

# EXPERT TESTIMONY IN CASES INVOLVING BATTERED WOMEN WHO KILL: GOING BEYOND THE BATTERED WOMAN SYNDROME

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## ABSTRACT

In cases involving battered women who kill their abusive partners and claim self-defense, expert testimony may be introduced in order to help the triers of fact understand the experiences and context within which some battered women resort to lethal force. Traditionally, expert testimony frames the experiences of battered women using the battered woman syndrome (BWS). Despite being routinely admitted within the courtroom, this evidence risks advancing a stereotypical and pathological characterization of battered women. This representation risks not only negating claims advanced by women whose experiences deviate from the BWS standard, but is likely to be inconsistent with a defense that requires a determination of reasonableness in order to be successful. As an alternative, social agency expert testimony frames the experiences of battered women within a wider social context by focusing less on a psychological profile and more on the social realities that face battered women. To provide context to these issues, Part II of this Article will outline the status of self-defense law in North Dakota. Part III will summarize BWS and consider its use in cases where self-defense is advanced. Part IV will address empirical research findings collected from social psychological research as it relates to both the BWS and consider an alternative framework for expert testimony. Specific recommendations are provided in Part V. Finally, in Part VI, we conclude that expert testimony which addresses the social context within which some battered women may resort to lethal force is better suited to represent a woman's use of lethal force as reasonable and justified.

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## I. INTRODUCTION

Violence against women by intimate partners has been identified as a serious social problem in the past two decades. On an annual basis, an estimated 1.3 million American women are victims of male-perpetrated intimate partner violence.<sup>1</sup> During 2011, in North Dakota alone, 5,159 incidents of domestic violence were reported to crisis intervention centers, with ninety-four percent of the victims being women.<sup>2</sup> At some point in an abusive relationship, some women may resort to the use of deadly force against their abuser. Investigations of these women suggest that they had been subject to more frequent attacks and sustained more severe injuries

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1. PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN IV (2000) <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

2. *Domestic Violence Statistics*, NORTH DAKOTA COUNCIL ON ABUSED WOMEN'S SERVICES (Feb. 2012), <http://www.ndcaws.org/facts/domesticviolence/domesticviolence/stats.html> (last visited Nov. 29, 2012).

than battered women who did not kill their partners.<sup>3</sup> The motive of these women is therefore purported to be self-defense.<sup>4</sup>

Part II of this Article outlines the status of self-defense law in North Dakota and addresses challenges battered women face when entering this defense. Part III summarizes the BWS and considers its use in cases involving claims of self-defense.<sup>5</sup> Part IV will discuss findings gleaned from social psychological research and argue that the introduction of BWS evidence works against the goals of expert testimony in these cases. As an alternative, expert testimony that can better contextualize the circumstances surrounding the use of lethal force by battered women while avoiding the difficulties inherent within BWS evidence is considered. Despite the problems associated with BWS evidence, it is recognized that expert testimony remains a valuable instrument in cases involving battered women advancing claims of self-defense. As such, Part V considers specific recommendations for the continued use of expert testimony in the courtroom. In Part VI, we conclude that expert testimony shift its focus from the individual pathology model advanced within the BWS onto the social context within which battered women live. In so doing, this form of testimony would be better suited to represent a battered woman's use of lethal force as reasonable and justified.

Self-defense is premised on the principle that one who was unlawfully attacked by another should be able to take reasonable steps to defend him or herself.<sup>6</sup> In cases involving battered women, self-defense justifies the woman's actions, as opposed to an insanity or mental impairment defense, which excuses a woman's behavior because of some form of mental illness.<sup>7</sup> Exoneration of female perpetrators using the self-defense plea has

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3. Ann Goetting, *Patterns of Marital Homicide: A Comparison of Husbands and Wives*, 20 J. COMP. FAM. STUD. 341, 348 (1989); ANN JONES, WOMEN WHO KILL (1980).

4. MARGO I. WILSON & MARTIN DALY, HOMICIDE (1988); Margo I. Wilson & Martin Daly, *Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides in the United States*, 30 CRIMINOLOGY 189, 206 (1992).

5. Lauren Champaign, *Criminal Law Chapter: Battered Woman Syndrome*, 11 GEO. J. GENDER & L. 59, 59-60 (2010):

Today, every jurisdiction accepts expert testimony on BWS to support claims of self-defense, and several states have codified its use. As the legal system has become more accepting of the BWS defense in criminal cases, courts have also begun to allow the introduction of expert testimony by prosecutors in domestic violence and child custody cases. *Id.*

6. Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 123 (1985); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 240 (2001).

7. Crocker, *supra* note 5, at 130; WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 454-56 (2d ed. 1986); *see also* DRESSLER, *supra* note 5, at 233-34.

met with limited success.<sup>8</sup> This is especially the case in non-confrontational homicides—for example, when a woman attacks during a lull in the violence, or when her husband is asleep.<sup>9</sup>

Difficulties that have arisen in the successful application of the self-defense plea in these cases are twofold. First, the laws of self-defense are argued to be discriminatory.<sup>10</sup> Historically, formulated in terms of male experience, the criteria have been criticized as failing to account for the experiences of battered women.<sup>11</sup> Second, juries are said to hold a number of myths and misconceptions regarding battered women.<sup>12</sup> These beliefs may further hinder application of self-defense criteria to the circumstances under which some battered women resort to lethal force.

In light of these obstacles, expert witness testimony may be introduced.<sup>13</sup> The purpose behind admitting expert testimony is to educate jury members, enabling them to understand and evaluate the facts so that they may form their own opinions as to how the issues should be decided.<sup>14</sup>

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8. See generally Crocker, *supra* note 5 (discussing the legal obstacles facing battered women who advance claims of self-defense); see also Gena Rachel Hatcher, *The Gendered Nature of the Battered Woman Syndrome: Why Gender Neutrality Does Not Mean Equality*, 59 N. Y. U. ANN. SURV. AM. L. 21 (2003-2004); Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill* 36 AM. U. L. REV. 11, 13 (1986).

9. Rocco C. Cipparone, Jr., Comment, *The Defense of Battered Women Who Kill*, 135 U. PA. L. REV. 427, 436 (1987); see also Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457 (2006); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 382 (1991).

10. Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 624-27 (1980) [hereinafter Schneider, *Equal Rights*]; ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 114-18 (2000) [hereinafter SCHNEIDER, *BATTERED WOMEN*].

11. CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW* 98-100 (1989).

12. See, e.g., Bonnie E. Carlson & Alissa Pollitz Worden, *Attitudes and Beliefs About Domestic Violence: Results of a Public Opinion Survey*, 20 J. INTERPERS. VIOLENCE. 1197, 1206 (2005); Mary Dodge & Edith Greene, *Juror and Expert Conceptions of Battered Women*, 6 VIOLENCE AND VICTIMS, 271, 272 (1991); Charles P. Ewing & Moss Aubrey, *Battered Woman and Public Opinion: Some Realities About the Myths*, 2 J. FAM. VIOLENCE 257 (1987); Edith Greene et al., *Jurors' Knowledge of Battered Women*, 4 J. FAM. VIOLENCE 105 (1989); Schneider, *Equal Rights*, *supra* note 9, at 624-30; Alissa Pollitz Worden & Bonnie E. Carlson, *Attitudes and Beliefs About Domestic Violence: Results of a Public Opinion Survey*, 20 J. INTERPERS. VIOLENCE, 1219 (2005).

13. See Kathleen J. Ferraro and Noel Bridget Busch-Armendariz, *The Use of Expert Testimony on Intimate Partner Violence*, VAWNET APPLIED RESEARCH FORUM: THE NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN, at 4-7 (Aug. 2009) [http://new.vawnet.org/Assoc\\_Files\\_VAWnet/AR\\_ExpertTestimony.pdf](http://new.vawnet.org/Assoc_Files_VAWnet/AR_ExpertTestimony.pdf) (discussing the variety of roles of expert witnesses in criminal trials: self-defense, duress, prosecution of batterers, failure to protect), marital dissolution and child custody cases, tort cases and immigration).

14. Maguigan, *supra* note 8, at 452 (“expert testimony about the effects of a history of abuse have been ruled admissible by the vast majority of appellate courts that have confronted the question.”); see also Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior*

In cases involving battered women charged with the murder of their partner, expert witness testimony is usually proffered to provide a framework from which battered women's experiences and actions may be understood.<sup>15</sup> In this way, expert testimony can help fact-finders reconcile seemingly discrepant self-defense criteria with cases where they would not otherwise do so.<sup>16</sup>

This Article examines the use of expert testimony, and in particular, testimony based on the battered woman syndrome (BWS) in cases involving battered women charged in the murder of their abusive male partners.<sup>17</sup> Despite recommendations to adopt the term "battering and its effects" instead of BWS,<sup>18</sup> states remain divided as to whether they acknowledge and apply either the BWS, or the term "battering and its effects." Consequently, the introduction of syndrome-based evidence persists within the courtroom.<sup>19</sup>

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in *Sexual and Domestic Violence Prosecutions*, AMERICAN PROSECUTORS RESEARCH INSTITUTE 12 (2007), [www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf) (noting that expert testimony relating the experiences and behaviors of victims of domestic violence may be introduced on behalf of both the defense and prosecution).

Prosecutors who seek to introduce expert testimony relevant to sexual and domestic violence victim behavior do so for different purposes than defense attorneys. Specifically, defense attorneys offer expert testimony to excuse, justify or mitigate their clients' 'criminal' behavior. Prosecutors, on the other hand, seek to introduce expert testimony to dispel myths and misconceptions so that a victim's puzzling but non-criminal behavior can be fairly evaluated, i.e., to provide an accurate context in which to assess a victim's behavior. *Id.*

15. Cara Cookson, *Confronting our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense in Vermont*, 34 VT. L. REV. 415, 433 (2009); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 198-99 (1986) [hereinafter Schneider, *Women's Self-Defense Work*].

16. Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, in THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT 3 (1996), <https://www.ncjrs.gov/pdffiles/batter.pdf>:

Expert testimony on battering and its effects is most readily accepted by state courts in cases involving traditional self-defense situations, i.e., it has been accepted by ninety percent of the states in such circumstances. Expert testimony has also been admitted by a substantial number of state courts in nontraditional self-defense situations, such as where a battered woman kills her batterer while he is sleeping (accepted by twenty-nine percent of the states) or by hiring a third party to kill him (accepted by twenty percent of the states). *Id.*

17. Hatcher, *supra* note 7, at 28-29; *see also infra* Part II.

18. Parrish, *supra* note 15, at vii. According to Meredith H. Larson, Assistant State's Attorney, Grand Forks County, Grand Forks, N.D., this recommendation is consistent with the trend among prosecutors across the nation to avoid BWS terminology when prosecuting perpetrators of violence; *see also* Long, *supra* note 13, at 47 (advising that syndrome-based explanations of victim behavior be avoided in criminal prosecutions).

19. *See generally* Kathleen J. Ferraro, *The Words Change, but the Melody Lingers: The Persistence of the Battered Woman Syndrome in Criminal Cases Involving Battered Women*, 9 VIOLENCE AGAINST WOMEN, 110 (2003) (discussing the continued use of the BWS construct in

Terminology notwithstanding, insofar as expert testimony continues to relay a discussion of battering and its effects using syndrome-based nomenclature, critical examination of BWS evidence remains relevant as it relates to self-defense doctrine. Specifically, regardless of the term used, expert testimony discourse continues to emphasize the psychological consequences of abuse. Consideration of social science research concerning the impact of BWS testimony can thus provide insight into aspects of syndrome-based expert testimony that may be problematic.

## II. SELF-DEFENSE DOCTRINE AND BATTERED WOMEN WHO KILL

Self-defense is premised on the principle that a person who is unlawfully attacked by another should be able to take reasonable steps to defend themselves against that person.<sup>20</sup> Although wording of the doctrine varies across jurisdictions, most require that three conditions be met for a plea of self-defense to be entered.<sup>21</sup> First, evidence surrounding the case must support the plea of self-defense as reasonable.<sup>22</sup> Second, the individual must have held a reasonable and honest belief of death or imminent threat. Finally, the defendant must have used reasonable force in self-defense.<sup>23</sup> In some jurisdictions, including North Dakota, defendants must also show that they were unable to escape, or retreat, from the attack.<sup>24</sup> There is no justification for deadly force if it can be avoided.<sup>25</sup>

The doctrine of self-defense is meant to apply equally to all persons regardless of gender, and on the surface, it does not seem to discriminate. Still, legal feminist scholars have argued that the doctrine of self-defense was historically formulated in terms of male experience.<sup>26</sup> Historically, the paradigmatic scenario for which the doctrine of self-defense was originally designed for was that of two men involved in an unwarranted assault or a

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criminal and civil cases despite criticism against its introduction in the courtroom); Ferraro & Busch-Armendariz, *supra* note 12, at 2; Long, *supra* note 13, at 24 (stating, "In many jurisdictions, it is still common practice for expert testimony on victim behavior to be introduced as BWS. . .or an evaluation that the victim's behavior is consistent with [this syndrome].").

20. Crocker, *supra* note 5, at 123.

21. Dressler, *supra* note 5, at 240.

22. *Id.* at 245-46.

23. *Id.*

24. See N.D. CENT. CODE § 12.1-05-03 (2011); N.D. CENT. CODE § 12.1-05-07(b)(2) (2011).

25. *Id.*

26. Gillespie, *supra* note 10, at 98-100; Fiona E. Raitt & M. Suzanne Zeedyk, *Review Essay, The Implicit Relation of Psychology and Law: Women and Syndrome Evidence*, 623 *SEXUALITIES, EVOLUTION & GEN.* 209, 213-14 (2004); Schneider, *Battered Women*, *supra* note 9, at 79-82, 116-18.

fistfight brawl.<sup>27</sup> The underlying assumptions of self-defense as it developed were that such an altercation was a one-time violent quarrel between two men who were strangers and who were of equal size and strength.<sup>28</sup>

Feminist legal scholars contend that the present day doctrine of self-defense, as the courts have currently interpreted it, has changed little from the time it was developed.<sup>29</sup> Application of male-centered self-defense criteria have been criticized as failing to accommodate the self-defense claims of battered women who kill their abusive partners.<sup>30</sup> For instance, the concept of imminent danger is based on face-to-face violent confrontations involving male adversaries or attacks by strangers.<sup>31</sup> As such, it has been argued the self-defense doctrine does not take into account the cumulative effects of repeated violence, or the prediction of violence in the future.<sup>32</sup> Furthermore, women who have killed their batterers may have often done so during a lull in the violence, at a calmer, safer period.<sup>33</sup> As “imminent” has been defined by some courts to mean “immediate,”<sup>34</sup> a

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27. GILLESPIE, *supra* note 10, at 31-49.

28. *Id.*

29. Raitt & Zeedyk, *supra* note 26, at 213; Schneider, *Equal Rights*, *supra* note 9, at 623.

30. Raitt & Zeedyk, *supra* note 26, at 69; Schneider, *Equal Rights*, *supra* note 9, at 23; Schneider, *Women's Self-Defense Work*, *supra* note 14, at 198.

31. GILLESPIE, *supra* note 10, at 98-100.

32. *See generally* ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* (The Free Press ed. 1987) (discussing the experiences of battered women who have resorted to the use of lethal force against their batterers).

33. *See, e.g.*, Crocker, *supra* note 5, at 139 (claiming that the majority of appellate opinions addressing admissibility of expert testimony arose from nontraditional confrontation cases); 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, 49 (1987) (“[t]ypically, when the woman strikes back, she is not in what most people would consider immediate danger at the time she killed her abuser.”); Jill S. Talbot, Note, *Is Psychological Self-Defense: A Solution to the Problem of Defending Battered Women Who Kill?* 45 WASH. & LEE L. REV. 1527, 1528-29 (1988) (“[a]lthough some women who kill their spouses in the midst of battering incidence can show an imminent threat of serious injury or death, many battered women kill their spouses during a lull in the violence, perhaps even when their spouses are asleep.”).

The assertion that the majority of battered women kill in non-confrontational situations has been challenged. Examination of appellate decisions published between 1902 and 1991 led Maguigan to conclude that the majority of women kill their abusers during a confrontation. Maguigan, *supra* note 8, at 391-97. *See also* Alan J. Tomkins, et al., *Self-Defense Jury Instructions in Trials of Battered Women who Kill Their Partner*, in LEGAL RESPONSES TO WIFE ASSAULT, CURRENT TRENDS AND EVALUATION 258-85 (N. Zoe Hilton ed., 1993) (noting in recognition of the futility of a self-defense plea in non-confrontational cases, plea bargains that be advanced or alternate legal strategies may be employed. Therefore, in comparison to confrontational cases, relatively few non-confrontational cases would be appealed, and those that are, are unlikely to rest on the issue of self-defense. Consequently, Maguigan’s survey of appeal cases to identify non-confrontational cases may have underestimated the frequency of self-defensive actions taken by women during non-confrontational situations).

34. Robert F. Schopp, et al., *Battered Woman Syndrome, Expert Testimony and the Distinction Between Justification and Excuse*, 45 U. ILL. L. REV. 65 (1994) (quoting BLACK’S

battered woman's use of lethal force during circumstances not traditionally defined as a confrontation is likely to be viewed as unjustified.<sup>35</sup>

Likewise, the criterion of reasonable force does not take into account the disparity in physical size and strength of the woman and batterer. Battered women often have to rely on a lethal weapon for protection against an abuser who often has the advantage in physical size and strength.<sup>36</sup> The inherent bias of the reasonable force requirement has been acknowledged in some courts. For instance, the judge noted in *State v. Wanrow*<sup>37</sup> that the jury instructions of reasonable force:

[l]eaves the jury with the impression that the objective standard to be applied is that applicable to an altercation between two men. The impression created - that a 5'4" woman with a cast on one leg and using a crutch must, under the law, somehow repel a 6'2"

LAW DICTIONARY 749, 750 (6th ed. 1990)) (“[A]n imminent danger” is an “immediate danger, such as must be instantly met.”).

35. Maguigan, *supra* note 8, at 414 (noting in terms of the choice between “imminence” and “immediacy,” “[i]t primarily affects, (1) the instructions given a jury regarding the significance of that that evidence, and (2) the scope of expert testimony.”); *Id.* at 415.

A battered woman defendant in an ‘imminent’ jurisdiction is more likely than her counterpart in an “immediate” jurisdiction to get jury instruction specifically on the relevance of the decedent’s past violence . . . The instruction explains to the jurors that the evidence of the decedent’s past violence should be considered as they evaluate the defendant’s past violence should be considered as they evaluate the defendant’s state of mind and the reasonableness of the defendant’s perception that the decedent posed an imminent threat of death or serious bodily injury. *Id.*

*See also* Schneider, *Equal Rights*, *supra* note 9, at 634-35 (“When the imminent danger rule is interpreted to preclude admission of evidence of the prior relationship and the abuse a woman has suffered, the jury is unable to understand why the woman believed herself to be in danger.”); *see, e.g.,* *People v. Moore*, 275 P.2d 485, 486 (Cal. 1954); *People v. Bush*, 148 Cal. Rptr. 430, 431 (Cal. Ct. App. 1978)). It is an empirical question as to whether pleas of self-defense are viewed as unjustified due solely to whether or not a confrontation was taking place at the time of the killing. Given the complexity of court trials, isolating the circumstances under which a battered woman may resort to lethal force (confrontation vs. nonconfrontation) while holding all other factors constant is impossible. *See* Maguigan, *supra* note 8, at 396, stating:

It is hard to assess the degree of distortion in the confrontation/nonconfrontation breakdown resulting from the omission of guilty pleas due to the wide variety of factors that incline the prosecution, and the defense to reach a non-trial disposition. The probable distortion from the exclusion of dismissals and acquittals, however, is easier to assess. These cases are likely to have included an over-representation of confrontation cases, while those leading to convictions are likely to have included an over-representation of nonconfrontation cases. *Id.*

*See also* Diane R. Follingstad, et al., *Factors Predicting Verdicts in Cases Where Battered Women Kill Their Husbands*, 13 L. & HUM. BEHAV. 253, 265 (1989); *infra* Part IV (for a more thorough discussion of jury simulation studies).

36. Schneider, *Equal Rights*, *supra* note 9, at 632; Regina A. Schuller, *Expert Evidence and Its Impact on Jurors’ Decisions in Homicide Trials Involving Battered Women*, 10 DUKE J. GENDER L. & POL’Y 223, 228 (2003); Lenore E. A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y, 324, 327 (1992) [hereinafter Walker, *Battered Women*].

37. 559 P.2d 548, 558 (Wash. 1977).

intoxicated man without employing weapons . . . violates the respondent's right to equal protection under the law.<sup>38</sup>

Nevertheless, it should be noted that not all judges find it necessary to draw attention to this biased feature of reasonable force. As such, it has often been left to the common sense of the jury to draw such conclusions.

#### A. CHOICE OF REASONABLENESS STANDARDS

The ultimate consideration in the applicability of the self-defense doctrine is whether the defendant's belief of danger and consequent action was reasonable.<sup>39</sup> In other words, the reasonable beliefs and perceptions of the defendant regarding the situation are at issue. Even if a battered woman defendant successfully meets legal criteria concerning seriousness, imminence, and retreat, she must still convince the jury that her belief of imminent danger or serious injury, and her response to that danger, was reasonable.<sup>40</sup> Jury instructions direct the jury as to the standard upon which the reasonableness of the defendant's self-defense actions are to be judged.<sup>41</sup> Traditionally, courts have distinguished between objective and subjective standards of reasonableness.<sup>42</sup> In objective jurisdictions, jurors are instructed to evaluate the claim of self-defense from the perspective of a reasonable person.<sup>43</sup> In other words, the apprehension of danger and the belief that self-defense was necessary must be reasonable from the perspective of a reasonable person.<sup>44</sup> A subjective standard involves an assessment of how the accused woman construed her situation at the time of the incident.<sup>45</sup> By requiring jurors to make use of a subjective standard, it is only required that the defendant honestly believe the self-defensive action was necessary.<sup>46</sup> That such a belief on the part of the defendant was unreasonable by a hypothetical objective person would not defeat the defendant's claim.<sup>47</sup>

The intent of the objective perspective, also known as the reasonable person test, was an objective, universal standard against which every

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38. JONES, *supra* note 3, at 286 (quoting *Wanrow*, 559 P.2d at 558).

39. See Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 439 (1981).

40. GILLESPIE, *supra* note 10, at 98.

41. Maguigan, *supra* note 8, at 409.

42. *Id.*

43. LAFAVE & SCOTT, *supra* note 6, at 454-55.

44. *Id.*

45. Donovan & Wildman, *supra* note 39, at 439.

46. David Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 624 (1986).

47. *Id.*

person's actions could be measured.<sup>48</sup> The guiding principles of an objective perspective are those of equality and individual responsibility so all persons would be held to the same standards. Thus, in cases of self-defense, this would ensure that there was no fluctuating standard against which the defendant would be measured.<sup>49</sup>

A purely objective standard of reasonableness has been criticized in terms of its applicability in self-defense cases in which battered women have killed their batterers. First, the use of an objective standard has been criticized on the grounds of not specifically addressing the special circumstances surrounding a battered woman's use of lethal force.<sup>50</sup> Thus, while expert testimony often refers to the history of abuse suffered by a battered woman, the social and economic pressures preventing her from leaving, and her fear may not be acknowledged when asking jurors to consider what a hypothetical reasonable person would have done or perceived under similar circumstances.<sup>51</sup> Understanding both the context and the perspective in which the woman acted, feminists posit, is essential to appreciating the reasonableness of the use of defensive force.<sup>52</sup> By failing to individualize the standard of reasonableness, the objective standard purportedly discourages jurors from viewing these events from the perspective of the defendant. Consequently, it minimizes the likelihood that jurors will attend to the defendant's perception of what was reasonable given her circumstances and history.<sup>53</sup>

Feminists have also been critical of the formal equality model on which the objective standard has been based.<sup>54</sup> Such a model calls for the elimination of distinctions between the sexes and advances a gender-neutral, strictly identical, treatment of men and women.<sup>55</sup> This model has been criticized that it only serves to obscure the social reality and inequalities faced by women.<sup>56</sup> An objective standard embodies male values, and hence, a jurors' knowledge of what is objective has been male-

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48. *Id.*; see also Shirley Sagawa, *A Hard Case for Feminists: People v. Goetz*, 10 HARV. WOMEN'S L.J. 253 (1987).

49. Maguigan, *supra* note 8, at 409-14.

50. Donna Martinson, et al., *A Forum on Lavalley v. R: Women and Self-Defense*, 23 U. BRIT. COLUM. L. REV. 26-29 (1991); SCHNEIDER, BATTERED WOMEN, *supra* note 9, at 138-43.

51. Crocker, *supra* note 5, at 144 -52; Sagawa, *supra* note 48, at 264.

52. Schneider, *Women's Self-Defense Work*, *supra* note 14, at 218-20.

53. *Id.*; SCHNEIDER, BATTERED WOMEN, *supra* note 9, at 138-43.

54. SCHNEIDER, BATTERED WOMEN, *supra* note 9, at 138-43.; Crocker, *supra* note 5, at 126; Sagawa, *supra* note 48, at 253.

55. Crocker, *supra* note 5, at 125 (noting "[t]he objective standard suffers from assuming that it is value-free in its determination of reasonable behavior.").

56. *Id.* at 125-26.

defined.<sup>57</sup> As such, it does not allow for the accommodation of women's experiences and perspectives, and thus serves only to further entrench inequality between the sexes.<sup>58</sup>

Though theoretically objective in its perspective, different jurisdictions have increasingly incorporated elements of subjectivity into the reasonableness standard.<sup>59</sup> To varying degrees, jurors may be instructed to incorporate the defendant's subjective experiences into their decision-making process regarding the reasonableness of her actions.<sup>60</sup> Consequently, jurors may come closer to evaluating the self-defensive action from the perspective of the defendant.<sup>61</sup> The extent to which this claim is valid remains disputable.

Although elements of the woman's experiences may be considered, an objective view of these circumstances may be applied. Despite being instructed to consider "the perception of both apprehension and imminent danger from the individual's own perspective," an objective standard of reasonableness by the jury of these circumstances may be used.<sup>62</sup> In other words, while a woman's perspective may be integrated within the instructions, this experience may nonetheless have to be objectively reasonable. Therefore, the full relevance of an "inquiry into the accused's own mental state" may only be achieved via instructions which explicitly inform jurors to consider the context in which the woman acted, as well as her own subjective impressions.<sup>63</sup> Accordingly, a subjective standard of reasonableness may be better suited to self-defense cases, particularly those involving battered women who killed their batterers.

The perspective from which to evaluate the battered woman's actions varies across jurisdictions.<sup>64</sup> In North Dakota, this issue was considered in *State v. Leidholm*.<sup>65</sup> In this case, Janice Leidholm was charged with murder in the stabbing death of her husband, Chester Leidholm.<sup>66</sup> Evidence and testimony supported claims that her husband abused her during the

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57. *Id.*

58. Schneider, *Equal Rights*, *supra* note 9, at 635-36.

59. Maguigan, *supra* note 8, at 410.

60. *Id.*

61. *Id.* at 409.

62. Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 155 (1978).

63. Donovan & Wildman, *supra* note 39, at 458.

64. Maguigan, *supra* note 8, at 409 (noting that the majority of jurisdictions combine objective and subjective tests of reasonableness).

65. *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983).

66. *Id.* at 813

marriage.<sup>67</sup> On the evening of the killing, both had attended a party, consumed a large amount of alcohol, and an argument ensued.<sup>68</sup> Upon arriving home, the argument continued, and Janice attempted to call the sheriff.<sup>69</sup> However, Chester prevented her from using the phone by shoving her and pushing her down.<sup>70</sup> When Chester had fallen asleep, Janice got out of bed, went to the kitchen, got a butcher knife, and stabbed Chester.<sup>71</sup> Chester died within minutes from shock and loss of blood.<sup>72</sup> Janice Leidholm was found guilty of manslaughter and sentenced to five years imprisonment.<sup>73</sup>

The North Dakota Supreme Court held in *Leidholm* that the trial court misstated the law of self-defense by applying an objective standard.<sup>74</sup> The trial court instructed the jury on the law of self-defense stating: “The circumstances under which she acted must have been such as to produce in the mind of reasonably prudent persons, regardless of their sex, similarly situated, the reasonable belief that the other person was then about to kill her or do serious bodily harm to her.”<sup>75</sup> The Supreme Court held that a subjective standard of reasonableness should have been applied.<sup>76</sup> That is, the court concluded that the correct statement of the law to be applied in a case of self-defense is:

[A] defendant’s conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under the like circumstances, but what he himself in good faith honestly believed and had reasonable ground to believe was necessary for him to do to protect himself from apprehended death or great bodily injury.<sup>77</sup>

From a subjective standard, when judging the reasonableness of the defendant’s beliefs and actions, jurors are specifically instructed to consider the social reality of the defendant and adopt the defendant’s perspective.<sup>78</sup> Application of a subjective standard affords fact-finders the opportunity to

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67. *Id.*

68. *Id.* at 813-14.

69. *Id.* at 814.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 813.

74. *Id.* at 818.

75. *Id.*

76. *Id.*

77. *Id.* at 818 (quoting *State v. Hazlett*, 113 N.W. 374, 380 (1907)).

78. Donovan & Wildman, *supra* note 39, at 445; Irvin B. Nodland, *Defending Battered Women: Everything She Says May be Used Against Them*, 68 N.D. L. REV. 131, 139 (1992).

explicitly consider the characteristics of the accused.<sup>79</sup> As noted in *Leidholm*, “[t]he practical and logical consequence of this interpretation is that an accused’s actions are to be viewed from the standpoint of a person whose mental and physical characteristics are like the accused’s and who sees what the accused sees and knows what the accused knows.”<sup>80</sup> Despite this, myths and misconceptions concerning battering and its effects remain prevalent.<sup>81</sup> As a consequence, triers of fact may encounter difficulty applying subjective standards of reasonableness. Expert testimony is often introduced to educate jurors as to the dynamics and experiences of battered women.<sup>82</sup>

#### B. EXPERT TESTIMONY AND ITS RELEVANCE TO SELF-DEFENSE

If admitted, the testimony of the expert typically seeks to establish the context within which a battered woman responded.<sup>83</sup> Since some battered women kill outside the acute battering incidents, legal scholars have noted expert witness testimony could be especially helpful in such situations.<sup>84</sup> Accordingly, in situations where a jury would not see any threat or danger, an expert witness can help educate how a battering relationship generates different perspectives of danger, imminence, and necessary force.<sup>85</sup> Under such a set of circumstances, expert testimony helps establish how and why the battered woman fits into traditional self-defense doctrine. It also

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79. Sagawa, *supra* note 48, at 257.

80. *Leidholm*, 334 N.W.2d at 818.

81. Carlson & Pollitz Worden, *supra* note 11; Dodge & Greene, *supra* note 11; Ewing & Aubrey, *supra* note 11; Greene et al., *supra* note 11.

82. *Leidholm*, 334 N.W.2d at 820, stating:

The jury’s use of a subjective standard of reasonableness in applying the principles of self-defense to the facts of a particular case requires it to consider expert testimony, once received in evidence, describing battered woman syndrome and the psychological effects it produces in the battered spouse when deciding the issue of the existence and reasonableness of the accused’s belief that force was necessary to protect herself from imminent harm. *Id.*

Though beyond the scope of this article, the reader is directed to Long, *supra* note 13, at 28-32 (concerning qualifying the expert under Section 702 of the Federal Rules of Evidence); North Dakota Rules of Evidence permit a witness to be qualified as an expert if, based on their knowledge, training, education, experience, or skill their testimony would assist the trier of fact to understand the evidence or to determine a fact in issue. N.D. R. EVID. 702.

83. *See, e.g.*, Long, *supra* note 13; *see also* Malcolm Gordon, *Impact of Evidence Concerning Battering and its Effects in Criminal Trials*, in THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT 3 (1996), <https://www.ncjrs.gov/pdffiles/batter.pdf>.

84. *See, e.g.*, CHARLES P. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 34 (1987); Crocker, *supra* note 5, at 139; Rosen, *supra* note 7, at 43.

85. Gordon, *supra* note 83, at 8.

attempts to dispel any misconceptions that jurors may harbor about battered women and replaces them with a framework that considers the battered woman's unique situation and perspective.<sup>86</sup> With this evidence, jurors would be better informed to more readily evaluate the subjective perspective of the battered woman when she resorted to lethal force against her abuser.<sup>87</sup> Despite the tendency to admit expert testimony in trials involving battered woman who kill, the content of the testimony has been the subject matter of much debate within academic and legal circles.<sup>88</sup>

For the most part, in attempting to establish how a battered woman meets the criteria for self-defense, expert witnesses have often introduced BWS testimony.<sup>89</sup> The syndrome, while not a defense,<sup>90</sup> is traditionally offered in a self-defense trial to aid the jury in understanding that, given the defendant's past experience and her perception of danger, her subsequent action was indeed reasonable.<sup>91</sup> As such, syndrome evidence does not represent a challenge to the self-defense doctrine, but rather, "attempts to frame the woman's actions within the existing laws of self-defense."<sup>92</sup> As a

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86. Crocker, *supra* note 5, at 131-35.

87. Regina Schuller & Patricia Hastings, *Trials of Battered Women Who Kill: The Impact of Alternative Forms of Expert Evidence*, 20 LAW & HUM. BEHAV. 167, 170 (1996).

88. Parrish, *supra* note 15, at vii.

89. See Jessica Savage, *Battered Woman Syndrome*, 7 GEO. J. GENDER & L. 761, 763 (2006). More recently, in order to encompass a gender-neutral standard, and to more accurately reflect the "breadth or nature of the scientific knowledge now available concerning battering and its effects." Parrish, *supra* note 15, at vii (noting that courts have attempted to refocus expert testimony on "Battering and Its Effects" instead of the Battered Woman Syndrome). Despite this, the syndrome-based terminology and framework remains. See Hatcher, *supra* note 7, at 28-29 (citing cases that have excluded "traditional gendered testimony on the Battered Woman Syndrome"); see, e.g., MD. CODE ANN. § 10-96 (2002) (defining battered spouse syndrome, but explaining that this syndrome is also recognized as Battered Woman Syndrome); State v. Ritt, 599 N.W.2d 802, 811 (Minn. 1999) (observing that expert testimony is useful to aid jury, ambiguous as to whether expert testimony is limited to Battered Woman Syndrome, or is totally gender neutral); State v. Gartland, 694 A.2d 564, 573 (N.J. 1997) (invoking Battered Woman syndrome but stating a rule that men could also take advantage: "our courts have always admitted evidence of a victim's violent character as relevant to a claim of self-defense so long as the defendant had knowledge of the dangerous and violent character of the victim."); Krank v. Krank, 529 N.W.2d 844, 848 n.2 (N.D. 1995) (acknowledging Battered Spouse Syndrome); S.C. CODE ANN. § 17-23-170 (2001) (Battered Spouse Syndrome).

90. Maguigan, *supra* note 8, at 411 n.111 (noting "[n]o state appellate court has approved the use of battered-woman-syndrome testimony to create a completely separate defense."); *Leidholm*, 334 N.W.2d at 820 (noting the trial court instruction correctly pointed out that battered woman syndrome is not of itself a defense).

91. State v. Kelly, 478 A.2d 364, 371-75 (N.J. 1984) (discussing the issue of admitting testimony concerning battered woman syndrome).

92. Regina Schuller, *Applications of Battered Woman Syndrome Evidence in the Courtroom*, in VIOLENCE AND THE LAW 115 (Mark Costanzo & Stuart Oskamp eds., 1994); see also *Leidholm*, 334 N.W.2d at 819. As noted by the North Dakota Supreme Court, instruction by the trial court concerning BWS testimony was properly:

[D]esigned to support Leidholm's claim of self-defense by focusing the jury's attention on the psychological characteristics common to women who are victims in

legal strategy, the benefit of introducing BWS testimony in self-defense cases remains unclear. In fact, the syndrome has been criticized on numerous methodological grounds, bringing its scientific status into question.<sup>93</sup> Moreover, though providing a framework from which an expert may educate a jury, the implications of this testimony on juror's perceptions of the defendant has been fiercely debated.

### III. BATTERED WOMAN SYNDROME

Lenore Walker, a psychologist specializing in the treatment of victims, formulated a theoretical model that she termed the battered woman syndrome.<sup>94</sup> The syndrome postulates a cyclical and escalating cycle of wife abuse to explain why women remain in abusive situations and why they sometimes resort to violence to end abusive relationships.<sup>95</sup> The theory was derived initially from her work with battered women and formulated in large part by interviews originally conducted with over 400 battered women.<sup>96</sup> The BWS, as described by Walker, puts forth two major theoretical components: (1) learned helplessness; and (2) the cycle theory of violence.<sup>97</sup> Together, these constructs encompass both the pattern of violence evident within abusive relationships, and the psychological impact of this violence on abused women.<sup>98</sup>

Walker's theoretical concept of "learned helplessness" was drawn from the experimental work of psychologist Martin Seligman.<sup>99</sup> Seligman observed that animals, after being subjected to intermittent and unavoidable schedules of shock, no longer attempted to escape from their cages even when a route to do so was provided.<sup>100</sup> The apparent similarities between

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abusive relationships, and by directing the jury that it may consider evidence that the accused suffered from battered woman syndrome in determining whether or not she acted in self-defense. *Id.*

93. See, e.g., Faigman, *supra* note 46, at 633-43; David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 68-77 (1997).

94. LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* (1984).

95. *Id.*

96. *Id.*

97. *Id.*

98. Regina A. Schuller et al., *Rethinking Battered Woman Syndrome Evidence: The Impact of Alternative Forms of Expert Testimony on Mock Jurors' Decisions*, 36 CAN. J. BEHAV. SCI. 127, 128-29 (2004).

99. MARTIN E.P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH* 21-24 (1975). This theory was first developed through experiments in which dogs were placed in harnesses and subjected to electrical shocks at random intervals. The experimenters noted that, over time, the dogs would not attempt to leave the cage when shocks were administered, even when escape routes were made possible. The dogs, learning that they had no control over the shock, eventually lost any motivation to alter their situation. *Id.*

100. *Id.*

Seligman's learned helplessness hypothesis and the behavior of battered women led Walker to adapt the theory in order to explain the apparent passivity of women in abusive situations.<sup>101</sup> Walker postulated that the unpredictability of repeated beatings leave women with the feeling that they have no control over what will happen to them.<sup>102</sup> Supporters of the learned helplessness construct claim it provides "a psychological rationale for why the battered woman becomes a victim and how the process of victimization further entraps her, resulting in psychological paralysis to leave the relationship."<sup>103</sup>

Repeated beatings, like the unpredictable electrical shocks experienced by laboratory animals, "diminish the woman's motivation to respond."<sup>104</sup> Battered women eventually learn that they are helpless to prevent future violent attacks and become passive.<sup>105</sup> According to Walker, the battered woman, having generalized her helplessness, does not believe that anything she does will alter any outcome.<sup>106</sup> This belief makes the battered woman particularly vulnerable to symptoms of depression and anxiety.<sup>107</sup>

The second component comprising the BWS is the cycle theory of violence. This proposition is a tension reduction hypothesis that maintains that incidents of wife abuse occur in a patterned, repetitive manner.<sup>108</sup> This three-step cycle is composed of the following three stages: (1) tension building; (2) acute battering incident; and (3) kindness and contrite behavior.<sup>109</sup>

The first phase is characterized by minor physical and verbal abuse perpetrated by the abuser, resulting in tension build up.<sup>110</sup> The second phase, the acute battering incident, results from the growing and unresolved tension build up from the first phase.<sup>111</sup> Phase two is characterized by verbal and physical aggression that can leave the woman physically injured.<sup>112</sup> This phase is ended when the batterer stops, bringing with its termination a sharp psychological reduction in tension.<sup>113</sup> The final phase

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101. WALKER, *supra* note 94.

102. Schuller, *supra* note 36, at 231.

103. Lenore E. A. Walker, *Battered Women and Learned Helplessness*, 2 VICTIMOLOGY 525, 525 (1978).

104. WALKER, *supra* note 94, at 87.

105. WALKER, *supra* note 94.

106. *Id.*

107. *Id.*; Walker, *supra* note 103, at 326-30.

108. WALKER, *supra* note 94, at 95-104.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

helps explain why many women remain in such a violent situation.<sup>114</sup> The behavior of the batterer in this stage is characterized by apologies, showing kindness and remorse, and promises that he will never be violent again.<sup>115</sup> Taken together, this cycle of violence establishes an intermittent reinforcement schedule that is critical in maintaining the battering relationship.<sup>116</sup>

Although often presented as a formally defined clinical syndrome, BWS is actually not a clinical diagnosis; rather, the syndrome is currently one of the traumatic experiences subsumed under the general diagnosis of Post-Traumatic Stress Disorder (PTSD) according to the American Psychiatric Association.<sup>117</sup> Systematic reviews of the literature have suggested that as many as sixty-four percent of battered women who have sought help from domestic violence programs, and as many as eighty-nine percent of those living in shelters, meet PTSD diagnostic criteria.<sup>118</sup> As with the impact of childhood sexual abuse, the widespread application of the PTSD diagnosis is associated with a number of advantages. For instance, the category provides a parsimonious framework by which the psychological symptomology associated with battering may be described. The disparate symptoms experienced by battered women may be integrated and thereby differentiated from other psychological difficulties.<sup>119</sup> Accordingly, the diagnostic category may be relied on in order to determine appropriate treatment.<sup>120</sup>

Walker asserts that it is helpful to use the PTSD criteria chart when presenting the BWS to a judge or jury.<sup>121</sup> She contends that as most battered women meet the diagnostic criteria, such evidence would aid jurors in their understanding of the psychology of battered women.<sup>122</sup> More specifically within the courtroom, Walker argues that the PTSD category

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114. *Id.*

115. WALKER, *supra* note 94, at 96.

116. *Id.* at 95-104; WALKER, *supra* note 94, at 55-70.

117. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994). "Traumatic events that are experienced directly include, but are not limited to . . . violent personal assault (sexual assault, physical attack, robbery, mugging)." *Id.*; see also Lenore E. A. Walker, *Understanding the Battered Woman Syndrome*, 31 TRIAL 32 (1995).

118. Jacqueline M. Golding, *Intimate Partner violence as a Risk Factor for Mental Disorders: A Meta-Analysis*, 14 J. FAM. VIOLENCE 99, 116-20 (1999); Loring Jones, Margaret Hughes, & Ulrike Unterstaller, *Post-Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence*, 2 TRAUMA, VIOLENCE, & ABUSE, 99, 111 (2001).

119. Mary Ann Dutton, & Lisa A. Goodman, *Posttraumatic Stress Disorder Among Battered Women: Analysis of Legal Implications*, 12 BEHAV. SCI. & L., 215, 220 (1994).

120. Walker, *Battered Women*, *supra* note 36, 327-329.

121. *Id.* at 329.

122. *Id.*

with reference to BWS provides a context from which a woman's violent response to physical abuse may be understood.<sup>123</sup> While the escalating cycle of violence helps to establish the constant fear and terror that the woman feels, learned helplessness helps to illuminate the woman's rationale for remaining with the abuser.<sup>124</sup> The symptoms of PTSD, particularly the consistent heightened arousal, explicate the sense of constant threat and terror experienced even in the absence of direct confrontation with the abuser.<sup>125</sup> As the cycle of abuse continues to establish itself within the relationship, the victim learns to predict both the probable period and severity of the ensuing abusive incident.<sup>126</sup> Together, this explanation is expected to assist in establishing the reasonableness of reacting to a non-confrontational incident with lethal actions.

Despite its admission within the legal setting, the application of BWS to battered women has been the subject of much criticism.<sup>127</sup> The very empirical basis upon which the BWS was drawn has been called into question. Close analysis of Walker's research provides little empirical support for her proposed cycle theory of violence and the learned helplessness construct.<sup>128</sup> Moreover, Walker's research design has been criticized as containing a number of methodological and interpretive flaws that bring her conclusions into question.<sup>129</sup>

For instance, in testing the cycle theory of violence, Walker relied only upon conclusions drawn from a series of interviews with battered women.<sup>130</sup> Although such a method may be valid, the use of leading questions by the interviewers renders the participants' responses suspect. It has been suggested that responses may have been the result of hypothesis

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123. *Id.*

124. *Id.* at 330-34.

125. *Id.* at 326-30.

126. *Id.*

127. Michael Riccardi, *Battered Woman's Syndrome Applies to Men Too, Judge Finds*, N.Y. L.J. (Dec. 8, 1999); *People v. Colberg*, 701 N.Y.S.2d 608, 610 (N.Y. 1999). Although less common, courts have begun to recognize a gender-neutral "Battered Syndrome." Though less scrutinized by legal and academic scholars, the Battered (Spouse) Syndrome has been subject to much the same criticism as the Battered Woman Syndrome. See, e.g., Brenda L. Russell et al., *Does Ambivalent Sexism Influence Verdicts for Heterosexual and Homosexual Defendants in a Self-Defense Case?*, 24 J. FAM. VIOLENCE 145, 152 (2009); Brenda L. Russell et al., *Self-Defense and Legal Decision Making: The Role of Defendant and Victim Gender and Gender-Neutral Expert Testimony of the Battered Partner's Syndrome*, 1 PARTNER ABUSE 399, 403-04 (2010).

128. Faigman, *supra* note 46, at 636-40; Faigman & Wright, *supra* note 93, at 67; Marilyn McMahon, *Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome*, 6 PSYCHIATRY PSYCHOL. & L., 23, 30 (1999).

129. Faigman, *supra* note 46, at 636-40; Faigman & Wright, *supra* note 93, at 67; McMahon, *supra* note 128, at 131.

130. Faigman, *supra* note 46, at 636-40; Faigman & Wright, *supra* note 93, at 76-78; McMahon, *supra* note 128, at 132.

guessing on the part of participants.<sup>131</sup> Further criticism has been directed toward the interpretation of participants' responses. For instance, Walker derives her evidence of tension building and loving contrition phases from interviewers' interpretations of responses, rather than directly from the responses themselves.<sup>132</sup> Interviewers, basing their judgment on the open-ended description and a series of closed-ended questions regarding the batterer's behavior before and after an abusive incident, would themselves note whether there was evidence of tension building and/or loving contrition.<sup>133</sup> Such an arrangement makes the research especially susceptible to experimenter bias.<sup>134</sup> The empirical foundation supporting a cycle of violence is tenuous at best.

Walker's adaptation of the learned helplessness concept has also been criticized as "suffering from both theoretical inconsistency and the use of inadequate research methodology."<sup>135</sup> Quite simply, learned helplessness is antithetical to the notion that a woman would use lethal force.<sup>136</sup> Moreover, the measures relied upon by Walker as indicative of learned helplessness, including anxiety, disgust, and hostility, have been criticized as lacking theoretical support.<sup>137</sup>

Despite the tendency to admit syndrome evidence on the basis of its relevance in explaining "a victim's conduct or testimony to avoid mischaracterizations,"<sup>138</sup> criticism regarding the reliability and validity of the BWS remains.<sup>139</sup> Nonetheless, courts generally tend to support that the syndrome has gained a considerable scientific acceptance to warrant admissibility.<sup>140</sup> In fact, the legal recognition of this syndrome testimony within the courtroom has been promoted as a way of alleviating the existing

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131. Faigman, *supra* note 46, at 636-40; Faigman & Wright, *supra* note 93, at 76-78; McMahon, *supra* note 128, at 32.

132. WALKER, *supra* note 94, at 96.

133. Faigman *supra* note 46, at 637-38.

134. Faigman & Wright, *supra* note 93, at 76-78.

135. Faigman, *supra* note 46, at 640.

136. Faigman & Wright, *supra* note 93, at 79.

137. Faigman, *supra* note 46, at 642.

138. Long, *supra* note 13, at 21.

139. *See also* Parrish, *supra* note 15, at vii.

140. *People v. Torres*, 488 N.Y.S.2d 358, 360 (N.Y. 1985); John W. Roberts, *Between the Heat of Passion and Cold Blood: Battered Woman's Syndrome as an Excuse for Self-Defense in Non-Confrontational Homicides*, 27 LAW & PSYCHOL. REV. 135, 150 (2003) ("expert testimony concerning battered woman syndrome has become more readily admissible under the Daubert standard"); *see also* DRESSLER, *supra* note at 5, at 243 n.133. For a discussion regarding the admissibility of this form of expert testimony, *see* Long, *supra* note 13, at 20-32. *See also* Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); Parrish, *supra* note 15, at 27-34.

gender bias in the law on self-defense.<sup>141</sup> Such testimony, however, has implications that go beyond merely describing a woman's response to male violence.

#### IV. SOCIAL PSYCHOLOGICAL RESEARCH: IMPACT OF BATTERED WOMAN SYNDROME EXPERT EVIDENCE

Methodological criticism notwithstanding, social psychological research has examined the impact of BWS testimony on mock juror decision-making.<sup>142</sup> Briefly, jury simulation paradigms allow researchers to present trial material to mock jurors and assess their responses on a variety of measures. Though the presentation of trial material varies, jury simulation techniques allow researchers to control extraneous variables, while manipulating only the variables of interest.<sup>143</sup> In this regard, research investigating the impact of expert testimony on juror decision-making in cases involving battered women who kill can vary, for instance, the presence or absence of BWS evidence.<sup>144</sup> Responses of mock jurors and juries can then be assessed on a variety of measures, including individual guilt ratings, verdicts, and attributions of blame and responsibility.<sup>145</sup> By adopting this methodology, researchers have been able to systematically investigate specific aspects of criticism that has been levied against BWS evidence.

Because jury simulations are research simulations of actual court trials, these paradigms are subject to criticism regarding their generalizability.<sup>146</sup> Factors, such as mock juror demographics, the degree to which they are invested in the research, and the length of the trial, differ from real court cases.<sup>147</sup> Undoubtedly, actual court cases are more complex. However, by limiting the complexity of the information presented, jury simulations

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141. Walker, *Battered Women*, *supra* note 36, at 334.

142. *C.f.* Norman J. Finkel et al., *The Self-Defense Defense and Community Sentiment*, 15 LAW & HUM. BEHAV. 585, 586 (1991); Marilyn Kasian et al., *Battered Women Who Kill: Jury Simulation and Legal Defenses*, 17 LAW & HUM. BEHAV. 289 (1993); Karyn M. Plumm, & Cheryl A. Terrance, *Battered Women Who Kill: The Impact of Expert Testimony and Empathy Induction in the Courtroom*, 15 VIOLENCE AGAINST WOMEN 186, 192 (2009); Schuller & Hastings, *supra* note 87, at 171; Cheryl Terrance & Kimberly Matheson, *Undermining Reasonableness: Expert Testimony in a Case Involving a Battered Woman Who Kills*, 27 PSYCHOL. WOMEN QUARTERLY 37, 38 (2003).

143. Schuller & Hastings, *supra* note 87, at 237.

144. *Id.*

145. *Id.*

146. *See, e.g.*, Terrance & Matheson, *supra* note 142, at 44.

147. *Id.*

provide researchers the opportunity to systematically isolate variables, such as expert testimony, that appear relevant in the decision making process.<sup>148</sup>

A. LIMITATIONS OF BATTERED WOMAN SYNDROME: EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR

In 1996, the U.S. Department of Justice (DOJ), U.S. Department of Health and Human Services, National Institute of Justice, and the National Institute of Mental Health released a three-part report, entitled *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials*.<sup>149</sup> A notable conclusion expressed by all authors was the opinion that the term BWS is inadequate at capturing the complexity of the nature and dynamics of domestic violence.<sup>150</sup> It was also stated that the term BWS risks subsuming the responses of all battered women under a single construct.<sup>151</sup> As a consequence, a stereotypic image of battered women may be portrayed.<sup>152</sup> Relatedly, concern was raised regarding the potential for syndrome-based terminology to advance a pathological characterization of battered women. This in turn was suggested as potentially endorsing a view that battered women suffer from a mental deficit.<sup>153</sup>

In light of these concerns, it was recommended that expert testimony concerning domestic violence relay evidence and move towards adopting terminology on “battering and its effects.”<sup>154</sup> Despite efforts to adopt terminology that more accurately reflects scientific knowledge concerning the dynamics and nature of domestic violence within the courtroom,<sup>155</sup> expert testimony still advances a framework that explains women’s reactions to violence within a psychological discourse.<sup>156</sup> Given the persistence of BWS terminology within the courtroom, an examination of

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148. For a comprehensive review of jury simulation techniques, see Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?* 23 LAW & HUM. BEHAV. 75 (1999).

149. Parrish, *supra* note 15, at vii.

150. *Id.*

151. *Id.*

152. *Id.* at viii.

153. *Id.*

154. *Id.* at vii.

155. Gordon, *supra* note 83, at 22.

156. Long, *supra* note 13, at 41, noting:

[A] survey of law review articles and case law reveals the common practice of describing victim behavior in terms of BWS, RTS [rape trauma syndrome], ‘battering and its effects,’ ‘effects of family violence,’ and PTSD in both sexual and domestic violence cases. Confusion exists because, notwithstanding the specific definitions of each term, the terms are used liberally and sometimes interchangeably by judges, prosecutors, and experts to describe common victim behavior. *Id.*

social science research concerning the impact of expert evidence that limits its focus to the psychological consequences of battering, as advanced within the BWS, is warranted. Indeed, the body of research conducted in this area supports the conclusion that the concerns expressed within the 1996 DOJ report are not without merit.

### 1. *The Battered Woman as Pathological*

Rather than providing a framework from which a battered woman defendant's actions may be perceived as a reasonable response, expert testimony concerning BWS may persuade jurors to interpret the woman's actions within the context of her "psychological (dys)functioning."<sup>157</sup> Using jury simulation methodology, research has investigated claims that BWS testimony portrays battered women as pathological. For instance, in one jury simulation study, researchers examined how mock jurors utilized expert testimony concerning the BWS in a case where a battered woman kills her spouse.<sup>158</sup> Compared to a no expert control group, this form of expert testimony failed to alter verdicts. However, it did influence how mock jurors perceived the defendant.<sup>159</sup> Mock jurors, who were provided with expert testimony concerning the BWS, viewed the defendant as "having less capacity for responsible choice and as being more distorted in her thinking."<sup>160</sup>

Empirical evidence also supports the contention that expert testimony concerning the BWS is associated with increased perceptions of diminished capacity on the part of the woman.<sup>161</sup> For example, expert testimony detailing the BWS was presented in a simulated jury trial involving a battered woman who killed her abusive partner.<sup>162</sup> The content of the expert testimony was held constant, and the plea entered on behalf of the battered woman defendant was varied to reflect a self-defense, automatism, or psychological self-defense plea.<sup>163</sup> Expert testimony was found to only

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157. Julie Stubbs, *The (Un)Reasonable Battered Woman? A Response to Eastreal*, 3 CURRENT ISSUES IN CRIM. JUST. 359, 360 (1992).

158. Finkel et al., *supra* note 142, at 586.

159. *Id.* at 593-600.

160. *Id.* at 598.

161. Kasian et al., *supra* note 142, at 298.

162. *Id.*

163. *Id.* at 299-300; psychological self-defense is a hypothetical plea.

[A] plea of psychological self-defense would be entered by a defendant in order to justify the use of deadly force to prevent a serious and immediate threat to psychological well-being. Ewing defines serious and immediate threat to psychological well-being as 'gross and enduring impairment of one's psychological functioning which would significantly limit the meaning and value of one's physical existence. (quoting EWING, *supra* note 84, at 79).

have an impact on mock jurors' private belief in guilt ratings in the automatism condition.<sup>164</sup> These findings suggest that expert testimony in battered women's cases is likely useful only under circumstances where the sanity of the defendant is called into question.<sup>165</sup>

While BWS is implicated in the tendency for jurors to perceive the woman as less reasonable in her decision to use lethal force, the representation of BWS as a subcategory of PTSD appears to further bolster the disordered and pathological portrayal of battered women defendants. Using a jury simulation study paradigm, researchers presented mock jurors with one of two forms of expert testimony in a case involving a battered woman charged with the murder of her spouse.<sup>166</sup> More specifically, mock jurors were presented with either expert testimony regarding BWS, BWS framed within PTSD nomenclature, or a no-expert control condition.<sup>167</sup> Mock juror verdicts failed to differ according to expert testimony condition.<sup>168</sup> However, both BWS and BWS/PTSD testimony were associated with perceptions of the defendant as being "more mentally unstable" and "out of her mind" at the time of the killing relative to the no-expert control condition.<sup>169</sup> Moreover, mock jurors presented with the addition of PTSD nomenclature were less likely to recognize the domination and control of the husband, and mock jurors were more likely to perceive the defendant as less mentally fit to raise her child than either the BWS or no-expert control conditions.<sup>170</sup>

Based upon previous research, concerns that BWS evidence portrays battered women as disordered are well founded. Referencing BWS within a PTSD framework appears to bolster the characterization of battered women as disordered and pathological.<sup>171</sup> This has significant implications for claims of self-defense. In fact, it would be challenging to argue that the disordered battered woman that is advanced by virtue of a mental health PTSD diagnosis is justified and reasonable in her perceptions and actions.<sup>172</sup>

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164. *Id.* at 305-06.

165. *Id.* at 309.

166. Terrance & Matheson, *supra* note 142, at 39.

167. *Id.* at 40-41.

168. *Id.* at 42.

169. *Id.* at 43.

170. *Id.*

171. *Id.* at 43-44.

172. Mary Ann Dutton, *Update of the "Battered Woman Syndrome": Critique*, APPLIED RESEARCH FORUM, at [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/AR\\_BWSCritique.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/AR_BWSCritique.pdf), 1, 8 (2009).

## 2. *The Stereotypical Battered Woman*

Concern has also been directed toward the potential for BWS testimony to create a prototypical battered woman stereotype that would replace jurors' misconceptions regarding battered women.<sup>173</sup> Battered women do not fit a singular profile.<sup>174</sup> As a result, the BWS characterization has the potential to create a rigid classification that may serve to exclude many battered women whose circumstances deviate from the BWS standard.<sup>175</sup> As a consequence, the actions of battered women defendants' risk being evaluated based upon the extent to which their experiences match a prototypical battered woman.<sup>176</sup> As opposed to clarifying the defendant's behavior and perceptions, the syndrome may be treated as a basis from which all battered women must conform.<sup>177</sup> Therefore, what risks becoming an issue is the extent to which the defendant fits the syndrome.

The "good" battered woman victim appears to be one who is helpless, passive, and has no history of violent or confrontational behavior.<sup>178</sup> If the accused does not meet the parameters as set out in the BWS categorization, she risks not benefiting from the narrowly constructed victim promoted by BWS. Consequently, she may be denied the opportunity of this defense and, having reacted to her battering situation in a lethal manner, she will likely be judged outside of the framework of that of a typical battered woman.<sup>179</sup> It is likely the case, therefore, that very little latitude exists within the stereotypical version of the battered woman, and thus, the diversity of individual experiences of battered women may not be accounted for. In other words, only the experiences of a few so inflicted women will benefit as legitimate victims.<sup>180</sup>

If, in fact, the legal use of BWS encourages a rigid victim stereotype, it is likely to be inconsistent with the realities faced by battered women. For instance, research findings have contradicted the suggestion that the

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173. Cookson, *supra* note 14, at 425-26; Pamela Jenkins & Barbara Davidson, *Battered Women in the Criminal Justice System: An Analysis of Gender Stereotypes*, 8 BEHAV. SCI. & L. 161, 167-68 (1990).

174. Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1196 (1993).

175. Elizabeth M. Schneider, *Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, in REPRESENTING BATTERED WOMEN WHO KILL 51, 88 (SARA L. JOHANN & FRANKLIN M. OSANKA eds., 1986) [hereinafter Schneider, *Problem of Expert Testimony*].

176. Crocker, *supra* note 5, at 149.

177. *Id.* at 144.

178. Jenkins & Davidson, *supra* note 173, at 169.

179. Schneider, *Problem of Expert Testimony*, *supra* note 175, at 88.

180. Terrance & Matheson, *supra* note 142, at 38.

behaviors of battered women are indeed passive.<sup>181</sup> For example, the abused women in Walker's sample were actively seeking outside help as the violence escalated and were not, as Walker suggested, passive.<sup>182</sup> In fact, the findings of several studies support the fact that battered women have been in contact with a variety of social services agencies to get assistance.<sup>183</sup>

The potential for BWS evidence to advance a stereotypic image of battered women as helpless and passive has been previously examined using jury simulation paradigms. In one study, researchers investigated whether the portrayal of the woman's behavior toward the batterer, specifically her degree of passivity, would influence the decision-making process.<sup>184</sup> The woman's prior response to her husband's abuse had little impact on mock jurors' verdicts.<sup>185</sup> However, there was an indication that the degree of correspondence between the woman's history of behavior and the nature of the information conveyed in the expert testimony played a role in juror decision-making among male participants.<sup>186</sup> Specifically, male mock jurors rated the BWS expert testimony as more applicable to the passive, as opposed to the active, response history condition.<sup>187</sup> This finding is consistent with the suggestion that a passive portrayal of the battered woman is relayed within BWS testimony.<sup>188</sup>

Another jury simulation study examined the degree to which a battered woman defendant must be consistent with the standard advanced with the BWS framework.<sup>189</sup> With increasing numbers of women in the workforce,

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181. Lee Bowker, *A Battered Woman's Problems are Social, Not Psychological*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 154-65 (RICHARD J. GELLES & DONILEE R. LOSEKE, eds., 1993); EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS (1988); Sherry L. Hamby et al., *Responses to Partner Violence: Moving Away From Deficit Models*, 11 J. FAM. PSYCHOL. 339, 339-40 (1997).

182. GONDOLF & FISHER, *supra* note 181, at 339-40.

183. *Id.*; Diane R. Follingstad et al., *Effects of Battered Women's Early Responses on Later Abuse Patterns*, 7 VIOLENCE AND VICTIMS 109 (1992); Lisa Goodman et al., *The Intimate Partner Violence Strategies Index: Development and Application*, 9 VIOLENCE AGAINST WOMEN 163, 178 (2003).

184. Schuller & Hastings, *supra* note 87, at 170.

185. *Id.* at 177.

186. *Id.* at 184.

187. *Id.*

188. Champaign, *supra* note 19, at 72; Schneider, *Women's Self-Defense Work*, *supra* note 14, at 207; Elizabeth A. Sheehy et al., *Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations*, 16 CRIM. L. J. 369, 384-85 (1992).

189. Terrance & Matheson, *supra* note 142, at 39.

battered women are increasingly included as part of the paid workforce.<sup>190</sup> This being the case, it is also likely that they have access to work cohorts, if not family and friends. This characterization stands in stark contrast to the helpless and pathologized battered woman prescribed within the BWS discourse, but nonetheless, a woman who is in the workforce represents a more accurate portrayal of the context within which many battered women live.<sup>191</sup> To examine the potential of BWS evidence to support a stereotypical victim in terms of financial dependence and isolation from a social support network, the degree to which the defendant fits the stereotype was varied to reflect either a high or low stereotype fit condition.<sup>192</sup> This study found that mock jurors provided with BWS testimony were more likely to rate the defendant as credible when her circumstances reflected a high, as opposed to low, stereotype fit.<sup>193</sup>

Further research supports the conclusion that BWS testimony promotes a “typical” battered woman standard.<sup>194</sup> In this jury simulation study, participants were provided with actual case summaries that varied both the typicality and passivity of the defendant.<sup>195</sup> All participants received expert testimony concerning the BWS.<sup>196</sup> When the defendant was portrayed as a “typical” battered woman, mock jurors were more likely to view the case as meeting the requirements of self-defense.<sup>197</sup> The passive defendant was perceived as having fewer options available to her other than killing and was more likely to be viewed as fitting a typology of a battered woman.<sup>198</sup> When the defendant was portrayed as typical and passive, mock jurors rated her version of events as more plausible and believed that she had less control over her actions at the time of the crime.<sup>199</sup> Though this study failed to include control group,<sup>200</sup> results suggest that judgments of culpability are influenced by the extent to which a defendant fits or does not fit the

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190. See, e.g., Kara Wettersten et al., *Freedom Through Self-Sufficiency: A Qualitative Examination of the Impact of Domestic Violence on the Working Lives of Women in Shelter*, 51 J. OF COUNSELING 447 (2004).

191. Terrance & Matheson, *supra* note 142, at 39.

192. *Id.* at 40.

193. *Id.* at 44.

194. Brenda L. Russell & Linda S. Melillo, *Attitudes Toward Battered Women Who Kill: Defendant Typicality and Judgments of Culpability*, 33 CRIM. JUST. & BEHAV. 219, 221 (2006).

195. *Id.* at 225-26; *People v. Evans*, 631 N.E.2d 281, 283 (Ill. App. Ct. 1994); *State v. Goforth*, 721 S.W.2d 756, 758 (Mo. Ct. App. 1986).

196. Russell & Melillo, *supra* note 194, at 227.

197. *Id.* at 234.

198. *Id.*

199. *Id.*

200. *Id.* at 225-28.

typology of a battered woman.<sup>201</sup> Consequently, “if the defendant does not depict the typical/passive battered woman, then the defendant’s use of expert testimony regarding the syndrome may not be a successful strategy.”<sup>202</sup>

Taken together, these studies suggest that the BWS framework goes beyond simply describing battered women’s behavior in response to their batterer’s abuse. Rather, it is prescriptive in terms of defining the particular roles that women must adopt, or have adopted, to be justifiably susceptible to this response.<sup>203</sup> Only to the extent that a battered woman defendant’s experiences and behaviors were consistent with the stereotypical image supported by BWS evidence were her claims viewed as legitimate among mock jurors.<sup>204</sup> Particularly troubling is the fact that this standard is inconsistent with the experiences of many battered women. For battered women defendants whose experiences deviate from the typology of battered women advanced by BWS testimony, their claims of self-defense risk being undermined.

#### B. AN ALTERNATIVE TO BATTERED WOMAN SYNDROME: SOCIAL AGENCY TESTIMONY

In light of the difficulties associated with the use of BWS/PTSD evidence, various alternatives have been suggested. For the most part, in response to concerns arising from the psychological and individualized focus BWS testimony, some feminist and legal commentators propose that expert testimony shift its focus.<sup>205</sup> In particular, it has been suggested that the content of expert testimony focus more on the social reality of the woman’s situation as opposed to her psychological reactions.<sup>206</sup>

In most cases, a battered woman’s behavior is best characterized as reasonable within the context of her abuser’s behavior, and not the product of a mental health problem.<sup>207</sup> Within this “social agency” (“SA”)

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201. *Id.* at 229-39.

202. *Id.* at 239.

203. Cookson, *supra* note 14, at 426-27.

204. See Russell & Melillo, *supra* note 194, at 227; Schuller & Hastings, *supra* note 87; Terrance & Matheson, *supra* note 142.

205. See, e.g., Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 3-4 (1991); Raitt & Zeedyk, *supra* note 26, at 20; Schuller et al., *supra* note 98, at 129; Schuller, *supra* note 36, at 27; Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling and Law*, 88 NW. U. L. REV. 1271, 1332 (1994).

206. Mahoney, *supra* note 205, at 4; Raitt & Zeedyk, *supra* note 26, at 177; Schuller et al., *supra* note 98, at 129; Schuller, *supra* note 36, at 235-36; Stefan, *supra* note 205, at 1333.

207. Dutton, *supra* note 172, at 8.

framework,<sup>208</sup> expert testimony need not explain the responses of battered women within a syndrome-based discourse in order to help jurors make sense of their use of lethal force.<sup>209</sup> A battered woman's reactions, including her failure to leave an abusive relationship and use of lethal force, are not diagnosed and explained as symptoms of a syndrome, but instead are viewed in light of the overall social context.<sup>210</sup> Rather than a focus on the passive and victimized aspects of women's experiences, testimony can highlight the circumstances that explain the use of lethal force as a "necessary choice."<sup>211</sup> A battered woman's inability to leave an abusive relationship is considered within an SA framework as a rational option given the numerous obstacles that battered women face.<sup>212</sup> Her responses then are described as normal, and as such, the pathologized passive and helpless characterizations are negated.

SA testimony can highlight the inadequacies that exist within the formal help sources. For instance, even where mandatory arrest policies exist, the police still must make probable cause determinations about whether violence has occurred.<sup>213</sup> As a result, discretion may result in failure to arrest the abuser.<sup>214</sup> Moreover, even if charges are laid, battered women still risk facing retaliatory violence in the event that the abuser returns.<sup>215</sup> A lack of alternatives where a woman may be safe is also influential in keeping battered women in their relationships. In comparison to the large number of battered women who require such services, shelters remain scarce.<sup>216</sup> Consequently, waiting list and time limits must often be

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208. Schuller & Hastings, *supra* note 87, at 171 (coined the term "social agency" testimony).

209. *Id.*

210. *Id.* at 170-71; Sheehy et al., *supra* note 188, at 383-86 (1992); Stefan, *supra* note 205, at 1335.

211. Schneider, *Women's Self-Defense Work*, *supra* note 14, at 198.

212. Schuller & Hastings, *supra* note 87, at 171.

213. Sara R. Benson, *Failure to Arrest: A Pilot Study of Police Response to Domestic violence in Rural Illinois*, 17 AM. U. J. GENDER SOC. POL'Y & L. 685, 691 (2009) (noting despite mandatory arrest laws that have been codified in many states, the Supreme Court has held that these laws are still discretionary).

214. *Id.*; Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Woman's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 293 (1997).

215. Dutton, *supra* note 174, at 1232.

216. John Michaelson, *Housing Crunch has N.D. Domestic Violence Shelters at Capacity*, PUBLIC NEWS SERVICE (June 13, 2012), at <http://www.publicnewsservice.org/index.php?content/article/26911-1>. According to Janelle Moos, executive director of the North Dakota Council on Abused Women Services,

[T]here aren't enough housing options for women looking to escape abusive situations [in North Dakota]. There [are] no apartments or transitional housing that they can go to after leaving a shelter, so they're staying longer at our shelters. So, it's making our programs have to turn other victims away because there's no room; because they can't move folks out as quickly as they used to be able to. *Id.*

enforced.<sup>217</sup> Battered women may also lack the financial support necessary to establish independence from their abusers.<sup>218</sup> Some of these women do not work, either by choice or by force, and may have limited access to finances as the result of the domination and control of the abuser.<sup>219</sup> If these women have children to care for, they must be certain that they can adequately support themselves and their families before leaving can be considered as a serious option.<sup>220</sup>

Women who work outside the home may also continue to face the domination and control of their husbands. Even with employment, a woman is often far from being financially independent.<sup>221</sup> Escaping an abusive partner often requires flight, which may involve leaving an established lifestyle including a job and a regular paycheck.<sup>222</sup> Unfortunately, even if a woman does escape the abusive situation and maintains her job, it is not uncommon for the abuser to sabotage the victim's employment with his disruptive behavior.<sup>223</sup>

Women who have successfully left an abusive relationship may still face retaliation from their abusers. The commonality of incidents of abuse that occur following separation has led to the creation of the term "separation assault."<sup>224</sup> It is not uncommon for women who have managed to escape the abusive environment to be sought out and abused. In fact, a large proportion of the battered women who are eventually killed by their batterer are not living with them at the time of their death.<sup>225</sup>

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Moos states that the twenty-one crisis centers in North Dakota served 4,600 victims of domestic violence last year, along with about 900 victims of sexual assault. *Id.*

217. Joan B. Cannon & Jean S. Sparks, *Shelters—An Alternative to Violence: A Psychosocial Case Study*, 17 J. COMMUNITY PSYCHOL. 203 (1989); Leslie M. Tutty et al., *Residents' Views of the Efficacy of Shelter Services for Assaulted Women*, 5 VIOLENCE AGAINST WOMEN, 898 (1999).

218. Dutton, *supra* note 174, at 1231-39 (discussing contextual factors that influence a battered woman's psychological reactions to domestic violence, including fear of retaliation, economic resources, concern for children, perceived availability of social support).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. Wettersten et al., *supra* note 190, at 447 (discussing vocational related issues relevant to female victims of domestic violence).

224. Mahoney, *supra* note 205, at 65-66, stating:

*Separation assault* is the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time. *Id.*

225. Dutton, *supra* note 174, at 1232; Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE AND VICTIMS 1, 3 (1993):

SA testimony addresses the obstacles and lack of alternatives available to women in abusive relationships. This form of testimony can therefore substantiate the defendant's claim that she believed she had no other alternative but to kill her abusive spouse without having to excuse her behavior as the actions of a woman suffering from a syndrome.<sup>226</sup> SA testimony locates the explanation for battered women's reactions within the political and social structure.<sup>227</sup> In so doing, the blame is diverted from the individual. In this way, women may no longer be assessed according to their degree of fit within a standard of victimhood. This testimony has the advantage of "being about men's behavior not women's pathology."<sup>228</sup> SA testimony may therefore be more consistent with the justification theory of self-defense than syndrome-based testimony. As such, this testimony may have implications for not only how the defendant is perceived, but her claim of self-defense as well.

In an examination of mock-juror reactions to a case involving a battered woman who entered a plea of self-defense in the murder of her abusive husband, the effectiveness of SA testimony relative to BWS evidence was evaluated.<sup>229</sup> Findings indicated that BWS was associated with a pathological portrayal of the defendant.<sup>230</sup> In particular, mock jurors were more likely to rate an insanity plea as being successful when presented with BWS as opposed to SA testimony.<sup>231</sup> Importantly, SA testimony was not associated with interpretations of diminished capacity.<sup>232</sup> Mock juror verdicts failed to differ across expert testimony conditions.<sup>233</sup> However, closer examination of both forms of testimonies indicates that there was considerable overlap in the actual content of each form of testimony.

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Frequencies of homicide victimization of wives and husbands, while cohabiting and when separated, are reported for all spousal homicides known to the police in Canada (1974-1990), in New South Wales, Australia (1968-1986), and in Chicago (1965-1990). In all three data sets, the degree to which spousal homicide victimization was female-biased was significantly greater when the couple were estranged than when they were coresiding. Victim counts and population-at-large estimates of coresiding and separated now-married spouses were combined to estimate differential homicide rates incurred by coresiding and estranged married persons. Wives in all three countries incurred substantially elevated risk when separated as compared to when coresiding. *Id.*

226. Stefan, *supra* note 205, at 1298-99.

227. *Id.*

228. *Id.* at 1335.

229. Schuller & Hastings, *supra* note 87.

230. *Id.* at 184.

231. *Id.*

232. *Id.* at 185.

233. *Id.* at 181-85.

Within the SA testimony, although the expert did not refer to a “syndrome,” testimony did describe the cycle theory of violence.<sup>234</sup> Arguably, though the explicit “pathologizing” syndrome element of BWS was excluded, the cycle theory of violence risked conveying the impression that all intimate partner violence occurs in a patterned, repetitive fashion. Consequently, the testimony may still have endorsed a stereotypical characterization of the experiences of battered women.

Even in its more “pure” form, SA testimony may be limited in that it conveys only a description of the context within which battered women live and the barriers that make it difficult for them to leave their abusive relationship. This concern was supported by the findings reported in a jury simulation study that varied alternative forms of expert testimony (SA versus BWS versus no expert control) in a case involving a battered woman charged in the murder of her abusive partner.<sup>235</sup> Mock jurors receiving SA expert testimony found the battered woman defendant to be less guilty after hearing the testimony than either the BWS or control conditions, and also rated the defendant as having fewer options available to her.<sup>236</sup> Despite this, mock jurors presented with SA testimony found the defendant to be less typical of a battered woman.<sup>237</sup> It may be the case that although SA expert testimony was highlighting the social factors that play a part in the lives of battered women, jurors were viewing the testimony as irrelevant to the defendant and dismissing it.<sup>238</sup> Jurors may have benefited more from SA expert testimony if it had made explicit links to the defendant’s case. Of course, this suggestion must be considered in light of various decisions across jurisdictions concerning the permitted scope of expert testimony.<sup>239</sup>

In another jury simulation study, however, more promising findings related to SA testimony were reported.<sup>240</sup> The researchers varied both the imminence of danger (direct confrontation vs. no confrontation/sleeping abuser) and expert testimony (BWS versus SA versus control) in a case

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234. *Id.* at 174-75.

235. Karyn M. Plumm and Cheryl A. Terrance, *Battered Women Who Kill: The Impact of Expert Testimony and Empathy Induction in the Courtroom*, 15 VIOLENCE AGAINST WOMEN 186 (2009).

236. *Id.* at 197-203.

237. *Id.*

238. *Id.* at 201-03.

239. Roberts, *supra* note 140, at 150-51 (discussing admissibility of general testimony concerning BWS and defendant-specific testimony that includes both general testimony, and an opinion as to whether the defendant was suffering from BWS at the time of the killing); Schneider, *Equal Rights*, *supra* note 9, at 645 (“Experts can testify about characteristics of battered women in general or about the make-up of the individual battered woman defendant.”). *Id.*

240. Schuller et al., *supra* note 98.

involving a battered woman charged in the murder of her abusive partner.<sup>241</sup> Results highlighted the importance of providing jurors with “information about the (limited) choices confronting battered women in their attempts to end the violence in their lives.”<sup>242</sup> Participants exposed to SA testimony were less likely than those presented with BWS testimony to view the defendant as psychologically unstable.<sup>243</sup>

Though the effectiveness of expert testimony that focuses on social factors remains equivocal, the limited research conducted suggests that this form of testimony is promising. By avoiding the stereotypical and pathologized representation advanced within BWS testimony, SA evidence may be more consistent with the criteria of reasonableness required of a successful self-defense plea. It is important that research concerning battering and its impact on women not be viewed as static.<sup>244</sup> Rather, reforms based upon the most recent scientific evidence can be directed toward reformulating expert evidence to most accurately reflect the social realities faced by battered women.<sup>245</sup> Future research can also be helpful in terms of identifying ways in which expert testimony can be viewed as relevant by fact finders.

## V. RECOMMENDATIONS

Despite the prevalence of domestic violence, there is substantial evidence that the public continues to endorse a number of myths and misconceptions concerning victims.<sup>246</sup> Anecdotally, interviews with mock jurors likewise support a lack of knowledge concerning victim behavior.<sup>247</sup> Expectations concerning a victim’s ability to leave, her (lack) of passivity, and helplessness, oftentimes conflict with the way many victims of domestic violence actually respond. Consequently, difficulties among the triers of fact arise when trying to reconcile a particular victim’s behavior with expectations concerning “typical” victim behavior. However, among those who work regularly with domestic violence victims, we are aware that

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241. *Id.*

242. *Id.* at 135 (citing Sheehy et al., *supra* note 188).

243. *Id.* at 134.

244. Schuller, *supra* note 36, at 245 (citing Sheehy et al., *supra* note 188, at 394).

245. *Id.*

246. *See supra* note 11.

247. Personal interviews conducted by Cheryl Terrance and Karyn Plumm with mock jurors following their participation in jury simulations over approximately the past 13 years (September, 1998 - May, 2011). This program of research originated primarily with Terrance’s dissertation work in 1998. These were informal discussions conducted after debriefing.

behavior that may be viewed as counterintuitive by laypeople, instead, actually represents *common victim responses to trauma*.<sup>248</sup>

The goal of introducing expert testimony in self-defense cases is to counteract the myths and misconceptions surrounding battered women and to explain the dynamics and impact of abuse, and in so doing, assist fact-finders in evaluating the reasonableness of a woman's use of lethal force. Although this goal may differ from prosecutorial use of expert evidence, and varies as a function of the case on hand, the consensus appears to be that expert testimony can serve as a valuable educational tool within the courtroom. Thus, while this Article focused on social science research concerning the use of expert testimony in self-defense cases, this research has important practical implications when considering the use of expert evidence to explain victim behavior within the courtroom.

Simply stated, the utility of BWS evidence as a trial strategy in self-defense cases is dubious. At the least, reference to BWS, and/or the constructs of learned helplessness and the cycle theory of violence should be avoided altogether. Though future research is necessary in order to delineate the specific elements of BWS that jurors perceive as necessary in order for a battered woman defendant to benefit from its inclusion in a trial, results gleaned from jury simulations provides evidence that BWS supports a characterization of battered women as psychologically disordered. This portrayal is inconsistent with a defense that rests upon establishing the reasonableness of a defendant's beliefs and actions. Jurisdictions differ in their application of reasonableness inasmuch as they apply objective or subjective standards of reasonableness, or a combination thereof.<sup>249</sup> Irrespective, using expert testimony to explain a victim's use of lethal force, within a psychological framework, risks undermining the reasonableness of the self-defense claim.

Research also provides persuasive evidence that BWS testimony promotes a stereotypical standard for battered women. Consequently, for women whose experiences deviate from this standard, their responses to their victimization risk being disbelieved because they are viewed as falling outside those of "typical" victims. In fact, syndrome-based testimony can be used to help establish that a particular woman is not a legitimate battered woman.<sup>250</sup> Unless a victim's experience of violence conforms to the pattern detailed within the "cycle theory of violence," or is consistent with "learned helplessness," the testimony, though entered in an effort to educate triers of

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248. Long, *supra* note 13, at 1.

249. Maguigan, *supra* note 8, at 409.

250. Ferraro, *supra* note 18, at 115.

fact, will actually be viewed as inapplicable and disregarded by jurors. Relatedly, the discrepancy between a particular battered woman defendant and expert testimony may more readily be made apparent through cross-examination and/or conflicting expert testimony.

Taken together, empirical evidence supports concerns that BWS evidence advances a stereotypical and pathological representation of battered women defendants. Despite the shortcomings associated with BWS evidence, expert testimony remains an important tool within the courtroom. Arguments that BWS testimony be placed under a “Domestic Abuse Syndrome” rubric in order to better encompass the “psychological impact on all victims of severe domestic violence,” does not, in light of empirical evidence, represent a viable option.<sup>251</sup> Rather, efforts to redefine the content of expert testimony in such a way that it addresses the complexity and reality of the experiences of battered women is more consistent with the justification-based plea of self-defense, than the individualistic, syndrome-based approach of BWS testimony.

## VI. CONCLUSION

Although the use of BWS in the courtroom has often been assumed to be advantageous in terms of shedding light upon the experiences of battered women who kill, there have been many recent critiques that point out why this may not be the case. Empirical findings gleaned from social science research supports these concerns. Nevertheless, use of the BWS within the courtroom persists. This may in part be because BWS terminology ostensibly provides a parsimonious framework under which the experiences and behaviors of battered women may be conveniently subsumed.<sup>252</sup> However, this framework fails to account for the complexity and diversity of victim experiences.<sup>253</sup> As a result, the nature and dynamics of domestic violence risk remaining obscured and misunderstood within the courtroom. The impact of abuse, including reasons why a victim engaged in seemingly counterintuitive behavior, can be explained without reference to BWS terminology, or because of psychological pathology. On the basis of the research reviewed in this Article, it is important that expert testimony shift

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251. Nancy Wright, *Voice for the Voiceless: The Case for Adopting the “Domestic Abuse Syndrome” for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers*, 4 CRIM. L. BRIEF 76, 77 (2009) (arguing for the adoption of a ‘domestic abuse syndrome’ to replace BWS and related testimony).

252. Dutton, *supra* note 172, at 9.

253. *See generally* Gordon, *supra* note 83, at 17 (noting that BWS is an inadequate term because it fails to account for the body of scientific and clinical knowledge relating to battering and its effects).

from a framework that emphasizes helplessness and individual pathology, to one that highlights the context within which some women may resort to lethal force. This form of expert testimony would more accurately represent the complexity of domestic violence, and in so doing, be better suited to characterize a battered woman's use of lethal force as reasonable and justified than syndrome-based evidence.