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Hear Me Now: The Admission of Expert Testimony on Battered Women's Syndrome—An Evidentiary Approach

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HEAR ME NOW: THE ADMISSION OF EXPERT TESTIMONY
ON BATTERED WOMEN'S SYNDROME—AN
EVIDENTIARY APPROACH

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INTRODUCTION

In the United States, at least three women a day are killed by their husbands or boyfriends.¹ A woman is assaulted or beaten every nine seconds in the United States, making domestic violence the leading cause of injury to women.² But domestic violence against women is not always limited to just the woman herself. Beyond “just” abusing women, between forty to sixty percent of men who abuse women also abuse children.³ Children living in a home with domestic violence are 1,500 times more likely to be abused themselves.⁴

From a legal perspective, domestic violence poses many challenges to the criminal justice system, including many evidentiary

1. DOMESTIC VIOLENCE STATISTICS, <http://domesticviolencestatistics.org/domestic-violence-statistics/> (last visited Nov. 3, 2013).

2. *Id.*

3. Kathy Luttrell Garcia, Note, *Battered Women and Battered Children: Admissibility of Evidence of Battering and its Effects to Determine the Mens Rea of a Battered Woman Facing Criminal Charges for Failing to Protect a Child from Abuse*, 24 UNIV. LA VERNE J. JUV. L. 101, 102 (2003–04) (citations omitted).

4. *Id.*

issues.⁵ The complexities of domestic violence cases also present unique challenges for prosecutors.⁶ Within this backdrop, Dr. Lenore Walker⁷ developed the Battered Women's Syndrome (BWS).⁸ BWS has since been used in many domestic violence cases⁹ and as part of self-defense claims when victims turn on their batterers.¹⁰

It should be acknowledged at the outset that this Note accepts BWS as an important and worthy development in criminal law.¹¹ It also assumes that BWS is a real, psychological condition worthy of proper legal protections without foreclosing the possibility of legal protections independent of a medical "syndrome."

The purpose of this Note is to assess and apply evidentiary principles to statutory permissions of expert testimony on BWS. Several states have developed evidentiary rules that specifically permit the use of expert testimony on BWS in domestic violence and self-defense cases.¹² This Note will argue that the Federal Rules of Evidence should embrace a similar statutory permission of expert testimony on BWS

5. See, e.g., *Arcoren v. United States*, 929 F.2d 1235, 1243 (8th Cir. 1991); *People v. Brown*, 94 P.3d 574, 583–84 (Cal. 2004).

6. See Matthew P. Hawes, Note, *Removing the Roadblocks to Successful Domestic Violence Prosecutions: Prosecutorial Use of Expert Testimony on Battered Woman Syndrome in Ohio*, 53 CLE. ST. L. REV. 133, 134 (2005–06) (noting that "[i]n a conventional criminal case the prosecution can expect to rely on the cooperation and participation of the victim to obtain a conviction. In a domestic violence case, however, the prosecution will often encounter victims who refuse to testify, recant previous statements, or whose credibility is attacked with questions on why they remained in a battering relationship.") (footnotes omitted).

7. See LENORE E. WALKER, *THE BATTERED WOMAN* 55–70 (1979).

8. Some debate remains over the proper terminology. See, e.g., *Brown*, 94 P.3d at 580; *People v. Humphrey*, 921 P.2d 1, 7 n.3 (Cal. 1996). The use of "syndrome" can connote a sense that victims of domestic violence suffer from an illness. *Brown*, 94 P.3d at 580. As a result, some modern commentators prefer "expert testimony on battering and its effects" or "expert testimony on battered women's experience." *Id.* In *Humphrey*, the court noted that

[d]omestic violence experts have critiqued the phrase 'battered woman's syndrome' because (1) it implies that there is one syndrome which all battered women develop, (2) it has pathological connotations which suggest that battered women suffer from some sort of sickness, (3) expert testimony on domestic violence refers to more than woman's psychological reactions to violence, (4) it focuses attention on the battered woman rather than on the batterer's coercive and controlling behavior and (5) it creates an image of battered women as suffering victims rather than as active survivors.

Humphrey, 921 P.2d at 7, n.3 (citation omitted). For purposes of this Note, though, "battered women's syndrome" (BWS) will be the exclusive terminology.

9. See, e.g., cases cited *supra* note 5.

10. See, e.g., *Humphrey*, 921 P.2d at 13; *Bechtel v. State*, 840 P.2d 1, 6 (Okla. Crim. App. 1992); *Commonwealth v. Miller*, 634 A.2d 614, 621–22 (Pa. Super. Ct. 1993).

11. Whereas the effectiveness of BWS in criminal practice may be debated, its impact is nonetheless assumed for purposes of this Note.

12. See, e.g., CAL. EVID. CODE § 1107 (West 2013); MO. ANN. STAT. § 563.033 (West 2013); OHIO REV. CODE ANN. § 2901.06 (West 2013).

with the policy purpose of increasing the number of states that recognize such an evidentiary rule. The ultimate goal is that through greater statutory codification of BWS, domestic violence cases and cases involving an affirmative claim of self-defense based on BWS can be successfully litigated.

I. OVERVIEW OF BATTERED WOMEN'S SYNDROME

A “battered woman” is “one who assumes responsibility for a cycle of violence occurring in a relationship, where the abuser (a husband or boyfriend) has told her that the first violent episode was her fault.”¹³ General characteristics of BWS ‘sufferers’ include “(1) the belief that the violence to the woman is her fault; (2) an inability to place responsibility for the violence elsewhere; (3) a fear for her life and the lives of her children; and (4) an irrational belief that the abuser is omnipresent and omniscient.”¹⁴ In order to deal with the constant violence, a battered woman often develops strong coping mechanisms and a belief that by doing more she can stop the constant violence.¹⁵ Ultimately, BWS is a psychological condition that can lead “a female victim of physical abuse to accept her beatings because she believes that she is responsible for them, and hopes that by accepting one more beating, the pattern will stop.”¹⁶

Typically, BWS follows a cycle of violence.¹⁷ As one author describes the cycle:

The battering relationship itself is often . . . cyclical in nature, with three distinct phases: tension building, confrontation, and contrition. During the ‘tension building’ phase, the woman is generally compliant, often feeling as though she deserves the abuse. Once the tension reaches a boiling point, the batterer will erupt uncontrollably, committing a violent act. Next, in an abrupt about-face, the abuser will exhibit seemingly intense love and affection towards his victim. The victimized women are then led to believe that the violence was an isolated incident and that it will not continue. This cycle of violence may leave the victim with feelings of learned helplessness, low self-esteem, depression, minimization techniques, self-isolation, and passivity.¹⁸

13. *Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir. 1991).

14. *Id.*

15. *Id.*

16. *Id.* at 1240.

17. *See, e.g., People v. Brown*, 94 P.3d 574, 583 (Cal. 2004).

18. Hawes, *supra* note 6, at 137 (footnotes omitted); *see also* Garcia, *supra* note 3, at 105–06.

This cycle of violence creates an environment analogous to other forms of post-traumatic stress.¹⁹ Although cyclical in nature, there is no defined amount of time required for moving through the cycles.²⁰

The first stage of the cycle, the tension building phase, focuses on the batterer asserting control.²¹ The batterer may assert control by criticizing his partner's behavior, calling her names, highlighting her shortcomings or failures, and isolating his partner from family or friends.²² Intimidation also forms a central part of the tension building phase wherein the batterer may use direct threats of harm or indirect threats of harm such as yelling, punching walls, or harming pets.²³ Following the verbal abuse and intimidation, the batterer gains control by expressing his love for his partner and shifting any blame to her.²⁴

In the second stage, the confrontation phase, the batterer displays overt violence against his partner.²⁵ Although this stage may begin with relatively minor violence such as "shoving, slapping, hair-pulling, or slamming the woman up against a wall," the level of violence escalates over time to include "kicks, punches with closed fists, actual beatings, multiple blows, threats with knives and guns, rape, mutilation, and even murder."²⁶

Following the violence of the second stage, the final contrition phase focuses on keeping the victim with the batterer.²⁷ The batterer becomes apologetic and professes his love, claiming the violent episode was a one-off outburst that will not happen again.²⁸ He also may try to blame the victim for the violence but nonetheless promises to change, and in some cases may even volunteer to go to counseling.²⁹ But, "[s]imultaneously, he [the batterer] reinforces feelings of inadequacy and love in the victim, as well as his power and control over her."³⁰

19. See *Bechtel v. State*, 840 P.2d 1, 7 (Okla. Crim. App. 1992) ("[BWS] is considered a sub-category of Post-traumatic Stress Disorder, which is generally accepted and is listed in the DSM-3R. Based upon our independent review of the available sources on the subject, we believe that the syndrome is a mixture of both psychological and physiological symptoms but is not a mental disease in the context of insanity."). *But see State v. Copeland*, 928 S.W.2d 828, 838 (Mo. 1996) (en banc).

20. WALKER, *supra* note 7, at 55.

21. Garcia, *supra* note 3, at 105–06 (footnotes omitted).

22. *Id.* at 106 (footnotes omitted).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Garcia, *supra* note 3, at 106 (footnotes omitted).

28. *Id.* at 106–07 (footnotes omitted).

29. *Id.* at 107 (footnotes omitted).

30. *Id.*

To the layperson, remaining in such an obvious cycle of manipulation and abuse may be confounding at the least and absurd at the most.³¹ But the dynamics involved in the types of abusive relationships that form the foundation of BWS are much more complex and are commonly outside a layperson's understanding.³² Many women remain with their abusive partners because of a perception that they are doing what is best for themselves and their children.³³ Strong financial and emotional ties often weave the batterer and his victim together.³⁴ Breaking those ties or attempting to break those ties can often lead to an increase in violence, regardless of what legal protections may exist.³⁵ This "no-win situation"³⁶ can lead to behavior and actions by victims that are simply outside of common understanding. But the introduction of BWS testimony to inform and enhance a layperson's understanding is not always welcomed, both legally and psychologically.³⁷

II. THE EVIDENTIARY ISSUE

A. *Relevance*

Typically, the first hurdle in admitting any type of evidence is relevancy. In *People v. Humphrey*, the California Supreme Court

31. See, e.g., Louise Kiernan, *Complex Issues Trap Women in Abuse*, CHI. TRIB., Mar. 16, 1993, at A1 (asking the rhetorical questions: "[w]hy didn't she get help? Why didn't she kick him out? Why didn't she leave? If she did leave, why would she ever agree to see him again? Those on the outside see these as logical questions, the steps painfully obvious: 'If only she'd done this.' 'If only she'd done that.'").

32. See, e.g., Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner's Abuse*, 6 HASTINGS WOMEN'S L.J. 67, 86 (1995) ("The commonly held attitude of 'I would have done . . . ' fails to take into account . . . that the 'I' referred to is a vastly different 'I' than the one in the actual battering situation. That is, those who say 'I would have . . . ' typically speak from their own non-battered experience, beliefs, emotions, education, and socio-economic situation, rather than from a battered woman's point of view. Furthermore, inquiries blaming women are misplaced. More appropriate inquiries are: why did he batter?; could she have left him?; and how could we have helped her to leave him? Leaving the abuser often does not stop the violence. Consider that three-fourths of women killed in domestic violence were separated or divorced from their mate.") (footnotes omitted); see also Kiernan, *supra* note 31.

33. See Kiernan, *supra* note 31.

34. *Id.*

35. See *id.* ("[E]ven with the recent proliferation of anti-stalking laws and the increase in women seeking protective orders, many tragedies attest that paper can't stop bullets or knives or fists . . . So, in the absence of any absolute protection from violence, there can be a perverse sense of safety and logic in staying.")

36. *Id.* (quoting Lenore Walker).

37. See, e.g., Shana Wallace, Note, *Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense*, 71 U. CHI. L. REV. 1749, 1749 (2004) ("[S]ome feminist scholars criticize BWS both for diagnosing battered women who act in their own defense as mentally ill and for ignoring the actual obstacles they face, while more conservative critics argue that BWS is a special standard for women that cloaks ulterior motives.")

admitted expert testimony on BWS.³⁸ The court held BWS testimony was relevant to the question of whether the victim acted reasonably and to the victim's credibility.³⁹ The majority of courts, however, require the proponent of expert testimony of BWS to establish "some evidentiary foundation that a party or witness to the case is a battered woman, and that party or witness has behaved in such a manner that the jury would be aided by expert testimony providing an explanation for the behavior."⁴⁰ Without such a showing, BWS testimony is irrelevant and thus inadmissible.⁴¹ But with such a showing, prior physical assaults may be relevant to a defendant's fear if she resisted her husband or the aggressor.⁴²

The relevance of expert testimony of BWS also often requires the showing of a "critical link."⁴³ The party seeking to admit expert testimony of BWS must establish a critical link between the expert's testimony about BWS generally and the specific complainant suffering from BWS.⁴⁴ But showing a "critical link" can put the proverbial cart before the horse. If the issue in a given case is whether the witness or defendant suffered from BWS, requiring a separate evidentiary showing for BWS can deprive the jury of their role as the trier of fact. In essence, the jury is asked to decide the ultimate issue in the case before hearing all of the testimony.

B. Character Evidence

Courts have held the use of expert testimony on BWS inadmissible for bolstering a witness's or defendant's credibility.⁴⁵ Instead, the testimony has been held admissible for explaining the witness's or defendant's behavior.⁴⁶ At times, a witness's or defendant's behavior

38. See *People v. Humphrey*, 921 P.2d 1, 2 (Cal. 1992).

39. *Id.*

40. *People v. Brown*, 94 P.3d 574, 585 (Cal. 2004) (Brown, J., dissenting) (citations omitted).

41. See *id.*

42. See, e.g., *Arcoren v. United States*, 929 F.2d 1235, 1243. (8th Cir. 1991) ("Evidence that Arcoren hit her with a baseball bat a year before was relevant to that issue, since it suggested that any apparent consent by Brave Bird might have resulted from fear of bodily injury if she resisted.")

43. See *Brown*, 95 P.3d at 586.

44. See *id.*

45. See, e.g., *Commonwealth v. Miller*, 634 A.2d 614, 622 (Pa. Super. Ct. 1993) ("[E]xpert testimony regarding a 'battered person syndrome' was relevant to the appellant's state of mind and is not introduced to improperly bolster the credibility of the defendant, but rather, to aid the jury in evaluating the defendant's behavior and state of mind given the abusive environment which existed.")

46. *Id.*

can appear strange or counter-intuitive, as was the case in *Arcoren*.⁴⁷ In such instances, expert testimony on BWS was admitted but only on the narrower issue of explaining behavior rather than bolstering credibility.⁴⁸

C. Expert Witnesses

The use of expert testimony on BWS, especially in cases involving affirmative self-defense claims, has increased in recent years.⁴⁹ Often, expert testimony on BWS is admissible under analogous rules to Federal Rule of Evidence 702⁵⁰ because it is scientific and technical.⁵¹ Courts, however, often prohibit experts from testifying to the ultimate issue, namely whether the witness or defendant has BWS because “[t]his determination must be left to the trier of fact.”⁵² But the testimony may still be admissible to the extent that it is beyond the understanding of the average person.⁵³ A majority of states have accepted this argument for the admissibility of expert testimony on BWS.⁵⁴

III. RULES OF EVIDENCE ON THE ADMISSIBILITY OF BWS

A. Evidentiary Developments in California

In 2005, California adopted a categorical acceptance of “intimate partner battering” in California Evidence Code § 1107.⁵⁵ Arguably this

47. In *Arcoren*, the witness did an ‘about-face’ in her testimony during trial, stating that the man who assaulted her was actually not the man she had previously indicated in her deposition. The court ultimately permitted BWS testimony to assist the jury, stating that [a] jury naturally would be puzzled at the complete about-face she made, and would have great difficulty in determining which version of Brave Bird’s testimony it should believe. If there were some explanation for Brave Bird’s changed statements, such explanation would aid the jury in deciding which statements were credible.

Arcoren v. United States, 929 F.2d 1235, 1240 (8th Cir. 1991).

48. *See id.*

49. *See, e.g., Arcoren*, 929 F.2d at 1239; *People v. Humphrey*, 921 P.2d 1, 10 (Cal. 1992); *Bechtel v. State*, 840 P.2d 1, 8 (Okla. Crim. App. 1992); *Miller*, 634 A.2d at 619.

50. FED. R. EVID. 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.”).

51. *See, e.g., Arcoren*, 929 F.2d at 1239.

52. *Id.* (citation omitted).

53. *See, e.g., State v. Hennem*, 441 N.W.2d 793, 798 (Minn. 1989).

54. *Id.*

55. In relevant part, § 1107 states:

(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects,

evidentiary rule eliminates barriers to admission of BWS testimony. Practically, the rule may change little, as it was intended only as a rule of evidence rather than a substantive addition.⁵⁶ By creating an evidentiary rule, however, California legitimized a common law, “backdoor” solution for such testimony. By admitting the evidence under an evidentiary rule, California may have eliminated some of the stigma and issues surrounding BWS, which is important independent of the practical effects of the legislation.

Interestingly, though, California courts have not always relied on a special evidentiary rule for admitting BWS testimony even following the passage of § 1107.⁵⁷ In *People v. Brown*, the California Supreme Court held BWS testimony in a domestic violence case admissible under California Evidence Code § 801 rather than California’s specialized Evidence Code § 1107.⁵⁸ It found BWS testimony “assist[s] the trier of fact in evaluating the credibility of the victim’s [inconsistent statements] . . . by providing relevant information about the tendency of victims of domestic violence later to recant or minimize their description of the violence.”⁵⁹

Prior to and even after the enactment of § 1107, California courts have used § 801 to admit BWS testimony.⁶⁰ To fit within § 801,⁶¹ courts permitted BWS testimony in order to disabuse the trier of fact of misconceptions relating to a victim’s usual behavior following an assault.⁶² BWS testimony was also permitted to “explain how the victim’s experiences as a battered woman affected her perceptions of danger, its imminence, and what actions were necessary to protect

including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge;

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

CAL. EVID. CODE § 1107 (West 2013).

56. See *People v. Humphrey*, 921 P.2d 1, 17 (Cal. 1992) (Brown, J., concurring) (“Evidence Code section 1107 is a ‘rule of evidence only;’ ‘no substantive change affecting the Penal Code is intended.’”) (citations omitted).

57. See, e.g., *People v. Brown*, 94 P.3d 574, 583 (Cal. 2004).

58. *Id.* at 575.

59. *Id.*

60. See *id.* at 580–81.

61. CAL. EVID. CODE § 801(a) (West 2013) (“(a) [Testimony] [r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact”).

62. See *Brown*, 94 P.3d at 580.

herself.”⁶³ Not all California courts permitted BWS testimony, however, even under § 801 and judicial precedent.⁶⁴

There is a tension between § 801 and § 1107.⁶⁵ Evidence Code § 1107 refers specifically to BWS, which “pertains to women who have been subjected to an extended period of abuse.”⁶⁶ But § 1107 also permits expert testimony on the effects of domestic violence on a victim’s perceptions, beliefs, and behavior.⁶⁷ Under this second category, there is no requirement for a pattern of abuse; one domestic assault is sufficient. The California Supreme Court did not resolve the tension within § 1107 in *Brown*.⁶⁸

By fitting the testimony at issue under § 801(a), however, the court seems to presume that BWS will remain “beyond common experience.” This poses a dilemma—greater recognition of BWS within society could render § 801(a) inapplicable as a basis for admitting expert testimony. Meanwhile, the California Supreme Court remains unclear as to how much prior abuse is necessary for expert testimony to be admissible under § 1107. This ambiguity leaves the potential for a batterer to get “one free episode of domestic violence before admission of evidence.”⁶⁹

B. Evidentiary Developments in Ohio

BWS first appeared in Ohio courts in 1981 in *State v. Thomas*.⁷⁰ The court rejected BWS testimony because the testimony was “irrelevant and immaterial to the issue of whether defendant acted in self-defense.”⁷¹ The court also held that the subject matter of the testimony was within the understanding of the jury; BWS was not a sufficiently developed scientific theory to be considered “expert” testimony, and the probative value of the testimony did not outweigh its prejudicial impact.⁷² In 1990, however, the holding in *State v. Koss* overruled *Thomas*.⁷³ Importantly in *Koss*, the court acknowledged that

63. *Id.*

64. *Id.*

65. *See id.* at 581–82.

66. *Id.* at 581.

67. *Id.*

68. *Brown*, 94 P.3d at 581–82 (noting that although there’s a “conundrum” in § 1107, there was no need to resolve the issue in the instant case because of the applicability of § 801(a)).

69. *Brown*, 94 P.3d at 581.

70. *See State v. Thomas*, 423 N.E.2d 137, 138 (Ohio 1981); Hawes, *supra* note 6, at 137–38.

71. *Thomas*, 423 N.E.2d at 140.

72. Hawes, *supra* note 6, at 138–39 (citations omitted).

73. *State v. Koss*, 551 N.E.2d 970, 974 (Ohio 1990).

expert testimony on BWS would help the jury's understanding and address the reasonableness of a woman's fear of imminent danger.⁷⁴

At the same time *Koss* was under consideration, the Ohio legislature considered Ohio Revised Code § 2901.06, which addressed the use of expert testimony on BWS.⁷⁵ Code § 2901.06 specifically addressed the findings in *Thomas* by concluding that BWS is an accepted syndrome in the scientific community,⁷⁶ and it is not within the common understanding of jurors.⁷⁷ Subsection (B) of § 2901.06 addressed the use of BWS in self-defense claims and is worth stating in full:

If a person is charged with an offense involving the use of force against another and the person, as a defense to the offense charged, raises the affirmative defense of self-defense, the person may introduce expert testimony of the 'battered woman syndrome' and expert testimony that the person suffered from that syndrome as evidence to establish the requisite belief of an imminent danger of death or great bodily harm that is necessary, as an element of the affirmative defense, to justify the person's use of the force in question. The introduction of any expert testimony under this division shall be in accordance with the Ohio Rules of Evidence.⁷⁸

In subsequent cases, though, courts have read § 2901.06(B) as a limitation on the use of BWS testimony.⁷⁹

In *State v. Pargeon*, the court relied on § 2901.06(B) to find expert testimony on BWS inadmissible in domestic violence cases because the probative value of the testimony was outweighed by unfair prejudice in violation of Ohio Rules of Evidence.⁸⁰ The court also held that the testimony violated Ohio Rules of Evidence because the testimony was really about prior bad acts "from which the inference may be drawn that [the defendant] has the propensity to beat his wife" and that he did so on this particular occasion.⁸¹ But ultimately the court found that *Koss* and § 2901.06(B) limited the application of § 2901.06,

74. *Id.* at 973.

75. OHIO REV. CODE ANN. § 2901.06 (West 2013).

76. *See id.* § 2901.06(A)(1) ("That . . . [battered woman] syndrome currently is a matter of commonly accepted scientific knowledge.").

77. *See id.* § 2901.06(A)(2) ("That the subject matter and details of the syndrome are not within the general understanding or experience of a person who is a member of the general populace and are not within the field of common knowledge.").

78. *See id.* § 2901.06(B).

79. *See, e.g., State v. Pargeon*, 582 N.E.2d 665, 667 (Ohio 1991). *But see State v. Haines*, 860 N.E.2d 91, 97 (Ohio 2006) (holding expert testimony is admissible "in the state's case-in-chief to help a jury understand a victim's reaction to abuse in relation to her credibility.").

80. Hawes, *supra* note 6, at 142.

81. *Pargeon*, 582 N.E.2d at 666.

and expert testimony on BWS generally, to only cases where BWS is raised as part of an affirmative self-defense claim.⁸²

In 2006, in *State v. Haines*, the Ohio Supreme Court directly addressed the issue of the admissibility of expert testimony on BWS in domestic violence cases and concluded the testimony was admissible.⁸³ The court relied heavily on its earlier holding in *Koss*, especially the value of expert testimony on BWS in dispelling misconceptions about a woman's behavior in the face of domestic violence.⁸⁴ Taken together, *Koss* and § 2901.06 do not limit the use of expert testimony on BWS to self-defense following *Haines*.⁸⁵ The court acknowledged, however, that although there is no limitation on the use of BWS testimony to self-defense cases, the testimony must still be admissible under other Ohio Rules of Evidence.⁸⁶

Relevance is the first issue when assessing the admissibility of expert testimony on BWS.⁸⁷ The court found instructive that “battered woman syndrome testimony is relevant and helpful when needed to explain a complainant's actions, such as prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse.”⁸⁸ Thus, the court held that appropriate foundation must be laid for establishing that the particular defendant or witness suffers from BWS but there are no rigid foundational requirements.⁸⁹ Instead, establishing the general cycle of violence associated with BWS is sufficient.⁹⁰

C. Evidentiary Developments in Missouri

In 1987, the Missouri General Assembly passed § 563.0333 addressing “battered spouse syndrome” in self-defense claims.⁹¹ Section 563.0333 states in relevant part:

1. Evidence that the actor was suffering from the battered spouse syndrome shall be admissible upon the issue of whether the actor lawfully acted in self-defense or defense of another.

82. *Id.*

83. *State v. Haines*, 860 N.E.2d 91, 97 (Ohio 2006).

84. *Id.* at 98.

85. *See id.* at 99.

86. *See id.*

87. *See id.*

88. *See Haines*, 860 N.E.2d at 99–100 (citing *People v. Christel*, 537 N.W.2d 194 (Mich. 1995)).

89. *See id.* at 100.

90. *See id.* (establishing a general cycle of violence is one possible way of addressing the “critical link” issue); *see supra* text accompanying notes 43–44.

91. MO. ANN. STAT. § 563.033 (West 2013). Although Missouri uses the term “battered spouse syndrome,” for purposes of consistency, this Note will continue to use “BWS” when referencing Missouri's statute.

2. If the defendant proposes to offer evidence of the battered spouse syndrome, he shall file written notice thereof with the court in advance of trial. Thereafter, the court, upon motion of the state, shall appoint one or more private psychiatrists or psychologists . . . to examine the accused No private psychiatrist, psychologist, or physician shall be appointed by the court unless he has consented to act. The examinations ordered shall be made at such time and place and under such conditions as the court deems proper The order may include provisions for the interview of witnesses.

3. No statement made by the accused in the course of any such examination and no information received by any physician or other person in the course thereof, whether such examination was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of whether he committed the act charged against him in any criminal proceeding then or thereafter pending in any court, state or federal.⁹²

Section 563.033 has been interpreted to apply equally to women married to the batterer and those “merely in a relationship with him.”⁹³ It has also been limited to claims of self-defense rather than as part of an independent defense.⁹⁴

The case of *State v. Edwards* presents an interesting fact pattern and helps clarify Missouri’s understanding of BWS. Mrs. Edwards and her husband had been arguing throughout the day but the argument escalated when they arrived at their shared place of employment.⁹⁵ Mr. Edwards struck Mrs. Edwards in the arm with a lead pipe.⁹⁶ Mrs. Edwards retreated and picked up a .38 caliber pistol and shot her husband four times, striking him in the head, arm, and back.⁹⁷ At trial, Mrs. Edwards stated, “I knew one of us was not going to walk out of that store.”⁹⁸

92. *Id.*

93. *State v. Edwards*, 60 S.W.3d 602, 614 (Mo. Ct. App. W.D. 2001).

94. *See State v. Copeland*, 928 S.W.2d 828, 838 (Mo. 1996) (en banc). In *Copeland*, the court stated that

[the Missouri General Assembly] has authorized the defense of battered spouse syndrome in matters of self-defense [in § 563.033]. Had the legislature intended battered spouse syndrome to be a general defense, it could easily have made provision for that defense. If self-defense is not in the case, there is no authority for admitting such evidence unless in support of a claim of mental disease or defect.

Id.

95. *Edwards*, 60 S.W.3d at 606.

96. *Id.*

97. *Id.* at 607.

98. *Id.* at 606.

For several years prior to the shooting, Mrs. Edwards had seen Dr. Gerald Roderick for stress anxiety.⁹⁹ At trial, Dr. Roderick testified that whenever he would suggest Mrs. Edwards leave her husband, Mrs. Edwards would respond that if she did so, Mr. Edwards would kill her.¹⁰⁰ The deposition of another doctor was read into the record at trial and stated that in the expert's opinion, Mrs. Edwards believed she was in imminent danger at the time of the shooting.¹⁰¹

In addressing Mrs. Edwards's contentions on appeal, the court stated that "while evidence of the battered spouse syndrome is not in and of itself a defense to a murder charge, its function is to aid the jury in determining whether a defendant's fear and claim of self-defense are reasonable."¹⁰² Furthermore, the court found that BWS is beyond the understanding of an average juror.¹⁰³ Indeed, the court believed that it is difficult for a layperson to understand the actions of a battered woman.¹⁰⁴

The legal difficulty, however, is identifying the proper lens through which to view the battered woman's actions. At times, Missouri courts have held that "the evidence is to be weighed by the jury in light of how the reasonable *battered woman* would have perceived and reacted in view of the prolonged history of physical abuse."¹⁰⁵ More recently, though, Missouri courts have found that standard to create an oxymoron.¹⁰⁶ Instead, they have stated the accurate description of the law is "if the jury believes the defendant was suffering from battered spouse syndrome, it must weigh the evidence in light of *how an otherwise reasonable person who is suffering from battered spouse syndrome* would have perceived and reacted in view of the prolonged history of physical abuse."¹⁰⁷ Although the newer standard clarifies the oddity of using a "reasonable battered woman" standard when the whole purpose of BWS is to identify a completely different mindset and set of perceptions, the "otherwise reasonable BWS sufferer" seems equally susceptible to being called an "oxymoron."¹⁰⁸

99. *Id.* at 607.

100. *Id.*

101. *Edwards*, 60 S.W.3d at 607.

102. *Id.* at 613.

103. *Id.*

104. *Id.* ("It is difficult for a lay person to understand why a battered spouse does not escape the situation or notify the police. A lay person may perceive that a battered woman is free to leave the spouse at any time. Indeed, a juror may otherwise conclude by 'common sense' that if the abuse were so bad the woman would have left the relationship.") (citations omitted).

105. *State v. Williams*, 787 S.W.2d 308, 312–13 (1990).

106. *Edwards*, 60 S.W.3d at 614.

107. *Id.* at 615 (emphasis added).

108. Accepting the court's statement in *Edwards* that "[a] battered woman is a terror-stricken person whose mental state is distorted," it is unclear what exactly the court's

D. Domestic Violence

Domestic violence differs from other forms of criminal violence.¹⁰⁹ Compared to other types of crimes, domestic violence is often significantly underreported.¹¹⁰ Typically those charged, the batterers, are male, and the victims are female.¹¹¹ Prosecutors also face atypical difficulties in prosecuting domestic violence cases because victims may recant earlier statements or simply refuse to testify.¹¹² This type of violence is also different in that “family violence occurs within ongoing relationships that are expected to be protective, supportive, and nurturing.”¹¹³ Lastly, prosecutors of domestic violence cases face unique difficulties in prosecuting batterers because of the close ties between batterer and victim.¹¹⁴

Domestic violence cases, though, may provide analogous clues about the challenges of establishing a sufficient foundation for expert testimony on BWS in cases where “only” a single incident of violence has occurred. In a domestic violence charge, the issue before the court is precisely whether domestic violence has occurred. Thus, the concern is that admitting expert testimony on BWS preemptively answers the question before the jury—whether domestic violence has occurred.¹¹⁵ Therefore, there must be an independent showing of evidence “from

“more accurate” standard actually means. *Id.* One interpretation could be that a battered woman is an otherwise reasonable person who, during the violence, acted in an “unreasonable” way if viewed outside the lens of BWS. This interpretation avoids labeling a BWS sufferer as someone with a mental disease that pre-exists the incident. *See supra* note 37 and accompanying text. Yet, conceptually, part of the point of BWS is to acknowledge that a battered woman thinks within a different paradigm altogether from other people. Putting an “otherwise reasonable person” qualifier thus runs the risk of eliminating the benefit of BWS testimony aimed at identifying the different perceptions held by battered women.

109. *See People v. Brown*, 94 P.3d 574, 577 (Cal. 2004).

110. *Id.*

111. *Id.*

112. Hawes, *supra* note 6, at 134.

113. *Brown*, 94 P.3d at 577.

114. *See id.* at 582. (“The Legislature, courts, and legal commentators have noted the close analogy between use of expert testimony to explain the behavior of domestic violence victims, and expert testimony concerning victims of rape or child abuse.”).

115. *Id.* at 584. Defense counsel (for the batterer) raised the objection that the argument in favor of admitting expert testimony after a single incident of violence was circular. *Id.* at 583. Defense counsel argued that the jury must first determine guilt in the underlying charge of domestic violence in order for there to be a sufficient foundation to admit the expert testimony. *Id.* at 583–84. The court ultimately rejected this view, however, based simply on precedent. *Id.* at 584. Although the Court was somewhat dismissive of this objection, there is at least some persuasive force to the circularity argument. Expert testimony of BWS in a case of a single or first incident does appear to be dependent on the truth of the underlying charge for purposes of establishing a sufficient foundation. Admitting such evidence prior to a jury determination arguably usurps the jury’s role. For additional discussion of this issue in California courts, *see id.* at 581.

which the trier of fact could find the charges true,”¹¹⁶ in order to admit expert testimony on domestic violence. But for the court in *Brown*, when dealing with credibility, that did not mean there was a requirement for a preliminary finding that the charged act occurred before the jury could consider the expert testimony.¹¹⁷ The expert testimony is admissible provided there is an independent showing that the witness or defendant suffered from BWS.¹¹⁸

E. Rape Shield Statutes

Rape shield statutes¹¹⁹ present a potential analytical corollary to expert testimony on BWS.¹²⁰ Rape shield statutes represent a legislative balance between the interests of the public and the victim weighed against the defendant’s right to testify.¹²¹ They represent legislative determinations about a victim’s right to privacy.¹²² Similar rights could be recognized for witnesses or defendants in BWS cases. Admittedly, the potential “status” as a witness versus a defendant is different than that of a typical victim in rape cases. Yet, much of the focus of BWS testimony, and indeed some of the harshest criticism against BWS testimony, stems from the victimization of the woman regardless of whether she is a witness or a defendant.¹²³

Evidentiary rules such as California’s § 1107, Ohio’s § 2901.06, or Missouri’s § 563.033 could be seen as analogous legislative determinations to rape shield statutes. Both reflect a balancing of whether “the interests served by the rule justify the limitation,” or in the case of BWS, expansion of admissible evidence. Certainly a pervasive risk of BWS testimony, whether by an expert witness or prior bad acts, is undue prejudice. The legislative determination is to what extent prejudice is permissible in the interest of furthering a

116. *People v. Brown*, 94 P.3d 574, 584 (Cal. 2004).

117. *Id.*

118. *Id.*

119. *See, e.g.*, FED. R. EVID. 412.

120. *See, e.g., Brown*, 94 P.3d at 582. *But see id.* at 587 (Brown, J., dissenting) (arguing that rape cases are primarily distinct from cases of domestic violence because misconceptions in rape cases are more likely to arise from a single incident. Misconceptions related to BWS, instead, stem from a woman remaining in a relationship despite continued abuse when she could leave the relationship. Similarly, domestic violence cases are distinct from rape cases in that domestic violence cases rely on the relationship between the victim and the defendant whereas rape cases do not).

121. *See Stephens v. Miller*, 13 F.3d 998, 1002 (7th Cir.1994) (holding statutes like rape shield statutes are “required to evaluate whether the interests served by the rule justify the limitation imposed on the criminal defendant’s right to testify.”).

122. *Id.* (stating that rape shield statutes “represent the valid legislative determination that victims of rape and . . . attempted rape deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.”).

123. *See, e.g., Wallace, supra* note 37, at 1749.

defendant's robust self-defense claim or the prosecution of legitimate acts of domestic violence.

IV. SOLUTIONS AND LOOKING FORWARD

A. *International Approaches to Self-Defense*

One possible alternative approach to restructuring evidentiary principles in favor of admitting expert testimony on BWS, advocated by Shana Wallace, is to apply international norms on "imminence" to individual self-defense claims.¹²⁴ Doing so would "identify the elements that are already implicitly assessed by 'imminence' and assign them their appropriate legal weight—rather than leaving it to the unarticulated prejudices of judges and juries."¹²⁵ By explicitly identifying the elements, a court might avoid misconceptions about BWS, which can form the evidentiary predicate for admitting expert testimony on BWS.¹²⁶

Minimizing or eliminating misconceptions is only part of the force of Wallace's argument for applying international norms on imminence to individual self-defense claims. Under this approach, properly identifying the elements of imminence cloaks the actions of a battered woman in a "legally recognized experience, rather than as [a] mental illness."¹²⁷ Although perhaps intangible, there certainly would seem to be a value in reducing the stigmatization of being labeled with a "syndrome" or illness as the result of raising a legal self-defense claim.¹²⁸ Practically, whether BWS is cloaked in a "legal experience" or mental syndrome, the misconceptions are likely to remain regardless of the terminology. That is not to say, though, that the elimination of "syndrome" from the nomenclature could shift the baseline of misconceptions from an "illness" to a legal creation.

Properly identifying the elements of self-defense in battered women's cases would also address criticisms raised by both feminists

124. *See, e.g., id.* at 1750–51 ("Historically, self-defense in the international context has developed through analogy and reference to an individual's right of self-defense. Currently the standards for self-defense are the same for individuals as for international entities: the danger must be imminent, and the self-defensive force both necessary and proportional. In both contexts, a strict requirement that a threat be temporally 'imminent' renders illegal any action taken in preemptive, or anticipatory, self-defense. With the Bush administration's adoption of a new policy of preemptive self-defense, the three factors (beyond temporality) that have been articulated as defining imminence are probability, availability of alternative recourses, and magnitude of harm. In keeping with the traditionally analogous relationship between the international and domestic concepts, these factors should be relevant to individual self-defense as well.") (footnotes omitted).

125. *Id.* at 1751.

126. *See, e.g.,* *People v. Brown*, 94 P.3d 574, 584 (Cal. 2004).

127. Wallace, *supra* note 37, at 1751.

128. *See* discussion *supra* note 8.

and legal conservatives.¹²⁹ “[B]y replacing an amorphous syndrome with more accessible, and objective, factors,”¹³⁰ international norms on imminence “may enable a greater number of battered women who kill their abusers to receive self-defense jury instructions and have their actions deemed justifiable self-defense.”¹³¹ Although Wallace assumes the conclusion, namely that allowing more women to raise a self-defense claim is a good thing, her approach would permit the trier of fact to determine the credibility of a self-defense claim rather than the judge in an evidentiary hearing.

Despite the issues with current conceptions of BWS, Wallace believes BWS has solved the evidentiary and jury instruction problems.¹³² As Wallace accurately acknowledges, however, a finding that a defendant suffers from BWS does not equal a battered woman’s defense.¹³³ Instead, the introduction of BWS testimony simply permits the jury to receive jury instructions on self-defense.¹³⁴ Practically, though, this is all that an evidentiary rule can accomplish. By permitting evidence to go before the trier of fact, all that can be assured is that the defense is raised, not that it is accepted. There is no assurance, however, that a proper identification of the elements of imminence would produce any result different from an evidentiary rule.¹³⁵

Ultimately Wallace’s proposal for reconsidering the elements of self-defense based on international norms is intriguing and perhaps more robust than an evidentiary rule. Although Wallace acknowledges the institutional resistance to changing the traditional requirements of self-defense,¹³⁶ she may underplay its practical consequences. Changing evidentiary rules presents an alternative, middle ground approach to expanding the scope of admissible evidence without challenging the traditional requirements of self-defense.

129. See Wallace, *supra* note 37, at 1779 (noting a concern that the “relaxed requirements (proposed) for self-defense . . . would tend to categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives’ testimony concerning their subjective speculation as to the probability of future felonious assaults by their husbands. Homicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution, to this problem.”) (citing *State v. Norman*, 378 N.E.2d 8, 15 (N.C. 1989)).

130. *Id.* at 1751.

131. *Id.* Presumably the same considerations could apply to the use of BWS testimony in domestic violence cases.

132. *Id.* at 1756.

133. *Id.* at 1756, n.39 (citations omitted).

134. *Id.*

135. Wallace may believe that her approach has more persuasive force with jurors, but there is no assurance that a jury, properly presented with the elements of imminence, will arrive at the conclusion that the battered woman acted in self-defense.

136. See Wallace, *supra* note 37, at 1780. Wallace acknowledges that “[t]he legal system has steadfastly refused to reconsider the traditional requirements of self-defense,” and yet nonetheless appears to attempt to reconsider the traditional requirements.

B. Amending the Federal Rules of Evidence

Today, forty-two states, Guam, Puerto Rico, the Virgin Islands, and the U.S. Military have adopted rules of evidence based on the Federal Rules of Evidence.¹³⁷ Most of these jurisdictions adopted rules similar to the 1975 Congressional enactment,¹³⁸ and some jurisdictions based their rules on earlier versions.¹³⁹ Meanwhile, “[a]s the Federal Rules of Evidence have been amended, some jurisdictions with rules based on the Federal Rules have also promptly amended theirs to incorporate the new addition[s] . . . [while] [o]thers have followed the federal lead less promptly, and still others have only rarely incorporated [federal changes].”¹⁴⁰

Regardless of the particular degree, the enactment of the Federal Rules of Evidence had a profound impact on state evidence rules.¹⁴¹ The Federal Rules of Evidence were not, however, universally well-received.¹⁴² Regardless of the Federal Rules of Evidence’s reception, though, the argument for conformity at the state level can be summed up in a word: uniformity.¹⁴³

137. 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE T-1 (2d ed. 2012) (Table of State and Military Adaptations of Federal Rules of Evidence).

138. *Id.*

139. *Id.* (“Other jurisdictions patterned their rules more closely on the Rules as the Supreme Court promulgated them in 1972. Still others adopted rules more closely resembling the 1974 Uniform Rules of Evidence, which were largely based on the 1972 final draft of the Federal Rules of Evidence, as modified and approved by the National Conference of Commissioners on Uniform State Laws, and subsequently approved by the American Bar Association.”).

140. *Id.*

141. See Leonard Packel, *Introduction*, 30 VILL. L. REV. 1313, 1313 (1985).

142. At least some commentators believe the Federal Rules of Evidence were not a good codification because:

First, the Federal Rules are poorly drafted—probably because of the haste with which they were put together rather than any lack of skill on the part of the drafters. Second, the Federal Rules do not accomplish what every writer, with the possible exception of Wigmore, has thought was essential: the Federal Rules do nothing to simplify evidence law. Finally, the Federal Rules continue a hundred-year-old trend of centering in trial judges more discretionary power to influence the outcome of litigation, thus reducing the role of lawyers in litigation.

Kenneth W. Graham, Jr., *State Adaptation of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293, 294, n.7 (1990).

143. See *id.* at 295. Graham presents several political and policy reasons for uniformity. From a political perspective, Graham argues that uniformity could be the product of lobbying by national law schools who wanted to prevent having to teach evidence law from fifty different jurisdictions, lawyers that practice in both federal and state courts, traveling lawyers that practice in multiple states, and corporate lawyers. See *id.* at 296–97. From a policy standpoint, Graham argues that uniformity facilitates the fairness, efficiency, and progress codified in FRE 102, reduces the cost of legal services by making it easier to practice across state lines, and tremendous economies of scale by having judges, lawyers, and scholars apply the same set of evidentiary rules. See *id.* at 299–300.

Leveraging the force of uniformity may be the best way forward because otherwise “the law of evidence is highly decentralized, bringing about the desired change [to the rules of evidence] would require a political effort in each of the fifty states as well as in the national capital.”¹⁴⁴ Thus, a continued disintegrated approach to BWS testimony reform on the state level would require a political effort in each state, which may exceed the contemporary political will. Instead, by approaching the issue on a national level through the Federal Rules of Evidence, the desire for uniformity could lead states “to adopt subsequent changes in the Federal Rules that they would reject if the change were debated solely on its merits. In short, for political purposes the appearance of uniformity is almost as potent as the fact.”¹⁴⁵ The desire for uniformity could thus encourage states to make changes to their rules of evidence to remain in line with changes to the Federal Rules of Evidence at a lower political cost than if changes were attempted on a state-by-state basis.

Amending the Federal Rules of Evidence to include a special allowance for BWS testimony similar to either California’s,¹⁴⁶ Ohio’s,¹⁴⁷ or Missouri’s¹⁴⁸ may present a more efficient and less costly option for reform. Although Wallace seeks to reconsider the traditional elements of self-defense rather than evidentiary changes,¹⁴⁹ her approach may simply be too “radical” for mainstream acceptance.¹⁵⁰ Amending the Federal Rules of Evidence with the goal of gaining broader state-level acceptance may provide a more feasible and acceptable middle ground.

But changes to the Federal Rules of Evidence, or any codification approach for that matter, present their own challenges. “Any uniform law of evidence, it is argued, will of necessity be a law of consensus and of the least common denominator among the affected interests,”¹⁵¹ whether dealing with expert testimony on BWS or a more mundane evidentiary principle. If that is true, a change to the Federal Rules of Evidence may fall far short of protecting the interests of women.¹⁵² Wallace may then be right that “the best that has been done to include women’s experiences in the law of self-defense has been to

144. *Id.* at 297.

145. *Id.* at 298–99.

146. See CAL. EVID. CODE § 1107 (West 2013).

147. See OHIO REV. CODE ANN. § 2901.06 (West 2013).

148. See MO. ANN. STAT. § 563.033 (West 2013).

149. See discussion *supra* note 124.

150. See Wallace, *supra* note 37, at 1780 (“The legal system has steadfastly refused to reconsider the traditional requirements of self-defense.”).

151. Graham, *supra* note 142, at 301.

152. See, e.g., discussion *supra* Parts III.A–C (noting the judicial ambiguity in applying BWS evidentiary rules designed for self-defense claims for defendants to witnesses who recant their testimony at trial in domestic violence cases).

offer the potential inclusion of evidence that their actions can be explained by a syndrome.”¹⁵³ Whatever issues may surround the use of “syndrome” in BWS, arguably its use is better than no inclusion of the testimony at all or a failed attempt to redefine the traditional elements of self-defense.

C. *Creating a ‘Model’ Rule for the Federal Rules of Evidence*

Accepting that amending the Federal Rules of Evidence is the proper way to proceed, the inevitable question becomes, what would the rule look like? Although perhaps a fool’s errand to seek to answer such a question, the lessons from California, Ohio, and Missouri may provide some guidance. Melding the three statutes into one could produce the following “model rule”¹⁵⁴ for the Federal Rules of Evidence:

(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding Battered Women’s Syndrome (BWS) and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge. If the evidence is being offered by a defendant charged with an offense involving the use of force against another and the defendant raises the affirmative defense of self-defense, the defendant may introduce expert testimony that the defendant suffered from BWS as evidence to establish the requisite belief of imminent danger of death or great bodily harm that is necessary, as an element of the affirmative defense, to justify the defendant’s use of the force in question.

(b) Expert testimony regarding BWS and its effects is presumptively relevant in domestic violence cases or when a criminal defendant raises the affirmative defense of self-defense. An opposing party may attempt to rebut this presumption with a showing that the testimony is irrelevant or extreme prejudice outweighs its probative value.

(c) The proponent of the evidence must establish the proper qualifications of the expert witness. No statement made by the defendant in the course of any examination by an expert witness shall be admitted in evidence against the defendant on the issue of whether the defendant committed the act charged against him or her in any criminal proceeding then or thereafter pending in any

153. See Wallace, *supra* note 37, at 1780.

154. In no way is the use of “model rule” intended to connote the expertise behind the Model Penal Code, Model Rules of Professional Conduct, or similar collaborative creations. Instead, it is simply an attempt to layout a template for proceeding with a Federal Rule of Evidence on expert testimony on BWS.

court, state or federal. Expert opinion testimony on BWS and its effects shall not be considered a new scientific technique whose reliability is unproven.

(d) Despite its name, expert testimony on BWS shall be applicable to any intimate partner battering. The issue of whether the relationship was sufficiently intimate or provided sufficient time to establish a cycle of violence shall be an issue left for resolution by the trier of fact after hearing the expert testimony.

Although by no means a perfect combination of the three statutes, and certainly not a brief combination, the above model rule combines some of the most important elements of each of three statutes.

Unpacking subsection (a) reveals essentially a strict combination of California's statute,¹⁵⁵ focused on domestic violence, and Ohio's statute,¹⁵⁶ focused on the affirmative defense of self-defense. "Imminence" is undefined in the model statute, but there is no reason that the ultimate definition or interpretation could not incorporate Wallace's definition of imminence.¹⁵⁷ Subsection (a) still suffers from the potential circularity argument regarding proving the ultimate issue.¹⁵⁸ The resolution of this potential issue, though, will likely have to be left up to the courts.

Subsection (b) can trace its roots to California's § 1107 (b). However, the language is arguably quite different. Rather than stating, "[t]he foundation shall be sufficient for admission of this [BWS] expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness,"¹⁵⁹ the model rule states that expert testimony on BWS is *presumptively relevant* in both cases discussed in (a).

As the model rule goes on to say in subsection (b), "[a]n opposing party may attempt to rebut this presumption with a showing that the testimony is irrelevant." The language of the model rule is thus clearly weighted in favor of admission. By shifting the burden to the opposing party to show irrelevance, the model rule further advances a preference for the inclusion of expert testimony on BWS but without eliminating the possibility of excluding expert testimony on BWS in cases where it is truly irrelevant. The model rule provides an additional opportunity for excluding expert testimony—through a showing of extreme prejudice. Here again, there is a possibility of exclusion but the rule remains clearly weighted in favor of admission.

155. See CAL. EVID. CODE § 1107 (West 2013).

156. See OHIO REV. CODE ANN. § 2901.06 (West 2013).

157. See *supra* note 124 and accompanying text.

158. See discussion *supra* note 115.

159. CAL. EVID. CODE § 1107 (West 2013).

Turning to subsection (c), this section incorporates the protections of Missouri's subsection (3)¹⁶⁰ on use of the defendant's statements during examination by the expert. The model rule also incorporates the statement from California's subsection (b)¹⁶¹ on the acceptability of BWS in the scientific community, which prevents any potential attacks to the psychological or psychiatric acceptance of BWS.

Finally, subsection (d) attempts to address the likely reality that the cycle of violence that characterizes BWS is not limited to female sufferers or heterosexual relationships. The California code implicitly recognizes this fact with its use of "intimate partner battering" as the descriptive phrase instead of BWS.¹⁶² Subsection (d) is also intended to acknowledge that it is the cycle of violence that characterizes BWS rather than a mental illness.¹⁶³ Lastly, subsection (d) seeks to make clear that the ultimate decision about the explanative power of BWS is a question for the trier of fact rather than the judge as an evidentiary matter. That is not to say, however, that judges do not and would not find expert testimony on BWS beneficial to jurors.¹⁶⁴

CONCLUSION

The violent and abusive acts too many women face at the hands of their domestic partners is real and prevalent. When those violent acts make their way to the courtroom, a new type of legal challenge arises for many women: telling their stories in a legally admissible way. Because of the limitations imposed on the scope of testimony through rules of evidence, a thorough and complete story may not always be possible. In some instances, such as with a victim's past sexual relationships,¹⁶⁵ limiting the scope of a witness's or victim's testimony may indeed be desirable. In other instances, though, eliminating all limitations on the scope of permissible evidence may be desirable.¹⁶⁶

When it comes to BWS, an underlying assumption throughout this Note has been that permitting BWS testimony at trial is not only desirable but also right. As is the case in California, Ohio, and Missouri, one means of permitting increased BWS testimony at trial is

160. See MO. ANN. STAT. § 563.033 (West 2013).

161. See CAL. EVID. CODE § 1107 (West 2013).

162. *Id.*

163. Whether this would appease the critics of the term "battered women's syndrome" is another question and likely one not soon to be resolved. See discussion *supra* note 8.

164. This is especially true considering "[t]hat the subject matter and details of the syndrome are not within the general understanding or experience of a person who is a member of the general populace and are not within the field of common knowledge." OHIO REV. CODE ANN. § 2901.06(A)(2) (West 2013).

165. See, e.g., discussion *supra* Part III.E.

166. See, e.g., FED. R. EVID. 609(a)(2) (requiring a court to admit evidence of a criminal conviction when the elements required proving a dishonest act or false statement).

through reforming state rules of evidence.¹⁶⁷ An alternative option can be found in Wallace's argument for redefining the traditional elements of self-defense.¹⁶⁸ A final option, and the position of this Note, is to reform the Federal Rules of Evidence with the goal that evidentiary changes at the federal level will be incorporated at the state level.

While no one option presents a single, proverbial silver bullet, amending the Federal Rules of Evidence presents the best option. California, Ohio, and Missouri represent viable, state-based options for reform. But as earlier discussion illustrates, they are not without their challenges in application.¹⁶⁹ Furthermore, the slow, state-by-state approach may simply leave too many women unprotected and unable to share their stories as individual states attempt independent legislative reform. Wallace's argument in favor of redefining self-defense is similarly with merit but also not without challenges, namely a wholesale approach to reform that likely exceeds the political will of state legislatures.

Reforming the Federal Rules of Evidence presents a viable middle ground to the state-by-state approach and Wallace's wholesale reform. Obviously any reform at the federal level would still depend on incorporation at the state level.¹⁷⁰ Reform at the federal level, however, may well still prove more feasible than reform in fifty different state legislatures.

Ultimately the goal of amending the Federal Rules of Evidence is to provide greater legal recognition and protection for women who suffer abuse at the hands of their domestic partners. As a society, the United States ought not to continue to tolerate a legal system that loses three women a day to domestic violence and sees another woman assaulted by her partner every nine seconds. Amending the Federal Rules of Evidence is a viable means of providing at least some recognition and protection for those women suffering from BWS should they turn to the courts for justice.

MATTHEW FINE*

167. See discussion *supra* Parts III.A–C.

168. See discussion *supra* Part IV.A.

169. See discussion *supra* Parts III.A–C.

170. Not only is this technically true but it is also practically true. Given that the types of crimes in which BWS testimony comes up is usually a matter of state law (e.g., domestic violence and murder), reform at the federal level would have a minimal initial impact without state adoption of analogous BWS provisions.

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