

**Defending Victims of Domestic Violence Who Kill Their Batterers:  
Using the Trial Expert to Change Social Norms**

*Battered Woman Syndrome was developed in the mid-1970s to help combat the sex-bias present in the criminal law, particularly in the law of self-defense. Prior to this time, the law did not recognize the reasonableness of a battered woman’s use of force when she killed her batterer. Scholars therefore developed Battered Woman Syndrome as a way to explain the experiences of a battered woman, and why her actions in self-defense were justified. As Battered Woman Syndrome was used in more and more trials, however, expert testimony began to take the form of excuse, rather than justification. A battered woman was excused from her conduct because of her irrationality or incapacity. This prompted many critics to call for an end to expert testimony on Battered Woman Syndrome. In response to these critics, this Paper offers another solution; one that allows lawyers and experts to work within the current legal system to change societal perceptions of domestic violence and battered women who kill. This Paper suggests that refocusing the expert’s testimony on the social norms that tolerate domestic violence, and identifying these norms as the true “syndrome,” will enable experts to educate a jury about domestic violence, without labeling the victim with a pathology.*

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## I. INTRODUCTION

It is a necessary evil that the women's self-defense movement has been forced to accept. At worst, it can reinforce stereotypes of gender roles and the view of women as emotional, irrational creatures. At best, it can educate others about the prevalence of domestic violence in our society, and also expose the societal biases and stereotypes that feed into this violent epidemic. It is a legal fiction that utilizes expert testimony to prove that a woman's actions in self-defense were "reasonable." It is battered woman syndrome.

Battered woman syndrome was introduced to help explain the reasonableness of a woman's actions in self-defense against her abuser.<sup>1</sup> It was pioneered by Dr. Lenore Walker, and was developed to allow experts to testify at trials, most commonly where a woman was on trial for killing her batterer, and was alleging self defense.<sup>2</sup> The expert explains why a battered woman had special knowledge of the imminence of an attack, as well as why retreat was not a reasonable alternative.<sup>3</sup> In other words, the expert explained the reasonableness of the woman's actions in a situation in which most jurors would probably not be familiar.<sup>4</sup>

This practice of using expert testimony in criminal trials to explain the reasonableness of a victim-defendant's actions against her abuser has been a hotly contested area of criminal law.<sup>5</sup> Some scholars praise it as a way of dispelling the myths that surround battered women,<sup>6</sup> while

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<sup>1</sup> CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMAN, SELF-DEFENSE, AND THE LAW 159 (1989).

<sup>2</sup> See Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RIGHTS LAW REPORTER 195 (207) (1986), in AMERICAN BAR ASSOCIATION, DEFENDING BATTERED WOMEN IN CRIMINAL CASES (1992) ("Virtually all of the cases that have considered the issue of expert testimony have done so in the context of testimony on battered woman syndrome and they have focused on Dr. Lenore Walker's work in her book *The Battered Woman*."). For a brief explanation of Walker's basic theory, see GILLESPIE, *supra* note 1, at 129.

<sup>3</sup> GILLESPIE, *supra* note 1, at 93.

<sup>4</sup> Schneider, *Describing and Changing*, *supra* note 2, at 211.

<sup>5</sup> See GILLESPIE, *supra* note 1, at 160.

<sup>6</sup> See, e.g., Schneider, *Describing and Changing*, *supra* note 2, at 198.

others decry it as a perpetuation of stereotypes of women as irrational, unreasonable victims.<sup>7</sup> Certainly the label of “syndrome” has fueled the critic’s arguments, and has carried with it the stigma of psychological disorder.<sup>8</sup>

The word “syndrome” carries with it negative connotations, and there is a tendency for members of the legal community and society at large to interpret battered woman syndrome as some sort of incapacity defense.<sup>9</sup> Despite these faults, the ability to present expert testimony at trial for a battered woman who has killed her abuser in self-defense is valuable. It has the potential to educate members of the community on the societal norms and pressures that create the environment that tolerates domestic violence.

This Paper will argue that the benefits of continuing to recognize battered woman syndrome outweigh its harms. However, the focus of expert testimony should change from emphasis on the personal syndrome to emphasis on the larger societal syndrome that has placed the battered woman in a situation where her only option was to kill her batterer. The necessity of her actions was caused by the community, and experts should point to the failures of society and the government at large to offer battered women reasonable alternatives. This goes to the heart of the theory of self-defense as one of necessity,<sup>10</sup> and shows that the battered woman’s actions should not be “excused” because of any personal ailment or shortcoming, but should be recognized as justified because of the situation in which she was placed.

To support this argument, Part II of this Paper will briefly discuss the theoretical background of the criminal justice system and the law of self-defense. This discussion will show

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<sup>7</sup> Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 4 (1991); Schneider, *Describing and Changing*, *supra* note 2, at 199-200.

<sup>8</sup> CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 203 (2000).

<sup>9</sup> *Id.*

<sup>10</sup> For a discussion of the relationship between common-law necessity and justification defenses, such as self-defense, see RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, JR. & PETER W. LOW, CRIMINAL LAW 410-19 (2d ed. 2004).

that the criminal system was founded on moralistic and normative concepts, which are subject to change and manipulation over time. Part II will then explain the origins and uses of battered woman syndrome, and identify some of the principle arguments in support and against its continued use. Having set up this legal background, Part III of this Paper will suggest that expert testimony regarding battered woman syndrome is essential to help change society's general assumptions about gender roles and the causes of domestic violence. The language of trial experts should emphasize the societal pressures that place women in inescapable violent relationships, rather than emphasizing the helplessness or particular psychological profile of the individual defendant. While their immediate goal should remain to explain the reasonableness of a particular defendant's actions, their larger goal should be to help change the social norms that underlie the criminal law's definitions of reasonableness and self-defense.

## II. BACKGROUND

### *A. Criminalization and the Law of Self-Defense*

The criminal justice system is an articulation of the basic moral code of our society. In the words of Justice White, the law is "constantly based on notions of morality. . . ."<sup>11</sup> As such, the conduct that we punish and the conduct that we excuse is an expression of our moral understanding of right and wrong.<sup>12</sup> The morals that guide the criminal law also give the law a normative function. As Professor Paul H. Robinson has argued, the criminal justice system relies on normative pressures to control crime.<sup>13</sup> He explained that the " 'normative' crime control mechanism . . . works through unofficial avenues to bring the potential offender to see the

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<sup>11</sup> *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled on other grounds by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>12</sup> See Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 988 (1932) ("It is . . . underlying ethical concepts which shape and give direction to the growth of criminal law.").

<sup>13</sup> Paul H. Robinson, *The Legal Construction of Norms: Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1839-41 (2000) ("criminal law's power to influence conduct may reside in large part in its normative rather than its coercive crime control mechanisms").

prohibited conduct as unattractive because it is inconsistent with the norms of family or friends and, even better, with the person's own internalized sense of what is acceptable.”<sup>14</sup> Robinson recognizes that the moralistic and normative aspects of the law are intertwined, in that “[e]ffective normative crime control requires a criminal law that has moral credibility within the community it governs.”<sup>15</sup> This moralistic-normative theory of the law explains “[p]eople come to hold the moral standards of the cultures in which they are raised; internal moral standards and external norms generally label the same actions as right or as wrong.”<sup>16</sup> Thus, the combination of internal morals and external norms shape and give substance to our laws.

The American criminal justice system has naturally developed laws based on generally shared norms. The substance of these laws was greatly clarified and specified in the “criminal codification movement of the 1960s and 70s” that was guided by the publication of the Model Penal Code by the American Law Institute in 1962.<sup>17</sup> Within twenty years of its publication, “new legislation in 37 American jurisdictions had been substantially influenced by the Model Penal Code.”<sup>18</sup> The Model Penal Code (“The Code”), though not adopted by all jurisdictions, provides generally applicable criminal law standards that have influenced the laws of most states.

The moralistic and normative overtones in The Code are easily identifiable. The code lists as one of its purposes “to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests.”<sup>19</sup> Another purpose is “to safeguard conduct that is without fault from condemnation as criminal.”<sup>20</sup> In this context, The Code defines what conduct should be criminalized, and what conduct should not.

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<sup>14</sup> *Id.* at 1840.

<sup>15</sup> *Id.* at 1841.

<sup>16</sup> *Id.* at 1862.

<sup>17</sup> *Id.* at 1839.

<sup>18</sup> BONNIE ET AL., *supra* note 10, at app. A-2.

<sup>19</sup> MODEL PENAL CODE § 1.02(1)(a) (1962).

<sup>20</sup> *Id.* § 1.02(1)(c).

For example, taking of the life of another person is usually considered a crime; however, in certain situations, this act may be justified. The Code recognizes one such justified use of force through its recognition of the affirmative defense of “Use of Force in Self-Protection.”<sup>21</sup> Under this definition, “the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”<sup>22</sup> Deadly force is only permitted when “the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat.”<sup>23</sup> Nor is it justifiable when “the actor knows that he can avoid the necessity of using such force with complete safety by retreating.”<sup>24</sup>

As stated above, this law recognizes that the use of force in self-defense may be justified. In other words, the use of force was “correct and appropriate, not only tolerated by the law not encouraged.”<sup>25</sup> As explained by Professor Elizabeth M. Schneider, “Inquiries about justification focus on the act rather than on the actor.”<sup>26</sup> This is distinct from an otherwise criminal act that is excused by the law. Thus, “A finding of justification is a finding that the act was right because of the circumstances of the act. By contrast, an excusable act is one that, although wrong, should be tolerated because of the actor’s characteristics.”<sup>27</sup>

Because the law views self-defense as justifiable action, the law also demands that this

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<sup>21</sup> *Id.* § 3.04.

<sup>22</sup> *Id.* § 3.04(1).

<sup>23</sup> *Id.* § 3.04(2)(b).

<sup>24</sup> *Id.* For another definition of the justified use of force, utilized in approximately eleven jurisdictions, BONNIE ET AL., *supra* note 18, at 411, see NEW YORK PENAL LAW § 35.05 (Consol. 2006).

<sup>25</sup> Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 630-31 (1980), in DEFENDING BATTERED WOMEN IN CRIMINAL CASES, *supra* note 2.

<sup>26</sup> *Id.* at 631.

<sup>27</sup> *Id.*; see also BONNIE ET AL., *supra* note 10, at 403 (“The law also includes doctrines of excuse. These defenses recognize claims that particular individuals cannot fairly be blamed for admittedly wrongful conduct. The defendant is excused not because his or her conduct was socially desirable, but because the circumstances of the offense evoke the societal judgment that criminal conviction and punishment would be morally inappropriate.”).

action be reasonable; thus, the circumstances of an act of self-defense must justify the act. Professor Schneider explains, “An act committed in self-defense was justified given the individual actor. The trier of fact must understand the circumstances of the act and identify with the actor. In examining the circumstances of the act, the fact finder applies substantive rules that reflect a standard of reasonableness.”<sup>28</sup> However, as Professor Schneider continues, “If the circumstances of the act claimed to be in self-defense do not justify the act, the jury shifts its focus to excuse and examines the defendant’s mental or emotional state. The law looks at excuses only after justification fails.”<sup>29</sup> Thus, the particular characteristics of a defendant are looked at only after a jury determines that a defendant’s self-defense claim is unreasonable.

### *B. Expert Testimony and Battered Woman Syndrome*

#### 1. Origins

Out of this conceptualization of justification, excuse, and self-defense law came the problem of women who had been in abusive intimate relationships, and had killed their batterers. Caroline Forell and Donna Matthews explained,

[I]n many ways the law still equates husband-killing with treason: such killing is presumed unreasonable, and the woman is seen as morally responsible for the man’s violence against her. The law of self-defense is framed in terms of how men ‘reasonably’ respond to the violence of other men; women killing men isn’t part of the picture. The basic terms are skewed so that women who kill their batterers rarely fit the male-defined standard of a justifiable killing.<sup>30</sup>

Cynthia Gillespie further detailed, “A woman who defends herself against a man’s violence is either a criminal or crazy; our society is very reluctant to say that she is ever justified.”<sup>31</sup> The criminal law—specifically the law of self-defense—was not adequately taking into account the

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<sup>28</sup> Schneider, *Equal Rights to Trial for Women*, *supra* note 25, at 631.

<sup>29</sup> *Id.*

<sup>30</sup> FORELL & MATTHEWS, *supra* note 8, at 197.

<sup>31</sup> GILLESPIE, *supra* note 1, at 12-13. Professor Schneider similarly wrote, “Historically, views of women as being unreasonable, sex-bias in the law of self-defense, and myths and misconceptions concerning battered women have operated to prevent battered women from presenting acts of homicide or assault committed against batterers as reasonable self-defense.” Schneider, *Describing and Changing*, *supra* note 2, at 198.

experiences of battered women.

This deficiency was and is alarming, given that the “overwhelming number of cases in which courts have addressed issues of women’s self-defense have involved battered women charged with killing men who battered them.”<sup>32</sup> To help remedy this situation, the women’s self-defense movement introduced the concept of Battered Woman Syndrome (“BWS”) in the 1970s.<sup>33</sup> BWS, developed in large part by Dr. Lenore Walker,<sup>34</sup> is “a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives.”<sup>35</sup> Professor Schneider explains:

Expert testimony on battered woman syndrome was developed to explain the common experiences of, and the impact of repeated abuse on, battered women. The goal was to assist the jury and the court in fairly evaluating the reasonableness of the battered women’s action and to redress this historical imbalance, at least where the testimony was proffered as relevant to self-defense.<sup>36</sup>

BWS was thus introduced to help explain the reasonableness of a battered woman’s self-defense actions.

The introduction of BWS was intended to “overcome sex-bias in the law of self-defense and to equalize treatment of women in the courts.”<sup>37</sup> This sex-bias in the law of self-defense is evident in the normal formulation of reasonableness that asks what the reasonable *man* would do.<sup>38</sup> In other words, “Jurors in self-defense cases are usually told to assess the reasonableness of the defendant’s act by asking themselves whether what he or she did was the sort of thing that

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<sup>32</sup> Schneider, *Describing and Changing*, *supra* note 2, at 196.

<sup>33</sup> Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 421 n.126 (1991), in DEFENDING BATTERED WOMEN IN CRIMINAL CASES, *supra* note 2.

<sup>34</sup> Schneider, *Describing and Changing*, *supra* note 2, at 207.

<sup>35</sup> State v. Kelly, 478 A.2d 364, 371 (N.J. 1984).

<sup>36</sup> Schneider, *Describing and Changing*, *supra* note 2, at 198.

<sup>37</sup> *Id.* at 197.

<sup>38</sup> Schneider, *Equal Rights to Trial for Women*, *supra* note 25, at 635.

would have been done by a reasonable man in the same circumstances.”<sup>39</sup> Gillespie explains:

The ultimate question in a self-defense case is whether the defendant’s act was a reasonable one. Even if she can successfully negotiate the legal hurdles of seriousness, imminence, retreat, and the like, she must still convince the jury of two things: that her belief that she was in imminent danger of death or serious injury was reasonable under the circumstances and that her response to that perceived danger was a reasonable one, not an overreaction.<sup>40</sup>

Self-defense law asks what a reasonable man would have done in a battered woman’s situation, and this question has proven inapposite to the reality faced by battered women.

It was thus recognized that the “reasonable man” standard could not explain the justified self-defense actions of a battered woman. Even application of a “reasonable woman” standard is not entirely helpful, because the reasonable woman would still be viewed as the stereotypical, passive female, who must submit to her man’s violence without complaint.<sup>41</sup> Therefore, lawyers defending battered women who had killed needed a way “to explain to the jury that the woman’s behavior, which seems to defy common sense, was entirely characteristic of women in her situation.”<sup>42</sup> The way this could be done was through the testimony of an expert witness.<sup>43</sup> This testimony is permissible because the environment in which a battered woman lives is “beyond the ken of the average layman,”<sup>44</sup> and “[t]he reasonableness of the woman’s fear and the reasonableness of her act are *not* issues which the jury knows as well as anyone else.”<sup>45</sup> The expert therefore is able to provide to the jury information about “otherwise puzzling aspects of

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<sup>39</sup> GILLESPIE, *supra* note 1, at 98.

<sup>40</sup> *Id.* at 93.

<sup>41</sup> See Schneider, *Describing and Changing*, *supra* note 2, at 201 (“A woman who kills her husband is viewed as inherently unreasonable because she is violating the norm of appropriate behavior for women.”).

<sup>42</sup> GILLESPIE, *supra* note 1, at 158.

<sup>43</sup> *Id.*

<sup>44</sup> *Ibn-Tamas v. United States*, 407 A.2d 626, 635 (D.C. 1979); see also GILLESPIE, *supra* note 1, at 93 (“However, the requirement that the jury must find the defendant’s action reasonable before it can acquit her presents another major source of problems from women in self-defense case. The jurors are uninvited—indeed obligated—to substitute their judgment for hers in a situation that most of them can barely imagine being in and seldom understand.”).

<sup>45</sup> Schneider, *Describing and Changing*, *supra* note 2, at 211.

defendant's behavior—especially her failure to leave or get help or tell anyone,"<sup>46</sup> and about how "the battered woman's prediction of the likely extent and imminence of violence is particularly acute and accurate."<sup>47</sup>

## 2. Controversy over Battered Woman Syndrome

Critics of this expert testimony have expressed concern about the implications of calling an expert to translate a battered woman's experience to a jury. Professor Schneider points out, "The notion of expert testimony was predicated on an assumption that battered women's voices would not be understood or were not strong enough to be heard alone in the courtroom."<sup>48</sup> She further wrote that "[this] is disturbing, for it suggests that only experts can bridge the gap between the individual and collective experience of women and counsel jurors and society that an individual woman's experience has a social validity and commonality that might be reasonable."<sup>49</sup> At the same time, however, Professor Schneider recognized that this testimony was necessary, to add authority to the battered woman's claim that her actions were reasonably necessary, because this claim "threatens deeply held stereotypes of appropriately submissive female conduct and of patriarchal authority."<sup>50</sup>

In response, supporters of BWS argue that patriarchal values and gender-stereotyping that belie the general public's understanding of domestic violence must be dispelled through expert testimony. The neutral, third-party expert is able to point to a larger truth about the common experiences of battered women, which adds credibility to the victim-defendant's claim. As one court noted, the expert testimony is necessary to combat "stereotypes and myths concerning the

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<sup>46</sup> GILLESPIE, *supra* note 1, at 159.

<sup>47</sup> Schneider, *Describing and Changing*, *supra* note 2, at 211.

<sup>48</sup> *Id.* at 198.

<sup>49</sup> *Id.* at 218.

<sup>50</sup> *Id.* at 202.

characteristics of battered women and their reasons for staying in battering relationships.”<sup>51</sup>

There is some question, however, whether testimony about BWS serves to dispel gender stereotypes or cultivate them. The “clinicalization” of the battered woman’s experiences as a syndrome implicitly suggests that a battered woman’s “response to violence is negative behavior that stems from weakness or emotional damage and requires explanation in clinical terms.”<sup>52</sup> The expert is typically called to answer questions like “why didn’t she just leave?”, which assumes that the woman is the one who is misbehaving by not leaving, that leaving is “the normal and reasonable response to being battered” and “if a woman fails to leave, her staying with her mate is peculiar behavior that requires explanation or excuse.”<sup>53</sup> Lawyers argue and courts admit this testimony when it focuses on a woman’s victimization, incapacity, or “learned helplessness,” but when battered women do not fit this narrow model of a passive, victimized female, they are oftentimes not permitted to introduce expert testimony on BWS.<sup>54</sup> As explained by Professor Schneider, “Courts appear to be willing to recognize the importance of expert testimony when the rationale for admission is women’s individual and collective psychological ‘weakness.’”<sup>55</sup> In the words of Professor Anne Coughlin, BWS “reclaims for women all of the insults of the gender ideology of domesticity while endorsing none of its compliments.”<sup>56</sup>

Even though expert testimony is supposed to “shed light on the *reasonableness* of the defendant’s behavior,”<sup>57</sup> the term “battered woman syndrome” instead tends to “conjure up images of a psychological defense—a separate defense and/or an impaired mental state

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<sup>51</sup> State v. Kelly, 478 A.2d 364, 370 (N.J. 1984); *see also* Maguigan, *supra* note 33, at 458 (“The expert testimony should be admitted to explain the effects of a history of abuse on a defendant’s behavior and perceptions and to rebut popular myths and misconceptions about battered women.”).

<sup>52</sup> GILLESPIE, *supra* note 1, at 156.

<sup>53</sup> *Id.* at 146.

<sup>54</sup> FORELL & MATTHEWS, *supra* note 8, at 204; Schneider, *Describing and Changing*, *supra* note 2, at 198-200

<sup>55</sup> *Id.* at 211.

<sup>56</sup> Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 87 (1994).

<sup>57</sup> GILLESPIE, *supra* note 1, at 159.

defense.”<sup>58</sup> Professor Coughlin has been particularly critical of BWS, arguing, “The [battered woman syndrome] defense itself defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities; indeed, the fundamental premise of the defense is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates.”<sup>59</sup> In this way, BWS “revives concepts of excuse.”<sup>60</sup> Applying excuse theory to a battered woman’s act of self-defense reinforces the idea that domestic violence is a private, personal problem. This sex-bias “increases the probability that the trier of fact will prefer to excuse the woman, seeing her act as ‘unreasonable’ self-defense.”<sup>61</sup> So long as the battered woman’s self-defense claim is supported by testimony of her “syndrome,” the danger of the fact-finder falling back on old stereotypes of female incapacity to excuse the victim-defendant’s conduct remains.<sup>62</sup>

Despite its shortcomings, BWS remains the only viable alternative for women wishing to prevent evidence of the general effects of battery at their trial.<sup>63</sup> Professor Myrna Raeder

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<sup>58</sup> Schneider, *Describing and Changing*, *supra* note 2, at 199; *see also* FORELL & MATTHEWS, *supra* note 8, at 203-04.

<sup>59</sup> Coughlin, *supra* note 56, at 7.

<sup>60</sup> Schneider, *Describing and Changing*, *supra* note 2, at 215.

<sup>61</sup> Schneider, *Equal Rights to Trial for Women*, *supra* note 25, at 638.

<sup>62</sup> Professor Mahoney observes:

[A] profound irony marks this expert testimony: Domestic violence is beyond the layman's ken (even though we know it is fairly common) because some jurors will interpret their own experience through cultural perceptions that distort understanding and make it difficult for all of us to talk about the subject, and because cultural stereotypes will shape the vision of battered women held by jurors who have no personal experience of such violence as well. Expert testimony, designed to overcome these stereotypes and help show the context for the woman's actions, has through the pressures of the legal system contributed to a focus on victimization that is understood as passivity or even pathology on the part of the woman. This image further promotes many cultural stereotypes, and may contribute to further stigmatizing of battered women and further denial by women of the dangers they face through domestic violence. In a particular legal action, an individual battered woman's experience is at least partly explained, but the cultural perceptions that limit broader social understanding may remain untouched, and go on to shape legal action again.

Mahoney, *supra* note 7, at 42.

<sup>63</sup> Myrna S. Raeder, *Proving the Case: Battered Woman and Batterer Syndrome: The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 790, 802 (1996).

explains, “[T]he practical consequence of BWS is to provide an imperfect solution that at a minimum supports a claim of imperfect self-defense.”<sup>64</sup> Professor Mahoney also remarks, “I would not choose to discard such a major tool [BWS] in the effort to explain women’s experience in court, just because it has proved vulnerable to distortion in culture and law—we need more, not less, explanation.”<sup>65</sup> It is the only judicially recognized method of providing this explanation, and therefore, absent dramatic changes to the law, reform must come from within the testimony on BWS itself.

### III. OFFERING A SOLUTION THAT REFOCUSSES EXPERT TESTIMONY

#### A. *The Battered Woman Syndrome Paradox*

The concept of BWS is essentially a paradox. The word “syndrome” necessarily implies some sort of disorder, and is commonly used by psychologists to describe a mental illness.<sup>66</sup> Using testimony about a “syndrome” to explain what a reasonable person would do is a contradiction in terms—it is a legal fiction that the legal community has developed to allow experts to testify in trials of battered women. This allows us to prevent the unjust result of sending a victim to jail for acting out of necessity, but doesn’t require us to change the actual substantive self-defense laws.

This use of expert testimony to explain reasonableness, though logically baffling, is the only realistic option for introduction of evidence of battering under the current evidentiary laws.<sup>67</sup> Judges and juries still require an expert to give the battered woman’s claim of self-defense a voice of authority, because her claim challenges long held social norms.<sup>68</sup> It is assumed that jurors cannot possibly see the correctness of the woman-defendant’s claims of

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<sup>64</sup> *Id.* at 802.

<sup>65</sup> Mahoney, *supra* note 7, at 42.

<sup>66</sup> GILLESPIE, *supra* note 1, at 160.

<sup>67</sup> Raeder, *Proving the Case*, *supra* note 63, at 790, 802.

<sup>68</sup> Schneider, *Describing and Changing*, *supra* note 2, at 202.

reasonableness without the help of an expert. Domestic violence is so far beyond the “ken of the average layman,” and so ingrained in our beliefs that it is a private, family matter, that an expert is required to fit this into commonly held views of reasonableness.

Of course, there are contradictions inherent in this argument. BWS testimony may have been developed to dispel common myths and stereotypes about battered women, but it has been accepted by the larger legal community *because of* its tendencies to reinforce social norms and patriarchal values.<sup>69</sup> Courts are more likely to accept the expert’s testimony of BWS if the victim fits the model of a hapless victim. The testimony is used to answer questions entirely inappropriate for considering her self-defense claim, such as why she didn’t just leave. Further, the expert testimony perpetuates the belief that the victim-defendant needs help to convey her reasonableness to the jury, and this help must come from a neutral, detached “expert” who legitimates the woman’s story through social science. This purges the woman’s experience of all its female aspects, and replaces it with a sterilized description of a psychological “syndrome.” Thus, this fits in with long-held beliefs that women are helpless, irrational victims whose actions are not recognizable as reasonable are rational.

As previously discussed, testimony regarding BWS is inherently filled with implications that the victim-defendant is somehow psychologically impaired or incapacitated. She didn’t leave because of the “syndrome.” She overreacted and lashed out against her abuser because of the “syndrome.” This testimony ends up resurrecting excuse doctrine to excuse this poor woman of her unreasonable conduct, compelled by her personal, private syndrome. As a result, we don’t have to look too hard at the public, societal pressures that create an environment that tolerates

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<sup>69</sup> See Schneider, *Describing and Changing*, *supra* note 2, at 199 (“[T]estimony is being presented, heard and sometimes misheard, that goes to the other extreme of depicting battered women as helpless victims and failing to describe the complexity and reasonableness of why battered women act. Courts are reflecting these perspectives in opinions on expert testimony on battered woman syndrome that resonate with familiar stereotypes of female incapacity.”).

domestic violence: it is the individual defendant's personal problem. Her syndrome is what kept her from doing what society sees as reasonable for women in domestic violence relationships: she didn't leave because of the syndrome. Her incapacity is the syndrome.

But we must remind ourselves that BWS is not a separate defense; it is merely a poorly named shorthand for an expert's testimony about the effects of battering on women. BWS is meant to provide context to a woman's actions, and provide evidence that this context is common among women in violent intimate relationships.<sup>70</sup> We must accept that BWS is generally accepted because it reinforces patriarchal norms, but at the same time seek to change those norms from within the system. In this way, expert testimony may resurrect the seemingly forgotten theory of necessity that underlies justification defenses.

#### *B. Making Domestic Violence an Issue of Public Concern*

A justification defense demonstrates a normative judgment that the action in question is socially desirable. Thus, it is a publicly acknowledged just action. Defenses of necessity, such as self-defense, are based on this notion that a person should not be punished for being placed in an impossible situation. The situation compels the action—not the particular person's characteristics. As Professor Schneider explained:

Excuse suggests that the act is personal to the defendant, a private act, in contrast with a more public and common sense of rightness which justification reflects. Excuse suggests a sense of the subject, while justification implies a more objective statement. Redrawing the boundaries of justification and excuse means recasting the boundaries of the private/public and subjective/objective oppositions, making women's experiences generally, and battered women's experiences and perceptions specifically, more public and legitimate, and also more objective.<sup>71</sup>

Self-defense law in particular recognizes the fundamental right to defend one's self against harm from others, and the reasonableness of this action.

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<sup>70</sup> Schneider, *Equal Rights to Trial for Women*, *supra* note 25, at 645.

<sup>71</sup> Schneider, *Describing and Changing*, *supra* note 2, at 216.

In cases of battered women who kill, what creates the necessity of her action? How is it ever her only reasonable option to kill her batterer? Instead of focusing on the victim-defendant's personal syndrome to explain her actions, expert testimony should instead focus on exposing the social norms and failings of local governments that have created this situation of necessity. The true syndrome is the social mores that view men as entitled to act violently toward their partners, and see domestic violence as a private, family matter.

### *C. Including Empirical Data in Expert Testimony*

Experts should use their testimony to redefine domestic violence as a public harm, caused by a larger, public wrong that created the victim-defendant's necessary act of self-defense. This will show that the societal ills that are tolerant of domestic violence should not be borne by the individual alone, one defendant at a time, but should be seen as a public problem. As Julie Blackman explains, "For too long, our shared reluctance to acknowledge the violence that existed in the family has caused societal abuse to be heaped upon the abuse perpetrated by individuals."<sup>72</sup> Expert testimony currently serves only a limited function. As Professor Mahoney writes, "In a particular legal action, an individual battered woman's experience is at least partly explained, but the cultural perceptions that limit broader social understanding may remain untouched, and go on to shape legal action again."<sup>73</sup>

Experts should do more: it should introduce empirical, historical, and cultural evidence to demonstrate the widespread, social, and public nature of the harms caused by domestic violence.

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<sup>72</sup> Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RIGHTS LAW REPORTER 227, 238 (1986), in DEFENDING BATTERED WOMEN IN CRIMINAL CASES, *supra* note 2; see also Julie Blackman, *Emerging Images of Severely Battered Women and the Criminal Justice System*, 8 BEHAVIORAL SCIENCES AND THE LAW 121, 128 (1990), in DEFENDING BATTERED WOMEN IN CRIMINAL CASES, *supra* note 2 ("The criminal justice system, like society more generally, has been reluctant to formally acknowledge the psychological consequences of severe battering and to shape them into a legal defense. Thus, each case is handled anew, with elaborate constructions of the relationship between battering and justification rediscovered in each case, before each grand jury and at each trial.").

<sup>73</sup> Mahoney, *supra* note 7, at 42.

This evidence should be offered to show that the syndrome is in fact shared by the greater American community, and not just the battered woman: it is the tendency of society to close a blind eye to the problems of domestic violence, or to look down upon women who do openly admit they are victims. Further, inadequate police protection and judicial support for victims of domestic violence perpetuates the norms that domestic violence is a personal, rather than a public, problem.

Several scholars have called for an increase in empirical testimony by expert witnesses in BWS cases. In two separate articles, Professor Raeder, writing in response to the issues brought out in the O.J. Simpson trial of the early 1990s, advocates the use of “statistics and general background information of battering,” particularly in cases prosecuting the batterer.<sup>74</sup> Professor Raeder’s recommendation, however, was limited to explaining the need to use empirical evidence to prevent the uninformed juror from reaching erroneous conclusions because “popular conceptions regarding domestic violence are so often at odds with the truth.”<sup>75</sup> Thus, this evidence is merely a way to explain the individual defendant’s situation. While this does so without pathologizing the woman, its ultimate goal is still only to describe one woman’s experience.

Professor David L. Faigman has similarly encouraged the use of empirical evidence in trials against battered women who have killed their abusers. In a note he wrote while still a law student, Professor Faigman argued that courts should allow “valid empirical evidence,” chiefly, “economic and social factors,” to explain “a woman’s failure to leave the battering

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<sup>74</sup> Myrna S. Raeder, *The Better Way: The Role of Batterers’ Profiles and Expert ‘Social Framework’ Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147, 179 (1997); see also Raeder, *Proving the Case*, *supra* note 63.

<sup>75</sup> Raeder, *The Better Way*, *supra* note 74, at 182.

relationship.”<sup>76</sup> This approach, while recognizing the benefit of the empirical evidence, still limits its potential effectiveness: it is used to explain why *this* woman did not leave, instead of saying why *society* expected her to stay.<sup>77</sup>

#### *D. Using Experts to Change Social Norms*

Empirical, historical, and sociological evidence should be used by experts to show that the necessity of a battered woman’s actions in self-defense is in large part created by societal pressures that demand that women stay in the home, and submit to the domination of men. For instance, an expert could demonstrate how the assumptions of the law and subsequently of law enforcement officials reflect the social norms that compel women to silently and privately cope with domestic abuse. As Caroline Forell and Donna Matthews wrote, “[T]he law is often ineffectual. For example, in a [1994] U.S. Department of Justice study, Marianne Zawitz estimated that nearly 90 percent of women killed by intimates had previously called the police, and that half of these had called five or more times.”<sup>78</sup> Professor Raeder similarly found, “The statistics produced from myriad sources are disconcerting, even with some discounting for methodological objections. Each year nearly 1500 women are killed by their batterers. Approximately ninety percent of women killed by husbands or boyfriends were stalked and had previously called the police.”<sup>79</sup>

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<sup>76</sup> David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Defense*, 72 VA. L. REV. 619, 644-45 (1986).

<sup>77</sup> Other scholars offer similar views about the use of “contextual” social evidence. See, e.g., Maguigan, *supra* note 33, at 383 (defining a “fair trial” for a battered woman as one that allows her to put forth evidence “of the social context of her action”); Schneider, *Describing and Changing*, *supra* note 2, at 202-03 (“Battered woman syndrome can also include a description of the psychological impact of the common social and economic problems which battered women face.”). Again, these scholars limit their discussion of the usefulness of this evidence to dispelling myths about the particular victim-defendant on trial.

<sup>78</sup> FORELL & MATTHEWS, *supra* note 8, at 206.

<sup>79</sup> Raeder, *Proving the Case*, *supra* note 63, at 792. For a study on the policies in place at local police departments for domestic violence calls, funded by the U.S. Department of Justice see MEG TOWNSEND, DANA HUNT, SARAH

Women who have been victimized by their intimate partners may have tried, and failed, to get help from the police. According to Gillespie, “Many women who have ultimately killed violent mates tell of their inability to get police protection.”<sup>80</sup> She continues:

If she is like the overwhelming majority of battered women, she also knows, first-hand, that she cannot rely on the police, the courts, neighbors, relatives, or anyone else for protection against her violent mate. Every attempt to get help is likely only to reinforce her perception that she has no alternative but to protect herself.<sup>81</sup>

This “don’t ask, don’t tell” mentality demonstrates a societal preference for idealized notions of the family over protection of the woman. This preference prevents women from seeking protection from the very public agencies that were created to help victims of abuse. As Julie Blackman explains, “[P]rotective agencies and interventionist policies more generally must ‘swim upstream’ against the flow of attitudes that give biological parents and marital bonds far more credit than they deserve.”<sup>82</sup>

These are the social ills that so severely limit a battered woman’s choices. This is what expert testimony should identify and seek to remedy. It is not the woman’s pathology that kept her from leaving a violent relationship, it is society’s illness that made it acceptable for the man to batter in the first place, and also pressured the woman to stay in the relationship. The battered woman’s actions were reasonable, because her community gave her no other choice.

This is where the normative function of criminal law comes into play. As Professor Schneider described, “Social mores determine when self-defense is reasonable.”<sup>83</sup> But the criminal law also shapes these social mores. Professor Robison observed, “[C]riminal law

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KUCK & CAITY BAXTER, LAW ENFORCEMENT RESPONSE TO DOMESTIC VIOLENCE CALLS FOR SERVICE (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/215915.pdf>. The U.S. Justice Department’s Bureau of Justice Statistics produced a report detailing intimate homicide trends in the United States, and this is available at <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm>.

<sup>80</sup> GILLESPIE, *supra* note 1, at 13.

<sup>81</sup> *Id.* at 135-36.

<sup>82</sup> Blackman, *Emerging Images*, *supra* note 72, at 128.

<sup>83</sup> Schneider, *Equal Rights to Trial for Women*, *supra* note 25, at 635.

influences conduct is by shaping the development of shared norms, thereby harnessing the powerful social forces of normative behavior control.”<sup>84</sup> He further explained:

Criminal law, in particular, can influence the norms that are held by the social group and that are internalized by the individual. Criminal law’s influence comes from its operation as a societal mechanism through which the force of social norms is realized and by which the force of internal moral principles is strengthened. That is, the law has little independent force, in the way that social group norms and internalized norms do. It has power to the extent that it can amplify, sustain, and shape these two power sources, and it has power to the extent that it influences what the social group thinks and what its members internalize.<sup>85</sup>

Therefore, according to Robinson, “every adjudication offers an opportunity to either confirm the exact nature of the norm or to signal a shift or refinement of it.”<sup>86</sup>

Experts, on a case-by-case basis, can work to shift and refine social norms. Testimony on the frequency of battered woman syndrome can demonstrate that domestic violence is a public, rather than a private, problem. Evidence about the unresponsiveness of law enforcement, the skepticism of judges, and the social pressures that keep women in battering relationships can reveal the community-wide syndrome that allows for the perpetuation of domestic violence. These pressures drive women to privatize domestic violence, and force them to take matters in their own hands in order to defend their lives. Expert testimony can not only reveal that these acts of self-defense are entirely reasonable, but can also awaken in jurors and judges a sense of social injustice, and a need to become more publicly aware of domestic violence.

#### IV. CONCLUSION

Expert testimony of BWS is one of the most highly contested aspects of criminal self-defense law. BWS was developed to dispel myths about the battered woman, and to help eliminate sex-bias in the criminal law. However, BWS has been, more often than not, used to

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<sup>84</sup> Robinson, *supra* note 13, at 1866.

<sup>85</sup> *Id.* at 1863-64.

<sup>86</sup> *Id.* at 1867.

reinforce stereotypes of women as helpless victims, who were driven to temporary insanity when they killed their batterers. It has become a reformulation of excuse defenses, and has abandoned its roots in the reasonableness inquiry of a claim of self-defense. BWS should instead be used to explain the context of a woman's actions: a context that is not generally understood by the majority of the population.

This Paper does not suggest that courts should no longer permit expert testimony on BWS. It has proven to be an effective tool to educate members of the community about domestic violence. Julie Blackman explained that verdicts finding battered women who killed not guilty reflect "the jurors' willingness to be educated about the potential impact of the shortage of alternatives available to battered women in our society."<sup>87</sup> Further, BWS fits into current evidentiary law. Perhaps its name should change to eliminate the word "syndrome," but the general *mechanism* by which expert testimony is introduced at the trial of a battered woman should not change.

Instead, the *focus* of the expert testimony should change. Experts should downplay a discussion of the woman's specific "syndrome," and emphasize the societal factors that allow men to batter women, and necessitate a woman's action of self-defense. In this way, BWS in fact returns to the proper necessity inquiry that underlies a woman's claim of justified self-defense. This is both a more logical approach to the reasonableness analysis, and an approach that shifts the focus from the pathology of the woman to the pathology of society and the men that batter. Thus, expert testimony, under the rubric of "battered woman syndrome," can slowly help change the social norms that tolerate domestic violence and demand that a battered woman accept the violence in silence.

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<sup>87</sup> Blackman, *Potential Uses for Expert Testimony*, *supra* note 72, at 236.