

EXPERT EVIDENCE AND ITS IMPACT ON JURORS' DECISIONS IN HOMICIDE TRIALS INVOLVING BATTERED WOMEN

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Over two decades ago, the first U.S. appellate court considered the admissibility of battered woman syndrome evidence.¹ Since this time, battered woman syndrome evidence has been used with some frequency not only in U.S. trials,² but also in trials in Canada,³ Australia,⁴ New Zealand,⁵ and Britain.⁶ Most often, these trials involve battered women who have killed their violent part-

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1. *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979).

2. A comprehensive report prepared by the National Clearinghouse for the Defense of Battered Women (NCDBW) analyzed the use of expert testimony on battering and its effects in over 250 state and federal court decisions. Some notable trends were found: expert testimony on battering and its effects was found to be admissible, "at least to some degree. . . in each of the 50 states plus the District of Columbia," and "[t]welve states have enacted statutes providing for the admissibility of [the] testimony." Janet Parrish, *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*, in *THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT*, NCJRS 160972 at § I.B. (U.S. Depts. of Just. & Health & Human Serv. eds., 1996), available at <http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/Trend/>.

3. See Regina A. Schuller, *The Impact of Battered Woman Syndrome Testimony on Jury Decision Making: Lavallee v. R. Considered*, 10 WINDSOR Y.B. ACCESS TO JUST. 105 (1990) [hereinafter Schuller, *Impact*] (examining the assumptions underlying the Court's ruling in *Lavallee v. R.* and the relevant social science research investigating the potential impact of expert testimony on jurors' evaluations and decisions); Martha Shaffer, *The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After R. v. Lavallee*, 47 U. TORONTO L.J. 1 (1997) [hereinafter Shaffer, *Revisited*] (analyzing post-*Lavallee* cases in which battered woman syndrome has been raised as a defense or a factor to be considered in sentencing).

4. See Julie Stubbs & Julia Tolmie, *Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome*, 23 MELB. U.L. REV. 709 (1999) (examining Australian use of Battered Woman Syndrome evidence in cases of self-defense and comparing its Australian application with Canadian and U.S. experiences with the testimony).

5. See Justice J. Bruce Robertson, *Battered Woman Syndrome: Expert Evidence in Action*, 9 OTAGO L. REV. 277 (1998). "Whilst there is no doubt evidence of battered woman syndrome is admissible in this country, self-defence is usually not available in such circumstances." *Id.* at 287. Justice Robertson, however, discusses a recent case, *R. v Manuel* (High Court Rotorua, T7/97, 19 September 1997, Robertson, J.), in which battered woman syndrome evidence was admitted at trial and in which the jury found the defendant not guilty. *Id.* at 288-94.

6. See Susan Edwards, *Battered Women—In Fear of Luc's Shadow*, 1997 DENNING L.J. 75 (1997). In both England and Wales, where the plea of self-defense has had limited success in battered women's homicide trials, expert evidence on abuse has been admitted in battered women's cases as evidence of diminished responsibility and in support of a defense of provocation. *Id.* at 82.

ners.⁷ The presumed intent of the testimony in these cases is to contextualize the woman's actions, which would otherwise be difficult to reconcile with the existing laws of self-defense. Since its first entry into the courtroom, battered woman syndrome evidence has been met with varied and mixed reactions. For many, its admissibility was heralded as a landmark victory for battered women.⁸ Indeed, the impetus it provided for the courts' eventual acknowledgment of the obstacles confronting a battered woman's claim of self-defense represents an important and significant legal achievement.⁹ Yet, alongside this jubilation, numerous legal feminist scholars voiced their concerns.¹⁰ Much of the controversy surrounding the testimony stemmed from its characterization of the battered woman and its singular (and unrepresentative) portrayal of battered women. As expressed by Elizabeth Schneider: "[T]he term 'battered woman syndrome' has been heard to communicate an implicit but powerful view that battered women are all the same, that they are suffering from a psychological disability and that this disability prevents them from acting 'normally.'"¹¹ In short, although the intent of the testimony is to contextualize and hence 'normalize' the woman's behavior, critics questioned the extent to which its introduction at trial would achieve this goal.¹²

This article examines the limitations of expert testimony in homicide cases in which women have asserted battered woman syndrome as a defense. The

7. Expert testimony on battering and its effects has been accepted by ninety percent of the states in cases involving traditional self-defense situations. Of the 238 state court decisions, just under seventy percent find expert testimony on battering relevant to support a self-defense claim and approximately forty percent require the defendant to plead self-defense in order to introduce the testimony. The testimony has also been offered in a "sizable minority" of states in non-defense cases (twenty percent of states have admitted the testimony in civil actions, sixteen percent in duress defenses or charges involving a crime committed against a third party). Parrish, *supra* note 2, at § I.B. See also *The Battered Woman Syndrome and Other Psychological Effects of Violence Against Women: Legal Issues*, 2 MODERN SCIENTIFIC EVIDENCE, THE LAW AND SCIENCE OF EXPERT EVIDENCE §§ 11-1.1.4 – 11-1.4 (David L. Faigman et al. eds., 2002) (noting that although the most typical use of battered woman syndrome testimony is found in self-defense cases, the testimony has also been proffered in a variety of other contexts, such as duress defenses, prosecution of batterers, and civil cases).

8. FIONA E. RAITT & SUZANNE ZEEDYK, THE IMPLICIT RELATION OF PSYCHOLOGY AND LAW: WOMEN AND SYNDROME EVIDENCE 85 (2000) (noting that while battered woman syndrome evidence "works in women's favour" by "acknowledg[ing] the existence of domestic violence" and "challeng[ing] the myths and stereotypes that often guide jurors' reasoning... these are moderate successes. . . . Women's actions, as explained via BWS evidence, are unreasonable, abnormal, the result of mental malady. . . The effect is to produce another stereotype—that of the woman who, once battered, inevitably becomes mentally disordered. . .").

9. *Id.*

10. See, e.g., Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 220 (1986) [hereinafter Schneider, *Describing and Changing*] ("The underlying theme throughout this discussion of the expert testimony cases is the dilemma that the notion of victimization poses for feminist legal theory. Examination of the expert testimony cases on battering has suggested that a perspective like battered woman syndrome, which either emphasizes victimization or which is susceptible to being characterized as victimization, raises serious problems for women in theory and practice."); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 136 (1985) ("The potential within the feminist theory of self-defense for reinforcement of sex roles is becoming legal reality.").

11. Schneider, *Describing and Changing*, *supra* note 10, at 207.

12. *Id.* at 197.

validity of feminist scholars' concerns is considered by examining the social psychological research that investigates the testimony's impact on mock jurors' decisions in homicide trials involving battered women who have killed their abusers.¹³ In general, this research suggests that the introduction of battered woman syndrome evidence is associated with positive effects for individual battered women; however, the findings also point to some of its shortcomings. In particular, although verdict decisions were overall more lenient when battered woman syndrome evidence was presented, concordant with the concerns raised by feminists, there was also evidence consistent with the notion that battered woman syndrome evidence is likely to be associated with interpretations of dysfunction. In contrast to these findings, research that examined a form of expert testimony focusing on the social context of a battered woman's experiences and choices, as opposed to the syndromization of her experiences, was not associated with interpretations of dysfunction. Moreover, omitting the potentially "pathologizing" aspects of battered woman syndrome from this evidence did not alter the beneficial impact of the testimony on verdict decisions. Given the problems associated with the use of battered woman syndrome evidence, it is the conclusion of this article that expert testimony on battering needs to shift from the psychological focus conveyed by current battered woman syndrome testimony towards a conceptualization that emphasizes the social reality and context of battered women's lives.

To that end, Part I of this article provides an overview of the difficulties confronting the battered woman who claims that her actions were in self-defense. Part II briefly outlines the general content of battered woman syndrome evidence and the rationale underlying its use. Part III considers the limitations that have been raised regarding the use of battered woman syndrome evidence. This discussion includes consideration of various reformulations of the testimony that have been proposed in light of these limitations. Part IV examines the social psychological research bearing on the impact of these alternative forms of expert evidence on jurors' decisions in homicide trials involving battered women. Part V concludes with a consideration of the implications of this body of work.

I. THE BATTERED WOMAN AND SELF-DEFENSE

Although the precise definition of self-defense varies somewhat from jurisdiction to jurisdiction, successfully advancing a plea of self-defense requires convincing a jury of the "reasonableness" of the defendant's actions.¹⁴ The difficulties a battered woman confronts when attempting to advance this defense have been well articulated in the legal literature and stem largely from two

13. See discussion *infra* Part IV and accompanying notes.

14. In the U.S., the laws of self-defense require that the defendant, at the time of the killing, had a reasonable perception of imminent death or grievous bodily harm from her adversary and that the force she used to repel this danger was necessary and reasonable. WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK OF CRIMINAL LAW 391-97 (1972). The issue of the "reasonableness" of the belief varies from jurisdiction to jurisdiction, with some states adhering to an objective standard (that is, what a reasonable person would have perceived) and others employing a subjective standard (that is, what was reasonable given the defendant's circumstances). Ultimately, however, the defendant must have perceived herself to be in danger. Faigman et al., *supra* note 7, at 14-16.

sources: (1) the male-gendered norms of “reasonableness” inherent in the laws of self-defense,¹⁵ and (2) the misconceptions the public (hence jurors) holds regarding battered women and the battering context.¹⁶

In a comprehensive socio-historical account of the laws of self-defense, Gillespie traces the development of male-based self-defense in U.S. legal doctrine to two types of confrontational situations, neither of which reflect the type of violence battered women encounter in their lives: (1) a sudden attack by an intruder or stranger; and (2) a fight between two equals that gets out of hand.¹⁷ Historically, self-defense laws developed around these situations (which, historically, concerned men, not women) were framed to ensure that justification of violence would be confined to circumstances of last resort only; the danger posed by the assailant must be deemed “imminent” to justify the use of force,¹⁸ and the force used to repel that danger must be deemed necessary and reasonable (that is, not excessive, proportionate to that used in the assailant’s attack).¹⁹ The emphasis of these requirements is on the spontaneity and necessity of the actions.²⁰ In essence, in deciding what is reasonable, the law has traditionally looked at what an “ordinary man” would do under the circumstances, and this standard fails to adequately capture the battered woman’s situation.

The inherently male-centered notions of self-defensive behavior reflected in these laws fail to accommodate the battered woman’s unique situation and circumstances.²¹ Physically and economically, battered women are typically not the equals of their partners. Nor is the violence in their lives a one-time altercation between two strangers; rather, it is ongoing in nature and at the hands of an intimate partner. These circumstances are reflected in the battered woman’s response to her violent partner.²² For instance, given the size differential between men and women, a battered woman may arm herself to protect herself from a violent partner. Because such actions appear to be planned, however, they may call into question the immediacy of her fear and perception of danger.²³ In addition, in some cases the woman strikes back during a period of relative calm or a lull in the violence such as after a battering incident has already occurred.²⁴ This

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

16. *Id.* at 157-59. Although the laws of self-defense have evolved over the centuries, its basic parameters have undergone little change. “[A]s the American law developed, the only two situations in which a self-defense plea was felt to be appropriate . . . were still the ancient ones in which men most frequently found themselves.” *Id.* at 49.

17. *Id.* at 31-49.

18. Although the imminence of the threat is not always explicitly stipulated in the law, in those jurisdictions in which it is not, “case law has . . . read the requirement into the defence.” *Lavallee v. R.*, [1990] S.C.R. 852, 876 (Can.).

19. LAFAVE & SCOTT, *supra* note 14, at 391.

20. RAITT & ZEEDYK, *supra* note 8, at 69.

21. *Id.*

22. *Id.*

23. *Id.*

24. A detailed examination of judicial appellate opinions in 223 cases involving battered women who killed their abusers revealed that in 20% of these cases the killings were committed outside of a direct confrontation (i.e., 4% “contact killings,” 8% when the husband was sleeping, 8% during a

delay between the abuser's original assault and the woman's eventual response can also render the immediacy of the threat questionable.²⁵ In many states, it is a legal requirement that the battered woman defendant prove she tried to escape from the situation, or the claim of self-defense is not available.²⁶ Furthermore, even in those states in which the battered woman defendant is not legally obliged to attempt to escape from the situation, her failure to do so is likely to be considered by the jurors in their evaluations of the reasonableness of her actions. The woman's "failure to escape from a beating and to have left altogether before things reach such a deadly pass often get muddled in the jurors' minds."²⁷ Indeed, the question most often asked by the jurors is "why didn't she just leave?"²⁸

As the court in *Lavallee* aptly stated, the jurors' evaluations of the reasonableness of the woman's actions are plagued by such troubling questions as:

Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect?²⁹

In short, the woman's account of the events surrounding the killing are difficult for the jurors to reconcile with her self-defense claim because neither her actions nor their beliefs about how a woman would respond to such a situation fits the traditional notion of self-defense. It is precisely in response to these difficulties that battered woman syndrome evidence has been admitted at trial. In the next section, its content and the rationale underlying its uses will be considered.

II. BATTERED WOMAN SYNDROME EVIDENCE

The term "battered woman syndrome" was first coined by Lenore Walker in 1979 to describe the pattern of violence found in abusive relationships and the psychological impact that this violence has on women.³⁰ Definition and use of the term, however, is far from clear. Examination of the term in the legal literature indicates that it has been used loosely to refer to a wide range of phenom-

lull in the violence). Holly Maguigan, *Battered Women and Self-Defense: Myths and Misperceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 396-97 (1991).

25. As the Supreme Court of Canada stated, "[i]f there is a significant time interval between the original unlawful assault and the accused's response, one tends to suspect that the accused was motivated by revenge rather than self defence." *Lavallee*, [1990] S.C.R. at 876.

26. GILLESPIE, *supra* note 15. Some states in the United States require the retreat obligation. In her historical account of the laws of self-defense, Gillespie notes that the retreat requirement has been adopted by many of the eastern states, and it is absent in most of the western states. *Id.* at 77-78. For those states in which the retreat requirement has been adopted, the situation is still further complicated by some additional exceptions to the requirement under some conditions in some states (e.g., assault by a stranger, assault taking place in the home). *Id.* at 82-83.

27. *Id.* at 81.

28. *Id.* at 81, 144-45.

29. *Lavallee*, [1990] S.C.R. at 872.

30. LENORE E. A. WALKER, *THE BATTERED WOMAN* (1979) [hereinafter WALKER, *BATTERED WOMAN*].

ena.³¹ For instance, it has been used to refer to both the pattern of violence battered women experience, as well as the psychological effects of the violence on women.³² Within the psychological literature there is also considerable variation. Bowker views it not as a psychological construct, but as a “shorthand term for a variety of conditions that hold battered women captive in violent” relationships.³³ In contrast, for Lenore Walker the term now takes on a more specific and clinical meaning.³⁴ Walker, who has devoted considerable attention to the delineation of the syndrome, notes that the “diagnostic term ‘battered woman syndrome’ may be used as a subcategory of Post-Traumatic Stress Disorder (PTSD).”³⁵ She also indicates, however, that “the collection of psychological symptoms that make up the Battered Woman Syndrome are very similar but not identical to those that comprise the diagnosis of Post-Traumatic Stress Disorder.”³⁶

Consistent with the pioneering work of Lenore Walker, expert testimony on battered woman syndrome typically presents the two theoretical constructs that underlie battered woman syndrome and delineates the common patterns found in abusive relationships and their impact on women. The first theoretical construct, the Cycle Theory of Violence, refers to a three stage recurrent pattern of violence—“tension building,” “acute battering,” and “loving contrition”—that characterizes these relationships.³⁷ The recurrent, yet unpredictable, nature of the violence plays a key role in explaining why a battered woman may not leave an abusive relationship.³⁸ In addition to the Cycle Theory of Violence,

31. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1194-1201 (1993) [hereinafter Dutton, *Redefinition*].

32. *Id.* at 1195 n.14; Marilyn McMahon, *Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome*, 6 PSYCHIATRY, PSYCHOL. & L. 23, 26 (1999). Similarly, Walker notes that “the legal system uses BWS to describe both the clinical syndrome and the dynamics of the battering relationship.” Lenore E. A. Walker, *Understanding the Battered Woman Syndrome*, 31 TRIAL, Feb. 1995, at 32 [hereinafter Walker, *Understanding*].

33. Lee H. Bowker, *Battered Women's Problems Are Social, Not Psychological*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 154, 154 (Richard J. Gelles & Donileen R. Loseke eds. 1993) [hereinafter Bowker, *Problems are Social*].

34. “Battered Woman Syndrome is considered a sub-category of the generic *Post Traumatic Stress Disorder* which is the diagnostic category listed in the *Diagnostic and Statistical Manual of Mental Disorders*... it is a collection of thoughts, feelings, and actions that logically follow a frightening experience that one expects could be repeated. . . there are three major symptom clusters . . . *cognitive disturbances, high arousal symptoms, and high avoidance symptoms* . . .” Lenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 327 (1992); see also WALKER, BATTERED WOMAN, *supra* note 30, at 16-17; LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME 101-38 (2d ed. 2000) [hereinafter WALKER, SYNDROME]; Lenore E. A. Walker, *Psychology and Law*, 20 PEPP. L. REV. 1170 (1993) [hereinafter Walker, *Psychology*]; Walker, *Understanding*, *supra* note 32, at 32.

35. PTSD is a diagnostic category listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). Battered Woman Syndrome is not explicitly listed by name, but no subcategories are listed. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) (4th ed. 1994). “Traumatic events that are experienced directly include, but are not limited to . . . violent personal assault (sexual assault, physical attack, robbery, mugging).” *Id.* at 424; see also Walker, *Understanding*, *supra* note 32, at 32.

36. Lenore E. A. Walker, *Assessment of Abusive Spousal Relationships*, in HANDBOOK OF RELATIONAL DIAGNOSIS AND DYSFUNCTIONAL FAMILY THERAPY 338, 344 (Florence W. Kaslow ed., 1996) [hereinafter Walker, *Assessment*].

37. WALKER, SYNDROME, *supra* note 34, at 126.

an abusive relationship.³⁸ In addition to the Cycle Theory of Violence, Walker employed a second construct, Seligman's theory of learned helplessness,³⁹ to explain the woman's sense of "psychological paralysis."⁴⁰ That is, given the repetitive, yet unpredictable, nature of the violence, the woman is eventually reduced to a state of "perpetual" fear and perceives that there is little she can do to alter the situation. In Walker's more recent descriptions of the concept of learned helplessness, she emphasizes the battered woman's limited repertoire of behaviors as opposed to the notion of passivity.⁴¹ Indeed, in a revised edition of her 1984 book, she notes that the term's "original intended meaning" is not that of being "helpless" but rather of "*having lost the ability to predict that what you do will make a particular outcome occur.*"⁴² According to Walker, the theory of learned helplessness as applied to battered women helps to explain how battered women become psychologically victimized in the relationship, utilizing "survival techniques" as opposed to "escape skills."⁴³

As the content of the testimony suggests, battered woman syndrome testimony speaks to the woman's mental state and provides a context for understanding why she perceived herself to be in danger at the time of the killing.⁴⁴ It also provides an explanation for why she felt that there was no option other than to resort to violence to avoid this danger.⁴⁵ The testimony attempts to dispel any misconceptions jurors may harbor about battered women and replaces them with a framework that takes account of the battered woman's unique circumstances and perspective. By providing a contextual framework that presumably "normalizes" her behavior, the jurors can now "fairly apply the *same*

38. *Id.* In the first, or "tension building," phase there is a build-up of "minor" abusive incidents (e.g., emotional threats, verbal outbursts) during which the woman is hyper-vigilant to her spouse's cues and moods, modifying her behavior in an effort to calm and placate the batterer. The tension eventually escalates, however, and the woman is subjected to a severe battering incident ("acute battering" phase). This phase is then followed by a third or "loving contrition" phase in which the batterer is remorseful, promising never to harm the woman again. *Id.* at 126-27.

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

40. Walker, *Assessment*, *supra* note 36, at 343-44.

41. *Id.* at 343; *see also* McMahon, *supra* note 32, at 28-29.

42. WALKER, *SYNDROME*, *supra* note 34, at 116.

43. *Id.* "[F]or example, becoming angry rather than depressed and self-blaming; active rather than passive; and more realistic about the relationship continuing on its aversive course rather than improving." *Id.* at 118.

44. "More than fifty percent of the states have found testimony [on battering and its effects] relevant to assessment of the reasonableness of the [woman]'s belief that she was in danger of imminent harm." Thirty-seven percent have found it relevant to the woman's perception of the "temporal proximity of the perceived danger." Parrish, *supra* note 2, at § I.B.

45. Two-thirds of the states have found testimony on battering and its effect to be relevant to the determination of why the woman did not leave the relationship or to explain other conduct (e.g., actions committed under duress). *Id.* at 7.

legal standards” to her actions as they would to a male defendant acting in a “normal” self-defense scenario.⁴⁶

III. LIMITATIONS OF BATTERED WOMAN SYNDROME EVIDENCE AND PROPOSED REFORMULATIONS

The presumed intent of battered woman syndrome evidence is to provide the jurors with an interpretive perspective, or “social framework,”⁴⁷ for interpreting a battered woman’s beliefs and actions. Without this framework, it would be difficult for the jurors to reconcile a battered woman’s actions with the requirements of self-defense. Yet, as early as the mid-eighties, Elizabeth Schneider warned the legal community about the dangers of adopting such a strategy to redress the difficulties raised by the incongruence between the existing (male-centered) laws of self-defense and battered women’s experiences.⁴⁸ Along with others,⁴⁹ she cautioned against the use of the term “battered woman syndrome,” arguing that, although it is merely used descriptively, the “syndrome” terminology itself is suggestive of an illness or clinical disorder.⁵⁰ Thus, rather than “normalizing” the battered woman’s actions, the term “conjures up images of a psychological defense—a separate defense based on an impaired mental state.”⁵¹

More problematic than the term itself is the content of the testimony. Following the early use of the testimony, numerous scholars argued that, given its focus on passivity, its characterization of the battered woman appears more suggestive of “loss of control” and “incapacity” than a woman responding reasonably to the circumstances in which she finds herself.⁵² Again, instead of providing a framework for viewing the woman’s actions as justifiable given her situation, battered woman syndrome evidence contextualizes her actions within

46. Schneider, *Describing and Changing*, *supra* note 10, at 214. The presumed intent of the testimony is to provide a framework for understanding the woman’s actions such that her actions can be viewed as consistent with the male-oriented norms of self-defense. This purpose is well captured by Walker, who states that the testimony allows the battered woman to tell the “story from her perspective in a more male-approved way.” LENORE E.A. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 258 (1989) [hereinafter WALKER, TERRIFYING LOVE].

47. In the mid-1980s, Monahan and Walker coined the term “social frameworks” to refer to a novel use of social science in the courtroom. This form of expert testimony provides the fact finders with a context or framework for evaluating particular trial evidence. This use of social science in the courtroom, although different, incorporates aspects of its traditional uses in the courtroom, which have been limited to “legislative fact” (e.g., general research findings used to aid in the determination of questions pertaining to general law and policy) or “adjudicative fact” (e.g., findings derived from parties specific to the case to aid in the determination of specific facts in dispute). Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 559, 568-71 (1987).

48. Schneider, *Describing and Changing*, *supra* note 10, at 199, 212-13.

49. See, e.g., ANGELA BROWNE, WHEN BATTERED WOMEN KILL 176 (1987); Crocker, *supra* note 10, at 137.

50. Schneider, *Describing and Changing*, *supra* note 10, at 215-17.

51. ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 81 (2000) [hereinafter SCHNEIDER, FEMINIST LAWMAKING].

52. Schneider, *Describing and Changing*, *supra* note 10, at 217; see also Crocker, *supra* note 10, at 144 (noting similar concerns with the battered woman syndrome: “A stereotype about battered women’s behavior is emerging that threatens to create a separate standard of reasonableness for battered women.”).

a framework of dysfunction.⁵³ Evidence of this misapplication of the testimony can be found in cases involving battered women.⁵⁴

[D]espite the purposes of this legal strategy, old stereotypes of incapacity have been replicated in a new form. Lawyers who have submitted testimony have primarily focused on the passive, victimized aspects of battered women's experiences—their “learned helplessness”—rather than explaining homicide as a woman's necessary choice to save her own life.⁵⁵

In contrast to this portrayal of battered women, a number of researchers challenged the passive or helpless characterization of battered women portrayed by the testimony, arguing that it is at odds with the help-seeking behavior of battered women. For example, on the basis of in-depth interviews with 146 formerly battered women,⁵⁶ Bowker found that battered women use a wide range of strategies and help sources in their attempts to end the violence in their lives.⁵⁷ Additionally, an increase, not a decrease, in the frequency of women's help-seeking behavior was noted over time.⁵⁸ These acts of rebellion or resistance” to the man's control, however, may be met with increased violence by the batterer.⁵⁹ Martha Mahoney has described and labeled this form of assault on a

53. Similarly, Ewing has argued that instead of convincing the jury that the defendant acted reasonably, expert testimony explains why the woman acted unreasonably. CHARLES PATRICK EWING, *BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION* 59 (1987).

54. Although there is no “battered woman's defense,” cases “continue to be presented . . . as though new, unique legal rules apply.” Parrish, *supra* note 2, at Preface.

55. SCHNEIDER, *FEMINIST LAWMAKING*, *supra* note 51, at 80.

56. The interviews were supplemented by 854 questionnaires completed by battered women responding to a survey. LEE H. BOWKER, *ENDING THE VIOLENCE: A GUIDEBOOK BASED ON THE EXPERIENCES OF 1,000 BATTERED WIVES* (1986) [hereinafter *BOWKER, ENDING THE VIOLENCE*]; see also R. Emerson Dobash & Russell P. Dobash, *The Nature and Antecedents of Violent Events*, 24 *BRIT. J. CRIMINOL.* 269, 286 (1984) (concluding, based on study, that women “attempted to avoid or avert violence in most events analyzed”).

57. Seven personal strategies were identified by Bowker: talking, extracting promises, nonviolent threatening, hiding, passive defense, avoidance, counterviolence. *BOWKER, ENDING THE VIOLENCE*, *supra* note 56, at 19. Both informal (turning to family, in-laws, neighbors, friends, and shelter services), *id.* at 34-47, 82-87, and formal help sources (turning to police, social service agencies, lawyers/district attorneys, clergy, women's groups), *id.* at 48-81, were identified. Other researchers have similarly documented the broad range of behaviors battered women employ in their attempts to stop their partners' violence. Relying on their survey methodology, Richard Gelles and Murray Straus found that, although the notion of learned helplessness applied to some battered women, the vast majority of women surveyed also engaged in a variety of responses in an attempt to end the abuse. R.J. GELLES & M.A. STRAUS, *INTIMATE VIOLENCE: THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY* 149 (1988); see also EDWARD W. GONDOLF & ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* 16-18 (1988); Karla Fischer et al., *The Culture of Battering and Role of Mediation in Domestic Violence Cases*, 46 *SMU L. REV.* 2117, 2133-36 (1993); Dobash & Dobash, *supra* note 56, at 281. See generally Regina A. Schuller & Sara Rzepa, *Battered Woman Syndrome and Other Psychological Effects of Domestic Violence Against Women*, in 2 *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* 37, 47-48 (David L. Faigman et al. eds., 2d ed. 2002).

58. GONDOLF, *supra* note 57, at 18.

59. Fischer et al., *supra* note 57, at 2136-37.

woman's attempt to separate as "separation assault."⁶⁰ Moreover, battered women's attempts at separation are not without risk; the elevated risk of violence battered women encounter when attempting to separate from their abusers is well documented with empirical research.⁶¹ In light of such findings, researchers have concluded that the difficulty women have in freeing themselves from violent relationships has more to do with "the intransigence of their husbands' penchant for domination and the lack of support from traditional institutions," than "the woman's passivity or helplessness."⁶²

Related to the testimony's portrayal of battered women as weak and psychologically damaged is the concern that the testimony fails to adequately capture the "diverse psychological realities" of battered women.⁶³ Although numerous studies document the profound impact of battering and its effects on women's physical and mental health, there is not overwhelming support for a particular profile:⁶⁴

[R]eactions to violence and abuse vary; they include emotional reactions (e.g., fear, anger, sadness); changes in beliefs and attitudes about self, others, and the world (e.g., self-blame, distrust, generalized belief that the world is unsafe); and symptoms of psychological distress or dysfunction (e.g., depression, flashback, anxiety, sleep problems, substance abuse). A particular battered woman's reactions may or may not meet criteria to warrant a clinical diagnosis.⁶⁵

In a review of the literature, Mary Ann Dutton concludes that women's reactions to domestic violence are much broader than has generally been considered.⁶⁶ Although some women clearly meet the full criteria for a diagnosis of Post-Traumatic Stress Disorder, PTSD characterizes only a subset of some battered women's experiences.⁶⁷ As such, according to Dutton, the testimony should not be limited to "learned helplessness, PTSD, or any other single reac-

60. Mahoney refers to separation assault as a "specific type of attack that occurs at or after the moment she decides on a separation or begins to prepare for one." Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65 (1991).

61. See generally WALTER S. DEKESEREDY & LINDA MACLEOD, WOMAN ABUSE: A SOCIOLOGICAL STORY 67-70 (1997); Desmond Ellis & Walter S. DeKeseredy, *Rethinking Estrangement, Interventions, and Intimate Femicide*, 3 VIOLENCE AGAINST WOMEN 590 (1997); Emma Morton et al., *Partner Homicide-Suicide Involving Female Homicide Victims: A Population-Based Study in North Carolina, 1988-1992*, 13 VIOLENCE & VICTIMS 91 (1998).

62. Bowker, *Problems are Social*, *supra* note 33, at 155; see also Nancy R. Rhodes & Eva Baranoff McKenzie, *Why Do Battered Women Stay?: Three Decades of Research*, 3 AGGRESSION & VIOLENT BEHAV. 402 (1998) ("[D]ata suggest that the concept of learned helplessness may not be as pertinent to battered women as was once thought. While it may be true that women become disenchanting with their ability to end the abuse, they do tend to turn outward for help.")

63. Dutton, *Redefinition*, *supra* note 31, at 1195.

64. *Id.* at 1196-1201.

65. Mary Ann Dutton, *Critique of the "Battered Woman Syndrome" Model*, APPLIED RESEARCH PAPER SERIES 2, at http://www.vawnet.org/vnl/library/general/AR_bws.html (¶6, 1996) [hereinafter Dutton, *Critique*].

66. Dutton, *Redefinition*, *supra* note 31, at 1226. Judith Herman also contends that the symptoms that result from prolonged and repeated abuse are not fully accounted for in the classic diagnosis of PTSD. She contends that responses to trauma range from a brief stress reaction that may improve without intervention, to the classic PTSD, to the complex syndrome of prolonged, repeated trauma. JUDITH L. HERMAN, TRAUMA AND RECOVERY 119 (1992).

67. Dutton, *Redefinition*, *supra* note 31, at 1200.

tion or ‘profile,’” but rather “should incorporate the diverse range of traumatic reactions described in the scientific literature.”⁶⁸

In short, although the term battered woman syndrome offers a convenient “label” that may ease communication, the disadvantage is that the “syndrome has become a stereotype that often does not fit the current state of knowledge concerning battering and its effects.”⁶⁹ Thus, the testimony is unlikely to benefit those women whose behavior does not conform to this “narrow vision of what battered women should look like.”⁷⁰ Indeed, support for the initial concern that battered woman syndrome evidence would develop into a new stereotype – the “reasonable battered woman” standard – can be found in judicial interpretations of the relevancy of the testimony. For instance, courts have found the testimony irrelevant on the grounds that the particular battered woman at trial did not fit all aspects of the syndrome.⁷¹ In *State v. Anaya*, the defendant’s status as a battered woman was called into question when the prosecution refuted expert testimony that battered women “most frequently react with passivity” with evidence that she had once stabbed her boyfriend.⁷² Likewise, a reading of Canadian cases suggests that the testimony may only benefit those women who conform to all aspects of the syndrome.⁷³

In light of the problems associated with the use of the battered woman syndrome evidence, various feminist scholars have proposed the adoption of a more progressive use of the testimony.⁷⁴ The most limited of these proposals merely involves a clearer characterization of the syndrome as a normal response to a traumatic situation.⁷⁵ That is, by emphasizing that the syndrome is a normal

68. *Id.* at 1201.

69. Dutton, *Critique*, *supra* note 65, at ¶5; *see also* Schneider, *Describing and Changing*, *supra* note 10, at 207, 216-17; Crocker, *supra* note 10, at 137.

70. Shaffer, *Revisited*, *supra* note 3, at 1; *see also* Crocker, *supra* note 10, at 137; Schneider, *Describing and Changing*, *supra* note 10, at 200, 207.

71. *See* Donna Martinson et al., *A Forum on Lavallee v. R.: Women and Self-Defence*, 25 U. BRIT. COLUM. L. REV. 23, 54-55 (1991) (reviewing some cases in which courts have held battered woman syndrome inapplicable as a defense because the woman defendant did not fit every characteristic of the syndrome); Martha Shaffer, *R. v. Lavallee: A Review Essay*, 22 OTTAWA L. REV. 607, 622-23 (1990) [hereinafter Shaffer, *Review Essay*] (discussing two cases in which evidence of a woman’s resistance to domestic violence was permitted to rebut her claim of having been battered).

72. 456 A.2d 1255, 1266 (Me. 1983).

73. On the basis of her examination, Shaffer concludes that “the feminist concern that the battered woman syndrome will lead to the creation of a stereotype of the ‘deserving’ or ‘authentic’ battered woman may explain, at least in part, the guilty pleas entered in some of the cases in which battered women were charged with killing their abuser.” Shaffer, *Revisited*, *supra* note 3, at 25; *see also* Pamela Jenkins & Barbara Davidson, *Battered Women in the Criminal Justice System: An Analysis of Gender Stereotypes*, 8 BEHAV. SCI. & L. 161, 167-69 (1990).

74. *See* SCHNEIDER, *FEMINIST LAWMAKING*, *supra* note 51, at 108-9; Elizabeth A. Sheehy et al., *Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations*, 16 CRIM. L.J. 369, 388-89 (1992).

75. Jacqueline R. Castel, *Discerning Justice for Battered Women Who Kill*, 48 U. TORONTO FAC. L. REV. 229, 255 (1990). To avoid such misperception of the testimony, Castel suggests that the expert witness “emphasize that BWS is not to be confused with masochism or personality disorder; instead, it is a normal response to a traumatic and dangerous situation.” *Id.* at 256. *See also* Michael Dowd, *Dispelling the Myths About the “Battered Woman’s Defense”: Towards a New Understanding*, 19 FORDHAM URB. L.J. 567, 578 (1992) (“[I]nstead of imposing the abnormalities inherent in its given name onto the victim—the battered woman—I believe practitioners should view Battered Woman’s Syndrome as

reaction to a dangerous situation, as opposed to a personality or psychological disorder, the expert can avoid any misperception or confusion with images of pathology.⁷⁶ Others, however, have argued that the term “battered woman syndrome” itself should be dropped from the testimony.⁷⁷ Along with dropping the syndrome terminology from the testimony, some contend that the content of the testimony should shift from a focus on learned helplessness and the woman’s psychological state to a greater emphasis on the woman’s circumstances and alternatives.⁷⁸ For instance, Martinson and her colleagues argue that the testimony should focus more on the social reality of the woman’s situation (for example, the batterer’s domination and control, lack of effective community alternatives, inadequacy of police response, risks of leaving) as opposed to her psychological reactions.⁷⁹ In a similar vein, Dutton states that reference should be made to “expert testimony concerning battered women’s experiences,” rather than to “‘battered woman syndrome’ per se.”⁸⁰ She further asserts that in order to provide a full explanation of the woman’s response to the violence, it is essential that the scope of the testimony extend beyond the psychological effects of the battering and include consideration of the overall social context in which the battering occurs (for example, the batterer’s domination and control, economic factors, the woman’s prior traumatic experiences, the response of the police and other institutions).⁸¹

IV. INVESTIGATIONS EXAMINING THE IMPACT OF EXPERT EVIDENCE ON BATTERING

As the foregoing discussion highlights, considerable controversy has surrounded the use of battered woman syndrome evidence in homicide trials involving battered women who have killed their abusers. Underlying much of this discussion is the issue of how, if at all, the evidence is likely to impact triers of fact. In the case of a jury trial, does expert evidence on battering truly alter the jurors’ understanding of the woman’s perceptions and actions? Does it in-

the responses and characteristics of a *normal* woman who finds herself in a defective or dysfunctional relationship, surrounded by the realities of life confronting a woman today. The major defects associated with Battered Woman’s Syndrome should accordingly be placed on the relationship, the batterer and society.”).

76. *Id.* at 578-79. As Walker’s conceptualization of the syndrome views the psychological effects as a response to the battering, as opposed to a disorder or personality defect, this is in fact the manner in which the testimony should be portrayed. Walker, *Psychology*, *supra* note 34, at 1177.

77. Sheehy et al., *supra* note 74, at 394.

78. *Id.* “Battered woman syndrome, like other PTSD, is not a mental illness, but rather a way to describe the impact of abuse on the woman’s state of mind.” Walker, *Psychology*, *supra* note 34, at 1177.

79. Martinson et al., *supra* note 71, at 59; *see also* SCHNEIDER, FEMINIST LAWMAKING, *supra* note 51, at 126; Sheehy et al., *supra* note 74, at 393-394.

80. Dutton, *Redefinition*, *supra* note 31, at 1201 (internal citations omitted). Similarly, Parrish’s report for the NCDWB calls for the use of “more generic, more inclusive language” on battering and its effects. Parrish, *supra* note 2, at 4.

81. Dutton, *Redefinition*, *supra* note 31 at 1201; *see also* Malcolm Gordon & Mary Ann Dutton, *Validity of “Battered Woman Syndrome” in Criminal Cases Involving Battered Women*, in THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT, NCJRS 160972 (U.S. Depts. of Just. & Health & Human Serv. eds., 1996), available at <http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/Trend>.

fluence their resultant verdicts? If so, how? In this section of the paper, I examine the pragmatic issue of the impact of battered woman syndrome evidence on the jurors for, as Justice Wilson explicitly noted in *Lavallee*:

[I]t is up to the jury to decide whether, in fact, the accused's perceptions and actions were reasonable. Expert evidence does not and cannot usurp that function of the jury. The jury is not compelled to accept the opinions proffered by the expert about the effects of the battering on the mental state of victims generally or on the mental state of the accused in particular.⁸²

To address these questions, this article looks to the body of social psychological research examining the impact of expert evidence on mock juror decision-making. This examination will focus on three key issues: (1) whether the presence of expert testimony on battered woman syndrome influences mock jurors' verdicts in homicide trials of battered women who have killed their abusers; (2) whether it influences mock jurors' perceptions of the defendant, and if so, in what manner; and, (3) how alternative forms of expert testimony on battering impact upon the jurors' decisions.

In the late 1980s, researchers began to explore the potential impact of battered woman syndrome evidence on juror decision-making processes by employing jury simulation techniques.⁸³ This procedure involves presenting mock jurors with a simulated trial in written, audio, or video format and then asking them to render a verdict and answer various questions about the case. Within the trial presentation, the variable of interest (for example, the presence of battered woman syndrome evidence) is then varied so that different individuals are exposed to either different forms of the expert testimony or no expert testimony at all. Responses to the various versions of the trial can be elicited individually or, alternatively, the mock jurors may deliberate to a verdict. Analyses of the responses across the different conditions of the trial are then conducted to assess the role expert testimony played in the decision process. Although jury simulations are subject to limitations stemming from their artificiality, the direct control the researcher has over the variable(s) of interest renders it a powerful method for studying jury behavior.⁸⁴

Using this methodology, Follingstad et al. examined the influence of a host of factors, including expert testimony, on jurors' verdicts in a case involving a battered woman who killed her abusive husband.⁸⁵ Half of the research participants were provided with expert testimony on the battered woman syndrome, while the other half received no expert information.⁸⁶ Although a positive rela-

82. *Lavallee*, [1990] S.C.R. at 891.

83. Diane R. Follingstad et al., *Factors Predicting Verdicts in Cases Where Battered Women Kill Their Husbands*, 13 LAW & HUM. BEHAV. 253 (1989) [hereinafter Follingstad et al., *Factors*].

84. Because the researcher systematically alters or changes the variable of interest within the simulation, s/he is able to isolate and directly assess its impact on the decision process. This ensures that the variable of interest, as opposed to some other variable, is responsible for any differences between the conditions. For a discussion of the strengths and weaknesses of this approach, see Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 LAW & HUM. BEHAV. 75 (1999); Shari Seidman Diamond, *Illuminations and Shadows from Jury Simulations*, 21 LAW & HUM. BEHAV. 561 (1997).

85. Follingstad et al., *Factors*, *supra* note 83, at 255-56.

86. *Id.* at 259.

tionship between the mock jurors' perceptions of the importance of the testimony and verdict leniency was detected, the testimony exerted no direct impact on the verdicts rendered.⁸⁷ Similarly a study conducted by Finkel, Meister, and Lightfoot found little evidence for the impact of battered woman syndrome evidence on verdict decisions.⁸⁸ This study, however, additionally collected data gauging mock jurors' perceptions of the defendant.⁸⁹ In contrast to the findings on verdicts, the presence of the expert evidence did alter the mock jurors' perceptions of the woman on trial; specifically, it was found that the presence of expert evidence that provided a diagnosis of battered woman syndrome, compared to a no expert control condition, led the jurors to view the defendant as more distorted in her thinking, less capable of making responsible choices, and less culpable for her actions.⁹⁰ As these perceptions were related to the verdicts rendered, the results suggest that the testimony may "shift mock jurors' perceptions closer to the diminished capacity and insane portraits."⁹¹

Research conducted by Kasian et al. similarly found little evidence for the direct impact of expert testimony on jury verdicts in a battered woman's case.⁹² In one of their studies, expert testimony on battering was provided while the verdict options offered at trial were varied among self-defense, automatism, and psychological self-defense.⁹³ Although the presence of the testimony had some influence on jurors' judgments at the individual level, it had no impact on the verdicts rendered at the group level.⁹⁴ In a second study, it was found that the expert evidence had an impact on jurors' private beliefs about guilt, but only when automatism was raised by the defendant.⁹⁵ Given this finding, the authors concluded that the "expert testimony . . . is likely to be useful only under circumstances where the sanity of the defendant is called into question."⁹⁶ Thus, similar to the findings of Finkel et al.,⁹⁷ the testimony again appeared to be asso-

87. *Id.* at 262. The high acquittal rate observed in the study (80%), however, provided little room for the detection of any expert testimony effects.

88. Norman J. Finkel et al., *The Self-Defense Defense and Community Sentiment*, 15 LAW & HUM. BEHAV. 585, 597 (1991).

89. *Id.* at 593.

90. *Id.* at 598.

91. *Id.*

92. Marilyn Kasian et al., *Battered Women Who Kill: Jury Simulation and Legal Defenses*, 17 LAW & HUM. BEHAV. 289, 298 (1993). In the first of these experiments both the presence of expert testimony pertaining to battered women as well as the type of plea offered by a defendant were examined, while in the second study the presence of expert testimony was held constant and the type of plea offered was varied. *Id.* at 293-94, 301-2.

93. *Id.* at 293-94. The expert testimony examined misconceptions about battered women and the battering context, a discussion of the Cycle Theory of Violence, as well as the expert's opinion regarding the tenability of the woman's plea. *Id.* at 293.

94. *Id.* at 295-96. The presence of the testimony interacted with the gender of the participant and the timing of the judgment (i.e., pre versus post deliberation). Specifically, when expert testimony was present, women were more likely to change a verdict from not guilty to guilty after the deliberations, while the reverse pattern was found for male participants.

95. *Id.* at 305-06.

96. *Id.* at 309. This finding must be interpreted with caution, however, as the study did not include a no expert control condition. In the first study, which included such a control condition, no interaction between the presence of the testimony and the plea entered was found. *Id.* at 295-96.

97. Finkel et al., *supra* note 88.

ciated with “portraits of insanity” as opposed to explanations of the reasonableness of the woman’s actions.

In contrast to these findings, which have found only indirect evidence for the impact of expert testimony, other research has indicated that its introduction at trial does have a significant impact on mock jurors’ verdict decisions.⁹⁸ These studies suggest that the presence of the testimony does result in greater verdict leniency; however, similar to the findings of the other juror simulation studies,⁹⁹ there were also indications in the data that the presence of the testimony may foster interpretations of psychological instability. In the first of these studies, mock jurors were provided with: no expert testimony; expert testimony pertaining to battered woman syndrome that was generic in nature (that is, the expert provided no assessment of the defendant on trial); or expert testimony pertaining to battered woman syndrome that was supplemented with an opinion that the defendant on trial fit the syndrome.¹⁰⁰ Comparisons across these three different versions of the trial indicated that participants were more lenient in their verdicts when expert testimony was present, but only when the testimony was accompanied by an opinion that the woman fit the syndrome.¹⁰¹ In contrast to the other two versions, the mock jurors also were more likely to view the woman’s claims (for example, her perceptions of fear, reasonableness of her actions) as more plausible when they had received battered woman syndrome evidence in the form of expert testimony plus an expert’s opinion that the woman fit the syndrome.¹⁰² Using the same three versions of the trial, a second study that incorporated jury deliberations and decisions was conducted. This study found that expert testimony with or without the additional opinion led to more lenient verdicts compared to the no expert control condition.¹⁰³ Moreover, an examination of the jury deliberations also revealed that the presence of the expert testimony influenced the nature of the discussion that ensued in the de-

98. Regina A. Schuller, *The Impact of Battered Woman Syndrome Evidence on Jury Decision Processes*, 16 LAW & HUM. BEHAV. 597, 615 (1992) [hereinafter Schuller, *Syndrome Evidence*]; see also Regina A. Schuller et al., *Jurors’ Decisions in Trials of Battered Women Who Kill: The Impact of Prior Beliefs and Expert Testimony*, 24 J. APPLIED SOC. PSYCHOL. 316, 330 (1994) [hereinafter Schuller et al., *Prior Beliefs*].

99. Finkel et al., *supra* note 88; Kasian et al., *supra* note 92.

100. Schuller, *Syndrome Evidence*, *supra* note 98, at 601-02. In Parrish’s report on the use of expert testimony on battering and its effects, it was found that 69% of the states have found “generic” expert testimony on battering that makes no reference to the defendant admissible and 20% have explicitly precluded the expert from testifying that the woman is a battered woman or “suffering from ‘battered woman syndrome.’” Parrish, *supra* note 2, at § III.E.1.

101. Schuller, *Syndrome Evidence*, *supra* note 98, at 603. When the expert testimony was generic in nature or no expert testimony was presented, verdicts were primarily distributed between the verdict options of murder and manslaughter. In contrast, in the expert condition in which an opinion was offered, the verdicts were predominantly manslaughter or not guilty, with very few murder verdicts.

102. *Id.* at 604-07. When the expert provided an opinion that the woman fit the syndrome, the mock jurors were more likely to indicate that the woman feared for her life, was in danger, believed the force that she used was necessary or was unable to leave or escape the situation, and found her more believable.

103. *Id.* at 611. In terms of the verdicts that were rendered, a modest trend toward greater leniency was found in the expert conditions in comparison to the no expert control condition. In both of the expert conditions, the modal verdict choice was manslaughter, whereas in the no expert condition the modal verdict choice was second-degree murder.

liberations, with interpretations more favorable to the woman being raised in the expert conditions compared to the no expert control condition.¹⁰⁴

Alongside the beneficial effects of the testimony identified in this research were some other troubling findings. For instance, did the testimony really provide a full explanation of the woman's actions as reasonable given that the jury verdicts only shifted towards manslaughter, a verdict of diminished capacity? Also of note, similar to the findings of Finkel et al.¹⁰⁵ and Kasian et al.,¹⁰⁶ there were some indications in the data to suggest that the presence of the testimony might be associated with interpretations of "diminished capacity and insane portraits."¹⁰⁷ In approximately one-third of the juries that received expert testimony, mock jurors spontaneously stated that the defendant should have raised the defense of temporary insanity. In contrast, when the expert testimony was omitted, this recommendation was not raised by a single juror in the deliberations.¹⁰⁸ These findings again suggest interpretations of the unreasonableness, as opposed to the reasonableness, of the woman's actions.

More recently, a study was conducted which was specifically designed to assess the extent to which battered woman syndrome evidence operates as a framework for jurors' evaluation of whether a battered woman's actions are a reasonable response to her situation.¹⁰⁹ To this end, a nullification instruction manipulation was employed in the study.¹¹⁰ Although juries, at least within the U.S., have the power to nullify, they are typically not informed of their right to disregard the law.¹¹¹ Research exploring the impact of informing jurors of their nullification power tends to suggest that the presence of a nullification instruction encourages mock jurors to follow their conscience if they feel that following

104. *Id.* at 612. Specifically, these jurors were less likely to question the degree and severity of abuse suffered by the woman and more likely to discuss the woman's perceptions of fear as believable than were mock jurors for whom the expert testimony was omitted.

105. Finkel et al., *supra* note 88, at 598.

106. Kasian et al., *supra* note 92, at 298.

107. Finkel et al., *supra* note 88, at 598.

108. Schuller, *Syndrome Evidence*, *supra* note 98, at 618.

109. Regina A. Schuller & Sara Rzepa, *Expert Testimony Pertaining to Battered Woman Syndrome: Its Impact on Jurors' Decisions*, 26 LAW & HUM. BEHAV. 655 (2002) [hereinafter Schuller & Rzepa, *Expert Testimony*].

110. *Id.* at 661-62. Jury nullification refers to the jury's power to disregard the law should its members feel that its strict application in a particular case would result in an unjust outcome. Thus, half of the participants received nullification instructions within the judicial instructions provided at the end of the trial. This information was omitted for the remainder of the participants. "The nullification instructions . . . informed the mock jurors that, although the law was intended to be helpful to them in reaching a just and proper verdict, it was not binding upon them. They were informed that, as jurors, they represented the community and it was appropriate to bring into their decision, both the feelings of the community, and their own feelings based on their conscience. Finally, they were told that, despite their respect for the law, nothing would bar them from acquitting the defendant if they felt that the law, as applied to the situation before them, would produce an inequitable or unjust verdict." *Id.*

111. See Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439, 451 (1988). In this study, Horowitz found that mock jurors' nullification tendencies were triggered by jurors' interpretations of the defendant's motive—when the nullification defense was present, jurors were "more likely to acquit a sympathetic defendant and more likely to deal harshly with an unsympathetic defendant."

the letter of the law would lead to an unjust outcome.¹¹² Thus, the inclusion of this variable was used as a means to assess the extent to which the expert evidence allows the mock jurors to reconceptualize the woman's actions such that her behavior can now be framed within the legal requirements of self-defense.¹¹³ Reasoning that the battered woman's case is likely to invoke feelings of injustice since she commits her actions in response to her husband's violent and abusive treatment, we predicted that the presence of a nullification instruction would lead jurors to more readily follow their conscience and hence find the woman less guilty.¹¹⁴ The primary question of interest, however, was how the nullification instruction would moderate the impact of the expert testimony.¹¹⁵ That is, it was hypothesized that, if battered woman syndrome evidence provides the jurors with a framework for understanding the battered woman's actions such that they can now be framed more readily within the context of self-defense, a nullification instruction should have little impact (that is, verdict leniency can now be attained by applying the existing laws of self-defense to the case).¹¹⁶

In addition, the study was designed to assess the question of whether juror receptivity to battered woman syndrome evidence might interact with the woman's behavior, and, in particular, with its degree of fit with the passive conceptualization of battered women conveyed via the testimony.¹¹⁷ For instance, might jurors question, as others have suggested, whether "women who act aggressively or who show any measure of autonomy" are "helpless enough to be 'real' battered women?"¹¹⁸ To this end, the woman's behavior was systematically varied within the trial presentation such that her behavior could be viewed as either consistent (in essence, passive) or inconsistent (in essence, active) with the portrayal of the battered woman conveyed via the testimony.¹¹⁹ This variation was attained by providing specific instances in which the defendant reacted assertively (physically and/or verbally) in response to her husband's abuse in

112. *Id.* For instance, Horowitz examined the impact of a radical nullification instruction in two conditions that evoked justice concerns (euthanasia and drunk driving), and compared their impact to a third condition that did not evoke these concerns (illegal possession of a firearm). *Id.* at 443-44. It was found that when justice concerns were evoked, informing participants of their nullification power appeared to "liberate" them from the law, thereby allowing them to rely more freely on their own sentiments and community norms (i.e., greater leniency in the euthanasia case and greater harshness in the drunk driving case). *Id.* at 452; see also Irwin A. Horowitz, *supra* note 11; Keith E. Niedermeier et al., *Informing Jurors of Their Nullification Power: A Route to a Just Verdict or Judicial Chaos?*, 23 LAW & HUM. BEHAV. 331 (1999); Richard L. Wiener et al., *The Social Psychology of Jury Nullification: Predicting When Jurors Disobey the Law*, 21 J. APPLIED SOC. PSYCHOL. 1379 (1991).

113. Schuller & Rzepa, *Expert Testimony*, *supra* note 109, at 658.

114. *Id.* at 658-59.

115. *Id.* at 660.

116. *Id.* at 659.

117. *Id.* at 660.

118. Shaffer, *Revisited*, *supra* note 3, at 14. For instance, if a battered woman has tried to defend herself, or perhaps has acted aggressively, might jurors not ask, "[aren't] 'real' battered women traditionalists? passive? unable to think about leaving?" Julie Blackman, *Emerging Images of Severely Battered Woman and the Criminal Justice System*, 8 BEHAV. SCI. & L. 121, 126 (1990).

119. Schuller & Rzepa, *Expert Testimony*, *supra* note 109, at 660. The characterization of response history as passive was not intended to imply that the woman was in fact passive, but rather to an interpretation that was likely to be drawn.

one of the conditions (referred to as the active condition).¹²⁰ In the other condition, or passive condition, this information was omitted. Within each of these versions of the trial, half of the mock jurors received no expert testimony, while the other half were presented with expert testimony pertaining to the battered woman syndrome.¹²¹

Overall, the results indicated that the mock jurors perceived the woman portrayed in the more active response condition differently than the woman characterized by greater passivity.¹²² Lending support to the concern that battered women who have fought back or behaved aggressively toward their abusers' violence will be negatively viewed by the jurors,¹²³ participants in the active response conditions were less sympathetic to the defendant's case, less likely to believe her claim of fear/threat, and more likely to believe she had other options.¹²⁴ Jurors also rendered harsher verdicts in this condition compared to the passive response condition.¹²⁵

In terms of the expert testimony, greater leniency, demonstrated by fewer manslaughter and more self-defense verdicts, was evidenced in the expert condition compared to the no expert control condition.¹²⁶ This occurred across both of the response history conditions.¹²⁷ In short, no support was found for the notion that battered woman syndrome evidence would be less effective if the particular woman on trial failed to fit the syndrome testimony.¹²⁸

120. *Id.* at 661.

121. *Id.* "The expert explained that battered woman syndrome . . . was a subcategory of Post Traumatic Stress Disorder (PTSD). She then explained several of the symptoms (e.g., avoidance symptoms, high levels of anxiety, memory difficulties) and then went on to explain Walker's Cycle Theory of Violence, and how the cyclical pattern of the violence contributes to the woman's perceived inability to escape the situation (e.g., learned helplessness). The actual dangers (i.e., threats, further beatings) associated with leaving an abusive relationship were also outlined. Common misconceptions about battered women were countered (e.g., that battered women are masochists). Finally, the expert concluded that, after a series of interviews with the defendant, it was her opinion that the defendant suffered from the battered woman syndrome." *Id.*

122. *Id.* at 664. Results indicated that, not only was the woman portrayed in the active response condition viewed as more active in her response to her husband's treatment than the woman portrayed in the passive response condition, her response history also was characterized as extremely active (i.e., seven on the nine-point scale). *Id.*

123. See Jenkins & Davidson, *supra* note 73; Shaffer, *supra* note 3; Stubbs & Tolmie, *supra* note 4, at 736-38.

124. Schuller & Rzepa, *Expert Testimony*, *supra* note 109, at 669.

125. *Id.* "[T]his difference [was] evidenced by more murder verdicts when the nullification instruction was absent and more manslaughter and fewer self-defense verdicts when the nullification instruction was present." *Id.* Along these lines, Follingstad, et al. similarly found that the defendant's verbal provocation towards her husband on the evening just prior to the killing led participants to question the validity of the woman's claim and resulted in more guilty verdicts. Diane R. Follingstad et al., *Reputation and Behavior of Battered Women Who Kill Their Partners: Do These Variables Negate Self-Defense?* 11 J. FAM. VIOLENCE 251, 262-64 (1996) [hereinafter Follingstad et al., *Reputation*].

126. Schuller & Rzepa, *Expert Testimony*, *supra* note 109, at 664-65. Manslaughter verdicts were handed down 45% of the time in the expert condition versus 62% of the time in the no expert conditions. Self-defense verdicts were handed down 38% of the time in the expert condition versus 20% of the time in the no expert condition.

127. *Id.* at 665.

128. *Id.* at 670 ("It should be noted, however, that participants in the active, as opposed to passive, response condition did not view the woman's behavior as less consistent with the expert's por-

As expected, the impact of the testimony was moderated by the presence of the nullification instruction; however, not in the expected direction. When the testimony was present, as opposed to absent, there was greater verdict leniency, but only when the “mock jurors had been released from a strict application from the law” (that is, when the nullification instruction was present). Under these circumstances, the mock jurors (in particular, the women) also viewed the woman’s options as more limited. Finally, jurors expressed greater sympathy for the woman when the expert testimony was provided, but, as with the verdicts, this occurred only when the mock jurors had been released from a strict application of the law. Since the testimony had its greatest impact in the presence of the nullification instruction, its impact on verdicts did not appear to operate by providing participants with a better fit between her actions and the legal requirements of self-defense, but rather by increasing juror sympathy for the woman’s case. This finding is troubling as it suggests that, rather than providing an educative function, the testimony may simply be increasing juror sympathy.

A final study (which I conducted with my colleague Patricia Hastings) examined the impact of an alternative form of expert testimony on battered and contrasted it with the more traditional form of battered woman syndrome evidence.¹²⁹ The alternative form of expert testimony incorporated some of the proposed recommendations for redefining the content of battered woman syndrome evidence.¹³⁰ Using the same methodology as the previous studies, participants received no expert testimony, the alternative form of expert testimony, or the traditional form of expert testimony.¹³¹ In the alternative form of the testimony, the term battered woman syndrome was dropped, along with its psychological classification within Post-Traumatic Stress Disorder.¹³² In addition, the study omitted the application of the theory of learned helplessness to the battered woman’s situation.¹³³ This information was replaced with information pertaining to the actions battered women might take and the obstacles they face when seeking help—in short, its focus was on the social reality of the

trayal of battered women. It is possible that variations in the woman’s past behavior were not significant enough to be viewed as inconsistent with the testimony.”).

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

130. *Id.* at 174-75. As in the Schuller and Rzepa study, *supra* note 109, for half of the participants, the portrayal of the woman’s response history was characterized as more active, while for the remainder it was characterized as more passive. Consistent with the findings of Schuller and Rzepa, battered woman syndrome evidence was not detrimental or even less effective for the woman in the active response condition. The manipulation of the response history variable, however, was weaker. Although responses on a measure assessing the mock jurors’ perceptions of the extent to which the woman fought back against her husband’s treatment indicated that the woman was differentially perceived across the two conditions, she was still viewed by participants as fairly passive in the active response condition (i.e., midpoint on the scale). In contrast to the findings of Schuller and Rzepa, the manipulation of the woman’s response history had little impact on mock jurors’ perceptions of the woman. In short, this study offered only a weak test of the hypothesis that a battered woman’s “aggressive” behavior would negatively interact with the jurors’ receptivity to the testimony. Schuller & Hastings, *supra* note 129.

131. Schuller & Hastings, *supra* note 129, at 174-75.

132. *Id.* at 175.

133. *Id.*

woman's circumstances and alternatives, as opposed to her psychological state.¹³⁴ This form of the testimony was referred to as "social/agency" testimony.¹³⁵

Overall, the results of the study indicated that jurors render more lenient verdicts and case judgments in the presence of expert testimony regardless of the form.¹³⁶ In addition, although the two forms of the testimony were perceived differently in terms of their psychological focus (the battered woman syndrome evidence received higher ratings of psychological emphasis than the social/agency form of the evidence), there were no differences in verdicts and juror perceptions.¹³⁷ Subsequent analyses indicated that the impact of the expert testimony on verdicts was mediated by the impact the testimony had on the mock jurors' perceptions.¹³⁸ The only difference to emerge across the two forms of the testimony involved ratings of the likelihood that an insanity plea would have been successful: jurors provided with the traditional battered woman syndrome evidence indicated that they would have been more likely to find a woman not guilty by reason of insanity than jurors provided with the social agency form of the testimony.¹³⁹ This finding lends some support to the notion that battered woman syndrome evidence is likely to be associated with interpretations of dysfunction.¹⁴⁰

Perhaps the most striking aspect of this study is that the omission of the pathologizing elements of battered woman syndrome evidence still yielded the beneficial effects of the expert information. Thus, exclusion of the term battered woman syndrome, its categorization within PTSD, and explanations of learned helplessness did not appear to alter the way in which the testimony was utilized. The battered woman syndrome evidence (like the social agency form of the testimony), also included discussion about the difficulties the woman experiences in leaving the abusive situation and the increased danger she faces when she either threatens to or actually does leave. Thus, the more important aspect of the testimony for jurors may be the information it provides regarding the batterer's domination and control and the social reality of the choices confronting battered women in their attempts to end the abuse. As this study represents one of the first attempts to assess the influence of a more general form of expert testimony on battering and its effects, it is important that future researchers attempt to disentangle exactly what aspects of the expert information are likely to be utilized by the jurors and how.

134. *Id.*

135. *Id.* at 174.

136. *Id.* at 177. More guilty verdicts were rendered in the no expert control condition (65%), compared to the expert conditions (50%).

137. *Id.* at 178-79.

138. *Id.* The study employed both a student and a non-student sample. For the non-student sample, only the judgment regarding the availability of the woman's other options was affected by expert testimony, while for the student sample the impact of the evidence was found on other case judgments as well (e.g., perception of her fear, plausibility of her claim).

139. *Id.* at 179-80. It should be noted, however, that the mean rating on this measure in the battered woman syndrome condition was still below the midpoint of the nine-point scale.

140. See Schneider, *Describing and Changing*, *supra* note 10; Stubbs & Tolmie, *supra* note 4.

The findings from our study, although somewhat preliminary to draw firm conclusions from them, suggest that a reformulation of expert evidence about battering that focuses on the battered woman's social context, as opposed to her psychological functioning, holds considerable promise. The results also emphasize the importance of providing the jurors with information about the (limited) choices confronting battered women in their attempts to end the violence in their lives. What is perhaps most noteworthy and promising in the findings is that this form of expert testimony, which presented the "context of domestic violence," appears to "avoid the pitfalls of the 'syndrome' evidence."¹⁴¹

V. CONCLUSIONS

Battered woman syndrome evidence has been instrumental in the courts' recognition of the male bias inherent in the laws of self-defense. Drawing on this research, the courts explicitly acknowledged the inappropriateness of holding a battered woman to the male-centered standard of self-defense and adopted the admission of battered woman syndrome evidence as the solution to this problem. The conclusions that can be drawn from juror simulation studies that have explored the impact of battered woman syndrome evidence on jurors' decisions in the trials of battered women who have killed, however, are somewhat mixed.

Although some of the studies have found no direct impact of the testimony on verdicts, others have shown that the testimony is associated with positive outcomes for women in battered women's defense cases. As well, the testimony was not, as some critics have feared, detrimental to a woman whose history of behavior was somewhat at odds with the passive portrayal of battered women conveyed via the testimony. Of some concern, however, is the finding that the beneficial impact of the testimony was primarily confined to a condition in which a nullification instruction was presented. Although the intended import of battered woman syndrome evidence is to provide the jurors with a framework for interpreting a battered woman's actions within the existing laws of self-defense, this finding indicated that it was only when the mock jurors were liberated from the law that the testimony led to greater verdict leniency. In short, these findings lend support to the concerns that have been raised regarding the inability of the testimony to provide the jurors with a framework for viewing the woman's actions as falling within the existing laws of self-defense.¹⁴²

As this review hopefully highlights, and as others have suggested, treatment of expert evidence on battering and its impact on women need not be static, and reforms can be directed towards the transformations of the evidence's content to reflect the social realities, as opposed to psychological states, of battered women.¹⁴³ As Justice L'Heureux-Dubé of the Supreme Court of Canada astutely commented in *R. v. Malott*, the "syndromization" of battered women who act in self-defense must be "scrupulously avoided":

141. Elisabeth McDonald, *Battered Woman Syndrome*, 1997 N.Z.L.J. 436, 438.

142. RAITT & ZEEDYK, *supra* note 8, at 85-6 (noting that while "BWS may have achieved laudable short-term goals . . . it is not helpful to the long-term interest of women as a group. It preserves institutional bias toward the male norm, nourished in a guise of scientific objectivity.").

143. Sheehy et al., *supra* note 74, at 394.

By emphasizing a woman's "learned helplessness," her dependence, her victimization, and her low self-esteem, in order to establish that she suffers from "battered woman syndrome," the legal debate shifts from the objective rationality of her actions to preserve her own life to those personal inadequacies which apparently explain her failure to flee from her abuser. Such an emphasis comports too well with society's stereotypes about women.¹⁴⁴

This, she notes, only serves to undermine the important advances that have been achieved by the admission of expert evidence on battering and its effects. The easy fit between battered woman syndrome evidence and the practice of law has its allure, but as the complexity of the problem of male battering expresses itself at the individual, institutional, and societal levels, a quick fix solution is doomed to fail.

144. R. v. Malott, [1998] S.C.R. 123, 143.