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Battered-Woman-Syndrome Testimony and the Jury: The Question of Admissibility

BATTERED-WOMAN-SYNDROME TESTIMONY AND THE JURY: THE QUESTION OF ADMISSIBILITY

INTRODUCTION

It has been estimated that wife abuse is the most underreported crime in America.[1] Dr. Lenore Walker, a noted authority on wife abuse,[2] has observed that "[a]s we begin to see more battered women, we realize the high probability that as the violence escalates, they will eventually be killed by or kill their men."[3] The battered woman who kills her mate may plead self-defense, but may encounter difficulty proving her claim.[4] This difficulty stems, in large part, from the circumstances surrounding the life of a battered woman—circumstances that the average juror, in assessing her claim, will find hard to believe or even understand.[5] Expert testimony concerning the phenomenon

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1. *See* Moore, *Editor's Introduction: An Overview of the Problem,* in BATTERED WOMEN 12 (D. Moore ed. 1979). Obtaining accurate data regarding the frequency of wife abuse is problematic because those "who most frequently come into contact with battered women either do not recognize the battering, have no need or means by which to report such incidents, or would prefer not to get involved because of the attitude that it is a private affair." *Id.*

2. Dr. Lenore Walker, a clinical psychologist, has been on the faculty of Rutgers Medical School in New Jersey, Rutgers University Graduate School of Applied and Professional Psychology, and Colorado Women's College. In 1975, she began to dedicate her time to working with, and informing the public about, battered women. L. WALKER, THE BATTERED WOMAN xi-xiii (1979). Dr. Walker is frequently quoted in court opinions and appears on behalf of women defendants. *See, e.g.,* Ibn-Tamas v. United States, 407 A.2d 626, 634-35 (D.C. 1979); Smith v. State, 247 Ga. 612, 618, 277 S.E.2d 678, 683 (1981); State v. Kelly, 97 N.J. 178, 191-94, 478 A.2d 364, 370-72 (1984).

3. L. WALKER, *supra* note 2, at 53.

4. The claim of self-defense requires a number of elements. *See infra* notes 9-10 and accompanying text.

5. *See* Note, *Legal and Psychiatric Concepts and the Use of Psychiatric Evidence in Criminal Trials,* 73 CALIF. L. REV. 411, 422 (1985) (testimony rejected when courts feel jury incapable of understanding effects of battering); Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent,* 72 VA. L. REV. 619, 644 (1986) (jurors may "fall prey to a 'stereotypical attitude toward the circumstances surrounding the woman's act' "). *Cf.* Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill,* 36 AM. U.L. REV. 11, 33 (1986) (battered woman's defense is misconceived and often confuses jurors). For a discussion of a battered woman's heightened perceptions of danger, see *infra* notes 15-16 and accompanying text.

termed "battered woman syndrome" can aid the jury in its assessment of the battered woman's claim of self-defense.[6]

Three areas inevitably come into play when a battered woman pleads self-defense:[7] (1) the specific requirements of self-defense; (2) the relevance of battered woman syndrome to a battered woman's claim of self-defense; and (3) the evidentiary criteria that expert testimony proffered on battered woman syndrome must meet in order to be admissible at trial.

This Note will examine leading cases involving women who have killed their mates, claimed self-defense, and attempted to admit into evidence expert testimony on battered woman syndrome.[8]

THE PLEA OF SELF-DEFENSE

Self-defense is a plea involving specific elements, as is aptly illustrated by section 35.15 of the New York Penal Law. Section 35.15 provides, in part, that individuals are justified in the use of deadly physical force upon another person only when they reasonably believe that such other person is using or is about to use deadly physical force against them.[9] This statute is typical of self-defense statutes throughout the United States,[10] in that it requires defendants to reasonably

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6. *See* Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 4 (1982) [hereinafter Walker]; *see also* Note, *Battered Woman Syndrome: Admissibility of Expert Testimony for the Defense*, 47 Mo. L. REV. 835, 842 (1982) ("[E]xpert testimony can show that the battered woman's familiarity with behavioral clues [alerts] her to the imminence of harm before the moment her attacker actually move[s] to strike.").

7. Not every battered woman would experience difficulty asserting a claim of self-defense. This Note does not concern the battered woman who uses deadly force in what is seen as a "traditional" self-defense situation, as she will arguably have only minimal difficulty in asserting self-defense at trial. Situations of traditional and non-traditional self-defense will be explored later in the text. *See infra* text accompanying notes 20-23.

8. These cases will be divided into two categories: those that have held expert testimony on battered woman syndrome admissible or possibly admissible, *see infra* notes 95-153 and accompanying text, and those that have held it inadmissible, at least on the facts. *See infra* notes 154-86 and accompanying text.

9. N.Y. PENAL LAW § 35.15 (McKinney 1984).

10. *See, e.g.*, CAL. PENAL CODE §§ 197-198 (West 1970) (for justifiable homicide "circumstances must be sufficient to excite the fears of a reasonable person"); CONN. GEN. STAT. ANN. § 53a-19 (West 1985) ("[D]eadly physical force may not be used unless the actor reasonably believes that [the] other person is (1) using or is about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm."); ILL. ANN. STAT. ch. 38, § 7-1 (Smith-Hurd 1972) (defendant must "reasonably [believe] that such force is necessary to prevent imminent death or great bodily harm to himself"); N.J. STAT. ANN. § 2c:3-4 (West 1982) (defense unavailable "unless the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm").

The court in People v. Goetz, 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18 (1986), construed New York's self-defense statute as establishing a subjective/objective standard

perceive that deadly physical force is being, or is about to be, used against them. The immediacy of the perceived danger and the reasonableness of such a perception are central concerns in all self-defense statutes,[11] and are critical elements to be introduced by the defendant at trial.[12] The reasonableness of the defendant's perception will be determined by a jury[13] from the facts and circumstances surrounding the killing.[14]

(possibly even an objective/subjective standard). *See id.* at 114-15, 497 N.E.2d at 52, 506 N.Y.S.2d at 29. Under the statute a jury must first consider whether the defendant had the requisite subjective beliefs. *Id.* at 115, 497 N.E.2d at 52, 506 N.Y.S.2d at 29. Second, the jury must consider "whether these beliefs were reasonable . . . in light of all the 'circumstances.' " *Id.*

11. *See supra* note 10.

12. States differ as to whether self-defense is an affirmative defense with the burden of proof on the defendant, or a defense, where the burden of proof shifts to the prosecution once the defendant puts forth the claim of self-defense. *Compare* Commonwealth v. Winebrenner, 439 Pa. 73, 86, 256 A.2d 108, 114-15 (1970) ("defendant has the burden of proving every actual and real affirmative defense by a fair preponderance of the evidence") *and* Chandler v. State, 7 Md. App. 646, 651, 256 A.2d 695, 697 (1969) (burden of proof on defendant to show by a preponderance of the evidence that he acted in self-defense) *with* State v. Gardner, 51 N.J. 444, 454, 242 A.2d 1, 6 (1968) (once burden of production has been met, either through the state's or the defendant's case, "the State has the burden of proving that the defense is untrue") *and* King v. State, 249 Ind. 699, 700, 234 N.E.2d 465, 468 (1968) (burden on state to show that defendant has not met one or more of the elements required to support a claim of self-defense). *See also* State v. Barrett, 128 Vt. 458, 460, 266 A.2d 441, 443 (1970) (burden on state to prove, "beyond a reasonable doubt, that the acts of the respondent were not done in self-defense"). Regardless of the placement of the burden of proof, the prosecution will try to impeach the defendant's claim. *See* Ibn-Tamas v. United States, 407 A.2d 626, 633 (D.C. 1979) (prosecution tried to undermine defendant's claim of self-defense by suggesting that defendant had exaggerated her husband's abuse, making her story implausible); State v. Kelly, 97 N.J. 178, 201, 478 A.2d 364, 375 (1984) (prosecution suggested that had the defendant's husband lived, he might have contradicted the defendant's testimony at trial). Such efforts will raise doubts in the jurors' minds—doubts that can be assuaged only by an offer of additional proof (testimony or other) on the defendant's perception of danger, and the reasonableness of that perception.

13. This Note will focus on those cases in which a jury serves as the fact finder.

14. 40 AM. JUR. 2D *Homicide* § 155 (1968). There is a split of authority as to what facts and circumstances may be considered. Some courts confine the jury to consideration of only those circumstances existing at the time of the killing. *See* People v. Williams, 240 Ill. 633, 640, 88 N.E. 1053, 1056 (1909) (evidence of antecedent events must be limited to consideration in "connection with some action at the time of the affray"); State v. Potter, 295 N.C. 126, 143, 244 S.E.2d 397, 408 (1978) (all elements of jury instruction are limited to circumstances related to the actual killing). The case of State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977), however, exemplifies the more prevalent, modern view. The *Wanrow* court stated that the law of self-defense called for the jury to consider all the facts and circumstances known to the defendant, including those known substantially before the time of the killing. *Id.* at 236, 559 P.2d at 556. For a detailed analysis of the *Wanrow* opinion, see Eber, *The Battered Woman's Dilemma: To Kill or To Be Killed,* 32 HASTINGS L.J. 895, 920-26 (1981) (arguing that antecedent factors are crucial to the jury's understanding of the battered woman's reasonableness of belief in

The battered woman is presented with many difficulties when pleading self-defense to the killing of her mate. Because a battered woman's perception of imminent danger is colored by her past experience with her mate,[15] she may not seem to fit the "traditional" self-defense mold.[16] A battered woman may react, when confronted by a hostile mate, with what might be termed "anticipatory self-defense."[17] She may kill before the danger to her has become what the law defines as "imminent."[18] If the battered woman's perception of imminent danger is different from the jury's, it is likely to be found unreasonable. Once the battered woman's perception of imminent danger is found unreasonable, her plea of self-defense will be rejected.[19]

To illustrate the great difficulty confronting a battered woman

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the necessity of using self-defense).

15. Dr. Walker stated that all the women she studied were aware that the threats of violence were not idle and that the batterers were capable of killing them. L. WALKER, *supra* note 2, at xv. Thus, a battered woman becomes sensitive to subtle changes in her mate's demeanor, for these changes could signal the imminence of an attack, and any attack could be life-threatening. The woman's heightened sensitivity to danger is, therefore, necessary to her survival. *See* Walker, *How Battering Happens and How to Stop It*, in BATTERED WOMEN, *supra* note 1, at 66-67.

16. The traditional self-defense situation requires that the person claiming self-defense have been "attacked" by the decedent. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 5.7 (2d ed. 1986). The definition of "attacked" does not usually include spoken threats alone. *See* 40 AM. JUR. 2d *Homicide* § 156 (1968). For a discussion of why a battered woman's claim of self-defense may not seem to fit this mold, see *infra* notes 21-24 and accompanying text.

17. The purpose of this Note is not to propose a new type of self-defense, but to help the reader see that a battered woman's killing of her mate often does fit the classic self-defense mold, when seen in the light of testimony on battered woman syndrome, and when standard evidentiary rules are applied.

18. When used in the legal context of self-defense, the word "imminent" means threatening to occur immediately, near at hand, or impending. *See* People v. Williams, 56 Ill. App. 2d 159, 205 N.E.2d 749 (1965). In *Williams*, a member of a gang beating an old man in the street threw a brick at a cab parked across the intersection, after which, the driver fired at the gang. The court held that the danger to the driver was imminent, because the gang was a short distance from the defendant and had the present ability to carry out the threatened harm. *Id.* at 160-62, 205 N.E.2d at 751-53.

19. 40 AM. JUR. 2d *Homicide* § 153 (1968) ("there must have been reasonable grounds for [the accused's] belief that he was in imminent danger of loss of life," in order to excuse or justify a homicide on the ground of self-defense). There is a split in authority, however, as to the standards for determining whether the defendant possessed a reasonable belief. *See id.* § 154. Some courts adopt the view that such a belief is to be determined solely from the viewpoint of the accused, the standard thus being "whether the slayer, under all the circumstances as they appeared to him, honestly believed that he was in imminent danger of losing his life or of suffering great bodily harm." *Id.* The majority rule, followed by most courts, "is that the apprehension of danger and belief of necessity which will justify killing in self-defense must be a reasonable apprehension and belief, such as a reasonable man would, under the circumstances, have entertained." *Id.; see* Addington v. United States, 165 U.S. 184, 187-88 (1928) (no error was committed by the trial court in using "reasonably prudent man" standard of self-defense).

when she attempts to plead self-defense, it is helpful to examine a "typical" instance of self-defense and then contrast it with facts peculiar to instances of battered women defending themselves. In the typical case, two men have an argument, but one of them becomes particularly incensed. The eventual defendant tries to calm the other man down, but to no avail. The other man pulls a gun and points it, at close range, at the defendant's face. Fearing death or serious bodily harm, and seeing no escape route, the defendant pulls his own gun and shoots the other man. The other man dies as a result of the gunshot wound. At trial, since the other man clearly presented an imminent deadly threat to the defendant, the defendant's use of deadly force will probably be found by a jury to be reasonable under the circumstances.[20]

In the case of a battered woman claiming self-defense, the facts may vary widely from the "typical" self-defense scenario.[21] The male may not be wielding a weapon at the time the woman kills him. He may have verbally threatened to kill her, but have made no menacing physical gestures.[22] Though he may have physically attacked her only minutes before she acts against him, the battering may have subsided at the time the woman kills him.[23] Yet the woman, just like the man in the "typical" case, perceives herself as being in imminent danger. At trial, the prosecution will attack the reasonableness of her belief,[24] seeking to undermine her claim of self-defense. Convincing a jury of

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20. These facts are based on People v. Ligouri, 284 N.Y. 309, 31 N.E.2d 37 (1940). In *Ligouri,* the New York Court of Appeals held that the defendant had demonstrated a clear case of self-defense. The trial court erred in refusing to "charge the jury definitely and directly that if they found that the felonious assault . . . was occurring, the defendant against whom it was being perpetrated was justified in killing the felonious aggressor if such were necessary in resisting the assault." *Id.* at 318, 31 N.E.2d at 40.

21. The characteristics used in this paragraph are taken from many different cases involving battered women. *See infra* notes 13-14 and accompanying text. Of course, not every case of a battered woman defending herself fits the same mold. For instance, in People v. Minnis, 118 Ill. App. 3d 345, 455 N.E.2d 209 (1983), the defendant testified that she killed her mate while defending herself from an ongoing physical attack. *Id.* at 352-53, 455 N.E.2d at 215. The court stated that such testimony, if believed by a jury, was sufficient to demonstrate that the force used by defendant was reasonable under the circumstances. *Id.* at 355, 455 N.E.2d at 217. Consequently, although the defendant was a battered woman, testimony on battered woman syndrome was not necessary to bolster her claim of self-defense. *Id.* This Note concerns only those cases where such testimony is pivotal to the woman's claim of self-defense, because the killing did not occur in the middle of an ongoing, uninterrupted attack. *See infra* text accompanying notes 95-186.

22. *See, e.g.,* State v. Allery, 101 Wash. 2d 591, 593, 682 P.2d 312, 313-14 (1984) (decedent had threatened to kill defendant, but remained lying on couch when defendant reentered room and shot him).

23. *See, e.g.,* State v. Kelly, 97 N.J. 178, 189-90, 478 A.2d 364, 369 (1984) (shortly after a brutal physical dispute between the defendant wife and the decedent husband, the defendant stabbed the decedent with a scissor after he ran at her with hands raised).

24. The prosecution's tactics will become evident later in this Note. *See infra* notes 111-18, 122-25 and accompanying text.

the reasonableness of the battered woman's perceptions of imminent danger is not easy, but is indispensable if her plea of self-defense is to succeed.[25] Expert testimony concerning battered woman syndrome[26] can serve to bolster a battered woman's claim of self-defense, by explaining why her perceptions of imminent danger were entirely reasonable, given the violent history of her relationship with her mate.

BATTERED WOMAN SYNDROME

> The man that lays his hand upon a woman,
> Save in the way of kindness, is a wretch,
> Whom 'twere gross flattery to name a coward.[27]

The quote above expresses, in nineteenth-century meter, a sentiment espoused by society at large throughout most of recorded history: A man should not strike a woman. Concurrent with, and ultimately contradicting this belief, was the idea that a man could, and indeed should, when necessary, employ physical force to control his wife's behavior. Toward that end, much "popular wisdom" seems actually to have encouraged wife beating.[28] In the law, concepts of marital pri-

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25. A prevailing standard for self-defense was set forth in Beard v. United States, 158 U.S. 550 (1895). The Court stated that "the question for the jury was whether [the defendant] had, at the moment he struck the deceased, reasonable grounds to believe, and in good faith believed, that he could not save his life or protect himself from great bodily harm except by doing what he did." *Id.* at 560.

26. For the purposes of this Note, the phrase "battered woman" will refer to any woman who is the victim of a battering relationship. Because the factual situations often involve lovers and common-law wives, as well as wedded spouses, *see* L. WALKER, *supra* note 2, at xi, the syndrome is often called "battered (or abused) woman (woman's, women, women's, wife, wife's, wives, wives') syndrome." *See id.* at xv; State v. Necaise, 466 So. 2d 660, 664 (La. Ct. App. 1985).

27. J. Tobin, *The Honeymoon*, act II, scene i (1805).

28. Ginny NiCarthy gives a historical perspective:

> Proverbs and poetry illustrate the historical acceptance of the idea that it's natural for men to control women and for male violence to support the concept of male superiority. Old English proverb: "A spaniel, a woman and a hickory tree, the more ye beat them, the better they be"; Alfred Lord Tennyson: "Man is the hunter, woman his game"; Russian proverb: "A wife may love a husband who never beats her, but she doesn't respect him."

G. NICARTHY, GETTING FREE: A HANDBOOK FOR WOMEN IN ABUSIVE RELATIONSHIPS 4 (1982). Of course, not all men agree with the above quoted "wisdom." In response to just such brutal attitudes, British philosopher John Stuart Mill wrote in 1869:

> [F]rom the very earliest twilight of human society, every woman . . . was found in a state of bondage to some man. Laws and systems of polity always begin by recognising [sic] the relations they find already existing between individuals. They convert what was a mere physical fact into a legal right . . . .

Mill, *The Subjection of Women*, in ESSAYS ON SEX EQUALITY 130 (A. Rossi ed. 1970). For a detailed history of wife beating, see R. LANGLEY & R. LEVY, WIFE BEATING: THE SILENT CRISIS 29-42 (1977).

vacy[29] and the wife as the husband's property developed.[30] These legal doctrines, while not actually encouraging wife beating, certainly did nothing to remedy it.[31] Fortunately, attitudes toward the abuse of women seem to be changing.[32]

In the twentieth century, wife battering has come into view as a serious and widespread phenomenon.[33] Apparently, the American fam-

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29. The early courts were very reluctant to examine married life behind closed doors. *See* State v. Rhodes, 61 N.C. 445, 448 (1868) ("[F]amily government is recognized by law as being complete in itself.") If family law was a closed system, the husband was the ruler of that system. In 1824, the Mississippi Supreme Court stated: "Perhaps the husband should still be permitted to exercise the right of moderate chastisement, in cases of great emergency, and to use salutary restraints in every case of misbehavior, without subjecting himself to vexatious prosecutions . . . ." Bradley v. State, 1 Miss. (1 Walker) 156, 156 (1824).

30. *See* Eber, *supra* note 14, at 898.

31. One legal doctrine that actually seems to have encouraged wife beating was the British "rule of thumb," which stipulated that a man might chastise his wife with "a rod not thicker than his thumb." *See* Davidson, *Wifebeating: A Recurring Phenomenon Throughout History*, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 18 (M. Roy ed. 1977). Davidson also notes a nineteenth-century study of violence against wives, published in *The Contemporary Review* of 1878, entitled, "Wife Torture in England." *Id.* at 17. The article was written by Frances Power Cobbe, an upperclass British woman who sought "to help her less fortunate sisters." *Id.* Mrs. Cobbe reported on a section of Liverpool, England "where husbands' brutality had become so oppressive that the area was referred to as the . . . 'kicking district.' " *Id.* For a further discussion of the attitudes about, and causes of, wife beating throughout the centuries (both generally and in contemporary society), see Moore, *supra* note 1, at 10-15; *see also* T. DAVIDSON, CONJUGAL CRIME (1978); Eber, *supra* note 14, at 897-901; Comment, *The Battered Wife Syndrome: A Potential Defense to a Homicide Charge*, 6 PEPPERDINE L. REV. 213 (1978).

32. *See* Martin, *What Keeps a Woman Captive in a Violent Relationship*, in BATTERED WOMEN, *supra* note 1, at 55-57. And yet, "the concepts of marital privacy and wives as their husbands' property continue to influence the attitude of police departments and prosecutors and to militate against the recognition that wife beating is a criminal offense." Eber, *supra* note 14, at 899.

33. Dr. Lenore Walker estimates that as many as 50% of all women will be beaten at some point in their lives. L. WALKER, *supra* note 2, at ix. Donna E. Moore, in her introduction to BATTERED WOMEN, cites some statistics indicating the pervasiveness of the problem:

> - Washtenaw County, Michigan. Thirty-five percent of all assault cases are wife assault.
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> - Dade County, Florida. Over a nine month period, 1,000 cases of battered women were handled.
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> - Montgomery County, Maryland. The Wife Assault Task Force handled 650 incidents during its first year of operation.
>
> - Michigan. One county reported 42.4% of all assault complaints in a five-month period were wife assault.
>
> - Brooklyn Legal Services, 1976. Fifty-seven percent of the women filing for divorce complained of physical assaults occurring for approximately four years before seeking divorce.

Moore, *supra* note 1, at 13. For a detailed discussion of the criminal justice system's

ily is not always the tranquil refuge that society expects it to be.[34] On the contrary, "it is frequently a fertile ground for often lethal aggression."[35] This aggression is, more often than not, directed at a woman.[36] Although some women do not stay in battering relationships, many do.[37] Battered woman syndrome describes not only the situation of a woman caught in a battering relationship with a man, but also the reasons why she may actually stay in such a relationship.[38]

Battering relationships are characterized by violence, but not all incidents of violence directed at a woman by a man fit the theory of battered woman syndrome.[39] In battered woman syndrome, the violence may start small but, inevitably, builds to a full-scale attack upon the woman's body.[40] Why a woman "chooses" to endure such

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response to battered women, see generally Martin, *Battered Women: Society's Problem*, in THE CRIMINAL JUSTICE SYSTEM AND WOMEN 265 (B. Price & N. Sokoloff eds. 1982).

34. L. WALKER, *supra* note 2, at 42.

35. *Id.*

36. 1973 statistics show that one fourth of all murders are intra-family. D. MARTIN, BATTERED WIVES 14 (1976). One half of all intra-family killings are between husband and wife, and the wife is the victim 52% of the time. *Id.*

37. *See* L. WALKER, *supra* note 2, at xvi.

38. *See id.; see also* Moore, *supra* note 1, at 20-21 ("One of the most compelling reasons for a woman remaining in a battering home is that of dependency: physical, financial, and emotional.")

39. L. WALKER, *supra* note 2, at xv. Dr. Walker describes the pattern that helps define battered woman syndrome:

> A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, [with the same man or a different man] and she remains in the situation, she is defined as a battered woman.

Id.; see also Moore, *supra* note 1, at 8 (defining battering as "deliberate, severe, and repeated physical injury with the minimal injury being severe bruising") (citing D. MARTIN, *supra* note 36, at 1-4).

40. "Women who have been battered over a period of time know that these minor battering incidents will only escalate." L. WALKER, *supra* note 2, at 56-57. The sort of violence endured by a battered woman in a full-scale attack was described in a letter written by a battered wife:

> For most of my married life I have been periodically beaten by my husband. What do I mean by "beaten"? I mean that parts of my body have been hit violently and repeatedly, and that painful bruises, swelling, bleeding wounds, unconsciousness, and combinations of these things have resulted. . . . I have had glasses thrown at me. I have been kicked in the abdomen when I was visibly pregnant. I have been kicked off the bed and hit while lying on the floor—again when I was pregnant. I have been whipped, kicked and thrown, picked up and thrown down again.

Martin, *supra* note 32, at 33-34.

violence[41] rather than leave her mate is difficult to understand because of the complex set of psycho-social variables involved.[42]

One important variable is the changing nature of the battering relationship. Dr. Walker identifies three distinct phases in the battering relationship, phases which "vary both in time and intensity for the same couple and between different couples."[43] The first, termed the "tension-building phase," is characterized by relatively minor incidents of violence.[44] In this phase, the violence is minimal, yet the woman is keenly aware of her mate's potential for more serious abuse.[45] The second phase is characterized by the inevitable "explosion or acute battering incident."[46] The third phase encompasses a period when the man feels remorse for having beaten the woman and becomes extremely loving and contrite.[47]

As brutal as the second phase can be, the third phase makes the couple's relationship seem idyllic in comparison.[48] It is the harmony of the third phase that, among other things, makes a woman reluctant to leave her battering mate.[49] During the third phase, the woman envisions that this caring and attentive man is the real man with whom she fell in love.[50] She fails to realize that the violent actions of the second phase reveal an integral part of her mate's personality.[51] Consequently, she is "persuaded" to remain in the relationship, and the cycle repeats itself.[52]

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41. For material illustrating why the endurance of this violence is often not by choice, see *infra* notes 43-64 and accompanying text.

42. Donna Moore lists the major reasons why a woman endures such a relationship as "dependency, fear, social stigma, home and love, and psychological pressures." Moore, *supra* note 1, at 20; *see also* G. NiCARTHY, *supra* note 28, at 10-11 (identifying principle reasons as love, guilt, and fear of poverty).

43. *See* L. WALKER, *supra* note 2, at 55.

44. *Id.* at 55-57.

45. *Id.* at 56-57.

46. *Id.* at 59. Incidents of battering can last anywhere from a few minutes to over an hour, or more. Martin, *supra* note 33, at 264.

47. L. WALKER, *supra* note 2, at 65. Dr. Walker has observed that, over time, the "tension building period actually becomes more pronounced, and the periods of loving contrition shorten." Walker, *supra* note 6, at 9.

48. L. WALKER, *supra* note 2, at 65.

49. *See infra* text accompanying notes 50-64.

50. L. WALKER, *supra* note 2, at 67-68. Ginny NiCarthy terms this phase the "honeymoon" phase. G. NiCARTHY, *supra* note 28, at 65. In a study of 150 cases of abuse, Maria Roy, founder and executive director of Abused Women's Aid in Crisis, Inc., found that the hope that their mate would stop beating them was a prime factor in causing victims to stay with their abusive mates. Roy, *A Current Survey of 150 Cases*, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE, *supra* note 31, at 31. The third phase, with its romantic calm, spurs such hope for reform. *See id.*

51. L. WALKER, *supra* note 2, at 69.

52. *Id.* at 66-69.

Dr. Walker explains that the social-learning theory called "learned helplessness" can also add to our understanding of the battered woman's dilemma.[53] This theory attempts to understand how people's perception of "control over events in their lives contributes to the way they think and feel about themselves and their ability to act," and accounts for a woman's feeling of helplessness throughout all of the phases of the relationship.[54] Repeated batterings diminish the woman's will to respond.[55] She cannot conceive of success and does not believe any response from her will result in a favorable outcome.[56] Because of the unpredictability of the battering, she comes to believe she has no control over her life. Therefore, she does not act in any way that might serve to extricate her from the battering situation.[57] Yet she lives in constant fear,[58] for any minor domestic conflict may result in a beating, and each beating presents the potential for imminent danger of death.[59]

The cyclical nature of the violence and its unpredictability are not the only factors working against a woman's escape from her abusive mate. Frequently, the male threatens to harm the woman's family and friends if she leaves him.[60] Often these very same family members and friends will exert pressure upon her, urging her to stay and try to make the relationship work.[61] Until recently, the legal system has encouraged

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53. *Id.* at 43.

54. *Id.* at 43-44. Dr. Walker explains that human beings come to expect "certain things to occur when [they] make a certain response." When the expected outcome does not occur, they look for a logical reason for the nonoccurrence. When none can be found, the inevitable conclusion is that they have no control over the outcome. "In this way, we learn what kinds of things in our environment we can control and what kinds of things are beyond our control." *Id.* at 45.

55. *Id.* at 49. The woman's motivation to respond is not the only thing diminished. "Her sense of well being becomes precarious. She is more prone to depression and anxiety." *Id.* at 49-50.

56. *Id.* at 49-50.

57. *Id.*

58. *Id.* at 52.

59. *See* Walker, *supra* note 15, at 66-68.

60. L. WALKER, *supra* note 2, at 105. Dr. Walker describes the situation: "In many cases, batterers threatened violence against the woman's parents, children, friends, coworkers, or other people in their support system. These women believed that their men could and would commit such acts of violence. Sometimes they took the beating rather than allow someone else to be harmed." *Id.*

61. *Id.* Ginny NiCarthy quotes a few common cliches used to keep a woman in a violent relationship:

- A woman's place is by her husband's side.
- No real woman leaves just because of a few family fights.
- It is the woman's responsibility to see that the family functions harmoniously.
- It must be her fault if he is being violent.
- She should learn to be a better wife.

this sort of compromise.[62] Even the battered woman who decides she must leave may have no place to seek refuge, and if she does, she may lack the resources to get there.[63]

In short, battered women are rightfully afraid of their mates, and yet, without outside help, feel virtually powerless to leave them.[64] When a woman trapped in this situation kills her abusive mate, testimony explaining battered woman syndrome can help a jury understand the woman's state of mind and her perceptions at the time of the killing. The testimony will, therefore, support a battered woman's claim that she killed in self-defense.[65] Whether such testimony will ever reach the jury depends upon evidentiary criteria.

- You can't run away from your problems.
- The family should stay together through thick and thin and work things out together.

G. NICARTHY, *supra* note 28, at 17.

62. It is beyond the scope of this Note to undertake an analysis of the types of outside help that a battered woman might need in order to break free or gain protection from her batterer. It is necessary to note, however, that the police in many cases do not supply the help a battered woman needs. *See* Paterson, *How the Legal System Responds to Battered Women*, in BATTERED WOMEN, *supra* note 1, at 87 ("nonresponsiveness is a common denominator running through experiences of battered women with the police"). Del Martin cites some figures that aptly illustrate the reluctance of some police officers and departments to get involved in family violence:

> A study conducted by the Kansas City (Missouri) Police Department in 1971-72 revealed that 46,137 [domestic disturbance] calls were received during one year. Of the city's homicides, 40% were found to be cases of spouse killing spouse. In more than 85% of these homicides, police had been summoned at least once before the murder occurred, and in almost 50% of the cases, the police had been called to the scene five or more times within the two year period prior to the homicide.

Martin, *supra* note 33, at 267-68; *see also* Eber, *supra* note 14, at 905 ("[p]olice are reluctant to arrest wife-beaters and to get involved in family disputes for a variety of reasons"); Schneider, *Equal Rights To Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 626 (1980) (legal system often fails to protect women from abuse); Note, *supra* note 6, at 840 (1982) (though it is "widely presumed that the law enforcement system protects battered women," it often does not).

63. *See* Schneider, *supra* note 62, at 626 (a woman who leaves may be without employment, child care, or adequate housing).

64. L. WALKER, *supra* note 2, at 47 (powerlessness stems from belief that victim cannot control what happens to her). Outside help may include some sort of shelter the woman can go to for support and lodging. *Id.* at 53. A recent article reports that the number of such shelters nationwide has risen from zero to 700 in the last few years. *See* Machlowitz, *PBS Explores the Hell of Family Violence*, A.B.A. J., June 1985, at 120, 120.

65. *See supra* text accompanying notes 53-59.

EVIDENTIARY CRITERIA

There is a growing trend toward allowing expert testimony on battered woman syndrome to reach the jury.[66] Following is a brief analysis of the evidentiary criteria such testimony must meet in order to be admissible, and of the objections some courts have found to battered-woman-syndrome testimony.

Battered-woman-syndrome testimony is expert testimony and, therefore, carries with it a special set of evidentiary rules addressed specifically to expert testimony. Yet there is one preliminary requirement that any type of evidence must meet: relevancy.[67] McCormick, one of the foremost authorities on the law of evidence, defines the two components of relevancy as "materiality" and "probative value."[68] Materiality depends on the relation between the propositions for which the evidence is offered and the issues in the case.[69] The evidence must be offered to help prove a proposition which is a matter in issue.[70] Probative value refers to the "tendency of evidence to [actually] establish the proposition that it is offered to prove,"[71] weighed against the same evidence's tendency to unfairly prejudice the jury.[72]

In a case where a battered woman kills her mate and pleads self-defense, there are three critical propositions she will want to prove at trial: first, that the killing was necessary; second, that her beliefs of danger were reasonable under the circumstances; and third, that she had no way to escape.[73] Underlying all of these propostions is the defendant's credibility; she will want the jury to believe her.[74] Despite the fact that testimony on battered woman syndrome can help establish each of these critical propositions, courts have voiced numerous objections to the relevancy of such testimony. Some courts find the testimony too prejudicial.[75] Other courts fail to see its connection to any of

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66. *See* People v. Torres, 128 Misc. 2d 129, 130, 488 N.Y.S.2d 358, 360 (Sup. Ct. 1985) (noting that battered-woman-syndrome testimony increasingly is being allowed to reach the jury).

67. *See* C. MCCORMICK, MCCORMICK ON EVIDENCE §§ 184-185 (E. Cleary 3d ed. 1984).

68. *Id.* § 185.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* Federal Rule of Evidence 401 incorporates both components: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

73. *See supra* text accompanying notes 9-14.

74. *Id.*

75. *See, e.g.*, Ibn-Tamas v. United States, 407 A.2d 626, 631 (D.C. 1979) (trial court below found battered-woman-syndrome testimony too prejudicial because it places the decedent on trial as a batterer), *appeal after remand*, 455 A.2d 893 (D.C. 1983).

the above-mentioned propositions,[76] and still others deem the testimony irrelevant after recharacterizing the propositions themselves.[77] Once a court rules that expert testimony on battered woman syndrome is relevant, then the special evidentiary criteria governing expert testimony must be examined.

An expert witness has something entirely different to contribute than an ordinary observer.[78] Rather than merely relating what he saw or heard, an expert has the power "to draw inferences from the facts which a jury would not be competent to draw."[79] Because these valuable inferences are one step beyond what an ordinary witness is permitted to say, the expert and the proposed testimony must meet stringent requirements.

The first requirement for expert testimony is that it be "beyond the ken" of the average layperson. In other words, the proffered testimony must be "distinctively related to some science, profession, business or occupation."[80] This requirement is a traditional one that is no longer mandatory in many state courts, but remains necessary in others.[81]

In jurisdictions still requiring it, the beyond-the-ken standard can present a very real obstacle to the admission of expert testimony on battered woman syndrome. A court may fail to see the testimony as containing knowledge so technical that an ordinary juror could not grasp it without the expert's testimony.[82] Additionally, a court may be

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76. *See, e.g.*, State v. Thomas, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 139 (1981) (battered-woman-syndrome testimony inadmissible as not beyond the ken of the average layperson; jury was well able to assess claim of self-defense without such testimony). For a discussion of *Thomas*, see *infra* text accompanying notes 154-64.

77. *See, e.g.*, State v. Necaise, 466 So. 2d 660, 665 (La. Ct. App. 1985) (battered-woman-syndrome testimony inadmissible because it is akin to the concept of "partial responsibility," which has been rejected in Louisiana). For a discussion of *Necaise*, see *infra* text accompanying notes 165-73.

78. C. MCCORMICK, *supra* note 67, § 13.

79. *Id.*

80. *Id.; see* McCoid, *Opinion Evidence and Expert Witnesses*, 2 UCLA L. REV. 356, 362 (1955) (courts have "for generations permitted a witness who possessed some special skill or knowledge, which a man of common experience lacked, to testify to his opinion on questions where such knowledge made him capable of making inferences which could not be drawn by the court or jury").

81. *See* Miller v. Pillsbury Co., 33 Ill. 2d 514, 516, 211 N.E.2d 733, 734 (1965) ("the trend is to permit expert testimony . . . even as to matters of common knowledge and understanding where difficult of comprehension and explanation"). Federal Rule of Evidence 702 abandons the beyond-the-ken standard. *See infra* text accompanying notes 84-87. *But see* State v. Thomas, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981) (beyond-the-ken standard employed to disallow expert testimony on battered woman syndrome).

82. *See Thomas*, 66 Ohio St. 2d at 521, 423 N.E.2d at 139 (battered-woman-syndrome testimony was not beyond the ken of the average juror, who was capable of judging woman's claim of self-defense without it).

cautious about the expert's power to draw conclusions about women involved in abusive relationships, and see this power as invading the fact-finding province of the jury.[83]

Federal Rule of Evidence 702 encompasses a more liberal standard than the beyond-the-ken requirement.[84] Jurisdictions which have adopted the federal standard typically have less apprehension about allowing battered-woman-syndrome testimony to reach the jury.[85] This rule provides for the admission of "expert opinion concerning matters about which jurors may have general knowledge if the expert opinion would still aid their understanding of the fact issue."[86] Thus, rule 702 acknowledges that specialized knowledge may be helpful, even when a particular matter is within the competence of the jurors.[87]

The next requirement shifts its focus from the testimony itself to the witness. Only a witness possessing "sufficient skill, knowledge, or experience in or related to the pertinent field" will be permitted to testify.[88]

Even if the testimony and the witness meet the above qualifications, there is one more test to be passed. The state of the pertinent art or scientific knowledge must be such that a reasonable opinion may be asserted.[89] This requirement concerns not the testimony itself, nor the expertise of the witness, but the status of the pool of knowledge from which the expert draws his testimony.[90] This pool of knowledge

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83. *See* Buhrle v. State, 627 P.2d 1374, 1378 (Wyo. 1981) (insofar as the expert on battered woman syndrome was prepared to state an opinion on whether defendant was in fear of death at the time of the shooting, and whether such fear was reasonable, the expert's testimony invaded the fact-finding province of the jury).

84. C. MCCORMICK, *supra* note 67, § 13. Rule 702 provides that expert testimony on "scientific, technical, or other specialized knowledge" is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702.

85. *See, e.g.*, State v. Allery, 101 Wash. 2d 591, 592, 682 P.2d 312, 315 (1984) (applying a standard similar to federal rule, testimony on battered woman syndrome admissible to aid the jury in understanding the battered woman's perceptions at the time of the killing).

86. C. MCCORMICK, *supra* note 67, § 13.

87. *Id.*

88. *Id.* When the field encompasses a large area of knowledge, such as medicine, and the matter to be illuminated by the expert falls within the domain of a speciality in that broad field, it is not necessary that the expert be a specialist in the sub-field. *Id.; see* Parker v. Gunther, 122 Vt. 68, 164 A.2d 152 (1960) (general practitioner allowed to testify as to brain injury).

89. C. MCCORMICK, *supra* note 67, § 13; *see, e.g.*, United States v. Watson, 587 F.2d 365, 369 (7th Cir.) (cross-racial identification not sufficiently established within the scientific community to warrant admission), *cert. denied*, 439 U.S. 1132 (1978).

90. This requirement, while not questioning the expertise of the witness outright, does cast a definite shadow upon the expert's credentials. How can one be a genuine expert in a field that is not "sufficiently established" to be recognized by others in the same area? For example, are experts on "flying saucers" considered reliable?

"must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[91]

These last two criteria pose special problems concerning the admission of expert testimony on battered woman syndrome because of the relative novelty of the study of battered women.[92]

Courts are cautious about the status of the theories behind battered woman syndrome within the scientific community.[93] This understandable caution leads them to question the testimony's reliability and, in turn, the credentials of the expert presenting the testimony.[94]

An examination of the leading cases addressing the question of the admissibility of expert testimony on battered woman syndrome reveals that courts increasingly are overcoming these objections to admission of the testimony. The following cases demonstrate the various ways courts have surmounted these objections without compromising the integrity of the rules of evidence or the plea of self-defense.

CASE LAW

The first leading case to examine in detail the admissibility of expert testimony on battered woman syndrome was *Ibn-Tamas v. United States*.[95] In *Ibn-Tamas*, the defendant, Mrs. Ibn-Tamas, was convicted of the second-degree murder of her husband.[96] At trial, she pled self-

91. Frye v. United States, 293 F. 1013, 1014 (1923). Acceptance in the field may be determined by a variety of considerations including the number of published works on a particular subject. *See* State v. Kelly, 97 N.J. 178, 210-11, 478 A.2d 364, 380 (1984) (numerous books, articles, and papers on battered woman syndrome were strong indications of its acceptance in the field).

92. *See* Buhrle v. State, 627 P.2d 1374, 1377 (Wyo. 1981) (research in field of battered woman syndrome is "in its infancy" and its objectives are not clearly defined).

93. *See, e.g., id.* The court cited several examples: research on battered woman syndrome is relatively new, objectives are not easily identifiable, statistical analysis is in the early stages of development, and acceptance is limited chiefly to those involved in research of the syndrome. *Id.*

94. *See, e.g., id.* The *Buhrle* court was apprehensive of the fact that the shooting occurred several days after the altercation, which was not in accord with "the standard battered woman self-defense situation." *Id.* The court further stressed its dissatisfaction with the vague and unclear explanation given by the expert of why Mrs. Buhrle's behavior did not conform to that generally exhibited by battered women. *Id.*

95. 407 A.2d 626 (D.C. 1979), *appeal after remand,* 455 A.2d 893 (D.C. 1983). While perhaps not the first case to consider the issue of the admissibility of expert testimony concerning battered woman syndrome, *Ibn-Tamas* is certainly the most widely cited by other courts. *See, e.g.*, Smith v. State, 247 Ga. 612, 618-19, 277 S.E.2d 678, 682-83 (1981); State v. Kelly, 97 N.J. 178, 202, 478 A.2d 364, 376 (1984); Buhrle v. State, 627 P.2d 1374, 1377 (Wyo. 1981). As such, *Ibn-Tamas* is an important starting point in the discussion of the admissibility of battered-woman-syndrome testimony.

96. 407 A.2d at 628. Mrs. Ibn-Tamas had been charged with "second-degree murder while armed," and "second-degree murder." *Id.* After one mistrial, a second jury returned a verdict of "second-degree murder while armed." *Id.* The trial court sentenced

defense.[97] Her appeal to the District of Columbia Court of Appeals raised six issues, one of which was the propriety of the trial court's exclusion of expert testimony offered by the defense on the subject of battered woman syndrome.[98] In determining whether the trial court abused its discretion in excluding expert testimony on battered woman syndrome, the court of appeals employed the standard tests for admissibility of evidence.[99]

Four distinct elements from the trial court record were important in ruling on admissibility. The first was Mrs. Ibn-Tamas' own testimony concerning events on the morning she shot her husband, and numerous past beatings inflicted upon her by her husband.[100] The second

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Mrs. Ibn-Tamas to one to five years. *Id.*

97. *Id.*

98. Also at issue were:

> [1] the prosecution's use, for impeachment purposes, of appellant's testimony at her first trial; [2] the prosecution's comments to the jury about appellant's consultation with her attorney before interrogation by the police after her arrest; [3] the court's allowing the prosecution to question appellant about her beneficial interest in her husband's life insurance policies; [4] an allegedly prejudicial variance between the prosecutor's description of the case in his opening remarks and the evidence adduced at trial; and [5] the trial court's refusal to instruct the jury as to how appellant's particular physical condition should affect an evaluation of her self-defense claim.

Id. at 628. Though these five issues were also addressed by the reviewing court, *id.* at 640-44, the issue of admissibility of battered-woman-syndrome testimony takes up the bulk of the court's opinion. *See id.* at 631-40.

99. The focus of the court of appeals' analysis was the trial court's exclusion of expert testimony on the ground that it would preempt the jury's function. *See id.* at 632. Concluding that this ground for exclusion concerned the issue of the testimony's admissibility, the court applied the three-fold admissibility test of Dyas v. United States, 376 A.2d 827, 832 (D.C.), *cert. denied,* 434 U.S. 973 (1977), which was based on C. MCCORMICK, MCCORMICK ON EVIDENCE § 13 (E. Cleary 2d ed. 1972). *See* 407 A.2d at 633. The *Ibn-Tamas* court summarized the admissibility test as follows: "the subject of the testimony must lend itself to expertise, the proffered expert must be qualified to give it, and experts must have studied the subject in a manner that will justify an expert opinion." *Id.* For a further discussion of the standard tests for admissibility of expert testimony, see *supra* text accompanying notes 80-91.

100. 407 A.2d at 630-33. Mrs. Ibn-Tamas had testified that on the morning of the shooting "she was aware of her husband's past violence toward herself and others, as well as the fact that her husband kept loaded revolvers and shotguns in the house and the adjoining office." *Id.* at 630. The court noted that subsequent investigation revealed that Dr. Ibn-Tamas had "at least" three guns not counting the weapon used by Mrs. Ibn-Tamas, "and hundreds of live rounds of ammunition in his house and office." *Id.* at 630 n.8.

The importance of examining Mrs. Ibn-Tamas' self-defense testimony relates to the admissibility requirement that the subject matter of the expert witness' testimony be "beyond the ken of the average layman." *See supra* text accompanying notes 80-91. To satisfy that substantive prong of the *Dyas* test, the expert's testimony "must provide a relevant insight which the jury otherwise could not gain in evaluating appellant's self-defense testimony about her relationship with her husband." 407 A.2d at 633.

was the prosecution's tactics in countering Mrs. Ibn-Tamas' claim of self-defense.[101] The third was the substance of what the expert would have proffered had such testimony been allowed to reach the jury.[102] Finally, in deciding whether the trial court abused its discretion, the court of appeals examined the criteria by which the trial court excluded such testimony.[103]

In determining the relevance of expert testimony concerning battered woman syndrome, the court of appeals focused on the defendant's testimony at trial.[104] Mrs. Ibn-Tamas' statement concerning numerous past beatings inflicted by her husband,[105] as well as the events of the morning on which Mrs. Ibn-Tamas shot her husband,[106] was re-

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101. 407 A.2d at 633-34. In an effort to discredit Mrs. Ibn-Tamas' testimony regarding her relationship with her husband, the prosecution suggested to the jury that a woman who was truly frightened by her husband would likely call the police or leave him. *Id.* at 634. In response, the defense proffered the expert's testimony on battered women to show that such women are a distinct and identifiable class of persons who would not act in accordance with the conduct characterized by the prosecution as the "logical reaction." *Id.* By examining this element of the record, the appellate court further tested whether the expert testimony was admissible by virtue of its ability to shed additional light on Mrs. Ibn-Tamas' testimony that she "perceived herself in imminent danger at the time of the shooting." *Id.*

For a further discussion of the prosecution's tactics, see *infra* notes 110-11 and accompanying text.

102. 407 A.2d at 634. Dr. Walker, the defendant's expert, had told the lower court the substance of her testimony out of the presence of the jury. *Id.*

103. *See id.* at 632-36. Having found, on review, that the substantive element of the *Dyas* test—"beyond the ken of the average layman"—was met, *id.* at 635, the *Ibn-Tamas* court needed to determine whether the trial court had excluded the expert testimony based on either of the two remaining *Dyas* criteria concerning the expert's credentials and the state of scientific knowledge in the field of "battered women." *See id.*

The court concluded that the trial court's ruling to exclude the expert's testimony neither explicitly nor implicitly addressed the second or third *Dyas* criterion. *Id.* at 635. The court noted that an "appellate court must not affirm a ruling premised on trial court discretion unless the record clearly manifests either (1) that the trial court has ruled on each essential criterion, or (2) that the trial court, as a matter of law, had 'but one option.'" *Id.* (quoting Johnson v. United States, 398 A.2d 354, 364 (D.C. 1979)). Having found that the trial court had not in fact ruled on each essential criterion—the first prong of its inquiry—the court of appeals examined the next prong: whether the trial court erred in ruling the testimony inadmissible as a matter of law. *Id.* The court ultimately found such error. *Id.* at 639.

104. *See id.* at 628-31.

105. Among the past incidents of violence described by the court were: a beating with a shoe where Dr. Ibn-Tamas had "dragged [the defendant] and their six month old baby off a bed and onto the floor;" a beating on a cement porch where the doctor had caused his wife to lose consciousness; and several occasions, when Mrs. Ibn-Tamas was pregnant, where Dr. Ibn-Tamas had punched her "in the neck and hit her in the head and face with his fists." *Id.* at 629.

106. *See id.* at 630. According to the defendant's testimony, Dr. Ibn-Tamas had not only beaten her that morning but had also pointed a gun at her face and said, "You are going out of here this morning one way or the other." *Id.* Shortly thereafter, according to

counted by the court in considerable detail. From the court's description of the testimony, a classic cyclical pattern of violence emerged.[107] The court noted that the Ibn-Tamas' "marriage was marred by recurring violent episodes separated by periods of relative harmony."[108] In citing Mrs. Ibn-Tamas' testimony, the court did not rule upon its credibility, but recognized only that such testimony had a direct bearing upon the relevancy of the battered-woman-syndrome testimony which the defendant sought to have admitted to strengthen her self-defense claim.[109]

The prosecution's cross-examination also bolstered the relevence of the expert's testimony. The prosecution "attempted to discredit [the defendant's] testimony by suggesting to the jury, through its questions, that Mrs. Ibn-Tamas' account of the relationship with her husband over the years had been greatly overdrawn, and that her testimony about perceiving herself in imminent danger . . . was therefore implausible."[110] In addition, the court of appeals found that the government implied to the jury that the logical reaction of a woman who was truly frightened by her husband, and regularly brutalized, would be to call the police or to leave him.[111]

Mrs. Ibn-Tamas, her husband returned to the bedroom and resumed his attack. The court recounted Mrs. Ibn-Tamas' version of what then happened:

> She was pushed toward the bureau on top of which her husband had left the gun that he had threatened her with moments earlier. Thinking that he was going to grab the gun, she picked it up, begged him to leave her alone, and fired the gun . . . to scare him. The doctor then left the room; . . . she took her daughter . . . and started toward the stairway. . . . [H]er husband allegedly jumped out from behind the wall at the landing. [Mrs. Ibn-Tamas] fired twice more. Although it was not immediately apparent to [her], one of those two shots struck [her husband] in the abdomen . . . . [H]e backed down the stairs . . . . As [Mrs. Ibn-Tamas] reached the bottom landing . . . her daughter jumped out in front of her, looked into the examination room and called out "Daddy." When [Mrs. Ibn-Tamas] glanced through the open door, she saw her husband crouching with what she thought was a gun in his hand. She fired again, striking the doctor in the head with what proved to be the fatal blow.

Id. at 630-31 (footnote omitted). This testimony, according to the court, was in conflict with that of Dr. Ibn-Tamas' secretary, Lynette McCollom, who testified that she heard a shot followed by thumping noises only seconds after Dr. Ibn-Tamas had passed her in the office. *Id.* at 631. Ms. McCollom then heard Dr. Ibn-Tamas say, "[D]on't shoot me anymore," and a second shot. *Id.* Then Ms. McCollom heard Mrs. Ibn-Tamas say to her husband, "I am not going to leave you, I mean it," and then the third and final shot. *Id.*

107. The Ibn-Tamas relationship exhibited a particularly brutal cyclical pattern. *Id.* at 629. The periods of relative calm did not last long, and the acute battering incidents were very close together. *Id.*

108. *Id.*

109. *See id.* at 632 (the credibility of such testimony was a question for the jury).

110. *Id.* at 633.

111. *Id.* at 633-34. The court further noted the prosecution's tactics in a footnote, by quoting from the state's closing argument: "Maybe she put up with too much too long,

Bearing in mind the defendant's testimony and the prosecution's cross-examination strategy, the court of appeals evaluated the expert testimony proffered in the court below. The court observed that Dr. Walker's testimony would have provided an explanation of the cycle theory of violence—and thus an explanation of why battered women rarely leave their mates; the battered woman's lack of control over her mate's violence; the effect of such a perceived lack of control on the battered woman's personality; and the constant fear in which such women live.[112] Based on these considerations, the court concluded that Dr. Walker's testimony would have served at least two basic functions. First, her testimony would "enhance Mrs. Ibn-Tamas' general credibility in responding to cross-examination designed to show that her testimony about her relationship with her husband was implausible."[113] Second, it would "support her testimony that on the day of the shooting her husband's actions had provoked a state of fear which led her to believe she was in imminent danger," causing her to respond in self-defense.[114]

The court then examined these functions in relation to the specific tests for admissibility and their development in the trial court record. Finding Dr. Walker's interpretation of the facts to be very different from the ordinary lay perception advocated by the prosecution, the court held that it was beyond the ken of the average layperson.[115] In so holding, an assignment of error was given to the trial court.[116]

The final inquiry made by the court of appeals concerned the trial court's ruling that Dr. Walker's testimony was more prejudicial than probative, in that it would go beyond those prior violent acts that a

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although whose fault was that? She could have gotten out, you know." *Id.* at 634 n.14. The state's questioning of Mrs. Ibn-Tamas illustrated this theme:

> Q: And during the time in Miami, did you ever leave him?
>
> A: No, I didn't.
>
> Q: Did you ever call the police?
>
> A: No, I didn't. He told me he would kill me if I called the police.

Id.

112. *See id.* at 634. Dr. Walker had described the typical personality traits of a battered woman. She is "low in self-esteem, feel[s] powerless, and [has] few close friends." *Id.* In relation to these personality traits, Dr. Walker had interviewed Mrs. Ibn-Tamas and had told the trial court she was a "classic case" of the battered wife. *Id.*

113. *Id.*

114. *Id.* The court likened such testimony to the psychiatric testimony in United States v. Hearst, 412 F. Supp. 889 (N.D. Cal. 1976), the Patricia Hearst case. The testimony there was admitted "to explain the effects kidnapping, prolonged incarceration, and psychological and physical abuse may have had on the defendant's mental state at the time of the robbery, insofar as such mental state is relevant to the asserted defense of coercion or duress." *Ibn-Tamas*, 407 A.2d at 634 (quoting *Hearst*, 412 F. Supp. at 890).

115. *Ibn-Tamas*, 407 A.2d at 635.

116. *Id.*

jury should consider when evaluating a self-defense plea, and hence "put the decedent on trial as 'a batterer.' "[117] Pointing out that the trial court had already admitted evidence relating to Dr. Ibn-Tamas' earlier attacks on his wife and others,[118] the court of appeals found that any prejudice resulting from Dr. Walker's testimony would be minimal.[119] Weighing against this minimal prejudice was the highly probative value of such testimony, as evidenced by the court's earlier analysis. Consequently, the court concluded, as a matter of law, that expert testimony on battered woman syndrome would not "engender vindictive passions within the jury . . . or confuse the issue."[120]

As the *Ibn-Tamas* court clearly indicated, the prosecution is more likely to confuse the issue than the expert witness. In *State v. Anaya*,[121] the trial court refused to allow testimony on battered woman syndrome, stating that "the evidence was irrelevant."[122] On appeal, the Supreme Judicial Court of Maine, in deciding the testimony's relevance, examined the prosecution's statements that implied the defendant could not have been afraid of her husband, because she never attempted to leave him.[123] These statements, according to the court, detracted from the defendant's claim of self-defense[124] and, in effect, proved the testimony's relevance to the defendant's case. The *Anaya* court found that the excluded testimony would have addressed the very doubts that the prosecution had sought to raise in the juror's

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117. *Id.* at 639. The trial court's reasoning inexplicably overlooks the prejudice that expert testimony is meant to counteract—the common lay perception that battered women are either exaggerating the violence, crazy to endure it, or actually enjoy it.

118. *See id.*

119. *See id.*

120. *Id.* (quoting United States v. Green, 548 F.2d 1261, 1268 (6th Cir. 1977)). Because of omissions in the trial court record, the court of appeals could not conclusively rule on the testimony's admissibility. 407 A.2d at 635. The record did not reflect whether the trial court had considered two questions: (1) Dr. Walker's "skill, knowledge, or experience;" and (2) "the state of the pertinent art or scientific knowledge." *Id.* On remand, the trial court excluded the testimony on the latter ground—that the expert failed to establish as generally accepted the methodology used. *Ibn-Tamas v. United States*, 455 A.2d 893, 894 (D.C. 1983). The District of Columbia Court of Appeals affirmed, declaring the matter as one within the discretion of the trial court. *Id.*

121. 438 A.2d 892 (Me. 1981). The Supreme Judicial Court of Maine vacated and remanded the judgment of the Cumberland County Superior Court which had convicted the defendant of manslaughter on the grounds that: (1) expert testimony concerning battered woman syndrome was incorrectly excluded by the trial court; and (2) the defendant was denied, in error, expert assistance regarding a claim that the grand jury was arraigned in an unrepresentative manner.

122. *Id.* at 894.

123. *See id.* The state's closing argument characterized the behavior of the defendant and her boyfriend as "bizarre." *Id.*

124. *Id.*

minds, and was, therefore, highly probative.[125]

Thus, the opinion in *Anaya* serves to highlight one very important aspect of the *Ibn-Tamas* court's approach to relevancy. Both the *Ibn-Tamas* and *Anaya* courts recognized that when the prosecution's strategy rests upon standard "why-didn't-she-leave-him?" tactics, the court has good reason to allow expert testimony on battered woman syndrome to reach the jury to counter this type of attack on the woman's credibility.[126] In fact, such tactics should be examined by the court in relation to both the relevancy and beyond-the-ken requirements for admissibility, because when the state asks, "Why didn't she leave him?," it calls into issue more than just the woman's credibility; it questions her very lifestyle as well. Testimony on battered woman syndrome can answer a juror's questions about the circumstances of the battered woman's life, circumstances typically beyond the juror's understanding in the absence of such testimony.[127]

The *Ibn-Tamas* and *Anaya* courts established that, in order for battered-woman-syndrome testimony to meet the requisite evidentiary criteria, a court must take into consideration not just the circumstances at the time of the killing, but also the circumstances at trial. In *State v. Allery*,[128] while the court did consider the trial situation,[129] the "facts" of the killing had a special significance in determining whether the testimony was relevant to the defendant's claim of self-defense.

In *Allery*, the defendant was subjected to "periodic pistol whippings, assaults with knives, and numerous beatings from her husband's

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125. *Id.* The excluded "evidence would have given the jury reason to believe that the defendant's conduct was, contrary to the state's assertions, consistent with [the defendant's] theory of self-defense." *Id.*

126. *See id.* The *Anaya* court observed:

> The record shows that [the defendant's expert witness] would have testified that abused women often continue to live with their abusers even though the beatings continue, and that a certain substrata of abused women perceive suicide and/or homicide to be the only solutions to their problems . . . . We agree with [*Ibn-Tamas*] that where the psychologist is qualified to testify about the battered wife syndrome, and the defendant establishes her identity as a battered woman, expert evidence on the battered wife syndrome must be admitted since it "may have . . . a substantial bearing on her perception and behavior at the time of the killing . . . [and is] central to her claim of self-defense."

Id. (quoting Ibn-Tamas v. United States, 407 A.2d 626, 639 (D.C. 1979)) (footnote omitted).

127. Recall that the "beyond-the-ken" standard limits expert testimony to areas "distinctly related to some science, profession, business or occupation." *See supra* notes 80-81 and accompanying text. The expert on battered woman syndrome is in possession of knowledge typically "beyond-the-ken" of the average layperson. Such knowledge is thus helpful to the jury in understanding the complex answer to the prosecutor's question: "Why didn't she leave him?" *See supra* notes 43-47 and accompanying text.

128. 101 Wash. 2d 591, 682 P.2d 312 (1984).

129. *Id.* at 593-94, 682 P.2d at 314.

fists throughout the marriage."[130] Yet on the night Mrs. Allery shot her husband, although he had threatened to kill her,[131] he had made no menacing physical gestures, and was, in fact, shot by Mrs. Allery while he was lying on their couch.[132] On appeal, the Washington Supreme Court first ruled that the trial court's jury instructions failed to stress that the jury should take "into consideration all the facts and circumstances known to the slayer at the time and prior to the incident."[133] The court then addressed the admissibility question.

The *Allery* court stressed the subjectivity of the defendant's perception of danger, and held expert testimony on battered woman syndrome admissible.[134] The court viewed such evidence as being extremely relevant and "central to [the defendant's] claim of self-defense,"[135] in that it might serve to justify her perceptions and behavior at the time of the killing.[136] The court was, in effect, acknowledging

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130. *Id.* at 592, 682 P.2d at 313.

131. *Id.* Traditionally, threats alone are not enough to justify the use of deadly force. 40 AM. JUR. 2D *Homicide* § 156 (1968).

132. 101 Wash. 2d at 593, 682 P.2d at 314. Mrs. Allery, after initiating divorce proceedings, had served her husband with restraining orders. She testified that she came home late on the night in question, only to find her husband inside the house lying on the couch. He said to her, "I guess I'm just going to have to kill you sonofabitch [sic]." *Id.* at 593, 682 P.2d at 313.

133. *Id.* at 595, 682 P.2d at 314-15. The facts and circumstances known to Mrs. Allery at the time of the slaying included incidents that evidenced "a consistent pattern of physical abuse at the hands of her husband." *Id.* at 592, 682 P.2d at 313. According to the Supreme Court the trial court failed to stress, in its self-defense instruction, that the jurors "must place themselves in the shoes of the defendant and judge the legitimacy of her act in light of all that she knew at the time." *Id.* at 594, 682 P.2d at 314. The jury, therefore, "should have been instructed to consider the self-defense issue from [Mrs. Allery's] perspective in light of all that she knew and had experienced with [her husband]." *Id.* at 595, 682 P.2d at 315.

134. *See id.* at 597-98, 682 P.2d at 316. The specific issue addressed by the court was whether the scientific understanding of battered woman syndrome was sufficiently developed so that expert testimony is admissible. *Id.* at 596, 682 P.2d at 315. After observing that Mrs. Allery's expert described the syndrome as a "recognized phenomenon in the psychiatric profession," the court went on to define the syndrome in terms of a cyclical analysis and the theory of "learned helplessness." *Id.* The court then expressed its intention to "join with those courts which hold expert testimony on the battered woman syndrome admissible." *Id.* at 597, 682 P.2d at 316.

135. *Id.*

136. *Id.* The court stated that such a holding—that a jury, in evaluating a self-defense claim, must consider all the facts and circumstances known to the defendant at the time of the killing—was in accord with their prior decision in State v. Wanrow. *Id.* at 597, 682 P.2d at 315 (citing State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977)). In *Wanrow*, the defendant, a 5'4" woman on crutches, had been convicted of second-degree murder and first-degree assault with a deadly weapon for the killing of a 6'2" visibly intoxicated man who had been pointed out to the defendant previously as being both a child molester and a former mental patient. Although the conviction was reversed on evidentiary grounds as well, the case was remanded by the Supreme Court of Washing-

that the circumstances under which battered women kill their mates do not always fit the classic self-defense mold. Rather than break the mold, testimony on battered woman syndrome can help a jury see that a battered woman's perceptions, while sensitive to her mate's moods, are entirely reasonable for a person in her situation.

Of the more recent cases, *State v. Kelly*[137] gives not only the most thorough examination of the testimony's relation to a traditional self-defense claim, but the best analysis of the syndrome itself.[138] Much of the court's analysis, however, parallels that of the *Ibn-Tamas* court and, therefore, need not be examined in detail.[139] What merits further attention, however, is one seemingly minor departure made by the *Kelly* court from what can now be termed "standard" analysis. This departure considerably broadens the relevancy of battered-woman-syndrome testimony.

The *Kelly* court, like the *Ibn-Tamas* and *Anaya* courts, considered the myths about battered women which the prosecution had reinforced at trial.[140] The court found the testimony regarding battered woman syndrome relevant to rebut the prosecution's tactics.[141] The *Kelly*

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ton because the jury instruction failed to "make clear that the defendant's actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable." 88 Wash. 2d at 240, 559 P.2d at 558. Further, in making their determination as to self-defense, the jury should have considered not only the circumstances existing at the time the homicide was committed, but also any facts or circumstances prior to the incident which would establish the reasonableness of the defendant's belief of imminent danger. *Id.* at 235-36, 559 P.2d at 556.

137. 97 N.J. 178, 478 A.2d 364 (1984).

138. Indeed, the first few pages of the *Kelly* opinion, both text and footnotes, read like a primer on battered woman syndrome. *See id.* at 190-96, 478 A.2d at 369-72.

139. After stating New Jersey's requirements for a successful claim of self-defense, the court carefully scrutinized each of the separate admissibility requirements in relation to expert testimony on battered woman syndrome. In determining the relevance of the proffered expert testimony to Gladys Kelly's claim of self-defense, the court took into account the prosecution's arguments that Gladys Kelly consciously intended to kill her husband and was not acting in self-defense, the credibility of Gladys Kelly's testimony, the myths about battered women, and the counterbalancing effect that battered-woman-syndrome testimony could have on each of these items. *See id.* at 200-07, 478 A.2d at 375-78. The thoroughness and structure of the *Kelly* opinion is reminiscent of the decision in *Ibn-Tamas* in that each case carefully examined the nature and relevance of expert testimony on the subject of battered women.

140. *See id.* at 202-07, 478 A.2d at 375-78.

141. *See id.* at 200-01, 478 A.2d at 375. The *Kelly* court observed that the defendant's credibility was critical to her claim of self-defense. *See id.* The prosecution's attempt to undermine Mrs. Kelly's credibility rested upon the assumption that Mrs. Kelly was the aggressor. *Id.* at 190 n.1, 201, 478 A.2d at 369 n.1, 375. The court found that the expert testimony was directly relevant in determining Gladys Kelly's state of mind at the time of the stabbing, and "was thus material to establish the honesty of her stated belief that she was in imminent danger of death." *Id.* at 201, 478 A.2d at 375. The state sought to disprove this belief by implying that Mrs. Kelly's claims of abuse were untrue. *Id.* The

court, however, went one step further than these other courts by pointing out that even if the state had not attempted to reinforce the juror's prejudices, battered-woman-syndrome testimony "would still be essential to rebut general misconceptions regarding battered women."[142] The court thus recognized that most any argument the prosecution advances will only mirror the ordinary juror's own erroneous preconceptions about the battered woman's credibility and situation. The expert's testimony, on the other hand, would help the jurors abandon their erroneous conclusions.[143] The *Kelly* court thereby acknowledged that battered-woman-syndrome testimony is highly relevant to a battered woman's claim of self-defense, whether or not the prosecution seeks to exploit these "common myths."[144]

Another aspect of the *Kelly* opinion is interesting in comparison to the earlier cases. Whereas the earlier cases had either avoided examining the methods employed in researching battered woman syndrome, or had concentrated their analysis on one particular expert's techniques,[145] the *Kelly* court took note of a relatively large and still growing body of literature on the subject of battered woman syndrome.[146] Although it refrained from ruling on whether the technique or mode of analysis used by the expert had a sufficiently scientific basis to produce uniform and reliable results,[147] the court stated that it was impressed

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court noted that the prosecution took another tack as well. On cross-examination and in closing argument, the state "trivialized the severity of the beatings." *Id.* at 205-06, 478 A.2d at 377. Testimony on battered woman syndrome was deemed relevant to meet this line of prosecutorial attack. *Id.* at 206, 478 A.2d at 378.

142. *Id.*

143. *Id.*

144. *Id.* The court stated that testimony on battered woman syndrome is aimed at "an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion." *Id.* The court further described the potential effect such testimony might have on a jury:

> After hearing the expert, instead of saying Gladys Kelly could not have been beaten up so badly for if she had, she certainly would have left, the jury could conclude that her failure to leave was very much part and parcel of her life as a battered wife. The jury could conclude that instead of casting doubt on the accuracy of her testimony about the severity and frequency of prior beatings, her failure to leave actually reinforced her credibility.

Id.

145. *See, e.g.*, Ibn-Tamas v. United States, 407 A.2d 626, 633-34 (D.C. 1979).

146. *See Kelly*, 97 N.J. at 211, 478 A.2d at 380. The court noted that briefs submitted indicated that at least five books and almost 70 scientific articles and papers had been written concerning battered woman syndrome. *Id.* Although the court did not specify in which party's brief this information was given, it seems a safe bet that Mrs. Kelly's brief, as well as the amicus curiae brief of the American Psychological Association, were the sources. *See id.* at 187, 478 A.2d at 368.

147. *Id.* The court explained the rationale behind the reliable-result requirement: "[E]xpert testimony seeks to assist the trier of fact. An expert opinion that is not reliable is of no assistance to anyone." *Id.* at 209, 478 A.2d at 379-80.

by the amount of literature available.[148] Thus, even though the issue was remanded to the trial court to give the state an opportunity to question the particular expert thoroughly,[149] the suggestion was that battered woman syndrome is gaining acceptance within the scientific community. Such acceptance in the scientific community can also signal greater, and more readily available, acceptance within the judicial community.

This prediction was borne out by the New York State Supreme Court's decision in *People v. Torres*.[150] In *Torres*, the trial court considered, among other things, whether scientific knowledge concerning battered woman syndrome was sufficiently developed to permit an expert to proffer a reasonable opinion.[151] In answering this inquiry, the court noted that numerous articles and books had been published on the syndrome, and that researchers in the field had confirmed its presence and "thereby indicated that the scientific community accepts its underlying premises."[152] The court concluded that the theory of battered woman syndrome had passed well beyond the experimental stage and had gained sufficient scientific acceptance to warrant admission.[153]

Although testimony on battered woman syndrome does not, in and of itself, constitute a defense, it is a valuable aid to a battered woman in advancing her claim of self-defense. As the courts in the foregoing cases have recognized, this testimony should be admitted into evidence when it is used to bolster a battered woman's credibility, to dispel common myths concerning a battered woman's situation, and to allow the jury to decide the ultimate issue of self-defense fully cognizant of all the circumstances surrounding the killing.

Some courts, however, do not permit the use of testimony relating to battered woman syndrome, finding that the average juror is well suited to decide the issue of self-defense without such testimony. An examination of these few higher court cases upholding exclusion at the trial court level reveals a number of evidentiary objections that are still upheld in some states.

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148. *Id.* at 211, 478 A.2d at 380.

149. *See id.* at 187, 478 A.2d at 368.

150. 128 Misc. 2d 129, 488 N.Y.S.2d 358 (Sup. Ct. 1985).

151. *See id.* at 134, 488 N.Y.S.2d at 362. The court also considered the relevance of battered-woman-syndrome testimony, and whether it was dependent upon professional or scientific knowledge not within the range of ordinary training or intelligence—i.e., whether it was beyond the ken of the average layperson. *See id.* at 133-34, 488 N.Y.S.2d at 361-62. In answering these inquiries, the *Torres* court found that the expert's opinions would counter the jury's "commonsense" conclusions about the defendant's home life, and were thus both relevant and beyond the range of ordinary training and intelligence. *See id.* at 134, 488 N.Y.S.2d at 362.

152. *Id.* at 135, 488 N.Y.S.2d at 363.

153. *Id.*

In *State v. Thomas*,[154] the Supreme Court of Ohio focused on the relevancy requirement in ruling that expert testimony on battered woman syndrome was inadmissible.[155] The court stated that the jury was "well able to understand and determine whether self-defense had been proven" without expert testimony on battered woman syndrome.[156] Although the court acknowledged that the defendant's explanation of the surrounding circumstances was important,[157] the court did not examine the relevance of battered-woman-syndrome testimony in relation to those circumstances.[158] Rather, the court stressed that the jury was the ultimate finder of fact.[159] In the *Thomas* court's view, the only relevant evidence concerned whether "the defendant had a bona fide belief she was in imminent danger of death or great bodily harm" and whether it was, therefore, necessary to use deadly physical force.[160] The court also found that expert testimony on battered woman syndrome was not beyond the ken of the average layperson, but stated no reason for its finding.[161]

In reaching its decision, the *Thomas* court did not consider the value of battered-woman-syndrome testimony to counter the common misconceptions about battered women harbored by jurors—misconceptions that could unfairly prejudice the defendant's case. The court was concerned, however, that the testimony on battered woman syndrome would itself tend to stereotype the defendant and thus prejudice the jury, causing it to decide the case on the basis of "typical, and not . . . actual facts."[162] Overlooked by the court, however, was the real possibility that wholly erroneous stereotypes concerning abused women were, in all probability, already engrained within the jurors' minds, and that testimony on battered woman syndrome was needed to counter these misconceptions. Thus, the *Thomas* court scrupulously protected the state's case from prejudice, but exhibited no such compunction regarding the defendant's case.[163] An avenue of inquiry, which the *Ibn-Tamas* and *Kelly* courts, among others, found to be crucial in deciding to admit battered-woman-syndrome testimony, was completely ignored

154. 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981), *rev'g* 17 Ohio Op. 3d 397 (Ct. App. 1980).

155. *See id.* at 521, 423 N.E.2d at 140.

156. *Id.* at 521, 423 N.E.2d at 139. The jury was confined to considering "participants' words and actions before, at, and following the murder, including the defendant's explanation of the surrounding circumstances." *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 521, 423 N.E.2d at 139.

160. *Id.* (citing State v. Robbins, 58 Ohio St. 2d 74, 388 N.E.2d 755 (1977)).

161. *Id.* at 521, 423 N.E.2d at 139.

162. *Id.* at 521, 423 N.E.2d at 140.

163. *See id.*

by the *Thomas* court.[164]

In *State v. Necaise*,[165] all critical inquiries were bypassed as the Louisiana Court of Appeals, in affirming the trial court's decision, held battered-woman-syndrome testimony inadmissible where a defendant claimed self-defense in the shooting death of her husband.[166] The court feared that admission of the testimony would condone the concept of "partial responsibility" by allowing proof of mental derangement short of insanity.[167] Resting its decision upon its interpretation of a Louisiana criminal procedure statute,[168] the court disallowed "state of mind" testimony because the defendant had failed to plead not guilty by reason of insanity.[169]

The *Necaise* decision, on its face, seems to misunderstand the na-

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164. After exhausting all state relief, Thomas unsuccessfully sought relief in federal court. The Sixth Circuit Court of Appeals affirmed the district court's denial of habeas corpus relief on the ground that Thomas failed to timely object to the magistrate's report and thus waived her right to appeal. Thomas v. Arn, 728 F.2d 813, 814 (6th Cir. 1984), *aff'd*, 474 U.S. 140 (1985). In dictum, Judge Jones, concurring, ascribed constitutional importance to the battered-woman-syndrome question:

> [I]f I were to reach the merits of this case I would grant the writ of habeas corpus. In my view, the trial court's exclusion of expert testimony on the "battered wife syndrome" impugned the fundamental fairness of the trial process thereby depriving Thomas of her constitutional right to a fair trial. There is sufficient literature which suggests that the public and thus, juries, do not understand the scope of the problem concerning battered women. Furthermore, they tend to be unsympathetic toward battered women. They fail to understand, for instance, why battered women do not leave their partners. Ascertaining a battered woman's state of mind is crucial to a determination of this and other aspects of her behavior. It may bear on the responsibility or lack of it, for her response. In my opinion the expert testimony could have clarified the unique psychological state of mind of the battered woman and should have been admitted by the trial judge. The law cannot be allowed to be mired in antiquated notions about human responses when a body of knowledge is available which is capable of providing insight.

Id. at 815 (Jones, J., concurring) (citations omitted). For a discussion of *Ibn-Tamas*, see *supra* text accompanying notes 111-12. For a discussion of *Kelly*, see *supra* text accompanying notes 141-45.

165. 466 So. 2d 660 (La. Ct. App. 1985).

166. *See id.* at 664-65. The defendant was convicted of manslaughter. *Id.* at 662.

167. *Id.* at 665. The court explained that Louisiana has chosen an "all or nothing" approach and has rejected the concept of impaired or partial responsibility. *Id.* It stated that a mental defect short of insanity cannot negate specific intent and reduce the degree of the crime. *Id.* at 664.

168. LA. CODE CRIM. PROC. ANN. art. 651 (West 1981 & Supp. 1987). Article 651 provides in part: "[W]hen a defendant is tried upon a plea of 'not guilty,' evidence of insanity or mental defect at the time of the offense shall not be admissible." *Id.*

169. 466 So. 2d at 664. The court concluded that because expert testimony on battered woman syndrome would be an attempt to establish the defendant's state of mind and her absence of specific intent, it was inadmissible. *Id.* at 664-65 (citing LA. CODE CRIM. PROC. ANN. art. 651 (West 1981 & Supp. 1987)).

ture of battered-woman-syndrome testimony in two ways. First, the court characterized such testimony as addressing a "lack of specific intent."[170] Yet, in previous cases, the testimony was not introduced to demonstrate a lack of intent, but rather to bolster the defendant's credibility when claiming self-defense.[171] Second, the court assessed battered woman syndrome as something closely akin to insanity.[172] This is a wholly erroneous classification. The syndrome is best understood as describing an identifiable group of symptoms that characterize the behavior and state of mind of abused women, symptoms that are the product of brutal conditioning rather than that of a diseased mind. Other courts have seen fit to allow expert testimony on battered woman syndrome without ever mentioning the insanity defense.[173] The *Necaise* court's classification of the syndrome testimony as a form of insanity foreclosed inquiry concerning the testimony's relevance to a battered woman's claim of self-defense. Once the testimony was categorized as pertaining to the defendant's lack of specific intent, it could be disposed of by looking to a procedural statute that barred such testimony in the absence of an insanity plea. It remains unclear whether the *Necaise* court's lack of insight can be attributed to the laws of Louisiana or to the failure of defense counsel to present the evidence properly.

Among the appellate court cases upholding the exclusion of battered-woman-syndrome testimony, *Buhrle v. State*[174] provides the most thorough explanation for its holding and illustrates a valid objection to the misuse of such testimony. In *Buhrle,* the trial court expressed three reasons for excluding the testimony: (1) voir dire of the expert did not adequately demonstrate that the state of the art permitted an expert to state a reasonable opinion; (2) the reasons for the experts' opinions were not adequately explained and would not aid the jury; and (3) the defendant's state of mind at the time of the killing was not adequately explained.[175]

On appeal, the Wyoming Supreme Court found sufficient support in the record for the trial court's finding that the present state of knowledge about battered woman syndrome did not permit a reasonable opinion to be expressed by an expert.[176] According to the court, the record indicated that research on battered woman syndrome "is in its infancy" and that acceptance of the phenomenon was largely limited to

170. *Id.* at 664.
171. *See, e.g.*, State v. Kelly, 97 N.J. 178, 187, 197-200, 478 A.2d 364, 368, 373-75 (1984).
172. *See* 466 So. 2d at 664-65.
173. *See, e.g.*, State v. Anaya, 438 A.2d 892 (Me. 1981).
174. 627 P.2d 1374 (Wyo. 1981).
175. *Id.* at 1377.
176. *Id.*

people actively engaged in research.[177]

In addition, the court found that Dr. Walker "had proposed to express an opinion on whether or not Mrs. Buhrle was in fear of her life at the time of the shooting and whether such fear was reasonable."[178] This testimony, according to the court, went far beyond that deemed admissible in *Ibn-Tamas*.[179] The *Buhrle* court distinguished the testimony proffered in *Ibn-Tamas* as merely supplying "background data" on battered women to aid the jury in their assessment of the defendant's claim and credibility.[180] In *Buhrle*, the expert was to express an opinion on the ultimate question of the defendant's actual fears at the time of the shooting.[181] The *Buhrle* court found this to be a misuse of the testimony, in that it drew conclusions concerning the central issue to be decided by the jury.[182] Thus, had the testimony in the *Buhrle* case been proffered differently in the court below, there is a chance that the court would have held it to be admissible.

The *Buhrle* case is most notable, however, not for what could have been changed in the court below, but for what could not have been. Mrs. Buhrle, although beaten by her husband throughout their eighteen-year marriage, had not, according to the court, exhibited "standard battered woman behavior."[183] Rather, she had gone to her husband's motel room a full week after the last beating, already armed with a rifle and rubber gloves, and had shot her husband after arguing with him through his motel room door.[184] Although the *Buhrle* court did not elaborate upon its reasons for finding the facts of the killing uncharacteristic, it apparently did not believe Mrs. Buhrle's actions were borne of the type of desperation exhibited in other cases where battered women have killed their mates.[185] Adding to the court's suspi-

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177. *Id.* The *Buhrle* court did not examine the volume of literature available on the syndrome, nor did it consider the extent of active research in the area. Rather, it emphasized the lack of "statistical analysis." *Id.*

178. *Id.* at 1378.

179. *Id.*

180. *See id.* The *Buhrle* court's assessment is not quite accurate, in that it misconstrues the *Ibn-Tamas* court's explanation of the substance of the expert testimony. In *Ibn-Tamas*, the expert was not only offering "background data" on battered women, but was expressing an opinion that Mrs. Ibn-Tamas displayed the typical characteristics of a battered woman. *See* Ibn-Tamas v. United States, 407 A.2d 626, 631 (D.C. 1979). Without this critical link to a specific defendant, the testimony becomes so peripheral as to be almost irrelevant.

181. 627 P.2d at 1378. The expert was to express her opinion on "whether or not Mrs. Buhrle was in fear of her life . . . and whether such fear was reasonable." *Id.*

182. *Id.*

183. *Id.*

184. *Id.* Mrs. Buhrle did not testify as to any threat made by her husband. *Id.*

185. For instance, according to the defendant's testimony in *Ibn-Tamas*, the killing had taken place in the Ibn-Tamas' home during a temporary lull in a beating, when Dr. Ibn-Tamas threatened his wife. *See supra* text accompanying note 112. In that case it

cion was Dr. Walker's testimony, which had failed to adequately explain "Mrs. Buhrle's behavior if such behavior did not fit into the pattern of battered women."[186]

The *Buhrle* case is a fitting close to an analysis of the admissibility of expert testimony on battered woman syndrome, despite the court's exclusion of the testimony. When the *Buhrle* court held the testimony inadmissible in a case displaying an uncharacteristic fact pattern, it left open use of battered-woman-syndrome testimony for more characteristic cases. It thereby preserved the integrity of battered-woman-syndrome testimony for those not seeking to abuse it.

CONCLUSION

Battered woman syndrome, with all of its tragic social ramifications, remains an evidentiary issue. The woman who kills her battering mate and claims self-defense must show the relevancy of expert testimony to her perceptions of imminent danger. Once that obstacle is overcome, the specific requirements governing the admissibility of expert testimony must be addressed. Courts react differently in each case, as they must, depending upon the circumstances of the killing and the circumstances of the trial. Increasingly, evidence on battered woman syndrome is allowed to reach the jury. This may be attributed to a steady rise in the volume of scholarly literature available, which demonstrates a greater acceptance of the existence of the syndrome, as well as a greater level of understanding by the courts.

Regardless of the reasoning used by courts to allow or disallow the testimony, one point must be stressed: battered woman syndrome is not a defense. Rather, it is highly relevant evidence, introduced by an expert, that may help a jury to understand that a woman's perception of imminent danger was reasonable under the circumstances. It does not classify such women as insane, but recognizes that complex factors exist tending to create a heightened sensitivity to danger in battered women. Expert testimony on battered woman syndrome, in and of itself, does not allow a woman to go free after killing her mate. It simply gives jurors a more complete picture of the circumstances surrounding

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could be said that Mrs. Ibn-Tamas legitimately and reasonably felt trapped and in fear of imminent death or great bodily harm, and that the shooting was, therefore, in self-defense. In *Buhrle*, however, the defendant's husband had already moved out of the family home and filed for divorce, which was indicative of his willingness to stay away from Mrs. Buhrle. *See* 627 P.2d at 1375. Mrs. Buhrle then came to her husband's motel room apparently prepared to kill him. *Id.* at 1376. In other words, before she had even seen her husband that day, and after she was reasonably free of his abuse, she seemingly *planned* to kill him.

186. *Id.* at 1377. In upholding the trial court's rationale, the high court observed that the "aura of special reliability and trustworthiness" surrounding expert testimony calls for a broad range of trial court discretion. *Id.*

the killing, thereby aiding their analysis. It is up to the jury, as always, to decide the fate of the defendant.

India De Carmine