The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials

Report Responding to Section 40507 of the Violence Against Women Act

U.S. Department of Justice
Office of Justice Programs
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Organization of the Report

Foreword

The passage of the Violence Against Women Act of 1994 (Public Law 103-322, Title IV) signalled a significant change in our nation's efforts to control and prevent crimes such as domestic violence, sexual assault, and stalking. The Act offers direction for a new collaborative approach between law enforcement, prosecutors, the courts and the judiciary, and the medical and health community, social service agencies, community leaders, and the private sector. It also offers a substantial commitment of federal resources to help the criminal justice system and the communities of our country build an integrated system to respond to these crimes and to their victims.

The Act explicitly recognizes that domestic violence is a serious crime that harms not only its immediate victims, but also their families, children, and the larger community. In recent years, our knowledge about battering and its effects has grown substantially. There has been a comparable growth in the introduction and use of that knowledge as evidence in criminal trials. Much of the testimony on the effects of battering has been admitted in criminal trials under the rubric of "battered woman syndrome," and the term has been used as a shorthand reference to the body of scientific and clinical literature that forms the basis for much expert testimony in domestic violence cases. To expand understanding of the research and experience in this area, and how they are being used in criminal trials, Congress called for a report on the medical and psychological bases of battered women's syndrome, the extent to which such evidence has been considered in criminal trials, and an assessment by judges, prosecutors, and defense attorneys of the effects of that evidence on criminal trials.

The resulting report represents a partnership effort not only between the Department of Justice and the Department of Health and Human Services, but also with the State Justice Institute and the National Association of Women Judges. The latter two organizations had a related project under way and generously shared information being developed through that effort. This report presents three papers addressing the three issues specified by Congress: 1) the medical and psychological validity of the effects of battering, 2) the extent to which evidence and expert testimony on this issue have been admitted in criminal trials; and 3) the assessment of criminal justice professionals on the effects of this evidence in criminal trials.

Among the most notable findings was the strong consensus among the researchers, and also among the judges, prosecutors, and defense attorneys interviewed for the assessment, that the term "battered woman syndrome" does

not adequately reflect the breadth or nature of the scientific knowledge now available concerning battering and its effects. There were also concerns that the word "syndrome" carried implications of a malady or psychological impairment and, moreover, suggested that there was a single pattern of response to battering. Equally important is the clear statement that there is not a "battered woman's defense" *per se*. Expert testimony in these cases, when introduced by the defense, should be used to support a battered woman's claim of self-defense or duress, *not to replace it*.

With respect to validity, a review of the research literature concluded that expert testimony on battering and its effects can be supported by an extensive body of scientific and clinical knowledge about the dynamics of domestic violence and traumatic stress reactions. Further, expert testimony on battering and its effects has been admitted in each of the 50 states plus the District of Columbia. The impact of evidence concerning battering and its effects, as assessed by judges, prosecutors, defense attorneys, and other experts, has been to increase recognition in the courtroom of the problem of domestic violence, to provide information that assists factfinders in their deliberations, and to dispel common myths that may interfere with the factfinders' ability to consider fairly the issues in the case.

The Violence Against Women Office and the Department of Justice are committed to assisting states and localities as they develop comprehensive systems to respond to the problem of domestic violence. The appropriate use of expert testimony in criminal trials is one element of that response, and this report makes a significant contribution to it.

Bonnie J. Campbell
Director
Violence Against Women Office
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Preface

The Violence Against Women Act, Title IV of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322) charts a new direction for our nation's response to violent crimes against women. The legislation not only recognizes explicitly that violence against women is a crime but also provides guidance for a collaborative approach to controlling and preventing such crime and assisting and protecting its victims.

In response to the Act, the National Institute of Justice (NIJ) is carrying out an extensive research and evaluation program to develop knowledge about effective responses to violence against women. One element of the program involves specific studies and reports mandated by the legislation.

This report on the scientific and clinical knowledge about battering and its effects and the extent and impact of its introduction as evidence in criminal trials responds to Section 40507 of the Violence Against Women Act, which directs the Attorney General and the Secretary of Health and Human Services to submit a report on these issues.

The development of the report was a genuinely collaborative process. A working group was formed with representatives not only from the Department of Health and Human Services and the Department of Justice, but also from the State Justice Institute (SJI) and the National Association of Women Judges. The National Association of Women Judges was conducting an SJI-sponsored project, *Family Violence and the Courts: Exploring Expert Testimony on Battered Women*, that addressed many of the same issues and questions raised by the Congress. Both organizations generously agreed to collaborate and to share data developed under their own project; both have been active members of the working group. This report is far richer in detail as a result of that partnership.

While the language of Section 40507 refers to "battered women's syndrome," one of the key findings was the consensus of both the researchers and the criminal justice professionals consulted that, given the knowledge now available, a more accurate and appropriate reference is "evidence concerning battering and its effects." The report found an extensive body of research literature, drawn from a range of disciplines. Expert testimony on battering and its effects has now been admitted in all 50 states and the District of Columbia, although considerable variation among and within states remains. An analysis of appeals of battered women defendants found that 63 percent of the convictions were upheld even though expert testimony on battering and its

effects was admitted in 70 percent of the cases. Researchers considered this strong evidence that, contrary to the contention of some critics, admitting expert testimony on battering and its effects was not tantamount to an acquittal. Judges, prosecutors, and defense attorneys interviewed concerning the impact of such evidence in criminal trials said that, within the courtroom, it has increased recognition of the broader problem of domestic violence and that its introduction can assist judges and juries to better understand the issues and/or dispel myths and stereotypes related to battered women.

As we seek to develop a strong and integrated system to respond to the problem of domestic violence in our communities, NIJ hopes that this report and the findings of related studies now under way will not only produce new knowledge but also provide guidance to criminal justice professionals on how they can use that knowledge in their professional duties.

Jeremy Travis
Director
National Institute of Justice

Overview and Highlights of the Report

Overview

Section 40507 of the Violence Against Women Act (Title IV of the Violent Crime Control and Law Enforcement Act of 1994) directs the Attorney General and the Secretary of Health and Human Services to transmit to the Congress a report on the "medical and psychological basis of 'battered women's syndrome' and the extent to which evidence of the syndrome has been considered in criminal trials." The Section stipulates three issues to be addressed:

1. Medical and psychological testimony on the validity of battered women's syndrome as a psychological condition;

2. A compilation of state, tribal, and federal court cases in which evidence of battered women's syndrome was offered in criminal trials; and

3. An assessment by state, tribal, and federal judges, prosecutors, and defense attorneys of the effects that evidence of battered women's syndrome may have in criminal trials.

To respond to the legislative directive, an interdepartmental working group was established. It drew representatives from the Office of Policy Development, the Office of Justice Programs, the National Institute of Justice, and the Bureau of Justice Statistics of the Department of Justice and from the National Institute of Mental Health, the Administration for Children and Families, and the Office of the Assistant Secretary for Planning and Evaluation of the Department of Health and Human Services.

The working group partnership broadened when it was learned that the State Justice Institute had awarded a grant to the National Association of Women Judges to conduct a project on *Family Violence and the Courts: Exploring Expert Testimony on Battered Women*. Given the congruency of concerns and the similarity of issues being addressed, representatives from the State Justice Institute and the National Association of Women Judges joined the working group. Their project was already under way and some of its products appeared directly relevant to Congressional concerns. The Departments of Justice and Health and Human Services also supplemented the original State Justice Institute award to support the development of additional materials specifically responding to the legislative directive. The result has been a

productive partnership, yielding a richer information base than either project might have produced alone. Major portions of this report build on work done by the National Association of Women Judges and its collaborators or draw directly from it.

Three separate reports address the three key issues specified in the legislation, and highlights from each are summarized below. The first, *Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women*, reviews the literature concerning scientific and clinical knowledge on battering and its effects, implications of this scientific knowledge for criminal cases involving battered women, and the role of expert testimony in such cases. The information is drawn from the fields of both domestic violence and traumatic stress, and reflects work in the disciplines of psychology, psychiatry, sociology, nursing, criminal justice, and others. The review concludes that an extensive body of scientific and clinical knowledge strongly supports the validity and relevance of battering as a factor in the reactions and behavior of victims of domestic violence. It further reports that such knowledge is relevant at many points in the criminal justice process, from charging through sentencing, and that expert testimony can provide information that helps factfinders in their deliberations, dispels common misconceptions, or interprets the behavior of the battered woman.

The second report, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, presents 238 state court decisions, 31 federal court decisions, and 12 state statutes addressing the admissibility of expert testimony on battering and its effects. Originally developed for the National Association of Women Judges' project by the National Clearinghouse for the Defense of Battered Women, the report offers a detailed analysis of individual cases and trends. The authors found that while much variation remains, expert testimony on battering and its effects is admissible or has been admitted without discussion in each of the 50 states plus the District of Columbia.

The working group made a separate effort to identify any tribal court cases in which evidence on battering and its effects was offered in criminal trials. The National Indian Justice Center, the American Indian Law Center, the DNA People's Legal Services, the National American Indian Court Judges Association, and the National Domestic Violence Resource Center were contacted, and reviews of *The Indian Law Reporter* and the *Cumulative Tribal Court Topical Index* from 1988 - 1995, as well as a Lexis search, were conducted. No tribal court cases involving expert evidence on battering and its effects were identified. This is perhaps not surprising since the use of expert witnesses is more likely in cases involving serious felony charges, and felonies arising in Indian country are generally not tried in tribal courts.

The third report, *Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women*, presents the results of a 3-day focus group convened by the National Association of Women Judges and attended by federal and state court judges, prosecutors, defense attorneys, expert witnesses, and advocates, as well as representatives of selected federal agencies. The group concluded that the most important effect of such evidence is to assist the factfinders in considering or understanding other evidence presented in the case. The strong consensus was that expert testimony is most likely to clarify the evidence when it is drawn from the now extensive body of scientific and clinical knowledge and when the relationship between the content of the testimony and the other evidence or issues in the case is made explicit.

A significant conclusion of all three reports is the view that the term "battered woman syndrome" is no longer useful or appropriate. While recognizing its historical role in the introduction of expert testimony in this area, the authors of these reports contend that the term does not reflect the breadth of empirical knowledge now available concerning battering and its effects. Each notes that the phrase "battered woman syndrome" implies that a single effect or set of effects characterizes the responses of all battered women, a position unsupported by the research findings or clinical experience. They also raise concerns that the word "syndrome" may be misleading, by carrying connotations of pathology or disease, or that it may create a false perception that the battered woman "suffers from" a mental defect. All preferred to refer to evidence or expert testimony "on battering and its effects" and urged the adoption of this terminology as the standard phrase of reference.

Highlights of *Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women*

- This report reviews the literature concerning scientific and clinical knowledge on battering and its effects, the implications of this scientific knowledge for criminal cases involving battered women, and the role of expert testimony in criminal cases involving battered women.

- The term, "battered woman syndrome" does not adequately reflect the breadth or nature of the empirical knowledge about battering and its effects.

    -- A singular construct, such as the term "battered woman syndrome" is not adequate to encompass the scientific and clinical knowledge about battering and its effects that is germane to criminal cases involving battered women.

- -- The term "battered woman syndrome" portrays a stereotypic image of battered women as helpless, passive, or psychologically impaired, and battering relationships as matching a single pattern, which might not apply in individual cases.

- In criminal court proceedings the dynamics and effects of battering can become an issue in cases in which

  - -- A battered woman is being tried for a crime and introduces a defense of self-defense, coercion, or insanity;

  - -- A battered woman has been charged with or convicted of a crime, and evidence of battering or its effects is offered to reduce the seriousness of the charges or the severity of the sentence;

  - -- A batterer is being tried for murder or assault, and when the defense raises questions about the battered woman's behavior or responsibility for the abuse, the prosecution introduces evidence about battering and its effects to explain the woman's behavior;

  - -- Battering is involved in the case, and counsel wants to address potential myths or misconceptions about domestic violence that might be held by the judge or jury.

- Research studies of battering and its effects are relevant to these legal circumstances, especially with regard to

  - -- A battered woman's perception of danger in a battering relationship, which is relevant to a defense of self-defense or coercion;

  - -- The consequences of battering on a woman's state of mind at the time of the alleged crime that are relevant to her defense;

  - -- Patterns of violent and coercive behavior in battering relationships and a battered woman's coping behaviors that are relevant to 1) explaining a battered woman's behavior, such as recanting testimony or remaining with the batterer; 2) charging and sentencing a battered woman; and 3) prosecution of batterers;

- Evidence about a battered woman's experiences and perceptions of battering, their impact on her, and her actions associated with battering, can be introduced and validated or interpreted by expert testimony.

    -- Such expert testimony on battering and its effects provides relevant information important to the factfinders for purposes of their deliberations in criminal cases involving battered women.

    -- Expert testimony on battering and its effects can be based on and supported by an extensive body of scientific and clinical knowledge on the dynamics of domestic violence and traumatic stress reactions.

    -- Such expert testimony on the relevance of a context of battering in criminal proceedings is admissible, at least to some degree, or has been admitted in every state.

Highlights of *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*

- An analysis of 238 state court decisions, 31 federal court decisions, as well as 12 state statutes addressed the admissibility of expert testimony on battering and its effects in criminal trials, the types of cases in which expert testimony was admitted, the showing necessary to introduce such testimony, the scope and relevance of expert testimony, the circumstances under which such testimony triggers an adverse psychological examination, and the disposition of cases on appeal.

- With respect to admissibility, expert testimony on battering and its effects is admissible, at least to some degree, or has been admitted (without any discussion of the standards for admissibility), in each of the 50 states plus the District of Columbia.

    -- Of the 19 federal courts that have considered the issue, all but three have admitted expert testimony on battering and its effects in at least some cases.

    -- Twelve states, moreover, have enacted statutes providing for admissibility of expert testimony, although in two states, the courts have interpreted these statutes in a restrictive fashion, limiting the admissibility of expert testimony to cases in which self-defense is claimed.

-- However, 18 states have excluded expert testimony in some cases. Only in Wyoming is there still doubt under case law as to the testimony's admissibility, but Wyoming provides for the admissibility of expert testimony by statute.

- While the types of case in which expert testimony on battering and its effects is admitted can vary, it is most readily accepted by state courts (i.e., in 90 percent of the states) in cases involving traditional self-defense situations.

  -- A substantial number of state courts have also admitted expert testimony in nontraditional self-defense situations (e.g., when a battered woman kills her batterer when he is asleep or hires a third party to kill him), in non-self-defense cases (e.g., where duress is asserted as a defense), and when offered by the prosecution (e.g., to explain a battered woman complainant's prior inconsistent statements).

  -- Of the 19 federal courts admitting expert testimony, two-thirds have done so in a duress case, while more than one-third have done so in traditional self-defense cases.

- With respect to the showing necessary to introduce expert testimony, nearly 40 percent of the states require that the defendant raise a self-defense claim in order to introduce expert testimony on battering and its effects; one third of the states have explicitly required that the proffered expert must be properly qualified as such.

- Although there is significant consensus among the courts as to the issues on which expert testimony on battering and its effects is relevant and admissible, case-by-case variations also exist within a given jurisdiction that depend on the nature of the case, the specific facts of the case, or the specific issues raised by the defendant on appeal.

  -- Over three-quarters of the states have found expert testimony admissible to prove the defendant is a battered woman or that she "suffers from 'battered woman syndrome.'" Almost 70 percent of the states have found "generic" expert testimony admissible in order to explain battering and its effects generally, without reference to a specific defendant. Twenty percent of the states, however, explicitly preclude experts from testifying that the defendant is a battered woman or "suffering from 'battered woman syndrome.'"

- -- Nearly 70 percent of the states have found expert testimony relevant to supporting a self-defense claim; nearly 70 percent of the states also agree that expert testimony is relevant to the issue of the defendant's state of mind at the time of the charged crime.

- -- Two-thirds of the states consider expert testimony on battering and its effects relevant to the question of why the defendant did not leave the battering relationship or to explain other conduct, such as acts performed under duress. A similar proportion of the federal courts have found the testimony relevant for these purposes.

- -- A significant minority of the states have explicitly noted that the testimony is admissible to rebut common myths and misperceptions about battered women (33 percent), to prove a defendant's diminished capacity or lack of intent (30 percent), to bolster the defendant's credibility (25 percent), or to show the existence of mitigating factors in the defendant's favor at the sentencing phase of the trial (20 percent). A similar proportion of the federal courts admitting such expert testimony have also found it relevant for these purposes.

- Twenty-two percent of the states have ruled on the issue of whether offering expert testimony on battering subjects a defendant to an adverse psychological examination by the prosecution's expert. All but one found that introducing expert testimony does trigger an adverse examination. Of the three federal courts that have considered this question, two have found that introduction of expert testimony does subject the defendant to an adverse examination.

- With respect to case disposition on appeal, the appeals of 152 battered women defendants in state courts were analyzed for this study; 63 percent resulted in affirmance of the conviction and/or sentence, even though expert testimony on battering and its effects was admitted or found admissible in 71 percent of the affirmances.

  - -- These findings are considered strong evidence that the defense's use of, or the court's awareness of, expert testimony on battering and its effects in no way equates to an acquittal on the criminal charges lodged against a battered woman defendant.

  - -- Moreover, of those appeals in state courts that resulted in reversals, less than half were reversed because of erroneous

exclusion of, limitation of, or failure of counsel to present, expert testimony.

-- Of the 22 appeals of battered women's cases heard in federal courts, more than three-quarters resulted in affirmances of convictions and/or sentences.

Highlights of *Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women*

- This report discusses the impact that evidence on battering and its effects has on criminal trials, based primarily on the results of a 3-day focus group conducted with federal and state court judges, prosecutors, defense attorneys, expert witnesses, and advocates.

- The introduction of evidence on battering and its effects has increased recognition in the courtroom of the problem of domestic violence, and the use of such testimony has both direct and indirect effects.

- Direct effects include implications for the deliberation process and for the disposition of cases.

  -- With respect to the **deliberation process**, the major purposes of introducing evidence about battering and its effects are to assist the triers of fact in their deliberations about the ultimate issues or to dispel common myths and misunderstanding about domestic violence that may interfere with the factfinders' ability to consider issues in the case.

  -- There was strong agreement among the participants that expert testimony concerning battering and its effects can help the factfinder more effectively evaluate the evidence in criminal cases involving a battered woman.

  -- While recognizing the historical precedent for using the term "battered woman syndrome" to refer to such testimony, there was strong consensus that "battered woman syndrome" is not adequate as a construct to incorporate the breadth of available knowledge about battering and its effects that may be relevant in these cases.

  -- The focus group concluded that the notion of a "syndrome," although descriptive of some battered women, does not

encompass the recognized variation in battered women's experiences or the body of scientific knowledge in the field.

-- As an alternative, reference to expert testimony concerning "battering and its effects" was viewed as a more useful construct that allows for the introduction of relevant scientific and clinical knowledge across various types of criminal cases involving battered women.

-- With respect to the **disposition of cases**, a review of state court cases found that convictions of battered women were reversed in less than one-third of the cases appealed and that, of those reversals, less than half were due to erroneous exclusion of, limitation of, or failure to present expert testimony on battering and its effects.

-- These findings suggest that, contrary to popular misconceptions, the introduction of expert testimony on battering and its effects does not equate to acquittal for a battered woman defendant.

- The use of evidence concerning battering has had significant indirect effects on the judiciary.

  -- Introduction of evidence about battering and its effects has increased both the demand for judicial education on the topic and the need for judges to become well-versed in the subject matter of domestic violence to inform their rulings, explanations, and jury instructions;

  -- Judges also need familiarity with the scientific methods used in domestic violence research, given the Daubert decision, which requires that trial court judges "ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable" and demonstrates "a valid scientific connection to the pertinent inquiry as a precondition to admissibility."

- The use of evidence about battering and its effects has indirectly affected both prosecution and defense counsel, requiring fuller understanding of the dynamics of domestic violence and stimulating demand for additional training.

  -- The use of evidence about battering and its effects in self-defense cases led to recognition of its relevance for other related defenses, such as duress.

-- Prosecutors rely on expert testimony to explain the battered victim/witness who recants or is uncooperative; greater attention is given to issues of battering and domestic violence at the charging stage.

- Evidence on battering and its effects also has had indirect effects on other legal matters, on the need for resources, and on the broader community.

  -- While the use of such evidence in criminal trials has preceded its use in most other contexts, it has now been introduced in divorce and custody cases, in applications for civil protection orders, in tort actions and contract cases, and in the evaluation of clemency petitions.

  -- Increased awareness of the utility of evidence related to battering and its effects has created a perceived need for greater access to expert witnesses; participants cited the need as two-fold: 1) financial resources to obtain experts and 2) increased admissibility of expert witness testimony from non-credentialed persons experienced in domestic violence (e.g., shelter workers, police officers, etc.).

  -- Evidence about battering and its effects has influenced changes in state statutes and criminal codes. Increased awareness of domestic violence has spurred efforts to improve the community's response. Domestic violence coordinating councils are a key development, and comprehensive programs (such as the Dade County Domestic Violence Plan, with its unified Domestic Violence Court, and the Duluth, Minnesota, program, which coordinates the criminal justice system, mental health agencies, public health, child welfare, and public and private employee assistance programs) were cited as potential models.

Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women

This report is an edited version by Malcolm Gordon, Ph.D., National Institute of Mental Health, of a review paper prepared by Mary Ann Dutton, Ph.D., Professorial Lecturer of Law, National Law Center, The George Washington University, Washington, D.C.

Contents

Introduction

The Violent Crime Control and Law Enforcement Act of 1994, Section 40507 of Title IV, the Violence Against Women Act, mandated a report concerning "medical and psychological testimony on the validity of battered women's syndrome as a condition." Accordingly, the purpose of this report is to review the literature concerning scientific and clinical knowledge on battering and its effects, the implications of this scientific knowledge for criminal cases involving battered women, and the role of expert testimony in criminal cases involving battered women. The relevant knowledge base includes information about the nature and dynamics of domestic violence involving intimate partners, the psychological and social impact of battering, victims' responses to battering, and the social and psychological context in which battering occurs.

Criminal Case Contexts in Which Battering is an Issue

In criminal court proceedings the dynamics and effects of battering can become issues in:

- The self-defense or insanity defense of a battered woman accused of murdering or assaulting the perpetrator.
- Charging and sentencing in such cases.
- The duress defense of a battered woman accused of criminal or illegal conduct through the instigation or coercion of a perpetrator.
- The prosecution of cases of domestic violence.
- Addressing misconceptions about domestic violence that might be held by judge or jury.

To Support a Plea of Self-Defense

Battered women sometimes use physical force, including the use of weapons, in response to their batterers' violent behavior toward them and other family members. These women may be charged with a criminal offense. In such cases, the legal defense of self-defense is often introduced. Of course, not all women who use violence against an intimate partner do so in self-defense.

The elements of self-defense in situations where the effects of battering are particularly relevant require that the defendant reasonably believed (a) that deadly force was necessary to protect herself or others against death or serious bodily harm used or threatened by the batterer and (b) that the use of force was immediately necessary to protect against death or serious bodily injury.[1] Most state courts do not require a duty to retreat, but factfinders may, nevertheless, find this issue to be relevant in their deliberations. Thus, evidence and testimony may be introduced to assist the triers of fact in deliberations concerning the specific elements of self-defense.[2]

To Support a Defense of Insanity

The defense of insanity requires a defendant to have had a severe mental illness, defect, or disorder at the time of the alleged criminal acts. Further, this condition must have impaired the defendant's mental capacity to such an extent that either (s)he did not understand the nature and consequences of what (s)he was doing or did not understand that what (s)he was doing was wrong.[3] Although this defense is used infrequently in cases involving battered women, it may apply in some instances.

An insanity defense claims that the battered victim's mental capacity was impaired, in contrast to a defense of self-defense or duress, which offers that the battered victim acted in response to a reasonable perception of danger. When the condition of legal insanity is related to domestic violence, testimony by experts can be offered to explain how traumatic reactions and their associated symptoms may preclude the victim from knowing right from wrong or appreciating the consequences of her actions at the time of the criminal acts.

To Support Mitigating Factors in Charging and Sentencing

Information about battering and its effects has been used by prosecutors in determining the severity of the charge that a battered woman should face in a trial and, during the sentencing phase, to show the existence of mitigating factors in the battered woman's criminal behavior.[4] Information considered in charging and sentencing may include the history of violence against the battered woman, the battered woman's efforts to protect herself and obstacles to those efforts, the social and psychological impact of violence on her, and the context in which the violence occurred.[5]

To Support a Defense of Duress

Batterers use physical force, intimidation, and coercion to control their victims' thoughts, feelings, and behaviors.[6] Some women, in an attempt to avoid further violence and abuse, comply with the batterer's explicit or implicit demands.[7] For some, compliance means being an accomplice to or actively engaging in illegal behavior, perhaps involving drug-related activity, fraud, theft, or even violence toward others. When a battered woman has participated in these and other criminal acts in response to the batterer's coercion, threats, or actual violence, a defense of duress is often introduced.

In order to successfully argue a defense of duress, the judge or jury must find that the defendant reasonably believed that participating in a crime (a) was necessary to avoid a specific and immediate threat of serious harm to self or others and (b) was the only way to avoid this harm.[8] Thus, for a battered woman to prove duress, she must demonstrate her reasonable belief that criminal behavior was necessary in order to avoid the batterer's violent or abusive behavior. Describing the pattern, over the course of the relationship, of a battered woman's compliance in the context of the batterer's violence or threats can provide a framework for jury evaluation of whether the alleged criminal conduct resulted from duress or coercion.

To Support the Prosecution of Crimes Involving Domestic Violence

District attorneys may introduce evidence and testimony on battering and its effects in efforts to prosecute domestic violence perpetrators.[9] Testimony may be used to explain a battered victim's recantation of an earlier statement, lack of cooperation with the prosecution, or other conduct of the victim.[10] A battered victim may recant an earlier statement of abuse, often at the point when she reconciles with the batterer or when she is coerced by the batterer by threats of violence or withdrawal of economic support. In some cases, a battered woman may recant a self-incriminating statement only after the batterer has been arrested, and it is safer to do so. Testimony can be useful for explaining to the factfinder the various reasons why battered victims may respond in these ways.

To Explain Misconceptions Related to Domestic Violence

Both prosecution and defense attorneys may introduce testimony to explain to the factfinder what may be misconceptions about battering and its effects.[11] It has been shown that lay persons generally hold misconceptions related to domestic violence.[12] These misconceptions, when held by the triers of fact,

can negate either the occurrence or seriousness of violence, as well as the victim's response of fear and intimidation.

Determining potential misconceptions relevant to a particular case depends, obviously, on the facts of that case. For example, a victim's alcohol or drug- abuse history may lead the jury to believe, erroneously, that the victim caused the battering. In another example, when a battered woman fights back against the batterer, her behavior could be construed as evidence of mutual battering, or even that she was the primary aggressor. Evidence and testimony can be useful to assist the factfinders in sorting out these issues.

The Relevance of Scientific and Clinical Knowledge Concerning Battering and Its Effects in Criminal Court Proceedings

Following is a brief review of the current "scientific, technical, or specialized knowledge"[13] relevant to criminal cases involving battered women. As discussed above, battering and its effects have become an issue primarily in criminal cases in which (1) a battered woman is being tried for a crime and introduces a defense of self-defense, coercion, or insanity, (2) a battered woman has been charged or convicted of a crime, and evidence of battering or its effects is offered to reduce the seriousness of the charges or the severity of the sentence, or (3) a batterer is being tried for murder or assault and the battered woman's behavior or responsibility for the abuse is raised as part of the defense of the batterer. In these instances research studies of battering and its effects are relevant. Research on the dynamics of battering relationships and on a woman's perception of danger in such relationships is pertinent to the defenses of self-defense and coercion. Studies of the consequences of battering on a woman's state of mind, including traumatic stress reactions and disorders associated with battering, are relevant to an insanity defense and issues of diminished capacity. Research identifying patterns of coercive behavior in battering relationships and a victim's coping behaviors is relevant to explaining the seemingly dysfunctional behavior of battered women—an issue raised in charging and sentencing battered women and prosecuting batterers.

This review is representative of the breadth of current and relevant information. By its nature, knowledge is in a process of continual revision,[14] based on new observations and empirical research findings. The information presented here is drawn from the interdisciplinary fields of domestic violence

and traumatic stress, which reflect work in psychology, psychiatry, sociology, nursing, criminal justice, and other disciplines.

The Nature and Dynamics of Domestic Violence

Definition

Domestic violence is defined as a pattern of coercive control characterized by the use of physical, sexual, and psychologically abusive behaviors.[15] Additionally, coercion of the domestic violence victim may be achieved through behaviors directed toward children, property, pets, or others.[16] Violence or the threat of violence toward one's children is often a powerful means of coercing the battered woman. Prior physical or sexual violence toward the battered woman, or knowledge of such behavior on the part of the batterer, enhances the coercive property of the batterer's subsequent psychologically or emotionally abusive behaviors.[17] For example, intimidating gestures or comments acquire a very singular meaning when the batterer has shown a willingness to actually harm his partner. Recognizing the variety of coercive behaviors used by a batterer to exert control over his partner helps to accurately characterize the relationship context within which a battered woman's behavior is considered by the factfinder.

In empirical studies, researchers may operationalize their definitions of domestic violence differently. Definitional and other methodological differences can produce divergent research results. For example, one study may examine violence by measuring the occurrence of aggressive behavior, whereas another may measure extent of injury. Thus, it is important to recognize that variations in results from different empirical studies may reflect methodological differences rather than contradictions in the substantive nature of domestic violence issues.

Prevalence

Empirical research supports the conclusion that physical aggression in intimate relationships is frequent and widespread. For example, nationally representative survey studies conclude that 15 to 35 percent of married, dating, and cohabitating couples experienced one or more act(s) of physical aggression in the previous year.[18] However, most of this physical aggression (e.g., solely acts of pushing, shoving, and slapping) does not lead to serious physical injury. More serious acts of physical aggression, such as punching, beating, choking, or use of a weapon, that could result in serious physical injuries, are relatively rare in the general population. Serious physical violence is

estimated to occur between fewer than 5 percent of couples. For example, the National Crime Victimization Survey found that in 1992–1993, approximately 1 percent of women in the sample reported being assaulted by an intimate partner with intent to injure. This survey requires that acts of domestic violence involve an injury and be labeled as a crime by the respondent to be reported. Thus, minor physical acts are unlikely to be reported, and the survey is more likely to capture episodes of physical aggression that are considered serious by respondents.[19] Experiencing acts of serious physical aggression is highly prevalent in certain samples, such as women seeking help for domestic violence (e.g., women in shelters, women seeking civil restraining orders, and women involved in episodes of domestic violence that were reported to the police). The vast majority of serious physical assaults are perpetrated by males against their female partners.[20]

Patterns of violence and abuse

Several distinctive patterns characterize some batterers' behavior before, during, and after episodes of physical assaults against their intimate partners. Understanding these patterns can clarify the nature of the batterer's coercive control and his partner's behavior in response. These patterns differ in the frequency, severity, and type of violence, the situations that elicit violence or coercion, and the aftermath of violence for both victim and perpetrator. The nature of violence can also change over the course of a relationship.

One characteristic pattern found in some, but not all, battering relationships has been termed the "cycle of violence."[21] This pattern is characterized by a series of stages with differing levels of positive and negative emotional engagement, coercion, and physical aggression. These stages may include tension-building, acute-battering, and contrite-loving phases. For example, Walker found that 65 percent of a sample of battered women reported indicators of a tension-building phase before episodes of assaults, and 58 percent reported a contrition phase following them.[22] Where present in a particular relationship, the cycle of violence can be one of the factors useful in understanding the reasons a battered woman remained in, or returned to, an abusive relationship, since such women might believe the violence may not recur, given its episodic nature and the apparent contrition of the perpetrator.

The "cycle of violence" is not the only pattern of abusive behavior found in battering relationships. For example, another pattern may consist of long periods of time between acute battering episodes. Battered women in relationships characterized by this pattern might reasonably believe, in the period between episodes of battering, that the violence would not recur and,

thus, remain in the relationship. Campbell, in a study of the relationship status of battered women over time, found that some battered women who had remained with their batterers had not been revictimized for periods of at least one year.[23]

Identifying the unique patterns of violence and abuse in a specific case also may facilitate understanding of the battered woman's response. A pattern of battering in which episodes of violence occur suddenly and abruptly can explain why a battered woman might reasonably believe there was little time to seek help—once any indication of recurrent violence was detected—and act preemptorily to avoid harm. Similarly, if a batterer's typical response to the battered woman's effort to end the relationship is to become reconciliatory, a sudden departure from that pattern (e.g., threats) may signal an escalation of violence. If a battered woman is sensitive to such a change in the pattern of the batterer's behavior, this may affect her appraisal of the degree of danger to herself and invoke new or customary coping responses (e.g., flight or preemptive attack).[24]

In sum, this body of knowledge can assist the factfinder in understanding how the particular pattern of batterer behavior has influenced the battered woman. Research on the prevalence of intimate partner violence suggests that serious domestic violence occurs in a relatively small proportion of couples and is rare enough that attorneys, judges, and the general public may not have had direct experience with it. Their understanding of the features and dynamics of domestic violence may be drawn from limited or secondhand experience or from media reports of a small number of domestic violence cases. To the extent that such individuals play a role in charging, prosecuting, defending, trying, or rendering a verdict when domestic violence and its effects are raised in court proceedings, this limited understanding of the unique experiences of battered women can affect decisionmaking in cases where perpetrator and victim behavior do not conform to preconceived notions. The introduction of scientific research findings and clinical experience on the nature and dynamics of battering and its effects, both in general and in particular cases, can provide a more informed context for the police, attorneys, judges, and juries to make determinations in criminal court proceedings.

Battered Woman's Appraisal of Danger

Psychology offers a guide to understanding the processes by which an individual appraises a situation as threatening—a matter central to the legal elements of both self-defense and duress. Understanding an individual's appraisal of a situation as dangerous involves consideration of the actual threat

behavior, the dangerousness of the situation, and the resources at hand for responding to that threat.[25] Thus, most people would consider that a woman is endangered in situations in which a batterer is physically assaultive or directly threatens an imminent assault; in other situations, where the threat is not immediate, a woman's history of being battered is relevant to her perception of the dangerousness of the situation and its likely outcome.[26] Analysis of the influence of a history of battering on a woman's appraisal of danger can contribute to understanding her reaction to a threatening situation. Where the appraisal of threat by a woman is high and/or her appraised resources for responding to threat behavior are low, an expected response would include fear or anxiety, physiological arousal, and behaviors intended either to avoid or alter the situation.[27] Thus, testimony can be offered to assist the factfinder in understanding the battered woman's appraisal of threat, i.e., her perception of danger at the time of a criminal act, as well as her response to that threat.

Threat behavior may be considered dangerous based solely on its objective nature, considering the disparity between two individuals in size, weight, strength, and/or skill in using physical force. Examples of such threat behavior include explicit or implicit threats to harm (e.g., threats to injure, maim, kill, or sexually assault) as well as actual violent behavior (e.g., punching, pushing down a flight of stairs, sexual assault, or use of a weapon). In addition, a batterer's unique history of abuse and violence may provide his victim with added information against which to determine the meaning of his subsequent behavior. For example, intimate partners generally learn to read the subtle nuances of each other's behavior more clearly than can others. Persons who are oppressed or victimized, such as prisoners of war or hostages, have a great incentive to read their oppressor's behavior accurately. This principle applies to battered women in their abusive relationships.[28] That is, a battered woman's appraisal of the threat implicit in a batterer's behavior is based on his pattern of prior violence and abuse. When she has been exposed to severe violence by her partner on previous occasions, she has had the unfortunate opportunity to learn the behavioral clues that signal danger. Thus, the meaning of threat behavior can best be understood in light of a woman's unique history and her knowledge of her partner's prior behavior, as well as by the objective properties of the threat behavior.

Generally, the severity of threat behavior influences the extent to which that behavior is reasonably appraised as dangerous.[29] "Actual or threatened death or serious injury, or a threat to the physical integrity of self or others"[30] is defined as a traumatic event within the medical and psychological community. However, once a batterer has engaged in severe violence toward his partner, any implied or low-level violence can be understood as, potentially, a

reasonable and imminent threat to her physical integrity. Even in situations where minor violence or threats do not actually escalate to serious violence, it is the batterer, not the battered woman, who determines to what point the violence escalates and at what point it ceases.[31]

The timing of threat behavior also influences the extent to which such behavior is appraised as dangerous.[32] Sometimes the batterer's threat is perceived as certain or inevitable, but not necessarily as immediate. Some battered women report as credible their batterers' threats to kill, maim, or seriously injure them at some point in the future. Sometimes, these threats are in connection with the battered woman's stated intention or actual attempts to leave;[33] at other times they arise from a batterer's knowledge that his partner is no longer available to him (e.g., when she has begun a new relationship or filed for divorce). This pattern of violence has been referred to as "separation abuse."[34] In these instances, the incubation, or period of anticipation, heightens the stress or fear associated with the threat.[35] That is, if a batterer has made threats to kill the battered woman, and she perceives this outcome to be inevitable, the passage of time since the threat serves to enhance the level of fear. Even when a battered woman attempts to cope with or in some way reduce that fear (e.g., denial, minimization, substance abuse, attempts to leave, and reports to the police), any renewed indication that the batterer is willing to act out the threat can trigger the full intensity of her fear reaction.

A battered woman's threat appraisal also can be influenced by her state of mind at the time the threat is made. Her prior exposure to violence can result in negative psychological sequelae, altering her state of mind in such a way as to enhance the salience of the batterer's threat. Specifically, domestic violence can lead to posttraumatic stress reactions, including posttraumatic stress disorder (PTSD),[36] in which certain behaviors or events can cause the battered woman to act or feel as if prior severe violence were recurring, even if it is not. This experience may include "reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated."[37] Additional research supports the conclusion that violence negatively impacts battered women in other ways, for example, economic loss,[38] loss of employment,[39] and increased health-care utilization.[40] The scholarly literature documents the negative emotional, social, educational, and physical impact of domestic violence on children.[41] The negative effects on children of witnessing violence can serve as an additional stressor for battered women, thus increasing their distress and/or decreasing their capacity to cope effectively.

To summarize, a battered woman's appraisal of the batterer's threat behavior can best be understood in terms of her unique history with the batterer. Of course, in some cases, an understanding of the threat is obvious, even without knowledge of such history. Knowledge about factors that influence an individual's appraisal of threat can assist the jury in determining whether a battered woman perceived a specific situation as dangerous, particularly in cases in which self-defense or the duress defense are raised. In self-defense, the battered woman claims that her use of force was justified as a response to danger; in a duress defense, the claim is that the battered woman's criminal activity was a means to avoid such danger.

Negative Psychological Consequences of Domestic Violence

An extensive and continually expanding research literature supports the assertion that domestic violence is associated with a wide range of traumatic psychological reactions. Recognition of the effects of trauma dates back more than 200 years.[42] Trauma theory[43] explains the psychological and physical impact of traumatic experiences, including violence, on victims. Research on a wide variety of both acute and chronic trauma has established that exposure to serious traumatic events can lead to exceptional mental states both during and following the trauma. Such altered mental states during trauma exposure can include amnesic states, in which aspects of traumatic events cannot be recalled or are otherwise blocked from consciousness, and dissociative states, in which no awareness exists of the self or of events during the course of exposure to the traumatic event. Some altered mental states following trauma exposure can include flashbacks and other forms of reexperiencing the trauma, a generalized flattening of affect to avoid overwhelming emotions associated with the trauma, and pathological feelings of shame or guilt ("survivor guilt").[44] Such exceptional mental states associated with psychological reactions to trauma exposure can explain puzzling aspects of the battered woman's state of mind and behavior, either during the abusive relationship or in relation to alleged criminal behavior associated with the trauma of battering. In criminal cases in which a woman is accused of assaulting her abuser, the woman’s psychological reactions to chronic or acute battering during the period preceding or during the assault may so impair mental capacity as to support a defense of insanity: the claim that a battered woman's mental condition impaired her capacity to such an extent that either she did not understand the nature and consequences of what she was doing, or she did not understand that what she was doing was wrong.[45] Similarly, traumatic psychological reactions can explain some puzzling patterns of behavior following assaults that may create an impression of culpability, such as an inability to remember events and their sequence, the

absence of emotional reactions to the events, hostile or angry reactions, or a wish to be punished for the assault.

A woman's mental state during an assault on her abuser can be determined by her immediate intense reaction to perceived danger or by posttraumatic reactions to prior trauma. Traumatic stress reactions are initiated when an individual's normal coping processes are overwhelmed during exposure to events that threaten physical harm or an individual's life, psychic identity, or integrity. Traumatic stress reactions can be initiated by such threats to self or valued others. Traumatic stress responses during traumatic events can include fear or terror, dissociation, and amnesia. Altered mental states and dysfunctional behavior can continue in the aftermath of exposure to traumatic events as posttraumatic stress reactions. Chronic forms of posttraumatic stress reactions may meet the criteria for the psychiatric diagnosis of posttraumatic stress disorder,[46] the symptoms of which include persistent reexperiencing of the traumatic events in such forms as flashbacks, distressing dreams, or reenactments of the traumatic events; persistent avoiding of stimuli associated with the traumatic event and/or a numbing of general responsiveness; and persistent symptoms of heightened physiological arousal as manifested in, for example, hypervigilance, irritability, or sleep difficulties.[47]

As described briefly in the preceding section, a battered woman's perception of danger in certain circumstances can reflect previous experience of psychic trauma. Thus, when a battered woman suffers from posttraumatic stress disorder based on previous violence in either a current or former relationship, she may experience a new situation as dangerous due to *reexperiencing* prior trauma through flashbacks and similar psychological reactions. In this example, the battered woman's experience of fear is genuine. However, it is based not on the objective reality of the current situation but, rather, on her psychological reaction, triggered by an event similar to or symbolic of a previously traumatic (e.g., violent) experience.[48] In some cases, the triggering process may occur upon awakening or while intoxicated.[49] Consider an example where, on a prior occasion, a battered woman had been severely beaten by her husband following an argument about her work. At some later point when her husband begins to talk about her work, the woman may experience the situation, specifically the fear, as though the beating was recurring. In this example, the fear may be due not to any actual danger of the moment but, rather, to a triggering of fear that originated from previous danger or harm. This situation must be distinguished from the more common one described earlier in which the battered woman's perception of danger is based on her ability to detect cues in her partner's behavior that signal actual impending danger. Similarly, physiological *hyperarousal*, which can be

manifested as hypervigilance for signs of danger in the environment, physical exhaustion and psychic confusion from sleep deprivation, and paranoid states, can affect her perception of events or her ability to cope with perceived threats.

In criminal proceedings in which a woman is accused of assaulting her abuser, posttraumatic psychological reactions and accompanying behavioral responses can affect the woman's demeanor and response to the offense and her ability to aid in her defense. Such reactions and behavior can include nightmares and flashbacks, avoidance of thoughts and feelings associated with the trauma, difficulty with concentration or memory, sleep disturbance, depression, low self-esteem, suicidal thoughts, anxiety, dissociation, anger or irritability, somatic or health problems, social withdrawal, and substance abuse.[50] Thus, presence of a posttraumatic stress reaction may explain a battered woman's apparent lack of, or atypical, emotion when testifying or talking about her experience with violence. In some cases, the battered woman may report these events as though she has no feeling or emotion related to them, as if on "automatic pilot." The posttraumatic psychological response of dissociation, or the separation of feelings about an event from the knowledge of it, can account for this behavior. In other cases, a woman's flat affect may be explained by attempts to avoid thinking or experiencing emotions associated with her traumatic experiences. In other instances yet, the battered woman may talk about her battering experience with anger or hostility. This behavior may be misinterpreted to suggest that she is an aggressor or, at least, an unlikely victim. This explanation fails to account for the normal reaction of anger as part of the psychological sequelae to the experience of a traumatic event.[51] In fact, it can be an indication of progress in the health process following victimization when a battered woman recognizes her anger at her partner for his violent behavior toward her.[52]

Some women are unable to remember traumatic aspects of the battering or their actions during such episodes even when they want to, due, in part, to a dissociative amnesia resulting from exposure to violence[53]—or even to neurological damage associated with head injuries resulting from the battering. Therefore, they are unable to participate effectively in their own defense. In other cases, posttraumatic guilt, shame, or depression may seriously weaken a woman's desire to avoid punishment for the assault.

Although a framework for describing negative psychological consequences of battering that focuses on traumatic stress reactions may explain many of the behavioral and psychological responses of battered women, especially those who have experienced chronic and severe violence, it should be emphasized

that a wide range of other responses may be involved. Many battered women have the personal resources to cope with their battering experience, ensure eventual safety for themselves and their children, and function with minimal mental health problems. Another common mental health outcome of battering is acute or chronic depression.[54] In many cases, symptoms of depression (or of many other mental health problems experienced by battered women) will be maintained during the battering relationship but will quickly or gradually remit after the woman has been able to terminate the abusive relationship.[55] It is also often the case that mental health problems will emerge after termination of an abusive relationship due to stress (e.g., serious loss of income from leaving the relationship, locating employment and child care, and lack of an intimate relationship) associated with establishing an independent life for the woman and any children.

Offering evidence of posttraumatic stress reactions or other mental health problems or disorders as an explanation for the reactions or behavior of a particular battered woman, of course, requires that an individual, face-to-face evaluation be made by a qualified expert. Possible clinical diagnoses relevant to diminished mental capacity that, if sufficiently serious, have been associated with battering include anxiety disorders (including PTSD and acute stress disorder (ASD)), dissociative disorders, brief psychotic disorder, disorders of extreme stress not otherwise specified (DESNOS), depressive disorders, and substance-related disorders.[56] Of course, symptoms of these disorders may exist prior to the traumatic experience and, therefore, are not caused by it. However, preexisting disorders may be exacerbated by the traumatic experience of violence.

Behavioral Patterns of Victims of Domestic Battering

One consequence of the negative psychological and social sequelae to battering is that victims sometimes engage in patterns of behavior that may be misinterpreted if not considered within the context of a battering relationship. Among such behavior patterns are continued involvement in an abusive relationship, use of physical aggression toward an abuser, and lack of cooperation in the prosecution of an abuser. These behaviors may be misinterpreted in legal proceedings as indicating that the alleged abuse was not serious or that the abused woman is primarily or partly responsible for the abusive behavior that occurred.

Continued involvement in an abusive relationship

A frequently raised issue in legal proceedings is why a battered woman did not terminate an allegedly abusive relationship or, if she did leave, why she returned to the abuser. An implication that may be drawn is that the abusiveness of the relationship is being exaggerated by the victim, as demonstrated by her failure to terminate the relationship. A number of factors or obstacles make terminating an abusive relationship difficult. Major factors addressed here include a lack of economic and other tangible resources, fear of retaliation, and emotional attachment. Other factors include the desire to provide children with a father in the home, shame and embarrassment, and denial of the severity of abuse.

Economic Factors. The lack of economic and other tangible resources makes leaving or staying away difficult for some battered women.[57] Without money, transportation, shelter, child care, and a source of income or support, a woman leaving an abusive relationship has no means of providing for herself and her children. Without these resources, she may risk losing custody of her children to the batterer or some other family member with more adequate means. Resources, such as shelters and advocacy services, to aid battered women in leaving abusive relationships and establishing independent households are severely limited in most communities throughout the country.

Separation Abuse and Fear of Retaliation. Another reason that may keep battered women from leaving abusive relationships has been termed "separation abuse"[58]—retaliation for a woman's efforts to separate from the abuser or to end the relationship. The battered woman may fear retaliation through harm to herself, her children, other family members, friends, or coworkers. Even when a battered woman is able to secure safety for herself, she may not be able to do the same for parents or coworkers; when the batterer is unable to attain access to the battered woman, he may turn to other important people in her life. When battered women are killed, they are more likely than not to be separated from their batterers at the time of death.[59] Jealousy and possessiveness on the part of the batterer are common in domestic homicides.[60] Thus, a battered woman's fear that her abusive partner will escalate his violence toward her at the point she attempts to separate from or end the relationship with him is validated, generally, by homicide statistics.[61]

A battered woman may fear retaliation through the batterer's threat to seek custody of her children or to keep them from her by kidnapping or other means. It has been shown that batterers seek custody at higher rates and are

awarded custody no less often than nonbatterers.[62] There is often no more powerful obstacle to terminating an abusive relationship than when a woman faces the possibility that her children will be taken from her either through custody decisions that favor the batterer, kidnapping, or homicide. A threat that the batterer will continue his coercion of the battered woman through manipulation of the courts in custody battles and other litigation can represent a significant barrier to terminating a violent relationship.

Emotional Attachment. Emotional attachment is yet another significant factor in explaining why battered women are often reluctant to leave an abusive relationship. In spite of past violence, some women hope that their abusive partner's violence will cease, much in the way that marital partners maintain hope that difficulties in a troubled marriage will be resolved. For battered women, the hope is often built on the batterer's apologies, promises, kindnesses, and gifts during the contrite phase of the cycle of violence.[63] Another explanation for a battered woman's emotional attachment to an abusive partner is based on traumatic bonding,[64] a process similar to that which occurs in captive prisoners of war or hostage victims. In traumatic bonding, a battered woman who experiences chronic and escalating violence can come to see the batterer as all-powerful, on the one hand, and to believe that she cannot survive without him, on the other.

Understanding these and other obstacles to leaving or staying away from a battering relationship assists the factfinder in considering the context of a battered woman's efforts to resist, escape, and cope with a violent relationship. Without an appreciation of this context, the factfinder's deliberations may rest on faulty assumptions, for example, that a woman who remains in an alleged abusive relationship has exaggerated or lied about the fact of violence.

Victim's use of physical aggression toward the abuser

Stereotypes and misconceptions about battered women interfere with the factfinder's ability to consider relevant issues in a criminal case involving domestic violence.[65] One common stereotype is the view that battered women are passive or helpless, that they do not call the police, fight back, or actively resist the violence against them. Although early observations portrayed battered women as passive and suffering from learned helplessness,[66] more recent work documents that many battered women engage in active efforts to resist, avoid, escape, and stop the violence against them.[67]

A recent Bureau of Justice Statistics study[68] reported that 40 percent of battered women fought back physically, and another 40 percent fought back

verbally. Results from other studies support the conclusion that it is not uncommon for battered women to resist the batterer's violent behavior.[69] However, battered women's efforts to protect themselves have been shown to make the situation worse at times, escalating the batterer's violent behavior and increasing the odds of injury to the victim.[70] Thus, evidence of a battered woman's use of physical or verbal aggression does not necessarily imply that she was the primary aggressor or that battering was mutual.

The National Crime Victimization Survey found that more than 50 percent of women in the interviewed sample who had been assaulted by an intimate partner had reported at least one assault to the police,[71] although police response to domestic violence (as opposed to stranger violence) is slower and less likely to result in a written report or a search for evidence.[72] Many battered women, however, are reluctant to call police based on concerns about racial or ethnic discrimination against their male partners by police or court systems. Further, social norms maintaining that violence in the home is a private matter[73] are also obstacles to calling the police.

Thus, it should not be assumed that a battered woman who has remained in an abusive relationship has been passive or helpless in that situation. Rather, the battered woman's efforts to respond to the violence against her and her children in the past and the outcome of those efforts[74] should be examined in a criminal case involving a battered woman. However, based on a number of factors outside of the battered woman's control (e.g., police response, court decisions regarding custody and visitation, economic resources), and, in spite of the battered woman's previous efforts, the threat of violence may continue or even escalate.

Battered women actively respond to violence and abuse in many other ways, both during an ongoing assault and subsequent to it. These include telling family or friends about the violence, fleeing from the batterer, legally separating and divorcing, seeking shelter residence, filing for civil protection orders, complying with the batterer's demands, hiding from the batterer, and others.[75] Ironically, maintaining contact with the batterer, in order to minimize or more accurately gauge the level of danger, is a strategy employed by some battered women. This type of information can inform the factfinder's analysis about a particular battered woman's response to violence and abuse in the criminal case at hand.

Lack of cooperation in prosecuting the abuser

Battered women may recant previous reports or testimony about the batterer's violence or may not cooperate with a district attorney in prosecuting a batterer. Various factors may explain this behavior, including the victim's psychological reactions to violence. For example, fear of the batterer can explain why a battered woman may attempt to "protect" him from negative legal consequences of his violent behavior. Even when a battered woman has called the police, she may attempt to avoid the batterer's retaliation by refusing to pursue criminal charges or to testify against him at trial.

Another explanation of a battered woman's reluctance or refusal to be involved in the prosecution derives from her avoidance reactions associated with PTSD. She may miss appointments to talk with the prosecutor or fail to appear in court. By avoiding having to remember or to talk about prior violence, the battered woman may also effectively postpone experiencing painful and distressing emotions.

Critique of "Battered Woman Syndrome"

Evidence and testimony in criminal cases concerning battering and its effects have often been presented in an attempt to establish that the behavior of an alleged victim falls within the parameters of the "battered woman syndrome."[76] However, the term "battered woman syndrome" does not adequately reflect the breadth or nature of knowledge concerning battering and its effects.[77] The scientific and clinical literature offers a large body of information relevant to various issues considered by the factfinder in criminal cases involving battered women, and the term "battered woman syndrome" has been used to signal a shorthand reference to that body of knowledge. However, use of the term "battered woman syndrome," in the context of the knowledge developed within the past 20 years, is imprecise and, therefore, misleading. The knowledge pertaining to battering and its effects does not rest on a singular construct, as the term "battered woman syndrome" implies. Thus, the term "battered woman syndrome" is not adequate to refer to the scientific and clinical knowledge concerning battering and its effects germane to criminal cases involving battered women.

There is no "battered woman defense,"[78] *per se*. Offering evidence of the effects of battering does not, in itself, constitute a legal defense.[79] That is, the question of "battered woman syndrome" is not the ultimate issue in a criminal case involving a battered woman. Rather, testimony about battering and its

effects is offered to assist factfinders in their determination of the ultimate issues, which are case-specific and are reflected in questions such as:

- Did a battered woman reasonably believe she was in danger of harm when she assaulted her abuser?

- Did a batterer threaten or coerce the battered woman into participating unwillingly in a crime?

Following is a discussion of the problems that exist with use of the term "battered woman syndrome" in criminal cases involving battered women.

As conceptualized in the late 1970s, "battered woman syndrome" encompassed a condition of "learned helplessness" in the battered woman that was hypothesized to explain her inability to protect herself against the batterer's violence.[80] Application of the learned helplessness theory to situations involving battered women who face actual danger has been challenged as a misinterpretation of the original learned helplessness theory.[81] Further, as discussed above, empirical evidence contradicts the view of battered women as helpless or passive victims; rather, it supports the idea that battered women continue to make active efforts to resist, escape, or avoid violence.[82]

Another early formulation of "battered woman syndrome" incorporated the cycle of violence theory.[83] The cyclical pattern of the batterer's behavior, including phases of tension building, acute battering, and contrition, was cited to explain women's reluctance to leave battering relationships. Where the cycle of violence is identified within a particular battering relationship, it may be useful to explain why, in spite of repeated occurrences of violence, the battered woman remained in, or returned to, an abusive relationship. Alternatively, it may be useful to explain why she was able to recognize the inevitability of a subsequent violent episode. Nevertheless, the scientific literature does not support a universal "cycle-of-violence" pattern in battering relationships, although this pattern is recognized in some relationships.[84] As discussed previously, some battered women report violence that occurs suddenly with no observable tension-building phase prior to a beating. Nor are all battering relationships characterized by a contrite, loving phase following a beating. Some women report no history of apologies or acts of kindness, while others report that, over time, these behaviors following a beating have diminished. Perhaps most importantly, a "cycle of violence" is not necessary to define a battering relationship or explain why a battered woman remains within it.

More recently, "battered woman syndrome" has been construed as indicating that a battered woman suffers from PTSD as a reaction to her experience of physical violence.[85] A diagnosis of PTSD requires a specific constellation of symptoms. These include intrusion of the traumatic memory into the individual's consciousness, avoidance of thoughts and feelings associated with the traumatic experience or numbing of general responsiveness, and symptoms characterized by increased arousal (e.g., difficulty sleeping or concentrating, hypervigilance). Prevalence studies of battered women have found the rates of PTSD range from 31 to 84 percent.[86] Diagnosed in a particular case, PTSD may be relevant to a number of issues in that case.[87] For example, indication that the battered woman suffered PTSD at the time of an alleged criminal act may help the factfinder to understand her state of mind. However, nothing in the scholarly literature suggests that PTSD is necessary, generally, to establish the relevance of battering and its effects to the various elements of criminal cases involving battered women.

Restricting the definition of "battered woman syndrome" to PTSD is problematic. Within the last decade, the scientific and clinical literature has documented a broad range of emotional, cognitive, physiological, and behavioral sequelae to traumatic events such as battering. Our understanding of the complexity and variability of traumatic response to violence continues to increase rapidly.[88] Any of these reactions to trauma, when characteristic of the battered woman, may be relevant to the factfinder in considering the various issues in the case. Limiting the scope of consideration of the mental health consequences of battering to PTSD alone excludes other potentially relevant and important information necessary for the factfinders in their deliberations.

Finally, the term "battered woman syndrome" evokes a stereotypic image of battered women as pathological or maladjusted.[89] Accordingly, expert testimony can mistakenly suggest to the factfinder that it is a battered woman's aberrant psychological condition that explains, for example, her acting in self-defense, committing a crime under duress, or recanting her testimony about her partner's battering. While psychological trauma associated with battering may be central to this explanation by the expert witness, the battered woman's greater acuity in detecting danger from an abusive partner, in some cases, is the more salient factor. Generally, the term "battered woman syndrome" fails to incorporate the social and psychological context necessary to "see what she sees and know what she knows" in considering the defendant’s actions.

In sum, "battered woman syndrome" is an inadequate term to represent the scientific and clinical knowledge concerning battering and its effects. Nevertheless, evidence and testimony on battering and its effects serves an

important function in assisting the factfinder to consider the context of a battered woman's actions.

Expert Testimony in Cases Involving Battered Women

Expert testimony on battering and its effects is introduced in criminal cases involving battered women by both defense counsel and prosecuting attorneys. It is used by defense counsel to support various types of criminal defenses including self-defense, duress, and insanity. Expert witness testimony may also be used by the defense in conjunction with the sentencing phases of a trial for purposes of mitigation. Prosecutors use expert testimony in domestic violence prosecution cases to explain such matters as the battered victim's recantation or lack of cooperation with the prosecution. Further, both the prosecution and defense use expert witness testimony to provide an explanation for what may be misconceptions about battered women, battering, and its effects.[90] It is not the role of the expert witness to determine the ultimate issues (for example, whether it was reasonable for the battered woman to have held the perception that she was in danger). However, expert testimony is offered to assist in the determination of these issues.

A general framework for admissibility of expert testimony in criminal cases is provided in Rule 702 of the congressionally enacted Federal Rules of Evidence:

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

It follows, therefore, that the framework for expert testimony in criminal cases involving battered women rests on the "scientific, technical, and other specialized knowledge base" concerning battering and its effects. Thus, information based on the expert witness' "knowledge, skill, experience, training, or education" provides the basis for his or her expert testimony.

A 1977 Supreme Court of Washington decision, *State v. Wanrow*,[91] ruled in a self-defense case involving a woman defendant that she was "entitled to have the jury consider her actions in the light of her own perceptions of the situation."[92] Counsel successfully argued that the jury instructions offered at trial did not take into account the woman's perspective, thereby failing to

correctly apply the existing standard of self-defense: "requiring the jury to consider the defendant's action 'seeing what (s)he sees and knowing what (s)he knows,' taking into account all the circumstances as (s)he knew them at the time."[93]

In addition to testimony offered by the defendant, evidence concerning a battered woman's perceptions and the relevant circumstances in a situation in which she has been charged with a crime can be introduced through expert testimony. Such expert testimony has been introduced in criminal cases involving battered women since the late 1970s.[94] Based on a recent analysis, "expert testimony on battering and its effects is admissible, at least to some degree, or has been admitted (without any discussion of the standards for admissibility) in every state."[95] Expert testimony in criminal cases involving battered women was developed initially to explain "the common experiences of, and the impact of repeated abuse on, battered women."[96] That is, expert testimony is offered to show the trier of fact the context of a battered woman's actions.[97] This type of expert testimony, generally, has been referred to as social framework testimony: "employing social science research. . .to provide a social and psychological context in which the trier can understand and evaluate claims about the ultimate fact."[98]

Expert testimony offered in cases involving battered women is either general or case-specific. A number of considerations influence which form of expert testimony is offered in a particular case. These include the facts of the case, case law or state statutes governing expert evaluation and testimony, available resources, and case strategy. General testimony is based on an understanding of the scientific and clinical[99] knowledge about domestic violence and its effects on battered women. In this type of testimony, there is no attempt to form opinions or conclusions related to a specific case.

Case-specific testimony provides information about a particular battered woman and the context in which domestic violence occurred; it places the unique facts of a specific case in a framework of what is known in the literature about battering and its effects. Case-specific testimony, or conclusions about a particular battered woman, requires a face-to-face evaluation of the battered woman, in addition to a review of relevant documents and other information. A suggested approach to case-specific expert testimony about battering and its effects is patterned after a clinical hypothesis-testing model of assessment.[100] Based on consultation with the attorney, an expert can generate a set of questions, or hypotheses, related to battering and/or its effects relevant to a particular case. The expert can then analyze data pertaining to the particular battered woman, relying on all the information

obtained in the evaluation process. This information is later distilled either to support or refute[101] the questions to which the expert will be asked to respond. This approach fits a model of clinical assessment routinely used in empirically based clinical practice.[102] Furthermore, the process is straightforward and makes explicit the relevant questions for inquiry by the expert witness.

Conclusions

The body of relevant scientific and clinical knowledge in the scholarly literature strongly supports the validity of considering battering as a factor in the reactions and behavior of victims of domestic violence. Evidence and testimony about battering and its effects provide information germane to factfinders' deliberations in criminal cases involving battered women. There exists an extensive body of scientific and specialized knowledge derived from the disciplines of the social, behavioral, and health sciences, that contributes to an understanding of domestic violence and traumatic stress reactions.

Although the term "battered woman syndrome" is inadequate to characterize either the reactions or behaviors of battered women, much progress has been made under this rubric toward the admissibility of battering and its effects as considerations in criminal trials. A more accurate representation of battering and its effects includes a range of issues on the nature and dynamics of battering, the effects of violence, battered women's responses to violence, and the social and psychological context in which domestic violence occurs. These issues are relevant in charging, trying, and sentencing battered women in criminal cases involving battering and in prosecuting batterers.

Expert testimony on battering and its effects is supported by an extensive body of scientific knowledge on the dynamics and consequences of domestic violence; this knowledge base will continue to expand with advances in the fields of social, behavioral, and health sciences. An effective framework for expert testimony must permit both general and specific application of research findings to cases involving battered women.

Notes

1. See Potuto, J.R., Saltzburg, S.A., and Pearlman, H.S. (Eds.). (1993, Supp.) *Federal Criminal Jury Instructions* (2nd ed.). Charlottesville, VA: Miche Company Law Publishers.

2. See H. Maguigan (1991). Battered women and self-defense: Myths and misconceptions in current reform proposals. *University of Pennsylvania Law Review,* 140(2), 379-486.

3. Potuto et al., at supra note 1.

4. See J. Parrish (1994). *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*. Report prepared by the National Clearinghouse for the Defense of Battered Women (NCDBW) for the National Association of Women Judges in a State Justice Institute-funded project, "Family Violence and the Courts: Exploring Expert Testimony on Battered Women." (No. A-93-018.DEF).

5. Dutton, M.A. (1992). Understanding women's responses to domestic violence: A redefinition of battered woman syndrome.*Hofstra Law Review,* 21(4), 1191-1242 , Walker, L.E. (1992). Battered women syndrome and self-defense. Symposium on Women and the Law, *Notre Dame Journal of Law, Ethics and Public Policy,* 6(2), 321-334; Blackman, J. (1986). Potential uses for expert testimony: Ideas toward the representation of battered women who kill. *Women's Rights Law Reporter*, 9(3/4), 227-240.

6. Edleson, J.L., and Tolman, R.M. (1992).*Intervention for men who batter: An ecological approach*. Newbury Park: Sage Publications.

7. Dutton, at supra note 5.

8. Potuto et al., at supra note 1.

9. Schroeder, J.M. (1991). Using battered woman syndrome evidence in the prosecution of a batterer. *Iowa Law Review,* 76(3), 553-582.

10. Parrish, at supra note 4.

11. Parrish, at supra note 4; Maguigin, at supra note 2.

12. Ewing, C.P., and Aubrey, M. (1987). Battered woman and public opinion: Some realities about the myths.*Journal of Family Violence,* 2(3), 257-264.

13. Fed. R. of Evid. 702.

14. See *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 113 S.C. 2786 (1993).

15. Warshaw, C., and Ganley, A.L. (1995). *Improving the health care response to domestic violence: A resource manual for health care providers*. The Family Violence Prevention Fund.

16. Warshaw and Ganley, at supra note 15.

17. Ganley, A.L. (1989). Integrating feminist and social learning analyses of aggression: Creating multiple models for intervention with men who batter. In P.L. Caesar and L.K. Hamberger (Eds.), *Treating men who batter: Theory, practice, and programs*. New York: Springer Publishing Co.

18. See J.E. Stets and M.A. Straus. (1990). The marriage license as a hitting license: A comparison of assaults in dating, cohabitating, and married couples. In M.A. Straus and R.J. Gelles (Eds.), *Physical violence in American families: Risk factors and adaptions to violence in 8,145 families*. New Brunswick: Transaction Publishers at 232.

19. Bachman, R.A. and Saltzman, L.E. (1995). Violence against Women: Estimates from the Redesigned Survey. U.S. Department of Justice, Bureau of Justice Statistics Special Report, NCJ-154348.

20. Zawitz, M.W. (1994) *Violence between Intimates*. U.S. Department of Justice, Bureau of Justice Statistics Special Report, NCJ-149259.

21. Walker, L. (1984) *The Battered Woman Syndrome*. New York: Springer.

22. Walker, at supra note 21.

23. See Campbell, J.C., Miller, P., Cardwell, M.M., and Belknap, R.A. (1994). Relationship status of battered women over time. *Journal of Family Violence*, 9(2), 99-111.

24. See Stuart, E.P., and Campbell, J.C. (1989). Assessment of patterns of dangerousness with battered women. *Issues in Mental Health Nursing*, 10, 3-4, 245-260.

25. Paterson, R.J., and Neufeld, R.W.J. (1987). Clear danger: Situational determinants of the appraisal of threat. *Psychological Bulletin*, 101(3), 404-416.

26. Stuart and Campbell, at supra note 24.

27. Paterson and Neufeld, at supra note 25, at 405.

28. See Dutton, D.G. (1995). *The domestic assault of women: Psychological and criminal justice perspectives*. Vancouver: UBC Press for a discussion of traumatic bonding. See Graham, D.L.R., Rawlings, E., and Rimini, N. (1988). Survivors of terror: Battered women, hostages and the Stockholm Syndrome. In Yllö, K. and Bograd, M. (Eds.) *Feminist perspectives on wife abuse*. Newbury Park: Sage Publications.

29. Paterson and Neufeld, at supra note 25.

30. See American Psychiatric Association. (1994). *Diagnostic and Statistical Manual of Mental Disorders* (4th Ed.). Washington, D.C.: Same. Hereafter referred to as DSM-IV. American Psychiatric Association, at 427.

31. Jacobson, N., et al. (1994). Affect, verbal content, and psychophysiology in the arguments of couples with a violent husband. *Journal of Consulting and Clinical psychology*, 62(5), 982-988.

32. Paterson and Neufeld, at supra note 25.

33. Mahoney, M. (1991). Legal images of battered women: Redefining the issue of separation. *Michigan Law Review*, 90(1), 1-94,

34. *Id.*

35. Paterson and Neufeld, at supra note 25.

36. See Kemp, A., Green, B.L., Hovanitz, C., and Rawlings, E.I. (1995). Incidence and correlates of posttraumatic stress disorder in battered women: Shelter and community samples. *Journal of Interpersonal Violence*, 10(1), 43-55; Kemp, A., Fawling, E.I., and Green, B. (1991). Posttraumatic stress disorder in battered women: A shelter sample. *Journal of Traumatic Stress*, 4(1), 137-148; Riggs, D., Rothbaum, B.O., and Foa, E. (1995). A prospective examination of symptoms of posttraumatic stress disorder in victims of nonsexual assault. *Journal of Interpersonal Violence*, 10(2), 201-214; Saunders, D. (1994). Posttraumatic stress symptoms profiles of battered women: A comparison of surveys in two settings. *Violence and Victims*, 9(1), 31-44.

37. American Psychiatric Association, at supra note 30, at 428.

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41. Peled, E., Jaffee, P.G., and Edleson, J.L. (1995).*Ending the cycle of violence: Community responses to children of battered women*. Newbury Park: Sage.

42. See M.R. Trimble (1985). Posttraumatic stress disorder: History of a concept. In C.R. Figley (Ed.), *Trauma and its wake: The study and treatment of Posttraumatic Stress Disorder*. New York: Brunner/Mazel.

43. See, for example, Herman, J. (1992). *Trauma and recovery*. New York: Basic Books; van Der Kolk, B.A. (1987). *Psychological trauma*. Washington, D.C.: American Psychiatric Press; Horowitz, M. (1986). *Stress response syndromes*. Northvale, NJ: Jason Aronson.

44. Horowitz, M. (1993). Stress-response syndromes: A review of posttraumatic stress and adjustment disorders. In J.P. Wilson and B. Raphael (Eds.),*International Handbook of Traumatic Stress Syndromes*. New York: Plenum, 49-60.

45. Potuto et al., at supra note 1.

46. American Psychiatric Association, at supra note 30.

47. *Ibid.*

48. *Ibid.*

49. American Psychiatric Association, at supra note 30.

50. American Psychiatric Association at supra note 30; Dutton at supra note 28; Herman at supra note 43; Follingstad et al. (1991). Factors moderating physical and psychological symptoms of battered women.*Journal of Family Violence*, 6(1), 81-95; Aguilar, R.J., and Nightingale, N.N. (1994). The impact of specific battering experiences on the self-esteem of abused women. *Journal of Family Violence*, 9(1), 35-45; Dutton, M.A. (1992). *Empowering and healing the battered woman*. New York: Springer Publishing Co.

51. Herman, at supra note 43.

52. Dutton, at supra note 50; Walker, L.E.A. (1994).*Abused women and survivor therapy*. Washington, D.C.: American Psychological Association.

53. Loewenstein, R.J. (1993). Psychogenic amnesia and psychogenic fugue: A comprehensive review. In Spiegel et al. (Eds.), *Dissociative disorders: A clinical review.* Lutherville, MD: The Sidran Press.

54. Campbell, R., Sullivan, C.M., and Davidson, W.S. (1996). Women who use domestic violence shelters: Changes in depression over time. *Psychology of Women Quarterly*, 19, 237-255.

55. *Ibid.*

56. American Psychiatric Association at supra note 30; Herman, at supra note 43.

57. Johnson. (1992). Economic, situational, and psychological correlates of the decision-making process of battered women. *Families in Society*, March; Kalmuss and Straus, (1982). Wife's marital dependency and wife abuse. *Journal of Marriage and the Family*, 44, 277-286.

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59. Cooper, M. (1994). *Wasted lives: The tragedy of homicide in the family.* Report prepared by Parallax Research Services for BC Institute on Family Violence. (#290 - 601 West Cordova, Vancouver, BC, V6B 1G1, Canada); Wilson, M., Daly, M., and Wright, C. (1993). Uxoricide in Canada: Demographic risk patterns. *Canadian Journal of Criminology*, 35(3), 263-291.

60. Wilson, Daly, and Wright, at supra note 59.

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63. See L.E. Walker (1977-78). Battered women and learned helplessness. *Victimology: An International Journal*, 2(3/4), 525-534; L.E. Walker (1983). Victimology and the psychological perspectives of battered women. *Victimology: An International Journal*, 8 (1/2), 82-104; L.E. Walker (1984). *The battered woman syndrome*. New York: Springer Publishing Company; L.E. Walker (1989). *Terrifying love*. New York: Harper and Row, Publishers; L.E. Walker. *The battered woman*. New York: Harper and Row.

64. Dutton, at supra note 28; Graham and Rawlings, at supra note 28.

65. See Pagelow, M.D. (1981). *Woman-Battering: Victims and Their Experiences*. Beverly Hills: Sage.

66. Walker (1984), at supra note 63.

67. See Gondolf, E. with Fisher, E.R. (1988). *Battered women as survivors: An alternative to treating learned helplessness*. Lexington, MA: Lexington Books; Bowker, L. (1983). *Beating wife beating*. Lexington, Mass: Lexington Books; Dutton, M.A. (1993). Understanding women's responses to domestic violence: A redefinition of battered woman syndrome. *Hofstra Law Review*, 21(4), 1191-1242.

68. Bachman, R. (1994). Violence against women: A National Crime Victimization Survey report. U.S. Department of Justice, Bureau of Justice Statistics, NCJ-145325.

69. Dutton, M.A., Perrin, S., and Chrestman, K. (1995). Differences among battered women's MMPI profiles: The role of context. Paper presented at the 4th International Family Violence Conference. Durham, New Hampshire; See Marshall, C.E., and Webb, V.J. (1994). A portrait of crime victims who fight back. *Journal of Interpersonal Violence*, 9(1), 45-74; Bachman, R., and Carmody, D.C. (1994). Fighting fire with fire: The effects of victim resistance in intimate versus stranger perpetrated assaults against females. *Journal of Family Violence*, 9(4), 317-331.

70. See Jacobson, N., et al., (1994). Affects, verbal content, and psychophysiology in the arguments of couples with a violent husband. *Journal of Consulting and Clinical Psychology*, 62(5), 982-988; Bachman at supra note 66; Bachman and Carmody at supra note 67.

71. Bachman, at supra note 68; Gondolf and Fisher, at supra note 67.

72. Bachman, at supra note 68.

73. Bachman, at supra note 68.

74. Dutton, at supra note 69.

75. Gondolf and Fisher, at supra note 67; Bowker, at supra note 67.

76. See Walker, L.E. (1979). *The battered woman*. New York: Harper and Row; Walker, L.E. (1984). *Battered woman syndrome*. New York: Springer Publishing Company.

77. See Schneider, E.M., (1986). Describing and changing: Women's self-defense work and the problem of expert testimony on battering. *Women's Rights Law Reporter*, 9(3/4), 195-226 ; See Schopp, R.F., Sturgis, B.J., and Sullivan, M. (1994). Battered woman syndrome, expert testimony, and the distinction between justification and excuse. *University of Illinois Law Review*, 1994(1), 45-113; Dutton, at supra note 67; Schuller, R.A., and Vidmar, N. (1992). Battered woman syndrome evidence in the courtroom. *Law and Human Behavior*, 18(3), 273-291; National Association of Women Judges. *Expert Testimony in Criminal Cases Involving Battered Women: A Resource Monograph*. A report from a State Justice Institute-funded grant. (NO.A-93-018.DEF) for a discussion of this issue and a similar conclusion.

78. Maguigin, at supra note 2; Parrish, at supra note 4.

79. Possibly with the exception of insanity where it could be argued that the psychological effects of domestic violence resulted in a mental condition that impaired the person's mental capacity to the extent that (s)he was unable to understand the nature and consequences of his or her actions or did not understand that those actions were wrong.

80. Walker, at supra note 63.

81. See Peterson, C., Maier, S.F., and Seligman, M.E.P. (1993).*Learned helplessness: A theory for the age of personal control*. New York: Oxford University Press at 239: "we think that the passivity observed among victims of domestic violence is a middling example of learned helplessness. Passivity is present, but it may well be instrumental. Cognitions of helplessness are present, as is a history of uncontrollability. But there may also be a history of explicit reinforcement for passivity. Taken together, these results do not constitute the best possible support for concluding that these women show learned helplessness." Also see Bowker, L.E. (1993). A battered woman's problems are social, not psychological. In R.J. Gelles and D.R.Loseke (Eds.).*Current controversies on family violence*. Newbury Park: Sage.

82. Gondolf, at supra note 67.

83. Walker (1984), at supra note 63.

84. Walker (1984), at supra note 63, at 96; also see Schopp, F.T., Sturgis, B.J., and Sullivan, M. Battered woman syndrome, expert testimony, and the distinction between justification and excuse. 1994 *U. Ill. L. Rev.* 45 for a critique of the theory of cycle of violence.

85. American Psychiatric Association, at supra note 30.

86. Kemp et al., at supra note 36; Saunders, D.G. (1994). Posttraumatic stress symptom profiles of battered women: A comparison of survivors in two settings.*Violence and Victims*, 9(1), 31-44; Astin, Lawrence, and Foy (1993). Posttraumatic stress disorder among battered women: Risk and resiliency factors. *Violence and Victims*, 8(1), 17-28.

87. See Dutton, M.A., and Goodman, L. (1994). Posttraumatic stress disorder among battered women: Analysis of legal implications. *Behavioral Sciences and the Law*, 12, 215-234. for a discussion of PTSD as it applies to forensic cases involving battered women.

88. See *Daubert v. Merrill Dow Pharmaceutical, Inc.*, 113 S. Ct. 2786 (1993): "scientific conclusions are subject to perpetual revision" at 16.

89. See Schneider at supra note 77 (1986 Law Reporter article); See P. Jenkins and B. Davidson (1990). Battered women in the criminal justice system: An analysis of gender stereotypes. *Behavioral Sciences and the Law*, 8, 171-180; See A. Browne (1987). *When battered women kill*. New York: The Free Press.

90. See Parish, at supra note 4, at 35 for a legal discussion of the scope and relevance of expert testimony.

91. 88 Wash. 2d 221, 559 P. 2d 548 (1977).

92. See E.M. Schneider and S.B. Jordan (1981). Representation of women who defend themselves in response to physical or sexual assault. In E. Bochnak (Ed.),*Women's self-defense cases*. Charlottesville, VA: The Michie Company, pp. 1-39.

93. *Id.* at 20.

94. See, for example, *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. Court of Appeals, 1979) which remanded a case to the trial court for reconsideration of the decision to exclude expert testimony. Also see Macpherson, S., Ridolfi, K., Sternberg, S., and D. Wiley (1981). Expert testimony. (Appendix G), In E. Bochnak (Ed.),*Women's self-defense cases: Theory and practice*. Charlottesville, VA: The Michie Company for list of 50 trial court cases involving expert testimony on the subject of battering. Also see L.E. Walker (1989). *Terrifying love: Why battered women kill and how society responds*. New York: Harper and Row, Publishers for a discussion of a 1977 case involving a battered woman charged with homicide in which Dr. Walker testified as an expert witness.

95. Parrish, at supra note 4.

96. Schneider, at supra note 77, at 198.

97. Maguigan, at supra note 2.

98. See Vidmar, N., and Schuller, R.A. (1989). Juries and expert evidence: Social framework testimony. *Law and Contemporary Problems*, 133.

99. Specialized knowledge is that based on experience, training, or skill such as that acquired by a battered women's advocate or shelter worker, counselor, or law enforcement officer. Specialized knowledge is contrasted with scientific knowledge which is derived from scientific research.

100. Nelson, R.O., and Hayes, S.C. (1986). *Conceptual foundations of behavioral assessment*. New York: The Guilford Press; Bellack, A.S., and Hersen, M. (Eds.). (1988).*Behavioral assessment: A practical handbook*. New York: Pergamon Press.

101. In some cases, there may be too little information to generate answers to a particular hypothesis or question.

102. Nelson and Hayes, at supra note 98; Bellack and Hersen, at supra note 100.

Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases

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"Family Violence and the Courts:
Exploring Expert Testimony on Battered Women"

Contents

Preface

The National Clearinghouse for the Defense of Battered Women is very pleased to be part of the National Association of Women Judges' project, *Family Violence and the Courts: Exploring Expert Testimony on Battered Women*, funded by State Justice Institute. The project will provide in-depth information and analysis about expert testimony in cases involving battered women.

At the National Clearinghouse we are acutely aware of the need for this project. On a daily basis we are confronted with the widespread misunderstanding that continues to exist—even within the legal community— about the use of expert testimony in cases involving battered women. It is true that in recent years legal scholars have produced a large body of literature about battered women who are charged with crimes, and much of it has focused on expert testimony. Unfortunately, most of these legal treatises fail to discuss the relationship of expert testimony to current substantive law, evidentiary provisions, or procedural rules. Moreover, almost none of the literature discusses battered women who are coerced into crime, women who are charged with "failing to protect" their children from an abuser's violence, and the use of expert testimony in these cases.

In our work at the National Clearinghouse we respond to calls from defense attorneys searching for an expert witness because they have "one of those battered women's cases" and want an expert for their "battered women's defense." Judges, members of the media, and others call us wanting to know which states allow or do not allow the "battered women's defense."

There is no such thing as a "battered women's defense."[1] Yet the *perception* that there is a separate defense called the "battered women's defense," or the "battered woman syndrome defense," persists. Due in large part to this misperception, many battered women's cases continue to be presented or considered as though new, unique legal rules apply. Many judges and lawyers fail to understand that testimony by an expert should be used to *support* a battered woman's self-defense or duress claim, *not to replace it*. When battered women are on trial, traditional concepts of criminal law continue to be discarded or oddly twisted, and myths and misconceptions about battered women run rampant.[2]

In general, expert testimony should help the jury and judge understand the defendant's experiences and actions, not excuse them. The testimony should be

part of the evidence that helps to inform the factfinder about the social context in which the incident occurred. Unfortunately, many people continue to misconstrue the use of evidence of abuse in criminal trials and, since the Bobbitt and Menendez trials, there has been increased publicity decrying the so-called "abuse excuses" as condoning vigilantism and freeing people who kill from personal responsibility.[3]

Supporting the introduction of expert testimony does not promote vigilantism; it promotes fair trials. Defendants—including battered women defendants—should be able to introduce all relevant evidence at their trials, including evidence of and expert testimony about their experiences of abuse, that can help the jurors better understand their situations.

It is essential that we increase understanding in the lay and legal communities about the role of an expert in supporting established defenses used by battered women, such as self-defense. In any self-defense case, the jury needs to have information about why the defendant believed she had to defend herself—why, to use generic self-defense language, the defendant was reasonable in her belief that she was in imminent danger of death or great bodily harm. *Any* defendant claiming self-defense would want to bring in information about the deceased's history of violence against her or him; obviously this evidence would help the jury to better understand why the person was so afraid at the time of the incident.

Even in a barroom fight between two men, the man who defended himself—the defendant—can bring in information about the other man's past threats and violence directed at the defendant (e.g., "A week ago the other guy threatened me. Four days ago he pulled a knife on me. Two days ago he punched me and said he'd kill me the next time he saw me."). Generally, in cases involving two men in a bar, there is less history of violence between the two parties than in cases involving battered women; but the idea is the same: the information about the past threats and violence is necessary to fairly evaluate the situation at the time of the incident. This type of "social context" information is *not* unique to battered women's self-defense claims.

In many cases involving battered women, it is also necessary to bring in an expert witness to testify about battering and its effects to help jurors and judges understand the experiences, beliefs, and perceptions of women who are beaten by their intimate partners—information that the common lay person usually does not possess. Generally, in a self-defense case, this testimony is introduced to help the jurors better understand why, given this woman's experience of violence at the hands of her abuser, she was reasonable in her

belief that she was in imminent danger. Although battered women who kill their abusers are most likely to call an expert about battering and its effects to support their self-defense claims, battered women charged with other crimes have also utilized expert witnesses at trial, most notably in duress defenses. Additionally, experts have testified in civil cases and in cases when batterers are prosecuted.[4]

As this ***Analysis*** shows, since the mid-1980s there has been increasing recognition by the courts of the relevance of expert testimony on battering and its effects to support battered women's defense claims. Yet, as you will see below, many battered women continue to face monumental hurdles when they come before the court system as defendants. Although the vast majority of states now allow expert testimony in support of battered women's defense claims, some women still are unable to present an expert witness to testify about the effects of abuse on their beliefs, experiences, and perceptions. Based on the calls we receive at the National Clearinghouse, many attorneys still do not understand the relevance of such testimony and fail to offer an expert on behalf of their clients. In other instances, the court allows an expert but severely limits the scope of the expert's testimony.

Due in large part to the fact that expert testimony about battering and its effects—as well as additional evidence about battering from other sources—is not being properly integrated into already existing jurisprudence, battered women's homicide cases are reversed on appeal at a rate significantly higher than the national average for homicide appeals.[5] It is our hope that this research will help practitioners and researchers alike better understand the true goals and purposes of introducing expert testimony, so that battered women defendants—like all defendants—will have an opportunity to introduce all the relevant evidence at their trials. After all, I think we can all agree that justice is best served when the jurors have an opportunity to hear all of the relevant evidence in order to fairly evaluate the case before them.

The report which follows—***Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases***—is the most comprehensive study of its kind. Building on the seminal work of Professor Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals* (140 U. PA. L. REV. 379 (1991)[6], Attorney Janet Parrish meticulously researched and analyzed every criminal case we were able to locate involving a battered woman defendant who introduced—or tried to introduce—an expert witness at her trial. This ***Trend Analysis*** provides detailed information about what is actually happening across the United States regarding the admissibility of expert testimony about battering and its effects.

The National Clearinghouse for the Defense of Battered Women looks forward to working with others in the field to learn more about the uses of expert testimony. As Janet Parrish states (page 1), "the [***Analysis***] raises as many questions as it answers." This is absolutely correct, but we are fortunate to have in this ***Trend Analysis*** such a solid foundation to support further exploration of these complex issues. It is our hope that this work will promote much needed understanding about the role of experts in cases of battered women charged with crimes and help encourage further dialogue to ensure that justice is served.

Sue Osthoff
Director
National Clearinghouse for the Defense of Battered Women

I. Overview

A. Introduction and Acknowledgements

The original version of this analysis (dated November 1994) was prepared by the National Clearinghouse for the Defense of Battered Women (NCDBW) under contract to the National Association of Women Judges (NAWJ) for its State Justice Institute (SJI)-funded project, *Family Violence and the Courts: Exploring Expert Testimony on Battered Women.* This revised version (dated May 1995) contains updated citations for some of the cases included in the original analysis as well as information about two additional state statutes not included in the earlier version.

NCDBW has gathered and analyzed relevant data on the admissibility of expert testimony on battering and its effects in criminal cases in state and federal courts. This resultant analysis is to serve as an Introductory Working Paper that contains the most up-to-date information about the current status of admissibility of such testimony nationally. In addition, this paper suggests some key questions that are beyond the scope of this analysis, but warrant additional investigation and analysis. These questions are listed at the end of the analysis. Such questions and other related issues will be the subject of Working Papers to be developed as part of the SJI-funded project and will be discussed at an interdisciplinary Roundtable to be convened by the NAWJ with NCDBW's assistance.

We acknowledge that this analysis may raise as many questions as it answers. We also acknowledge the limits of this analysis. It is an effort to capture current trends, notwithstanding the fact that it is difficult to do a direct state-to-state comparison. Obviously, the states have varying evidentiary and substantive criminal law standards, which impact on their approaches to the purpose, relevance, and scope of expert testimony in general and on battering and its effects in particular. Providing correlations between, for example, a state's self-defense standard and its views on the admissibility or relevance of expert testimony for a particular purpose is beyond the scope of this analysis, but they certainly would enhance our understanding of these results.

Throughout this analysis, the term "expert testimony on battering and its effects" will be used. This testimony has often been referred to in court decisions and literature as testimony on "battered woman syndrome" or "battered women's syndrome" (which may be abbreviated as "BWS"). However, the syndromic characterization of such testimony does not

adequately reflect the broad scope of testimony that is allowed in many states.

Many battered women's advocates, experts, and attorneys have expressed concern about the use of the term "syndrome" in connection with this issue. Although it may have been necessary initially to use the term to demonstrate the scientific validity of the proffered expert testimony, and although it is a convenient way of describing a set of characteristics that are common to many (but not all) battered women, the use of the term "syndrome" has also served to stigmatize the battered woman defendant or to create a false perception that she "suffers from" a mental disease or defect (one court even referred to it as a "malady").

Such misconceptions persist even *now*. For example, in *Ware v. Yukins, 1994 U.S. App. LEXIS 3824, at *17 (6th Cir. 2/25/94) (unpub. disposition), cert. denied 114 S.Ct. 2763 (1994), the Sixth Circuit Court of Appeals characterized the defendant's theory of her case as being "that [she] had lost control of her faculties in much the same manner as would a victim of `Battered Woman Syndrome.'" Similarly, in State v. Daws*, 1994 Ohio App. LEXIS 3295 (7/27/94) (slip op.), *appeal allowed by* 71 Ohio St.3d 1406, 641 N.E.2d 203 (1994), an Ohio appellate court, in a lengthy opinion considering the permissible scope of expert testimony on battering and its effects, noted that most courts permit such testimony to counteract jury misperceptions about battered women; yet, demonstrating its own misperceptions, the court also observed (at *25) that "it is not so obvious that the average juror will be able to interpret the abnormal behaviors of a person suffering from the battered woman syndrome...." Rather than perpetuate such inaccuracies, we use (and urge others to use) the more generic, more inclusive language that is utilized by many expert witnesses and in a number of state statutes on the admissibility of expert testimony on battering and its effects.

Finally, we acknowledge the invaluable assistance of the following individuals in this project: Professor Holly Maguigan; Susan Toler, Esquire; Rose M. Weber; Ruth A. Cionca; David Dorsey, Esquire; Holly White; and Leigh R. Krohmer. We also appreciate the helpful comments and suggestions of the project Editor, Mary Ann Dutton, Ph.D.

B. Summary of Findings and Conclusions

This analysis of 238 state court decisions, 31 federal court decisions, and 12 state statutes finds a number of significant trends in the use of expert testimony on battering and its effects in criminal cases. Although the analysis should be

read in its entirety (and indeed, the cited cases and statutes should be carefully reviewed first-hand by practitioners who intend to rely on them), the following major findings and conclusions emerge (primarily from the analysis of state court decisions).

- ***Admissibility of expert testimony on battering and its effects***

  - **Expert testimony on battering and its effects is admissible, at least to some degree, or has been admitted without discussion of the standards for admissibility, in each of the 50 states plus the District of Columbia.** On the other hand, 18 states have also excluded expert testimony in some cases; of these, only as to Wyoming is there still doubt under case law as to the testimony's admissibility. However, Wyoming (plus 11 other states) provides for the admissibility of expert testimony by statute.

  - **Twelve states have enacted statutes providing for the admissibility of expert testimony, all but two of which were passed within the last four years.** Notably, in Ohio and Missouri, the courts have interpreted these statutes in a restrictive fashion to limit the admissibility of expert testimony to cases in which self-defense is claimed (as opposed to, e.g., duress).

  - **Of the 19 federal courts that have considered the issue, all but three have admitted expert testimony on battering and its effects in at least some cases.**

- ***Types of cases in which expert testimony admitted***

  - **Expert testimony on battering and its effects is most readily accepted by state courts in cases involving traditional self-defense situations, i.e., it has been accepted by 90 percent of the states in such circumstances.** Expert testimony has also been admitted by a substantial number of state courts in nontraditional self-defense situations, such as where a battered woman kills her batterer while he is sleeping (accepted by 29 percent of the states) or by hiring a third party to kill him (accepted by 20 percent of the states).

  - **In another striking trend, expert testimony on battering offered by the prosecution has been admitted or discussed with favor in**

29 percent of the states, e.g., to explain a battered woman complainant's prior inconsistent statements.

- **A sizable minority of states have admitted expert testimony in non-self-defense cases**, such as where duress is asserted as a defense (16 percent of the states) or where a battered woman defendant has been charged with a crime against a third party, other than the batterer (14 percent of the states). **Expert testimony on battering has also been used in civil actions in at least 20 percent of the states.**

- **Two-thirds of the federal courts admitting expert testimony (11 of 16 courts) do so in a duress case.** More than one-third of the federal courts admitting this testimony have done so in traditional self-defense cases.

- ***Showing necessary to introduce expert testimony***

  - **Nearly 40 percent of the states require that the defendant raise a self-defense claim in order to introduce expert testimony on battering and its effects.** Similarly, 42 percent of the 12 state statutes providing for the admissibility of such expert testimony require that there be a claim of self-defense made.

  - **Over 25 percent of the states have required some evidence that "battered woman syndrome" is accepted in the scientific community in order to admit the testimony,** while 33 percent of the states have explicitly required that the proffered expert must be properly qualified as such.

  - **Twenty percent of the states require that the defendant first show that she is a battered woman before expert testimony will be admitted.** Similarly, 25 percent of the state statutes have this requirement.

- ***Ineffectiveness of counsel issues***

  - **Of the 15 state jurisdictions that have considered the issue of whether trial counsel was ineffective (primarily for failing to offer expert testimony on battering and its effects), the majority (60 percent) have found that counsel was not ineffective.** Each of the five states that has considered whether state funds must be made

available to an indigent battered woman defendant so she could hire an expert witness has held that it was acceptable to deny such funds (although one of these decisions was reversed by the federal courts).

- ***Scope and relevance of expert testimony***

  - **Although there is significant consensus among the courts as to the issues on which expert testimony on battering and its effects are relevant and admissible, variations also exist within a given jurisdiction from case to case, depending on the nature of the case (e.g., traditional self-defense versus a "hire-to-kill" case), the specific facts of the case, or the specific issues raised by the defendant on appeal.**

  - **The vast majority of states (76 percent) have found expert testimony to be admissible to prove the defendant is a battered woman or that she "suffers from 'battered woman syndrome.'"** Forty-two percent of the 12 state statutes provide for such use of expert testimony, while close to two-thirds of the 16 federal courts admitting such testimony permit the expert to testify that the defendant is a battered woman or exhibits the characteristics of "battered woman syndrome." Sixty-nine percent of the states have found "generic" expert testimony admissible, i.e., to explain battering and its effects generally without reference to the specific defendant. Twenty percent of the states have explicitly precluded experts from testifying that the defendant is in fact a battered woman or "suffering from 'battered woman syndrome.'"

  - **Nearly 70 percent of the states have found expert testimony relevant to supporting a self-defense claim.** More than 50 percent of the states have found the testimony relevant to assessment of the reasonableness of the defendant's belief she was in danger of imminent harm and/or of her actions in defense of herself or others. A lesser, but significant, number (37 percent) have found the testimony relevant to the defendant's perception of the temporal proximity of the perceived danger to life or safety.

  - **Nearly 70 percent of the states agree that expert testimony is relevant to the issue of the defendant's state of mind at the time of the charged crime.** Similar but somewhat lesser percentages of the 12 state statutes specifically permit the use of the testimony to

support a self-defense claim or to elucidate the defendant's state of mind. Of the 16 federal courts admitting the expert testimony, 75 percent have found it to be relevant to the defendant's state of mind.

- **More than 25 percent of the states have found an expert can give an opinion on the "ultimate question" for the factfinder of reasonableness or whether the defendant acted in self-defense.** But a larger group of states (37 percent) have held to the contrary.

- **Two-thirds of the states consider expert testimony on battering and its effects to be relevant to the question of why the defendant did not leave the battering relationship or to explain other conduct, such as acts done under duress by the batterer.** A similar proportion of the federal courts have found the testimony to be relevant for these purposes. In addition, 33 percent of the states have explicitly noted that the testimony is admissible to rebut common myths and misperceptions about battered women.

- **Almost 30 percent of the states agree that the expert testimony is admissible to prove a defendant's diminished capacity, mental defect, or lack of intent to commit the charged crime.** Forty-four percent of the federal courts admitting expert testimony have so found.

- **Consistent with the general law of these jurisdictions, 25 percent of the states have found expert testimony on battering and its effects to be admissible to bolster the defendant's credibility.** A similar percentage of the federal courts admitting the testimony have so found.

- **Expert testimony on battering and its effects has also been admitted by 20 percent of the states to show the existence of mitigating factors in the defendant's favor at the sentencing phase of the trial.** A similar percentage of the admitting federal courts (notably the 9th Circuit Court of Appeals) has so found.

- ***Expert testimony triggers adverse examination***

  - **Of the 22 percent of the states that have ruled on the issue whether offering expert testimony on battering subjects a defendant to an adverse psychological examination by the**

prosecution's expert, the overwhelming majority have found that introducing expert testimony does trigger an adverse examination. Only Minnesota has gone the other way on this issue, albeit with limitations.

- **Both of the two state statutes that address this issue provide for an adverse examination with limitations.** Of the three federal courts that have looked at this question, two have found that introduction of expert testimony does subject the defendant to an adverse examination.

- ***Case dispositions on appeal***

  - **Of the battered women defendants' appeals (152 state court decisions) analyzed here, 63 percent resulted in affirmance of the conviction and/or sentence, even though expert testimony on battering and its effects was admitted or found admissible in 71 percent of the affirmances.** This is strong evidence that the defense's use of or the court's awareness of expert testimony on battering and its effects in no way equates to an acquittal on the criminal charges lodged against a battered woman defendant.

  - **Of the 32 percent of the appeals that resulted in reversals, less than half (45 percent) were reversed due to erroneous exclusion of, limitation of, or failure of counsel to present expert testimony.** The remainder were reversed on grounds unrelated to the expert testimony issue.

  - **Five percent of the appeals were remanded, nearly all for reasons unrelated to the expert testimony issue.**

  - **These findings are roughly similar to those of Professor Holly Maguigan in her 1991 study, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals* (140 U. PA. L. REV. 379).** However, it appears that from 1991 to 1994 when this survey was conducted, the odds that a battered woman defendant's conviction would be affirmed on appeal in a case in which expert testimony was used or was at issue increased by almost 20 percent.

  - **Of the battered women's appeals heard in the federal courts (22 cases), 77 percent resulted in affirmances of convictions and/or**

sentences. This is significantly higher than the 60 percent affirmance rate for state court appeals found in both this analysis and Maguigan's 1991 study.

II. Research Methodology

A. Database for the Trend Analysis

The database for this analysis is comprised of 238 state court[7] (primarily appellate) decisions and 31 federal court (mostly appellate) decisions.[8] As detailed in Section III.G.1. *infra*, nearly two-thirds (152) of the state court cases represent high or intermediate appellate court decisions regarding battered women charged with crimes. The remainder is comprised of 30 trial court-level cases involving battered women charged with crimes, 12 appellate decisions on pretrial motions in battered women defendants' cases, 13 civil actions involving the use of expert testimony on battering and its effects, and 31 cases involving prosecution of batterers or male defendants charged with sexual assault where expert testimony on battering or sexual assault was discussed by the court.

To ensure that this database was reasonably complete, it was cross-checked against the case citations contained in the seminal article by Professor Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals* (140 U. PA. L. REV. 379 (1991)) and those contained in the unreported trial court decision in *State v. Hazel* (No. 931400263, 4th Judicial District Court for County of Utah, State of Utah (Memorandum Decision 9/7/93)), which claimed to contain an extensive review of decisions on expert testimony on battering and its effects. The handful of decisions referred to in Maguigan's article that were not already in the NCDBW library as of February 1994 were obtained, abstracted, and added to the database. The completeness of the database was further cross-checked against a 1992 article by Hugh Joel Breyer, *The Battered-woman (sic) Syndrome and the Admissibility of Expert Testimony*, 28 CRIMINAL LAW BULLETIN 99.

Additionally, LEXIS searches were performed in March and April 1994 to identify and obtain any more recent decisions (particularly for 1993 and 1994). (Taking into account the language usually utilized by the courts, the LEXIS search specifications were for cases that contained the language "battered wom*n" or "battered wom*n syndrome" within 25 words of the language "expert testimony" and were decided after 1992. Alternative versions of the

search looked for the language "battered wife" or "battered wife syndrome," and for "battered spouse" or "battered spouse syndrome.") As a result, about 30 cases were identified, of which about half were already in the database. The others were abstracted and added to the database. In September 1994, a final LEXIS search was conducted, and a former NCDBW staff person provided several cases involving battered women asserting a duress defense. As a result, ten more cases (primarily decisions rendered in 1994) were added to the database. Based on LEXIS searches conducted in April 1995, the case citations were updated, where possible, for cases that had previously been unreported or reported only on LEXIS or Westlaw.

The database for this analysis of some 270 cases is more comprehensive than that utilized in any of the foregoing analyses. Maguigan's review (which primarily focuses on the application of the states' self-defense standards) examined more than 80 decisions on the expert testimony admissibility issue (plus over 180 others cited for their holdings on self-defense issues); the *Hazel* case summarized about 60 cases; and the Breyer article refers to approximately 40 cases.

In addition to utilizing more appellate level decisions than previous analyses, the database for this analysis includes 40 unreported decisions or trial transcripts available as a collection only through NCDBW. There is no other more comprehensive repository for such critical data, yet this body of cases obviously presents an incomplete picture of the myriad state trial court decisions since it represents only those cases judges, attorneys, expert witnesses, or battered women's advocates have shared with NCDBW. Nevertheless, it seemed valuable to include this otherwise unreported data in this analysis, to get some sense of how the admissibility and scope of expert testimony are being treated at the trial level, as compared to the appellate level. Though it is certainly beyond the scope of this analysis, it would be highly valuable to undertake a systematic survey of the states to obtain a more complete representational group of trial decisions and experts' testimony.

For purpose of this analysis, in states where there was a court decision holding that expert testimony on battering and its effects was admissible (which sometimes overruled outright an earlier decision), the case holding testimony admissible was used as the chronological starting point for that state. While it is certainly worthwhile knowing the prior history of excluding such testimony in earlier cases, this analysis is focused more on the current status of the admissibility of such testimony.

To supplement the picture provided by reviewing case law, state statutes regarding the admissibility of expert testimony on battering and its effects were also surveyed. Information on hand in the NCDBW library was used as a starting point. LEXIS searches conducted in August and September 1994, and again in February and April 1995, confirmed that such legislation is in effect only in the 12 states identified by NCDBW in its current LEGISLATIVE UPDATE. Thus, the state statute database is comprised of 12 statutes.

B. Methodology

As suggested in Section II.A. above, the major starting point for this research project was Professor Holly Maguigan's article, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals* (140 U. PA. L. REV. 379 (1991)), which analyzed more than 80 appellate decisions involving the use of expert testimony (and more than 260 battered women's self-defense cases in total). Because of the widespread respect accorded Maguigan's excellent scholarship in this area, this analysis builds on the foundation laid by her article, rather than "recreating the wheel." To the extent possible, therefore, Maguigan's coding system for categorizing the relevant aspects of the cases was utilized (see 140 U. PA. L. REV. at 462-463). However, because the present analysis focuses solely on expert testimony cases, it was necessary to develop additional codes to track greater detail (particularly as to the scope and relevance of the expert testimony).

All cases (and to the extent applicable, state statutes on the admissibility of expert testimony on battering) were coded as to seven major areas:

1. Is expert testimony on battering and its effects admissible, and to what degree?
2. What showing is necessary in order to have the testimony admitted?
3. What kind of case was it (using three categories: self-defense, non-self-defense (e.g., duress) or other (e.g., civil))?
4. Was counsel found to be ineffective (primarily for not proffering expert testimony on battering)?
5. What are the scope and relevance of expert testimony?
6. Does the use of expert testimony trigger an adverse psychological examination of the defendant?
7. What was the disposition of the case on appeal (i.e., affirmed, reversed or remanded)?

In addition, the cases were coded according to the level of the court rendering the decision (high, intermediate, or trial level).

A key to the codes utilized is attached as Appendix I. A table displaying all of the coded data is attached as Appendix II. A table displaying the coded data for state statutes only is attached as Appendix III. The tables and codes are also intended to be usable separate from this narrative analysis.

To give a more accurate picture of what each state is actually doing with respect to expert testimony on battering and its effects, multiple decisions from a given jurisdiction were coded. That is, while a state may have one decision or more that squarely holds expert testimony to be admissible, it may also have a subsequent decision admitting such testimony only on a limited basis or excluding it on the facts of a particular case. To facilitate analysis of the impact of such decisions, the level of the court(s) rendering the various decisions (i.e., high, intermediate, or trial level) was noted.

For the purpose of categorizing the states' positions on the admissibility of the expert testimony, it was decided to assign the state only one code on this threshold question based on its *most inclusive ruling*. Thus, for example, if there are two decisions—one with a square holding on admissibility and one with a limited holding—the state is coded as "AH" for "admits squarely," not "AL" for "admits with limits on scope"). This permits a general overview as to how the states break out in terms of the number that have, at some point, squarely admitted expert testimony, versus those that have admitted it but only in a limited fashion or conditionally, versus those that have actually admitted it or recognized its admissibility without explicitly ruling on any admissibility issue.

The continuing weight to be given this coding, or the extent to which it can be relied upon, must be determined not only by examining the way subsequent decisions in that state have been coded, as mentioned above, but also by referring to the "scope and relevance" codes assigned to each decision, which reflect in more detail the purposes for which expert testimony will be admitted (or excluded) in any given jurisdiction.

It should clearly be borne in mind that, even though a state may have squarely held expert testimony to be admissible, later decisions by the same or higher level court may have limited this holding, as noted in the discussion of admissibility in Section III.A.1. *infra*. Later limiting decisions by a lower court are also noted. Depending on the nature of the departure from the prior, square holding decision, they may indicate clarification of that holding or its minor erosion; they may also indicate a lack of clarity for the lower courts as to what the higher court actually meant, or they may signal resistance to applying the higher court's holding. Moreover, in some instances, the impact

of court decisions may have been modified by subsequent passage of a statute governing admissibility of expert testimony on battering and its effects; this is noted in the discussion of state statutes.

Some judgment had to be applied in assigning the "scope and relevance" codes; in general, the codes were assigned in accordance with the specific language utilized by a court in its decision or the actual scope of the testimony given by an expert witness (either as evident from a trial transcript or as described by the court in a decision that did not necessarily reach the admissibility issue head-on). The appropriate "scope and relevance" code was assigned any time a decision or trial transcript supported it. Occasionally, it was arguable whether a particular code should be assigned; this is noted in the footnoted case citations in this analysis and is also denoted by the inclusion of a "?" after the code in the tables in Appendices II and III. It should be kept in mind that a coded case may only be a trial court decision or the actual testimony of an expert, leaving open the question whether this use of expert testimony truly has precedential value in the state. However, to give a flavor for what is possible and has actually been done within each state, it was reasonable to opt for this more inclusive approach.

Initially, case abstracts were utilized to assign preliminary codes, which were cross-checked against Maguigan's coding (where it existed). Then, each case and trial transcript was reviewed individually to ensure the accuracy and completeness of the coding.

The data were first recorded manually in a chart; to facilitate tabulating the data, they were then entered in a computer database. The coding system was then utilized to tabulate the results.

III. Expert Testimony Trend Analysis

A. Admissibility of Expert Testimony

1. *Admissibility of expert testimony: admissibility under state case law*

Expert testimony on battering and its effects is admissible, at least to some degree, or has been admitted (without any discussion of the standards for admissibility) in every state. The results of this survey are briefly summarized in the following table (refer to the Coding Legend in Appendix I for a fuller description of the admissibility codes) and are discussed in more detail in the narrative that follows.

TABLE 1
ADMISSIBILITY OF EXPERT TESTIMONY STATE SURVEY RESULTS

Admissibility Code	Number of States	Percentage of States
AH (admits squarely)	21	41
AR (recognizes admissible)	7	14
AL (admits with limits)	6	12
AC (admits conditionally)	6	12
D (discusses content)	10	20
O (outside information)	1	<1
Total	**51**	**100**

In 41 percent of the states (21), there is a square holding (coded "AH") that such testimony is admissible,[9] which breaks down as follows:

- In 12 states (Connecticut, Florida, Georgia, Kansas, Massachusetts, Montana, New Jersey, New York, Ohio, Pennsylvania, South Carolina, and Washington), there is a square holding by the state's high court.[10] However, it should be noted that in half of these states, there is a subsequent more restrictive decision by the same court (Connecticut, Georgia, and Kansas),[11] a lower court (New Jersey and Ohio),[12] or both the same and a lower court (Washington).[13] (The nature of the subsequent limiting decisions is briefly discussed *infra*.)

- In seven states (California, Hawaii, Illinois, New Mexico, Oklahoma, Texas, and Wisconsin), plus seven of the foregoing ones (Florida, Georgia, Kansas, New Jersey, Ohio, Pennsylvania, and South Carolina), there is a square holding by the state's intermediate (appellate) court.[14] Again, it should be noted that in one-third of these states, there is a subsequent limiting decision by the same[15] or a higher[16] court.

- Finally, in two states (Minnesota and Utah), the only square holding of admissibility is by a trial court;[17] for one of these, there are subsequent limiting decisions by a higher court.[18]

With the exception of Ohio, it would appear that the subsequent, more restrictive decisions do not significantly eviscerate the state's earlier square holding. For example, the later decision only holds that the expert cannot give his/her opinion as to the ultimate facts in the case[19] or that expert testimony cannot be used to bolster the defendant's credibility.[20] Or, it represents a more limited view of the use of expert testimony in a nontraditional self-defense situation, such as a "hire-to-kill" case (where a battered woman hires or arranges with a third party to assault or kill her batterer).[21]

In Ohio, however, the more limiting later decisions by intermediate appellate courts seem to reflect a more consistent refusal to permit the use of expert testimony in anything but a traditional self-defense situation;[22] indeed, as will be discussed in Section III.A.3. below, some of the decisions go so far as to find that a state statute enacted subsequent to the Ohio Supreme Court's *Koss* decision, *supra* note 3 (which overruled its previous holding that expert testimony on battering and its effects was inadmissible), excludes the use of expert testimony in anything but a self-defense case.[23]

In seven states (Alabama, Alaska, Louisiana, Missouri, Nebraska, North Carolina, and Rhode Island), although there has been no square holding by any court, there are intermediate or high court decisions that implicitly recognize the admissibility of expert testimony on battering and its effects without discussing the issue (coded "AR").[24]

In yet another six states (Idaho, Kentucky, Michigan, New Hampshire, South Dakota, and Vermont),[25] such testimony is admissible but only on a limited basis (coded as "AL") (usually, not on the broader question of self-defense or the defendant's state of mind, but on more specific issues such as to explain the defendant's conduct; or it is considered admissible to explain battering and its effects in general but not whether the defendant herself is a battered woman or "suffers from battered woman syndrome"). (The "AL"-coded cases can reasonably be considered to be a subset of the "AH"-coded cases, in which case the percentage of states with a square or essentially square holding of admissibility would be 53 rather than 41 percent.)

In six other states (Arkansas, District of Columbia, Maine, Indiana, Mississippi, and Oregon)[26] (coded as "AC"), expert testimony is admissible

only if certain conditions are first met (e.g., showing that such testimony is accepted in the scientific community).

Finally, in 10 states (Arizona, Colorado, Iowa, Maryland, Nevada, North Dakota, Tennessee, Virginia, West Virginia, and Wyoming)[27] (coded "D"), it appears such testimony is admissible, but there are only intermediate or high court decisions discussing its content, not the standards for its admission. And, for the remaining state (Delaware) (coded "O"), it appears only that expert testimony has been admitted in one case at the trial level.[28]

2. ***Admissibility of expert testimony: exclusion under state case law***

While every state has at least one decision in which it at least appears from the court's discussion that expert testimony on battering and its effects was admitted or considered admissible (even if the standards for admissibility have not been the subject of case law), 18 states have excluded expert testimony in other cases, either outright (coded "E");[29] or—most commonly—in a limited way or on the particular facts of the case (e.g., because the case involved not a self-defense claim, but a duress defense) (coded "EL");[30] or—in Wyoming—unless and until certain conditions are met (e.g., demonstrating scientific acceptance of the "battered woman syndrome") (coded "EC").[31]

Of these states, Wyoming is the only one where the admissibility under case law of expert testimony in still largely in doubt.[32] It should also be noted that of the 35 decisions excluding testimony in some way, almost 25 percent (8) were Ohio decisions. Georgia, Louisiana, and Montana each account for nearly 10 percent (3) of the decisions.

3. ***Admissibility of expert testimony: admissibility under state statute***

In addition to or apart from the case law summarized above, in 12 states (California, Georgia, Louisiana, Maryland, Massachusetts, Missouri, Nevada, Ohio, Oklahoma, South Carolina, Texas, and Wyoming), expert testimony on battering and its effects is admissible pursuant to a state statute (see Appendix III for a table displaying this data). All but two of these statutes were passed within the last four years. (In addition, legislation related to the admissibility of expert testimony has been introduced in a number of states since 1990. According to LEXIS searches conducted in August and September 1994 and April 1995, as well as information provided to the National Clearinghouse, legislation was proposed in 1993, 1994, and 1995 in at least 15 states (California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Nebraska, New Jersey, New York, Pennsylvania, South Carolina, Utah,

Vermont, and Wisconsin) plus the District of Columbia. Some of this legislation is "dead," while other bills appear to be pending. These data are not reflected in the table in Appendix III. More detailed information about the pending legislation is available in the National Clearinghouse's LEGISLATIVE UPDATE.)

In some instances, no court decisions addressing the admissibility issue appear after enactment of the statute, suggesting that the statute may have had the effect of putting an end to any doubt as to the admissibility of such expert testimony. In others (notably Ohio and Missouri), enactment of statutes has been used by the courts to *restrict* the admissibility of the testimony to self-defense cases. While neither statute indicates on its face that by addressing the self-defense situation the legislature intended to preclude the use of expert testimony in any other criminal context, those states' courts have interpreted these statutes in this restrictive fashion (*see* OH [Pargeon *and* Lundgren, *supra* note 6] and MO [Anderson *and* Clay, *supra* note 24]).[33] Thus, it is important that California and Massachusetts have specifically included language to the effect that enactment of the statute is not intended to preclude the use of expert testimony in civil or criminal actions where it was already admissible under case law, and the South Carolina statute itself provides that it "does not preclude the admission of testimony on battered spouse syndrome in other criminal actions" beyond those specified therein.[34]

The majority (eight) (California, Louisiana, Massachusetts, Missouri, Nevada, Oklahoma, South Carolina, and Texas) of the statutes use mandatory rather than permissive language; that is, they provide either that expert testimony "shall be admitted," "is admissible" or that the defendant "shall be permitted to introduce" such evidence.[35] The remaining four (Georgia, Maryland, Ohio, and Wyoming)[36] use permissive language such as "may introduce."

Half of the statutes (California, Maryland, Missouri, Ohio, South Carolina, and Wyoming) refer specifically to expert testimony on "battered woman syndrome"[37] or use the related term "battered spouse syndrome."[38] [39] The others (Georgia, Louisiana, Massachusetts, Nevada, Oklahoma, and Texas) are more generic in their language, referring to the nature and effects of "domestic violence,"[40] "family violence"[41] or "physical, sexual or psychological abuse"[42] on the beliefs, behavior and perceptions of the person being abused. Although, as discussed earlier, three (Ohio, Missouri, and Wyoming) of the five states whose statutes use syndromic language are notable for their restrictive case law on the admissibility of expert testimony, there does not appear to be an ironclad correlation between the statutory language used and the way the states (as measured by their case law) view admissibility.

For example, Wyoming's restrictive decisions predated its statute. In addition, Louisiana, one of the states that uses generic language, ranked high in the number of decisions excluding expert testimony (although two of these were rendered prior to enactment of the statute). On the other hand, the other five states that use generic language (Georgia, Massachusetts, Nevada, Oklahoma, and Texas) do have a record of appellate decisions, both before and after enactment of the statute, that is broadly accepting of the admissibility of expert testimony. So does California, whose statute refers to testimony on battered woman syndrome but also, more broadly, on the effects of battering. On balance then, to avoid misconceptions about the permissible scope or admissibility of expert testimony on battering, it would appear preferable to use more generic statutory language.

4. ***Admissibility of expert testimony: admissibility under federal case law***

Of the eight federal appellate courts (11th, 10th, 9th, 8th, 7th, 6th, 5th, and 3rd Circuits) and 11 federal trial courts (N.D.Ill., S.D.N.Y., E.D.N.Y., D.Kan., D.Hawaii, S.D.Ohio, N.D.Ala., S.D.Fla., W.D.La., E.D.Pa., and U.S. Tax Ct.) that have considered the issue, all but five (9th Cir., 7th Cir., 6th Cir., S.D.N.Y., and S.D.Ohio)[43] have admitted expert testimony on battering and its effects. Only one (7th Cir.)[44] of the five has excluded the testimony outright, while the other four (9th Cir., 6th Cir., S.D.N.Y., and S.D.Ohio)[45] have excluded it on the facts of the case or on some other limited basis, such as counsel's failure to give the required advance notice that expert testimony would be offered. Moreover, two of the Courts of Appeals (9th and 6th Circuits)[46] that excluded testimony on a limited basis have admitted such testimony in other cases.

Three of the Courts of Appeals (10th, 9th, and 8th Circuits)[47] have admitted such testimony squarely (coded "AH"), as have two federal district courts (D.Kan. and S.D.Fla.).[48] Another circuit (6th Cir.) (plus one of the circuits that also has made a square holding (8th Cir.)) has recognized the admissibility of the testimony without discussing it (coded "AR").[49] One district court (N.D.Ill.) (together with one circuit that has also made a square holding of admissibility (9th Cir.)) admitted testimony with limitations on its scope (coded "AL").[50] Two district courts (E.D.Pa. and N.D.Ill.) (one of which—N.D.Ill.—recently admitted the testimony with limitations) have admitted it conditionally (coded "AC").[51]

Seven additional federal courts (11th Cir., 5th Cir., 3rd Cir., E.D.N.Y., N.D.Ala., W.D.La., and Tax Ct.)[52], and three (10th, 9th, and 6th Circuits) that also have holdings of admissibility coded "AH," "AR," "AL" or "AC,"

have discussed the content of expert testimony but not the standards for admissibility, indicating that such testimony has nevertheless been admitted.

B. Types of Cases in Which Expert Testimony Admitted

As briefly mentioned in Section II.B. *supra*, each case was considered to fall within one of three categories: (1) self-defense, (2) non-self-defense or (3) other, and was assigned the most appropriate code within that category (*see* the Coding Legend in Appendix I).

Thus, cases in which a battered woman defendant charged with homicide, assault or similar charges claimed she acted in self-defense were coded as either a (1) traditional self-defense during a confrontation (coded "CO"); (2) nontraditional self-defense situation, e.g., assaulting or killing the batterer while he slept or was lying down, referred to for convenience as a "sleeping man case" (coded "SM"); or (3) "hire to kill case," that is, where a battered woman defendant hires or arranges with a third party to assault or kill her batterer (coded as "HK").

Non-self-defense cases in which other criminal or quasi-criminal charges were brought against a battered woman were coded as either a (1) duress/coercion case, e.g., where a battered woman defendant asserted she performed the criminal act for which she was charged only because she feared she was in danger of imminent harm from her batterer (coded "DU"); (2) case involving a crime against a third party, not the batterer, not asserted to have been done under duress, e.g., killing the batterer's girlfriend (coded "3rd"); or (3) termination of parental rights case, in which a battered woman's alleged failure to protect her children from abuse or harm, generally from her batterer, results in an effort to terminate her rights as a parent (coded as "TPR") (note that cases wherein criminal charges are lodged against the battered woman for abusing or harming her children fall within the "3rd" category).

Cases treated as falling within the "other" category were (1) civil cases, e.g., tort or domestic relations actions (coded "CI") and (2) criminal cases involving the prosecution of a male batterer or male sexual assailant, wherein the prosecution offered expert testimony on battering and its effects or the use of such testimony was discussed by the court (coded "PR").

In addition to being coded under one of the three foregoing categories, where applicable, cases were assigned a code to reflect a holding that (1) it was permissible to deny the battered woman defendant funds to obtain an expert witness (coded "FY") or (2) it was not permissible to deny funds for an expert

witness (coded "FN"). Finally, each case was coded as to whether it involved a claim that a battered woman defendant's trial counsel rendered ineffective assistance, primarily based on challenges to failure to offer expert testimony on battering, i.e., "Y" (counsel was ineffective), "N" (counsel was not ineffective), or "N/A" (not applicable).

1. *Types of cases in which expert testimony admitted: "traditional" and "nontraditional" self-defense/state cases*

As would be expected, expert testimony on battering and its effects is most readily accepted in cases involving traditional self-defense situations, i.e., where a battered woman defendant kills her batterer during a struggle or in response to an obvious, immediate threat. (There were just a handful of cases in which the defendant claimed her/his actions were also or solely taken in defense of another person,[53] so these were not categorized separately.) Ninety percent of the states (45)[54] have admitted testimony in traditional self-defense cases, either with a square or limited holding or without discussing the standards for admissibility.

As mentioned in the introduction to this section, for this analysis, cases in which a battered woman defendant asserted that she acted in self-defense, where her batterer was killed or assaulted other than in the midst of a struggle with her or other than in response to an obvious, present threat, were coded as one of two kinds of nontraditional self-defense cases—a "sleeping man case" or a "hire-to-kill case." By coding these separately, we do not intend to indicate that such cases involve any less of a legitimate self-defense situation than the more traditional situation. Moreover, we admittedly made a fine and perhaps arguable distinction between cases in which, for example, in the midst of a confrontation, the batterer goes into another room and the defendant then kills him (which were coded "CO"), and those in which following a confrontation, he lies down on a bed or couch and she then kills him (which were coded "SM"). However, it seemed reasonable to categorize and track such cases separately in light of a popular perception, evidenced by some dramatic made-for-television movies, that battered women typically kill their batterers while they are asleep or during a "lull in the violence,"[55] and also to determine whether the courts treated such nontraditional self-defense situations differently (in terms of the admissibility of expert testimony on battering).[56]

Expert testimony has been admitted by a substantial minority of states in the more controversial, nontraditional self-defense situations. That is, 29 percent of the states (15) (Alabama, California, Georgia, Kansas, Michigan, Minnesota, Nevada, New Hampshire, New York, North Carolina, North

Dakota, Ohio, South Carolina, Tennessee, and Wisconsin)[57] have admitted expert testimony in a "sleeping man case." Only three states (Louisiana, New York, and Ohio)[58] (two of which admitted it in other sleeping man cases) have explicitly refused to admit expert testimony in some such cases. Moreover, nearly one-fifth of the states (10) (Alabama, Colorado, Delaware, Florida, Massachusetts, North Carolina, Ohio, Tennessee, Texas, and Washington)[59] have admitted such testimony in a "hire to kill case." Only four states (Illinois, Maryland, Missouri, and Montana)[60] have explicitly refused to admit expert testimony in such cases.

2. *Types of cases in which expert testimony admitted: as offered by the prosecution/state cases*

Apart from its use in self-defense situations, the most striking trend in the acceptance of expert testimony on battering is its use by the prosecution against batterers. Typically, in these cases, the battered woman has given an initial statement about the assault on her to the police, a grand jury or at a deposition, but at trial, she recants her earlier statement. In rebuttal, the prosecution then offers expert testimony to explain and impeach the witness' inconsistent statements. In another typical fact pattern, expert testimony on battering is used by the state (often in rebuttal) to explain other conduct of a complainant who has been sexually assaulted by her batterer, such as delayed reporting of the incident, not leaving the battering relationship or escaping from a kidnapping-type situation, or lack of consent to sex.

In 29 percent of the states (15) (Alaska, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Minnesota, Nebraska, New Hampshire, New Jersey, New York, Washington, Wisconsin, and Wyoming),[61] expert testimony on battering and its effects has been admitted for such purposes, or discussed with favor by the court in cases involving prosecutions for sexual assault in a non-battering context. Note that we did not attempt to survey and do not here report on all sexual assault/child sexual abuse cases; rather, in the course of researching the admissibility of expert testimony on battering, some cases were found involving sexual assault issues in a non-battering situation, where the court discussed the analogous admissibility of expert testimony on battering as part of its discussion of the admissibility of expert testimony, for example, on child sexual abuse accommodation syndrome or about the typical characteristics or "profile" of male perpetrators. Because these cases reflect a jurisdiction's position on the admissibility of expert testimony on battering, particularly when offered by the prosecution, they were included in the database for this analysis.

Expert testimony has been found admissible for the purpose of explaining the battered woman's recanting her earlier complaint in five states (Alaska, Connecticut, Indiana, Hawaii, and Wisconsin).[62] Moreover, a total of ten states (Connecticut, Florida, Georgia, Illinois, Nebraska, New Jersey, New York, Washington, Wisconsin, and Wyoming) have permitted the use of expert testimony to explain other conduct of the complainant or bolster her credibility—five in cases involving the conduct of a battered woman[63] and the other five in sexual assault or child abuse cases not involving a battered woman, but where the admissibility of expert testimony on battering for similar purposes was discussed with favor.[64]

However, in seven states (Alaska, Georgia, Kansas, Kentucky, New Jersey, Ohio, and Oregon),[65] three of which have also admitted such testimony in other cases, "profile" testimony has been found inadmissible against male defendants, primarily those charged with sexual assault.

Although it is conceivable that expert testimony on battering and its effects could be offered by the prosecution against a batterer in lieu of direct testimony by a battered woman who refused to testify at trial, no *reported* cases were found in which this occurred. However, two cases were found in which expert testimony was admitted to corroborate the out-of-court statements of battered women who had been killed, and therefore were unavailable to testify.[66]

3. *Types of cases in which expert testimony admitted: non-self-defense/state cases*

In a sizable minority of states, expert testimony on battering and its effects has been admitted in non-self-defense cases, which generally fall into two, potentially overlapping, categories. To reiterate the explanation in the introduction to this section, where a battered woman defendant committed a crime (e.g., selling drugs) and asserted as a defense that she did so under duress or coercion by her batterer, the case was coded "DU." Where she committed crimes against a third party, not the batterer (e.g., killing the batterer's girlfriend), but did not assert that she did so under duress, the case was coded "3rd." Seven cases could be coded as either or both,[67] but were tabulated as a duress case only in order to better track the issue that appears most directly relevant to the permissible scope of expert testimony.

Sixteen percent of the states (eight) (California, Kansas, Minnesota, New Jersey, Oklahoma, Oregon, Virginia, and West Virginia)[68] have admitted testimony in duress cases, while 10 percent (five) (Alabama, Kentucky,

Michigan, Ohio, and Washington)[69] have refused to do so. Fourteen percent of the states (seven) (Florida, Illinois, Indiana, Massachusetts, Minnesota, Missouri, Montana, and Rhode Island)[70] have admitted testimony in third party cases, while two (Missouri and Ohio)[71] have refused to do so.

While the primary focus of this research was on the use of expert testimony in criminal actions involving battered women, in the course of our research, a small number of civil actions (comprising five percent of the total state courts' database of nearly 240 cases) were reviewed. Typically, these cases involve personal injury actions brought by a formerly battered woman against her former batterer, child custody determinations, or marital dissolutions. While the use of expert testimony in the civil context appears to be relatively infrequent (indeed, a battered woman plaintiff's attorney erroneously claimed that an August 1994 New Jersey trial court decision was the first time "battered woman syndrome" had been used in any civil action in the United States),[72] it is certainly possible that there are additional civil cases that we did not become aware of during our search. It may also be that the use of expert testimony in such civil actions is occurring at the trial level, and that the decisions are simply not being reported. Regardless, with growing awareness of the applicability of such testimony to the civil context, it is likely that it will be used in more cases in the future.

With these caveats in mind, it is noteworthy that expert testimony on battering and its effects has been used in civil actions in at least 11 (20 percent of the) states (Colorado, Connecticut, Idaho, Louisiana, Maryland, Missouri, Montana, Ohio, Pennsylvania, South Carolina, and Vermont).[73] It has also been used in *at least* three states (Nebraska, New York, and West Virginia)[74] in cases involving termination of parental rights (typically, where the batterer is abusing the children also, and the issue is whether the battered woman/mother neglected or failed to protect them). Interestingly, in only four civil cases[75] (and none of the termination cases) was there explicit or implicit discussion by the court of the admissibility of the expert testimony; in all the others (coded "D"),[76] there was no square holding and the court merely discussed the contents of the testimony (which was allowed to be introduced).

4. *Types of cases in which expert testimony admitted: provisions of state statutes*

Each of the 12 state statutes identified in Section III.A.3. *supra* provides for the use of expert testimony on battering and its effects in a criminal action in which self-defense has been raised (although, e.g., Georgia, Nevada, and Texas restrict the admissibility of the testimony to cases where the defendant

has killed, rather than merely assaulted, someone).[77] Both the California and Nevada statutes[78] provide that the testimony can be used either in the case in chief or in rebuttal, suggesting that it can be offered by the prosecution against an accused batterer.

By statute, Massachusetts and South Carolina[79], and perhaps Nevada[80], permit the use of expert testimony in cases where duress is raised as a defense. Only the California, Massachusetts, and Oklahoma statutes appear to contemplate the use of testimony in a civil matter.[81]

5. *Types of cases in which expert testimony admitted: federal cases*

The much smaller sample of 31 federal court cases reveals one major trend—the use of expert testimony on battering and its effects in cases where a duress defense is raised. Since the federal courts rarely have jurisdiction of battered women's self-defense cases (except cases where killings occurred on a Native American reservation or a U.S. military facility, or habeas corpus petitions), it is not surprising that most federal case law on the issue arises out of drug, wiretap, or fraud cases. Two-thirds of the federal courts admitting expert testimony (11 of 16 courts) do so in a duress case.[82] Two federal courts (9th and 7th Circuits)[83] have refused to admit such testimony in a duress case, and testimony was also excluded by a federal district court (S.D.N.Y.) in a limited way in a conspiracy/bribery case in which the battered woman defendant disclaimed a duress defense.[84]

Of the 16 federal courts admitting expert testimony, more than one-third (six) (10th Cir., 9th Cir., 8th Cir., 6th Cir., E.D.Pa., and D.Hawaii)[85] have done so in traditional self-defense cases. But two federal courts (6th Cir. and S.D.Ohio)[86] have excluded the testimony in traditional self-defense cases, albeit on limited grounds as discussed in Section III.A.4. *supra*. It should be noted that two federal courts (5th Cir. and W.D.La.)[87] have admitted expert testimony in one hire-to-kill case, and two (9th and 8th Circuits)[88] have admitted it when used by the prosecution.

C. Showing Necessary to Introduce Expert Testimony

1. *Showing necessary to introduce expert testimony: under state case law*

When Maguigan looked at this issue in 1991, there was very little information discernable from the reported decisions as to what showing was necessary before a defendant could have expert testimony on battering and its effects admitted. While there is still no information at all on this question for 20 (40

percent of the) states[89] (or, it can only be said that testimony has been admitted without discussion as to the necessary preliminary showing), there is somewhat more information available at this time, and some trends can be detected.

Of those states that have discussed this issue, the most common requirement is that there be a self-defense claim being raised. Nearly 40 percent of the states (18)[90] have this requirement. In addition, two states (Indiana and Ohio)[91] may require that there be evidence of an overt act of aggression by the deceased sufficient to substantiate a self-defense claim, as well as prima facie evidence of self-defense by the defendant before expert testimony can be introduced. One (Missouri)[92] requires just prima facie evidence of self-defense.

Twenty-seven percent of the states (14) (Alaska, District of Columbia, Florida, Georgia, Kansas, Kentucky, Massachusetts, Minnesota, New Jersey, New Mexico, Ohio, Oregon, Washington, and Wyoming)[93] have required some evidence that "battered woman syndrome" is accepted in the scientific community. However, nine states (Connecticut, Florida, Illinois, Minnesota, Missouri, New York, Ohio, Utah, and Washington)[94] have specifically said that there need not be any such showing made, i.e., it is beyond question that "battered woman syndrome" is commonly accepted in the scientific community. Of these nine, four (Florida, Minnesota, Ohio, and Washington) have also required evidence of scientific acceptance in other cases; but of the four, only Florida shows a pattern of requiring evidence of scientific acceptance in earlier decisions, followed by later decisions not requiring such evidence.

One-third of the states (17) (Connecticut, District of Columbia, Florida, Hawaii, Kentucky, Louisiana, Maine, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Utah, and Washington)[95] have explicitly required that the proffered expert must be properly qualified as such. While qualification of a witness as an expert is typically required in all kinds of cases, the language used by these courts suggests that they are underscoring this requirement when it is applied to expert witnesses on battering and its effects.

One-fifth of the states (10) (Florida, Georgia, Maine, Massachusetts, Ohio, Oklahoma, Pennsylvania, Washington, Wisconsin, and Wyoming)[96] require that the defendant must first show she is in fact a battered woman before expert testimony on battering and its effects can be introduced; only one (Texas)[97] has explicitly held that a defendant need *not* first make such a showing.

2. *Showing necessary to introduce expert testimony: under state statute*

Of the 12 state statutes, 42 percent (5) (Georgia, Louisiana, Ohio, Texas, and Wyoming)[98] require that there be a claim of self-defense in order for the expert testimony to be admissible. One-fourth of the state statutes (3) (Louisiana, Maryland, and Oklahoma)[99] require, essentially, that the defendant first establish that she is a battered woman (i.e., that there is some evidence of prior domestic violence at the hands of the deceased).

Also, of the 12 state statutes, three (California, Ohio, and South Carolina)[100] provide that there is no need to establish that there is acceptance of "battered woman syndrome" in the scientific community in order for the expert testimony on battering to be admitted. The South Carolina statute also provides that a sufficient foundation for admission of the testimony is laid "if the proponent of the evidence establishes its relevancy and the proper qualifications of the witness"[101] and that lay testimony regarding the batterer's actions and how they contributed to the incident underlying the criminal charge may be "used to establish the foundation for evidence on the battered spouse syndrome."[102] Finally, in Missouri, although the statute refers to "battered spouse syndrome," an intermediate appellate court has held that the use of expert testimony on battering is not to be restricted to cases involving spouses.[103]

3. *Showing necessary to introduce expert testimony: under federal case law*

As to the federal courts, there is only a smattering of information available on the showing necessary to introduce expert testimony on battering and its effects. Of the 19 courts in the database, three appeals courts (8th, 9th, and 10th Circuits) and three district courts (E.D.Pa., S.D.Ohio, and S.D.N.Y.) have spelled out some position on what showing must be made in order to have expert testimony on the effects of battering admitted. Each of the factors mentioned by these courts is cited by only one or two courts.

That is, one appeals court (10th Cir.)[104] has found that a claim of self-defense must be asserted in order to introduce expert testimony, while two (9th and 8th Circuits)[105] have found that the testimony is not limited to cases where a self-defense claim is asserted. Two district courts (E.D.Pa. and S.D.N.Y.)[106] have held that the defendant must first establish evidence that she is a battered woman before the expert testimony can be introduced.

As to the more general requirements for introduction of expert testimony, two district courts (S.D.Ohio and E.D.Pa.)[107] have required some showing of the

acceptance of "battered woman syndrome" in the scientific community, while another (S.D.N.Y.),[108] in a more recent decision, has found that no such showing need be made. Two federal courts (8th Cir. and E.D.Pa.)[109] have explicitly required qualification of the proffered expert witness. And two federal district courts (S.D.Ohio and E.D.Pa.)[110] have found that the probative value of the proffered testimony must outweigh any potential prejudice arising therefrom.

Finally, one circuit (9th Cir.) strictly enforces procedural rules requiring advance notice of the intent to introduce expert testimony and has upheld its exclusion on this basis in two recent decisions.[111]

D. Ineffective Counsel Issues

1. *Ineffective counsel issues: state cases*

In fewer than ten percent (21) of the 238 state cases in the database, an issue arose as to whether trial counsel was ineffective, primarily (though not exclusively) for failing to offer expert testimony on battering and its effects or failing to get it admitted. The 15 jurisdictions that have considered this issue have split into two camps on how they have disposed of this claim. Sixty percent of these states (nine) (Alabama, Georgia, Michigan, Minnesota, New Mexico, New York, Ohio, South Carolina, and Wisconsin)[112] (in a total of 12 decisions) found that counsel *was not* ineffective; the other 40 percent (six states) (California, Delaware, Nevada, Pennsylvania, Tennessee, and Wisconsin)[113] have rendered a total of nine decisions finding there *was* ineffective assistance of counsel.

A somewhat related issue is whether state funds are sought or are made available to an indigent defendant to hire an expert witness. Each of the five states that has considered the issue (Georgia, Kansas, Mississippi, Montana, and Tennessee)[114] has held that it was acceptable to deny such funds (although one of these, Kansas' *Dunn* decision, was reversed by the federal courts). Ironically, of these five states, Tennessee has also found counsel to be ineffective for not presenting expert testimony, suggesting a "Catch-22" whereby counsel is ineffective if s/he does not put on an expert, but funds will not be provided to enable an indigent defendant to do so.

2. *Ineffective counsel issues: federal cases*

In the federal courts, the ineffective counsel issue has only arisen in two circuits (9th and 6th Circuits) (in three separate cases), and both found counsel

not to have been ineffective.[115]

The expert witness funds issue has only arisen in one case, and as alluded to above, both the federal appellate court (10th Cir.) and the lower federal court (D.Kan.) found that it was improper to deny the defense funds to obtain an expert witness on battering and its effects.[116]

E. Scope and Relevance of Expert Testimony

There tends to be a fair amount of discussion by the courts as to the issues on which expert testimony on battering and its effects are relevant and admissible. There is significant consensus on a number of these. To understand the following results it should be kept in mind that a given jurisdiction often finds that expert testimony is relevant and admissible on a number of different issues. This may reflect the nature of the case (e.g., traditional self-defense during a confrontation versus a "hire-to-kill" or duress case), the specific facts of the case or the specific issues raised by the defendant on appeal. It should also be remembered that some of these holdings are made in the context of civil actions or prosecutions of male batterers.

1. *Scope and relevance of expert testimony: effects of battering in general/state cases*

An astounding 76 percent of the states (39) have found expert testimony on battering and its effects admissible to prove the defendant is a battered woman or "suffers from battered woman syndrome."[117] Nearly as many, 35 states or 69 percent,[118] have found "generic" expert testimony admissible, i.e., to explain battering and its effects generally. Of these, 10 states (20 percent) (Alaska, Georgia, Kentucky, Michigan, Minnesota, Ohio, Pennsylvania, South Dakota, Vermont, and Wisconsin)[119] prohibit the expert from expressing an opinion whether the defendant herself is a battered woman or "suffers from battered woman syndrome."

In an interesting variation on this issue, expert testimony on battering and its effects has been used to help gain reversal of a conviction by showing that a battered woman defendant had been unable to assist her trial counsel with the preparation of her defense.[120]

2. *Scope and relevance of expert testimony: self-defense issues/state cases*

There is consensus that expert testimony on battering and its effects is relevant to a determination of the validity of a self-defense claim. Nearly 70 percent of

the states (35)[121] have found expert testimony to be relevant to supporting a self-defense claim generally. Similarly, slightly more than two-thirds, or 35 states,[122] agree that expert testimony is relevant to the defendant's state of mind at the time of the charged crime. (Only one state, Wyoming, has found expert testimony to be *not* relevant to support a self-defense claim.)[123]

It is beyond the scope of this analysis to provide correlations between the states' self-defense standards and their view of the scope of expert testimony on various self-defense issues. However, in considering the following, more specific results, it is helpful to keep in mind Maguigan's finding that

> There are only two apparent correlations between a state's conclusions about the purpose of expert testimony and its definitions of the standard of reasonableness and of the temporal proximity of danger. First, states that define the harm threatened as imminent are more likely than those requiring immediacy to receive expert testimony on the theory that it is relevant to the jury's assessment of the reasonableness of the defendant's judgment about the proximity of the harm threatened. [footnote omitted] ...second...[j]urisdictions that include a subjective inquiry in the reasonableness standard are slightly more likely than objective ones to require a special instruction on the significance of battered-woman-syndrome testimony or to include specific reference to the testimony in the jury charge on the reasonableness standard. [footnote omitted] (140 U. PA. L. REV. at 431.)

Somewhat more than half of the states (27) have found such testimony relevant to the assessment of the reasonableness of the defendant's belief that she was in danger of imminent harm and/or of her conduct in defense of self or others.[124] (Note that just two states (Georgia and Wyoming) have found the testimony to be *not* relevant to the assessment of reasonableness.)[125] In addition, 19 states (37 percent) have found that expert testimony is relevant to the defendant's perception of the temporal proximity of the perceived danger to life or safety.[126] A handful of states (6) (California, Georgia, Maryland, New Jersey, North Dakota, and Ohio)[127] have said that expert testimony is relevant to show the honesty of the defendant's belief that she faced imminent danger from the deceased to her life or safety. One of these states (Ohio)[128]

also joins Washington[129] in finding the testimony to be relevant to assessing the proportionality of the force used by the defendant in self-defense.

A considerable minority—more than a quarter of the states (14) (Alaska, Florida, Georgia, Kansas, Maine, New Hampshire, New Mexico, New York, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Virginia)[130]—have found an expert can give an opinion on the "ultimate question" for the factfinder of reasonableness on whether the defendant acted in self-defense. But a larger group of 19 states (37 percent)[131] has held that an expert cannot testify on the ultimate issue.

3. *Scope and relevance of expert testimony: understanding the defendant's conduct/state cases*

In a related vein, many courts have come to recognize the difficulty that juries and even trial judges may have in giving credence to a battered woman's self-defense claim, due to their feeling that the defendant should have left the battering relationship rather than "take matters into her own hands" in the way she did. Or, they argue that if the claimed past history of abuse had "really been so bad," she would have left.

Thus, it is significant that fully two-thirds of the states (34) have considered expert testimony on battering and its effects to be relevant to the question of why the defendant did not leave the relationship or to explain other conduct, including acts done under duress by the batterer.[132] However, six states (Alabama, Illinois, Michigan, Montana, Ohio, and Washington)[133] have found expert testimony to be *not* relevant to the question of why the defendant did not leave the relationship or other conduct, including actions claimed to have been taken under duress.

Understanding a battered woman's actions or failure to act also has significance in a termination of parental rights case, where it is typically alleged that a battered woman failed to protect her children from an abusive husband or boyfriend.[134] This issue can also arise in child custody or marital dissolution cases. While such cases were not a major focus of this research, we became aware of some such cases where expert testimony was involved. Though this is therefore not an exhaustive list, in at least three states (Nebraska, New York, and West Virginia),[135] in the context of parental rights termination actions, courts have discussed the content of expert testimony on battering and its effects, used to explain the woman's apparent failure to take protective action. In none of the cases we found was the use of expert testimony for this purpose precluded.

While expert testimony on battering generally has the effect of dispelling myths and misperceptions about battered women, just one-third of the states (17)[136] have explicitly noted that such testimony is admissible to rebut common myths and misperceptions.

4. *Scope and relevance of expert testimony: establishing diminished capacity/state cases*

Almost 30 percent of the states (15)[137] agree that expert testimony on battering and its effects is admissible to prove the defendant's diminished capacity, mental defect, or a lack of intent to commit the charged crime. Of these 15, 73 percent (11) (Florida, Georgia, Illinois, Kansas, Louisiana, Minnesota, Missouri, New York, Ohio, Tennessee, and West Virginia) have also found the testimony to be relevant to the defendant's state of mind at the time of the offense.[138]

Six states (Kentucky, Louisiana, Michigan, Missouri, New Jersey, and North Carolina) have found in other cases that expert testimony is *not* admissible to prove the defendant's diminished capacity, mental defect, or lack of intent to commit the charged crime.[139] Interestingly, two of these states (Kentucky and Michigan) plus six others (California, Georgia, Massachusetts, Ohio, South Carolina, and Wyoming) have found such testimony is not generally relevant to the defendant's state of mind at the time of the offense.[140]

5. *Scope and relevance of expert testimony: bolstering or attacking credibility/state cases*

According to Maguigan (*see* 140 U. PA. L. REV. at 430, note 183), to make some decisions regarding the relevance and scope of expert testimony on battering and its effects, the courts resort to existing evidentiary law on analogous questions. Thus, in jurisdictions that permit bolstering of ordinary witnesses' testimony, an expert's testimony that tends to bolster a defendant's credibility can be expected to be received (e.g., New Jersey). In those which prohibit bolstering in general, the reverse is likely to occur (e.g., Montana).

One-fourth of the states (12) (California, Connecticut, Hawaii, Illinois, New Jersey, New York, Ohio, Pennsylvania, Utah, Vermont, Wisconsin, and Wyoming)[141] have found expert testimony on battering and its effects to be admissible to bolster the defendant's credibility. These jurisdictions generally observe that the testimony is not rendered inadmissible merely because it also has the effect of bolstering the defendant's credibility. But in other cases, two of these states (Connecticut and Pennsylvania) plus four others (Kansas,

Montana, Oregon, and Washington)[142] have found that the testimony is *not* admissible to bolster credibility.

On a somewhat related issue, six states (Kansas, Maine, New Mexico, New York, Ohio, and Texas)[143] have said evidence of the defendant's prior bad acts is admissible to rebut the expert testimony. One of these (New York) has also held to the contrary in another case, as have two other states (Maryland and Washington).[144]

6. *Scope and relevance of expert testimony: at sentencing/state cases*

Expert testimony on battering and its effects has not only been introduced at trial on the issue of the battered woman defendant's guilt. One-fifth of the states (10) (Alabama, Alaska, Florida, Illinois, Indiana, Maine, Minnesota, Ohio, Texas, and Washington)[145] have found such testimony to be admissible to show the existence of mitigating factors in the defendant's favor or otherwise affect the sentencing phase of the trial. Two states (Minnesota and North Carolina)[146] have held to the contrary.

7. *Scope and relevance of expert testimony: as offered by the prosecution/state cases*

Given the increasing use by prosecutors of expert testimony on battering against batterers, it is unsurprising that five states (Alaska, Connecticut, Hawaii, Indiana, and Wisconsin)[147] have found this testimony to be relevant to explain the complainant's recanting prior testimony or statements given against the batterer. Only one state (Ohio)[148] has held to the contrary.

On a related topic, it should be noted that one state (New Hampshire) has found expert testimony on battering relevant to show the batterer was not insane where he claimed this as a defense.[149]

8. *Scope and relevance of expert testimony: civil actions/state cases*

In the newer context of civil actions (see Section II.B.3. *supra*), a few states have explicitly made each of the following findings: (1) expert testimony is relevant to a custody determination (Connecticut, Maryland, and Montana);[150] and (2) expert testimony is relevant to the damages determination in a tort action (Idaho and Louisiana).[151] Presumably, expert testimony has actually been used for these purposes in additional civil actions, which have not been reported or are not within our limited civil database.

Moreover, it will be recalled that in the vast majority of the civil actions reviewed, no square holding of admissibility was made; rather, the contents of the testimony were discussed. Thus, it is unsurprising that most of the courts have not made specific pronouncements regarding the permissible scope or relevance of the testimony.

9. *Scope and relevance of expert testimony: no information about scope or relevance/state cases*

In 15 states[152] there have been decisions wherein the admissibility of expert testimony on battering and its effects has been discussed or reference is made to the use of testimony at the trial level, but there is no information given in the decision as to what the court considers to be the appropriate scope or relevance of such testimony. Fortunately, for only one such state, Arkansas, is such a case the *only* decision on admissibility for the state.

10. *Scope and relevance of expert testimony: state statutes*

Each of the 12 state statutes (California, Georgia, Louisiana, Maryland, Massachusetts, Missouri, Nevada, Ohio, Oklahoma, South Carolina, Texas, and Wyoming) has some provision regarding the scope or relevance of expert testimony. California, for example, uses broad language, providing that expert testimony on "battered women's syndrome" may include "the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence."[153] A shortened version of this language is echoed in the Oklahoma statute.[154] The Massachusetts statute is also quite expansive in its approach, providing for the admissibility of expert testimony

> ...regarding the common pattern in abusive relationships; the nature and effects of physical, sexual or psychological abuse and typical responses thereto, including how those effects relate to the perception of the imminent nature of the threat of death or serious bodily harm; the relevant facts and circumstances which form the basis for such opinion; and evidence whether the defendant displayed characteristics common to victims of abuse.[155]

Seven state statutes (California, Georgia, Louisiana, Maryland, Nevada, Ohio, and Texas)[156] permit use of the testimony as to the defendant's state of mind. Six (California, Missouri, Nevada, Ohio, South Carolina, and Wyoming)[157] find it generally relevant to a self-defense claim. Five (California, Georgia, Massachusetts, Ohio, and Wyoming)[158] specifically note its relevance to the reasonableness of the defendant's belief that she was in danger of bodily harm

or death. These five (California, Georgia, Massachusetts, Ohio, and Wyoming)[159] also find it relevant to the defendant's perception of the temporal proximity of the perceived danger, and one (Massachusetts)[160] also finds it relevant to the proportionality of the force used.

Five (Massachusetts, Missouri, Ohio, South Carolina, and Wyoming)[161] state statutes provide that the testimony may be used to show the defendant is a battered woman or "suffers from battered woman syndrome." One of these, Massachusetts, provides for the admissibility of such testimony (i.e., "whether the defendant displayed characteristics common to victims of abuse"), as well as generic testimony on battering and its effects.[162]

Finally, Ohio permits the testimony to establish the defendant's diminished capacity, i.e., "to establish the requisite impairment of the defendant's reason, at the time of the commission of the offense, that is necessary for a finding that the defendant is not guilty by reason of insanity."[163]

11. *Scope and relevance of expert testimony: federal cases*

Among the 16 federal courts that have admitted expert testimony, the most notable trend is that expert testimony on battering and its effects is relevant to the defendant's state of mind. Twelve of the courts (75 percent) (10th Cir., 9th Cir., 8th Cir., 6th Cir., 3rd Cir., N.D.Ill., E.D.N.Y., D.Kan., S.D.Ohio, N.D.Ala., S.D.Fla., and Tax Ct.)[164] have so held. Just one court (E.D.Pa.) has held to the contrary.[165] Five (10th Cir., 9th Cir., 3rd Cir., N.D.Ill., and S.D.Fla.)[166] of the 12 "state of mind" jurisdictions plus two other[167] federal courts (5th Cir. and W.D.La.) have held that the testimony is admissible to prove the defendant's diminished capacity, mental defect, or lack of intent to commit the charged crime. However, three courts (9th Cir., 7th Cir., and N.D.Ill.) have found to the contrary.[168]

Nearly two-thirds (10) (10th Cir., 9th Cir., 8th Cir., 6th Cir., 3rd Cir., E.D.N.Y., Tax Ct., W.D.La., E.D.Pa., and D. Hawaii)[169] of the 16 courts admitting the testimony have found that it is admissible to show the defendant is a battered woman or suffers from "battered woman syndrome." One of these circuits (8th Cir.)[170] has also held to the contrary in an earlier case. Further, six (10th Cir., 9th Cir., 8th Cir., W.D.La., E.D.Pa., and D. Hawaii)[171] of the ten courts that permit expert testimony that the defendant is a battered woman, plus one other federal court (S.D.N.Y.)[172], permit an expert to give more generic testimony about the characteristics of battered women.

A significant cluster of federal courts (nine) (10th Cir., 9th Cir., 3rd Cir., N.D.Ill., S.D.N.Y., D.Kan., N.D.Ala., S.D.Ohio, and E.D.Pa.)[173] have found the testimony to be relevant to the question of why the defendant did not leave the relationship, or to explain other conduct including actions taken under duress. One appeals court (9th Cir.)[174] has found the testimony admissible to rebut common myths and misperceptions about battered women, and one appeals court (8th Cir.)[175] has found testimony relevant to explain the complainant's recanting prior testimony against the batterer.

In the 10 federal cases involving self-defense situations, four federal courts (10th Cir., 8th Cir., 6th Cir., and S.D.Ohio)[176] have found expert testimony to be relevant to supporting a self-defense claim, and one (E.D.Pa.) has found to the contrary.[177]

In a related vein, two federal courts (D.Kan. and S.D.Ohio)[178] have found the testimony to be relevant to showing the reasonableness of the defendant's belief that she was in danger of imminent harm and/or her actions were in self-defense, and one (S.D.Ohio)[179] has found it relevant to the defendant's perception of the temporal proximity of the perceived danger to life or safety.

A small number of the district courts (N.D.Ill., S.D.N.Y., and E.D.Pa.)[180] have found that the testimony can be admitted to bolster the defendant's credibility, while an appeals court (8th Cir.)[181] has held to the contrary. On a somewhat related issue, two courts (8th Cir. and D.Hawaii) have said evidence of the defendant's prior bad acts is admissible to rebut the expert testimony.[182]

Three federal courts (Tax Ct., S.D.Ohio, and W.D.La.)[183] have permitted experts to give an opinion on the ultimate question before the factfinder, while three others (9th Cir., N.D.Ill., and S.D.Fla.)[184] have said this is not permissible.

Finally, three federal courts (notably, 9th Cir. (which has considered the issue extensively) and also 8th Cir. and E.D.N.Y.) have found expert testimony admissible to show mitigating factors in favor of the defendant or otherwise affect the sentencing phase of trial.[185]

F. Expert Testimony Triggers Adverse Examination

1. *Expert testimony triggers adverse examination: state cases*

A significant number of courts have considered the question whether offering expert testimony on battering subjects the defendant to an adverse psychological examination by the prosecution. Of the 11 states (22 percent) that have ruled on this issue (Florida, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oklahoma, and Texas), the overwhelming majority (10)[186] have found that introducing expert testimony can indeed trigger an adverse examination by the prosecution. Essentially, what these courts have found is that by placing her mental state at issue, the defendant has opened herself up to this inquiry by the prosecution and that compelling an adverse examination, therefore, does not violate her constitutional rights.

Only Minnesota has gone the other way on this issue, albeit with limitations; that is, by limiting expert testimony to a general description of battered woman syndrome and its characteristics and by precluding the expert from testifying as to whether a defendant "suffers from" battered woman syndrome, Minnesota avoids the need for a compelled adverse examination that it recognizes would violate the defendant's constitutional rights.[187] At least one Minnesota trial court has concluded that a defendant may, however, voluntarily waive her rights in this regard and undergo an adverse examination, in order to be able to offer defendant-specific expert testimony.[188]

2. *Expert testimony triggers adverse examination: state statutes*

Only two of the 12 state statutes (Missouri and Ohio) address this issue, and both provide for an adverse examination with limitations. The Missouri statute[189] provides for an adverse examination upon the state's motion, but with the caveat that the adverse expert cannot testify to any of the defendant's statements that may be self-incriminating. The Ohio statute—the only state statute that addresses the introduction of expert testimony on battering and its effects to support an insanity defense—provides for an adverse examination where any defendant (not only a battered woman) has entered an insanity plea,[190] consistent with the general practice in other jurisdictions. Ohio also provides that the adverse expert must consider in his/her findings evidence that the defendant "suffered, at the time of the commission of the offense, from the `battered woman syndrome.'"[191]

3. *Expert testimony triggers adverse examination: federal cases*

Only three federal courts have looked at this issue—two appeals courts (9th and 6th Cir.)[192] have found that the introduction of expert testimony does subject the defendant to an adverse examination, while one district court (N.D.Ill.) has found to the contrary.[193]

G. Case Dispositions on Appeal

1. *Case dispositions on appeal: state cases*

In her 1991 article, Maguigan found that, of the cases she studied, 40 percent of the appeals resulted in reversals due to trial errors, a rate that was significantly higher than the 8.5 percent national average reversal rate for all homicide appeals (140 U. PA. L. REV. at 386, 432-33). Maguigan concluded that this higher reversal rate for battered women defendants resulted, in the majority of jurisdictions, from trial judges' refusal to apply longstanding principles of substantive, evidentiary, and procedural law to their self-defense claims (*Ibid* at 437). Of greatest interest for purposes of this analysis, Maguigan found that of the reversals in battered women's appeals, 16 percent were based on the trial court's exclusion or limitation of expert testimony on battering and its effects (*Id* at 433, note 192). We also reviewed case dispositions on appeal, in part to ascertain whether Maguigan's finding applied equally where, as here, the entire database was comprised of cases involving the use of expert testimony.

In this study, there were 238 state cases analyzed for which case dispositions were available. Eighty-six (36 percent) of these were eliminated from the pool at this point because they represented prosecutions of batterers or male defendants charged with sexual assault (31 cases),[194] civil actions (13 cases),[195] decisions on pretrial motions (12 cases),[196] or dispositions of cases at the trial level (30 cases).[197] The remaining 152 decisions by intermediate or high courts regarding battered women defendants charged with crimes were analyzed to determine how they were disposed of on appeal.

Of these 152 decisions, 63 percent (96) affirmed the battered woman defendant's conviction and/or sentence.[198] This is quite similar to Maguigan's finding that of all the battered women's self-defense cases she studied (approximately 270 opinions),[199] 59 percent of the appeals resulted in affirmances (*Id* at 432).

However, we wanted to compare our finding with the case disposition results for just the expert testimony-related cases within Maguigan's total database, in order to be more directly comparable. Nearly half (about 130) of the 270 opinions Maguigan studied were cited in footnotes to her table of results (*Id* at 461-78), among them 86 cases also included in our database and which we therefore identified as involving expert testimony.[200] Consistent with the methodology described earlier in this section, six cases that involved prosecutions of male defendants and civil actions were eliminated from the pool at this point, yielding 80 expert testimony-related cases for comparative analysis. The affirmance rate for these cases was calculated to be 53 percent,[201] somewhat lower than the 63 percent rate found for the 152 decisions in our database. Stated another way, in the 80 expert testimony cases included in Maguigan's database, five out of every ten battered women defendants had their conviction affirmed on appeal; but in the 152 expert testimony cases analyzed for case disposition here, six out of every ten battered women defendants had their conviction affirmed on appeal. This indicates that during the period between Maguigan's study and the current one, the odds that a battered woman defendant's conviction would be affirmed on appeal in a case in which expert testimony was used or was at issue increased by almost 20 percent.

We also found that, of the 96 cases in our database with affirmances, expert testimony on battering and its effects had been admitted or found admissible (that is, these decisions were coded either "AH," "AR," "AL," "AC," or "D") in 68 of them[202] (71 percent of all affirmed convictions/sentences).[203] Thus, notwithstanding the fact that in nearly three-fourths of these cases, expert testimony was used in the defense or the court recognized that it was admissible, these battered women defendants' convictions and/or sentences were still affirmed. This is strong evidence that — contrary to popular misconceptions reflected in some media coverage of this issue — the defense's use of or the court's awareness about expert testimony on battering and its effects in no way equates to acquittal on the criminal charges lodged against a battered woman defendant.

Of the remaining 56 cases in our database, the conviction was reversed in 49 (32 percent of the entire group of 152 cases). Of these, 22 (45 percent of all reversals) were reversed based on erroneous exclusion of,[204] limitation of,[205] or failure of counsel to present[206] expert testimony on battering and its effects. Significantly, these 22 cases represent just 14 percent of the 152 decisions in the pool. The other 27 cases (55 percent of all reversals)[207] were reversed on other grounds unrelated to the expert testimony issue. No cases were found in

which the conviction was reversed due to erroneous jury instructions related to expert testimony on battering.

The remaining seven cases (5 percent of the pool of 152) were remanded, six[208] for reasons unrelated to the expert testimony issue and one[209] due to the exclusion of expert testimony.

The foregoing findings on reversals differ somewhat from Maguigan's 1991 findings. She reported that

> Of the reversals in battered women's appeals, only 16 [percent] were based on the trial court's exclusion or limitation of expert testimony on battered woman syndrome. Other evidentiary errors served as the basis for 32 [percent] of the reversals. Reversals on sufficiency-of-evidence grounds represented 10 [percent], while reversals on the basis of errors in jury instructions accounted for 41 [percent].
>
> (*Id* at 433, note 192.)

Thus, at first blush, it appears that, while Maguigan found that reversals related to exclusion or limitation of expert testimony accounted for only 16 percent of all reversals in battered women's appeals, this analysis finds that errors in this area accounted for more than three times as many of the reversals (45 percent). However, the difference in findings is in reality not that major, when the comparison is again made to that portion of Maguigan's base of cases that represented expert testimony cases. As a check, we made this comparison first, directly, using the case disposition codes we assigned to Maguigan's 80 expert testimony cases and then, indirectly, by extrapolating from Maguigan's findings. The comparative data are displayed in the following table.

TABLE 2
COMPARISON OF CASE DISPOSITION ON APPEAL RESULTS

Disposition	NCDBW Database For Current Analysis	Maguigan's Database (direct comparison)	Maguigan's Database (indirect comparison)
Total cases	152 (100%)	80 (100%)[210]	80 (100%)
Affirmed on appeal	96 (63%)	42 (53%)	48 (60%)[211]
Reversed on appeal	49 (32%)	34 (43%)	32 (40%)
Reversed for expert testimony reason	22 (45% of reversals; 14% of all cases)	16 (47% of reversals; 20% of all cases)	17 (53% of reversals; 21% of all cases)
Reversed on other grounds	27 (55% of reversals)	18 (53% of reversals)	15 (47% of reversals)
Remanded on appeal	7 (5%)	3 (4%)	Unknown

Using our assigned codes, we found that of the 80 cases, 34 (43 percent) were reversed on appeal. Consistent with the foregoing comparison of affirmance rates, this is somewhat higher than the 32 percent reversal rate found with respect to our database. Of the 34 reversals, 16 (47 percent of all reversals) were reversed based on erroneous exclusion of, limitation of, or failure of counsel to present expert testimony on battering and its effects, and the other 18 (53 percent) were reversed on grounds unrelated to the expert testimony issue. This is quite consistent with the findings for our database (with 45 percent of reversals for expert testimony-related reasons and 55 percent of reversals on other grounds). The 16 cases reversed on expert testimony-related grounds represent 20 percent of the 80 decisions in the pool. This is somewhat higher than the finding for our database that cases reversed on expert testimony grounds represented only 14 percent of the entire pool. Finally, three cases (4 percent of the 80 cases) were remanded, two for reasons unrelated to expert testimony and one due to the exclusion of expert testimony. This is similar to our finding that 5 percent of the cases in our database were remanded.

To back into our indirect comparison, we first noted that the 80 expert testimony-related cases represented about 30 percent of Maguigan's database, whereas expert testimony cases comprised 100 percent of the database used for this analysis. Extrapolating from Maguigan's finding that where almost one-third of the cases involve expert testimony and related errors account for 16 percent of the errors, one would project that where 100 percent of the cases involve expert testimony, related errors would account for about three times as many errors, or something on the order of 45 to 50 percent—essentially, the conclusion of this analysis.

Looking at the question another way, if the 40-percent reversal rate on appeal Maguigan found applied equally to the 80 expert testimony cases, one would expect that about 32 of these cases resulted in reversals. (In fact, our direct comparison found that there were 34 reversals among the 80 cases.) It could thus be deduced that Maguigan found reversal due to expert testimony-related errors in 17 cases.[212] (In fact, according to our direct comparison, there were 16 cases reversed due to expert testimony-related errors.) Therefore, it can be estimated that about 53 percent (or, 17 out of 32) of the reversals in expert testimony cases were due to expert testimony-related errors (a bit higher than, but not that significantly different from, the 45-percent rate found with respect to our database or the 47-percent rate found in the direct comparison of Maguigan's 80 cases).

Finally, it should be noted that these 17 cases would represent 21 percent of the entire base of Maguigan's 80 expert testimony cases. (This is very similar to the direct comparison finding that 16 cases reversed for expert testimony-related errors represent 20 percent of the entire pool of 80 cases.) By comparison, the 22 cases in our database found to have been reversed due to an expert testimony-related error represent 14 percent of the entire base of 152 cases used in this analysis.

Consistent with our earlier finding of the increased chance that a battered woman defendant's conviction will be affirmed on appeal, the data regarding reversals indicate that, from 1991 (when Maguigan's analysis was performed) to 1994 (the year of this analysis), the chance of prevailing in an appeal challenging an error related to exclusion or limiting of expert testimony on battering and its effects has decreased by one-third. As a possible explanation for this result, we hypothesized that the nature of the expert testimony-related error may have become more subtle over the years, as the courts have increasingly accepted the admissibility of such testimony for at least some purposes. However, this does not appear to be a valid theory, in that of the 16

reversals for exclusion of expert testimony,[213] half (8) were decided as recently as 1990 through 1994.[214]

2. *Case dispositions on appeal: federal cases*

Thirty-one federal decisions from 19 courts were analyzed in this study. Nine cases (29 percent) were eliminated from the pool when case disposition on appeal was studied, because they represented prosecutions of batterers/male defendants charged with sexual assault (two cases),[215] decisions on pretrial motions (two cases),[216] dispositions of cases at the trial level (four cases),[217] or sentencing decisions (one case).[218]

Of the remaining 22 cases, 77 percent (17) resulted in affirmances of convictions and/or sentences.[219] This is significantly higher than the 60-percent affirmance rate for state court appeals found both in this analysis and by Maguigan, as discussed in the preceding section.

Of the four cases in which reversals occurred, two (less than 10 percent of the entire pool of 22 cases)—which actually involved the same defendant—were reversed based on erroneous exclusion of expert testimony on battering and its effects,[220] and two were reversed on other grounds, unrelated to the expert testimony issue.[221]

IV. Suggested Followup Research Questions

There are a number of research questions beyond the scope of this paper that were suggested by the findings of this analysis or that became evident during the course of doing the data gathering and analysis. They include:

1. How does a state's position on (a) the admissibility of and (b) the scope and relevance of expert testimony on battering and its effects correlate with its general self-defense standard (i.e., objective, subjective, or hybrid)?

2. How does a state's position on the admissibility of expert testimony on battering and its effects correlate with its self-defense temporal proximity standard (i.e., "imminence" versus "immediacy" of the perceived danger to life or safety)?

3. How does a state's position on the admissibility of expert testimony on battering and its effects correlate with its standards for admissibility of

other expert testimony (e.g., on Rape Trauma Syndrome or Child Sexual Abuse Syndrome)? That is, for what purposes are various kinds of "profile" testimony admissible?

4. What are the ramifications of the growing use of expert testimony on battering and its effects by the prosecution to explain the battered woman/complainant's recanting her previous testimony against her batterer or other related conduct?

5. How have state statutes, or the ways in which they have been interpreted by the courts, changed, restricted, or expanded the admissibility of expert testimony on battering and its effects and/or its scope and relevance as compared to the standards established by state case law? How, if at all, is the content of these statutes connected to statutes regarding sentencing, clemency, or parole for battered women?

6. To what extent does the availability of funds to pay for expert witnesses appear to be an impediment to battered women defendants?

7. What definition of "battered woman syndrome" is being used by the courts and by expert witnesses? How is it being limited by case law or statute? How do these definitions or limitations impact on particular communities, e.g., women of color, lesbians? To the extent particular terms of art such as "learned helplessness" are being misused, does this have the effect of—rather than dispelling myths and misperceptions—creating new ones?

8. Are there any significant differences between how expert testimony on battering and its effects is being used at the trial level and at the appellate level? How is the testimony being used for sentencing purposes when a defendant pleads guilty? How is it being used in clemency proceedings? In death penalty cases?

9. What are the impacts and ramifications of various limitations which have been imposed on the scope of expert testimony on battering and its effects?

10. What is the impact of having to establish that a defendant is a battered woman before expert testimony on battering and its effects can be admitted?

11. What is the likely impact of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993) on the admissibility of or scope and relevance of expert testimony on battering and its effects?

12. What criteria are used in various jurisdictions for qualifying experts on battering and its effects? How if at all do these differ from those applied to other experts?

13. What factors account for the apparent decrease in the chances of a battered woman defendant's prevailing in an appeal of her conviction shown by the comparison of data from Maguigan's 1991 study and this analysis?

14. Do Maguigan's 1991 findings regarding dispositions on appeal of all battered women's self-defense cases (not just expert testimony cases) still hold true? If not, what accounts for the differences? What, if any, differences exist between the outcomes of traditional and nontraditional self-defense cases?

Notes

1. With the possible exception of Rhode Island. *See McMaugh v. State*, 612 A.2d 725 (R.I. 1992).

2. For example, many people believe that when battered women kill they do so when their abusers are asleep. While it is true that some battered women do kill their abusive partners while they are sleeping or passed out, most battered women who kill their partners do so during an ongoing confrontation. Despite this fact, very few battered women are actually acquitted at trial. The vast majority of women who are charged—between 75 and 80 percent—accept a plea or are found guilty. *See* Charles P. Ewing, *Battered Women Who Kill: Psychological Self-Defense as Legal Justification* (1987) and Angela Browne, *When Battered Women Kill* (1987).

3. See, for example, Alan Dershowitz, *The Abuse Excuse and Other Cop-Outs, Sob Stories, and Evasions of Responsibilities* (1994). In this book he states that "the `abuse excuse'—the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation—is quickly becoming a license to kill and maim." He goes on to state that "... vigilantism—whether it takes the old-fashioned form of the lynch mob or the new-fashioned form of the abuse victim's killing her sleeping husband—threatens the very fabric of our democracy and sows the seeds of anarchy and autocracy. The abuse excuse is dangerous, therefore, both in its narrow manifestation as a legal defense and in its broader manifestation as an abrogation of societal responsibility."

4. The primary focus of the *Trend Analysis* is the use of expert testimony in criminal cases, but it briefly discusses the use of such testimony in civil cases and as introduced by the state when prosecuting a batterer.

5. A recent study conducted by the National Center for State Courts concluded that only 8.5 percent of homicide appeals result in discharge or the order of a new trial. Yet, according to the results of a recent study by Professor Holly Maguigan of New York University Law School, 40 percent of battered women's homicide cases have resulted in reversals. *See* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991) at 433 (citing Joy A. Chapper & Roger A. Hansom, National Center for State Courts, *Understanding Reversible Error in Criminal Appeals: Final Report 38* (1990)).

6. Unlike this analysis, Professor Maguigan's study did not focus solely on cases involving expert testimony. Rather, her study focused on cases involving battered women who claimed self-defense at trial, only some (approximately 30 percent) of whom had or tried to have an expert testify at their trial. However, knowing what a solid and important foundation Professor Maguigan established in her excellent article, we chose to build on her work. See *Research Methodology* section, pages 3–5 for additional information.

7. "State court" as used in this analysis includes the 50 states plus the District of Columbia.

8. Note that for 34 state and three federal cases included in the total database of some 270 cases, there is not actually a reported court decision; rather, NCDBW has trial transcripts, copies of expert testimony given in or other "outside information" about the use of expert testimony in these cases. For purpose of this analysis, these cases have been coded to reflect that expert testimony on battering and its effects was admitted as well as the scope of the testimony. To the extent possible, the outcome of the case has been ascertained and coded.

9. It is interesting to observe that, in 1991, Maguigan found that only 14 states had a square holding of admissibility: *see* CA (People v. Aris, 215 Cal. App. 3d 1178, 264 Cal. Rptr. 167 (1989), *review denied* (3/1/90)), FL (Terry v. State, 467 So.2d 761 (Fla. Dist. Ct. App. 1985), *pet. for review denied*, 476 So.2d 675 (Fla. 1985)), GA (Smith v. State, 247 Ga. 612, 277 S.E.2d 678 (1981)), IL (People v. Minnis, 118 Ill. App. 3d 345, 455 N.E.2d 209 (1983)), KS (State v. Hodges, 239 Kan. 63, 716 P.2d 563 (1986), *overruled on other grounds*, State v. Stewart, 243 Kan. 639, 763 P.2d 572 (1988)), ME (State v. Anaya, 438 A.2d 892 (Me. 1981)), MN (State v. Hennum, 441 N.W.2d 793 (Minn. 1989) (*en banc*)), NJ (State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984)), NM (State v. Gallegos, 104 N.M. 247, 719 P.2d 1268 (N.M. Ct. App. 1986)), NY (stating there is actually no square holding but citing In the Matter of Nicole V., 71 N.Y.2d 112, 518 N.E.2d 914 (1987); People v. Ciervo, 123 A.D.2d 393, 506 N.Y.S.2d 462 (1986); and People v. Emick, 103 A.D. 2d 643, 481 N.Y.S.2d 552 (1984)), OH (State v. Koss, 49 Ohio St.3d 213, 551 N.E.2d 970 (1990)), SC (State v. Hill, 287 S.C. 398, 339 S.E.2d 121 (S.C. 1986)), TX (Fielder v. State, 756 S.W.2d 309 (Tex. Crim. App. 1988)), WA (State v. Allery, 101 Wash. 2d 591, 682 P.2d 312 (1984)). Essentially, the additional seven states that now have square holdings had decisions rendered in 1992, 1993 or 1994, *see* CT (State v. Borrelli, 227 Conn. 153, 629 A.2d 1105 (1993); Knock v. Knock, 244 Conn. 776, 621 A.2d 267 (1993)), HI (State v. Cababag, 9 Haw. App. 496, 850 P.2d 716 (1993), *cert. denied*, 74 Haw. 652, 853 P.2d 542 (1993)), MA (Commonwealth v. Rodriguez, 418 Mass. 1, 633 N.E.2d 1039 (1994)), MT (State v. Hess, 252 Mont. 205, 828 P.2d 382 (1992); *reh'g denied* (3/31/92)), OK (Bechtel v. State, 840 P.2d 1 (Okla. Crim. App. 1992) (appeal after remand)), UT (Hazel, *supra* text, page 7), WI (State v. Bednarz, 179 Wis. 2d 460, 507 N.W.2d 168 (Wis. Ct. App. 1993), *review denied*, 513 N.W.2d 406 (Wis. 1994); State v. Slade, 168 Wis. 2d 358, 485 N.W.2d 839 (Wis. Ct. App. 1992), *review denied*, 490 N.W.2d 23 (Wis. 1992)).

10. *See* CT (Borrelli, *supra* note 3; Knock, *supra* note 3), FL (State v. Hickson, 630 So.2d 172 (Fla. 1993)), GA (State v. Chapman, 258 Ga. 214, 367 S.E.2d 541 (1988); Smith, *supra* note 3), KS (State v. Crawford, 253 Kan. 629, 861 P.2d 791 (1993); State v. Clements, 244 Kan. 411, 770 P.2d 447 (1989) (appeal after remand); Hodges, *supra* note 3; State v. Stewart, 243 Kan. 639, 763 P.2d 572 (1988); State v. Hundley, 236 Kan. 461, 693 P.2d 475 (1985)), MA (Rodriguez, *supra* note 3), MT (Hess, *supra* note 3), NJ (Kelly, *supra* note 3), NY (Nicole V., *supra* note 3), OH (Koss, *supra* note 3), PA (Commonwealth v. Stonehouse, 521 Pa. 41, 555 A.2d 772 (1989)), SC (Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (S.C. 1992), *reh'g denied* (6/3/92); Hill, *supra* note 3), WA (State v. Kelly, 102 Wash. 2d 188, 685 P.2d 564 (1984); Allery, *supra* note 3; State v. Janes, 121 Wash. 2d 220, 850 P.2d 495 (1993) *(en banc)*).

11. CT (*compare* Borrelli, *supra* note 3, *with* State v. Freeney, 228 Conn. 582, 637 A.2d 1088 (1994)), GA (*compare* Chapman (1988), *supra* note 4, *with* Pugh v. State, 260 Ga. 874, 401 S.E.2d 270 (1991) (appeal after remand)), KS (*compare* Hodges, *supra* note 3, and Stewart, *supra* note 4, with State v. Dunn, 243 Kan. 414, 758 P.2d 718 (1988), *habeas corpus granted by* Dunn v. Roberts, 768 F. Supp. 1442 (D.Kan. 1991), *aff'd*, 963 F.2d 308 (10th Cir. 1992); but note that Dunn was reversed by a federal court, and *see* the later decision in Crawford, *supra* note 4).

12. NJ (*compare* Kelly, *supra* note 3, *with* State v. McClain, 248 N.J. Super. 409, 591 A.2d 652 (A.D. 1991), *certification denied by* 126 N.J. 341, 598 A.2d 897 (1991)), OH (*compare* Koss, *supra* note 3, *with* State v. Engle, 1994 Ohio App. LEXIS 3918 (8/11/94) (slip op.), *appeal allowed by* 71 Ohio St.3d 1446, 644 N.E.2d 408 (1995); State v. Lundgren, 1994 Ohio App. LEXIS 1722 (4/22/94) (slip op.); State v. Dowd, 1994 Ohio App. LEXIS 132 (1/19/94) (slip op.), *dismissed*, 69 Ohio St.3d 1476, 634 N.E.2d 1023 (1994); State v. Calvin Redding, 1992 Ohio App. LEXIS 976 (3/5/92), *dismissed*, 65 Ohio St.3d 1407, 598 N.E.2d 1161 (1992); State v. Marcia Redding, 1992 Ohio App. LEXIS 972 (3/5/92), *dismissed*, 65 Ohio St.3d 1462, 602 N.E.2d 1171 (1992); State v. Coulter, 75 Ohio App. 3d 219, 598 N.E.2d 1324 (1992), *denial of post-conviction relief aff'd*, 1992 WL 193658 (Ohio App. 8/10/92); State v. Poling, 1991 Ohio App. LEXIS 2294 (5/17/91), *dismissed*, 62 Ohio St.3d 1438, 579 N.E.2d 212 (1991); State v. Pargeon, 64 Ohio App. 3d 679, 582 N.E.2d 665 (1991), *reh'g denied*, 62 Ohio St.3d 1466, 580 N.E.2d 787 (1991) — but *see* Daws, *supra* text, page 2).

13. WA (*compare* Kelly, *supra* note 4, *and* Allery, *supra* note 3, with State v. Ciskie, 110 Wash. 2d 263, 751 P.2d 1165 (1988), *and* State v. Riker, 123 Wash. 2d 351, 869 P.2d 43 (1994), *and* State v. Hanson, 58 Wash. App. 504, 793 P.2d 1001 (1990); *recon. denied* (8/31/90), *review denied*, 115 Wash. 2d 1033, 803 P.2d 325 (1990); but *see also* later decision in Janes, *supra* note 4).

14. CA (People v. Romero, 13 Cal. Rptr. 2d 332 (Cal. App. 2 Dist. 1992), rev'd on other grounds, 35 Cal. Rptr. 2d 270, 883 P.2d 388 (1994); People v. Day, 2 Cal. App. 4th 405, 2 Cal. Rptr. 916 (1992); Aris, *supra* note 3), FL (Rogers v. State, 616 So.2d 1098 (Fla. Dist. Ct. App. 1993), *reh'g denied* (5/4/93); *approved in part, quashed in part*, 630 So.2d 177 (Fla. 1993), Terry, *supra* note 3), GA (Motes v. State, 192 Ga. App. 302, 384 S.E.2d 463 (1989)), HI (Cababag, *supra* note 3), IL (People v. Fleming, 155 Ill. App.3d 29, 507 N.E.2d 954 (1987), *leave to appeal denied*, 116 Ill.2d 566, 515 N.E.2d 116 (1987), *rev'd*, U.S. ex rel. Fleming v. Huch, 924 F.2d 679 (7th Cir. 1991); People v. Server, 148 Ill. App. 3d 888, 499 N.E.2d 1019 (4 Dist. 1986), *appeal denied*, 114 Ill.2d 555, 508 N.E.2d 734 (1987), *cert. denied*, 484 U.S. 842 (1987), *habeas corpus denied by* Server v. Mizell, 902 F.2d 611 (7th Cir. 1990); Minnis, *supra* note 3), KS (State v. Cramer, 17 Kan. App. 2d 623, 841 P.2d 1111 (1992), *review denied* (2/3/93)), NJ (State v. McGuigen, Docket No. A-1557-85T4, Sup. Ct., App. Div. (N.J. 2/5/88); State v. Frost, 242 N.J. Super. 601, 577 A.2d 1282 (A.D. 1990), *cert. denied*, 127 N.J. 321, 604 A.2d 596 (1990); State v. Myers, 239 N.J. Super. 158, 570 A.2d 1260 (1990), *cert. denied*, 127 N.J. 323, 604 A.2d 598 (1990)), NM (Gallegos, *supra* note 3; State v. Branchal, 101 N.M. 498, 684 P.2d 1163 (N.M. Ct. App. 1984)), OH (Daws, *supra* text, page 2; State v. Spinks, 1990 WL 56554 (Ohio App. 5/3/90)), OK (Bechtel, *supra* note 3),

PA (Commonwealth v. Miller, 430 Pa. Super. 297, 634 A.2d 614 (1993), *appeal denied*, 646 A.2d 1177 (Pa. 1994); Commonwealth v. Kacsmar, 421 Pa. Super. 64, 617 A.2d 725 (1992), *appeal denied*, 536 Pa. 640, 639 A.2d 25 (1994)), SC (Doe v. Greenville Hospital System, ___ S.C. App. ___, 448 S.E.2d 564 (1994), *reh'g denied* (10/6/94), *cert. granted* (3/10/95); State v. Wilkins, 305 S.C. 272, 407 S.E.2d 670 (S.C. App. 1991); *reh'g denied* (8/29/91); *cert. denied* (11/21/91)), TX (Fielder, *supra* note 3), WI (Bednarz, *supra* note 3; Slade, *supra* note 3).

15. IL (*compare* Fleming, *supra* note 8, *with* People v. Jackson, 180 Ill. App. 3d 78, 535 N.W.2d 1086 (1989), *appeal denied*, 126 Ill. 2d 563, 541 N.E.2d 1111 (1989)), NJ (*compare* Frost, *supra* note 8, *and* Myers, *supra* note 8, *with* McClain, *supra* note 6), TX (*compare* Fielder, *supra* note 3, *with* Ortiz v. State, 834 S.W.2d 343 (Tex. Crim. App. 1992)).

16. GA (*compare* Motes, *supra* note 8, *with* Pugh, *supra* note 5).

17. MN (State v. Mick, Order and Memorandum on State's Motion in Limine, File No. K-84-497 (Dist. Ct., 8th Jud. Ct., Kandiyohi Co., MN, 7/30/84)), UT (Hazel, *see supra* text, page 7). Also note that in three states which have square holdings by a higher court as well, there are trial court decisions with a square holding -- FL (State v. Stiles, Case No. 92-16173, Cir. Ct., 13th Jud. Cir., Hillsborough Co., FL (June 1993) (unpub. op.)), NJ (Cusseaux v. Pickett, 279 N.J. Super. 335, 652 A.2d 789 (1994)) *and* NY (People v. Torres, 128 Misc. 2d 129, 488 N.Y.S.2d 358 (N.Y. Crim. Ct. 1985).

18. MN (*compare* Mick, *supra* note 11, *with* Hennum, *supra* note 3, *and* State v. Borchardt, 478 N.W.2d 757 (Minn. 1991)).

19. *See, e.g.*, GA (Pugh, *supra* note 5), OH (Poling, *supra* note 6), WA (Ciskie, *supra* note 7).

20. *See, e.g.*, CT (Freeney, *supra* note 5) *and* WA (Hanson, *supra* note 7).

21. *See, e.g.*, IL (Jackson, *supra* note 9) *and* TX (Ortiz, *supra* note 9).

22. *See, e.g.*, Poling ("sleeping man" case), *supra* note 6; Pargeon (expert testimony offered by the prosecution), *supra* note 6; C. Redding, *supra* note 6; M. Redding, *supra* note 6; Coulter (crime against third party), *supra* note 6; Dowd (expert testimony offered by the prosecution), *supra* note 6; Lundgren (duress/crime against third party case), *supra* note 6; Engle (duress/infanticide case), *supra* note 6.

23. *See* Pargeon, *supra* note 6, *and* Lundgren *supra* note 6.

24. AL (Ex parte Haney, 603 So.2d 412 (Ala. 1992), *reh'g denied* (8/28/92), *cert. denied*, 113 S.Ct. 1297 (1993)), AK (Brandon v. State, 839 P.2d 400 (Alaska App. 1992) (appeal after remand), *reh'g denied* (10/29/92)), LA (Laughlin v. Breaux, 515 So.2d 480 (La. App. 1 Cir. 1987)), MO (State v. Landrum, Cause No. 576441, Div. 17, Team A, Cir. Ct., St. Louis Co. (MO 8/12/88) (unpub. order of 8/12/88), NE (State v. Doremus, 2 Neb. App. 784, 514 N.W.2d 649 (1994)), NC (State v. Clark,

324 N.C. 146, 377 S.E.2d 54 (1989)), RI (State v. Ordway, 619 A.2d 819 (R.I. 1992)). Note that in six additional states (already assigned the most inclusive code, "AH") where there is a square holding of admissibility, there are also decisions that recognize admissibility of the testimony without discussing it — GA (Ledford v. State, 254 Ga. 656, 333 S.E.2d 576 (1985)), MN (State v. Merrill, 1991 Minn. App. LEXIS 790 (8/13/91) (unpub. op.)), NJ (State v. J.Q., 130 N.J. 554, 617 A.2d 1196 (1993)), NM (State v. Vigil, 110 N.M. 254, 794 P.2d 728 (N.M. 1990)), NY (People v. Taylor/People v. Banks, 75 N.Y.2d 277, 552 N.E.2d 131 (1990)), OH (State v. Roquemore, 85 Ohio App. 3d 448, 620 N.E.2d 110 (1993); State v. Manning, 74 Ohio App. 3d 19, 598 N.E.2d 25 (1991), *reh'g denied*, 62 Ohio St.3d 1466, 580 N.E.2d 786 (1991), *cert. denied*, 112 S.Ct. 1961 (1992); State v. Seymour, 1993 Ohio App. LEXIS 5387 (1993) (slip op.), *dismissed*, 69 Ohio St.3d 1436, 632 N.E.2d 519 (1994), *recon. denied*, 70 Ohio St.3d 1437, 638 N.E.2d 1041 (1994)), PA (Commonwealth v. Tyson, 535 Pa. 391, 635 A.2d 623 (1993)).

25. ID (State v. Griffiths, 101 Idaho 163, 610 P.2d 522 (1980), *overruled on other grounds*, State v. LePage, 102 Idaho 387, 630 P.2d 674 (1981), *cert. denied*, 454 U.S. 1057 (1981)), KY (Commonwealth v. Craig, 783 S.W.2d 387 (Ky. 1990), *overruled by* Dyer v. Com., 816 S.W.2d 647 (Ky. 1992); Commonwealth v. Rose, 725 S.W.2d 588 (Ky. 1987), *cert. denied*, 484 U.S. 838 (1987), *overruled by* Com. v. Craig, 783 S.W.2d 387 (1990)), MI (People v. Wilson, 194 Mich. App. 599, 487 N.W.2d 822 (1992)), NH (State v. Baker, 120 N.H. 773, 424 A.2d 171 (1980)), SD (State v. Burtzlaff, 493 N.W.2d 1 (S.D. 1992)), VT (State v. Verrinder, 161 Vt. 250, 637 A.2d 1382 (1993)). Note that in nine additional states already assigned the more inclusive codes of "AH" or "AR," there are also decisions that are coded as "AL" — AK (Haakanson v. State, 760 P.2d 1030 (Alaska App. 1988)), CT (Freeney, *supra* note 5, State v. Battista, 31 Conn. App. 497, 626 A.2d 769 (1993), *cert. denied*, 227 Conn. 907, 632 A.2d 696 (1993)), FL (State v. Rhone, 566 So.2d 1367 (Fla. Dist. Ct. App. 1990) (There is some question whether this code applies to this case.), GA (Pugh, *supra* note 5, Thompson v. State, 203 Ga. App. 339, 416 S.E.2d 755 (1992), *cert. denied* (4/24/92)), KS (State v. Meyer, No. 59,213, Kan. Ct. App. (12/4/86) (unpub. slip op.)), MN (Hennum, *supra* note 3; State v. Krage, No. K3-91-155, Dist. Ct. (3rd Jud. Dist.), MN (unpub. Order and Memorandum dated 7/18/91)), TX (Ortiz, *supra* note 9), WA (Hanson, *supra* note 7; Ciskie, *supra* note 7), WI (State v. Landis, 138 Wis. 2d 527, 406 N.W.2d 171 (Wis. Ct. App. 1987), *review denied*, 139 Wis. 2d 860, 415 N.W.2d 162 (1987).

26. AR (Thompson v. State, 306 Ark. 193, 813 S.W.2d 249 (1991)), DC (Ibn-Tamas v. U.S., 407 A.2d 626 (D.C. App. 1979) *and* Ibn-Tamas v. U.S., 455 A.2d 893 (D.C. App. 1983) (appeal after remand)), IN (Fultz v. State, 439 N.E. 2d 659 (Ind. App. 3rd. 1982)), ME (Anaya (1981), *supra* note 3), MS (Lentz v. State, 604 So.2d 243 (Miss. 1992)), OR (State v. Milbradt, 305 Or. 621, 756 P.2d 620 (1988); State v. Moore, 72 Or. App. 454, 695 P.2d 985 (1985), *review denied*, 299 Or. 154, 700 P.2d 251 (1985). Also note that for eight other states that have a more inclusive holding coded "AH," "AR," or "AL," there are also decisions admitting expert testimony on battering and its effects on a conditional basis — AL (Ex Parte Hill, 507 So.2d 558 (Ala. 1987)), FL (Hawthorne v. State, 470 So.2d 770 (Fla. Dist. Ct. App. 1985) (appeal after remand)), KY (Dyer v. Commonwealth, 816 S.W.2d 647 (Ky. 1991); Rose, *supra* note 19), LA (State v. Burton, 464 So.2d 421 (La. App. 1 Cir.

1985); *writ denied*, 468 So.2d 570 (La. 1985)), MA (Commonwealth v. Grimshaw, 412 Mass. 505, 590 N.E.2d 681 (1992); Commonwealth v. Lazarovich, 410 Mass. 466, 574 N.E.2d 340 (1991); Commonwealth v. Moore, 25 Mass. App. Ct. 63, 514 N.E.2d 1342 (1987)), MN (Borchardt,*supra* note 12), MO (State v. Williams, 787 S.W.2d 308 (Mo. App. 1990)), NH (State v. Briand, 130 N.H. 650, 547 A.2d 235 (1988)).

27. AZ (State v. Denny, 27 Ariz. App. 354, 555 P.2d 111 (1976); *reh'g denied* (8/17/76); *pet. for rev. denied* (10/13/76)), CO (People v. Yaklich, 833 P.2d 758 (Colo. App. 1991), *reh'g denied* (1/9/92), *cert. denied*, (8/10/92); People v. Hare, 782 P.2d 831 (Colo. App. 1989); *aff'd*, 800 P.2d 1317 (Colo. 1990); Morrison v. Bradley, 622 P.2d 81 (Colo. App. 1980), *rev'd on other grounds*, 655 P.2d 385 (Colo. 1982)), IA (State v. Nunn, 356 N.W.2d 601 (Iowa App. 1984)), MD (Banks v. State, 92 Md. App. 422, 608 A.2d 1249 (1992)), NV (Larson v. State, 104 Nev. Adv. 113, 766 P.2d 261 (1988)), ND (State v. Leidholm, 334 N.W.2d 811 (N.D. 1983)), TN (State v. Zimmerman, 823 S.W.2d 220 (Tenn. Cr. App. 1991); State v. Furlough, 797 S.W.2d 631 (Tenn. Crim. App. 1990); State v. Devita, 1989 Tenn. Crim. App. LEXIS 292 (4/12/89); State v. Aucoin, 756 S.W.2d 705 (Tenn. Crim. App. 1988), *cert. denied*, 489 U.S. 1084 (1989), *reh'g denied*, 490 U.S. 1077 (1989); State v. Leaphart, 673 S.W.2d 870 (Tenn. Crim. App. 1983)), VA (Wilmoth v. Commonwealth, 10 Va. App. 169, 390 S.E.2d 514 (1990); Pancoast v. Commonwealth, 2 Va. App. 28, 340 S.E.2d 833 (1986)), WV (In Interest of Betty J.W., 179 W. Va. 605, 371 S.E.2d 326 (1988); State v. Steele, 178 W. Va. 330, 359 S.E.2d 558 (1987); State v. Duell, 175 W. Va. 233, 332 S.E.2d 246 (1985); State v. Lambert, 173 W. Va. 60, 312 S.E.2d 31 (1984)), WY (Frenzel v. State, 849 P.2d 741 (Wyo. 1993); Griffin v. State, 749 P.2d 246 (Wyo. 1988) (There is some question whether this code applies to this case.)). Note that for 28 additional states already coded with a more inclusive code of "AH," "AR," "AL," or "AC," there are also intermediate or high court decisions discussing the contents but not the standards for admission of expert testimony on battering and its effects — AL (Haney,*supra* note 18), FL (Jackson v. State, 648 So.2d 85 (Fla. 1994)), GA (Strong v. State, 251 Ga. 2d 540, 307 S.E.2d 912 (1983); Norris v. State, 250 Ga. 38, 295 S.E.2d 321 (1982)), ID (Curtis v. Firth, 123 Idaho 598, 850 P.2d 749 (1993); Curtis v. Firth, 125 Idaho 229, 869 P.2d 229 (1994) (appeal after remand)), IL (People v. Sheila Smith, 241 Ill. App. 3d 446, 608 N.E.2d 1259 (1993); People v. Novy, 232 Ill. App. 3d 631, 597 N.E.2d 273 (1992); People v. Gindorf, 159 Ill. App. 3d 647, 512 N.E.2d 770 (1987), *appeal denied*, 117 Ill.2d 548, 517 N.E.2d 1090 (1987), *cert. denied*, 486 U.S. 1011 1988)), IN (Dausch v. State, 616 N.E.2d 13 (Ind. 1993); Allen v. State, 566 N.E.2d 1047 (Ind. App. 1991)), KY (Ford v. Commonwealth, 720 S.W.2d 735 (Ky. Ct. App. 1986)), LA (State v. Moore, 568 So.2d 612 (La. App. 4 Cir. 1990)), ME (State v. Anaya, 456 A.2d 1255 (Me. 1983) (appeal after remand)), MA (Commonwealth v. Grimshaw, 31 Mass. App. Ct. 917, 576 N.E.2d 1374 (1991), *aff'd*, 412 Mass. 505, 590 N.E.2d 681 (1992)), MN (State v. Loch, 1994 Minn. App. LEXIS 91 (1/25/94)), MO (Hunziger v. Noellsch, Case No. CV591-5CC, Circuit Ct., Holt Co., MO (3/2/94) (unpub. op.)), MT (State v. Redcrow, 242 Mont. 254, 790 P.2d 449 (1990); In Re Marriage of Houtchens, 760 P.2d 71 (Mont. 1988)), NE (In re Interest of C.P., 235 Neb. 276, 455 N.W.2d 138 (1990); State v. Jackson, 231 Neb. 207, 435 N.W.2d 893 (1989)), NH (Briand, *supra* note 20), NJ (State v. Walker, 199 N.J. Super. 354, 489 A.2d 728 (1985)), NM

(State v. Swavola, 114 N.M. 472, 840 P.2d 1238 (N.M. Ct. App. 1992),*cert. denied*, 114 N.M. 501, 841 P.2d 549 (N.M. 1992)), NY (People v. Barrett, 189 A.D.2d 879, 592 N.Y.S.2d 766 (1993); People v. Rollock, 177 A.D.2d 722, 577 N.Y.S.2d 90 (2nd Dept. 1991), *appeal denied*, 79 N.Y.2d 923, 590 N.E.2d 1211 (1992); In the Matter of Glenn G., 154 Misc. 2d 677, 587 N.Y.S.2d 464 (Fam. Ct. Kings Co. 1992); People v. Anderson, N.Y. Sup. Ct. Bronx Co. N.Y.L.J. 3/14/91 at p.25; People v. Fratt, 146 Misc. 2d 77, 548 N.Y.S.2d 978 (N.Y.S.Ct. 1989); Emick,*supra* note 3; Ciervo, *supra* note 3), NC (State v. Torres, 99 N.C. App. 364, 393 S.E.2d 535 (1990),*rev'd*, 330 N.C. 517, 412 S.E.2d 20 (1992); State v. Norman, 324 N.C. 253, 378 S.E.2d 8 (1989); State v. Heidmous, 75 N.C. App. 488, 331 S.E.2d 200 (1985)), OH (State v. Higgs, 1992 Ohio App. LEXIS 5212 (10/7/92); State v. Rice, 1991 Ohio App. LEXIS 2731 (6/6/91), *dismissed*, 62 Ohio St.3d 1453, 579 N.E.2d 1392 (1991); Scheibert v. Hatton, 1991 Ohio App. LEXIS 4016 (8/21/91); State v. Lampkin, 1990 Ohio App. LEXIS 4315 (10/3/90), *cause dismissed*, 60 Ohio St.3d 706, 573 N.E.2d 674 (1991)), OK (McDonald v. State, 674 P.2d 1154 (Okl. Crim. App. 1984)), OR (State v. Bockorny, 124 Or. App. 585, 863 P.2d 1296 (1993), *review denied*, 318 Or. 351, 870 P.2d 220 (1994)), PA (Commonwealth v. Dillon, 528 Pa. 417, 598 A.2d 963 (1991)), RI (McMaugh, *supra* preface endnote 1), TX (Hayward v. State, 1993 Tex. App. LEXIS 945 (4/1/93); Pierini v. State, 804 S.W.2d 258 (Tex. Crim. App. 1991)), VT (Blair v. Blair, 154 Vt. 201, 575 A.2d 191 (1990)), WA (State v. Hutcheson, 62 Wash. App. 282, 813 P.2d 1283 (1991), *recon. denied* (9/30/91), *review denied*, 118 Wash. 2d 1020, 827 P.2d 1012 (1992); State v. Walker, 40 Wash. App. 658, 700 P.2d 1168 (1985), *recon. denied* (6/21/85), *review denied*, 104 Wash. 2d 1012 (1985); State v. Bowerman, 115 Wash. 2d 794, 802 P.2d 116 (1990); *recon. denied* (2/21/91), WI (State v. Felton, 110 Wis. 2d 485, 329 N.W.2d 161 (Wis. 1983)).

28. DE (State v. McBride, Criminal Action Nos. IK-80-05-0058, IK-80-05-0059, IK-80-05-0027, Super. Ct. Kent Co. (DE 1982), testimony of Susan Steinmetz). Note that for 21 other states already coded with a more inclusive admissibility code, the database includes information on 33 additional cases in which expert testimony on battering and its effects was actually admitted at the trial level — AK (State v. Pabst, Case No. 3LN-87-764CR, Super. Ct., 3rd Jud. Dist. at Kenai (AK 1988), testimony of Frances Purdy; State v. Charliaga, Kodiak Super. Ct. (AK 10/91), information in NCDBW files), FL (State v. Soubielle, Case No. 87-508-CFA, Cir. Ct., Crim. Div., 18th Jud. Ct., Seminole Co. (FL 1988), testimony of Lois Veronen), GA (State v. Chapman, trial transcript from unidentified case no. (GA 1987), *voir dire* and testimony of Cheryl Christian), HI (State v. Miller, discussed by Lenore E. Walker in *Terrifying Love* (1989) pp. 77-91), IN (State v. Davidson, Lower Case No. SCR 86-70, Marshall Super. Ct. No. 1 (IN 1991), testimony of Gail Beaton), IA (State v. Jones, Crim. No. D7X107208, 1st Jud. Dist., Black Hawk Co. (IA 1989), testimony of Angela Stukenberg), KS (State v. Dunn, No. 85-CR-59T, Dist. Ct., Shawnee Co., 5th Dist. (KS 1992), testimony of Marilyn Hutchinson), KY (Commonwealth v. Jones, Indictment No. 92-CR-00006, Rockcastle Circ. Ct. (KY 11/10/93), unpub. order dismissing indictment), ME (State v. Murchison, Docket No. 84-252, AD-84-23, Super Ct. Crim. Action (ME 1984), testimony of Lawrence Salveson), MD (State v. Evelyn Smith, Crim. Trial 91-2547X, Cir. Ct., Prince George's Co. (MD 1992), testimony of Neil Howard Blumberg; Kaliher v. Kaliher, Civil No. 24796, Cir. Ct., Montgomery Co. (MD 1990), testimony of Ellen McDaniel), MA

(Commonwealth v. Scott, Case No. 072980, Super. Ct. (MA 1989), testimony and *voir dire* of Charles Ewing), MI (People v. Matthews, No. 88-7676, Recorder's Ct., Detroit (MI 9/88); People v. Jeanette Smith, trial transcript from unidentified case no. (MI 1979), testimony of Camela S. Serum), MN (State v. Tisland, unidentified case no. (MN 1984), outline of the testimony of Lynn Powers; State v. Vizenor, File No. 74437-1, 4th Jud. Dist., Hennepin Co. (MN 1980), testimony of Phillip Oxman), NH (State v. Masters, No. 85-S-220, Super. Ct., Concord (NH 1987), *voir dire* and testimony of Sheila Stanley), NY (People v. Sarah Smith, Indictment No. 04824-89, Sup. Ct., Bronx Co. (NY 1991), testimony of Lois Veronen; People v. Brundidge, unidentified case no., Sup. Ct., Monroe Co. (NY 1988), testimony of Charles Ewing; People v. Pizarro, Indictment No. 6068-86, Sup. Ct. (NY 1988), testimony of Julie Blackman; People v. Brown, Indictment No. 3175/79, Sup. Ct., Kings Co. (NY 1981), testimony of Julie Blackman), OH (State v. Flowers, Case No. 89 CR 463, App. No. 90 T 4452, Ct. of Common Pleas, Trumbull Co. (OH 6/1/90), testimony of Stan Palumbo), PA (Commonwealth v. Forsythe, unidentified case no., Ct. of Common Pleas, Westmoreland Co. (PA 11/18/86), testimony of Herbert Levit; Heck v. Heck, No. 168, February 1986, Ct. Common Pleas, Berks Co. (PA 11/23/87), testimony of Julie Blackman; Commonwealth v. Beadriz Singh, Nos. 77-78, June Term 1986, Ct. Common Pleas, Philadelphia Co. (PA 12/9/87), *voir dire* and testimony of Julie Blackman; Commonwealth v. Gatewood, No. 85-12-1086-1088, Ct. of Common Pleas, Philadelphia Co. (PA 12/16/86), testimony of Julie Blackman), TX (State v. King, Trial Ct. Cause No. 461,560, 351st Dist. Ct., Harris Co. (TX 1987), testimony of Toby Meyers; In the Interest of...., unidentified case no., 321st Jud. Dist. Ct. Sitting as a Juv. Ct., Smith Co., Tyler (TX 2/11/92), testimony of Robert Geffner), VA (Commonwealth v. Plantz, No. CR90-1176, Cir. Ct. Virginia Beach (VA 1990), testimony of Alice Twining; Commonwealth v. Credle, Cir. Ct., Newport News (VA 1990), testimony of Alice Twining), WA (State v. Alaniz, Skagit Co. Super. Ct. 88-1-00047-5 (WA 1988), based on case summary by Robert Jones, defense counsel), WV (State v. McClanahan, unidentified case no., Cir. Ct., Pendleton Co. (WV 11/1/93)). It will be recalled that the foregoing listing of unreported trial decisions is not exhaustive; rather, it represents all of the unreported cases that are on file with NCDBW.

29. OH (Pargeon, *supra* note 6), WY (Braley v. State, 741 P.2d 1061 (Wyo. 1987)).

30. AL (Neelley v. State, 624 So.2d 494 (Ala. Crim. App. 1993)), AR (State v. Green, unidentified case no. Garland Co. Cir. Ct. (8/94) (information in NCDBW files), GA (Clenney v. State, 256 Ga. 116, 344 S.E.2d 216 (1986); Pruitt v. State, 164 Ga. App. 247, 296 S.E.2d 795 (1982); Mullis v. State, 248 Ga. 338, 282 S.E.2d 334 (1981)), IL (Jackson, *supra* note 9; People v. White, 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980)), KS (Dunn (88), *supra* note 5), KY (Foster v. Commonwealth, 827 S.W.2d 670 (Ky. 1992), *cert. denied*, 113 S.Ct. 337 (1992); Brandenburg v. Commonwealth, No. 86-CA-1834-MR, Ky. Ct. App. (8/5/88) (unpub. op.)), LA (State v. Clayton, 570 So.2d 519 (La. App. 5 Cir. 1990); State v. Necaise, 466 So.2d 660 (La. App. 5th Cir. 1985); State v. Edwards, 420 So.2d 663 (La. 1982)), MD (Boyd v. State, 321 Md. 69, 581 A.2d 1 (1990)), MI (People v. Moseler, 202 Mich. App. 296, 508 N.W.2d 192 (1993), *appeal denied*, 519 N.W.2d 899 (Mich. 1994)), MO (State v. Anderson, 785 S.W.2d 596 (Mo. App. 1990), *denial of habeas corpus aff'd by* Anderson v. Goeke, 44 F.3d 675 (8th Cir. 1995), *reh'g denied* (2/15/95); State v.

Clay, 779 S.W.2d 673 (Mo. App. 1989); State v. Martin, 666 S.W.2d 895 (Mo. App. 1984)), MT (State v. Dannels, 226 Mont. 80, 734 P.2d 188 (1987)), NJ (State v. McClain, *supra* note 6), NY (People v. Powell, 83 A.D.2d 719, 442 N.Y.S.2d 645 (1981)), OH (Engle, *supra* note 6; Lundgren, *supra* note 6; Dowd, *supra* note 6; Coulter, *supra* note 6; C. Redding, *supra* note 6; M. Redding, *supra* note 6; Poling, *supra* note 6;), TN (State v. Pendergrast, 1992 Tenn. Crim. App. LEXIS 766 (10/8/92)), WA (Riker, *supra* note 6), WI (State v. Balke, 173 Wis. 2d 306, 498 N.W.2d 913 (Wis. Ct. App. 1992), *review denied*, 501 N.W.2d 458 (Wis. 1993)).

31. WY (Jahnke v. State, 682 P.2d 991 (Wyo. 1984); Buhrle v. State, 627 P.2d 1374 (Wyo. 1981)).

32. Expert testimony was conditionally excluded in the *Buhrle* decision in 1981, when the scientific acceptance of the "battered woman syndrome" was far less widespread than in later years, and the issue has not been squarely raised since. However, subsequent decisions may be read to indicate such testimony could be admitted in a self-defense case, where the defendant has established she is a battered woman, and that acceptance of "battered woman syndrome" in the scientific community can now be demonstrated to the court's satisfaction. But *see* Section III.A.3 *infra* for more information on Wyoming's 1993 statute permitting introduction of expert testimony on battering and its effects.

33. Indeed, the Ohio statute on its face (OHIO REV. CODE ANN. §2945.392 (Anderson 1990)) also provides that expert testimony on battered woman syndrome and that the defendant "suffered from that syndrome" may be introduced "to establish the requisite impairment of the defendant's reason, at the time of the commission of the offense" where the defendant has entered a plea of not guilty by reason of insanity.

34. CAL. EVID. CODE §1107 (West 1993) (*see* Section 2 of Stats.1991, c. 812 (A.B.785)), MASS. GEN. LAWS ANN. ch.233, §23E (West 1994), S.C. CODE ANN. §17-23-170(A) (Law. Co-op. 1995).

35. CAL. EVID. CODE §1107, LA. CODE EVID. ANN. art. 404(A)(2) (West 1989), MASS. GEN. LAWS ANN. ch. 233, §23E, MO. ANN. STAT. (Crimes & Punishment) §563.033 (Vernon 1991), NEV. REV. STAT. §48.061 (1993), OKLA. STAT. ANN. tit. 22, §40.7 (West 1992), S.C. CODE ANN. §17-23-170(A), TEX. PENAL CODE §19.06 (West 1992).

36. GA. CODE ANN. §16-3-21(d) (Michie 1994), MD. CTS. & JUD. PROC. CODE ANN. §10-916 (1991), OHIO REV. CODE ANN. §2901.06(B) (Anderson 1990), WYO. STAT. (Crimes and Offenses) §6-1-203 (1993).

37. CAL. EVID. CODE §1107 (this statute also refers to the admissibility of expert testimony regarding the "physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence"), OHIO REV. CODE ANN. §2901.06, WYO. STAT. §6-1-203.

38. MD. CTS. & JUD. PROC. CODE ANN. §10-916, MO. ANN. STAT. (Crimes and

Punishment) §563.033, S.C. CODE ANN. §17-23-170.

39. A Missouri intermediate appeals court held that application of the statute is not dependent on the parties' marital status, notwithstanding its use of the term "battered spouse syndrome." See Williams, *supra* note 20.

40. LA. CODE EVID. ANN. art. 404(A)(2), OKLA. STAT. ANN. tit. 22, §40.7, NEV. REV. STAT. §48.061.

41. GA. CODE ANN. §16-3-21(d), TEX. PENAL CODE §19.06(b)(1).

42. MASS. GEN. LAWS ANN. ch. 233, §23E.

43. 9th Cir. (U.S. v. Archer, 1993 App. LEXIS 24875 (9th Cir. 9/23/93); U.S. v. Homick, 964 F.2d 899 (9th Cir.1992)), 7th Cir. (U.S. v. Mark Thomas, 11 F.3d 1392 (7th Cir. 1993)), 6th Cir. (Kathy Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), *cert. granted*, 470 U.S. 1027 (1985) and *aff'd*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986)), S.D.N.Y. (U.S. v. Taylor, 820 F. Supp. 124 (S.D.N.Y. 1993)), S.D.Ohio (Tourlakis v. Morris, 738 F. Supp. 1128 (S.D.Ohio 1990)).

44. 7th Cir. (Thomas, *supra* note 37).

45. 9th Cir. (Archer, *supra* note 37; Homick, *supra* note 37), 6th Cir. (Thomas v. Arn, *supra* note 37), S.D.Ohio (Tourlakis, *supra* note 37), S.D.N.Y. (Taylor, *supra* note 37).

46. *Compare* 9th Cir. (Archer, *supra* note 37; Homick, *supra* note 37) *with* 9th Cir. (U.S. v. Carolyn Johnson, 956 F.2d 894 (9th Cir. 1992), *opinion supplemented on denial of reh'g by* U.S. v. Emilio, 969 F.2d 849 (9th Cir. 1992) *and on remand to* U.S. v. Longoria, 1992 WL 252122 (D.Or. 9/25/92), *aff'd by* U.S. v. Baracco, 15 F.3d 1090 (9th Cir. 1993); U.S. v. Winters, 729 F.2d 602 (9th Cir. 1984); U.S. v. Sebresos, 1992 U.S. App. LEXIS 17757 (9th Cir. 7/22/92) (unpub. disposition); U.S. v. Gable, 1994 U.S. App. LEXIS 22969 (9th Cir. 6/15/94) (unpub. disposition), *cert. denied*, 115 S.Ct. 376 (1994) and Funderburk v. U.S., 115 S.Ct. 376 (1994); U.S. v. Russell, 1993 U.S. App. LEXIS 6952 (9th Cir. 3/24/93) (unpub. disposition); U.S. v. July, 1992 U.S. App. LEXIS 6394 (9th Cir. 3/25/92) (unpub. disposition) *and compare* 6th Cir. (Thomas v. Arn, *supra* note 37, *with* Ware, *supra* text, page 2); Meeks v. Bergen, 749 F.2d 322 (6th Cir. 1984)).

47. 10th Cir. (Dunn v. Roberts, 963 F. 2d 308 (10th Cir. 1992)), 9th Cir. (Johnson, *supra* note 40; Winters, *supra* note 40), 8th Cir. (Arcoren, 929 F.2d 1235 (8th Cir. 1991), *cert. denied*, 502 U.S. 913 (1991)).

48. D.Kan. (Dunn v. Roberts, 768 F. Supp. 1442 (D.Kan. 1991), *aff'd*, 963 F.2d 308 (10th Cir. 1992)), S.D.Fla. (U.S. v. Ellis, Memorandum Order, No. 87-5970-CR-Aronovitz (U.S. Dist. Ct., S.D.Fla., 2/15/88)).

49. 6th Cir. (Ware, *supra* text, page 2). *See also* 8th Cir. (U.S. v. Whitetail, 956 F.2d 857 (8th Cir. 1992)).

50. N.D.Ill. (U.S. v. Bell, 1994 U.S. Dist. LEXIS 8520 (N.D.Ill. 4/28/94)). *See also* 9th Cir. (Sebresos, *supra* note 40).

51. E.D.Pa. (Fennell v. Goolsby, 630 F. Supp. 451 (E.D.Pa. 1985)). *See also* N.D.Ill. (U.S. v. Gregory, 1988 U.S. Dist. LEXIS 10060 (N.D.Ill. 9/2/88)).

52. 11th Cir. (U.S. v. Sixty Acres in Etowah County, 930 F.2d 857 (11th Cir. 1991), *reh'g denied*, 952 F.2d 413 (11th Cir. 1991), *reh'g denied*, 952 F.2d 413 (11th Cir. 1991)), 5th Cir. (U.S. v. Karen Gordon, 812 F.2d 965 (5th Cir. 1987), *cert. denied*, Woodcock v. U.S., 482 U.S. 908 (1987) and Gordon v. U.S., 483 U.S. 1009 (1987)), 3rd Cir. (U.S. v. Santos, 932 F.2d 244 (3rd Cir. 1991), *cert. denied*, 502 U.S. 985 (1991)), E.D.N.Y. (U.S. v. Gaviria, 804 F. Supp. 476 (E.D.N.Y. 1992)), N.D.Ala. (U.S. v. Sixty Acres, 736 F. Supp. 1579 (N.D.Ala. 1990), *rev'd*, 930 F.2d 857 (11th Cir. 1991) *reh'g denied*, 952 F.2d 413 (11th Cir. 1991)), W.D.La. (U.S. v. Karen Gordon, 638 F. Supp. 1120 (W.D.La. 1986), *aff'd*, 812 F.2d 956 (5th Cir. 1987), *cert. denied*, Woodcock v. U.S., 482 U.S. 908 (1987) and Gordon v. U.S., 483 U.S. 1009 (1987)), U.S. Tax. Ct. (Toner v. Commissioner of Internal Revenue, 1990 WL 154691 (U.S. Tax Ct. 10/17/90), *aff'd sub. nom.*, Doe v. Commissioner of Internal Revenue, No. 91-1678 (3rd Cir. 2/14/92), unpub. Judgment Order). *See also* 10th Cir. (Lumpkin v. Ray, 977 F.2d 508 (10th Cir. 1992)), 9th Cir. (Gable, *supra* note 40; Russell, *supra* note 40; July, *supra* note 40; Sebresos, *supra* note 40), 6th Cir. (Meeks, *supra* note 40).

53. OH (Redding, C. *supra* note 6; Redding, M., *supra* note 6), TN (Furlough, *supra* note 21), VT (Verrinder, *supra* note 19), WY (Braley, *supra* note 23).

54. AK (Charliaga, *supra* note 22), AZ (Denny, *supra* note 21), AR (Thompson, *supra* note 20), CA (Day, *supra* note 8), CO (Hare, *supra* note 21), DC (Ibn-Tamas (1979), *supra* note 20; Ibn-Tamas (1983), *supra* note 20), FL (Rogers, *supra* note 8; Hickson, *supra* note 4; Hawthorne, *supra* note 20; Terry, *supra* note 3; Soubielle, *supra* note 22), GA (Pugh, *supra* note 5; Motes, *supra* note 8; Smith, *supra* note 3; Ledford, *supra* note 18; Strong, *supra* note 21; Norris, *supra* note 21), HI (Miller, *supra* note 22), ID (Griffiths, *supra* note 19), IL (Fleming, *supra* note 8; Minnis, *supra* note 3), IN (Fultz, *supra* note 20; Davidson, *supra* note 22), IA (Jones, *supra* note 22; Nunn, *supra* note 21), KS (Cramer, *supra* note 8; Hodges, *supra* note 3; Hundley, *supra* note 4; Meyer, *supra* note 19), KY (Craig, *supra* note 19; Rose, *supra* note 19; Ford, *supra* note 21; Jones, *supra* note 22), LA (Moore, *supra* note 21; Burton, *supra* note 20), ME (Anaya (1981), *supra* note 3; Anaya (1983), *supra* note 21; Murchison, *supra* note 22), MD (Banks, *supra* note 21; Smith, *supra* note 22), MA (Rodriguez, *supra* note 3; Scott, *supra* note 22; Moore, *supra* note 20), MI (Matthews, *supra* note 22; Smith, *supra* note 22), MN (Tisland, *supra* note 22; Vizenor, *supra* note 22; Borchardt, *supra* note 12), MS (Lentz, *supra* note 20), MO (Landrum, *supra* note 18 (There is some question whether this code applies to this case.)), MT (Hess, *supra* note 3), NE (Jackson, *supra* note 21), NH (Masters, *supra* note 22 (There is some question whether this code applies to this case.)), NJ (Myers, *supra* note 8; Kelly, *supra* note 3), NM (Swavola, *supra* note 21; Vigil, *supra* note 18; Branchal, *supra* note 8), NY (Barrett, *supra* note 21; Rollock, *supra* note 21; Anderson, *supra* note 21; Fratt, *supra* note 21; Ciervo, *supra* note 3; Torres, *supra* note 11; Smith, *supra* note 22; Brundidge, *supra* note 22; Pizarro, *supra* note 22), NC (Torres, *supra* note

21; Heidmous, *supra* note 21 (There is some question whether this code applies to this case.)), OH (Daws, *supra* text, page 2; Flowers, *supra* note 22; Higgs, *supra* note 21; Rice, *supra* note 21; Koss, *supra* note 3 (There is some question whether this code applies to this case.); Spinks, *supra* note 8; Seymour, *supra* note 18), OK (Bechtel, *supra* note 3), OR (Moore, *supra* note 20), PA (Forsythe, *supra* note 22; Miller, *supra* note 8; Kacsmar, *supra* note 8; Dillon, *supra* note 21; Stonehouse, *supra* note 4; Tyson, *supra* note 18), RI (Ordway, *supra* note 18), SC (Wilkins, *supra* note 8; Hill, *supra* note 3), SD (Burtzlaff, *supra* note 19), TN (Zimmerman, *supra* note 21; Furlough, *supra* note 21; Devita, *supra* note 21), TX (Hayward, *supra* note 21; Pierini, *supra* note 21; Fielder, *supra* note 3; King, *supra* note 22; In The Interest Of, *supra* note 22), UT (Hazel, *see supra* text, page 7), VT (Verrinder, *supra* note 19), VA (Wilmoth, *supra* note 21; Plantz, *supra* note 22; Credle, *supra* note 22), WA (Hanson, *supra* note 7; Walker, *supra* note 21; Kelly, *supra* note 4; Allery, *supra* note 3; Janes, *supra* note 4), WV (Steele, *supra* note 21; Duell, *supra* note 21; McClanahan, *supra* note 22), WY (Griffin, *supra* note 21 (There is some question whether this code applies to this case.)).

55. Also note the appellate court's observation in Aris, *supra* note 3, that "[i]t is not uncommon for a battered woman to kill the batterer while he sleeps."

56. Although not within the scope of this analysis, it would also be useful to investigate and determine whether the outcomes of trials in nontraditional self-defense cases (whether or not expert testimony was used or was an issue) differ significantly from those in traditional self-defense situations.

57. AL (Hill, *supra* note 20), CA (Aris, *supra* note 3), GA (Chapman (1988), *supra* note 4), KS (Stewart, *supra* note 4), MI (Wilson, *supra* note 19), MN (Hennum, *supra* note 3), NV (Larson, *supra* note 21), NH (Briand, *supra* note 20), NY (Emick, *supra* note 3), NC (Norman, *supra* note 21), ND (Leidholm, *supra* note 21), OH (Manning, *supra* note 18), SC (Robinson, *supra* note 4), TN (Aucoin, *supra* note 21), WI (Landis, *supra* note 19; Felton, *supra* note 21).

58. LA (Necaise, *supra* note 24), NY (Powell, *supra* note 24), OH (Poling, *supra* note 6).

59. AL (Haney, *supra* note 18), CO (Yaklich, *supra* note 21), DE (McBride, *supra* note 22), FL (Stiles, *supra* note 11), MA (Grimshaw (1992), *supra* note 20), NC (Clark, *supra* note 18), OH (Lampkin, *supra* note 21), TN (Leaphart, *supra* note 21), TX (Ortiz, *supra* note 9), WA (Hutcheson, *supra* note 21; Bowerman, *supra* note 21; Alaniz, *supra* note 22).

60. IL (Jackson, *supra* note 9), MD (Boyd, *supra* note 24), MO (Anderson, *supra* note 24; Martin, *supra* note 24), MT (Dannels, *supra* note 24).

61. AK (Brandon, *supra* note 18), CT (Freeney, *supra* note 5; Borrelli, *supra* note 3; Battista, *supra* note 19), FL (Rhone, *supra* note 19), GA (Thompson, *supra* note 19), HI (Cababag, *supra* note 3), IL (Server, *supra* note 8), IN (Dausch, *supra* note 21), MN (Merrill, *supra* note 18), NE (Doremus, *supra* note 18), NH (Baker, *supra* note 19), NJ (J.Q., *supra* note 18; Frost, *supra* note 8), NY (Nicole V., *supra* note 3;

Taylor, *supra* note 18), WA (Ciskie, *supra* note 7), WI (Bednarz, *supra* note 3; Slade, *supra* note 3), WY (Frenzel, *supra* note 21).

62. AK (Brandon, *supra* note 18 — although expert testimony was not actually presented by the prosecution), CT (Borrelli, *supra* note 3), IN (Dausch, *supra* note 21), HI (Cababag, *supra* note 3), WI (Bednarz, *supra* note 3).

63. CT (Battista, *supra* note 19 (to explain delayed reporting by battered woman)); Freeney, *supra* note 5 (to explain why woman gave disjointed version of events and did not attempt to escape)), FL (Rhone, *supra* note 19 (to show battered woman's lack of consent to sex, and why she did not escape or complain to relatives)), GA (Thompson, *supra* note 19 (to show sexual assault victim's behavior consistent with "battered woman syndrome")), WA (Ciskie, *supra* note 7 (to explain battered woman's failure to report rape or end relationship)), WI (Slade, *supra* note 3 (to explain characteristics of batterers, why battered women do not leave)).

64. IL (Server, *supra* note 8 (testimony on rape trauma syndrome admitted to show behavior consistent with that of child victims of sexual assault)), NE (Doremus, *supra* note 18 (to show mildly retarded man's lack of consent to sex)), NJ (J.Q., *supra* note 18 (to explain delayed reporting and that symptoms consistent with child sexual abuse accommodation syndrome)), NY (Taylor, *supra* note 18 (to explain reluctance of rape victim to identify defendant)), WY (Frenzel, *supra* note 21 (to explain delayed reporting in child sexual abuse case)).

65. AK (Haakanson, *supra* note 19 (profile testimony inadmissible)), GA (Pruitt, *supra* note 24 (although error was harmless, expert testimony on battered woman syndrome should not have been admitted since case did not involve woman defendant asserting self-defense and there was no evidence woman was battered)), KS (Clements, *supra* note 4 (profile testimony inadmissible)), KY (Brandenburg, *supra* note 24 (battered woman's state of mind irrelevant to whether defendant assaulted her); Dyer, *supra* note 20 (profile evidence inadmissible unless qualified expert can express opinion as to defendant's mental condition)), NJ (Walker, *supra* note 21 (expert testimony not admissible to explain excited utterances of hospitalized battered woman before she died from injuries inflicted)), OH (Dowd, *supra* note 6 (follows Pargeon and holds expert testimony on "battered woman syndrome" inadmissible because probative value outweighed by prejudice to defendant, it amounts to impermissible evidence of defendant's prior bad acts and it is accepted in Ohio only in support of battered woman's self-defense claim); Pargeon, *supra* note 6; see also Roquemore, *supra* note 18 (profile testimony inadmissible against defendant charged with rape-murder)), OR (Milbradt, *supra* note 20 (expert testimony that directly gives opinion that sexual assault complainant is credible is not permissible)).

66. MN (Merrill, *supra* note 18), NH (Baker, *supra* note 19 — expert testimony used to rebut male defendant's claim of insanity). In a third case, NY (Nicole V., *supra* note 3), expert testimony was admitted to corroborate the out-of-court statements of a non-testifying child victim of sexual assault whose complaints only needed to be verified by other evidence. In addition, NCDBW has been informed but has not yet fully verified reports that prosecutors in a few states have used expert testimony on battering and its effects to explain why a battered woman/complainant refused to

testify at trial. According to Sue McGee, director of the Domestic Violence Project/SAFE House in Ann Arbor, MI, such expert testimony by battered women's advocates, social workers with an M.S.W., or psychologists in lieu of testimony by the battered woman herself has been used by prosecutors in their local courts in approximately 8 to 12 cases in the past two years, and its use is increasing (conversation with NCDBW resource coordinator, Holly White on November 22, 1994). In addition, the San Diego City Attorney's Office occasionally offers expert testimony in unusual circumstances (perhaps six times in one year), such as where a battered woman complainant recants her testimony on the stand or surprises the prosecution by refusing to testify on the eve of trial, *and* where there is not sufficient other evidence (e.g., medical evidence, record of telephone call to 911) to enable the prosecution to still go forward with their case (conversation with Jean Emmons, assistant to Casey Guinn, Esquire on November 22, 1994).

67. AL (Neelley, *supra* note 24), KY (Foster, *supra* note 24), MI (Moseler, *supra* note 24), OH (Engle, *supra* note 6; Lundgren, *supra* note 6), OK (McDonald, *supra* note 21), OR (Bockorny, *supra* note 21).

68. CA (Romero, *supra* note 8), KS (Crawford, *supra* note 4; Dunn (1992), *supra* note 22), MN (Mick, *supra* note 11; Krage, *supra* note 19), NJ (McGuigen, *supra* note 8), OK (McDonald, *supra* note 21), OR (Bockorny, *supra* note 21), VA (Pancoast, *supra* note 21), WV (Lambert, *supra* note 21).

69. AL (Neelley, *supra* note 24), KY (Foster, *supra* note 24), MI (Moseler, *supra* note 24), OH (Engle, *supra* note 6; Lundgren, *supra* note 6), WA (Riker, *supra* note 7). Note that KS (Dunn (1988), *supra* note 5) also excluded expert testimony in a duress case, but since this decision was overruled by the federal district court, it was not counted here.

70. FL (Jackson, *supra* note 21), IL (Smith, *supra* note 21; Novy, *supra* note 21; Gindorf, *supra* note 21), IN (Allen, *supra* note 21), MA (Lazarovich, *supra* note 20), MN (Loch, *supra* note 21), MO (Williams, *supra* note 20), MT (Redcrow, *supra* note 21), RI (McMaugh, *supra* preface endnote 1).

71. MO (Clay, *supra* note 24), OH (Coulter, *supra* note 6).

72. The attorney was quoted in an Associated Press story and in the August 15, 1994 edition of *New Jersey Lawyer* (3 NJL 1573) (on file with NCDBW). In the Cusseaux case (*supra* note 11), the court held, in a case of first impression, that "the `battered-woman's (sic) syndrome' is now a cognizable cause of action under the laws of New Jersey." However, as discussed *infra*, in doing the research for this analysis, we found at least a dozen other cases from other states where expert testimony on battering and its effects was used in civil actions.

73. CO (Morrison, *supra* note 21), CT (Knock, *supra* note 3), ID (Curtis (1993), *supra* note 21; Curtis (1994), *supra* note 21), LA (Laughlin, *supra* note 18), MD (Kaliher, *supra* note 22), MO (Hunziger, *supra* note 21), MT (Houtchens, *supra* note 21), OH (Scheibert, *supra* note 21), PA (Heck, *supra* note 22), SC (Doe, *supra* note 8), VT (Blair, *supra* note 21). Given the August 1994 ruling by a New Jersey court

(Cusseaux, *supra* note 11) that "battered woman syndrome" states a civil cause of action, presumably expert testimony will also be used in civil actions in that state as well.

74. NE (C.P., *supra* note 21), NY (Glenn G., *supra* note 21), WV (Betty J.W., *supra* note 21).

75. CT (Knock, *supra* note 3) (coded "AH"), LA (Laughlin, *supra* note 18) (coded "AR"), NJ (Cusseaux, *supra* note 11) (coded "AH") and SC (Doe, *supra* note 8) (coded "AH").

76. CO (Morrison, *supra* note 21), ID (Curtis (1993), *supra* note 21; Curtis (1994), *supra* note 21), MO (Hunziger, *supra* note 21), MT (Houtchens, *supra* note 21), OH (Scheibert, *supra* note 21), VT (Blair, *supra* note 21), NE (C.P., *supra* note 21), NY (Glenn G., *supra* note 21), WV (Betty J.W., *supra* note 21). The remaining two cases — MD (Kaliher, *supra* note 22) and PA (Heck, *supra* note 22) — were actually coded "O" (i.e., these were trial court cases for which trial transcripts of expert testimony were reviewed).

77. GA. CODE ANN. §16-3-21(d), NEV. REV. STAT. §48.061(2), TEX. PENAL CODE §19.06.

78. CAL. EVID. CODE §1107(a), NEV. REV. STAT. §48.061.

79. MASS. GEN. LAWS ANN. ch. 233, §23E, S.C. CODE ANN. §17-23-170(A).

80. The Nevada statute provides for the admissibility of expert testimony concerning the effect of domestic violence to show the defendant's state of mind when determining whether a person is excepted from criminal liability (NEV. REV. STAT. §48.061(1)).

81. CAL. EVID. CODE §1107 (*see* Section 2 of Stats. 1991, c. 812 (A.B. 785)), MASS. GEN. LAWS ANN. ch. 233, §23E, OKLA. STAT. ANN. tit. 22 §40.7.

82. 11th Cir. (Sixty Acres (1991), *supra* note 46), 10th Cir. (Dunn (1992), *supra* note 41), 9th Cir. (Gable, *supra* note 40; Russell, *supra* note 40; Johnson, *supra* note 40; Sebresos, *supra* note 40), 6th (Ware, *supra* text, page 2), 3rd Cir. (Santos, *supra* note 46), N.D.Ill. (Bell, *supra* note 44; Gregory, *supra* note 45), E.D.N.Y. (Gaviria, *supra* note 46), N.D.Ala. (Sixty Acres (1990), *supra* note 46), S.D.Fla. (Ellis, *supra* note 42), D.Kan. (Dunn (1991), *supra* note 42), U.S. Tax Ct. (Toner, *supra* note 46).

83. 9th Cir. (Archer, *supra* note 37; Homick, *supra* note 37) (but note that in both 9th Circuit cases, testimony was excluded on procedural grounds, i.e., failure to give advance notice of the testimony), 7th Cir. (U.S. v. Mark Thomas, *supra* note 37).

84. S.D.N.Y. (Taylor, *supra* note 37).

85. 10th Cir. (Lumpkin, *supra* note 46), 9th Cir. (July, *supra* note 40), 8th Cir. (Whitetail, *supra* note 43), 6th Cir. (Meeks, *supra* note 40), E.D.Pa. (Fennell, *supra*

note 45), D.Hawaii (U.S. v. Wilson, Crim. No. 91-01502ACK, U.S. Dist. Ct. (D. Hawaii 1991), testimony of Marilyn Hutchinson).

86. 6th Cir. (Thomas v. Arn, *supra* note 37), S.D.Ohio (Tourlakis, *supra* note 37).

87. 5th Cir. (Gordon (1987), *supra* note 46), W.D.La. (Gordon (1986), *supra* note 46).

88. 9th Cir. (Winters, *supra* note 40), 8th Cir. (Arcoren, *supra* note 41).

89. AL, AZ, AR, CA, CO, DE, ID, IA, MI, MT, NE, NV, NH, NC, ND, SD, TN, VT, VA, WV.

90. FL (Terry, *supra* note 3), GA (Pruitt, *supra* note 24), IL (Jackson, *supra* note 9), KS (Dunn (1988), *supra* note 5; Stewart, *supra* note 4; Meyer, *supra* note 19), LA (Burton, *supra* note 20), MD (Boyd, *supra* note 24), MA (Rodriguez, *supra* note 3), MS (Lentz, *supra* note 20), MO (Williams, *supra* note 20; Clay, *supra* note 24), NM (Branchal, *supra* note 8), OH (Lundgren, *supra* note 6; Dowd, *supra* note 6; C. Redding, *supra* note 6; M. Redding, *supra* note 6; Pargeon, *supra* note 6; Poling, *supra* note 6; Koss, *supra* note 3), OK (Bechtel, *supra* note 3), SC (Hill, *supra* note 3), TX (Fielder, *supra* note 3; Ortiz, *supra* note 9 (There is some question whether this code applies to this case.)), UT (Hazel, *supra* text, page 7 (There is some question whether this code applies to this case.)), WA (Hanson, *supra* note 7; Walker, *supra* note 21), WI (Balke, *supra* note 24), WY (Jahnke, *supra* note 25).

91. IN (Fultz, *supra* note 20), OH (Lundgren, *supra* note 6 (There is some question whether this code applies to this case.)); note that LA (Burton, *supra* note 20) formerly had this requirement under case law, but no longer does under the terms of its admissibility statute.

92. MO (Anderson, *supra* note 24; Martin, *supra* note 24).

93. AK (Haakanson, *supra* note 19), DC (Ibn-Tamas (1979), *supra* note 20; Ibn-Tamas (1983), *supra* note 20), FL (Hawthorne, *supra* note 20; Terry, *supra* note 3), GA (Chapman (1987), *supra* note 22), KS (Hodges, *supra* note 3; Meyer, *supra* note 19), KY (Dyer, *supra* note 20; Brandenburg, *supra* note 24; Rose, *supra* note 19), MA (Moore, *supra* note 20), MN (Borchardt, *supra* note 12), NJ (Kelly, *supra* note 3), NM (Gallegos, *supra* note 3), OH (Koss, *supra* note 3), OR (Milbradt, *supra* note 20; Moore, *supra* note 20), WA (Riker, *supra* note 7), WY (Frenzel, *supra* note 21; Buhrle, *supra* note 25; Jahnke, *supra* note 25).

94. CT (Borrelli, *supra* note 3), FL (Rogers, *supra* note 8; Hickson, *supra* note 4; Stiles, *supra* note 11), IL (Minnis, *supra* note 3), MN (Hennum, *supra* note 3), MO (Williams, *supra* note 20), NY (Torres, *supra* note 11), OH (Flowers, *supra* note 22), UT (Hazel, *supra* text, page 7), WA (Hanson, *supra* note 7).

95. CT (Borrelli, *supra* note 3), DC (Ibn-Tamas (1979), *supra* note 20), FL (Rogers, *supra* note 8; Stiles, *supra* note 11; Hawthorne, *supra* note 20; Terry, *supra* note 3), HI (Cababag, *supra* note 3), KY (Dyer, *supra* note 20; Craig, *supra* note 19; Rose, *supra* note 19), LA (Moore, *supra* note 21), ME (Anaya (1981), *supra* note 3), NJ

(Kelly, *supra* note 3; Cusseaux, *supra* note 11), NM (Gallegos, *supra* note 3), NY (Barrett, *supra* note 21), OH (Rice, *supra* note 21; Koss, *supra* note 3), OK (Bechtel, *supra* note 3), OR (Moore, *supra* note 20), RI (Ordway, *supra* note 18), SC (Hill, *supra* note 3), UT (Hazel, *supra* text, page 7), WA (Allery, *supra* note 3).

96. FL (Stiles, *supra* note 11; note that this was a "hire to kill" case), GA (Pruitt, *supra* note 24), ME (Anaya (1981), *supra* note 3), MA (Rodriguez, *supra* note 3), OH (Daws, *supra* text, page 2; Roquemore, *supra* note 18; Coulter, *supra* note 6; Rice, *supra* note 21; Pargeon, *supra* note 6; Poling, *supra* note 6; Koss, *supra* note 3; Seymour, *supra* note 18), OK (Bechtel, *supra* note 3), PA (Dillon, *supra* note 21; Stonehouse, *supra* note 4; Tyson, *supra* note 18), WA (Allery, *supra* note 3), WI (Balke, *supra* note 24 (There is some question whether this code applies to this case.)), WY (Griffin, *supra* note 21 (There is some question whether this code applies to this case.)).

97. TX (Fielder, *supra* note 3).

98. GA. CODE ANN. §16-3-21(d), LA. CODE EVID. ANN. art. 404 (A)(2), OHIO REV. CODE ANN. §2901.06(B), TEX. PENAL CODE §19.06(b)), WYO. STAT. (Crimes and Offenses) §6-1-203(b).

99. LA. CODE EVID. ANN. art. 404(A)(2), MD. CTS. & JUD. PROC. CODE ANN. §10-916(b), OKLA. STAT. ANN. tit. 22, §40.7.

100. CAL. EVID. CODE §1107(b), OHIO REV. CODE ANN. §2901.06(A)(1), S.C. CODE ANN. §17-23-170(B).

101. S.C. CODE ANN. §17-23-170(D).

102. S.C. CODE ANN. §17-23-170(C).

103. *See* MO. ANN. STAT. (Crimes and Punishment) §563.033, *and* Williams, *supra* note 20.

104. 10th Cir. (Lumpkin, *supra* note 46).

105. 9th Cir. (Johnson, *supra* note 40), 8th Cir. (Arcoren, *supra* note 41).

106. E.D.Pa. (Fennell, *supra* note 45), S.D.N.Y. (Taylor, *supra* note 37).

107. S.D.Ohio (Tourlakis, *supra* note 37), E.D.Pa. (Fennell, *supra* note 45).

108. S.D.N.Y. (Taylor, *supra* note 37).

109. 8th Cir. (Arcoren, *supra* note 41), E.D.Pa. (Fennell, *supra* note 45).

110. S.D.Ohio (Tourlakis, *supra* note 37), E.D.Pa. (Fennell, *supra* note 45).

111. 9th Cir. (Archer, *supra* note 37; Homick, *supra* note 37).

112. AL (Neelley, *supra* note 24), GA (Thompson, *supra* note 19), MI (Moseler, *supra* note 24), MN (Loch, *supra* note 21 (grounds not specified)), NM (Swavola, *supra* note 21; Vigil, *supra* note 18), NY (Rollock, *supra* note 21), OH (Engle, *supra* note 6; Coulter, *supra* note 6 (on grounds not related to expert testimony); Seymour, *supra* note 18), SC (Robinson, *supra* note 4), WI (Balke, *supra* note 24). Note that a WI court has also found counsel to be ineffective in another decision (Felton, *supra* note 21).

113. CA (Romero, *supra* note 8; Day, *supra* note 8), DE (State v. Scott, 1989 WL 90613 (Del. Super. 7/19/89) (on grounds not related to expert testimony), NV (Larson, *supra* note 21), PA (Miller, *supra* note 8; Stonehouse, *supra* note 4; Tyson, *supra* note 18), TN (Zimmerman, *supra* note 21), WI (Felton, *supra* note 21). Note that a WI court also found counsel *not* ineffective in a more recent decision (Balke, *supra* note 24).

114. GA (Ledford, *supra* note 18), KS (Dunn (1988), *supra* note 5), MS (Lentz, *supra* note 20), MT (Dannels, *supra* note 24), TN (Aucoin, *supra* note 21).

115. 9th Cir. (Archer, *supra* note 37) (note that the court did not reach the issue on the merits)), 6th Cir. (Ware, *supra* text, page 2; Meeks, *supra* note 40).

116. D.Kan. (Dunn (1991), *supra* note 42).

117. AK (Charliaga, *supra* note 22), AL (Haney, *supra* note 18), CA (Aris, *supra* note 3), CO (Yaklich, *supra* note 21), CT (Knock, *supra* note 3), DC (Ibn-Tamas (1979), *supra* note 20), DE (McBride, *supra* note 22), FL (Jackson, *supra* note 21; Rogers, *supra* note 8; Soubielle, *supra* note 22; Hickson, *supra* note 4 (only if prior notice to state and chance for adverse examination)), GA (Thompson, *supra* note 19; Pugh, *supra* note 5; Chapman (1988), *supra* note 4; Chapman (1987), *supra* note 22; Clenney, *supra* note 24; Norris, *supra* note 21; Smith, *supra* note 3), ID (Curtis (1993), *supra* note 21), IL (Smith, *supra* note 21; Novy, *supra* note 21; Jackson, *supra* note 9; Fleming, *supra* note 8; Gindorf, *supra* note 21), IN (Dausch, *supra* note 21; Davidson, *supra* note 22), KS (Cramer, *supra* note 8; Dunn (1992), *supra* note 22; Stewart, *supra* note 4; Hodges, *supra* note 3), KY (Jones, *supra* note 22; Dyer, *supra* note 20 (There is some question whether this code applies to this case.); Craig, *supra* note 19), LA (Laughlin, *supra* note 18; Burton, *supra* note 20; Necaise, *supra* note 24 (only if plead insanity)), ME (Murchison, *supra* note 22; Anaya (1983), *supra* note 21), MD (Smith, *supra* note 22; Kaliher, *supra* note 22; but see Boyd, *supra* note 24 (expert testimony proffered but not introduced because trial court said it did not generate self-defense issue)), MA (Rodriguez, *supra* note 3 (high court notes state statute allows such testimony); Lazarovich, *supra* note 20; Scott, *supra* note 22), MN (Mick, *supra* note 11; Krage, *supra* note 19 (such specific testimony allowed only if defendant waives 5th Amendment right not to be subjected to adverse examination)), MO (Hunziger, *supra* note 21; Williams, *supra* note 20; Landrum, *supra* note 18), MT (Houtchens, *supra* note 21; Hess, *supra* note 3; Dannels, *supra* note 24), NE (C.P., *supra* note 21 (note court sees "battered woman syndrome" as "malady")), NH (Briand, *supra* note 20; Masters, *supra* note 22), NM (Swavola, *supra* note 21), NY (Barrett, *supra* note 21; Glenn G., *supra* note 21; Anderson, *supra* note 21; Fratt, *supra* note 21; Brundidge, *supra* note 22; Pizarro, *supra* note 22; Ciervo, *supra* note

3; Torres, *supra* note 11; Emick, *supra* note 3; Brown, *supra* note 22), NC (Clark, *supra* note 18; Norman, *supra* note 21; Heidmous, *supra* note 21), ND (Leidholm, *supra* note 21), OH (Higgs, *supra* note 21; Poling, *supra* note 6; Flowers, *supra* note 22), OK (McDonald, *supra* note 21), OR (Bockorny, *supra* note 21), PA (Dillon, *supra* note 21; Forsythe, *supra* note 22; Heck, *supra* note 22; Gatewood, *supra* note 22), RI (McMaugh, *supra* preface endnote 1), SC (Wilkins, *supra* note 8), TN (Furlough, *supra* note 21; Devita, *supra* note 21), TX (Hayward, *supra* note 21; Ortiz, *supra* note 9; Pierini, *supra* note 21; King, *supra* note 22; In The Interest Of, *supra* note 22), VA (Credle, *supra* note 22; Plantz, *supra* note 22; Wilmoth, *supra* note 21), WA (Kelly, *supra* note 4; Bowerman, *supra* note 21 (according to Hutcheson, *supra* note 21)), WV (McClanahan, *supra* note 22; Steele, *supra* note 21; Duell, *supra* note 21).

118. AL (Hill, *supra* note 20 (There is some question whether this code applies to this case.)), AK (Pabst, *supra* note 22; Haakanson, *supra* note 19 (There is some question whether this code applies to this case.)), CO (Hare, *supra* note 21), CT (Battista, *supra* note 19; Borrelli, *supra* note 3), DC (Ibn-Tamas (1979), *supra* note 20), DE (McBride, *supra* note 22), FL (Rogers, *supra* note 8; Hickson, *supra* note 4; Soubielle, *supra* note 22), GA (Thompson, *supra* note 19; Chapman (1987), *supra* note 22; Smith, *supra* note 3), IL (Smith, *supra* note 21), IN (Dausch, *supra* note 21; Davidson, *supra* note 22), IA (Jones, *supra* note 22), KS (Dunn (1992), *supra* note 22; Hodges, *supra* note 3; Hundley, *supra* note 4), KY (Jones, *supra* note 22; Rose, *supra* note 19), LA (Burton, *supra* note 20), ME (Murchison, *supra* note 22), MD (Smith, *supra* note 22), MA (Grimshaw (1991), *supra* note 21; Lazarovich, *supra* note 20; Scott, *supra* note 22; Rodriguez, *supra* note 3 (high court also notes that state statute permits testimony whether defendant is a battered woman)), MI (Wilson, *supra* note 19; Smith, *supra* note 22), MN (Krage, *supra* note 19; Hennum, *supra* note 3; Tisland, *supra* note 22; Vizenor, *supra* note 22), MO (Williams, *supra* note 20 (court notes testimony admissible even if defendant not married to batterer)), NH (Masters, *supra* note 22), NJ (Frost, *supra* note 8), NY (Glenn G., *supra* note 21; Smith, *supra* note 22; Brundidge, *supra* note 22; Pizarro, *supra* note 22; Torres, *supra* note 11; Emick, *supra* note 3; Brown, *supra* note 22), OH (Poling, *supra* note 6; Flowers, *supra* note 22), OR (Moore, *supra* note 20), PA (Dillon, *supra* note 21; Stonehouse, *supra* note 4; Singh, *supra* note 22; Forsythe, *supra* note 22; Heck, *supra* note 22; Gatewood, *supra* note 22), SD (Burtzlaff, *supra* note 19), TN (Furlough, *supra* note 21; Leaphart, *supra* note 21), TX (King, *supra* note 22; In The Interest Of, *supra* note 22 (in context of post-traumatic stress disorder)), VT (Verrinder, *supra* note 19), VA (Credle, *supra* note 22; Plantz, *supra* note 22; Wilmoth, *supra* note 21), WA (Ciskie, *supra* note 7; Allery, *supra* note 3), WI (Bednarz, *supra* note 3; Slade, *supra* note 3; Landis, *supra* note 19; Felton, *supra* note 21), WV (McClanahan, *supra* note 22; Betty J.W., *supra* note 21), WY (Frenzel, *supra* note 21; Griffin, *supra* note 21 (There is some question whether this code applies to this case.)).

119. AK (Haakanson, *supra* note 19), GA (Clenney, *supra* note 24 (court made this holding as to former spouses)), KY (Rose, *supra* note 19), MI (Wilson, *supra* note 19), MN (Hennum, *supra* note 3), OH (Dowd, *supra* note 6; Pargeon, *supra* note 6), PA (Singh, *supra* note 22), SD (Burtzlaff, *supra* note 19), VT (Verrinder, *supra* note 19), WI (Bednarz, *supra* note 3; Landis, *supra* note 19).

120. RI (McMaugh, *supra* preface endnote 1).

121. AL (Neelley, *supra* note 24), CA (Romero, *supra* note 8), CO (Yaklich, *supra* note 21), CT (Borrelli, *supra* note 3 (notes with seeming approval use of expert testimony for this purpose permitted in other jurisdictions)), FL (Stiles, *supra* note 11; Terry, *supra* note 3), GA (Motes, *supra* note 8; Chapman (1988), *supra* note 4; Pruitt, *supra* note 24; Chapman (1987), *supra* note 22), IL (Jackson, *supra* note 9; Fleming, *supra* note 8; Minnis, *supra* note 3), IN (Fultz, *supra* note 20), IA (Nunn, *supra* note 21), KS (Crawford, *supra* note 4; Clements, *supra* note 4; Stewart, *supra* note 4; Hodges, *supra* note 3; Meyer, *supra* note 19), LA (Burton, *supra* note 20), ME (Anaya (1981), *supra* note 3), MA (Grimshaw (1991), *supra* note 21; Moore, *supra* note 20), MI (Matthews, *supra* note 22), MN (Hennum, *supra* note 3), MO (Anderson, *supra* note 24; Williams, *supra* note 20 (court holds such testimony admissible even if defendant not married to batterer); Clay, *supra* note 24; Martin, *supra* note 24), MS (Lentz, *supra* note 20), MT (Hess, *supra* note 3), NV (Larson, *supra* note 21), NH (Briand, *supra* note 20), NJ (Myers, *supra* note 8; Kelly, *supra* note 3; Cusseaux, *supra* note 11), NM (Gallegos, *supra* note 3; Branchal, *supra* note 8), NY (Anderson, *supra* note 21; Rollock, *supra* note 21; Brundidge, *supra* note 22; Ciervo, *supra* note 3; Torres, *supra* note 11; Emick, *supra* note 3), NC (Norman, *supra* note 21), ND (Leidholm, *supra* note 21), OH (Daws, *supra* text, page 2; Lundgren, *supra* note 6; C. Redding, *supra* note 6; M. Redding, *supra* note 6; Manning, *supra* note 18; Pargeon, *supra* note 6; Poling, *supra* note 6; Rice, *supra* note 21; Koss, *supra* note 3; Spinks, *supra* note 8), OK (Bechtel, *supra* note 3), OR (Moore, *supra* note 20), PA (Miller, *supra* note 8; Tyson, *supra* note 18; Kacsmar, *supra* note 8; Dillon, *supra* note 21; Stonehouse, *supra* note 4; Forsythe, *supra* note 22), SC (Robinson, *supra* note 4; Wilkins, *supra* note 8; Hill, *supra* note 3), TN (Zimmerman, *supra* note 21; Furlough, *supra* note 21), TX (Ortiz, *supra* note 9), UT (Hazel, *supra* text, page 7), WA (Riker, *supra* note 7; Janes, *supra* note 4; Hanson, *supra* note 7; Walker, *supra* note 21; Allery, *supra* note 3; Kelly, *supra* note 4), WV (Steele, *supra* note 21).

122. AK (Pabst, *supra* note 22), AZ (Denny, *supra* note 21), CA (Aris, *supra* note 3), CO (Yaklich, *supra* note 21; Morrison, *supra* note 21), DE (McBride, *supra* note 22), FL (Jackson, *supra* note 21; Stiles, *supra* note 11; Rhone, *supra* note 19; Soubielle, *supra* note 22), GA (Chapman (1987), *supra* note 22), ID (Griffiths, *supra* note 19), IL (Smith, *supra* note 21; Novy, *supra* note 21; Server, *supra* note 8), IA (Nunn, *supra* note 21), KS (Hundley, *supra* note 4), KY (Dyer, *supra* note 20; Ford, *supra* note 21), LA (Laughlin, *supra* note 18; Necaise, *supra* note 24), ME (Murchison, *supra* note 22; Anaya (1981), *supra* note 3), MI (Smith, *supra* note 22), MN (Krage, *supra* note 19), MO (Hunziger, *supra* note 21; Williams, *supra* note 20), MT (Dannels, *supra* note 24), NE (Doremus, *supra* note 18), NJ (J.Q., *supra* note 18; Myers, *supra* note 8; McGuigen, *supra* note 8; Kelly, *supra* note 3; Cusseaux, *supra* note 11), NM (Gallegos, *supra* note 3; Branchal, *supra* note 8), NY (Barrett, *supra* note 21; Anderson, *supra* note 21; Fratt, *supra* note 21; Brundidge, *supra* note 22; Pizarro, *supra* note 22; Nicole V., *supra* note 3; Torres, *supra* note 11), NC (Clark, *supra* note 18), OH (Daws, *supra* text, page 2; Roquemore, *supra* note 18; Manning, *supra* note 18; Poling, *supra* note 6; Rice, *supra* note 21; Flowers, *supra* note 22), OK (Bechtel, *supra* note 3;), PA (Miller, *supra* note 8; Kacsmar, *supra* note 8; Dillon, *supra* note 21; Forsythe, *supra* note 22), SC (Wilkins, *supra* note 8; Hill, *supra* note 3), SD (Burtzlaff, *supra* note 19), TN (Zimmerman, *supra* note 21;

Furlough, *supra* note 21), TX (Fielder, *supra* note 3; In The Interest Of, *supra* note 22), UT (Hazel, *supra* text, page 7), WA (Riker, *supra* note 7; Hutcheson, *supra* note 21; Ciskie, *supra* note 7; Allery, *supra* note 3), WI (Felton, *supra* note 21), WV (Steele, *supra* note 21; Duell, *supra* note 21).

123. Braley, *supra* note 23.

124. CA (Romero, *supra* note 8; Aris, *supra* note 3 (but held expert testimony on the subjective reasonableness of the defendant's conduct was irrelevant to the issue of a reasonable person's conduct, i.e., the objective part of a complete or "perfect" self-defense claim)), DC (Ibn-Tamas (1979), *supra* note 20), FL (Stiles, *supra* note 11; Soubielle, *supra* note 22; Hawthorne, *supra* note 20; Terry, *supra* note 3), IL (Fleming, *supra* note 8), IN (Fultz, *supra* note 20), IA (Nunn, *supra* note 21), KS (Crawford, *supra* note 4; Clements, *supra* note 4; Dunn (1988), *supra* note 5; Stewart, *supra* note 4; Meyer, *supra* note 19; Hundley, *supra* note 4), LA (Burton, *supra* note 20), MD (Banks, *supra* note 21), MA (Grimshaw (1991), *supra* note 21; Moore, *supra* note 20), MI (Wilson, *supra* note 19; Matthews, *supra* note 22), MN (Hennum, *supra* note 3; Mick, *supra* note 11), NJ (Myers, *supra* note 8; Kelly, *supra* note 3; Cusseaux, *supra* note 11), NM (Gallegos, *supra* note 3; Branchal, *supra* note 8), NY (Barrett, *supra* note 21; Torres, *supra* note 11), ND (Leidholm, *supra* note 21), OH (Daws, *supra* text, page 2; Lundgren, *supra* note 6; C. Redding, *supra* note 6; Koss, *supra* note 3), OK (Bechtel, *supra* note 3), PA (Miller, *supra* note 8; Tyson, *supra* note 18; Dillon, *supra* note 21; Stonehouse, *supra* note 4; Forsythe, *supra* note 22), SC (Robinson, *supra* note 4; Wilkins, *supra* note 8), TN (Zimmerman, *supra* note 21), TX (Fielder, *supra* note 3), UT (Hazel, *supra* text, page 7), VA (Plantz, *supra* note 22; Pancoast, *supra* note 21; Wilmoth, *supra* note 21), WA (Riker, *supra* note 7; Janes, *supra* note 4; Hanson, *supra* note 7; Walker, *supra* note 21; Allery, *supra* note 3; Kelly, *supra* note 4), WV (McClanahan, *supra* note 22; Steele, *supra* note 21), WY (Jahnke, *supra* note 25).

125. GA (Mullis, *supra* note 24), WY (Buhrle, *supra* note 25).

126. CA (Romero, *supra* note 8; Aris, *supra* note 3), DC (Ibn-Tamas (1979), *supra* note 20), FL (Stiles, *supra* note 11; Hawthorne, *supra* note 20; Terry, *supra* note 3), GA (Chapman (1988), *supra* note 4), IL (Fleming, *supra* note 8), IN (Fultz, *supra* note 20), IA (Nunn, *supra* note 21), KS (Crawford, *supra* note 4; Dunn (1988), *supra* note 5; Meyer, *supra* note 19; Hundley, *supra* note 4), LA (Burton, *supra* note 20), MA (Grimshaw (1991), *supra* note 21; Moore, *supra* note 20), NJ (Myers, *supra* note 8), NM (Gallegos, *supra* note 3; Branchal, *supra* note 8), OH (Daws, *supra* text, page 2; Lundgren, *supra* note 6; C. Redding, *supra* note 6; Manning, *supra* note 18; Pargeon, *supra* note 6), OK (Bechtel, *supra* note 3), PA (Tyson, *supra* note 18), SC (Robinson, *supra* note 4; Wilkins, *supra* note 8), TN (Furlough, *supra* note 21), VA (Plantz, *supra* note 22), WA (Janes, *supra* note 4; Allery, *supra* note 3; Kelly, *supra* note 4).

127. CA (Day, *supra* note 8; Romero, *supra* note 8; Aris, *supra* note 3), GA (Pugh, *supra* note 5), MD (Banks, *supra* note 21), NJ (Myers, *supra* note 8; Kelly, *supra* note 3; Cusseaux, *supra* note 11), ND (Leidholm, *supra* note 21), OH (C. Redding, *supra* note 6; Pargeon, *supra* note 6; Koss, *supra* note 3).

128. Pargeon, *supra* note 6; Koss, *supra* note 3.

129. Walker, *supra* note 21.

130. AK (Pabst, *supra* note 22), FL (Soubielle, *supra* note 22), GA (Smith, *supra* note 3), KS (Dunn (1992), *supra* note 22), ME (Anaya (1981), *supra* note 3), NH (Masters, *supra* note 22), NM (Gallegos, *supra* note 3), NY (Brundidge, *supra* note 22; Ciervo, *supra* note 3; Emick *supra* note 3), NC (Clark, *supra* note 18; Norman, *supra* note 21), OR (Bockorny, *supra* note 21 (court approved state's expert testimony that jail inmates in general tend to "work over their story" to rebut defense expert's testimony that defendant was being truthful); Moore, *supra* note 20), SC (Wilkins, *supra* note 8), TN (Furlough, *supra* note 21), TX (King, *supra* note 22; In The Interest Of, *supra* note 22), VA (Pancoast, *supra* note 21 (although note that this was not expert testimony on "battered woman syndrome")).

131. CA (Aris, *supra* note 3), DC (Ibn-Tamas (1979), *supra* note 20), GA (Pugh, *supra* note 5; Chapman (1987), *supra* note 22), ID (Griffiths, *supra* note 19), KY (Craig, *supra* note 19; Rose, *supra* note 19), MD (Kaliher, *supra* note 22), MA (Scott, *supra* note 22), MI (Wilson, *supra* note 19), MN (Loch, *supra* note 21 (implied holding)), NY (Pizarro, *supra* note 22 (although the testimony actually seems to be going to the ultimate fact)), OH (Poling, *supra* note 6; Flowers, *supra* note 22), OK (Bechtel, *supra* note 3), PA (Forsythe, *supra* note 22), SD (Burtzlaff, *supra* note 19), UT (Hazel, *supra* text, page 7), VA (Wilmoth, *supra* note 21), WA (Ciskie, *supra* note 7), WI (Bednarz, *supra* note 3; Slade, *supra* note 3), WY (Frenzel, *supra* note 21 (note that this holding applies to the parallel use of expert testimony on child sexual abuse accommodation syndrome); Buhrle, *supra* note 25).

132. AK (Pabst, *supra* note 22), CA (Day, *supra* note 8; Romero, *supra* note 8), CO (Yaklich, *supra* note 21), CT (Freeney, *supra* note 5; Battista, *supra* note 19; Borrelli, *supra* note 3), DC (Ibn-Tamas (1979), *supra* note 20), FL (Rhone, *supra* note 19; Soubielle, *supra* note 22; Hawthorne, *supra* note 20; Terry, *supra* note 3), GA (Thompson, *supra* note 19; Chapman (1988), *supra* note 4; Chapman (1987) *supra* note 22), IL (Server, *supra* note 8; Minnis, *supra* note 3), IN (Dausch, *supra* note 21; Davidson, *supra* note 22), IA (Jones, *supra* note 22), KS (Dunn (1992), *supra* note 22; Stewart, *supra* note 4; Hodges, *supra* note 3; Hundley, *supra* note 4), KY (Jones, *supra* note 22), LA (Laughlin, *supra* note 18; Burton, *supra* note 20), ME (Murchison, *supra* note 22; Anaya (1981), *supra* note 3; Anaya (1983), *supra* note 21), MA (Rodriguez, *supra* note 3; Grimshaw (1991), *supra* note 21; Lazarovich, *supra* note 20; Scott, *supra* note 22; Moore, *supra* note 20), MI (Wilson, *supra* note 19; Matthews, *supra* note 22; Smith, *supra* note 22), MO (Hunziger, *supra* note 21), NH (Masters, *supra* note 22), NJ (J.Q., *supra* note 18; Frost, *supra* note 8; Kelly, *supra* note 3; Cusseaux, *supra* note 11), NM (Swavola, *supra* note 21; Vigil, *supra* note 18), NY (Barrett, *supra* note 21; Glenn G., *supra* note 21; Smith, *supra* note 22; Taylor, *supra* note 18; Brundidge, *supra* note 22; Pizarro, *supra* note 22; Nicole V., *supra* note 3; Torres, *supra* note 11; Emick, *supra* note 3), NC (Norman, *supra* note 21; Heidmous, *supra* note 21), OH (Roquemore, *supra* note 18; Higgs, *supra* note 21; Scheibert, *supra* note 21; Koss, *supra* note 3; Flowers, *supra* note 22), OK (McDonald, *supra* note 21), PA (Kacsmar, *supra* note 8; Stonehouse, *supra* note 4; Forsythe, *supra* note 22; Heck, *supra* note 22; Gatewood, *supra* note 22), RI

(McMaugh, *supra* preface endnote 1), SC (Doe, *supra* note 8), TX (Pierini, *supra* note 21; Fielder, *supra* note 3; King, *supra* note 22; In The Interest Of, *supra* note 22), VT (Verrinder, *supra* note 19; Blair, *supra* note 21), VA (Credle, *supra* note 22; Plantz, *supra* note 22), WA (Hanson, *supra* note 7; Ciskie, *supra* note 7; Allery, *supra* note 3), WI (Slade, *supra* note 3), WV (Steele, *supra* note 21), WY (Frenzel, *supra* note 21; Griffin, *supra* note 21 (There is some question whether this code applies to this case.)).

133. AL (Neelley, *supra* note 24), IL (White, *supra* note 24), MI (Moseler, *supra* note 24), MT (Dannels, *supra* note 24 (implied holding)), OH (Dowd, *supra* note 6; Pargeon, *supra* note 6), WA (Riker, *supra* note 7 (holds testimony irrelevant in context of non-battering relationship)).

134. Note that criminal charges may also be brought against the battered woman/mother in such circumstances; *see*, e.g., Engle, *supra* note 6. Engle and other similar cases where the battered woman/mother asserted a duress defense to such charges are referred to in Section III.B.3. *supra*.

135. NE (C.P., *supra* note 21), NY (Glenn G., *supra* note 21), WV (Betty J.W., *supra* note 21).

136. CA (Day, *supra* note 8; Romero, *supra* note 8), CT (Borrelli, *supra* note 3), DC (Ibn-Tamas (1979), *supra* note 20), KS (Hodges, *supra* note 3), MI (Wilson, *supra* note 19; Smith, *supra* note 22), MN (Hennum, *supra* note 3), NH (Masters, *supra* note 22), NJ (J.Q., *supra* note 18; Kelly, *supra* note 3), NM (Vigil, *supra* note 18), NY (Torres, *supra* note 11; Taylor, *supra* note 18 (in context of a rape case), Brown, *supra* note 22), OH (Daws, *supra* text, page 2; Coulter, *supra* note 6; Koss, *supra* note 3), OK (Bechtel, *supra* note 3), PA (Dillon, *supra* note 21; Stonehouse, *supra* note 4; Singh, *supra* note 22), UT (Hazel, *supra* text, page 7), VT (Blair, *supra* note 21), WY (Frenzel, *supra* note 21).

137. FL (Rhone, *supra* note 19), GA (Norris, *supra* note 21), IL (Novy, *supra* note 21; Gindorf, *supra* note 21), KS (Dunn (1988), *supra* note 5), LA (Laughlin, *supra* note 18; Moore, *supra* note 21 (in context of insanity defense)), MA (Lazarovich, *supra* note 20), MN (Mick, *supra* note 11), MO (Hunziger, *supra* note 21), NV (Larson, *supra* note 21), NY (Anderson, *supra* note 21), OH (Lampkin, *supra* note 21), RI (McMaugh, *supra* preface endnote 1), TN (Devita, *supra* note 21), WA (Bowerman, *supra* note 21), WV (Duell, *supra* note 21; Lambert, *supra* note 21).

138. *See* cases cited in note 137, *supra*.

139. KY (Foster, *supra* note 24 (expert testimony on battering and its effects held inadmissible as to battered woman defendant because she was a lesbian)), LA (Edwards, *supra* note 24 (holding based on defendant's failure to plead not guilty or not guilty by reason of insanity)), MI (Moseler, *supra* note 24), MO (Martin, *supra* note 24), NJ (McClain, *supra* note 6), NC (Clark, *supra* note 18).

140. CA (Day, *supra* note 8), GA (Clenney, *supra* note 24 (note case dealt with post-arrest state of mind issue)), KY (Brandenburg, *supra* note 24), MA (Scott, *supra* note 22

(note this issue was the basis for defendant's 1991 appeal, but was not decided because defendant dropped her appeal as well as her motion for a new trial in July 1993 when her sentence was reduced to the 22 months time she had already served and she was placed on three years probation)), MI (Moseler, *supra* note 24), OH (Coulter, *supra* note 6), SC (Doe, *supra* note 8), WY (Braley, *supra* note 23).

141. CA (Day, *supra* note 8; Romero, *supra* note 8), CT (Battista, *supra* note 19), HI (Cababag, *supra* note 3), IL (Server, *supra* note 8), NJ (Frost, *supra* note 8), NY (Nicole V., *supra* note 3), OH (Daws, *supra* text, page 2), PA (Kacsmar, *supra* note 8), UT (Hazel, *supra* text, page 7), VT (Verrinder, *supra* note 19), WI (Slade, *supra* note 3), WY (Frenzel, *supra* note 21).

142. CT (Freeney, *supra* note 5), KS (Hodges, *supra* note 3), MT (Dannels, *supra* note 24), OR (Milbradt, *supra* note 20), PA (Singh, *supra* note 22), WA (Hanson, *supra* note 7).

143. KS (Cramer, *supra* note 8), ME (Anaya (1983), *supra* note 21), NM (Swavola, *supra* note 21), NY (Ciervo, *supra* note 3), OH (Daws, *supra* text, page 2; Higgs, *supra* note 21), TX (Hayward, *supra* note 21). Also, although it was not stated explicitly by the court in another case, in effect, the defendant's prior bad acts were used to rebut expert testimony, IA (Jones, *supra* note 22).

144. MD (Banks, *supra* note 21), NY (Barrett, *supra* note 21), WA (Kelly, *supra* note 4).

145. AL (Neelley, *supra* note 24), AK (Pabst, *supra* note 22), FL (Jackson, *supra* note 21), IL (Smith, *supra* note 21; Jackson, *supra* note 9), IN (Allen, *supra* note 21), ME (Murchison, *supra* note 22), MN (Merrill, *supra* note 18), OH (Lampkin, *supra* note 21), TX (Ortiz, *supra* note 9 (also holds expert testimony may be used to rebut "battered woman syndrome" as mitigating factor)), WA (Alaniz, *supra* note 22). Note that, by statute, Washington also allows judges to consider as mitigating factors in the exercise of their discretion to impose a sentence outside the standard range, that the defendant committed crimes under duress or that the defendant or defendant's children suffered physical or sexual abuse by the deceased and the offense was in response to the abuse (WASH. REV. CODE §9.94A.390(1)(a),(c),(h)).

146. MN (Loch, *supra* note 21), NC (Torres, *supra* note 21).

147. AK (Brandon, *supra* note 18), CT (Borrelli, *supra* note 3), HI (Cababag, *supra* note 3), IN (Dausch, *supra* note 21), WI (Bednarz, *supra* note 3). There is also anecdotal evidence that the expert testimony can be used to explain a battered woman's first confessing to having committed a crime, and then recanting once her batterer has been incarcerated and she regards herself as being "safe;" or alternatively, her first denying that she had been assaulted by her batterer, and later admitting that he is the one who had assaulted her (conversation with Mary Ann Dutton, Ph.D. on October 28, 1994). On the other hand, NCDBW has limited information about a 1993 Washington State Court of Appeals decision, affirming the murder conviction of Imogene Farrell, despite the trial court's exclusion of expert testimony on battering to explain the defendant's having "covered" for her abusive boyfriend who she asserted had actually committed the murders of her father and another person (*The Equal Times*, Summer

1993, p. 3 (newsletter of the Northwest Women's Law Center)).

148. OH (Dowd, *supra* note 6).

149. NH (Baker, *supra* note 19).

150. CT (Knock, *supra* note 3), MD (Kaliher, *supra* note 22), MT (Houtchens, *supra* note 21).

151. ID (Curtis (1993), *supra* note 21; Curtis (1994), *supra* note 21), LA (Laughlin, *supra* note 18). Also note that, although this issue was not explicitly addressed by the New Jersey Superior Court in Cusseaux v. Pickett, *supra* note 11, it can reasonably be anticipated, based on its ruling that battered woman syndrome states a civil cause of action, that expert testimony (of which it clearly recognized the admissibility in a self-defense context) would be admissible in support of a damages determination.

152. AR (Thompson, *supra* note 20), DC (Ibn-Tamas (1983), *supra* note 20), DE (Scott, *supra* note 107), GA (Strong, *supra* note 21; Ledford, *supra* note 18), HI (Miller, *supra* note 22), LA (Clayton, *supra* note 24), MA (Grimshaw (1992), *supra* note 20), MT (Redcrow, *supra* note 21), NE (Jackson, *supra* note 21), NY (Powell, *supra* note 24 (no information because proffer of expert testimony refused)), OH (Engle, *supra* note 6 (the court did imply that expert testimony was not relevant to a duress defense)); Seymour, *supra* note 18), PA (Commonwealth v. McFadden, 402 Pa. Super. 517, 587 A.2d 740 (1991)), RI (Ordway, *supra* note 18 (only information is that it is permissible for the adverse expert to testify)), TN (Pendergrast, *supra* note 24; Aucoin, *supra* note 21), WI (Balke, *supra* note 24).

153. CAL. EVID. CODE §1107(a).

154. "...[t]estimony of an expert witness concerning the effects of such domestic abuse on the beliefs, behavior and perception of the person being abused shall be admissible as evidence" (OKLA. STAT. ANN. tit. 22, §40.7).

155. MASS. GEN. LAWS ANN. ch. 233, §23E.

156. CAL. EVID. CODE §1107, GA. CODE ANN. §16-3-21(d)(2) (permits expert testimony "regarding the condition of the [defendant's] mind at the time of the offense, including those relevant facts and circumstances relating to the family violence...that are the bases of the expert's opinion"), LA. CODE EVID. ANN. art. 404(A)(2), MD. CTS. & JUD. PROC. CODE ANN. §10-916(b), NEV. REV. STAT. §48.061(1), OHIO REV. CODE ANN. §2901.06, TEX. PENAL CODE §19.06(a) and (b)(2).

157. CAL. EVID. CODE §1107, MO. ANN. STAT. (Crimes and Punishment) §563.033.1, NEV. REV. STAT. §48.061(2), OHIO REV. CODE ANN. §2901.06, S.C. CODE ANN. §17-23-170(A), WYO. STAT. (Crimes and Offenses) §6-1-203(b). In a related vein, the South Carolina statute also provides that the evidence is admissible on the issue of whether the defendant lawfully acted in defense of another, of necessity or under duress, S.C. CODE ANN. §17-23-170(A).

158. CAL. EVID. CODE §1107, GA. CODE ANN. §16-3-21(d), MASS. GEN. LAWS ANN. ch. 233, §23E, OHIO REV. CODE ANN. §2901.06(B), WYO. STAT. (Crimes and Offenses) §6-1-203(b).

159. *See* citations in preceding note.

160. MASS. GEN. LAWS ANN. ch. 233, §23E.

161. MASS. GEN. LAWS ANN. ch. 233, §23E, MO. ANN. STAT. (Crimes and Punishment) §563.033, OHIO REV. CODE ANN. §2901.06(B), S.C. CODE ANN. §17-23-170(A), WYO. STAT. (Crimes and Offenses) §6-1-203(b).

162. MASS. GEN. LAWS ANN. ch. 233, §23E(b).

163. OHIO REV. CODE ANN. §2945.392(B). Note that California also permits expert testimony on the emotional and mental effects of domestic violence on the defendant's perceptions (CAL. EVID. CODE §1107).

164. 10th Cir. (Dunn (1992), *supra* note 41), 9th Cir. (Archer, *supra* note 37; July, *supra* note 40; Homick, *supra* note 37; Sebresos, *supra* note 40), 8th Cir. (Whitetail, *supra* note 43), 6th Cir. (Ware, *supra* text, page 2; Meeks, *supra* note 40 (note that the court impliedly made this finding)), 3rd Cir. (Santos, *supra* note 46), N.D.Ill. (Bell, *supra* note 44), E.D.N.Y. (Gaviria, *supra* note 46), D.Kan. (Dunn (1991), *supra* note 42), S.D.Ohio (Tourlakis, *supra* note 37), N.D.Ala. (Sixty Acres (1990), *supra* note 46), U.S. Tax Ct. (Toner, *supra* note 46), S.D.Fla. (Ellis, *supra* note 42).

165. E.D.Pa. (Fennell, *supra* note 45).

166. 10th Cir. (Dunn (1992), *supra* note 41), 9th Cir. (Gable, *supra* note 40; Archer, *supra* note 37; Johnson, *supra* note 40; Homick, *supra* note 37), 3rd Cir. (Santos, *supra* note 46), N.D.Ill. (Gregory, *supra* note 45), S.D.Fla. (Ellis, *supra* note 42). Note that one of these appeals courts (9th Cir. (Sebresos)) and one of these district courts (N.D.Ill. (Bell)) have also held to the contrary.

167. 5th Cir. (Gordon (1987), *supra* note 46), W.D.La. (Gordon (1986), *supra* note 46).

168. 9th Cir. (Sebresos, *supra* note 40), 7th Cir. (U.S. v. Mark Thomas, *supra* note 37 (There is some question whether this code applies in this case.)), N.D.Ill. (Bell, *supra* note 44).

169. 10th Cir. (Dunn (1992), *supra* note 41), 9th Cir. (Gable, *supra* note 40; July, *supra* note 40; Johnson, *supra* note 40), 8th Cir. (Whitetail, *supra* note 43), 6th Cir. (Meeks, *supra* note 40 (implied holding)), 3rd Cir. (Santos, *supra* note 46), E.D.N.Y. (Gaviria, *supra* note 46), U.S. Tax Ct. (Toner, *supra* note 46), W.D.La. (Gordon (1986), *supra* note 46), E.D.Pa. (Fennell, *supra* note 45), D.Hawaii (Wilson, *supra* note 79).

170. 8th Cir. (Arcoren, *supra* note 41).

171. 10th Cir. (Dunn (1992), *supra* note 41), 9th Cir. (July, *supra* note 40), 8th Cir. (Arcoren, *supra* note 41; Whitetail, *supra* note 43), W.D.La. (Gordon (1986), *supra* note 46), E.D.Pa. (Fennell, *supra* note 45), D.Hawaii (Wilson, *supra* note 79).

172. S.D.N.Y. (Taylor, *supra* note 37).

173. 10th Cir. (Dunn (1992), *supra* note 41), 9th Cir. (Johnson, *supra* note 40; Winters, *supra* note 40), 3rd Cir. (Santos, *supra* note 46), N.D.Ill. (Bell, *supra* note 44), S.D.N.Y. (Taylor, *supra* note 37), D.Kan. (Dunn (1991), *supra* note 42), N.D.Ala. (Sixty Acres (1990), *supra* note 46), S.D.Ohio (Tourlakis, *supra* note 37), E.D.Pa. (Fennell, *supra* note 45). Note that the 9th Circuit has also held such testimony is *not* relevant to explain the defendant's conduct, Sebresos, *supra* note 40.

174. 9th Cir. (Winters, *supra* note 40).

175. 8th Cir. (Arcoren, *supra* note 41).

176. 10th Cir. (Lumpkin, *supra* note 46), 8th Cir. (Whitetail, *supra* note 43), 6th Cir. (Meeks, *supra* note 40 (implied holding)), S.D. Ohio (Tourlakis, *supra* note 37).

177. E.D.Pa. (Fennell, *supra* note 45).

178. D.Kan. (Dunn (1991), *supra* note 42), S.D.Ohio (Tourlakis, *supra* note 37).

179. S.D.Ohio (Tourlakis, *supra* note 37).

180. N.D.Ill. (Bell, *supra* note 44), S.D.N.Y. (Taylor, *supra* note 37), E.D.Pa. (Fennell, *supra* note 45).

181. 8th Cir. (Arcoren, *supra* note 41).

182. 8th Cir. (Whitetail, *supra* note 43), D.Hawaii, (Wilson, *supra* note 79).

183. U.S. Tax Ct. (Toner, *supra* note 46), S.D.Ohio (Tourlakis, *supra* note 37), W.D.La. (Gordon (1986), *supra* note 46).

184. 9th Cir. (July, *supra* note 40), N.D.Ill. (Bell, *supra* note 44), S.D.Fla. (Ellis, *supra* note 42).

185. 9th Cir. (Gable, *supra* note 40; Russell, *supra* note 40; Johnson, *supra* note 40), 8th Cir. (Whitetail, *supra* note 43), E.D.N.Y. (Gaviria, *supra* note 46).

186. FL (Rhone, *supra* note 19; *see also* Hickson, *supra* note 4, a subsequent decision by a higher court, providing for an adverse examination with limitations), MO (Landrum, *supra* note 18), MT (Hess, *supra* note 3), NE (Doremus, *supra* note 18 (holding adverse examination appropriate where state's expert testifies about an essential element of the crime)), NH (Briand, *supra* note 20), NJ (Myers, *supra* note 8), NY (Fratt, *supra* note 21 (found an adverse examination is triggered, with limitations)), OH (Manning, *supra* note 18), OK (Bechtel, *supra* note 3), TX (Ortiz, *supra* note 9

— at sentencing). Also note that in OR (Bockorny, *supra* note 21), although an adverse examination was not triggered, the state presented rebuttal testimony by an expert.

187. *See* Hennum, *supra* note 3.

188. *See* Krage, *supra* note 19.

189. MO. ANN. STAT. (Crimes and Punishment) §§563.033.2, 563.033.3.

190. OHIO REV. CODE ANN. §2945.39(A) provides that the court may order one or more, but not more than three, such evaluations of the defendant's mental condition at the time the offense was committed.

191. OHIO REV. CODE ANN. §2945.39(A)(3).

192. 9th Cir. (July, *supra* note 40 (Note that the court made this finding even though the defendant did not present "battered woman syndrome" evidence as a mental state defense)); 6th Cir. (Ware, *supra* text, page 1 (cited by the court as a reason why the defendant had agreed with her counsel that she would not present her own expert testimony)).

193. N.D.Ill. (Bell, *supra* note 44 (holding that, since mental state is irrelevant in a duress defense and the defendant did not present a diminished capacity defense, the government is not entitled to compel a psychiatric examination of a defendant who intends to present expert testimony on battering and its effects)).

194. AK (Brandon, *supra* note 18; Haakanson, *supra* note 19), CT (Freeney, *supra* note 5; Borrelli, *supra* note 3; Battista, *supra* note 19), FL (Rhone, *supra* note 19), GA (Pruitt, *supra* note 24; Thompson, *supra* note 19), HI (Cababag, *supra* note 3), IL (Server, *supra* note 8), IN (Dausch, *supra* note 21), KS (Clements, *supra* note 4), KY (Brandenburg, *supra* note 24; Dyer, *supra* note 20), MN (Borchardt, *supra* note 12; Merrill, *supra* note 18), NE (Doremus, *supra* note 18), NH (Baker, *supra* note 19), NJ (Frost, *supra* note 8; J.Q., *supra* note 18; Walker, *supra* note 21), NY (Nicole V., *supra* note 3; Taylor, *supra* note 18), OH (Dowd, *supra* note 6; Roquemore, *supra* note 18; Pargeon, *supra* note 6), OR (Milbradt, *supra* note 20), WA (Ciskie, *supra* note 7), WI (Bednarz, *supra* note 3; Slade, *supra* note 3), WY (Frenzel, *supra* note 21).

195. CO (Morrison, *supra* note 21), CT (Knock, *supra* note 3), ID (Curtis (1993), *supra* note 21; Curtis (1994), *supra* note 21), LA (Laughlin, *supra* note 18), MD (Kaliher, *supra* note 22), MO (Hunziger, *supra* note 21), MT (Houtchens, *supra* note 21), NJ (Cusseaux, *supra* note 11), OH (Scheibert, *supra* note 21), PA (Heck, *supra* note 22), SC (Doe, *supra* note 8), VT (Blair, *supra* note 21).

196. FL (Hickson, *supra* note 4; Stiles, *supra* note 11), MN (Mick, *supra* note 11; Krage, *supra* note 19), MO (Landrum, *supra* note 18), NH (Briand, *supra* note 20), NY (Glenn G., *supra* note 21; Anderson, *supra* note 21; Fratt, *supra* note 21; Torres, *supra* note 11), OH (Spinks, *supra* note 8), UT (Hazel, *supra* text, page 7).

197. AK (Pabst, *supra* note 22; Charliaga, *supra* note 22), AR (Green, *supra* note 24), DE (McBride, *supra* note 22), FL (Soubielle, *supra* note 22), GA (Chapman (1987), *supra* note 22), HI (Miller, *supra* note 22), KS (Dunn (1992), *supra* note 22), ME (Murchison, *supra* note 22), MD (Smith, *supra* note 22), MA (Scott, *supra* note 22), MI (Matthews, *supra* note 22; Smith, *supra* note 22), MN (Tisland, *supra* note 22; Vizenor, *supra* note 22), NH (Masters, *supra* note 22), NY (Smith, *supra* note 22; Brundidge, *supra* note 22; Pizarro, *supra* note 22; Brown, *supra* note 22), OH (Flowers, *supra* note 22), PA (Singh, *supra* note 22; Gatewood, *supra* note 22; Forsythe, *supra* note 22), TX (King, *supra* note 22; In The Interest Of, *supra* note 22), VA (Plantz, *supra* note 22; Credle, *supra* note 22), WA (Alaniz, *supra* note 22), WV (McClanahan, *supra* note 22).

198. AL (Hill, *supra* note 20; Haney, *supra* note 18; Neelley, *supra* note 24), AR (Thompson, *supra* note 20), CA (Aris, *supra* note 3), CO (Yaklich, *supra* note 21; Hare, *supra* note 21), DC (Ibn-Tamas (1983), *supra* note 20), GA (Pugh, *supra* note 5; Motes, *supra* note 8; Clenney, *supra* note 24; Ledford, *supra* note 18; Mullis, *supra* note 24; Strong, *supra* note 21; Norris, *supra* note 21), ID (Griffiths, *supra* note 19), IL (Smith, *supra* note 21; Novy, *supra* note 21; Fleming, *supra* note 8; Gindorf, *supra* note 21; Jackson, *supra* note 9; White, *supra* note 24), IN (Fultz, *supra* note 20), IA (Nunn, *supra* note 21), KS (Crawford, *supra* note 4; Cramer, *supra* note 8; Dunn (1988), *supra* note 5; Meyer, *supra* note 19), KY (Foster, *supra* note 24; Rose, *supra* note 19), LA (Clayton, *supra* note 24; Moore, *supra* note 21; Necaise, *supra* note 24; Burton, *supra* note 20), ME (Anaya (1983), *supra* note 21), MD (Boyd, *supra* note 24), MA (Grimshaw (1991), *supra* note 21; Grimshaw (1992), *supra* note 20; Lazarovich, *supra* note 20; Moore, *supra* note 20), MI (Moseler, *supra* note 24), MN (Loch, *supra* note 21 (conviction on one charge — solicitation of child to engage in sexual conduct — was reversed, but conviction was affirmed in all other respects)); Hennum, *supra* note 3), MS (Lentz, *supra* note 20), MO (Anderson, *supra* note 24; Clay, *supra* note 24; Martin, *supra* note 24), MT (Hess, *supra* note 3; Redcrow, *supra* note 21; Dannels, *supra* note 24), NE (C.P., *supra* note 21; Jackson, *supra* note 21), NJ (McClain, *supra* note 6; Myers, *supra* note 8), NM (Swavola, *supra* note 21; Vigil, *supra* note 18), NY (Rollock, *supra* note 21; Powell, *supra* note 24), NC (Torres, *supra* note 21; Norman, *supra* note 21; Clark, *supra* note 18), OH (Engle, *supra* note 6; Lundgren, *supra* note 6; Coulter, *supra* note 6; Higgs, *supra* note 21; C. Redding, *supra* note 6; M. Redding, *supra* note 6; Rice, *supra* note 21; Poling, *supra* note 6; Manning, *supra* note 18; Lampkin, *supra* note 21; Seymour, *supra* note 18), OK (McDonald, *supra* note 21), OR (Bockorny, *supra* note 21; Moore, *supra* note 20), SC (Robinson, *supra* note 4), SD (Burtzlaff, *supra* note 19), TN (Pendergrast, *supra* note 24; Devita, *supra* note 21; Aucoin, *supra* note 21; Leaphart, *supra* note 21), TX (Hayward, *supra* note 21), VT (Verrinder, *supra* note 19), VA (Wilmoth, *supra* note 21; Pancoast, *supra* note 21), WA (Riker, *supra* note 7; Hutcheson, *supra* note 21; Hanson, *supra* note 7; Walker, *supra* note 21; Bowerman, *supra* note 21), WV (Steele, *supra* note 21), WI (Balke, *supra* note 24; Landis, *supra* note 19), WY (Griffin, *supra* note 21; Jahnke, *supra* note 25; Buhrle, *supra* note 25).

199. Maguigan describes her methodology starting at p. 479 of her article. Notably, she started with more than 400 opinions, but excluded over 130 cases that fell into one of several categories: those in which the discussion did not include a history of abuse of the

defendant by the deceased; those in which the defendant was male; those in which the defendant and deceased were not involved in an intimate heterosexual relationship; those in which the charge was other than homicide; those in which no self-defense claim was raised; those that did not address trial or pre-trial errors; and trial level opinions. By contrast, our overall analysis included all these categories, while our analysis of dispositions on appeal excluded only trial level opinions, appellate decisions on pre-trial issues, and cases in which the defendant was male.

200. It is possible that there were additional expert testimony cases among the other 135 or so cases in Maguigan's database that were not reflected in her table.

201. Of the 80 battered women defendants/expert testimony-related cases included in Maguigan's total database, the conviction and/or sentence was affirmed on appeal in 42, according to the case disposition codes we assigned to those cases.

202. AL (Hill, *supra* note 20; Haney, *supra* note 18), AR (Thompson, *supra* note 20), CA (Aris, *supra* note 3), CO (Yaklich, *supra* note 21; Hare, *supra* note 21), DC (Ibn-Tamas (1983), *supra* note 20), GA (Pugh, *supra* note 5; Motes, *supra* note 8; Ledford, *supra* note 18; Strong, *supra* note 21; Norris, *supra* note 21), ID (Griffiths, *supra* note 19), IL (Smith, *supra* note 21; Novy, *supra* note 21; Fleming, *supra* note 8; Gindorf, *supra* note 21), IN (Fultz, *supra* note 20), IA (Nunn, *supra* note 21), KS (Crawford, *supra* note 4; Cramer, *supra* note 8; Meyer, *supra* note 19), KY (Rose, *supra* note 19), LA (Moore, *supra* note 21; Burton, *supra* note 20), ME (Anaya (1981), *supra* note 3), MA (Grimshaw (1991), *supra* note 21; Grimshaw (1992), *supra* note 20, Lazarovich, *supra* note 20; Moore, *supra* note 20), MN (Loch, *supra* note 21; Hennum, *supra* note 3), MS (Lentz, *supra* note 20), MT (Hess, *supra* note 3; Redcrow, *supra* note 21), NE (C.P., *supra* note 21; Jackson, *supra* note 21), NJ (Myers, *supra* note 8), NM (Swavola, *supra* note 21; Vigil, *supra* note 18), NY (Rollock, *supra* note 21), NC (Torres, *supra* note 21; Norman, *supra* note 21; Clark, *supra* note 18), OH (Higgs, *supra* note 21; Rice, *supra* note 21; Manning, *supra* note 18; Lampkin, *supra* note 21; Seymour, *supra* note 18), OK (McDonald, *supra* note 21), OR (Bockorny, *supra* note 21; Moore, *supra* note 20), SC (Robinson, *supra* note 4), SD (Burtzlaff, *supra* note 19), TN (Devita, *supra* note 21; Aucoin, *supra* note 21; Leaphart, *supra* note 21), TX (Hayward, *supra* note 21), VT (Verrinder, *supra* note 19), VA (Wilmoth, *supra* note 21; Pancoast, *supra* note 21), WA (Hutcheson, *supra* note 21; Hanson, *supra* note 7; Walker, *supra* note 21; Bowerman, *supra* note 21), WV (Steele, *supra* note 21), WI (Landis, *supra* note 19), WY (Griffin, *supra* note 21).

203. It is certainly possible that expert testimony was used in additional cases, but may not have given rise to an issue on appeal. Thus, it may well be that the 71 percent calculation is too low.

204. FL (Rogers, *supra* note 8; Terry, *supra* note 3), GA (Smith, *supra* note 3), IL (Minnis, *supra* note 3), ME (Anaya (1981), *supra* note 3), MO (Williams, *supra* note 20), NJ (Kelly, *supra* note 3), OH (Koss, *supra* note 3; Daws, *supra* text, page 2), OK (Bechtel, *supra* note 3), PA (Kacsmar, *supra* note 8; Stonehouse, *supra* note 4; Tyson, *supra* note 18), SC (Wilkins, *supra* note 8; Hill, *supra* note 3), TX (Fielder, *supra* note 3), WA (Allery, *supra* note 3).

205. KY (Craig, *supra* note 19), NM (Gallegos, *supra* note 3).

206. CA (Romero, *supra* note 8; Day, *supra* note 8), DE (Scott, *supra* note 107 (There is some question whether this code applies to this case.)), TN (Zimmerman, *supra* note 21).

207. AZ (Denny, *supra* note 21), FL (Hawthorne, *supra* note 20), GA (Chapman (1988), *supra* note 4), IA (Jones, *supra* note 22), KS (Hodges, *supra* note 3; Hundley, *supra* note 4), KY (Ford, *supra* note 21), LA (Edwards, *supra* note 24), MD (Banks, *supra* note 21), MA (Rodriguez, *supra* note 3), NV (Larson, *supra* note 21), NJ (McGuigen, *supra* note 8), NM (Branchal, *supra* note 8), NY (Barrett, *supra* note 21; Ciervo, *supra* note 3; Emick, *supra* note 3), ND (Leidholm, *supra* note 21), PA (Dillon, *supra* note 21), RI (Ordway, *supra* note 18; McMaugh, *supra* preface endnote 1), TN (Furlough, *supra* note 21), TX (Pierini, *supra* note 21), WA (Kelly, *supra* note 4), WV (Betty J.W., *supra* note 21; Duell, *supra* note 21; Lambert, *supra* note 21), WI (Felton, *supra* note 21).

208. IN (Allen, *supra* note 21), MI (Wilson, *supra* note 19), NC (Heidmous, *supra* note 21), PA (McFadden, *supra* note 146), TX (Ortiz, *supra* note 9), WA (Janes, *supra* note 4).

209. DC (Ibn-Tamas (1979), *supra* note 20).

210. Results are reported in this table for 79 of the 80 cases. The other case involved an appeal by the state of an acquittal of a battered woman defendant.

211. Number and percentage are estimated so that affirmances and reversals will total to 100 percent because the number of cases remanded for new trial is unknown.

212. Maguigan's base was 270 cases; if 40 percent were reversed, then 108 cases were reversals. She reported that 16 percent of these represented expert testimony-related errors; thus, 16 percent of 108 equals 17 cases.

213. *See* cases cited *supra* at note 198.

214. FL (Rogers, *supra* note 8), MO (Williams, *supra* note 20), OH (Koss, *supra* note 3; Daws, *supra* text, page 2), OK (Bechtel, *supra* note 3), PA (Kacsmar, *supra* note 8; Tyson, *supra* note 18), SC (Wilkins, *supra* note 8).

215. 9th Cir. (Winters, *supra* note 40), 8th Cir. (Arcoren, *supra* note 41).

216. S.D.N.Y. (Taylor, *supra* note 37), S.D.Fla. (Ellis, *supra* note 42).

217. U.S. Tax Ct. (Toner, *supra* note 46), N.D.Ill. (Gregory, *supra* note 45), W.D.La. (Gordon (1986), *supra* note 46), D.Hawaii (Wilson, *supra* note 79).

218. E.D.N.Y. (Gaviria, *supra* note 46).

219. 11th Cir. (Sixty Acres (1991), *supra* note 46), 10th Cir. (Lumpkin, *supra* note 46

(habeas corpus denied)) 9th Cir. (Gable, *supra* note 40; Russell, *supra* note 40; Archer, *supra* note 37; July, *supra* note 40; Johnson, *supra* note 40 (also remanded on other grounds); Homick, *supra* note 37), 8th Cir. (Whitetail, *supra* note 43 (also remanded on other grounds)), 7th Cir. (U.S. v. Mark Thomas, *supra* note 37), 6th Cir. (Ware, *supra* text, page 2 *(habeas corpus denied)*; Meeks, *supra* note 40 *(habeas corpus denied)*; Thomas v. Arn, *supra* note 37 *(habeas corpus denied)*), 5th Cir. (Gordon (1987), *supra* note 46), 3rd Cir. (Santos, *supra* 46), S.D.Ohio (Tourlakis, *supra* note 37 *(habeas corpus denied)*), E.D.Pa. (Fennell, *supra* note 45 *(habeas corpus denied)*).

220. 10th Cir. (Dunn (1992), *supra* note 41), D.Kan. (Dunn (1991), *supra* note 42).

221. 9th Cir. (Sebresos, *supra* note 40), N.D.Ala. (Sixty Acres (1990), *supra* note 46).

Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women

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Introduction

The Violent Crime Control and Law Enforcement Act of 1994, Section 40507 of Title IV, the Violence Against Women Act requires a report on the "assessment by State, tribal, and Federal judges, prosecutor, and defense attorneys of the effects that evidence of battered woman syndrome may have in criminal trials." This report is a response to that legislative requirement and it provides a framework for two companion documents also developed in response to the same Section of the Violence Against Women Act: (a) *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*[1] and (b) *Validity of "Battered Woman Syndrome" in Criminal Cases*.[2] A related report, *Expert Testimony in Criminal Cases Involving Battered Women: A Resource Monograph*,[3] developed by the National Association of Women Judges, provides a discussion of key issues in these cases.

The present document presents a discussion of the impact that evidence of battering and its effects had on criminal trials.[4] This report is based largely on the results of a focus group conducted over three days consisting of federal and state court judges, prosecutors, defense attorneys, expert witnesses, and advocates.[5] See the Overview for further elaboration of this process. The introduction of evidence on battering and its effects in criminal cases has been to increase recognition in the courtroom of the problem of domestic violence. The purpose of this report is to explore both the direct and indirect effects of the use of this testimony.

Background

When evidence of battering and its effects is introduced in a criminal trial, it may be offered both through fact witness and expert witness testimony. The battered woman and other fact witnesses (e.g., family, neighbors, coworkers, police officers, physicians, therapists) often provide testimony as to various aspects of the battered woman's experience through their descriptions of violent acts directed toward the battered woman, resultant injuries, and the battered woman's responses to the violent and abusive behavior.

In contrast, an expert witness can offer an opinion about the battered woman's experience, based on an analysis of relevant information. The Rule 702 of the congressionally-enacted Federal Rules of Evidence states the following:

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

Expert testimony has been introduced in criminal cases involving battered women since the late 1970s.[6] A 1977 Supreme Court of Washington decision, *State* v. *Wanrow*,[7] ruled in a self-defense case involving a woman defendant that she was "entitled to have the jury consider her actions in the light of her own perceptions of the situation."[8] The lawyers successfully argued that the jury instructions offered at trial did not consider the woman's perspective, thereby failing to correctly apply the existing standard of self-defense: "requiring the jury to consider the defendant's action 'seeing what (s)he sees and knowing what (s)he knows,' taking into account all the circumstances as she knew them at the time."[9] Thus, the original intent of expert testimony in criminal cases involving battered women was to explain "the common experiences of, and the impact of repeated abuse on, battered women."[10]

Expert testimony was developed to show the trier of fact the context of a battered woman's actions.[11] This type of expert testimony has been called social framework testimony: "employing social science research . . . to provide a social and psychological context in which the trier can understand and evaluate claims about the ultimate fact."[12] Based on a recent analysis, "expert testimony on battering and its effects is admissible, at least to some degree, or has been admitted (without any discussion of the standards for admissibility) in every state."[13] See *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*[14] for a review of case law and state statutes regarding admissibility.

The testimony of an expert witness is offered as either general or case-specific testimony. General testimony refers to that which is known concerning battering and its effects based on an understanding of the scientific and specialized[15] knowledge in the field. In this type of testimony, there is no attempt to form specific opinions or conclusions related to a particular case. Alternately, case-specific testimony offers an analysis about a particular battered woman and the context of her life. Case-specific testimony places the unique facts of a particular case into the framework of more general knowledge. In this type of testimony, in which opinions and conclusions about a particular battered woman are offered, a face-to-face evaluation of the battered woman is required. In addition, other information is usually relied

upon for the evaluation, including a review of relevant documents and information obtained from people other than the battered woman.

Expert testimony on battering and its effects can be introduced in criminal cases involving battered women by both defense counsels and prosecuting attorneys. Expert testimony is used by defense counsels in various types of criminal defenses such as self-defense, duress, and insanity. This testimony may also be used by the defense for purposes of mitigation during the sentencing phases of a trial. Prosecutors use expert testimony to explain the battered victim's recantation or lack of cooperation with the prosecution of a batterer. Further, both prosecution and defense use expert witness testimony to provide explanations for what may be misconceptions about battered women, battering, and its effects.[16] See the companion report, *Validity of the Use of Medical and Psychological Expert Testimony in Criminal Cases Involving Battered Women*,[17] for an extended discussion of the content of expert witness testimony.

Impact of Evidence Concerning Battering and Its Effects

In this report, evidence concerning battering and its effects in criminal trials involving battered women is examined for both its direct and indirect effects. Direct effects examined in this report are the implications for (a) the deliberation process and (b) the disposition of cases. Indirect effects include implications for (a) the judiciary, (b) legal counsel, (c) other legal matters, (d) resource availability, and (e) the larger community.

Direct Effects

Implications for the deliberation process

This section addresses the implications for the deliberation process by the factfinder of introducing evidence concerning battering and its effects. The major purpose of such evidence is to assist the triers of fact in their deliberations concerning the ultimate issues. The ultimate issues are the legal elements explicated in the jury instructions that must be proven in the case.[18] Another purpose of introducing evidence concerning battering and its effects is to dispel common myths and misunderstanding concerning domestic violence, including stereotypes of both battered women and of batterers, that may interfere with the factfinders' ability to consider these and other issues in the

case.[19] See the *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*[20] for an extensive review of the scope of expert testimony defined by case law and state statutes.

There was clear and strong agreement among judges, defense attorneys, prosecutors, expert witnesses, and advocates that expert testimony concerning battering and its effects can assist the factfinder in more effectively evaluating the evidence in a criminal case involving a battered woman. However, there was also consensus that the concept "battered woman syndrome" is not adequate to portray the necessary information to assist the factfinder "to understand the evidence or to determine a fact in issue."[21] The dilemma that results is that, on the one hand, there is historical and/or legal precedent for "battered woman syndrome" as a term to refer to such testimony and, on the other hand, "battered woman syndrome" is not adequate as a construct to incorporate the breadth of knowledge about battering and its effects that may be relevant in these cases.

Historically, there is precedent for referring to expert testimony in cases involving battered women as "battered woman syndrome" testimony. The term has been used to refer both to the dynamics of a battering relationship and to the various effects of battering on victims.[22] There is the perception that "battered woman syndrome" is a condition for which distinct criteria exist. Such a perception is reflected in the question, "Does she suffer from the "battered woman syndrome?". The courts have come to recognize the term as familiar and some states have incorporated the language of "battered woman syndrome" or its variants, such as "battered spouse syndrome," in laws codified to govern the admissibility of such testimony. See *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*[23] for a complete review of state statutes governing admissibility of expert testimony concerning battering and its effects. Therefore, precedent would support continuing to refer to such testimony using the term "battered woman syndrome."

However, the consensus among participants was that the concept "battered woman syndrome" is inadequate to convey the information that is available for the purpose either to assist the factfinder in understanding the evidence or to determine a fact in issue. As stated earlier, "battered woman syndrome" has been used to refer to both the dynamics of battering and to the psychological effects of battering. As it has been used in the courtroom, the term is imprecise and, thus, confusing. The questions relevant to battering and its effects that may be raised during expert testimony are many; they do not lend themselves to characterization by a single construct. Thus, "battered woman

syndrome" was thought by the focus group to be both too ambiguous and too narrow. The term does not incorporate the breadth of available knowledge concerning battering and its effects that may be relevant in a criminal case involving a battered woman. There is considerable scientific and scholarly knowledge that supports this consensus. See *Validity of the Use of Medical and Psychological Expert Testimony in Criminal Cases Involving Battered Women*[24] for a critique of "battered woman syndrome."

To elaborate, a major concern of participants in the focus group is the use of "battered woman syndrome," as a specific checklist of battered woman characteristics, to establish either that one is a battered woman or that one "qualifies" for expert testimony. Such an approach excludes battered women who do not demonstrate a specified pattern of effects, thus creating a stereotype of the "real" or the "worthy" battered woman. There is no basis to suggest that only particular psychological effects of violence are relevant in criminal cases involving battered women.

The effects of violence on battered women, like trauma victims generally, vary based on characteristics of the violence (e.g., type, severity, chronicity, patterning), of the recovery environment (e.g., socioeconomic conditions, social support, community response), and of the individual (e.g., prior history of victimization, coping style).[25] Thus, there is no single effect or set of effects that characterize all battered women; there is a range of effects demonstrated in the literature characteristic of trauma victims, including battered women. For example, given a particular level of violence, one battered woman may demonstrate resilience to the negative effects of violence due, in part, to her greater access to social support and economic resources when responding to the violence and abuse. Assuming the same level of violence, another woman may experience debilitating effects due, partially, to the cumulative effects of victimization based on a lifetime of physical and sexual assault during childhood and adulthood. Alcohol or drug use as a strategy for coping might also contribute to the negative effects of violence in some cases. Thus, expert testimony concerning the effects of violence on a battered woman, and the factors that influence those effects, may be useful to the triers of fact for considering the issues in the case. Such testimony that derives from the body of scientific knowledge is more useful to the factfinder than dated or stereotypic notions of battered women as passive or helpless.

Thus, there is a growing body of knowledge related to battering and its effects that may be relevant to a particular criminal case involving a battered woman and useful to the triers of fact in the deliberation process. This knowledge base has developed greatly since the early introduction of "battered woman

syndrome" as the rubric under which expert testimony is offered. The consensus of the focus group was that expert testimony is an important vehicle for providing the factfinder with access to such relevant information. Therefore, the introduction of expert testimony in this area has created the demand that developments in knowledge (e.g., new theories, empirical findings, observations in applied settings) be incorporated in expert witness testimony concerning evidence of battering and its effects.

A second major concern raised by the focus group was the extent to which the term "battered woman syndrome" signals disorder, pathology, or a clinical condition. Although battered women may experience a number of clinical symptoms or diagnoses associated with their being victims of violence, these do not constitute a legal defense *per se*.[26] A battered woman's reasonable belief that an intimate partner was going to kill her and that immediate action was necessary to prevent it can most often be explained by inductive reasoning based on the battered woman's repeated experiences of abuse.[27] Because of such violence, it can be explained that the battered woman has learned to detect behaviors that signal a beating is inevitable. However, such a perception does not require the notion of a syndrome or other pathological condition. Only on some occasions is posttraumatic stress disorder relevant to this explanation.[28] Thus, for these reasons the focus group concluded that the term "battered woman syndrome" is not only inadequate, but can potentially mislead the factfinder in consideration of a criminal matter involving a battered woman.

To summarize, the panel concluded that evidence about battering and its effects was relevant and important in criminal cases involving battered women to assist the triers of fact in their deliberation of the issues. There was consensus that the knowledge base or experience upon which expert testimony is based must reflect the diversity of battered women's experience in order for expert testimony concerning battering and its effects to best assist the factfinder in the case. Second, the panel concluded that the notion of a syndrome, although descriptive of some battered women, does not represent the recognized variation in battered women's experience nor the corpus of scientific knowledge in the field. Therefore, "battered woman syndrome" is inadequate as a term to characterize such testimony. As an alternative, reference to expert testimony concerning battering and its effects allows for the introduction of relevant scientific and specialized knowledge across various types of criminal cases involving battered women. Of course, opinions or conclusions offered by an expert witness qualified due to "knowledge, skill, experience, training, or education"[29] must necessarily be derived from a foundation of "scientific, technical, or other specialized knowledge"[30] to serve

the intended purpose: to "assist the trier of fact to understand the evidence or to determine a fact in issue."[31] See *Validity of the Use of Medical and Psychological Expert Testimony in Criminal Cases Involving Battered Women*[32] for a review of the professional literature that supports the use of expert testimony in these cases.

Implications for the disposition of cases

The effect of evidence concerning battering and its effects in criminal cases involving battered women can also be examined in terms of the disposition of cases. However, at the trial level, there are no available data summarizing the disposition of cases involving a battered woman either as defendant or as victim based on the introduction of evidence concerning battering and its effects, whether through the use of expert or fact witness testimony. This may be due, in part, to the difficulty in tracking cases at the trial court level in which domestic violence issues are raised.

However, the panel discussed factors that may contribute to a particular disposition in these cases. First is the issue of whether expert testimony presents an understanding of the battered woman within the social context of the battering relationship and the social problem of domestic violence more generally. A second factor thought to influence case disposition was the attorney's understanding of domestic violence and his or her skill in best utilizing an expert witness. It was thought that expert witnesses are often underutilized due to the attorney's inexperience in this area. Related to this issue is the extent to which an attorney can bridge the link for the factfinder between this expert witness' testimony and the specific issues in the case, thus making explicit the relevancy of the testimony. Finally, a third factor thought to influence the outcome of the case relates to qualities of the expert witness. Specifically, the expert should understand the phenomenology of battered women's experience through direct contact with battered women—rather than through academic endeavors alone.

Although a summary of case dispositions on a trial level is not available, case dispositions based on appellate decisions in criminal cases involving battered women defendants have been examined. A review of state court cases reported in the *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*,[33] found that convictions of battered women were reversed in 32 percent of cases,[34] of which 45 percent of these reversals were due to erroneous exclusion of, limitation of, or failure of counsel to present expert testimony on battering and its effects. Further, the *Trend Analysis* found that 63 percent of conviction/sentences were affirmed on appeal by either

intermediate or high courts regarding battered woman defendants. Based on the *Trend Analysis*, expert testimony was found to have been admitted or found admissible in 71 percent of cases that affirmed convictions or sentences.

These findings suggest that even with the introduction of expert witness testimony in cases involving a battered woman defendant, most convicted cases are affirmed on appeal. What can be concluded from the available data from the *Trend Analysis* is that "contrary to popular misconceptions reflected in some media coverage of this issue—the defense's use of or the court's awareness about expert testimony on battering and its effects in no way equates to acquittal on the criminal charges lodged against a battered woman defendant."[35] See *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*[36] for a comprehensive review of case dispositions on appeal in both state and federal cases to reach a conclusion about the effect of the use of expert testimony in criminal cases involving battered women.

Indirect Effects

Besides the direct impact, several indirect effects of evidence concerning battering and its effects were identified. While the specific impact of these indirect effects may be more difficult to determine in a particular case, their influence was, nevertheless, considered.

Implications for the judiciary

The introduction of expert testimony in criminal cases involving battered women has had numerous implications for the judges who serve in these cases. The United States Attorney General's Task Force on Family Violence, in its final report states,

> Judges are the ultimate legal authority in the criminal justice system. If they fail to handle family violence cases with the appropriate judicial concern, the crime is trivialized and the victim receives no real protection or justice.[37]

Accordingly, it is imperative that judges who handle cases involving domestic violence have a basic understanding of battering and its effects. Without some familiarity with such information, the trial court judge may fail to determine the relevancy of expert witness testimony to the issues at hand, a factor necessary for ruling on admissibility and other matters. Even where admissibility of such expert

testimony is already established,[38] the judge is in a position to rule on issues such as jury instructions and scope of expert testimony allowed before the triers of fact. The "judge sets the tone in the courtroom, and it is the judge who makes the most critical decisions affecting the lives of the victims, the perpetrators, and the children."[39] It follows that one impact of the introduction of evidence on battering and its effects in the courtroom has been on the enterprise of judicial education.

Determining the validity of expert testimony according to the criteria set forth in *Daubert* v. *Merrill Dow Pharmaceuticals, Inc.*[40] places an increased burden on the trial court judge. As discussed in *Daubert,* validity must also consider the "fit" for the purpose used. Thus, expert testimony that may have been determined to be valid in one case may not be when offered for a somewhat different purpose or in a different set of circumstances in another case. The impact for the trial court judge is one that requires competence in understanding validity of knowledge, based on both scientific[41] and nonscientific evidence.[42] While there are standard principles of scientific validity, for various types of scientific methodology (e.g., experimental design, correlational, factor analysis, descriptive, or qualitative), the evaluation of validity differs accordingly. Therefore, a general understanding of the scientific methods used in domestic violence research is useful for the trial court judge to determine validity of scientific evidence in these cases.

Thus, for reasons cited, judicial education concerning domestic violence has become more in demand. One type of effort has been directed at the development of judicial training curricula and other materials in the area of domestic violence. The State Justice Institute has funded the development of three judicial curricula: *Family Violence: Effective Judicial Intervention,* prepared by the National Association of Women Judges, and *Domestic Violence: The Crucial Role of the Judge in Criminal Court Cases: A National Model for Judicial Education,* and *Domestic Violence in Civil Court Cases,* both prepared by The Family Violence Prevention Fund. These and other curricula have been applied in judicial training across the country. In addition, The State Justice Institute has funded numerous curriculum-adaptation projects related to domestic violence, adapting a general curriculum to state-specific case law, statutes, and criminal codes of evidence.

On another front, the National Judicial College has made a commitment to meet the needs of the judiciary to understand and deal with the pressing issues related to domestic violence.[43] Among their course offerings related to domestic violence, The National Judicial College annually offers a week-long course focused solely on the topic of domestic violence. In addition, The Family Violence Project, a program of the National Council of Juvenile and Family Court Judges through the Conrad N. Hilton Foundation Model Code

Project, provided training on domestic violence to 555 legislators, judges, and other professionals in the six-month period between July and December, 1995. The American Bar Association Judicial Administration Division has sponsored judicial training through the National Judicial College and through their own seminar series for appellate judges. Both the 1994 and 1995 Annual Meetings of the American Bar Association offered educational programs on the topic of domestic violence available for judges and lawyers. There have been many other national, state, and local training conferences specifically geared to the issues of domestic violence for judges at all levels of the court.

In summary, introduction of evidence concerning battering and its effects has increased the demand for judicial education on this topic. An additional burden is placed on trial court judges, based on the ruling in the *Daubert* decision, to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable"[44] which requires "a valid scientific connection to the pertinent inquiry as a precondition to admissibility."[45] Taken together, these factors point to the need for judges to be well versed in both the subject matter of domestic violence as well as the methods of scientific inquiry related to it.

Implications for legal counsel

There are also important implications for both defense and prosecuting attorneys for the introduction of evidence concerning battering and its effects. The focus group identified the importance of attorneys recognizing the need for knowledge related to battering and the effects it has on victims to competently work on these cases. Without this competence, both defense attorneys and prosecutors rely on the same misconceptions and misunderstandings about domestic violence as does the lay public. Without an adequate understanding of the dynamics of domestic violence, and the ways in which this experience can impact on victims, lawyers are ill-equipped to recognize the relevance of this type of evidence where it exists. Where lawyers do understand the relevance of this information to the issues in the case, they can introduce appropriate evidence, whether through the battered victim, other witnesses, or an expert witness.

Another implication of the introduction of such evidence in self-defense cases, historically, has been the recognition of the relevance of similar evidence in other criminal cases. One type of non-self-defense case in which expert witness testimony concerning battering and its effects has been introduced is when a battered woman is charged with a crime to which she asserts as a defense that she engaged in the criminal acts under duress or coercion by her batterer. The other type of case is one in which the battered woman committed

a crime against a third party, not the batterer, but did not assert that she did so under duress. See *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*[46] for a review of cases in which expert testimony has been introduced in non-self-defense criminal cases. . . . . .

There is another implication that the introduction of domestic violence-related expert testimony has held for prosecuting attorneys. Prosecutors rely on such testimony in a case against the batterer when the battered woman, who is a victim/witness in the case, has recanted previous testimony, is unwilling to cooperate with the prosecution, or has engaged in behavior that the factfinder may find puzzling regarding the facts of the case.[47] See *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*[48] for a review of case law and state statutes allowing the introduction of expert testimony concerning battering and its effects by the prosecution. Thus, some purposes for which prosecutors and defense attorneys use the evidence in criminal cases are quite similar.

An important implication of evidence of battering and its effects introduced in criminal trials for prosecuting attorneys has been greater attention to these issues at the charging stage, sometimes involving the grand jury. In some cases, prosecutors use such evidence to influence their decisions about whether to bring charges in a given case and at what level. Under some circumstances, this evidence is presented to a grand jury to assist them in their decisions about returning an indictment in a criminal case.[49]

The demand for increased understanding of domestic violence has resulted in greater training opportunities for lawyers working these cases. The National College of District Attorneys offered their Fifth Annual National Conference on Domestic Violence in 1995. The American Bar Association Section of Criminal Justice offered a National Institute, "Defending Battered Women in Criminal Cases" in 1992 and 1993. Other national, state, and local opportunities for legal education have been created in response to the demand.

Another means by which an individual attorney can gain a better understanding of the relevance of domestic violence in a particular case is through consultation with an expert witness. Thus, another implication of the introduction of such testimony is that attorneys use experts not only to provide testimony but also to consult about issues of domestic violence in their cases. The consultants may be shelter workers, battered woman advocates, counselors, psychologists, psychiatrists, or social workers.

Implications for other legal matters

The introduction of evidence of battering and its effects in criminal trials has preceded the use of such testimony in most other contexts. Nevertheless, such evidence has been introduced in various types of civil cases, including dissolution of marriage, custody, civil protection orders, tort actions, and contract cases. In these, as in criminal cases, the evidence is offered for the purpose of assisting the factfinder, the jury or a judge, in consideration of the issues in the case.

Further, evidence of battering and its effects has been relied upon to evaluate clemency petitions. Florida Governor Lawton Chiles established interdisciplinary panels of experts to review evidence related to domestic violence and to provide relevant information to the Governor and to the Parole Board for their determination of clemency petitions by alleged battered victims.[50] Thus, the impact of evidence concerning battering and its effects in criminal cases has been associated with the recognition that similar evidence can be useful in matters other than criminal legal cases.

Implications for resource availability

Increased efforts to introduce evidence of battering and its effects have created a greater demand for resources needed in order for expert witnesses to consult with attorneys and to testify in these cases. The focus group expressed concern for the problems that result from the lack of access to expert witnesses. This lack of access stems from two major sources. First, the use of expert witnesses requires financial resources. Case-specific expert witness testimony requires a comprehensive assessment, including a face-to-face evaluation with the battered woman. Time required for reading and integrating other documents in the case, trial preparation, consultation with an attorney, and actual trial testimony can be extensive. Even general expert testimony requires several hours in consultation with the attorney to determine the specific information relevant to the case at hand and to prepare for testimony. Therefore, lack of funds can present a significant problem in a case where expert testimony may be useful, but in which there is no source of funds to pay for an expert's time. Of course, some experts contribute a portion of their time *pro bono*, but that is not a sufficient solution to the problem, nor can it be routinely expected.

A second issue associated with the greater demand for the availability of expert witnesses is the reluctance of some judges to rule that testimony from a nonprofessional is admissible as expert witness testimony. Rule 702 of the Federal Rules state that an expert witness is qualified by reason of

"knowledge, skill, experience, training, or education." Thus, a shelter worker, police officer, trauma technician, or hotline worker, for example, may qualify as an expert witness based on her or his extensive experience working with battered women, and thus could testify generally about their observations and knowledge of battered women's experiences. While such an expert witness would not be qualified to form a professional opinion of an individual battered woman, it is not always necessary to provide such evidence. A final note: Expertise based on experience working with battered women was considered by the focus group to be essential, regardless of the expert's other qualifications.

Thus, the increased applicability of evidence related to battering and its effects has created a need for increased resources to respond to the need for expert witness testimony in various legal matters. The need exists both in terms of financial resources for experts and in terms of admissibility of expert witness testimony from non-credentialed persons experienced with domestic violence.

Implications for the community

The impact of introduction of evidence concerning battering and its effects in the courts has been felt in the community at large. Legislatures have modified statutes and criminal codes in response to the impact of such evidence in the criminal process. See *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*[51] for a review of state statutes and criminal codes related to admissibility, the showing necessary to introduce expert testimony, type of cases in which expert testimony is admitted, scope and relevance of expert testimony, and whether expert testimony triggers adverse examination. As the community demands a more effective response to domestic violence, the local, state, and national legislative bodies have responded with legislation to assist in that effort. For example, The Violence Against Women Act is federal legislation that increases penalties for specific violent crimes, creates new categories of criminal behavior related to domestic violence, provides greater protection for victims of domestic violence, and funds an array of initiatives focused toward preventing domestic violence. In addition, many states have passed comprehensive domestic violence laws.

Further, the introduction of evidence concerning battering and its effects introduced into the courtrooms has been associated with the development of domestic violence coordinating councils across the country. A domestic violence coordinating council, often headed by the court, consists of community organizations, agencies, and individuals involved with the problem of domestic violence. Typical membership includes representatives from the

court, the state attorney's office, the prosecutor's office, law enforcement, batterer treatment programs, battered women's shelters, schools, hospitals, law clinics, child welfare agencies, and other government agencies and organizations, for example. A key focus of the activities of coordinating councils has been to improve the effectiveness in the way domestic violence cases are handled in the community at all levels. These activities have led to reform in every segment of the community that responds to domestic violence. See for example, the Dade County Domestic Violence Plan, "a comprehensive plan to reduce the rate of incidents of domestic violence in the community."[52] The plan includes a Domestic Violence Court, a criminal court with a civil component that mandates punishment for the defendant but also emphasizes meaningful treatment for the offender, victim, and children. Another example is the Duluth Model, a comprehensive community effort to coordinate law enforcement, the justice system, and mental health agencies in Duluth, Minnesota. This model has recently incorporated three new entities: public health, child welfare, and private and public sector employee assistance programs.[53] Finally, the District of Columbia Superior Court has recently approved an integrated, interagency Domestic Violence Plan[54] that adopts numerous innovative methods for responding to domestic violence, especially in the courts.

Conclusion

This report provides a summary of the assessment by judges, defense attorneys, prosecutors, expert witnesses, and advocates of the effects of evidence concerning battering and its effects in criminal cases involving battered women. This group concluded that the most important impact of such testimony was to assist the factfinders in considering evidence presented in the case. The strong consensus was that expert testimony is most likely to clarify the evidence for the factfinder when it is drawn from the extensive body of available scientific and clinical knowledge and when that connection is made relevant to the factfinder. Equally compelling was the conclusion that the concept "battered woman syndrome" is inadequate to the task. There was a recognition that the impact of evidence concerning battering and its effects in criminal trials has been felt outside the context of the individual criminal case in which it has been introduced. Finally, there was recognition of the need for continued education of judges and lawyers in order to most effectively utilize the available expertise concerning battering and its effects in criminal cases. Specifically, the need for standards of practice for defense and prosecuting attorneys and expert witnesses in criminal cases involving battered women was identified.

Notes

1. Parish, J. (1994). *Trend analysis: Expert Testimony on Battering and its Effects in Criminal Cases*. Report prepared for "Family Violence and the Courts: Exploring Expert Testimony on Battered Women", a State Justice Institute funded project of the National Association of Women Judges (No. A-93-018.DEF).

2. Paper, "Validity of 'Battered Woman's Syndrome' in Criminal Cases" edited by Malcolm Gordon, NIMH, based on a paper by Dutton, M.A. (1995). *Validity of the Use of Medical and Psychological Expert Testimony in Criminal Cases Involving Battered Women*. A report prepared for Congress in response to the Violent Crime Control and Law Enforcement Act of 1994, Section 40507 of Title IV, The Violence Against Women Act.

3. Dutton, M.A. (1996). *Expert Testimony in Criminal Cases Involving Battered Women: A Resource Monograph*. A report prepared for "Family Violence in the Courts: Exploring Expert Testimony on Battered Women ", a State Justice Institute funded project by the National Association of Women Judges.

4. See Dutton, at supra note 2, for a discussion of the terminology "battered woman syndrome."

5. There were no tribal judges included in the focus group. Since expert witness testimony is not typically used in cases presented in tribal courts, no tribal court judges were identified with experience with this type of expert testimony.

6. See, for example, *Ibn-Tamas* v. *United States*, 407 A.2d 626 (D.C. Court of Appeals, 1979) which remanded a case to the trial court for reconsideration of the decision to exclude expert testimony. Also see Macpherson, S., Ridolfi, K. Sternberg, S., & D. Wiley (1981). Expert testimony. (Appendix G), In E. Bochnak (Ed.), *Women's self-defense cases: Theory and practice.* Charlottesville, VA: The Michie Company for list of 50 trial court cases in which expert testimony on the subject of battering was presented. Also see L. E. A. Walker (1989) *Terrifying love: Why battered women kill and how society responds.* New York: Harper & Row, Publishers for a discussion of a 1977 case involving a battered woman charged with homicide in which Dr. Walker testified as an expert witness.

7. 88 Wash. 2d 221, 559 P. 2d 548 (1977).

8. See E. M. Schneider & S. B. Jordan (1981). Representation of women who defend themselves in response to physical or sexual assault. In E. Bochnak (Ed.), *Women's self-defense cases*. Charlottesville, VA: The Michie Company. pp. 1-39 (at p. 23).

9. *Id.* at 20.

10. See E. M. Schneider (1986). Describing and changing: Women's self-defense work and the problem of expert testimony on battering. *Women's Rights Law Reporter*, 9(3/4), 195-226 at 198.

11. See H. Maguigan (1991). Battered women and self-defense: Myths and misconceptions in current reform proposals. *University of Pennsylvania Law Review*, 140(2), 379-486.

12. See Vidmar, N., & Schuller, R. A. (1989). Juries and expert evidence: Social framework testimony. *Law & Contemporary Problems*, 133.

13. See J. Parrish (1994). *Trend analysis: Expert testimony on battering and its effects in criminal cases*. Report prepared by the National Clearinghouse for the Defense of Battered Women (NCDBW) for the National Association of Women Judges in a State Justice Institute-funded project, "Family Violence and the Courts: Exploring Expert Testimony on Battered Women". (No. A-93-018.DEF).

14. Parrish, at supra note 13.

15. Specialized knowledge is that based on experience, training, or skill such as that acquired by a battered women's advocate or shelter worker, counselor, or law enforcement officer. Specialized knowledge is contrasted with scientific knowledge that is derived from scientific research.

16. See Parish, at supra note 13, at 35 for a legal discussion of the scope and relevance of expert testimony.

17. Dutton, at supra note 2.

18. See Maguigin, at supra note 11. Also see Maguigan, H. (1995).*A Defense Perspective on Battered Women Charged with Homicide: The Expert's Role During Preparation for and Conduct of Trials*. Paper prepared for the National Association of Women Judges' State Justice Institute-funded project, "Family Violence and the Courts: Exploring Expert Testimony on Battered Women" (No. A-93-018.DEF).

19. Maguigin, at supra note 11.

20. Parish at supra note 13.

21. Fed R. of Evid. 702.

22. Walker, L. E. A. (1992). Battered women syndrome and self-defense. Symposium on Women & the Law. *Notre Dame Journal of Law, Ethics & Public Policy*, 6(2), 321-224.

23. Parish, at supra note 13 (Appendix III).

24. Dutton, at supra note 2.

25. Green, B. L., Wilson, J., Lindy, J. D. (1985). Conceptualizing posttraumatic stress disorder: A psychosocial framework. In C. Figley (Ed.),*Trauma and its wake: The study and treatment of posttraumatic stress disorder* (pp. 53-69). New York: Brunner/Mazel.

26. With the exception of insanity, where the defendant must have a severe mental illness, defect, or disorder at the time of the alleged criminal act and that condition must have impaired the defendant's mental capacity to such an extent that either (s)he didn't understand the nature and consequences of what (s)he was doing or did not understand what (s)he was doing was wrong. See Potuto, J. R., Saltzburg, S. A., & Pearlman, H. S. (Eds.). (1993,

Supp.). *Federal Criminal Jury Instructions* (2nd ed.). Charlottesville, VA: Miche Company Law Publishers.

27. See Schopp, R. F., Sturgis, B. J., & Sullivan, M. (1994). Battered woman syndrome, expert testimony, and the distinction between justification and excuse. *University of Illinois Law Review*, 1194(1), 45-113 for an extended discussion of this issue.

28. See Dutton, at supra note 2, for a discussion of how posttraumatic stress disorder may result in the perception of danger.

29. Fed. R. of Evid. 702.

30. Fed. R. Evid. 702

31. Fed. R. Evid. 702.

32. Dutton, at supra note 2.

33. Parrish, at supra note 13.

34. Compare to Maguigin, H. 140 U. Pa. L. Rev. at 386, 432-33 who found a reversal rate of 43 percent, of which 47 percent were reversals for reasons related to exclusion or limitation on expert testimony.

35. Parrish, at supra note 13, at 53.

36. Parrish, at supra note 13.

37. See United States Attorney General's Task Force on Domestic Violence, Final Report.

38. See *State* v. *Hickson*, 630 So. 2d 172 (Fla, 1993). Also see Parrish, at supra note 13, for review by state of case law on admissibility.

39. The National Judicial College Annual Report (1994) at 19.

40. 113 S. Ct. 2786 (1993).

41. The guidelines provided in *Daubert* v. *Dow Pharmaceuticals* for evaluating validity were meant to relate only to scientific validity, leaving the issue of validity in nonscientific testimony unaddressed.

42. See Imwinkelried, E. J. (1994). The next step after Daubert: Developing a similarly epistemological approach to ensuring the reliability of nonscientific expert testimony. 15 *Cardozo L. Rev*, 2271 for a discussion of criteria for determining validity of nonscientific evidence.

43. The National Judicial College Annual Report (1994) at 19.

44. *Daubert* v. *Dow Pharmaceuticals, Inc.*, at supra note , at 9.

45. *Daubert* v. *Dow Pharmaceuticals, Inc.*, at supra note 40, at 11.

46. Parrish, at supra note 13.

47. Schroeder, J. M. (1991). Using battered woman syndrome evidence in the prosecution of a batterer. *Iowa law Review*, 76(3), 553-582.

48. Parrish, at supra note 13.

49. Blackman, J. (1986). Potential uses for expert testimony: Ideas toward the representation of battered women who kill. *Women's Rights Law Reporter*, 9(3/4), 227-240.

50. State of Florida, Office of the Governor, Exec. Order No. 92-80 (1991).

51. Parish, at supra note 13.

52. Administrative Order (No. 92-49) signed by Chief Judge L. Rivkind, Eleventh Judicial Circuit Court.

53. See Paymar. M. (1995). Coordinating multiple systems response: New efforts in Duluth. Paper presented at the International Study Group on the Future of Intervention with Battered Women & Their Families. Haifa, Israel.

54. See *The District of Columbia, Domestic Violence Plan.* Copies can be obtained from District of Columbia Courts, Cheryl R. Bailey, Ph.D., 500 Indiana Avenue, Room 1500, Washington, D.C. 20001 (202-879-1700).

Appendices Not Included