, Kathleen L. Davis, Melanie Falco, Guy A. McCormick, Ronald M. Smalley, and Rebecca A. Smith.

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*** B.S. in Law and Justice, The College of New Jersey, 2002.

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I. INTRODUCTION

Starting in the mid-1980s and continuing, in increasing force, through the 1990s, scholars began to vocally protest the ways in which highly questionable “expert testimony” was routinely admitted into evidence in the courts of the United States.² Peter Huber³ offered one of the most powerful arguments that “the kind of expertise regularly accepted as admissible by courts was, frankly, ‘junk’ of scandalous lack of dependability.”⁴ To address the problem of “junk science” in the courtroom, the United States Supreme Court decided *Daubert v. Merrell-Dow Pharmaceuticals, Inc*⁵ in 1993. In it, the Court set forth a new standard for determining the admissibility of scientific evidence in the federal courts of the U.S. And, since the time *Daubert* was decided, subsequent decisions of the Supreme Court have extended *Daubert*’s application to all expert testimony, not just that which is technically “scientific.”⁶ The impact of *Daubert*, however, is

2. E.g., Richard H. Underwood, “X-Spurt” Witnesses, 19 AM. J. TRIAL ADVOC. 343 (1995).
 3. PETER W. HUBER, GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM (New York, Basic Books 1991).
 4. D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 101 (2000) (citing HUBER, *supra* note 3).
 5. 509 U.S. 579 (1993).
 6. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

not limited to federal courts, since many states have also adopted the *Daubert* test for the admissibility of expert testimony.⁷

Since the time *Daubert* was decided, both courts and legal commentators have voiced concerns that *Daubert's* focus on empirical testability, scientific falsifiability, and reliability and validity (including an assessment of error rates) may pose serious problems for expert testimony in the behavioral sciences.⁸ Yet, in spite of the ostensibly daunting problems facing certain types of psychological expert testimony under *Daubert* in the post-*Kumho* era, courts have continued to admit the testimony of behavioral scientists in federal trials. In some cases, courts have done so even when the proffered testimony should have failed the *Daubert* test, such as in cases concerning Battered Women's Syndrome evidence and in Rape Trauma Syndrome evidence.⁹ Courts appear to have "embraced both syndromes as a matter of good social policy, rather than a matter of good social science."¹⁰

While there are numerous articles that have criticized the application of *Daubert* to a particular issue, including, just to name a few, topics such as repressed memories of sexual abuse,¹¹ parental alienation in child custody cases,¹² psychological factors affecting domestic violence cases,¹³ and clinical assessments of dangerousness,¹⁴ there is a dearth of research on the systematic application of *Daubert* to particular disciplines or fields. In an

7. John Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 WASH & LEE L. REV. 901, 911 (2000).

8. See, e.g., Michelle Michelson, *The Admissibility of Expert Testimony on Battering and its Effects after Kumho Tire*, 79 WASH. U. L. Q. 367, 370 (2001); Dara Loren Steele, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE L.J. 933 (1999); Michael H. Gottesman, *Admissibility of Expert Testimony After Daubert: The "Prestige" Factor*, 43 EMORY L.J. 867 (1994); James T. Richardson et al., *The Problems of Applying Daubert to Psychological Syndrome Evidence*, 79 JUDICATURE 10 (1995); Michael H. Graham, *Daubert v. Merrell Dow Pharmaceuticals, Inc.: No Frye, Now What?*, 30 CRIM. L. BULL. 153, 162 (1994); see also, e.g., United States v. Bighead, 128 F.3d 1329, 1331 (9th Cir. 1997); Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1298-1300 (8th Cir. 1997); Gier v. Educ. Serv. Unit No. 16, 845 F. Supp. 1342, 1344-49 (D. Neb. 1994), *aff'd*, 66 F.3d 940 (8th Cir. 1995).

9. See Janet C. Hoeffel, *The Gender Gap: Revealing Inequities in Admission of Social Science Evidence in Criminal Cases*, 24 U. ARK. LITTLE ROCK L. REV. 41 (2001).

10. *Id.* at 41.

11. Caia Johnson, *Current Public Law and Policy Issues: Traumatic Amnesia in the New Millennium: a New Approach to Exhumed Memories of Childhood Sexual Abuse*, HAMLIN J. PUB. L. & POL'Y 387 (2000).

12. Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249 (2001).

13. E.g., Hoeffel, *supra* note 9; Michelson, *supra* note 8; Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81 (2001).

14. E.g., Monahan, *supra* note 7; Thomas R. Litwack, *Actuarial Versus Clinical Assessments of Dangerousness*, 7 PSYCH. PUB. POL. & L. 409 (2001).

attempt to fill this void, the present study examines how *Daubert* has been applied to cases in which psychological expert testimony has been offered in federal courts since *Daubert* was decided in 1993.

II. LITERATURE REVIEW

A. Background on the Admissibility of Scientific Evidence

1. The *Frye* General Acceptance Test

At common law, the *Frye* test governed the admissibility of scientific testimony. In *Frye v. United States*,¹⁵ “the court rejected scientific testimony based on the use of a lie detector, stating that ‘the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs’ in order to be admissible.”¹⁶

The purpose behind the *Frye* test was to “prevent[] . . . the introduction into evidence of specious and unfounded scientific principles or conclusions based upon such principles.”¹⁷ At the heart of *Frye* is the realization that the expert witness is a hired gun.

“Whatever his credentials, publications, or affiliations, a scientist who becomes the alter ego of a lawyer is no longer a scientist. . . . So while a resume may be a necessary condition of expert competence, it is never a sufficient one. Science is . . . defined by a community, not the individual, still less by a resume. . . . The cowl does not make a monk.”¹⁸

Despite the uniformity its followers argue the *Frye* rule provides, it employs several terms that are open to differing interpretation. Who comprises the relevant scientific community? After all, “[m]any scientific techniques do not fall within the domain of a single academic discipline or professional field.”¹⁹ What is general acceptance? Is it “widespread[,] prevalent[,] [and] extensive though not universal,”²⁰ or is it agreement “by a

15. 293 F. 1013 (D.C. Cir. 1923).

16. Denise M. Dunleavy, *Expert Testimony and the Charge of Junk Science*, 451 PLI/LIT. 449, 451-52 (1992).

17. Paul C. Giannelli, *The Admissibility Of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 COLUM. L. REV. 1197, 1224 (1980) (citations omitted).

18. Peter Huber, *Junk Science in the Courtroom*, 26 VAL. U. L. REV. 723, 742-43 (1992).

19. Giannelli, *supra* note 17, at 1208.

20. *United States v. Zeiger*, 350 F.Supp. 685, 688 (D.D.C. 1972), *rev'd* 475 F.2d 1280 (D.D. C. Cir. 1972).

substantial section of the [relevant] scientific community[?]"²¹ Perhaps, however, the biggest problem with the *Frye* test is "that it often results in excluding relevant, probative evidence, and thereby impedes the truth-seeking function of litigation."²²

2. The Federal Rules of Evidence

Given the various problems associated with the *Frye* rule, it was intentionally not incorporated into the Federal Rules of Evidence.²³ Instead, the Federal Rules of Evidence opted for a more liberal approach to the admissibility of scientific evidence. This more liberal approach was adopted by some thirty-one states as of 1988.²⁴ Federal Rule of Evidence 702 provides, "[i]f 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."²⁵ Rule 703 requires that the facts or data relied upon in the formulation of an expert opinion be of "a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."²⁶ The role of the *Frye* test after the adoption of the Federal Rules of Evidence was unclear until 1993 when the U.S. Supreme Court decided *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*²⁷ In *Daubert*, the Court set a new standard for determining the admissibility of scientific evidence.

3. The *Daubert* Standard For Admissibility of Scientific Evidence

Daubert involved two children born with serious birth defects. Their parents brought suit alleging the defects were caused by Bendectin,[®] an anti-nausea drug produced by the predecessor companies to the Merrell-Dow Pharmaceutical Company in the early 1950s. The drug was approved by the

21. *United States v. Williams*, 443 F. Supp. 269, 273 (S.D.N.Y. 1977).

22. N. Kathleen Strickland & Leah S. Elkins, *A Current Assessment of Frye in Toxic Tort Litigation*, 446 PLI/LIT. 321, 349-350 (1992) (citing *United States v. Downing*, 753 F.2d 1224, 1236 (3d Cir. 1985)); see also Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH L. REV. 473, 476 (1986).

23. See WEINSTEIN'S FEDERAL EVIDENCE, §§ 702.36 - 702.44 (2d ed. 2002).

24. Bert Black, *Evolving Legal Standards for the Admissibility of Scientific Evidence*, 239 SCIENCE 1508, 1512 n.1 (1988).

25. FED. R. EVID. 702.

26. FED. R. EVID. 703.

27. 509 U.S. 579 (1993).

Food and Drug Administration in 1956 as an anti-nausea drug.²⁸ Physicians frequently prescribed the drug for treatment of “morning-sickness” in pregnant women between 1957 and 1983.²⁹ In well over a thousand cases since its availability in 1956, women have alleged that the combination of dicyclomine hydrochloride and doxylamine succinate in Bendectin[®] is teratogenic, that is, a substance that causes birth defects.³⁰

Merrell-Dow moved for summary judgment of the *Daubert* case claiming Bendectin[®] did not cause birth defects and the plaintiffs would not be able to proffer evidence to the contrary.³¹ To support their motion, Merrell-Dow introduced an affidavit by a well-credentialed epidemiologist with an expertise in chemical exposure risk.³² The physician cited 30 published studies on the subject, none of which concluded Bendectin[®] caused birth defects.³³

The plaintiffs countered with eight well-credentialed experts of their own who had conducted various studies, all of which demonstrated a causal link between the product and birth defects.³⁴ The district court granted Merrell-Dow’s motion for summary judgment.³⁵ Relying on the *Frye* standard, it concluded the plaintiff’s expert testimony was inadmissible because it was not “sufficiently established to have general acceptance in the field to which it belongs.”³⁶ The case was appealed, and the United States Court of Appeals for the Ninth Circuit affirmed the summary judgment stating that the reliability of a scientific technique must be “generally accepted” by the relevant scientific community for it to be admissible.³⁷ The Supreme Court, however, vacated the judgment of the lower courts and accepted the plaintiff’s argument that the Federal Rules of Evidence superseded the *Frye* test.³⁸ The Court made clear that the critical concerns of Rule 702 are evidentiary reliability and relevancy.³⁹

The essence of the reliability standard lies within the Court’s citation to philosopher of science Karl Popper’s statement that “the criterion of the

28. *Lynch v. Merrell-Nat’l Lab.*, 830 F.2d 1190, 1191 (1st Cir. 1987).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1194.

33. *Id.*

34. *Id.* at 1193-95.

35. *Id.* at 1191.

36. *Daubert v. Merrell Dow Pharm., Inc.*, 727 F. Supp. 570, 572 (S.D. Cal. 1989) (quoting *United States v. Kilgus*, 571 F. 2d 508, 510 (9th Cir. 1978)).

37. *Daubert v. Merrell Dow Pharm., Inc.*, 951 F. 2d, at 1129-1130 (citing *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)).

38. *Daubert*, 509 U.S. at 585-89.

39. *Id.* at 595.

scientific status of a theory is its falsifiability, or refutability, or testability.”⁴⁰

In order to best ensure relevant and reliable testimony and exclude “unsupported speculation,” *Daubert* establishes a two-pronged test which requires a district court to determine “whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.”⁴¹ This “gatekeeping” role calls for the trial judge to make a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid, (i.e., whether it is reliable;) and whether that reasoning or methodology properly can be applied to the facts in issue,” i.e., whether it is relevant to the issue involved.⁴² “Proffered scientific evidence must satisfy both prongs to be admissible.”⁴³

The first decision judges as gatekeepers must determine is whether a witness is sufficiently qualified by “knowledge, skill, experience, training, or education” before he will be permitted to give expert testimony.⁴⁴

This means that a witness must be qualified in the specific subject for which his testimony is offered. “Just as a lawyer is not by general education and experience qualified to give an expert opinion on every subject of the law, so too a scientist or medical doctor is not presumed to have expert knowledge about every conceivable scientific principle or disease.”⁴⁵

The evaluation of an alleged expert’s qualification in his or her field is not a novel concept, and is well within the abilities of our capable federal judiciary.

Once a judge has decided a witness is qualified to serve as an expert, *Daubert* requires the judge to then make an independent assessment to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”⁴⁶ This involves an examination of the methodology underlying the expert opinion to determine whether it utilizes valid scientific methods and procedures. *Daubert* suggests several factors to aid federal

40. *Id.* at 593 (quoting KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989)).

41. *Id.* at 592.

42. *Id.* at 593.

43. *Joiner v. General Electric Co.*, 78 F.3d 524, 529-30 (11th Cir. 1996).

44. FED. R. EVID. 702.

45. *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 24 (D. Mass. 1995).

46. *Daubert*, 509 U.S. at 589.

judges in evaluating whether a particular scientific theory or study is reliable: (1) its empirical testability; (2) whether the theory or study has been published or subjected to peer review; (3) whether the known or potential rate of error is acceptable; and (4) whether the method is generally accepted in the scientific community.⁴⁷ But these factors are neither exhaustive nor applicable in every case.⁴⁸

This gatekeeping role is simply to guard the jury from considering as proof pure speculation presented in the guise of legitimate scientifically-based expert opinion. It is not intended to turn judges into jurors or surrogate scientists. Thus, the gatekeeping responsibility of the trial courts is not to weigh or choose between conflicting scientific opinions, or to analyze and study the science in question in order to reach its own scientific conclusions from the material in the field. Rather, it is to assure that an expert's opinions are based on relevant scientific methods, processes, and data, and not on mere speculation, and that they apply to the facts in issue.⁴⁹

The *Daubert* standard was criticized in a variety of fora for a number of reasons. Even upon remand, the Ninth Circuit Court of Appeals wrote:

[S]omething doesn't become "scientific knowledge" just because it's uttered by a scientist; nor can an expert's self-serving assertion that his conclusions were "derived by the scientific method" be deemed conclusive. . . . As we read the Supreme Court's teaching in *Daubert*, therefore, though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by the scientific method."

The task before us is more daunting still when the dispute concerns matters at the very cutting edge of scientific research, where fact meets theory and certainty dissolves into probability. As the record in this case illustrates, scientists often have vigorous and sincere disagreements as to what research methodology is proper, what should be accepted as sufficient proof for the existence of a "fact,"

47. *Id.*

48. *See, e.g.,* In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 750 (3d Cir. 1994).

49. *Joiner*, 78 F.3d at 530.

and whether information derived by a particular method can tell us anything useful about the subject under study.⁵⁰

4. Daubert Expanded

In *General Electric Co. v. Joiner*,⁵¹ the U.S. Supreme Court made it clear that a trial court's determination on the admissibility of expert testimony under *Daubert* is to be given great deference on appeal. Admissibility decisions are to be overturned on appeal only if the trial court's decision was an abuse of discretion.⁵² Initially, *Daubert* applied only to scientific evidence, but in *Kumho Tire Co. v. Carmichael*,⁵³ the Court held that all expert testimony that involves scientific, technical, or other specialized knowledge must meet the *Daubert* test for admissibility.⁵⁴

Kumho has been praised by several scholars for numerous reasons, but two reasons in particular stand out. The first is that the case gives a plain-text meaning to Federal Rule of Evidence 702 since it does not differentiate between "scientific," "technical," or "other specialized" knowledge.⁵⁵ The second and more important reason is that *Kumho* "eliminated the trial judge's impossible task of differentiating between scientific and non-scientific evidence."⁵⁶ As Morsek has pointed out, this has particular applicability to the behavioral sciences:

50. *Daubert*, 43 F.3d 1311, 1315-16 (9th Cir. 1995), *cert. denied*, 516 U.S. 869 (1995).

51. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

52. *Id.* at 136-37.

53. 526 U.S. 137 (1999).

54. 526 U.S. at 141.

55. Leslie Morsek, *Get on Board for the Ride of Your Life! The Ups, the Downs, the Twists, and the Turns of the Applicability of the "Gatekeeper" Function to Scientific and Non-Scientific Expert Evidence: Kumho's Expansion of Daubert*, 34 AKRON L. REV. 689, 721-22 (2001); *see also* C. WRIGHT & V. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6266, at 285 (1997) ("Nothing in the language of that Rule suggests that scientific expert testimony should be treated differently from other expert testimony.").

56. Morsek, *supra* note 55, at 728 (*citing* Patricia A. Krebs and Bryan J. De Tray, *Kumho Tire Co. v. Carmichael: A Flexible Approach to Analyzing Expert Testimony Under Daubert*, 34 TORT & INS. L.J. 989, 996 (1999)); *see also* Michelle Michelson, *Recent Development: The Admissibility of Expert Testimony on Battering and its Effects after Kumho Tire*, 79 WASH. U. L. Q. 367, 370 & n.13 (2001) (*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")); Diana K. Sheiness, *Out of the Twilight Zone: The Implications of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 69 WASH. L. REV. 481, 491 (1994); Timothy B. Dyk and Gregory A. Castanias, *Daubert Doesn't End Debate on Experts*, NAT'L L.J. 17, 20 (Aug. 2, 1993) ("[W]ho is a scientist? A political scientist? A 'human factors expert'?").

Psychology is an example illustrating the difficulty in discerning between scientific and non-scientific testimony. By its very definition, psychology is the “science of mind and behavior.” Psychologists conduct experiments and there are standard texts and accepted methods of analysis which evince that a psychologist’s testimony is grounded in science. However, a psychologist may also utilize observations and experience to reach conclusions, which are not necessarily grounded in science. Henceforth, the totality of the psychologist’s testimony should be subject to the rigorous scrutiny because it would be impossible for a judge to separate the testimony into scientific and non-scientific segments.⁵⁷

B. Implications for Behavioral Science.

Daubert’s adoption of Popper’s view of what constitutes “science” is somewhat problematic for the social sciences in general. Many of the social sciences “rely predominantly on retrospective observational studies rather than on controlled experimentation, and do not necessarily meet the . . . standard of falsifiability.”⁵⁸ That is not to say, however, that social science evidence ought to be inadmissible under *Daubert*. As several scholars have pointed out, the social sciences have their own standards for assessing validity and reliability. These standards include, but are not limited to, (1) replicability, (2) logic, (3) adherence to recognized methodologies, (4) construct validity (i.e., how well data analysis “fits” into preexisting theory), (5) adherence to proper statistical sampling and statistical procedures for data analysis, (6) avoidance of bias, and (7) qualifications of the researcher.⁵⁹

In spite of these criteria, some continue to argue that social science on the whole should be more rigorously scrutinized under the traditional *Daubert* reliability standards using the Popperian notion of “science,” and they warn that courts need to “protect jurors from ‘worthless social science evidence.’”⁶⁰ If *Daubert’s* focus on reliability was rigorously adhered to –

57. Morsek, *supra* note 55, at 729-30, n.130 (citations omitted).

58. Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMPLE L. REV. 55, 69 (1998).

59. *Id.* at 70-71 (citing, KARIN D. KNORR-CETINA, THE MANUFACTURE OF KNOWLEDGE: AN ESSAY ON THE CONSTRUCTIVIST AND CONTEXTUAL NATURE OF SCIENCE 21 (1981); Alvan R. Feinstein, *Scientific Standards in Epidemiologic Studies of the Menace of Daily Life*, 242 SCI. 1257, 1259-61 (1988); Richard Lempert, *The New Evidence Scholarship: Analyzing the Process*, 66 B.U. L. REV. 439, 442 (1986)).

60. HARV. L. REV., *Confronting The New Challenges of Scientific Evidence Summary*, 108 HARV. L. REV. 1481, 1524-25 (1995) (citing 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, 1009, 1083-84 (1989)). *But cf.* 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,

whether reliability was “defined in its scientific sense to mean consistency of result or, in the sense the Court appeared to use it, to mean a measure of accuracy or validity – much behavioral science testimony [would] not fare well”⁶¹ For example, mental health clinicians “disagree more than half the time even on major diagnostic categories such as schizophrenia and organic brain syndrome” and mood disorders.⁶² Reliability is even lower for Axis II personality disorders in the clinical setting, with a high of 49% for antisocial personality disorder to a low of only 1% for schizoid personality disorder.⁶³

Moreover, even if reliability were high, validity is often low because “many symptoms – such as whether a person is ‘depressed,’ ‘anxious,’ or ‘suffering from low self-esteem’ – are unverifiable in the same way a physical fact is because the terms themselves are so amorphous and subjective.”⁶⁴ And the problem worsens when not focusing on clinical diagnosis.

Attempts to explain the causes of behavior (e.g., unconscious conflicts, chemical imbalances, abuse as a child, relationship with parents) are even more speculative. Most opinion testimony of this type is based on untested theories, or theories that have been subjected only to the most preliminary scientific inquiry. Paul Meehl’s highly critical comment twenty years ago is still true today: “[M]ost so-called ‘theories’ in the soft areas of psychology . . . are scientifically unimpressive and technologically worthless.” In many of these situations, forensic clinicians can at best offer only “anecdotal”: information obtained through experience in dealing

94-107 (1987).

61. Christopher Slobogin, *Doubts About Daubert: Psychiatric Anecdotal as a Case Study*, 57 WASH & LEE L. REV. 919, 919 (2000).

62. *Id.* at 920 (citing Samuel Fennig et al., *Comparison of Facility and Research Diagnoses in First-Admission Psychotic Patients*, 151 AM. J. PSYCHIATRY 1423, 1426 (1994) (showing 57.1% agreement on schizophrenia); Paul B. Lieberman & Frances M. Baker, *The Reliability of Psychiatric Diagnosis in the Emergency Room*, 36 HOSP. & COMMUNITY PSYCHIATRY 291, 292 (1985) (showing 41% agreement on schizophrenia, 50% agreement on mood disorders, and 37% agreement on organic brain syndromes)); see also David Faust & Jay Ziskin, *The Expert Witness in Psychology and Psychiatry*, 241 SCIENCE 31 (1988) (“A number of subsequent studies showed that rate of disagreement of specific diagnostic categories often equals or exceeds rate of agreement.”).

63. Slobogin, *supra* note 61, at 920 n. 11 (citing Graham Mellsop, *The Reliability of Axis II of DSM-III*, 139 AM. J. PSYCHIATRY 1360, 1361 (1982)).

64. *Id.* at 921.

with psychological problems, reading about case studies, and extrapolation from the theoretical speculations of others.⁶⁵

In light of the aforementioned problems with psychological theories, methodologies, and diagnostic conclusions, several commentators have argued that behavioral science testimony should almost always fail the *Daubert* test.⁶⁶

C. Purpose of the Present Study

Much of the scholarly literature concerning the application of *Daubert* has been largely theoretical. In other words, scholarship has focused on what *Daubert* should require and how it might affect certain disciplines.⁶⁷ Little attention has been paid to what the impact of *Daubert* has actually been. The present study is an attempt to fill that void in the literature by conducting a content analysis of all published federal judicial cases applying *Daubert* to an issue of psychology or psychiatry since the case was decided in 1993.

III. RESEARCH METHODOLOGY

A. Data Collection

The research sample for our content analysis was comprised of all federal judicial opinions decided since *Daubert* was handed down in 1993 that deal with psychology or psychiatry. This purposeful sample was accessed by conducting a search using Westlaw,[®] a proprietary legal database. Within Westlaw[®] the following a search was run in the "ALLFEDS" database:

(DAUBERT /P "MERRELL DOW") /P ("509 U.S. 579""113 S. CT. 2786""61 U.S.L.W. 4805""NO. 92-102") & DATE(AFTER 1992) & DATE(BEFORE 2001) & PSYCH!

Accordingly, the search was designed to find all federal opinions, both published and unpublished, citing *Daubert*, that contained any word having "psych" as its base (e.g., psychology, psychological, psychologist,

65. *Id.* at 921-22 (citing Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 461 (1980); Paul E. Meehl, *Theoretical Risks and Tabular Asterisks: Sir Karl, Sir Ronald, and the Slow Progress of Soft Psychology*, 46 J. CONSULTING & CLINICAL PSYCHOL. 806, 806 (1978)).

66. E.g., Michael H. Gottesman, *Admissibility of Expert Testimony After Daubert: The "Prestige" Factor*, 43 EMORY L.J. 867 (1996); Graham, *supra* note 8, at 162 ("[T]he testability or falsifiability and potential error rate factors for appraising [social science evidence] will rarely be sufficiently present to meet the *Daubert* standard.").

67. See *supra* nn.44, 45, 51.

psychiatry, psychiatric, etc.) that were decided by the end of the year 2000, the cut-off date for inclusion in this study. The search yielded a total of 325 judicial opinions.

B. Data Analysis and Coding

Each of the 325 cases was reviewed by three researchers and analyzed using ethnographic content analysis.⁶⁸ This method is particularly appropriate since multiple cases were reviewed in an attempt to discover emergent patterns and differing emphases among and between the cases reviewed. Consistent with the research method as set forth by Altheide,⁶⁹ the research involved a focus on narrative data in which both categorical and unique data were obtained from each case studied. Cases were then classified based on the patterns that emerged during the analysis.

The qualitative analysis was conducted in three phases. First, 252 cases in the purposeful sample that did not present a *Daubert* issue for some aspect of behavioral science were discarded. For example, cases in which “psychology” appeared only as part of a person’s or institution’s title, or the title of a book, article, or other citation, and therefore presented no issue under *Daubert*, were all discarded. Similarly, cases in which the term was simply mentioned in passing were discarded. For example, there were seventeen cases that presented issues dealing with the admissibility of polygraph evidence. Such cases do not present *Daubert* issues for the behavioral sciences, but are better classified as cases in the forensic sciences. The fact that a court may have used the term “psychology” in describing the unreliability of polygraph tests for determining whether someone is telling the truth is not the type of case with which this study is concerned. Rather, we focused on the seventy-three cases in which an issue of behavioral science was the subject of a *Daubert* analysis.

In the second phase of the research, qualitative comparisons among and between the seventy-three relevant cases were conducted. Consistent with proper ethnographic content analysis methodology,⁷⁰ the comparing and contrasting of cases without predefined content analysis categories allowed for the emergence of central themes. Cases that presented similar themes in applying *Daubert* were grouped together. Ten main themes emerged from this analysis, allowing for the development of a typology of the way in

68. See DAVID ALTHEIDE, *QUALITATIVE MEDIA ANALYSIS* (Sage Publishing Co. 1996).

69. *Id.*

70. *Id.*

which *Daubert* has been applied to behavioral science. The topologies are explored in detail in the results and discussion section of this article.

IV. RESULTS AND DISCUSSION

The ethnographic content analysis of the seventy-three relevant cases in the research sample can be broken down into ten main categories of cases as presented in Table 1. We will summarize the ten categories found in our analysis and offer illustrative cases within each category. We will also compare and contrast those cases within each category in an attempt to determine what might be responsible for inconsistencies in judicial rulings.

Table 1: Typology of Behavioral Science Issues Under *Daubert*

Category	Number of Cases
Confessions/Interrogations	7
Competency to Stand Trial	2
Emotional Distress	11
Job Placement/Harassment/Discrimination	6
Memory	14
Mental Disorders	15
Mens Rea	4
Sexual Predators	3
Victimology	6
Witness Credibility	4
Miscellaneous	1
N	73

A. Confessions/Incriminating Statements (N=7)

Expert testimony bearing directly on the credibility of witnesses is rarely admitted.⁷¹ But most courts appear to be receptive to expert testimony when the credibility of a confession is at issue.⁷² Specifically, when a confession is challenged by the defense as having been falsely made, the courts are willing, even if reluctantly so, to allow the defendant to present evidence in support of this claim. The key to admissibility of such expert testimony under *Daubert*, however, appears to be the particularity with which the research on false confessions is shown to have specific application to the defendant. When offering generalized data on false confessions from

71. See Section E, *infra* at 35-36.

72. United States v. Filler, 2000 WL 123446, at *1 (9th Cir. 2000) (upholding the exclusion of a forensic psychiatrist's ability to testify that he had falsely confessed to a crime in light of his mental illness); United States v. Meling, 1998 WL 81450 (9th Cir. 1998).

social psychological research, for example, the testimony of the expert may be properly limited to presenting data that false confessions do, in fact, exist, and the traits associated with those who give false confessions. Such an expert, however, may not extrapolate from such empirical research that a particular defendant's mental impairments led to a greater likelihood of confessing falsely.⁷³

For example, in *United States v. Mazzeo*,⁷⁴ the defendant appealed a conviction for the misappropriation of postal funds. He claimed that he had falsely confessed to the crime.⁷⁵ To bolster his argument, he sought to call a psychiatrist who had expertise in the area of false confessions.⁷⁶ The district court conducted a *Daubert* hearing and concluded that the expert's "reasoning and methodology as applied to [the defendant] in particular lacked scientific validity."⁷⁷ The psychiatrist had interviewed the defendant for only one-hour in person and twenty minutes over the phone.⁷⁸ He had also reviewed the defendant's statement and the notes taken by the postal inspectors who had interviewed him.⁷⁹ Most importantly to the court, however, the psychiatrist

did not administer to [the defendant] any of the available tests designed to measure the extent to which a person is likely to make false confessions. When pressed by the district court to explain precisely the factors that led him to conclude that [the defendant] fit within one of the false confession profiles, Dr. Anderson merely repeated the characteristics associated with the profile and referred in conclusory fashion to his own professional experience. Assessing Dr. Anderson's statements at the *Daubert* hearing as a whole, the district court did not commit "manifest error" in excluding his proffered testimony at trial because it was not scientifically reliable as applied to this case.⁸⁰

73. *United States v. Hall*, 974 F. Supp. 1198, 1205 (C.D. Ill. 1997); cf. *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996).

74. *United States v. Mazzeo*, 2000 WL 232032 (2d Cir. 2000).

75. *Id.* at *1.

76. *Id.*

77. *Id.* at *2.

78. *Id.*

79. *Id.*

80. *Id.*

In contrast, *United States v. Raposo*⁸¹ demonstrates the way in which such testimony can be welcomed by a court when a proper foundation has been established. The defendant had confessed to arson.⁸² At trial, the defendant sought to offer the testimony of a well-qualified clinical psychologist that he had characteristics that made him more susceptible to giving a false confession than people in the general population. Specifically, the psychologist found that the defendant “demonstrated a low-average IQ with some deficit in overall verbal functioning, attention and concentration abilities.”⁸³ It was the opinion of the expert that “a lower IQ usually correlates with a tendency to be more suggestible, less assertive, and less equipped to resist pressure.”⁸⁴ Other psychological tests revealed that the defendant suffered from “depression, poor reality testing, low self-esteem, and has difficulty coping with interpersonal relationships . . . [f]urther, the tests showed [the defendant] to have a ‘self-defeating’ personality, which tends to be isolated, demeaned and/or manipulated by others, and willing to be taken advantage of.”⁸⁵ The prosecution acknowledged the tests used by the psychologist were valid and reliable measures regularly used in the relevant scientific community.⁸⁶ The prosecution disputed, however, that the results of these tests could be interpreted in a manner reflecting on the likelihood of this particular defendant making a false confession.⁸⁷ The court disagreed and allowed the psychologist to testify that “an individual with a certain psychological profile could be more susceptible than other members of the general population to making a false confession,”⁸⁸ noting that the psychologist’s conclusions were based on the clinical assessment of the defendant using methodologies that were well-established in clinical psychology.

*United States v. Shay*⁸⁹ similarly demonstrates how the specific application of clinical psychology to the defendant is permitted under *Daubert* in false confessions cases. In *Shay*, the defense sought to call a psychiatrist who was prepared to testify that the defendant suffered from *pseudologia fantastica*, a factitious disorder also referred to as Munchausen’s Disease.⁹⁰ The disorder is characterized as an extreme form of pathological lying.⁹¹ Although the district court noted that those

81. 1998 WL 879723 (S.D.N.Y. Dec. 16, 1998).

82. *Id.* at *2.

83. *Id.* at * 3.

84. *Id.*

85. *Id.* (internal citations omitted).

86. *Id.* at *5.

87. *Id.*

88. *Id.* (citing *United States v. Shay*, 57 F.3d 126, 133-134 (1st Cir. 1995)).

89. *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995).

90. *Id.* at 129.

91. *Id.* at 129-30.

diagnosed with the disorder often show up at police stations and confess to crimes they did not commit, the court prevented the defense from introducing expert testimony regarding the disorder, "primarily because the jury was capable of determining the reliability of [the defendant's] statements without the testimony."⁹² On appeal, this was held to be an error.⁹³

B. Competency to Stand Trial (N=2)

Much to our surprise, only two cases in the research sample presented *Daubert* issues in the realm of competency to stand trial. Presumably this remarkably small number is due to the fact that a defendant's competency to stand trial necessarily relies upon the reports of psychologists or psychiatrists who have conducted clinical assessments of a criminal defendant to see if the accused has (1) "a rational as well as factual understanding of the proceedings against him" and (2) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."⁹⁴ Accordingly, the determination of a defendant's competency to stand trial depends on the expertise of behavioral scientists. In fact, competency assessments are one of the most important roles mental health professionals play in the criminal process. The usual course of events is for "clinical evaluators [to] examine the defendant and then submit written reports to the court. The court then decides the issue, sometimes following a hearing at which the examiners testify and are subject to cross-examination."⁹⁵ Given this well-accepted process, one would assume that *Daubert* is not an issue in most cases in which competency is at issue, presuming three important factors.

First, the normal processes of clinical evaluation of a defendant whose competency was questioned must have been adhered to. Second, the clinician conducting the evaluation must be duly qualified. And third, the clinician must use tests and methods that are generally accepted in the field of clinical evaluation.⁹⁶ When one of these cornerstones of competency

92. *Id.* at 130 (citing unpublished district court opinion).

93. *Id.* at 133-34.

94. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). This formulation is followed in nearly all U.S. jurisdictions and has been reaffirmed by the Supreme Court quite recently (in constitutional terms). See *Medina v. California*, 505 U.S. 437, 452 (1992).

95. Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 572 n.1 (1995).

96. *United States v. Gigante*, 982 F. Supp. 140 (E.D.N.Y. 1997) (finding the opinions of defendant's mental health experts were unreliable under *Daubert* because they relied upon the

assessment is violated, a *Daubert* issue may present itself as it did in *United States v. Duhon*.⁹⁷

Duhon involved a twenty-year-old who was mentally retarded. The defendant had been declared incompetent to stand trial since he had the mental functioning of a seven-year-old.⁹⁸ Although it appeared to the court to be absurd to attempt to restore competency to someone who was mentally retarded, a condition that cannot be changed, and it also appeared potentially “harmful to separate from his family a mentally retarded person with the understanding of a seven-year old in order to attempt to ‘restore competency,’ the court concluded it had no discretion to do otherwise” under applicable federal law.⁹⁹ After two months in a federal correctional institute’s program to restore competency, the defendant was “certified” to be competent by the psychiatric staff of the prison.¹⁰⁰ The certification was signed by a psychiatrist and a clinical psychologist who opined the defendant was competent because he “showed the ability to learn, retain, and relate information inspite [sic] of his limited reading ability” and had “a general understanding of the adversarial nature of criminal law and an understanding of the criminal process, procedural protection of his rights, and the roles of courtroom personnel.”¹⁰¹ Further, the psychologist found that the defendant held “no fixed irrational beliefs about his attorney.”¹⁰² The court refused to find the defendant competent based on these conclusory statements.¹⁰³ It noted that independent, court-appointed experts were not only “unaware of any peer reviews or publications dealing with the effectiveness of competency restoration groups[,]” but also that the psychological community generally does not accept them as effective.¹⁰⁴ Moreover, the court rejected the methodologies used in conducting the defendant’s competency evaluation while in the correctional institute.¹⁰⁵

The FCI’s forensic evaluation report cites Duhon’s behavior and responses in the competency restoration group as evidence that he is competent. However, the report contained no explanation of what information was presented to Duhon and what he actually

results of PET scans of the defendant’s brain while he was on several antipsychotic medications to determine his incompetency to stand trial, a technique that, even absent the presence of mind-altering medication, is not reliably established to judge whether someone is malingering).

97. 104 F. Supp. 2d 663 (W.D. La. 2000).

98. *Id.* at 667.

99. *Id.* at 668 (citing 18 U.S.C. § 4241(d)(1)); see also *United States v. Shawar*, 865 F.2d 856, 860 (7th Cir. 1989).

100. *Duhon*, at 668.

101. *Id.*

102. *Id.*

103. *Id.* at 682.83.

104. *Id.* at 676.

105. *Id.* at 676-78.

understood as opposed to what he memorized in rote responses. Dr. Berger was unable to provide any insight because he had never attended one of the classes.¹⁰⁶

C. *Mens Rea* (N=4)

Four cases in the research sample involved attempts by criminal defendants to introduce testimony of psychological experts to prove the defendants lacked the mens rea to have committed the crime with which they were charged. The defendants in three of these four diminished capacity cases failed. But care should be taken not to conclude that courts are hostile to expert testimony in diminished capacity based defenses. The more appropriate conclusion would appear to be that criminal defense attorneys often try to obfuscate the issues at trial by interjecting irrelevant claims of diminished mental capacity, and courts appear to be wise to this ploy. Consider the case of *United States v. Pendergraft*¹⁰⁷ in which the defendant was charged with conspiracy to commit extortion and mail fraud. He wanted to use a forensic psychologist to show that he had a “personality disorder not otherwise specified” that interfered with his capacity to have committed the crime.¹⁰⁸ The psychologist’s expertise was not in question, nor were the methods he used to conduct his assessment, as it included a “comprehensive clinical examination . . . lasting in excess of [twelve] hours, and use of collateral sources to verify the integrity of the information obtained from the examination and testing” including interviews with the defendant’s wife, codefendant, a police officer who knew the defendant, “and a review of prior psychiatric records of counseling the defendant underwent five years previously after he separated from his wife.”¹⁰⁹ But the court excluded the proffered testimony on the grounds of relevancy. The psychologist had determined the defendant’s personality disorder caused him “to lack the self reflective mechanisms to control [certain] behaviors.”¹¹⁰ Such an opinion did not mean, however, “that the [d]efendant lacked the intent to commit the crimes charged.”¹¹¹ Since the testimony, even if

106. *Id.* at 677-78.

107. 120 F. Supp. 2d 1339 (M.D. Fla. 2000).

108. *Id.* at 1341.

109. *Id.*

110. *Id.* at 1344.

111. *Id.*

accepted by a jury, would not negate mens rea, it was excluded as irrelevant. Similar results occurred in two of the other diminished capacity cases.¹¹²

*United States v. Towns*¹¹³ also involved an inappropriate proffer of diminished capacity evidence. However, there was a dual-relevancy issue that made the expert's testimony valuable for something other than directly disproving mens rea.¹¹⁴ *Towns* involved a defendant who was accused of attempted bank robbery.¹¹⁵ It was his contention that he did not intend to rob the bank, but rather was faking an attempted bank robbery because he needed psychiatric treatment.¹¹⁶ Because he had been unable to get help elsewhere for his schizoaffective disorder, the defendant claimed he thought he could get help through the criminal justice system.¹¹⁷ He sought to offer the testimony of an unquestionably qualified expert who would have opined that the defendant did not actually intend to rob the bank, but rather was motivated to act out an attempted bank robbery to get the help he knew he needed.¹¹⁸ The court refused to allow the expert to testify as to intent for the following reason:

There is no scientific basis to conclude that because [the defendant] suffered from a combination of schizoaffective disorder, alcohol dependence, and borderline intellectual functioning, he lacked the intent to take the money from the bank teller. Put differently, Dr. Stott has no basis to connect the defendant's psychological impairments with a lack of intent to take the bank's money. . . . Dr. Stott is in no position to testify to the opinion that [the defendant] lacked the intent to commit bank robbery. To the contrary, Dr. Stott's proffered testimony is relevant more to the issue of what might have incited and stimulated Towns to form the intent to execute a chain of events that might lead to his apprehension . . . [rather] than to the actual issue of whether or not [he] intended to execute those events.¹¹⁹

112. See also *United States v. Young*, 213 F.3d 627 (2d Cir. 2000) (upholding the exclusion of testimony by an expert regarding the defendant's mental state when no specific purpose to cross state lines in a kidnapping needed to be proven to sustain a federal conviction for said offense); *United States v. Kruckel*, 1994 WL 774645 (D.N.J. 1994) (rejecting motion for new trial based upon exclusion of treating physician's testimony that defendant was an alcoholic when there was no evidence that defendant was intoxicated at the time of the alleged acts, and, therefore, his alcoholism was unrelated to any relevant mental state for the offenses charged).

113. 19 F. Supp. 2d 67 (W.D.N.Y. 1998).

114. *Id.* at 71.

115. *Id.* at 70.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 71.

The court, however, did recognize that the psychologist could offer insights into the defendant's motive, something very much at issue in the case:

If the jury concludes that Towns was moved to approach the teller, brandish a butter knife, and pass a threatening note because he wanted treatment for his mental maladies, and that his desire to fake a bank robbery to secure treatment did not extend so far as to include taking the money from the teller, then Towns will have succeeded in negating the proof of mens rea.¹²⁰

D. Emotional Distress (N = 11)

Behavioral scientists are often called upon by attorneys as part of claims for emotional distress. Given that the law recognizes a compensable tort for both the intentional and negligent infliction of emotion distress, it is not surprising that courts routinely accept the testimony of psychologists and psychiatrists regarding the types of emotional distress someone may have suffered. So long as the proffered expert used reliable methods to assess the victim's emotional distress, courts accept this type of testimony. In fact, of the eleven cases in the research sample presenting claims for emotional distress, expert testimony was allowed in all but two of them. And in those two cases, the experts either used unorthodox methods or went beyond their expertise.

The first case in which expert testimony was not permitted involved a claim for hedonic damages – the damages which seek to compensate a victim for the value of the loss of enjoyment of life allegedly suffered as a result of a defendant's actions. Although the trend appeared to be leaning towards the admission of expert testimony on claims for hedonic damages up until the time *Daubert* was decided, since the *Daubert* decision, courts have generally rejected expert testimony on hedonic damages.¹²¹ While the bulk of such cases deal with the expert testimony of economists, the same

120. *Id.* at 72.

121. See, e.g., *Kurncz v. Honda North America, Inc.*, 166 F.R.D. 386 (W.D. Mich. 1996); *Ayers v. Robinson*, 887 F. Supp. 1049 (N.D. Ill. 1995); *Estate of Sinthasomphone*, 878 F. Supp. 147 (E.D. Wis. 1995); *Hein v. Merck & Co.*, 868 F. Supp. 230 (M.D. Tenn. 1994); *Sullivan v. United States Gypsum Co.*, 862 F. Supp. 317 (D. Kan. 1994); see also Thomas J. Airone, Note, *Hedonic Damages and the Admissibility of Expert Testimony in Connecticut After Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 15 QUINNIPIAC L. REV. 235 (1995); Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 811 (1995).

trend has been applied to the testimony of behavioral scientists as illustrated by the case of *McGuire v. City of Santa Fe*.¹²²

In *McGuire*, the plaintiff offered the testimony of a psychologist who had interviewed the plaintiff and then “prepared a report based on ‘The Lost Pleasure of Life Scale,’ which estimates the degree of loss that [the plaintiff] has suffered in four areas of his life: practical functioning; emotional/psychological functioning; social functioning; and occupational functioning.”¹²³ Based on that report, an economist calculated a monetary value for the plaintiff’s damages. The report was rejected under this line of reasoning:

Dr. Murphy’s report states the “Lost Pleasure of Life Scale,” which she used to calculate the relevant percentages to be attributed to Plaintiff’s hedonic losses, “has been found to be moderately reliable and that moderate reliability and validity means that results are greater than chance.” This is hardly a quantifiable error rate and it hardly seems useful to provide the fact finder with “expert” testimony on figures that are only touted as more reliable than those which might be drawn out of a hat. The life experiences of a judge or jury would also seem to provide a guide to the value of life’s pleasures which is more reliable than random chance and thus such testimony would seem unlikely to assist the trier of fact.¹²⁴

The other case in which expert testimony with regard to emotional distress was disallowed was *Black v. Rhone-Poulenc, Inc.*¹²⁵ The plaintiffs sought damages for the emotional distress they experienced when the defendant’s chemical plant caught fire and a toxic cloud was released into the air.¹²⁶ In support of their emotional distress claim, they hired a clinical psychologist who designed a study to examine the emotional impact of the mishap.¹²⁷ At trial, the court refused to admit the findings from the study, finding the methodology used in the study did not meet the general standards of the scientific community.¹²⁸ Specifically, the study suffered from a number of important shortcomings. Some of the tests administered did not have validity scales which would allow the researchers to determine the truthfulness of the participants. The literature offered by the expert did not provide sufficient details to permit the court to perform the necessary

122. 954 F. Supp. 230 (D.N.M. 1996).

123. *Id.* at 231.

124. *Id.* at 233.

125. *Black v. Rhone-Poulenc, Inc.*, 19 F. Supp. 2d 592 (S.D.W. Va. 1998).

126. *Id.* at 593.

127. *Id.* at 594.

128. *Id.* at 606.

“comparative analysis between his work . . . and that of his colleagues elsewhere.”¹²⁹ The researcher failed to abide by his own protocol for conducting the study, thereby failing to control for certain variables. Also, the potential error rate was too high because of a number of reasons ranging from participant selection and compensation and using inadequately trained researchers to poor recording techniques and data coding problems.¹³⁰ In contrast, however, when such methodological flaws are absent, courts appear willing to accept the testimony of psychological experts with regard to claims of emotional distress.¹³¹

E. Witness Credibility (N = 4)

Parties often seek to call behavioral science experts to collaterally impeach the credibility of other witnesses. As a rule, though, “experts may not opine on credibility [because] [c]redibility is an issue for the jury.”¹³² *Klein v. Vanek*¹³³ illustrates this point. The plaintiff filed suit for damages resulting from a battery.¹³⁴ It was the defense’s position that the plaintiff was fabricating the story.¹³⁵ To bolster its position, the defense sought to call an expert who would have testified that the plaintiff suffered from bipolar disorder and, generally speaking, that people suffering from bipolar disorder tend to falsely blame others.¹³⁶ The expert would have further opined that the plaintiff’s bipolar disorder caused him to falsely blame the defendant for his injuries.¹³⁷ But the defense did not offer any evidence

129. *Id.* at 600.

130. *Id.*

131. See *Walker v. Soo Line R. Co.*, 208 F.3d 581 (7th Cir. 2000); *Skidmore v. Precision Printing and Pkg., Inc.*, 188 F.3d 606 (5th Cir. 1999); *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997); *United States v. Waddell*, 28 F.3d 1215 (6th Cir. 1994); *Webb v. Hyman*, 861 F. Supp. 1094 (D.D.C. 1994); *Bachir v. Transoceanic Cable Ship Co.*, 2000 WL 1738409 (S.D.N.Y. 2000); *Mareno v. Madison Square Garden, L.P.*, 2000 WL 1401156 (S.D.N.Y. 2000); *Walker v. Consol. Rail Corp.*, 111 F. Supp. 2d 1016 (N.D. Ind. 2000); *Chrissafis v. Cont’l Airlines*, 1998 WL 100307 (N.D. Ill. 1998).

132. *United States v. Filler*, 210 F.3d 386 (9th Cir. 2000) (citing *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985) (stating that because credibility is an issue for the jury, psychiatric experts may not testify specifically as to credibility or buttress credibility improperly)); *United States v. Barnard*, 490 F.2d 907, 912-13 (9th Cir. 1973) (upholding exclusion of expert psychiatric testimony that codefendant suffered from mental illness that caused him to lie).

133. 86 F. Supp. 2d 812 (N.D. Ill. 2000).

134. *Id.* at 814.

135. *Id.* at 815.

136. *Id.* at 816.

137. *Id.* at 817.

suggesting a causal link between bipolar disorder and a person's propensity to fabricate.¹³⁸ The expert's testimony was therefore excluded.¹³⁹

It should be noted, however, that the rule against collateral impeachment via an expert witness has an important exception. When a party makes a successful proffer of expert testimony under *Daubert* (regardless of the field of expertise), the opposing party may always seek to collaterally impeach the expert witness by offering an expert of their own who might take issue with the soundness of the methodologies used or the conclusions reached by the original expert.¹⁴⁰

F. Memory (N=14)

Of the fourteen cases using a *Daubert* analysis in dealing with the issue of memory, one dealt with the effect of drugs on memory,¹⁴¹ two dealt with the resurfacing of repressed memories,¹⁴² and eleven dealt with eyewitness identification reliability.

In *United States v. Saya*¹⁴³ the defendant, in an effort to discredit the chief prosecution witness against him, offered an expert "to testify 'concerning the effects of prolonged and active polysubstance by'" that witness.¹⁴⁴ Specifically, the expert would have testified how the drug use would have affected the witness' "ability to remember, relate, and distinguish historical events."¹⁴⁵ The court excluded the testimony because its basis was methodologically unsound.¹⁴⁶ The expert had not examined the witness nor conducted any tests of the witness' memory. Instead, the expert based his opinion on an affidavit containing hearsay accounts of the witness' drug use by four other unknown "witnesses."¹⁴⁷ Even the expert himself conceded that his methodology was "unendorsed by any scientific survey, literature or publication."¹⁴⁸

Both of the repressed memory cases admitted the testimony of qualified experts so they were able to testify about the phenomenon of repressed memories surfacing during therapy. The theory of resurfaced repressed

138. *Id.* at 818.

139. *Id.*

140. *Alberts v. Wickes Lumber Co.*, 1995 WL 557473 (N.D. Ill. 1995).

141. *United States v. Saya*, 961 F. Supp. 1395 (D. Haw. 1996).

142. *Hoult v. Hoult*, 57 F.3d 1 (1st Cir. 1995); *Shahzade v. Gregory*, 923 F. Supp. 286 (D. Mass. 1996).

143. *United States v. Saya*, 961 F. Supp. 1395 (D. Haw. 1996).

144. *Id.* at 1395.

145. *Id.* at 1395-96.

146. *Id.* at 1396.

147. *Id.*

148. *Id.*

memories was held to be “well-recognized” and satisfied the *Daubert* criteria for reliability.¹⁴⁹

An analysis of the group of cases dealing with reliability issues in eyewitness identifications yielded some interesting inconsistencies. Nine of the eleven cases (81.8%) excluded expert testimony regarding the reliability of eyewitness identification for reasons such as the testimony would not assist the trier of fact,¹⁵⁰ it would be misleading to the jury,¹⁵¹ or cross-examination of the eyewitness in conjunction with jury instructions would cover the topics of the proffered testimony.¹⁵² For example, in *United States v. Smith*,¹⁵³ the defendant was convicted of stealing guns from a gun shop. Several lay witnesses testified they saw the defendant running out of the store with the guns. At trial, the defendant offered expert testimony regarding eyewitness reliability. The expert would have explained the “circumstances that give rise to inaccurate memories,”¹⁵⁴ as well as the phenomenon of an eyewitness’ false confidence in the identification of a suspect.¹⁵⁵ Both the district and appellate courts agreed the proffered expert testimony was properly excluded.¹⁵⁶ The circuit court explained that “in the instant case, the proffered testimony touches ‘on areas of common knowledge.’ Thus, . . . the testimony would not assist the trier of fact.”¹⁵⁷

In contrast, however, there appears to be some judges who understand the psychological research concerning the unreliability of eyewitness identifications and the associated false confidence that eyewitnesses can have in mistaken identifications. They recognize that these phenomena are

149. *Shahzade v. Gregory*, 923 F. Supp. 286 (D. Mass. 1996). The other case, *Hoult v. Hoult*, 57 F.3d 1 (1st Cir. 1995), did not undertake a comprehensive analysis of the underlying *Daubert* issue since the defendant had not made an objection to the testimony of the prosecution’s expert at trial, thereby having waived the objection).

150. *United States v. Crotteau*, 218 F.3d 826 (7th Cir. 2000); *United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999); *United States v. Smith*, 156 F.3d 1046 (10th Cir. 1998); *United States v. Walton*, 122 F.3d 1075 (9th Cir. 1997); *United States v. Smith*, 122 F.3d 1355 (11th Cir. 1997); *United States v. Kime*, 99 F.3d 870 (8th Cir. 1996); *United States v. Brien*, 59 F.3d 274 (1st Cir. 1995); *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994).

151. *United States v. Walton*, 1997 WL 525179 (9th Cir. 1997); *United States v. Smith*, 122 F.3d 1355 (11th Cir. 1997); *United States v. Kime*, 99 F.3d 870 (8th Cir. 1996); *United States v. Burrous*, 934 F. Supp. 525 (E.D.N.Y. 1996); *United States v. Brien*, 59 F.3d 274 (1st Cir. 1995); *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994).

152. *United States v. Crotteau*, 218 F.3d 826 (7th Cir. 2000); *United States v. Walton*, 122 F.3d 1075 (9th Cir. 1997); *United States v. Smith*, 122 F.3d 1355 (11th Cir. 1997); *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994).

153. 156 F.3d 1046 (10th Cir. 1998).

154. *Id.* at 1052.

155. *Id.*

156. *Id.* at 1053.

157. *Id.*

not within the common knowledge of jurors, and therefore permit experts to address these issues at trial.¹⁵⁸ The following excerpt from *United States v. Hines*¹⁵⁹ illustrates that some judges can make appropriate rulings when they understand the purpose of expert testimony in eyewitness identification cases:

While jurors may well be confident that they can draw the appropriate inferences about eyewitness identification directly from their life experiences, their confidence may be misplaced, especially where cross-racial identification is concerned. . . . Nor do I agree that this testimony somehow usurps the function of the jury. The function of the expert here is not to say to the jury – “you should believe or not believe the eyewitness.” . . . All that the expert does is provide the jury with more information with which the jury can then make a more informed decision.¹⁶⁰

G. Job Placement/Discrimination/Harassment (N=6)

Six cases in this sample address the testimony of psychologists regarding alleged discrimination or harassment in the workforce. Testimony by these experts includes commentary on subjects including hiring techniques, tests involved in assigning promotions, and stereotypes.¹⁶¹ In general, as long as an expert can establish that the theories underlying his/her testimony have been tested in the laboratory and the field, subjected to peer review, published in reputable scientific journals, and generally accepted by experts in the field of psychology, then testimony of this nature is welcomed by the courts.¹⁶² However, experts are generally not permitted to opine that a plaintiff was, in fact, subject to or not subject to harassment.¹⁶³

The case of *Bryant v. City of Chicago*¹⁶⁴ is an example of how courts appear to be uniformly applying *Daubert* to claims of discrimination in the workplace. *Bryant* involved forty-four present or former sergeants of the Chicago Police Department of African-American or Latino descent.¹⁶⁵ They had alleged they were not promoted to lieutenant after taking the 1994 police

158. See *United States v. Hines*, 55 F. Supp. 2d 62 (D. Mass. 1999); *United States v. Norwood*, 939 F. Supp. 1132 (D.N.J. 1996).

159. 55 F. Supp. 2d 62 (D. Mass. 1999).

160. *Id.* at 72.

161. See, e.g., *Flavel v. Svedala Indus., Inc.*, 875 F. Supp. 550 (E.D. Wis. 1994).

162. *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257 (N.D. Cal. 1997).

163. *Voisine v. Danzig*, 1999 WL 33117132 (D. Me. 1999).

164. 200 F.3d 1092 (7th Cir. 2000).

165. *Id.* at 1094.

lieutenant examination as a result of racial bias in the test, resulting in deprivation of equal employment opportunities in the police force.¹⁶⁶ The City retained Dr. Barrett, the psychologist who developed and administered the examination being challenged.¹⁶⁷ Plaintiffs argued that Dr. Barrett's testimony was inadmissible under *Daubert* because his contention that the exam was "content valid and . . . could be used for rank-order promotions [was] nothing more than inadmissible conjecture . . . [that] . . . lack[ed] 'scientific validity.'"¹⁶⁸ The court, however, sided with the City of Chicago, finding that Dr. Barrett was a well-qualified expert who had authored approximately fifty articles dealing with employee selection and promotion testing which were published in peer-reviewed journals.¹⁶⁹ More important, the court found Dr. Barrett's opinions were formulated using data detailing the relationship between the skills measured in the examination and an individual's effectiveness as a lieutenant.¹⁷⁰ Accordingly, he was permitted to testify.

In contrast, *Collier v. Bradley University*¹⁷¹ illustrates the barring of expert testimony when the *Daubert* criteria for admissibility are not satisfied. In this discrimination case, the plaintiff was an African-American who had been given a terminal contract for employment as an assistant professor at Bradley University.¹⁷² She retained a social psychologist as an expert witness to testify that she had been the victim of discrimination.¹⁷³ The defense claimed the methodology used to arrive at this conclusion was flawed because it was based solely upon a content analysis of selected documents and interviews with the plaintiff and her attorney.¹⁷⁴ They argued that the expert should have interviewed other people, performed other tests, and made independent attempts to verify the data that had been provided to the expert by the plaintiff's attorney.¹⁷⁵ The court, however, noted that "[w]hatever merit there may be to content analysis being a recognized methodology in the field of social psychology, it is far from clear that Dr. Wilson even knows what methodology she applied in this case to

166. *Id.*

167. *Id.* at 1096.

168. *Id.* at 1096.

169. *Id.* at 1098.

170. *Id.*

171. 113 F. Supp. 2d 1235 (C.D. Ill. 2000).

172. *Id.* at 1237.

173. *Id.*

174. *Id.* at 1244.

175. *Id.*

reach her conclusions.”¹⁷⁶ The court went on to assume the validity of content analysis, but still found fault with the way in which the expert conducted the analysis because in comparing the depositions of the relevant parties, she assumed that “90 percent of what most people say is true and 10 percent is self-serving.”¹⁷⁷ The court had no problem dismissing this assumption as unsupported conjecture.

[T]he problem in this case is there is no indication in the record that the 90%/10% gestalt methodology is even accepted among social psychologists as an appropriate methodology. There is absolutely no support, medical or otherwise, for her conclusion that people are truthful 90% of the time and self-serving the other 10%. Absent some type of support among social scientists or some other reliable sources for her unique assumption, the Court finds that the methodology employed by Dr. Wilson is fundamentally flawed. Moreover, even if the 90%/10% were an acceptable methodology, one would reasonably expect, and furthermore demand, that Dr. Wilson be able to articulate what she credited and discredited in her gestalt approach. Absent Dr. Wilson being able to articulate what testimony she disregarded as “self-serving,” her conclusions are impossible to test on cross-examination by Defendants.¹⁷⁸

The case of *Olsen v. Marriott International, Inc.*¹⁷⁹ also illustrates how courts are strictly applying *Daubert* in job discrimination cases. The plaintiff alleged he had been denied a position as a massage therapist because he was male.¹⁸⁰ The defense argued “being female is a bona fide occupational qualification for the percentage of massage therapists necessary to satisfy customer requests for female therapists.”¹⁸¹ The defense wanted to call an expert who would have testified that massage therapy can trigger memories of past sexual abuse, so, to avoid uncomfortable memories of past victimization, clients should be permitted to choose the gender of their massage therapist.¹⁸² The court recognized the expert was qualified in the areas of sexual abuse and gender, but disagreed that the proffered testimony was within her realm of expertise since she lacked knowledge regarding the psychological effects of massage.¹⁸³ More importantly, though, the court was concerned with the fact that the expert provided no reliable basis for an

176. *Id.*

177. *Id.* at 1245.

178. *Id.* at 1246.

179. 75 F. Supp. 2d 1052 (D. Ariz. 1999).

180. *Id.* at 1056.

181. *Id.*

182. *Id.*

183. *Id.* at 1057.

opinion that “gender plays a part in triggering kinesthetic memories through touch. . . .”¹⁸⁴ Without establishing this link via reliable methods, the expert’s testimony was deemed to fail the *Daubert* test for admissibility.

H. Mental Disorders (N=15)

A large proportion of cases in the research sample (20.6%) concerned expert testimony regarding mental disorders. In general, so long as the expert is qualified and the methodologies used comport with generally accepted behavioral science techniques, then courts welcome the opportunity to have insights shared regarding most mental disorders.¹⁸⁵ Although four cases in the research sample did not discuss the particular mental disorder at issue in the case,¹⁸⁶ most of the remaining cases fell into three distinct subgroups. We will address each of these in turn. Before doing so, however, it should be noted that one case in the research sample prohibited testimony on the existence of “factitious disorder” or “Munchausen syndrome.” The court simply said it had conducted a lengthy *Daubert* hearing on the matter and concluded this psychiatric diagnosis did not meet the reliability criteria of *Daubert*.¹⁸⁷ It did not, however, offer any explanation for its rationale in arriving at this conclusion.

1. Compulsive Gambling Disorder

Four of the mental disorder cases concerned parties diagnosed with compulsive gambling disorder. Although the testimony of psychologists or psychiatrists was unanimously admitted in these cases, the scope of the expert’s testimony was always limited to the diagnosis of the relevant party as a compulsive or pathological gambler.¹⁸⁸ None of the experts was permitted to go beyond the DSM-IV diagnostic criteria to discuss a

184. *Id.* at 1058.

185. See *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000) (allowing testimony predicting future dangerousness of defendant based on his score on the Hass Psychopathy Checklist Revised over defendant’s objections to the test’s reliability since defendants only challenged the Psychopathy Checklist with two articles written by his own expert, and no other evidence of unreliability); *Sims v. Med. Ctr of Baton Rouge, Inc.*, 1997 WL 527330 (E.D. La. 1997) (holding a claim of misdiagnosis under the DSM-IV does not render the opinion inadmissible, but rather is something that can be challenged on cross-examination).

186. *Barnette*, 211 F.3d 803 (4th Cir. 2000); *United States v. Martinez*, 1999 WL 33290665 (W.D. Tex. 1999); *Sims*, 1997 WL 527330 (E.D. La. 1997); *Goomar v. Centennial Life Ins. Co.*, 855 F. Supp. 319, 326 (S.D. Cal. 1994).

187. *United States v. Martinez*, 1999 WL 33290665 (W.D. Tex. 1999).

188. *United States v. Scholl*, 166 F.3d 964 (9th Cir. 1999); *United States v. Scholl*, 959 F. Supp. 1189 (D. Ariz. 1997); *United States v. Libutti*, 1994 WL 774646 (D.N.J. 1994).

“pathological gambling lifestyle.” For example, in *United States v. Scholl*,¹⁸⁹ the defendant was charged with several counts of tax evasion based on his gambling earnings and losses.¹⁹⁰ The district court allowed his expert to testify that he was a compulsive gambler. But, the expert was not permitted to testify that “pathological gamblers have distortions in thinking and ‘denial,’ which impact their ability and emotional wherewithal to keep records” since doing so would “force them to confront the reality of losses, which creates too much upheaval.”¹⁹¹ The court, in upholding the exclusion of this testimony on appeal, made it clear that “there was no support in the literature for this opinion or for the idea that pathological gamblers cannot truthfully report gambling income.”¹⁹²

2. Learning Disabilities

As with the compulsive gambling cases, courts are very open to receiving testimony regarding the presence of learning disabilities. The proffered expert need not, per se, be an expert in learning disabilities. For example, in *Lanni v. New Jersey*,¹⁹³ a physician with board certifications in psychiatry, neurology, and forensic psychiatry was permitted to testify that he did not believe the plaintiff suffered from dyslexia or any other neurological disorder, even though the expert did not specialize in learning disabilities.¹⁹⁴ “Dr. Welner need not be the best qualified expert in order to proffer an opinion about [p]laintiff’s learning disabilities [He] is an expert in forensic psychiatry and is qualified to proffer an opinion about [p]laintiff’s learning disabilities and mental condition.”¹⁹⁵ Moreover, courts appear eager to learn about a person’s learning disabilities, even if the expert did not strictly adhere to DSM-IV criteria in arriving at their diagnosis. In *Mancuso v. Consolidated Edison Co.*,¹⁹⁶ a qualified psychologist had conducted a detailed examination of a person found to have “attention deficit disorder and [a] learning disability (mixed type affecting both language and the perceptual domain).”¹⁹⁷ According to the expert herself, she did not rely on the DSM-IV because “although the DSM is widely respected in the field of psychological disorders, it is not the ‘bible’ for determining learning disability.”¹⁹⁸ Instead, she relied on a book by Jerome M. Sattler entitled

189. 166 F.3d. 964 (9th Cir. 1999).

190. *Id.* at 968-69.

191. *Id.* at 970.

192. *Id.* at 971.

193. 177 F.R.D. 295 (D.N.J. 1998).

194. *Id.* at 298.

195. *Id.* at 302-03.

196. 967 F. Supp. 1437 (S.D.N.Y. 1997).

197. *Id.* at 1454.

198. *Id.* at 1454-55.

*Assessment of Children's Intelligence and Special Abilities*¹⁹⁹ that she considered to be the “definitive text’ for diagnosing learning disabilities in children.”²⁰⁰ That book states that “[i]n the final analysis, clinical and psycho-educational considerations must come together in a diagnosis of learning disability.”²⁰¹ Since the expert’s conclusions were based on her clinical and psycho-educational judgment – a “gray area” in the science of learning disabilities according to the court – she was permitted to testify.²⁰² The fact that her diagnosis was not in accordance with the DSM-IV was something that could be attacked on cross-examination, but would not bar her opinion from being admitted into evidence.²⁰³

3. Personality Disorders

Courts have a long history of being hostile to Axis II personality disorders.²⁰⁴ But, it appears courts are at least willing to admit testimony of mental health professionals who have examined a patient and found that patient to be suffering from a personality disorder under circumstances where the clinician is seeking to opine on the current and future psychiatric treatment of the patient. Because this testimony is based on clinical research as well as professional experience with a specific patient, testimony is generally admitted.²⁰⁵ There are certain instances, however, where clinicians are not permitted to testify.

In *United States v. Marsh*,²⁰⁶ the defendant had been convicted of attempted extortion for trying to get money from a businessman with whom he had been having a homosexual relationship for nearly twenty-five years that had, at least in the beginning, started out with acts of prostitution.²⁰⁷ At trial, the defendant wanted an expert to testify that the alleged victim was suffering from dependant personality disorder and, as a result, the victim was not scared into making monetary payments to the defendant, but rather

199. JEROME M. SATTTLER, *ASSESSMENT OF CHILDREN'S INTELLIGENCE AND SPECIAL ABILITIES* (2d ed. 1988).

200. *Mancuso*, 967 F. Supp. at 1455.

201. *Id.* (citing Sattler, *supra* note 199, at 400).

202. *Id.* at 1456.

203. *Id.*

204. *E.g.*, Michael L. Perlin, *Unpacking The Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 639 (1990).

205. *See, e.g.*, *Doe v. Tag, Inc.*, 1993 WL 484212 (N.D. Ill. 1993).

206. 26 F.3d 1496 (9th Cir. 1994).

207. *Id.* at 1498.

did so voluntarily in order to keep the defendant in his life.²⁰⁸ The district court excluded the testimony as irrelevant since the victim's state of mind in an extortion or attempted extortion case is not an element of the crime.²⁰⁹ The appeals court upheld this decision.²¹⁰ The dissent argued that if the expert testimony had been admitted, the voluntary nature of the relationship would have been better understood by the jury, allowing it to have interpreted the defendant's words "not as extortion but as, . . . an exchange 'in which both members were getting something out of the relationship.'"²¹¹ The dissent, citing several psychological studies, went on to explain that the testimony of the expert would have helped the jury understand the defendant's state of mind insofar as his taunts "played to a side of [the alleged victim] that welcomed such treatment and in no way feared or resented it . . ."²¹² It is unclear whether the majority of the court did not understand the relevance of the expert testimony, or whether it simply disregarded it, because the majority opinion made no attempt to counter the argument of the dissenting judge.²¹³

When evaluating the cases in this category, a clear limitation on the admissibility of expert testimony with regard to the existence of mental disorders emerged. Retrospective expert testimony regarding the existence or onset of a mental illness is generally "inadmissible speculation" under *Daubert*.²¹⁴ *Provident Life and Accident Ins. Co. v. Fleischer*²¹⁵ illustrates this limitation. The plaintiff in *Fleischer* filed suit against his insurance company for failing to pay disability benefits to him.²¹⁶ In support of his claim, he offered the testimony of an expert who, after a three-hour long examination of the plaintiff, concluded he had been suffering from bipolar disorder for at least twelve years and that it would have rendered the plaintiff totally disabled by 1994, a critical date under the facts of the case.²¹⁷ The court excluded the testimony of the expert following the general rule that "retrospective expert testimony regarding the existence or onset of a mental illness is inadmissible speculation."²¹⁸ Specifically, the court found that the expert's report was of "no value in assisting the court to determine the cause or onset of Fleischer's mental disability that occurred four years earlier."²¹⁹

208. *Id.* at 1500.

209. *Id.*

210. *Id.* at 1503.

211. *Id.* at 1507.

212. *Id.* at 1508.

213. *Id.* at 1504.

214. *Goomar v. Centennial Life Ins. Co.*, 855 F. Supp. 319, 326 (S.D. Cal. 1994).

215. 26 F. Supp. 2d 1220 (C.D. Cal. 1998).

216. *Id.*

217. *Id.* at 1221-22.

218. *Id.* at 1226 n.5 (citing *Goomar*, 855 F. Supp. at 326).

219. *Id.*

This was especially the case since the plaintiff's own two treating physicians during the relevant time frame had diagnosed him with depression.²²⁰

Another limitation that emerged from the research sample on the admissibility of expert testimony regarding mental disorders concerned the area of expertise of the proffered expert. Courts have applied *Daubert* inconsistently on this question. As discussed earlier in the learning disabilities section, *Lanni v. New Jersey*,²²¹ permitted a psychiatrist to give his opinion that a party did not suffer from a learning disability even though he lacked specialized skills and experience in the appropriate sub-areas of his discipline dealing with learning disabilities.²²² But when someone seeks to do so with regard to a mental disorder, courts are much less lenient.

In *Smith v. Rasmussen*,²²³ the plaintiff had been diagnosed with a gender identity disorder.²²⁴ He sued to have Medicaid pay for the final stage of his sex reassignment therapy, the actual sex change operation.²²⁵ In its attempt to prove that sex change operations were "experimental," and therefore not covered by Medicaid, the government wanted to call a psychiatrist to testify that sex reassignment is "'controversial,' and more specifically, 'poorly evolved, less than perfected, certainly not [a] curative procedure.'"²²⁶ The psychiatrist also would have testified that he "opposed surgical treatment of psychiatric disorders and that he believes psychotherapy is a more appropriate treatment in all cases of gender identity disorder."²²⁷ But the government's expert had no first-hand knowledge of gender identity disorder, his opinion was based strictly on a literature review.²²⁸ The court did not allow the expert to testify, reasoning the lack of first hand knowledge with the specific disorder rendered the expert's opinion unreliable.²²⁹ Moreover, the court stated that the specific expertise in dealing with gender identity disorder could not be removed by his review of the literature since a literature review "is an insufficient basis or methodology on which to render a reliable expert opinion."²³⁰

220. *Id.* at 1226.

221. 177 F.R.D. 295 (D.N.J. 1998).

222. *Id.* at 296.

223. 57 F. Supp. 2d 736 (N.D. Iowa 1999).

224. *Id.* at 740.

225. *Id.*

226. *Id.* at 764.

227. *Id.*

228. *Id.* at 766.

229. *Id.* at 764-69.

230. *Id.* at 766.

I. Sexual Predators (N=3)

Defendants charged with acts of child molestation sometimes seek to offer the testimony of experts to testify that they do not fit the common characteristics of fixated pedophiles and/or child molesters. When faced with situations like this, courts pay lip service to *Daubert*, but ultimately seem to resort to the *Frye* test. *United States v. Robinson*²³¹ is a typical case. The defendant was accused of having engaged in sexual contact with two females under the age of twelve.²³² A defense expert, after having evaluated the defendant using, among other tests, the “Abel Assessment for Sexual Interest,” opined the defendant did not have a sexual interest in underage females.²³³ Even though the Abel test was a relatively recent creation at the time of the trial, the court ruled that it had been sufficiently tested to establish its validity and reliability, the results had been subjected to the peer review publications process, its potential error rate was not too high, and it was generally accepted in the scientific community.²³⁴ Accordingly, the expert was permitted to testify.²³⁵

Not all tests, however, have achieved general acceptance in the psychological community via a demonstration of their reliability and validity. In *United States v. Powers*,²³⁶ the court refused to admit the results of a penile plethysmograph test, a test which measures arousal by testing the response of the penis to being shown pictures of nude females of various age groups.²³⁷

First, the Government proffered evidence that the scientific literature addressing penile plethysmography does not regard the test as a valid diagnostic tool because, although useful for treatment of sex offenders, it has no accepted standards in the scientific community. Second, the Government also introduced evidence before the judge that a vast majority of incest offenders who do not admit their guilt, such as [the defendant], show a normal reaction to the test. The Government argues that such false negatives render the test unreliable.²³⁸

The *Powers* court also upheld the district court’s exclusion of a psychologist from testifying that the defendant did not demonstrate the

231. 94 F. Supp. 2d 751 (W.D. La. 2000).

232. *Id.* at 752.

233. *Id.*

234. *Id.* at 752-54.

235. *Id.* at 755.

236. 59 F.3d 1460 (4th Cir. 1995).

237. *Id.* at 1471.

238. *Id.*

psychological profile of fixated pedophile.²³⁹ The district court had ruled the defendant had not established the scientific reliability of psychological profiling.²⁴⁰ The appeals court, however, did not address that issue.²⁴¹ Instead, the court ruled that any such evidence was not relevant since, even if admitted, the testimony would have only shown that the defendant, unlike forty percent of incest perpetrators, did not exhibit the characteristics of a fixed pedophile.²⁴² But the defendant was not charged with being a fixed pedophile, but rather with the statutory rape of his daughter.²⁴³ He “offered no evidence to link a non-proclivity for pedophilia with a non-proclivity for incest abuse.”²⁴⁴ Accordingly, the proffered expert testimony was deemed to have been properly excluded on the grounds of relevancy.²⁴⁵

Finally in this category, it is worth noting that at least one court has allowed expert testimony from a non-behavioral scientist on the issue of sexual predators. In *United States v. Romero*,²⁴⁶ the prosecution offered the testimony of an FBI agent “who had spent many years studying the sexual exploitation of children and produced over 20 publications”²⁴⁷ The agent was permitted to testify about the characteristics of a “preferential sex offenders” – those having “a definite preference for sexual contact with children and methodically pursue such contact.”²⁴⁸ Since the defendant had lured his victim to him over the course of months in internet chat rooms, the appeals court upheld the decision of the trial court to admit the testimony on the grounds that it

was critical in dispelling from the jurors’ minds the widely held stereotype of a child molester as ‘a dirty old man in a wrinkled raincoat’ who snatches children off the street as they wait for the school bus. Many real-life child molesters use modern technology and sophisticated psychological techniques to ‘seduce’ their victims.²⁴⁹

239. *Id.* at 1471-72.

240. *Id.* at 1472.

241. *Id.* at 1472-73.

242. *Id.*

243. *Id.* at 1472.

244. *Id.*

245. *Id.* at 1473.

246. 189 F.3d 576 (7th Cir. 1999).

247. *Id.* at 582.

248. *Id.* at 583.

249. *Id.* at 584.

Because the agent's testimony helped the jury to understand the *modus operandi* of a certain type of child molester, the court felt the testimony was highly relevant.²⁵⁰ It is interesting to note, however, that the judicial opinion in the *Romero* case was devoid of any analysis of the FBI agent's methodologies. There was no inquiry into the validity and reliability of his methods or his conclusions. It therefore appears that *Daubert* was not correctly applied in this case.

J. Victimology (N = 6)

In cases in which the behavior of the alleged victim of a crime or tort is of some relevance (e.g., claims of self-defense, consensual sex, non-reporting of abuse, etc.), it is often helpful for the jury to have expert testimony that explains the behavior of the victim. Such testimony by experts on issues of victimology is generally admitted under certain proscriptions.²⁵¹ Experts are limited to explaining "behavior that would otherwise appear unusual to the average juror, such as why a victim of sexual abuse might not immediately report his or her abuse."²⁵² But experts may not testify regarding their opinions whether an alleged victim was or was not actually abused. For example, in *Gier ex rel Gier v. Educ. Serv. Unit No. 16*,²⁵³ mentally and physically handicapped children underwent psychological testing and evaluations to determine whether or not they had been subjected to abuse.²⁵⁴ The plaintiffs wanted their experts to be able to testify that the children they examined had, in fact, been abused.²⁵⁵ The court did not permit the experts to testify "to any conclusion that any plaintiff was abused in any way," "to any opinion based on such a conclusion," or "to any opinion that plaintiffs' behavior is consistent with abuse of any kind."²⁵⁶

There was an anomalous case in this category which, at first, blush, appears to be an excellent example of how expert testimony can be used to explain the seemingly bizarre behavior of the victim of a crime. Upon further scrutiny, however, some serious issues about the misapplication of

250. *Id.* at 585.

251. *See* United States v. Bighead, 128 F.3d 1329 (9th Cir. 1997); United States v. Alzanki, 54 F.3d 994 (1st Cir. 1995); White v. Keane, 51 F. Supp. 2d 495 (S.D.N.Y. 1999); Houser v. Lowe, 1996 WL 560232 (D. Kan. 1996).

252. *White*, 51 F. Supp. 2d at 501.

253. 66 F.3d 940 (8th Cir. 1995).

254. *Id.* at 942.

255. *Id.*

256. *Id.* at 942-43; *see also* *White*, 51 F. Supp. 2d at 501 (upholding admission of testimony that was limited to describing victim behavior after abuse where expert made no assertions with regard to her opinions on the victimization of the children in that particular case); *cf.* *Karibian v. Columbia Univ.*, 930 F. Supp. 134, (S.D.N.Y. 1996) (disallowing testimony of clinical social worker who would have attempted to explain why the plaintiff in a sexual harassment suit behaved as she did when such testimony was offered to bolster the plaintiff's credibility).

Daubert come to light. *United States v. Bighead*²⁵⁷ involved a prosecution of a father for the sexual abuse of his minor daughter. The victim testified that she began to be sexually molested at the age of seven and that this abuse continued until she was seventeen years old. When she was eighteen, she finally notified the police. At trial, the cross-examination of the victim centered around her delay in reporting the abuse, as well as some minor inconsistencies in her testimony. In rebuttal, the prosecution called an expert witness to testify not only about the general characteristics of child sexual abuse victims, but also the issues concerning the timing of their reporting the abuse and their recollection of abuse details. Her opinions were based on having interviewed over 1300 victims of sexual abuse over the course of years of clinical work.

On appeal, the defendant contended the admission of this testimony was in error since the court made no determinations regarding the expert's theories about "delayed disclosure" and "script memory," two phenomena that would help the jury understand why the victim had not previously come forward and why she had some inconsistencies in her testimony. Specifically, the defendant argued the court should have inquired whether the expert's theories could be tested, were subjected to peer review and publication, had the potential for error, and were generally accepted in the field. The court rebuffed those arguments, saying because the expert had based her opinions upon her professional experience rather than on any novel scientific or special technique or model, *Daubert* was not implicated. The dissenting judge, however, took sharp issue with the majority's handling of the case. First, he pointed out that the expert was neither a psychologist nor a psychiatrist, but rather was a nurse with an interdisciplinary doctorate in law, sociology, social work, psychology, and nursing. Second, the dissent cited research conducted by a clinical professor of child psychiatry at the College of Physicians and Surgeons of Columbia University regarding the work of "experts" like the one offered by the prosecution in this case. That research concluded there is a remarkable bias by people without professional training and proper credentials as psychologists and psychiatrist towards believing whatever stories the child victim tells them. Such "experts" believe that children never lie, and they often interpret what is actually normal as indicators of sexual abuse suffered by the children.²⁵⁸

The outcome in the *Bighead* case turned on the majority's belief that it did not have to apply *Daubert* to testimony like the one offered by the

257. 128 F.3d 1329 (9th Cir. 1997).

258. *Id.* at 1338 (citing RICHARD A. GARDNER, SEX ABUSE HYSTERIA: SALEM WITCH TRIALS REVISITED 46-65 (1991)).

prosecution in the case. This may be due, in large part, to the fact that *Bighead* was decided before the U.S. Supreme Court made it clear in *Kumho* that *Daubert* applies to all expert testimony in March 1999. Presumably, the case would be differently decided today. “Key-citing” the case in Westlaw[®], however, reveals no negative indirect history to the case.

K. Miscellaneous (N = 1)

One case in the research sample, *Estate of Macias v. Lopez*,²⁵⁹ presented a rather unique fact pattern and was unable to be included in one of the ten typology categories described above. This case was brought by the estate of Ms. Macias for her wrongful death. She was shot and killed by her ex-husband. The estate argued that her relationship with her husband escalated to the point of his killing her due to the lack of law enforcement and judicial intervention in the domestic violence issues occurring in their home. The estate sought to introduce the testimony of a family counselor who specialized in domestic violence and child abuse. He was prepared to testify that the defendants acted wrongfully in handling the Macias case. Moreover, he would have testified that the negligent conduct of the authorities was a “substantial factor” in causing Maria Macias’ death.²⁶⁰ The basis for his having reached that opinion was his “expertise and experience” with men like Avelino Macias. Specifically he asserted “it was reasonably foreseeable from January 21, 1996 onward that if Avelino was permitted to continue his pattern of harassment it would escalate to violence.”²⁶¹ Finally, the expert wanted to testify about studies demonstrating that aggressive law enforcement intervention reduces domestic homicide rates.

The court determined the sections of the expert’s testimony regarding police procedure and the effectiveness of domestic violence intervention and counseling would be admissible. However, the conclusions with regard to the specifics of the case regarding the behavior of Avelino Macias were not admitted because, according to the court, testimony regarding a direct link between the defendants’ acts and omissions and the death of Maria Macias was pure speculation.

259. 42 F. Supp.2d 957 (N.D. Cal. 1999).

260. *Id.* at 970.

261. *Id.*

V. CONCLUSION

A. Specific Conclusions Regarding the Typology

Before drawing conclusions about *Daubert's* application to behavioral science as a whole, there are some important findings that should be emphasized within each category of the typology.

Testimony by psychologists and psychiatrists regarding false confessions is generally accepted by the courts, but in two distinct ways. First, testimony regarding empirical research into the phenomenon of false confessions is permitted if the expert offers only generalized information. They are permitted to testify that false confessions occur. They can also explore the traits associated with those who may falsely testify. However, such experts are not permitted to testify about anything specifically relating to the defendant on trial, such as stating that the defendant's mental impairments increase the likelihood of that individual falsely confessing. In contrast, though, psychologists and psychiatrists who have performed a clinical evaluation of the defendant are permitted to testify about the specific likelihood of a false confession from a defendant based upon their evaluation of the defendant, provided they have used generally accepted methods of clinical assessment.

Expert testimony in the area of competency to stand trial is almost always allowed, presumably because of the legal justifications surrounding it. However, when the competency evaluation process is not properly adhered to, or when the clinician assessing the defendant does not use tests or methods generally accepted in a clinical field, expert testimony will likely be excluded.

When experts testify in support of diminished capacity defenses regarding a defendant's mens rea, they must have some specific insights into the defendant's mental state that is directly related to the level of criminal intent at issue in the case. Generalizations about how a particular mental disorder may be highly correlated to specific personality traits that may or may not have played a role in a particular defendant's case will not be accepted.

Discrimination/job placement cases generally admit expert testimony if two criteria are met. First, they must have used methods that are generally accepted by experts in the field. Second, the expert may need to have special expertise directly linked to the facts of the case.

As long as an expert is properly qualified and the methodologies used are in accordance with generally accepted behavioral science techniques,

testimony regarding mental disorders is welcomed by the court. In regards to compulsive gambling cases, testimony is admitted when dealing with the diagnosis of an individual as a compulsive gambler, but testimony cannot continue with discussion of the “pathological gambling lifestyle.” Courts are also very accepting of experts testifying about learning disabilities. Lastly, when an expert examines and treats an individual for a personality disorder and wishes to comment on the current and future treatment of the patient, testimony is usually admitted. However, experts are not permitted to proffer retrospective testimony regarding the onset of a disorder.

A properly qualified expert may testify about the issue of emotional distress as long as their methodology is sound. Such testimony may regard the causes, types, and problems associated with emotional distress, but may generally not address how the victim should be compensated for the emotional distress. Of course, such testimony will be excluded, though, if the methods used have not been established as reliable.

Expert testimony regarding the credibility of other witnesses is generally excluded under *Daubert*. This is an issue for a jury to determine. However, it should be noted that when one side offers expert testimony, the other side may always try to impeach the credibility of that expert by offering expert testimony of their own.

The general category of memory can be broken down into three sub-categories. The first sub-category deals with the effects of drugs on a person’s ability to remember. Testimony has been denied regarding this issue for reliability reasons. The second sub-category deals with the phenomenon of repressed memory retrieval. This subject matter has been generally accepted by the scientific community and is, therefore, generally accepted under *Daubert*. The third sub-category regards the reliability of eyewitness identification. Courts are split on whether testimony of this subject matter should be permitted under *Daubert*. Some courts admit such testimony, finding it would help the jury assess a defendant’s claim of innocence in spite of a positive eyewitness identification. Other courts excluded such testimony finding it would not assist the jury, but rather would mislead it, or, alternatively, that rigorous cross-examination of an eyewitness in conjunction with appropriate jury instructions would be sufficient.

Expert testimony about the general characteristics sexual predators is also generally accepted under *Daubert*. This testimony is often supplemented with a conclusion that a defendant does or does not exhibit the same characteristics of such predators. When courts determine whether or not to admit such testimony, the standards of *Frye* are usually relied on insofar as the courts seem to hinge their decisions on whether the testimony is based on methods accepted by the relevant scientific community.

Testimony is also offered in regards to the general characteristics of certain types of victims – particularly those of sexual abuse. Such testimony

is generally accepted under *Daubert* as long as the expert does not opine that victimization did or did not occur in a particular case.

B. Generalized Conclusions

Several important conclusions can be drawn from this study. First, although critics of *Daubert* have suggested that having judges evaluating scientific methodologies would lead to inconsistent results, it appears that inconsistencies are the exceptions, rather than the rule. *Daubert* was uniformly applied in the vast majority of the categories within the typology. For example, courts have taken a uniform approach in ruling that a literature review is an insufficient basis, standing alone, to allow an expert to proffer an opinion based on his or her review of the relevant literature.²⁶² Similarly, testimony with regard to hedonic damages is uniformly excluded as unreliable.²⁶³ Such consistency in outcomes was found in each of the ten major subtypes of cases identified in the typology presented by this research with only two notable exceptions.

Courts are split with regard to whether an expert needs to have specific expertise on the relevant issue in order to testify about that issue. Some courts allow a qualified behavioral scientist to render an opinion on an issue of behavioral science in general, even if the expertise of the proffered witness is in a different sub-field than the one in which they seek to testify. In contrast, other courts require experts to have specialized expertise in the relevant sub-field.

A second major inconsistency has to do with the ways in which courts deal with the issue of the reliability of eyewitness testimony. While no courts dismiss the empirical research on mistaken identifications on methodological grounds, some refuse to admit evidence regarding this phenomenon. The two reasons most frequently cited for rejecting expert testimony in this realm are that courts mistakenly believe jurors are aware of the problems with eyewitness identification, or that they believe testimony will not be helpful to the jury in its deliberations.

Finally, although courts pay lip service to *Daubert*, it appears the *Frye* test is alive and well. Cases in which methods and/or conclusions were being offered that conformed to those that are “generally accepted in the

262. See, e.g., *United States v. Paul*, 175 F.3d 906, 912 (11th Cir. 1999); *Burton v. Danek Med., Inc.*, 1999 WL 118020, *3-4 (E.D. Pa. Mar. 1, 1999); *Mancuso v. Consolidated Edison Co. of N.Y.*, 967 F. Supp. 1437 (S.D.N.Y. 1997); *Diaz v. Johnson Matthey, Inc.*, 893 F. Supp. 358, 372-73 (D.N.J. 1995); *Wade-Greaux v. Whitehall Labs., Inc.*, 874 F. Supp. 1441, 1476 (D.V.I.), *aff'd without op.*, 46 F.3d 1120 (3d Cir. 1994).

263. See sources *supra* at note 87.

relevant scientific community” are the ones in which testimony is deemed admissible. In contrast, when an expert varies from that which is generally accepted, courts are quick to exclude the testimony citing the very same factors that were relevant under *Frye*, with peer-reviewed publication being one of the most important factors.

There appears to be only one area in which *Daubert* is not being rigorously applied to behavioral science testimony. Courts are highly deferential to the “expert opinions” offered by law enforcement officers based on their years of experience in the field when they offer opinions with regard to *modus operandi* or other aspects of “the working of the criminal mind.”²⁶⁴ Explorations into their theoretical knowledge base, as well as the validity and reliability of both their methodologies and their conclusions, appear to have escaped *Daubert* review.²⁶⁵

In light of cases analyzed in this study, and the conclusions drawn therefrom, judges are applying *Daubert* vigorously when experts seek to offer opinions based on methodologies that are not generally accepted. With the few exceptions noted above (i.e., whether sub-specialization should be required as a prerequisite to admit expert testimony; whether testimony with regard to the inaccuracy of eyewitness testimony should be admitted; and the ostensibly overbroad latitude granted to law enforcement officers when they testify as experts), it appears to be that the driving force behind *Daubert* – the exclusion of evidence lacking scientific validity and reliability – is being met.

264. Clifford Britt, *Getting Your Security Expert over the Daubert Hurdle*, 37 TRIAL 31, 36 (2001); Marc C. Garber, *Opening Daubert's Gate: Testing the Reliability of an Expert's Experiences After Kumho*, 15 JUDICATURE 4 (2000).

265. *Compare* United States v. Romero, 189 F.3d 576 (7th Cir. 1999), *Kerlec v. E-Z Serve Convenience Stores, Inc.*, 1998 WL 637244 (E.D. La. 1998), and *Warmack & Co. v. Beltz*, 2000 WL 1299553 (Tex. Ct. App. 2000), *with* *Shah v. Pan American World Services*, 148 F.3d 84 (2d Cir. 1998).