

2013

# History of the Battered Woman Syndrome- a fallen attempt to redefine the reasonable person standard in domestic violence cases.

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## Recommended Citation

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## **History of the Battered Woman Syndrome- a fallen attempt to redefine the reasonable person standard in domestic violence cases.**

*1 in 4 women in the United States will likely experience domestic violence in her lifetime.<sup>1</sup>*

### **I. Introduction- What is domestic violence?**

We have a pervasive problem in America involving the abuse of women who are trapped in domestic violence relationships. In this paper I am going to discuss the history of violence against women and explore the judicial responses to battering in criminal trials. After having conducted the research necessary for this paper and taken a course on domestic violence at Seton Hall University School of Law<sup>2</sup>, I am of the opinion that in criminal cases involving a battered woman defendant, expert testimony explaining battering and its effects should always be allowed in.

Domestic violence is best described as a pattern of abusive behavior that is exhibited by one person against his or her intimate partner. While domestic

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<sup>1</sup> National Institute for Justice and Centers for Disease Control and Prevention

<sup>2</sup> In Spring 2011, a course on domestic violence was first offered at Seton Hall University School of Law. Jessica Miles, a visiting assistant clinical professor, was selected to teach this course. Professor Miles has over ten years experience advocating for victims of domestic violence. She obtained her J.D. at New York University School of Law and her B.A. from Duke University. Upon graduating from law school Professor Miles served as the Director of Legal Services with the Sexual Assault/Spouse Abuse Resource Center in Maryland. While acting as director of legal services, she served on her county's Domestic Violence Coordinating Committee, Lawyer's Advisory Committee and Pro Bono Advisory Committee. For more information see: [http://law.shu.edu/Faculty/display-profile.cfm?customel\\_datapageid 4018=54942](http://law.shu.edu/Faculty/display-profile.cfm?customel_datapageid 4018=54942)

violence often includes physical violence, the term broadly encompasses emotional, sexual, and economic abuse as well as coercion, isolation, threats and intimidation.<sup>3</sup>

The effects of domestic violence are far reaching and often manifest in lives of those close to the victim. While it is undisputed that domestic violence has a profound effect on the person against whom the abuse is directed, many people unfamiliar with domestic violence fail to consider the implications the abuse has on children present in the home. The violence can affect the children both directly and indirectly. It affects them directly because an estimated 50% of intimate partner abusers also abuse their children. The abuse affects even more children indirectly when abusers use the children as a way of harassing their intimate partners. For example, victims of domestic violence commonly report threats made by the abuser involving the children. Such threats include kidnapping the children, filing for custody, or physically abusing the children if the victim does not comply with the abusers demands.

The phrase 'battered woman syndrome' or BWS was most often used in criminal cases where a woman was on trial for murdering her intimate partner and sought to introduce evidence that she was a victim of domestic violence and the deceased was her abuser. Historically, the type of criminal case that presented the biggest problem for the courts involved a woman who killed her intimate partner while he was asleep, unconscious, or when she was not under an immediate threat of attack. In these cases, the defendant is not afforded the claim of self-defense because the immediacy element was missing.

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<sup>3</sup> ABA Commission on Domestic Violence

The cases involving a woman who killed her lover while he was attacking her were much simpler because the defendant would likely assert of self-defense. For the purposes of this paper, I will refer only to cases involving a woman who killed her partner while she was not under an immediate attack and therefore was precluded from asserting a traditional claim of self-defense.

This essay is structured as follows: I am first going to discuss the public awareness of domestic violence starting with the feminist movement in the 1960's and 1970's. Then I will discuss the specific forms of domestic violence along with Congressional response. In the next section I will discuss the admissibility of expert testimony from 1923 to present day. I will then discuss the effects of battering and the battered woman syndrome (BWS), including the role of expert witnesses in criminal cases involving battered women defendants. Next I will list the certification boards for psychologists and the national testing requirement for practice of professional psychology. Following this, I will look into the validity and use of BWS in criminal cases and then analyze the trend of expert testimony in such cases. I will conclude this paper with a look into a couple of defenses available to battered women in criminal homicide cases and discuss the need for a more suitable defense.

## **II. Domestic Violence from a Historical Perspective**

In early colonial times, a husband was seen as the master of his household and was said to be in charge of his property, including his wife. A wife's legal rights merged with her husbands and he might be held responsible for her mischievous

acts. As master of his house, the husband had the authority to chastise his wife, so long as he did not inflict permanent injury on her. In keeping with this accepted tradition, in 1824 the Supreme Court of Mississippi decided Bradley v. State.<sup>4</sup> The court in Bradley held that husbands have the right to use moderate chastisement against their wives.<sup>5</sup> Fortunately for women, Bradley was overruled seventy years later in Harris v. State,<sup>6</sup> where the Supreme Court of Mississippi struck down its earlier holding of Bradley v. State.

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<sup>4</sup> (“*Calvin Bradley v. The State* (of Mississippi) resulted in the first American legal ruling on the subject of “reasonable chastisement.” In that 1824 case, the court found that Bradley, convicted by a lower court of assault and battery against his wife, had gone too far in chastising his wife. “If the defendant now before us could shew from the record, in this case he confined himself within reasonable bounds, when he thought proper to chastise his wife, we would deliberate long before an affirmance of the judgment,” the court noted. While criticizing Bradley for bringing shame to his family, the court ruled:

“Family broils and dissensions cannot be investigated before the tribunals of the country, without casting a shade over the character of those who are unfortunately engaged in the controversy. To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement in cases of great emergency and use salutary restraints in every case of misbehavior, without being subjected to vexatious prosecutions, resulting in mutual discredit and shame of all parties concerned.””).

Read more: <http://www.libraryindex.com/pages/2031/Abuse-Women-Worldwide-Issue-AMERICAN-TRADITIONS.html#ixzz1LiuKpDbQ>

<sup>5</sup> Bradley v. State, Supreme Court of Mississippi, 1824. 1 Miss. 156, Walker 156.

<sup>6</sup> Harris v. State, 71 Miss. 462 (Miss. 1893) Harris was convicted in trial court of assault and battery with intent to kill his wife. The facts showed that he slapped his wife and beat her with a board or an otherwise heavy stick. He appealed his conviction on the grounds that here was no evidence adduced at trial of an intent to kill. The appellate court agreed and reversed his conviction and remanded the case for further proceedings. The state appealed and the Supreme Court of Mississippi reversed and remanded the case.

“The testimony fully sustains the verdict. Upon all the evidence, there can be no reasonable doubt that the accused beat his wife cruelly and brutally with a heavy stick. Though the homicidal intent may not have been proved as a distinct and independent fact, it was properly inferred or deduced from the facts and circumstances attending the beating. The brutal character of the weapon used, the extent of the injuries, the declaration of the accused, all these indicated a brutality and utterly reckless indifference to consequences, and this is equivalent to proof of express intent.” *Id.* at 2.

Although the judiciary shifted away from the acceptance of moderate chastisement, it began to view the issue of domestic violence under the common law doctrine of family privacy, which justified the non-intervention into marital relationships.<sup>7</sup> It wasn't until slavery was on the brink of being abolished did courts begin to punish acts involving intimate violence. During this era, courts frequently punished only minorities such as African-Americans and indigent immigrants, sparing the privileged classes such as middle and upper class Caucasian men.<sup>8</sup>

The protection of middle and upper class men from being charged with intimate violence led the courts to use claims of intimate violence as a way to promote educating the battered women to use better household habits in order to prevent provoking their husbands. This "social service" era encouraged women to accept their share of the blame for provoking violence and encouraged them to stay with their husbands and change their habits so they could become better wives. This notion, along with the long upheld doctrine of family privacy, caused the

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"The suggestion in the evidence of a belief amongst the humbler classes of our colored population of a fancied right in the husband to chastise the wife in moderation, makes it proper for us to say that this brutality found in the ancient common law, though strangely recognized in *Bradley v. State, Walker (Miss.)*, 156, has never since received countenance, and it is superfluous to now say that the blind adherence shown in that case to revolting precedent has long been utterly repudiated in the administration of criminal law in our courts." *Id.* at 4.

<sup>7</sup> Reva B. Siegel, *"The Rule of Love": Wife Beatings as Prerogative and Privacy*, 105 Yale L.J. 2117, 2123 (1996). ("During the antebellum era, courts began to invoke marital privacy as a supplementary rationale for chastisement, in order to justify the common law doctrine [of non-intervention] within the discourse of companionate marriage. A judge reasoning about marriage as a companionate relationship could invoke values of marital privacy to justify giving wife beaters immunity from prosecution much as he could invoke authority-based conceptions of marriage to justify giving husbands formal prerogative to beat their wives.")

<sup>8</sup> See *id.* at 2153.

problem of male violence to recede from view. This era persisted in the courts until the late twentieth century.<sup>9</sup>

### **A. 1960's Women's Movement**

The women's rights movement of the 1960's placed a strong spotlight on domestic violence and the unequal roles between husband and wife. Feminists and activists decided to focus their efforts on the under-enforcement of crimes involving intimate abuse. This focus on domestic inequality led to the development of the battered women's movement. Early advocates for battered women recognized that the law would be an important tool in protecting them against violence.

One of the first issues highlighted from this movement was the failure of police officers to protect battered women from being assaulted.<sup>10</sup> All over America entire police departments were turning a blind eye to battered women, often refusing to intervene in domestic violence situations. Class action lawsuits were filed against police departments in New York City and in Oakland, California in the early 1970's.<sup>11</sup>

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<sup>9</sup> See *id.* at 2170.

<sup>10</sup> In the 1970's the police had a clear non-arrest policy when responding to complaints of domestic violence. The role of the police in this context was seen as more of a mediator, often encouraging the parties to talk things over. When presented with a persistent demand for an arrest by one of the parties, the police were instructed to explain the ramifications if an arrest were made. The ramifications included possible lost wages, bail procedures and fees, and court appearances. If the police arrived on the scene of a domestic dispute and the woman victim only had minor injuries, the responding officer would likely become angry that she wasted his time. When the officer would take the time to do some investigative work, he almost always sided with the man and instructed the woman that she needed to learn how to be a better wife. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990* (1992)

<sup>11</sup> For a more detailed look at the early class actions for police failure to protect victims of domestic violence see <http://www1.umn.edu/humanrts/svaw/domestic/link/policereform.htm>

“In the United States, advocates brought legal action against the police for failure to protect women from domestic violence by not responding to victims' calls to police and not enforcing criminal assault laws in cases of domestic violence. The first class

The first battered women's shelter that opened in the US was in St. Paul, Minnesota in 1974. As a result of the women's movement, many battered women's shelters have opened their doors, countless victim's advocacy programs have been established, there is a wealth of professional literature on the subject, and many medical and law schools have added courses that focus on domestic violence and its effects.<sup>12</sup> Seton Hall University School of Law in Newark, New Jersey is one example of a professional school that expanded its curriculum to include a domestic violence course.

### **a. Judicial Responses to the Women's Movement**

Since the 1970's courts have been allowing expert witnesses to testify in criminal cases involving battered women. The testimony of the experts during this period was generally to explain the experience of the battered woman, how the battering impacted her, and how repeated battering affected women.<sup>13</sup> Quite often, the general public has misconceptions about victims of domestic violence and fails

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action lawsuit, Scott v. Hart, No. C-76-2395 (N.D. Cal. Filed Oct. 28, 1976), was filed against the Oakland, California city police in 1976. Two months later, in Bruno v. Codd, 396 N.Y.S.2d 974 (Sup. Ct. Special Term 1977), rev'd in part, appeal dismissed in part, 407 N.Y.S.2d 165 (1978), aff'd, 47 N.Y.2d 582 (1979), activists filed suit against the New York City Police for failure to comply with state laws. Bruno v. Codd, for example, was a suit brought by an NGO on behalf of twelve women who had received no assistance from the police after they were attacked by their intimate partners. One of those women stated that the police did not arrest her husband even after they watched him attempt to strangle her. The lawsuits were settled when both police departments agreed to change their practices in domestic violence cases." Emerson Dobash & Russel P. Dobash, *Women, Violence and Social Change* 121 (1992).

<sup>12</sup> For more information on domestic violence courses incorporated into law schools see: *Incorporating Domestic Violence Into Law School Curricula*, American Bar Association Commission on Domestic Violence. © 2003 by the American Bar Association. Found at [http://www.americanbar.org/content/dam/aba/migrated/domviol/teach\\_students.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/teach_students.authcheckdam.pdf)

<sup>13</sup> E.M. Schneider (1986). Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering. *Women's Rights Law Reporter*, 195-226 at 198.

to understand why people choose to stay in a violence relationship. Use of an expert witness can aid the trier of fact to clear up any misconceptions and educate the jury on the lasting and damaging effects battering has on an individual.

In 1977, the Supreme Court of Washington ruled that in a self-defense case, a woman is entitled to have the jury consider her actions from her perception.<sup>14</sup> This decision permitted the domestic violence victim to put the jury in her shoes and allow them to see her experience from her perspective as a battered woman.

## **B. Lenore Walker- Emergence of the Battered Woman Syndrome**

Psychologist Lenore Walker coined the phrase “battered woman syndrome” (BWS) in the 1970’s.<sup>15</sup> BWS is a subspecies of post-traumatic-stress disorder that describes the psychological responses of a woman confronted with repeated violence in an intimate relationship. BWS is a summation of the body of scientific and clinical literature that formed the basis for expert testimony in domestic violence cases.<sup>16</sup> Activists and lawyers for battered women quickly developed a trial strategy that consisted of using expert testimony to educate the trier of fact about the battering and its effects.

### **a. Cycle of Violence**

Dr. Walker conducted a study of sixteen hundred battering incidents and found that in two-thirds of the cases there was a cycle of violence that repeated. Dr. Walker has broken down the cycle of violence that occurs in most domestic violence

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<sup>14</sup> *State v. Wanrow* 88 Wash. 2d 221, 559 P. 2d 548 (1977)

<sup>15</sup> Lenore Walker (1979). *The Battered Woman*. New York, NY: Harper & Row.

<sup>16</sup> *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*. U.S. Department of Justice, May 1996.

relationship into three phases: the tension-building phase; the acute battering incident; and the tranquil, loving phase, also known as the honeymoon phase.<sup>17</sup> In the tension-building phase only minor battering such as slapping or verbal abuse occurs. During this phase it is common for the woman to attempt to calm her abuser down. Eventually the abuse worsens as the cycle progresses. The verbal abuse and physical abuse become more intense during the second phase known as the acute phase. The violence in the acute phase is violent and often results in more severe injury and sometimes even death. During this phase, the battered woman has no control, is unable to reason with her batterer and all attempts to calm him down will likely fail. Once the acute phase ends, the honeymoon phase begins. Now that the violent attack is complete, the abuser may feel remorse and begin to act loving and gentle towards his spouse. He often begs her forgiveness and promises to never lay a hand on her again. This period of quiet bliss is often welcome by the battered woman. She wants to believe that her lover can change and tries to convince herself that this time he will. During this phase, the woman is often tells herself that this good man is the man she married or fell in love with.

### **III. Specific Forms of Domestic Violence and the Congressional Response**

Approximately 1/3<sup>rd</sup> of all female murder victims are killed by their intimate partners. The corresponding number of male murder victims killed by their intimate partners is a substantially lower 1/25<sup>th</sup>.<sup>18</sup> To understand the effects of battering and its implications for assisting the trier of fact in a criminal case

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<sup>17</sup> Lenore Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (1989)

<sup>18</sup> Callie Marie Rennison, *Intimate Partner Violence, 1993-2001*, Bureau of Justice Statistics (February, 2003).

involving a battered woman, one must have a basic understanding of what domestic violence entails. Below are three categories of abuse commonly found in domestic violence relationships.

### **A. Physical Abuse**

Physical abuse is perhaps the easiest form of abuse to document. Victims of domestic violence can take pictures of the injuries that resulted from violent attacks. They can also seek medical help, which would create a medical recording of the event, perhaps even strengthening the credibility of the battered woman. Friends and family members are also able to testify about physical characteristics of abuse on a battered woman. Such telltale signs of abuse can include broken bones, bruising, lacerations, or noticeable welts. Some studies show that documenting the physical evidence of abuse by taking photographs quadruples the likelihood of conviction.<sup>19</sup>

#### **a. Congressional Response to the Problem of Domestic Violence**

The first major federal legislation pertaining to the problem of domestic violence was the Violence Against Women Act of 1994 (VAWA). VAWA was passed after four years of investigating the extent and severity of domestic violence, sexual assault, and stalking committed against women.<sup>20</sup> The Act authorized the expenditure of federal funds to support shelters for battered women. The Act & its 2000 reauthorization make restraining orders subject to the Constitution's Full

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<sup>19</sup> Crystal A. Garcia, Sheila Suess Kennedy and Barbara Lawrence, *Picturing Powerlessness: Digital Photography, Domestic Violence, and the Fight over Victim Autonomy*, 25 Hamline J. Pub. L. & Pol'y 1 (2003).

<sup>20</sup> Faith Trust Institute <http://www.ncdsv.org/images/HistoryofVAWA.pdf>

Faith & Credit clause and created protections for immigrants who were dependent on their abusers. It also make it a crime to travel across state lines to commit an act of domestic violence or to bring a victim of domestic violence across state lines to further acts of domestic violence.<sup>21</sup> The 2005 reauthorization Section 106 expanded the scope of the Full Faith and Credit provision. The Act now requires states to recognize and enforce custody, visitation and support orders contained in restraining orders. Another provision of VAWA makes possession of a firearm by anyone who is subject to a restraining order a crime, punishable by up to ten years in prison, a \$250,000 fine, or both.<sup>22</sup>

## **B. Emotional Abuse**

When a person is exposed to pain, fear, and fatigue it is not uncommon for them to seek increased attention and care from another person, even if that other person is their abuser. A bond often develops between batterer and victim in abusive marriages that is similar to the bond developed between captor and hostage, or cult leader and follower.<sup>23</sup> One article has went so far as to liken the abuse suffered by a battered woman to tactics used by brainwashers in prisoner-of-war camps.<sup>24</sup> The batterer uses manipulation techniques to exercise control over the woman in order to break her down psychologically, which would cause her to relinquish any sense of autonomy and be more likely to comply with his demands.

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<sup>21</sup> 18 U.S.C. Sec. 2261A.

<sup>22</sup> 18 U.S.C. Sec. 2264(b)(1)(B).

<sup>23</sup> Dutton D, Painter SL: *Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse*. *Victimology* 6:139-155, 1981.

<sup>24</sup> Edward Gondolf with Ellen Fisher, *Battered Women as Survivors: An Alternative to Treating Learned Helplessness* (1988)

Some psychologists similarly theorize that traumatic bonding occurs when the abuse leaves the battered woman so emotionally and physically drained that she desperately needs some form of human support, even if that support comes from her abuser.<sup>25</sup> During the traumatic bonding phase (also known as the Honeymoon phase), the battered woman is likely to respond to the batterer's apologies and affection after the abuse. Psychological dependencies have also been noted to occur in prisoner-of-war situations when prisoners become sympathetic towards their guards.

### **C. Sexual Abuse**

According to the U.S. Department of Justice as many as 62% of all adult rapes are committed by current or former husbands or boyfriends.<sup>26</sup> Sexual assault is not uncommon in domestic violence situations. When the battered woman is subjected to rape and sexual assault both her sexual autonomy and sexual health are jeopardized. There are many different ways in which a batterer will subject his victim to sexual abuse. For instance, batterers often force a woman to engage in unwanted sexual acts or drug her for the purpose of rendering her unconscious so he can rape her. When rape is committed by a husband or a boyfriend it is more likely to end in completed rape, rather than attempted rape. In addition, the actual rape is usually more violent than stranger rapes.<sup>27</sup>

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<sup>25</sup> Edward Gondolf with Ellen Fisher, *Battered Women as Survivors: An Alternative to Treating Learned Helplessness* (1988)

<sup>26</sup> Patricia Tjaden and Nancy Thoennes, *National Institute of Justice Research Report: Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women Survey* (2000).

<sup>27</sup> Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law On Sexual Offenses by Intimates* 54 *Hastings L.J.* 1465 (2003).

Though sexual assaults are prosecuted in every state, there remains a horrific problem in situations where the parties are married. In an alarming number of states, a husband enjoys immunity when he drugs his wife in order to have sex with her. In twenty states, a husband has immunity if he takes advantage of his wife's mental incapacity or unconsciousness by having sex with her without her consent.<sup>28</sup> This raises numerous concerns about the sexual autonomy, sexual health, and reproductive rights of the battered woman. How many women contract STD's in such a way? How many unwanted pregnancies are terminated as a result of the man's selfish and careless conduct? In many instances, if the wife does get pregnant from such an experience, her husband will force her to have the baby, even if she protests, often subjecting the wife to severe beatings if she goes against her husband's wishes. Married women should be afforded the same rights and equality under the law. A woman's sexual autonomy should not be dispositive to her husband's sexual desire. This is an area of enormous concern for domestic violence victims.

Marital rape has numerous psychological effects that include depression, post-traumatic stress disorder, intense fear, anxiety, shock, problems establishing trusting relationships, increased negative feelings about themselves, sexual dysfunction, and emotional pain. Evidence of sexual abuse in a criminal case involving domestic violence can be pertinent to the issue of the abused woman's state of mind.

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<sup>28</sup> Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law On Sexual Offenses by Intimates* 54 *Hastings L.J.* 1465 (2003).

### **a. Congressional Response to the Problem of Sexual Assault**

In 1994, Congress enacted the Federal Rules of Evidence 413-415. These rules now allow for the introduction of character evidence in cases where the defendant is accused of committing an offense of child molestation or sexual assault and in civil cases where the claim is based on the respondent's commission of a like offense.<sup>29</sup> These Federal Rules do not require the prior act have resulted in a conviction. In fact, the prior acts need not have been reported to the police. This significant departure from the rules prohibiting character evidence allows the jury to infer guilt if the defendant (or respondent in a civil case) has committed prior acts of sexual assault or child molestation. However, these rape shield laws do cause problems in some domestic violence cases because they allow for the introduction of evidence that the victim of a rape had previously consented to sex with the defendant in the past. This ability of the defendant to imply to the fact finder that the victim consented on the occasion in question can be detrimental in a rape case that involves a victim of domestic violence.

The United States Supreme Court has decided a few cases that have made significant advances to women's sexual autonomy. Planned Parenthood v. Casey is one such case. In Casey, the Court struck down as unconstitutional a provision of the Pennsylvania abortion statute that required a pregnant woman to notify her husband before undergoing an abortion.<sup>30</sup> Casey was a very important decision to

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<sup>29</sup> Fed. R. Evid. 413-415

<sup>30</sup> Planned Parenthood v. Casey, 505 U.S. 833 (1992).

the women's rights movement because it upheld the constitutional protection of a woman's right to her reproductive decision.

#### IV. Expert Testimony and the Battered Woman Syndrome

##### A. Admissibility of Expert Testimony From 1923 to the Present

The basis for evaluating the admissibility of expert testimony from 1923 until 1993 rested upon the case Frye v. United States.<sup>31</sup> Frye's general acceptance test required the trial judge to determine whether the scientific evidence has sufficient recognition in the scientific community. The two Frye factors were: 1. The field in which the principle fell; and 2. Whether the evidence offered is generally accepted in its field.

In 1975 Congress promulgated the Federal Rules of Evidence. The general acceptance test articulated in Frye was not included into the text of Federal Rule of Evidence 702. Because the new federal rules failed to mention the rule in Frye, courts were left to independently conclude whether they thought Rule 702 displaced Frye. Rule 702 states:

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<sup>31</sup> Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Summary of Frye retrieved from [http://psychlaw.stanford.edu/expert\\_cases.html](http://psychlaw.stanford.edu/expert_cases.html) (emphasis supplied)

"Defendant James Alphonso Frye was convicted of murder in the second degree and appealed the decision. The issue presented for consideration is that defense counsel offered an expert witness to testify to the result of a systolic blood pressure deception test, a rudimentary precursor to the lie detector, and was denied. They further offered that a test be conducted in the courtroom and were again denied. The prosecution argued that *"while the courts will go a long way in admitting expert testimony, deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."* The appeals court upheld the assertion of the lower court that the deception test did not meet that criterion."

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The 1993 U.S. Supreme Court finally announced in a landmark case, Daubert v. Merrell Dow Pharmaceuticals, Inc., that Rule 702 displaced the Frye test. Daubert set forth the rules governing the admissibility of scientific testimony by an expert witness.<sup>32</sup> According to Daubert, the four factors that courts should use to aid their decisions on whether to admit expert testimony are: 1. whether the scientific technique or theory has been tested, 2. whether the technique or theory has been peer reviewed or published, 3. what the known or potential rate of error is, and 4. whether the principle has gained general acceptance in the scientific community.

Six years later the U.S. Supreme Court in Kumho Tire Co., Ltd. v. Carmichael extended the Daubert factors to apply to non-scientific testimony.<sup>33</sup> The Supreme

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<sup>32</sup> Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993). Summary of Daubert retrieved from [http://psychlaw.stanford.edu/expert\\_cases.html](http://psychlaw.stanford.edu/expert_cases.html) (emphasis supplied):

“Two minor children and their parents alleged in their suit against respondent that the children’s serious birth defects had been caused by the mothers’ prenatal ingestion of Bendectin, a prescription drug marketed by respondent. The District Court granted respondent summary judgment based on a well-credentialed expert’s affidavit concluding, upon reviewing the extensive published scientific literature on the subject, that maternal use of Bendectin has not been shown to be a risk factor for human birth defects. Although eight experts for the petitioners concluded that Bendectin can cause birth defects, the District Court ruled that the evidence did not meet the applicable “general acceptance” standard for the admission of expert testimony. Citing *Frye v. United States*, the appeals court held that the evidence did not meet the standard for expert testimony. ***Finally, the United States Supreme Court held that, under the Federal Rules of Evidence, not Frye, that the evidence did not meet the standard for admitting expert testimony in a federal trial.***”

<sup>33</sup> Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167 (1999). Summary of Kumho Tire retrieved from [http://www.oyez.org/cases/1990-1999/1998/1998\\_97\\_1709](http://www.oyez.org/cases/1990-1999/1998/1998_97_1709) (emphasis supplied):

“In 1993, the right rear tire of a minivan driven by Patrick Carmichael blew out and the vehicle overturned. One passenger died in the accident and several others were severely injured. Subsequently, the Carmichaels brought a diversity suit against the Kumho Tire Company and others, claiming that the tire was defective. A significant part of the Carmichaels’ case turned on the testimony of Dennis Carlson, Jr., an expert in tire failure analysis. Carlson intended to testify to support the Carmichaels’ conclusion that a defect in the tire’s manufacture or design caused the blow out. To

Court in Kumho Tire further clarified that the gatekeeping task of trial judges is to assess the methods relied upon by experts in determining evidentiary reliability. Kumho Tire allows a trial court to examine the way in which an expert witness applied data to his methodology in arriving at his conclusion.<sup>34</sup>

In 2000, as a result of the Daubert and Kumho Tire decisions, Congress amended Federal Rule of Evidence 702 to include three tests for trial courts to use in determining expert testimony's evidentiary reliability: 1. the testimony must be based upon sufficient facts or data, 2. the testimony must derive from reliable principles and methods, and 3. the expert must apply those principles and methods reliability to the facts of the case.

#### a. Difficulty of Gatekeeping Role by the Judiciary<sup>35</sup>

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support this conclusion, Carlson used a methodology that was partly disputed. Kumho moved to exclude Carlson's testimony on the ground that his methodology failed to satisfy Federal Rule of Evidence 702, which provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact..., a witness qualified as an expert...may testify thereto in the form of an opinion." The Federal District Court granted the motion, excluded Carlson's testimony, and entered summary judgment for Kumho. The court found that Carlson's methodology was insufficiently reliable. In reversing, the Court of Appeals concluded that a federal trial judge's "gatekeeping" obligations under the Federal Rules of Evidence were limited to scientific context, and not Carlson's testimony, which the court characterized as skill- or experience- based. In an opinion delivered by Justice Stephen G. Breyer, the Court held that ***a federal trial judge's "gatekeeping" obligation applies not only to "scientific" testimony, but to all expert testimony.*** Justice Breyer wrote for the Court that Federal Rule of Evidence 702 "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized knowledge. It makes clear that any such knowledge might become the subject of expert testimony." The Court concluded that this interpretation of Rule 702 would insure that an expert witness's testimony rests on a reliable foundation and is relevant to the task at hand. The Court also concluded that the District Court's determination that Carlson's methodology was not reliable was within the court's discretion."

<sup>34</sup> Goodwin, Robert J. "Roadblocks to Achieving "Reliability" For Nonscientific Expert Testimony: A Response to Professor Edward J. Imwinkelried" Copyright (c) 2000 Cumberland Law Review. Retrieved from: **30 Cumb. L. Rev. 215, 223**

<sup>35</sup> ARTICLE: ROADBLOCKS TO ACHIEVING "RELIABILITY" FOR NONSCIENTIFIC EXPERT TESTIMONY: A RESPONSE TO PROFESSOR EDWARD J. IMWINKELRIED

Under Daubert, whether the proffered expert testimony is scientific or non-scientific, trial judges must act as gatekeepers, only allowing in testimony that has a reliable foundation. There are many factors a court may use in determining whether an expert's methodology is reliable. Those factors include whether the expert considered alternate theories of causation, whether the methodology has a non-litigation use, whether the expert consulted scientific material in forming his opinion, and whether the expert's methods have been peer reviewed.

Scientific testimony can present a challenge to the judiciary, as most judges are not trained in the field of science. In cases that involve scientific testimony the accuracy of that testimony is critical, not only in the case in which it is being offered, but for the future practice of law in the field. A badly decided case can have a domino effect on the future (or would-be) defendants who may be similarly harmed. One of the main difficulties in these cases is the fact that most judges lack of scientific training.<sup>36</sup> The judiciary faces a daunting task when faced with deciphering scientific testimony. Perhaps scientific training for the fact finder

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“First, consider the difficulty of the trial court's gatekeeping task as outlined in *Daubert* and *Kumho Tire*, and the lack of guidance on how to perform that task. Under the common law system the trial judge's duty was relatively simple: to determine if other scientists in the expert's field generally accepted the reliability of the theory and technique employed by the testifying expert. 24 Under the common law system the trial judge deferred to scientists in determining reliability. 25 *Daubert* and *Kumho Tire*, on the other hand, place more demanding responsibilities on the trial judge confronted with a proffer of expert testimony than did the common law. Under *Daubert* and *Kumho Tire* [\*219] the trial judge cannot defer to the determination of qualified experts. Instead, the trial court itself must determine that expert testimony "has a reliable basis in the knowledge and experience" of whatever discipline the expert represents.” **30 *Cumb. L. Rev.* 215, 218-219**

<sup>36</sup> Breyer, Stephen, *The Interdependence of Science and Law*, 280 *Science* 537 (1998).

would be an important tool for assisting in the evaluation of scientific claims or evaluating scientific expert witnesses.

On the other hand, the difficulty appears reduced when the case involves non-scientific testimony. Judges can look at the methods used by the expert in forming his non-scientific testimony and determine whether the methods utilized were rigorous enough to reflect reliability. The problem that seems to arise frequently with non-scientific testimony is the fact that there are often no external, objective methods against which to measure the reliability of the expert's method.

Although trial courts carry the heavy burden on deciding whether to admit or exclude expert testimony, they derive benefit from the broad boundaries of the abuse of discretion standard of review. This allows the trial court to use a flexible inquiry into the reliability of expert witnesses methodology. Perhaps this is one reason that has contributed to the trend of admitting non-scientific expert testimony.

## **B. Experts on Battering: Battered Woman Syndrome and Beyond**

The Federal Judicial Center (FJC) has listed scientific disciplines to include physics, geology, chemistry, toxicology, statistics, behavioral science, computer science, agricultural science, metallurgy, epidemiology, molecular biology and genetics.<sup>37</sup> On the other hand, the FJC has listed non-scientific or technical disciplines to include engineering, arson, accounting, economics, appraisal, accident reconstruction, and mental and medical health. The area of intimate battering falls

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<sup>37</sup> John F. McCauley, Bingham McHale, LLP. *The Slippery Application of Daubert to Non-Scientific Expert Evidence*. (Date unknown)

under the FJC's non-scientific or technical discipline under the mental health field. Because some courts consider BWS to be a non-scientific field it is increasingly difficult to research and document battering and its effects in such a way as to satisfy Daubert's four factor test.

At one point in history, it became quite common to introduce the effects of battering into criminal trials under the label of the "battered woman syndrome" (BWS).<sup>38</sup> The proffered experts in the area of battering and its effects generally were

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<sup>38</sup> In fact, several states enacted statutes that explicitly allowed for expert witnesses to testify about battered woman syndrome. Among those are: Md. Code Ann. Cts & Jud. Proc. 10-916 (2002) and S.C. Code Ann. 17-23-170 (Law Co-op 2003) Of the states that enacted such statutes many have since revised them to be more gender neutral. One example of this is California Code 1107 (2010): (emphasis supplied)

Cal Evid Code § 1107. Admissibility of expert evidence regarding intimate partner battering

(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding *intimate partner battering* and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.

(b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on intimate partner battering and its effects shall not be considered a new scientific technique whose reliability is unproven.

(c) For purposes of this section, "abuse" is defined in Section 6203 of the Family Code, and "domestic violence" is defined in Section 6211 of the Family Code and may include acts defined in Section 242, subdivision (e) of Section 243, Section 262, 273.5, 273.6, 422, or 653m of the Penal Code.

(d) This section is intended as a rule of evidence only and no substantive change affecting the Penal Code is intended.

(e) This section shall be known, and may be cited, as the Expert Witness Testimony on Intimate Partner Battering and Its Effects Section of the Evidence Code.

(f) The changes in this section that become effective on January 1, 2005, are not intended to impact any existing decisional law regarding this section, and that decisional law should apply equally to this section as it refers to "intimate partner battering and its effects" in place of "battered women's syndrome."

psychologists. These experts were believed to be able to describe the nature of battered woman syndrome and explain how BWS may have had an impact on the case being presented. Experts on battering ideally would present psychological evidence and statistics that focused on the experiences, mental states and perceptions of a victim of domestic violence in order to assist jurors in appreciating how the defendant reasonably believed that she needed to use deadly force against her batterer.

Some have likened the effects of intimate battering to the effect severe trauma has on individuals. There are countless studies focusing on human biological responses to traumatization. Psychologists often rely on such scientific research in understanding the psychological effects of battering. One such study found “victims of trauma respond to contemporary stimuli as if the trauma had returned, without conscious awareness that past injury rather than current stress is the basis of their physiologic emergency responses.”<sup>39</sup> In this scholarly article written by Dr. Van Der Kolk, the biological responses to traumatization were marked by a chronic physiologic hyperarousal to stimuli that is similar to past trauma. In the state of hyperarousal<sup>40</sup>, the person’s ability to make rational

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<sup>39</sup> Van Der Kolk, MD *The Compulsion to Repeat the Trauma: Re-enactment, Revictimization, and Masochism*. *Psychiatric Clinics of North America*, Volume 12, Number 2, Pages 389-411, June 1989.

<sup>40</sup> Miller-Keane Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health, Seventh Edition. © 2003 by Saunders, an imprint of Elsevier, Inc. (Hyperarousal is defined by the Miller-Keane Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health as “a state of increased psychological and physiological tension marked by such effects as reduced pain tolerance, anxiety, exaggerated startle responses, insomnia, fatigue, and accentuation of personality traits.”)

assessments in a calm fashion is impaired. Instead, the person responds to threats as emergencies that require immediate action, rather than collected thought.<sup>41</sup>

Understanding the biological responses seems to be a critical step in exploring the effects of battering of a victim of domestic violence. Taking more of a scientific approach to the effects of battering could open the door in establishing reliable methodology against which expert testimony could be weighed.

### **a. Present Admissibility of Expert Testimony on Battering and its Effects**

In each of the fifty states and in the District of Columbia expert testimony on battering and its effects is admissible to some degree.<sup>42</sup> Expert testimony is admissible in the following types of cases (the number following the type of case is the percent of the states that accept the testimony in such circumstances): self-defense- 90%<sup>43</sup>, nontraditional self-defense- 29%, contract killing- 20%, duress as a defense- 16%, crime against a 3<sup>rd</sup> party- 14%, in civil cases-20%.<sup>44</sup>

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<sup>41</sup> Van Der Kolk, MD *The Compulsion to Repeat the Trauma: Re-enactment, Revictimization, and Masochism*. Psychiatric Clinics of North America, Volume 12, Number 2, Pages 389-411, June 1989.

<sup>42</sup> Janet Parrish, Esq. *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*. National Clearinghouse for the Defense of Battered Women (May 1995)

<sup>43</sup> There are many states that explicitly recognize battered woman syndrome to be a scientific field yet still limit its admissibility to self-defense claims only. Take for example the following Ohio statute:

ORC Ann. 2901.06 (2011)

§ 2901.06. **Battered woman syndrome** testimony as evidence relevant to claim of self-defense

(A) The general assembly hereby declares that it recognizes both of the following, in relation to the "**battered woman syndrome**:"

(1) That the **syndrome** currently is a matter of commonly accepted scientific knowledge;

(2) That the subject matter and details of the **syndrome** are not within the general understanding or experience of a person who is a member of the general populace

It is important to understand how the expert testimony is limited once it is admissible into court. Here is a break down of the scope and relevancy restrictions on the use of expert testimony that is admissible (followed by the percent of states that agree): admissible to show the defendant is a battered woman- 76%, testimony is relevant on the issue of the defendant's state of mind- 70%, generic expert testimony about battering and its effects-69%, relevant to determine the reasonableness of the defendant's belief that she was in imminent harm- 50%, to prove defendant's diminished capacity, mental defect, or lack of intent to commit the crime charged-30%, states that have explicitly precluded experts from testifying that the defendant is a battered woman- 20%,

### **C. Role of Expert Witnesses in Criminal Cases Involving Battered Women Defendants**

Expert witness testimony is being offered in criminal cases as either general testimony or case-specific testimony. The generalized testimony tends to focus on battering and its effects.<sup>45</sup> Such testimony relies on an understanding of scientific

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and are not within the field of common knowledge.

(B) If a person is charged with an offense involving the use of force against another and the person, as a defense to the offense charged, raises the affirmative defense of self-defense, the person may introduce expert testimony of the "**battered woman syndrome**" and expert testimony that the person suffered from that **syndrome** as evidence to establish the requisite belief of an imminent danger of death or great bodily harm that is necessary, as an element of the affirmative defense, to justify the person's use of the force in question. The introduction of any expert testimony under this division shall be in accordance with the Ohio Rules of Evidence.

<sup>44</sup> Parrish, Esq., Janet, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*. National Clearinghouse for the Defense of Battered Women (May 1995)

<sup>45</sup> An expert testimony is often proffered to explain how the battered woman's perception of danger may make her reasonably fearful of an imminent threat of severe bodily harm, even though the average juror may not perceive that threat. See, State v. Leidholm, 334 N.W.2d 811 (N.D. 1983)

and specialized knowledge. Case-specific expert testimony focuses more on the plaintiff in the case in which the testimony is being proffered. Here, the expert is required to conduct a face-to-face interview with the alleged victim of domestic violence and then tie the facts of that case in with his generalized knowledge in the field.<sup>46</sup>

The role of an expert witness in a criminal case involving a battered woman should be limited to assisting the trier of fact in understanding the defendant's experiences and actions, not to excuse them. While it is true in any self-defense case that the jury needs to know facts that tend to show why the defendant felt the need to defend herself, the situation that involves battering that occurs over time is sufficiently different to warrant the need of further explanation. The average juror does not possess the knowledge of the effects of battering and therefore it is proper for an expert to explain battering and its effects on women in relationships.

## **V. Certification Boards and National Testing for Professional Psychologists**

Many of the experts testifying on battering and its effects in a criminal trial are psychologists. In this section I will discuss the various certifying bodies for psychologists and the examination requirements for licensure in most jurisdictions in the U.S. I will begin my discussion with a look at three certification boards, then move to a detailed look at the national Examination for Professional Practice in Psychology (EPPP), and end with a critique of the EPPP.

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<sup>46</sup> Dutton Ph.D., Mary Ann, *"Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women."* (1996)

Various certification boards exist for other specialized areas of psychology that will not be covered in this paper. For example, a certification board for school psychologists is the National Association of School Psychologists (NASHP).

### **A. New Jersey State Board of Psychological Examiners**

The New Jersey State Board of Psychological Examiners (NJSBPE) licenses and regulates psychologists in New Jersey.<sup>47</sup> Those seeking to obtain a license to practice psychology in the state of New Jersey are reviewed by the NJSBPE. The review consists of examining the education, work experience, and other credentials of every applicant. The Board retains the power to not only issue a license to practice psychology, but also to suspend or revoke a license or bring a lawsuit against anyone who is practicing in New Jersey without a license.

### **B. The Association of State and Provincial Psychology Boards**

The Association of State and Provincial Psychology Boards (ASPPB) is the association of psychology licensing board in the U.S. and in Canada. The organization was formed in 1961. Since 1965, ASPPB has created and maintained the standardized test called the Examination for Professional Practice in Psychology (EPPP). Everyone who wishes to enter the profession of psychology is required to take the EPPP.<sup>48</sup> ASPPB publishes materials for training programs and helps prepare students who seek to enter the psychology profession.

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<sup>47</sup> See Appendix A.1 for a copy of the *Application for Licensure as a Practicing Psychologist* prepared by the State Board of Psychological Examiners.

<sup>48</sup> See Appendix A.2 entitled *Specific Licensure Requirements by State/Province/Territory Handbook: EPPP Passing Score Requirements By Jurisdiction & License Type* by the Association of State and

ASPPB's mission statement is "To enhance services and support its member jurisdictions in fulfilling their goal of advancing public protection by:

1. Offering exemplary examination and credentialing programs;
2. Providing state of the art programs and services to all our stakeholders;
3. Serving as the source for the most current and accurate information about the regulation of psychologists; and
4. Contributing to the critical consumer protection perspective in the on-going development of the profession."<sup>49</sup>

In addition, the ASPPB maintains a database called the Handbook of Licensing and Certification Requirements that educates the public on the minimum requirements for licensure, supervisory qualifications, reciprocity/endorsement, and continuing education.<sup>50</sup> (see Appendix A.2 for the State of New Jersey handbook of licensing and certification requirements)

### **C. The Examination for Professional Practice in Psychology**

ASPPB developed the Examination for Professional Practice in Psychology (EPPP) in order to determine the qualifications of licensure and certification applicants. The EPPP is an assessment of the knowledge base of candidates as well as an assessment on the candidates' ability to apply the knowledge. ASPPB created this standardized examination with the help of the Professional Examination Service (PES). The EPPP is administered in computer format over a network of over 320

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Provincial Psychology Boards for more detailed information containing each state's licensing requirements.

<sup>49</sup> About ASPPB: *What is the Association of State and Provincial Psychology Boards?* (Retrieved from <http://www.asppb.net/i4a/pages/index.cfm?pageid=3285>)

<sup>50</sup> Association of State and Provincial Psychology Boards (Retrieved from <http://www.asppb.org/HandbookPublic/handbookreview.aspx>)

computer testing centers in the U.S. and Canada.<sup>51</sup> Jurisdictions that do not have access to a computer testing center administer the exam in pencil and paper format. Today, every individual seeking to obtain psychology licensure in the United States and most of Canada has to take the EPPP. ASPPB reports that the EPPP is used by 59 agencies in assessing entry-level knowledge to practice.<sup>52</sup> Approximately 4,000 people take this exam every year.

EPPP literature sets forth certain goals other than determining the qualifications of applicants for licensure. One goal is to protect the public; another is to measure knowledge that is vital to the professional practice of psychology and the applicant's ability to apply it; and a third is to assess competence. The EPPP scores are scaled from 200 to 800. Because the ASPPB views the EPPP to assess professional competence, the ASPPB recommends that minimum passing score for supervised practice is 450 and 500 for as the minimum for unsupervised, independent practice.<sup>53</sup> The number recommended by the ASPPB is just that, a recommendation. Jurisdictions are free to set their own pass-rate. As of 2010, the ASPPB reported that of the 64 ASPPB member jurisdictions (licensing authorities in the US and Canada) more than 90% used the recommended 500 passing score.<sup>54</sup>

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<sup>51</sup> 2010, Association of State and Provincial Psychology Boards, *Psychology Licensing Exam Scores by Doctoral Program*. (retrieved from: <http://www.asppb.net/files/public/ASPPBPsychExamScores3-19-10.pdf>)

<sup>52</sup> Association of State and Provincial Psychology Boards website (retrieved from: <http://www.asppb.net/i4a/pages/index.cfm?pageid=3285>)

<sup>53</sup> Rosen, G.A. (2000). *Research Digest: The Examination for Professional Practice of Psychology (EPPP)*. Montgomery, AL: Association of State and Provincial Psychology Boards.

<sup>54</sup> 2010, Association of State and Provincial Psychology Boards, *Psychology Licensing Exam Scores by Doctoral Program*. (retrieved from: <http://www.asppb.net/files/public/ASPPBPsychExamScores3-19-10.pdf>)

The EPPP that is in effect now through July 31, 2011, consists of 225 multiple-choice questions. Of the 225 questions, 200 are scored and 25 are pre-test items. All 225 questions are to be completed in 4 hours and 15 minutes. The EPPP that is effective August 1, 2011, consists of 225 multiple-choice questions. Of the 225 questions, 175 are scored and 50 are pre-test items.<sup>55</sup> The reason for the change appears to be a result of the conclusion of a 24-month study: *An Analysis of Professional Practice with a Focus on the Validation and Assessment of Competencies*, completed in 2010. Of the 225 multiple-choice questions, each item has four suggested answer, of which only one is correct. The score reported on the EPPP is based on the number of correct responses. There is no penalty for incorrect answers.

In the EPPP, there are eight domains that are intended to reflect the knowledge base required for the responsibilities of psychologists. The eight domains are: biological bases of behavior; cognitive-affective bases of behavior; social and cultural basis of behavior; growth and lifespan development; assessment and diagnosis; treatment, intervention, prevention, and supervision; research methods and statistics; and ethical/legal/professional issues.

**a. Pass-Rates: EPPP Performance by Designated Doctoral Program in Psychology 2010 Report**

In 2010, the ASPPB published EPPP scores by doctoral program. (see addendum 1 for a copy of the table of data on EPPP performance by doctoral program). The report contains the pass rate from APA/CPA accredited schools or

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<sup>55</sup> Appendix A.3 *Test Specifications/Summary of EPPP Content Areas/Psychologists' Roles*. Information for Candidates © 2010. Association of State and Provincial Psychology Boards.

schools that have met the ASPPB/National Register Joint Designation criteria. The chart listing the pass rates consists of EPPP candidates who tested between January 2005 and December 2009. If a candidate took the test multiple times during the five-year period, each of the scores was included in the report. The pass rate used in compiling this report was 500, which is the ASPPB recommended passing score for independent practice.

Most of the candidates who took the EPPP during the five-year time span for this report had a doctoral degree in psychology, one year of supervised experience, as well as postdoctoral experience.<sup>56</sup> The average pass-rate for first time test takers exceed 80%.<sup>57</sup>

Seton Hall University Department of Professional Psych and Family Therapy's clinical program had 14 students take the EPPP during the five-year span. Of those 14, 9 passed, making the pass rate for Seton Hall 64.3%. During that same five-year span, Seton Hall's Department of Professional Psycho and Family Therapy's counseling program had 22 students take the EPPP, of which 16 passed, making the pass rate for the counseling program 72.7%.

## **b. Criticism of the EPPP**

One article entitled, *"The EPPP is the Era of Evidence-Based Practice"* examines the EPP in an evidence-based context. The authors of this article, both of whom are psychologists, are employed in the Center for Psychotherapy Research,

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<sup>56</sup> 2010, Association of State and Provincial Psychology Boards, *Psychology Licensing Exam Scores by Doctoral Program*. (retrieved from: <http://www.asppb.net/files/public/ASPPBPsychExamScores3-19-10.pdf>)

<sup>57</sup> *Id.* (2010 EPPP Exam Score Report)

Department of Psychiatry at the University of Pennsylvania School of Medicine. Issues raised in this article include whether the EPPP is capable of meeting its goals of protecting the public and licensing competent psychologists for clinical practice.

The specific areas of the EPPP that are called into question by the authors include whether the multiple choice format is sufficient in capturing the complexity of the subject matter, and whether the content of the EPPP is too heterogeneous for effective use as a post-doctoral licensure instrument. The multiple-choice format is criticized because of the often limited context present in each question. The authors question whether the questions and available answer choices provide sufficient information that is needed when one is applying psychological knowledge, especially when you consider the purposeful use of wording that is meant to be tricky and confusing to test-takers. The inability to access the actual testing materials limits one's ability to refute claims against the validity of exams, but not unlike many exams assessing competency for licensure, these exams are proprietary and test-takers often are required to sign non-disclosure agreements.<sup>58</sup>

The breadth of the testing appears to be a common complaint of the EPPP format. A candidate seeking to practice in a specialized field could theoretically pass the EPPP having proven very little knowledge of the practice in his discipline, yet demonstrated knowledge in the field of psychology at large. Given this problem, it seems as though the EPPP will have difficulty in meeting its stated goal of producing competent licensed psychologist for practice in specialized fields.

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<sup>58</sup> *The Examination for Professional Practice in Psychology (EPPP) in the era of evidence-based practice.* By Sharpless, Brian A.; Barber, Jacques P. *Professional Psychology: Research and Practice*, Vol 40(4), Aug 2009, 333-340.

At the time this article was written, in 2009, the EPPP had not yet published failure rates. The authors contacted ASPPB in order to obtain this information but were diverted to the Senior Program Director of PES, Robert Lipkins. Mr. Lipkins informed authors that ASPPB and PES do not currently publish pass-fail rates but that a report listing the pass-rates was in the works. This report was subsequently released and its findings are outlined in the previous section entitled Pass-Rates: EPPP Performance by Designated Doctoral Program in Psychology 2010 Report.

## **VI. Congressional Response to the Domestic Violence Epidemic**

### **A. Violence Against Women Act**

Congress passed the Violence Against Women Act of 1994 (VAWA) in response to our nation's efforts to both control and prevent crimes that target women, such as domestic violence, stalking, and sexual abuse. VAWA not only recognized that violence directed towards women is a crime, it established an approach to direct agencies to control and prevent such crimes.<sup>59</sup> VAWA is the first

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<sup>59</sup> Roe, Kristen J., *"The Violence Against Women Act and Its Impact on Sexual Violence Public Policy: Looking Back and Looking Forward."* National Alliance to End Sexual Violence (September 2004)

"One of the driving concerns of sexual and domestic violence activists, along with the initial Congressional supporters of the Act, pointed to the deficiencies, insensitivities, and improper practices within all branches of the criminal justice system in regard to victims. For example, sexual violence activists highlighted law enforcement practices which questioned victims' reports of rape, prosecutors' unwillingness to file cases based on a "he-said/she-said" consent dispute, judges' lenient sentences, and other similar practices which ultimately result in the decreased willingness of victims to bring complaints forward. The original Act, in response, included a number of laws to initiate changes within the criminal and civil justice systems. For example, VAWA doubled federal penalties for repeat sex offenders and enhanced federal penalties for sex crimes.

In addition, a number of procedural changes were enacted in order to encourage, rather than deter, victims from filing complaints. Examples include clarification that law enforcement is responsible for payment for the collection of forensic evidence in rape exams, a prohibition against assessing charges for filing criminal charges against perpetrators or for serving protection orders, pretrial detention of defendants in

major federal legislation on domestic violence. The Act authorized the expenditure of federal funds to support shelters for battered women. The Act and its 2000 and 2005 reauthorization<sup>60</sup> make all restraining orders subject to the Constitution's Full Faith & Credit clause and created protections for immigrants who were dependent on their abusers.

### **B. U.S. Department of Justice's Response to the VAWA: The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials**

In an effort to understand the battered woman syndrome and to expand on the research in this area, Congress called for a report that detailed the medical and psychological basis of the syndrome and its effect on criminal trials.<sup>61</sup> The report that was prepared by the U.S. Department of Justice, the U.S. Department of Health and Human Services, the State Justice Institute and the National Association of Women Judges. The report is entitled, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials*, (the report). The report presents three papers that address the three issues Congress specified: 1. The medical and psychological validity of the effects of battering; 2. The extent to which evidence and expert testimony on battering have been admitted into criminal trials; and 3.

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federal sex offense and interstate domestic violence cases, the right for victims to be heard at pretrial release hearings, mandatory restitution for victims of sex crimes and interstate domestic violence and enforcement of restitution orders through suspension of federal benefits to offenders. The Act also established a form of "rape shield" in federal civil and criminal cases, clarifying that a victim's past sexual history is generally not admissible."

<sup>60</sup> For more information on the 2005 VAWA Reauthorization see:

[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_bills&docid=f:h3402enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h3402enr.txt.pdf)

<sup>61</sup> *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*. U.S. Department of Justice, May 1996.

Criminal justice professionals' assessment of the effects of battering evidence in criminal trials.<sup>62</sup>

**a. Validity and Use of the Battered Woman Syndrome Used in Criminal Cases that Involve Battered Women.**

There are many types of criminal cases where a party may wish to introduce evidence of the effects of battering. Those cases include self-defense or insanity defense cases where a battered woman is accused of either assaulting or murdering her aggressor; in the prosecution of domestic violence cases; or duress defense cases where the battered woman is accused of illegal conduct and she blames her acts as the coercion of her abuser.<sup>63</sup>

In addition, evidence reflecting the adverse effects of battering may be introduced to clear up any misconceptions the trier of fact may have regarding domestic violence. A misconception on the impact of domestic violence on battered women is tragically common. Testimony can and perhaps should be offered to clear up any misconceptions the trier of fact may have in order for them to gain a more clear understanding on the state of mind of the battered woman.

In criminal cases where a battered woman is being tried for a crime and seeks to introduce a defense of insanity, coercion, or self-defense, or where a battered woman is charged with a crime and offers evidence of battering in order to reduce the seriousness of the charge against her, or even where a batterer is being charged with murder or assault and is attempting to introduce evidence of the

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<sup>62</sup> See *id.*

<sup>63</sup> *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.* U.S. Department of Justice, May 1996.

battered woman's behavior as part of his defense, evidence in the form of research or studies that explain the effects of battering are relevant and should be admitted.<sup>64</sup>

Such research can aid the trier of fact by examining the relationship between the battering and its effects on the battered woman. Research can show how the battering affects a woman's state of mind, perception of danger, and coping behaviors.

**b. Analyzing the Trend of Expert Testimony on Battering Compared to Its Effect in Criminal Cases.**

The section of *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials* that discusses the trend analysis on the use of expert testimony is entitled *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*. This article was prepared in May 1995 by the National Clearinghouse for the Defense of Battered Women. The article focused on gathering the most up-to-date status on the admissibility of expert testimony on battering and its effects.<sup>65</sup> In creating the database for the trend analysis, 238 state courts decisions and 31 federal court decisions were used. Most of the decisions were appellate level decisions.

Table on the Admissibility of Expert Testimony of the State<sup>66</sup>

<b><u>Admissibility Code</u></b>	<b><u>Number of States</u></b>	<b><u>Percentage of States</u></b>
AH (admits squarely)	21	41
AR (recognizes admissibility)	7	14
AL (admits with limits)	6	12
AC (admits conditionally)	6	12

<sup>64</sup> *Id.* at 4.

<sup>65</sup> Janet Parrish, Esq. *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*. National Clearinghouse for the Defense of Battered Women (May 1995)

<sup>66</sup> *Id.* at 13.

D (discusses content)	10	20
O (outside information)	1	<1
<b>Total</b>	<b>51</b>	<b>100</b>

The NCDBW's 1995 study revealed that on the issue of showing necessary for the admissibility of expert testimony there was no information at all for 20 states (40%).<sup>67</sup> One of the reasons for this is due to the testimony having been admitted with no discussion on the requisite preliminary showing. Below, I have gathered the statistics available in the report and organized it into a table:

<b>Showing Necessary for the Admissibility of Expert Testimony</b>	<b>Number of States</b>	<b>Percentage of States</b>
Self-defense claim must be raised	18	36
Evidence that BWS is accepted in the scientific community	14	28
BWS is commonly accepted, no showing necessary	9	18
Explicitly require the expert be properly qualified as such	17	34
Defendant must first show she is a battered woman	10	20

**c. How Evidence of Battering has Impacted Criminal Cases.**

The section of *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials* that discusses the impact of evidence about battering and how it effects criminal trials was written and prepared by Mary Ann Dutton, Ph.D, Professorial Lecturer of Law at The George Washington University. This report, entitled *Impact of Evidence Concerning Battering and Its Effects in Criminal Trials*

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<sup>67</sup> *Id.* at 23.

*Involving Battered Women* outlines both the direct and indirect effects of battering evidence testimony in criminal trials.<sup>68</sup>

There are essentially two types of witnesses a battered woman may present in court, fact witnesses (such as friends, family members, police officers, social workers, neighbors) and expert witnesses. The role of the fact witness is to testify about instances of abuse suffered by the victim of domestic violence by describing specific instances of violence, subsequent wounds on the battered woman, and the battered woman's responses to the abuse.<sup>69</sup> Fact witnesses are not testifying as to their opinion. Rather their testimony is important in relaying to the fact finder instances of violent conduct directed against the battered woman or the results that follow. An expert witness, on the other hand, reviews the relevant information about the abuse suffered, perhaps has an interview with the battered woman and then testifies based on his opinion about the experiences she suffers from.

As noted supra, an expert testifying in a criminal case involving a battered woman could offer either general or case-specific testimony. General testimony on battered women is based on the actual battering and the effects it has on individuals. This testimony is based on a generalized understanding of the scientific and specialized knowledge in the field.<sup>70</sup> With general testimony, the expert witness does not offer his opinion or form conclusions. The case-specific testimony of an expert witness instead focuses on the battered woman involved in the current case.

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<sup>68</sup> *Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women* by Mary Ann Dutton, Ph.D, Professorial Lecturer of Law at The George Washington University

<sup>69</sup> *Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women* by Mary Ann Dutton, Ph.D, Professorial Lecturer of Law at The George Washington University

<sup>70</sup> *Id.* at 2.

The expert has a face-to-face interview with the battered woman and uses other information obtained by interviewing people who are close to the battered woman or her domestic situation.

### **1. Direct Effects of Expert Testimony**

The introduction of expert testimony on the direct effects battering has on women involved in domestic violence situations serves two distinct purposes: to introduce the court to evidence on battering and its effects and to dispel common myths and misunderstandings on the issue of domestic violence.<sup>71</sup> It is not uncommon for the fact finder to have preformed stereotypes concerning both the battered woman and the batterer. These stereotypes would likely interfere with the fact finder's ability to resolve the issues in a case involving domestic violence.

### **2. Indirect Effects of Expert Testimony**

Expert testimony in criminal cases that involves a battered woman has the indirect effect of educating the trier of fact about the nature of domestic violence. Any judge who hears and decides cases involving battered women is more likely to make an appropriate ruling if he is educated on the effects of battering. Failing to have such knowledge may result in a judge dismissing relevant information in a case involving a battered woman.

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<sup>71</sup> Dutton Ph.D, Mary Ann "Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women" Professorial Lecturer of Law at The George Washington University (pg 3)

Attorneys on both sides of the table will also benefit from a more thorough understanding of the effect of battering.<sup>72</sup> Attorneys, judges and lay people all run the risk of holding misconceptions about domestic violence. Education in this field is crucial for everyone involved in order to develop a deeper understanding about the complexities that surround domestic violence relationships.

## **VII. Lack of More Suitable Defenses for Battered Women**

Though expert testimony on battering and its effects is proffered in many different types of cases where the defendant is a battered woman, it is accepted most in cases involving traditional self-defense situation.<sup>73</sup> An example of this type of case would be where a woman killed her batterer during one of his violent attacks against her. In fact, in the 1995 study by the National Clearinghouse for the Defense of Battered Women, nearly 40% of the states required there be a claim of self-defense raised in order for expert testimony to be admissible in criminal cases involving a battered woman.

### **A. Self-Defense**

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<sup>72</sup> The introduction of expert testimony on the effects of battering reaches into other fields of criminal law outside of self-defense cases. Attorneys would benefit from a general understanding on the effects of domestic violence in order to assist them with other cases. One example involves criminal cases in which a battered woman engages in criminal activity and asserts the defense of duress or coercion by her batterer. Another type of criminal case where attorneys would benefit from knowledge of the effects of battering involves prosecutions of the batterer when the star witness, a battered woman, has become unwilling to cooperate with the prosecutor or has recanted her earlier testimony. Attorneys who are likely to have a case involving a battered woman may find their job frustrating if they are unaware of the signs of abuse and the effects it has on its victims. *Id.* at 10.

<sup>73</sup> Janet Parrish, Esq. *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*. National Clearinghouse for the Defense of Battered Women (May 1995) (pg 19)

The American Law Institute drafted the Model Penal Code (MPC) to assist states in enacting criminal statutes.<sup>74</sup> Traditional self-defense claims require an element of immediacy or imminence.<sup>75</sup> Battered women accused of assaulting or murdering their abusers who are either asleep or unconscious often will not benefit from the use of a self-defense claim due to the lack of the immediacy requirement inherent in a self-defense claim.<sup>76</sup>

There are four elements to a traditional self-defense claim: defensive force may be used only if used against an unjustified attack; the force must be proportionate to the threat; the force used must be necessary; the threat must be

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<sup>74</sup> The American Law Institute (ALI) was founded in 1923. In 1962, the ALI submitted the official draft of the MPC. 34 the states have relied heavily on the MPC when replacing their existing criminal codes. Although it is not the law, the Code has a powerful influence on the development of criminal laws in the United States. Kadish, Schulhofer, Steiker, *Criminal Law and its Processes: Cases and Materials*, Aspen Publishers (2007).

<sup>75</sup> MPC § 3.04. Use of Force in Self-Protection. (Relevant parts, emphasis supplied)

1) *Use of Force Justifiable for Protection of the Person.* Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is **immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.**

2) *Limitations on Justifying Necessity for Use of Force.*

- b. The use of deadly force is not justifiable under this Section *unless the actor* believes that such force is necessary to protect himself against death, serious bodily injury, kidnaping or sexual intercourse compelled by force or threat; nor is it justifiable if:
- ii. the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or
  - iii. the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take, except that:
    1. the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and
- b. Except as required by paragraphs (a) and (b) of this Subsection, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act that he has no legal duty to do or abstaining from any lawful action.

<sup>76</sup> In fact, most courts do not change the rules of self-defense in battered woman situations. In traditional self-defense claims, the standard that is used for determining reasonableness is an objective one. Most courts attempt to keep out subjectivity when determining whether the battered woman acted reasonably. The main problem with a strict adherence to the objective standard is that the average juror or judge is not a battered woman. It is hard to imagine what a reasonable battered woman might do without understanding the psychological effect battering has on its victims.

imminent. Courts generally use the reasonableness standard to determine each of these elements. Arguably, the most litigated element when attempting to prove a claim of self-defense is the imminent requirement. Some courts have interpreted the word imminent to mean immediate, while other courts have interpreted it to mean close at hand. Black's Law Dictionary defines imminent in the self-defense context to mean immediate danger.<sup>77</sup> It appears as though the courts use the terms immediate and imminent interchangeably.

One study indicated that in the vast majority of criminal cases involving a battered woman on trial for murdering her intimate partner the killing occurred in a confrontational setting, thus granting these types of cases the potential of meeting the imminent/immediate requirement for the claim of self-defense.<sup>78</sup> It is the cases in which the partner was murdered whilst he slept or was unconscious that raises concerns about the imminent danger requirement. The research performed by the National Clearinghouse for the Defense of Battered Women revealed that only 29% of the states in 1995 admitted expert testimony in this type of nontraditional self-defense situation.<sup>79</sup>

The most widely cited case where a battered woman was did not prevail on her claim of self-defense based on the application of the imminence rule was that of State v. Norman.<sup>80</sup> In Norman, after being badly beaten by her husband, the defendant shot and killed him after he fell asleep. The Normans had been married

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<sup>77</sup> Black's Law Dictionary (5<sup>th</sup> ed. 1979)

<sup>78</sup> Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in the Current Reform Proposals*, 140 U. Pa. L. rev. 379, 384 (1991)

<sup>79</sup> Janet Parrish, Esq. *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*. National Clearinghouse for the Defense of Battered Women (May 1995) (pg 19)

<sup>80</sup> State v. Norman, 378 E.E.2d 8 (N.C. 1989).

for twenty-five years. The defense psychologist testified that the abuse Mrs. Norman was subjected to could be characterized as “torture, degradation, and reduction to an animal level of existence, where all behavior was marked purely by survival.” Yet Norman’s claim of self-defense failed because the court held that imminent danger is so defined as to require the person in peril to not have the time to call for help or seek protection from the law.<sup>81</sup> Since the killing occurred when Mr. Norman was asleep, the court stated that Mrs. Norman had ample time to utilize other methods of protection.

Based on the above facts, it is easy to see why a criminal defendant who is a battered woman will likely fail in a self-defense argument if she killed her abuser during a lull in the violence. Domestic violence advocates have urged the imminence rule to be either revised or removed altogether from a self-defense claim. The advocates argue that the self-defense law was crafted towards a scenario involving people of equal size and strength. Typically, the battered woman is smaller and weaker than her batterer and therefore cannot put up a sufficient fight during an attack. If a battered woman waits until she is being violently attacked to kill her abuser, she will more than likely be the one killed. It is not uncommon in criminal homicide cases for the defendant to have used the battered woman’s

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<sup>81</sup> The blind adherence to the imminent threat requirement of a claim of self-defense should be relaxed in certain situations. It does not take an enormous stretch of the imagination to understand that a 5’4” 110lb woman may not use deadly force (or even non-deadly force for that matter) when faced with imminent, serious bodily harm or death at the hands of her 6’1” 210lb batterer. A woman in that situation who was bold enough to purchase a weapon to use the next time her batterer decided to use her as a punching bag would more likely than not become an excerpt in the Sunday paper’s obituaries, rather than be standing in court benefiting from the use of a claim of self-defense. In short, it is extraordinarily unreasonable to expect the average battered woman to have the strength to use any force against her batterer.

weapon against her, causing her death. If the battered woman is a mother, perhaps the possibility of her own death is too great a risk for her to take.

There is a select subset of domestic violence cases where I believe the imminence requirement should be removed entirely. This would be where the victim of domestic violence has been falsely imprisoned and, despite several attempts to escape, is entirely unable. In kidnapping cases, the victim is wholly in the control of her captor. Courts have widely accepted that there is no imminence requirement in kidnapping cases.<sup>82</sup> The substantive effect of this alteration of the self-defense requirements allows those being held captive to use deadly force to escape their captor. How likely are the courts to remove the imminence requirement where a battered woman who has been sufficiently imprisoned in her home?<sup>83</sup> Sadly, many years will pass before courts recognize the inherent dangers

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<sup>82</sup> Kaufman, Whitley "*Self-Defense, Imminence, and the Battered Woman*" *New Criminal Law Review*, Vol. 10, Number 3, pps 342-370. © 2007 by the Regents of the University of California.

<sup>83</sup> Here is a brief hypothetical situation to illustrate to those unfamiliar with intimate battering the severity of harm that can occur when a battered woman also faces false imprisonment: Sara and Dan have been dating for six months. They are not living together but this weekend Dan picked Sara up at her house and insisted she stay the weekend at his house. He also insisted that she not bring her car, because he said he wanted to drive her there. Sara is a very petite woman and Dan is 6'3" and 200lbs. Dan is in law enforcement and Sara is still in school. Dan started verbally and emotionally abusing Sara three months of the relationship and the physical and sexual abuse started shortly thereafter. Sara has tried to end things with Dan twice but she fell prey to his remorseful behavior and his promising to change and to get help with his anger management problem. Tonight, Dan's violence is at its worst. Sara again tries to break the relationship off. Dan responds by abusing Sara. He slaps her, screams at her for making him mad, and throws glassware at her. She has locked herself in the bathroom, but Dan kicks in the door. He pulls her by her hair to the living room where he pulls her pants down and violently rapes her. After he is finished, he tells her how disgusting she is and kicks her while she is crying on the floor. She crawls to get the phone but Dan has ripped the cords from the wall. She tries to get her cell phone from her purse, but Dan beat her to it and smashed the phone on the kitchen floor. Sara pulls up her pants and tries to walk out of the front door but Dan attacks her. He shoves her face first against the wall and grabs her by the wrists and forces her into the bedroom and onto the bed. He rips all of the clothes off of her and is verbally abusing her and threatening to have his way with her again. While sitting on top of her, Dan covers her face with a pillow, trying to smother her. Sara cannot breathe and is terrified. She almost passes out but then Dan removes the pillow and punches her on the side of her head. He picks her up and throws her on the floor. Then gets her off the floor by yanking her by the hair, and then he tosses her back onto the bed. When Dan turns his back to Sara, she jumps up off of the bed and rushes towards

battered women face and even more years before they extend to battered women any defenses to shield them from criminal liability in non-traditional self-defense settings.

## **B. The Insanity Defense**

In order for a defendant to make an adequate insanity defense, he or she must suffer from a severe mental illness, disorder, or defect at the time the alleged criminal act occurred.<sup>84</sup> If the defendant is able to show that when he committed the crime he was insane, he will be found not guilty by reason of insanity. One of the drawbacks for the defense of insanity is the mandatory civil commitment that will almost certainly follow an acquittal by reason of insanity.

There are three basic tests for insanity that a jurisdiction can use. One is the common law M’Naghten test which requires that the defendant show he did not understand the nature and quality of his act or that he did not know his act was wrong. A battered woman would probably not meet the test for insanity under

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the front door, fully prepared to run outside at 3:00am completely naked. But Sara feels a violent jerk back when Dan grabs a handful of her hair and once again proceeds to drag her back to the bedroom. This time Dan tells Sara that he is going to kill her. Dan laughs at Sara’s futile attempt to escape, as he slams her against the walls of the hallway on the way back to the bedroom. Once in the bedroom, he throws her on the floor, then tells her to get up and get back on the bed. When Sara doesn’t move he picks her up by her wrists and feet and throws her on the bed. Dan rapes Sara again, but this time he sodomizes her as well. After the attack, Sara can no longer move. Everything hurts terribly and she is starting to see black spots. She falls asleep. When she wakes up and notices Dan is asleep, she quietly picks her clothes up from the floor and tries to unlock the front door without waking Dan up. But she forgot about the alarm, which beeped when the door was open, waking Dan and sending him rushing out of the room to find Sara. She knows he will not let her leave. The following two days of abuse were just as violent. She can’t escape. What should she do? If Sara didn’t know Dan and he had kidnapped her and forced her to come to his house, Sara could kill Dan during a lull in the violence or while he slept, and she would escape criminal liability by asserting a self-defense claim. Why should our Sara in this hypo not benefit from the same defense? I find it extremely hard to rationalize the opposing outcomes in liability.

<sup>84</sup> *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*. U.S. Department of Justice, May 1996.

M’Naghten. She likely is able to distinguish right from wrong and knows that killing is a moral wrong. Jurisdictions that apply the MPC standard use the test set out in MPC Sec 4.01(1).<sup>85</sup> The last test is the MPC substantial capacity test that states: the defendant will be acquitted if as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Essentially, a battered woman who seeks to establish insanity at the time she killed her abuser would need to have been unaware that the killing was wrong or have been unable to control her conduct. The last test is the irresistible impulse test. Under this test the defendant would need to show that he was unable to control his conduct because of an irresistible impulse. While it may seem more plausible that killing your abuser is an irresistible impulse for some severely battered women, I highly doubt they would be acquitted for such a killing. This is especially true considering the killing is more than likely an isolated event in most battered women’s lives and as such, they do not suffer from a repeated impulse that would be more indicative of insanity.

In addition, utilizing a defense of insanity would paint the picture that battered women are mentally impaired. There are lingering stereotypes of battered women as being weak, powerless, victimized, and even sick women. Adding mentally impaired to the mix would not help the battered women’s movement advance out of its infancy stage.

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<sup>85</sup> **MPC Article 4. Responsibility**

§ 4.01. Mental Disease or Defect Excluding Responsibility.

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

### **VIII. Conclusion**

While there seems to be no clear answer on the horizon, there remains a considerable problem of criminal liability facing victims of domestic violence who resort to killing as a way to escape their abuser. The battered women's movement is in desperate need of reliable, scientific research to detail the lingering effects of abuse. For the time being, due to the common misconceptions and misunderstandings surrounding victims of domestic violence, expert testimony should be allowed in every case to explain the effects on battering. A psychologist who possesses educational, scientific, or specialized knowledge on the effects of battering best explains the complexity of the psychological process that flows hand-in-hand with the cycle of violence that plagues battered women.

It may be necessary to redefine the reasonable person standard in homicide cases where the defendant is a victim of domestic violence and has been charged with killing his or her abuser. Otherwise, fact finders will be in a constant struggle to understand how to apply the reasonable person standard to facts far outside the grasp of an ordinary reasonable person.