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ADMITTING EXPERT TESTIMONY ON BATTERED WOMAN SYNDROME IN VIRGINIA COURTS: HOW PEEPLES1 CHANGED VIRGINIA SELF-DEFENSE LAW

Domestic violence continues to be a significant problem nationwide. "Each year, close to four million Americans are physically abused by their spouses or partners; 37 percent of women seeking emergency room treatment in 1994 for violence-related injuries were injured by a former or current spouse or partner."2 This national plague of abuse is also costly to the private sector, as "[t]he Bureau of National Affairs estimates that family violence costs employers at least $3 billion to $5 billion a year in lost days of work and reduced productivity."3 Virginia has an increased cost as well, because a victim seeks help from a state domestic violence program an average of every twelve minutes.4 Furthermore, "[i]n a recent fiscal year, more than 48,200 people requested services from Virginia's spous[all] abuse programs."5

What happens to these women?6 They can stay in a dangerous situation, try to leave, or they can strike back while defending themselves. This Note deals with those situations in which a woman strikes back in self-defense and consequently is prosecuted under a criminal assault charge,7 specifically in the Commonwealth of Virginia. This Note, however, does not argue either that the battered woman does not have a reasonable claim of self-defense, or that she may, indeed, have an "abuse excuse" that explains and justifies her actions. Instead, this Note raises questions as to the adequacy of merely admitting expert testimony generally in Battered Woman Syndrome (BWS)8 cases in Virginia.

3. Id.
4. See id.
5. Id.
6. For simplicity, this Note uses gender-specific terms for batterer and victim. Understanding the ramifications of such convenience, the overwhelming majority of books and articles consulted for this piece studied mainly female victims of domestic violence. In fact, the Battered Woman Syndrome cases cited here involved heterosexual relationships in which the abuser was male. For a discussion of Lesbian and Gay battering, see generally Nancy Hammond, Lesbian Victims and the Reluctance to Identify Abuse, in NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING 190 (Kerry Lobel ed., 1986).
8. The definition of Battered Woman Syndrome used in this Note is the same one coined by psychologist Dr. Lenore Walker:
This Note will explain the status of self-defense law, both before and after the decision in *Peeples v. Commonwealth*, with a special emphasis on how this decision will change the criteria for admitting Battered Woman Syndrome testimony in Virginia courts. The Note also will discuss the problems associated with Battered Woman Syndrome and will suggest that case-specific jury instructions would better serve those abused women who do have genuine self-defense claims of "imminent danger." Specifically, this Note will assert that effectively drafted jury instructions would weed out those marginal cases that make "bad law" and would avoid the re-victimization of battered women that occurs through proffering unaccompanied BWS testimony as a lesser version of an insanity plea.

**BATTERED WOMAN SYNDROME TESTIMONY IN VIRGINIA BEFORE *PEEPLES***

Before September 1998, the law of self-defense in Virginia summarily dismissed the use of expert testimony regarding Battered Woman Syndrome as an inadmissible diminished capacity defense and therefore irrelevant in criminal prosecutions. In
1993, the law in Virginia was changed explicitly to allow evidence of the abuse to be admitted but not of the psychological ramifications of that harm—particularly its manifestation as a change in the ability of the victim both to perceive her situation and to determine her next course of action. Essentially, evidence of the abuse was admissible, but not necessarily the attached syndrome. This rule allowed the jury to hear relevant abuse evidence but not
to hear an expert’s explanation of how this abuse may have affected the battered woman’s judgment.\textsuperscript{16}

In September 1998, however, the Court of Appeals of Virginia reconsidered the issue of expert testimony and the use of self-defense in \textit{Peeples v. Commonwealth}.\textsuperscript{17} Determining that the affirmative justification of self-defense hinged on the defendant’s subjective perception of imminent harm,\textsuperscript{18} the court departed from the long-established standard of allowing such expert testimony only when the defendant pled not guilty by reason of insanity.\textsuperscript{19} The decision effectively rendered testimony regarding the defendant’s state of mind at the time of the crime as not only relevant, but crucial in deciding the truthfulness of a defendant’s self-defense claim.\textsuperscript{20} This expansion of the use of expert testimony in self-defense cases may allow domestic violence victims the opportunity to introduce expert testimony at trial to explain the state of mind of the battered woman defendant at the time she struck back at her abuser.\textsuperscript{21} Furthermore, this testimony may prove helpful to a jury in judging her actions, especially when judging the reasonableness of her actions and her perception of “imminent danger.”\textsuperscript{22}

\begin{itemize}
  \item \textsuperscript{16} See Diana Patton, “He Never Hit Me”—The Need for Expert Testimony in Domestic Violence Cases, \textit{ARIZ. ATTY}, Jan. 1994, at 10, *13, available in WL 30-JAN AZATT 10 (discussing the need for more than lay testimony of domestic violence); see also infra notes 139-46 and accompanying text for the problems associated with allowing only abuse evidence to be heard by the jury under this standard.
  \item \textsuperscript{17} 504 S.E.2d 870 (Va. Ct. App. 1998).
  \item \textsuperscript{18} See id. at 873.
  \item \textsuperscript{19} See \textit{id}. at 875 (citing \textit{Stamper v. Commonwealth}, 324 S.E.2d. 682 (Va. 1985)). \textit{Stamper} held “that evidence of a criminal defendant’s mental state at the time of the offense, in the absence of an insanity defense, is irrelevant to the issue of guilt.” \textit{Stamper}, 324 S.E.2d. at 688.
  \item \textsuperscript{20} See \textit{Peeples}, 504 S.E.2d at 875.
  \item \textsuperscript{21} The function of admitting expert testimony on Battered Woman Syndrome is to assist the trier of fact in evaluating the woman’s self-defense claim, specifically the “reasonableness” in her decision to use force, its severity, and the method she chose in using force against her abuser. See, e.g., \textit{People v. Minnis}, 455 N.E.2d 209, 217-18 (Ill. App. Ct. 1983) (using BWS testimony to explain why a woman dismembered her abuser after killing him); see generally Regina A. Schuller, \textit{The Impact of Battered Woman Syndrome Evidence on Jury Decision Processes}, 16 LAW & HUM. BEHAV. 597 (1992) (discussing two experiments which found a positive association between the admittance of BWS testimony and lenient verdicts).
  \item \textsuperscript{22} Battered Woman Syndrome has been found to be relevant to a jury’s deliberations regarding “the perception in the mind of the defendant at the time of the killing as to how a battered woman would perceive danger as being imminent even though her batterer was not then in a position to pose immediate danger.” \textit{Minnis}, 455 N.E.2d at 215.

“Imminent” is defined as: “[n]ear at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous. Something which is threatening to happen at once, something close at hand, something to happen upon the instant, close although not yet touching, and on the point of happening.” \textit{BLACK’S LAW DICTIONARY} 750 (6th ed. 1990). “Imminent danger” is defined as:
Whether this type of testimony, by itself, would prove beneficial to a battered woman defendant or a jury is questionable in light of a recent societal backlash against the so-called "abuse excuse." Although the new rule regarding expert testimony articulated in Peeples has opened the door for more juries to hear expert testimony on Battered Woman Syndrome, this development in Virginia self-defense law may not be very helpful to the battered women who appear before Virginia courts unless there is a broader change in the law of self-defense and revised jury instructions. Case-specific jury instructions and a broadened definition of "imminent harm" would allow for a more inclusive context in which to evaluate the circumstances of these difficult cases.

**SELF-DEFENSE LAW IN VIRGINIA**

Self-defense is a recognized defense to criminal assault charges in Virginia. At common law, self-defense is an affirmative defense. It can be claimed by a defendant when she has used necessary force to repel an attack, deadly if need be, when she reasonably feared "death or serious bodily harm to [her]self at the hands of [her] victim." The defendant has the burden of proving

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*In relation to homicide in self-defense, this term means immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law. Or, as otherwise defined, such an appearance of threatened and impending injury as would put a reasonable and prudent man to his instant defense.*

*Id.* See *infra* notes 44-45 and accompanying text for a discussion of "imminent danger" in terms of Virginia self-defense law.

23. These cases include, most notably, those of Erik and Lyle Menendez and Lorena Bobbitt. See generally ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OFFS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994) (discussing the use of various "abuse excuses," including Battered Woman Syndrome, as improper rationalizations for negating criminal responsibility).

24. This Note assumes that the self-defense issue will be raised in conjunction with a defense to murder in order to negate the requisite mens rea, thereby reducing the charge of murder to manslaughter. The Virginia Code allows for the conviction of lesser included offenses in lieu of an indictment for homicide: "In any trial upon an indictment charging homicide, the jury or the court may find the accused not guilty of the specific offense charged in the indictment, but guilty of any degree of homicide supported by the evidence for which a lesser punishment is provided by law." *Va. Code Ann.* § 19.2-266.1 (Michie 1995). The Virginia Code allows abuse testimony only in a "criminal prosecution alleging personal injury or death, or the attempt to cause personal injury or death" and limits its content to "abuse of the accused by the victim." *Va. Code Ann.* § 19.2-270.6 (Michie 1995). It is unclear whether abuse testimony would be allowed in cases in which the accused (i.e., the battered woman) is pleading duress or coercion as an affirmative defense to criminal charges under current Virginia law.


26. *Id.* at 810.
this affirmative defense.\textsuperscript{27} The Commonwealth need not offer evidence rebutting the question unless it is raised by the defendant.\textsuperscript{28}

In asserting a self-defense claim, the defendant admits to the killing but claims it was not intentional.\textsuperscript{29} Self-defense law in Virginia actually recognizes two separate and distinct defenses within this assertion. First, "excusable homicide" or "excusable self-defense" applies when the defendant, who was previously at fault in precipitating the combat, abandons the fight and retreats before attempting to repel the attack.\textsuperscript{30} Alternatively, "justified self-defense" or "justifiable homicide" applies to a defendant who is free from fault in provoking the attack.\textsuperscript{31} If the fact finder finds either

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\item \textsuperscript{27} See Lynn \textit{v.} Commonwealth, 499 S.E.2d 1, 9 (Va. Ct. App. 1998), aff'd, 514 S.E.2d 147 (Va. 1999).
\item \textsuperscript{28} See id. There is also no duty to retreat in Virginia self-defense law, at least when the victim is attacked in her home and is without fault in the attack. See Gilbert \textit{v.} Commonwealth, 506 S.E.2d 543, 546-47 (Va. App. 1998) (holding that when accused is free from fault in attack, she can stand her ground and repel the attack by force if necessary). The court in Gilbert also found that a person threatened with death or serious bodily harm, who has reasonable grounds to believe the threats will be carried through, has a right to arm herself in order to "combat such an emergency." \textit{Id.} at 547 (quoting Bevley \textit{v.} Commonwealth, 38 S.E.2d 331, 333 (Va. 1946)). Moving to disarm an attacker, however, does not give the victim the subsequent right to use the attacker's weapon in resisting a deadly attack. See Lynn, 499 S.E.2d at 10.
\item \textsuperscript{29} See McGhee, 248 S.E.2d at 810. This does not preclude the defendant from asserting additional defenses, such as the heat of passion, to defeat the requisite mens rea of a murder charge. See Barrett \textit{v.} Commonwealth, 341 S.E.2d 190, 192 (Va. 1986). When a defendant asserts affirmative defenses of self-defense and heat of passion simultaneously, they are held to not conflict with each other. See id.
\item \textsuperscript{30} See Lynn, 499 S.E.2d at 7.
\item \textsuperscript{31} See id. Any conduct by the defendant not free from fault, however, may be sufficient to eliminate the justifiable self-defense claim. See Smith \textit{v.} Commonwealth, 435 S.E.2d 414, 416 (Va. Ct. App. 1993).
\end{itemize}

"Justifiable homicide in self-defense occurs [when] a person, without any fault on his part in provoking or bringing on the difficulty, kills another under reasonable apprehension of death or great bodily harm to himself." If an accused "is even slightly at fault" in creating the difficulty leading to the necessity to kill, "the killing is not justifiable homicide." Any form of conduct by the accused from which the fact finder may reasonably infer that the accused contributed to the affray constitutes "fault."

"Excusable homicide in self-defense occurs where the accused, although in some fault in the first instance in provoking or bringing on the difficulty, when attacked retreats as far as possible, announces his desire for peace, and kills his adversary from a reasonably apparent necessity to preserve his own life or [to] save himself from great bodily harm."

Whether the danger facing the accused is "reasonably apparent" is determined from the viewpoint of the accused at the time that he shot the victim. However, his fear alone does not excuse the killing; there must be an overt act indicating the victim's imminent intention to kill or seriously harm the accused.

\textit{Id.} at 416-17 (alterations in original) (citations omitted).
of these defenses applicable, then the defendant is entitled to an acquittal.\textsuperscript{32}

As late as 1941, the Virginia Supreme Court required an objective test, in addition to its subjective test,\textsuperscript{33} in evaluating a defendant's self-defense claim.\textsuperscript{34} In \textit{McReynolds v. Commonwealth},\textsuperscript{35} the Supreme Court of Virginia explained:

It is not enough for the accused to say that he was terrified. There is no way by which we can gauge his state of mind. Moreover, one whose nerves were unstrung might have been frightened by facts which would not have troubled an ordinary man at all. It is for a jury to say whether they were reasonably sufficient to warrant an ordinary man in believing that he stood in danger of serious bodily harm.\textsuperscript{36}

Five years later, in \textit{Taylor v. Commonwealth},\textsuperscript{37} the Supreme Court of Virginia expanded the objective "reasonable person" test to include an evaluation of a self-defense claim in light of the surrounding circumstances.\textsuperscript{38} In 1992, the Virginia Court of Appeals reaffirmed that a defendant's self-defense claim is to be evaluated "through the eyes of the person allegedly threatened."\textsuperscript{39}

In \textit{Harper v. Commonwealth},\textsuperscript{40} the Virginia Supreme Court held that a defendant could assert a self-defense claim even if the

\begin{footnotesize}
\textsuperscript{32} See Gilbert, 506 S.E.2d at 546 (citing Bailey v. Commonwealth, 104 S.E.2d 28, 31 (Va. 1958)).

\textsuperscript{33} The Supreme Court of Virginia defined the "subjective" test in \textit{Taylor v. Commonwealth}, 38 S.E.2d 440, 441 (Va. 1946), finding the tendered jury instructions erroneous because they contained the italicized language below:

The court instructs the jury in that in passing upon the danger, if any, to which the accused was exposed, you will consider the circumstances as they reasonably appeared to the accused and draw such conclusion from those circumstances as he could reasonably have drawn, situated as he was at the time; in other words, the court instructs you that the accused is entitled to be tried and judged by facts and circumstances as they reasonably appeared to him, provided they would so appear to a reasonable man placed under similar circumstances, and not by any intent that may or may not have existed in the mind of the deceased.

\textit{Id.} at 441. The court further explained that "[w]hat reasonably appeared to the accused at the time of the shooting, as creating the necessity for the act, is the test and not what reasonably appeared to him, provided it would so appear to some other reasonable person under similar circumstances." \textit{Id.}

\textsuperscript{34} See \textit{McReynolds v. Commonwealth}, 15 S.E.2d 70, 74 (Va. 1941).

\textsuperscript{35} 15 S.E.2d 70 (Va. 1941).

\textsuperscript{36} \textit{Id.} at 74 (citations omitted).

\textsuperscript{37} 38 S.E.2d 440 (Va. 1946).

\textsuperscript{38} See supra note 33.


\textsuperscript{40} 85 S.E.2d 249 (Va. 1955).
\end{footnotesize}
danger of attack was not objectively real.\textsuperscript{41} The court cautioned, however, that “[t]he bare fear that a man intends to commit murder, however well grounded, unaccompanied by any overt act indicative of such an intention, will not warrant killing the party by way of prevention.”\textsuperscript{42} Although the overt act requirement would appear to allow evidence or testimony regarding the beatings a victim has endured,\textsuperscript{43} the Harper court interpreted “reasonableness” to require that the overt act of the battery “imminently” or “immediately”\textsuperscript{44} precede the victim’s act of self-defense,\textsuperscript{45} effectively sealing the fate of battered women claiming self-defense in Virginia.

For example, in Yarborough \textit{v.} Commonwealth,\textsuperscript{46} the court found that a woman who shot her abuser as he was reaching for his sock, where she knew he kept a knife, could not claim self-defense because her abuser’s movement “was not such an overt act indicative of his intention to kill or do great bodily harm to defendant as would excuse the homicide.”\textsuperscript{47} Furthermore, the court found that even though the trial court’s declaration that defendant’s continuous relationship with her abuser (they had been together for seven years, throughout which she had suffered abuse at his hand)\textsuperscript{48} deprived her from claiming to be without fault in the attack was “incorrect,” this consideration was not enough to reverse her conviction as the trial court’s ruling was based primarily on the “correct” doctrine of self-defense.\textsuperscript{49}

\textsuperscript{41} See id. at 254.
\textsuperscript{42} Id. at 254 (quoting Litton \textit{v.} Commonwealth, 44 S.E. 923 (Va. 1903)).
\textsuperscript{43} See ROBERT F. SCHOPP, \textit{JUSTIFICATION DEFENSES AND JUST CONVICTIONS} 113 (1998) (“Regardless of the availability of a well-supported syndrome, evidence confirming a history of battering provides the best support for the defendant’s credibility because it directly supports the aspect of her testimony that jurors may find dubious.”)
\textsuperscript{44} There is a huge difference between “imminent” and “immediate” in terms of self-defense law. The term “imminent” does not necessarily connote the temporal proximity that “immediate” does. See DONALD A. DOWNS & EVAN GERSTMANN, \textit{A Framework for Battered Women: Self-Defense and the Necessity of the Situation}, in DONALD ALEXANDER DOWNS, \textit{MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME, SOCIETY, AND THE LAW} 223, 229 (1996). Therefore, despite the court’s conflation, the two should not be used interchangeably.
\textsuperscript{45} “In order to justify an accused in striking another with a deadly weapon, as the accused admits he did in this case, a threatening attitude alone affords no justification. The adversary must have made some overt act indicative of imminent danger to the accused at the time.” Harper, 85 S.E.2d at 255 citing Stoneman \textit{v.} Commonwealth, 66 Va. (25 Gratt.) 887, 893 (1874); Berkeley \textit{v.} Commonwealth, 14 S.E. 916, 916 (Va. 1892)) (emphasis added).
\textsuperscript{46} 234 S.E.2d 286 (Va. 1977).
\textsuperscript{47} Id. at 292.
\textsuperscript{48} See id. at 290-91.
\textsuperscript{49} See id. at 292.
OTHER DEFENSES: IMPERFECT SELF-DEFENSE AND DIMINISHED CAPACITY

"Imperfect" self-defense applies when the defendant, perceiving a threat to her safety, acts unreasonably—for example, by using more force than necessary to repel or stop the attack. Virginia, however, does not recognize the imperfect self-defense claim. If the defendant was at all at fault in provoking the attack, which is a factual question, then the defendant loses her right to assert the self-defense claim of justifiable homicide. If she fails to retreat after first being at fault, she may not assert a self-defense claim of excusable homicide. Thus, the Battered Woman Syndrome expert testimony potentially provides a jury with a reason for the victim's particular reaction. The crucial difference the expert testimony offers is to allow the jury to understand that she was in genuine fear for her life and felt she needed to use this degree of force to protect herself.

Diminished capacity or diminished responsibility defenses attempt to negate the requisite mens rea of the crime by presenting evidence that the defendant lacked the mental capability to commit the crime alleged. These defenses, however, are unavailable in

50. In Virginia, this is called the proportionality rule. See McGhee v. Commonwealth, 248 S.E.2d 808, 810 (Va. 1978) (holding that the defendant can use deadly force in self-defense only when she fears "death or serious bodily harm to [her]self at the hands of [her] victim"). For a general discussion of the proportionality rule, see PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(d) (West 1984).

51. A jury can only convict of a lesser-included offense. See VA. CODE ANN. § 19.2-266.1 (Michie 1995).


53. See id. at 416 (citing Bailey v. Commonwealth, 104 S.E.2d 28, 31 (Va. 1958)).


55. See id. at *15.

56. [The diminished capacity] doctrine recognizes that although an accused was not suffering from a mental disease or defect when the offense was committed sufficient to exonerate him from all criminal responsibility, his mental capacity may have been diminished by intoxication, trauma, or mental disease so that he did not possess the specific mental state or intent essential to the particular offense charged.


[The diminished responsibility doctrine] refer[s] to lack of capacity to achieve state of mind requisite for commission of crime. The concept of diminished responsibility, also known as partial insanity, permits the trier of fact to regard the impaired mental state of the defendant in mitigation of the punishment or degree of the offense even though the impairment does not qualify as insanity under the prevailing test.

Id. (citations omitted).
Virginia. Other states, however, have found that when BWS testimony is proffered, it is used to assert claims of either diminished capacity or insanity.

**EXPERT TESTIMONY IN VIRGINIA**

Virginia law allows admission of expert testimony to assist the trier of fact in areas beyond the general knowledge of a layperson. In order to provide an expert opinion, one does not need an academic or professional degree. Anyone who possesses specialized knowledge, obtained through education, professional training, or experience, may testify as an expert. The trial judge has great discretion in determining whether to allow an expert to testify.

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58. See, e.g., United States v. Ramos-Oseguera, 120 F.3d 1028, 1040 (9th Cir. 1997) (remanding case to allow district court to use downward departures in sentencing guidelines with regard to diminished capacity defenses that included “youthful lack of guidance,” imperfect duress, and Battered Woman Syndrome, based on abuse evidence offered to mitigate drug-trafficking charges); State v. Mott, 931 P.2d 1046, 1048 (Ariz. 1997) (en banc) (not allowing BWS testimony because it was offered to negate mens rea in a case of child abuse), cert. denied, 520 U.S. 1239 (1997); People v. Minnis, 455 N.E.2d 209, 217-18 (Ill. App. Ct. 1983) (offering BWS testimony to explain why a woman mutilated the body of her abuser after killing him). Offering BWS testimony also can prevent a criminal defendant from asserting her Fifth Amendment right against self-incrimination because the State can compel mental examination by its own experts to rebut BWS testimony. See Hess v. Macaskill, No. 94-35446, 1995 WL 564744, at *2 (9th Cir. Sept. 20, 1995) (finding BWS technically not a defense of insanity or diminished capacity, yet still upholding State’s right to present its own expert testimony when a defendant seeks to introduce expert testimony of insanity or diminished capacity).

59. Ohio, for example, requires that BWS testimony be offered in connection with a plea of not guilty by reason of insanity. See Ohio Rev. Code Ann. § 2945.392 (West 1997). But see Pugh v. State, 382 S.E.2d 143, 144 (Ga. Ct. App. 1989) (finding it unnecessary to decide whether BWS testimony also raises an issue of insanity, mental illness, or incompetency as it already was held to be independently admissible in a self-defense claim); State v. Moore, 568 So. 2d 612, 618 (La. Ct. App. 1990) (finding BWS testimony insufficient to establish an insanity defense as defendant’s actions before and after shooting her abuser did not indicate that she suffered “from a mental disease or defect which rendered her incapable of distinguishing right from wrong”); State v. Burton, 464 So. 2d 421, 427-28 (La. Ct. App. 1985) (finding that there was no error in refusing BWS testimony in connection with her defense of insanity because: 1) the jury was presented already with a basis for determining defendant’s sanity; 2) there was no evidence of an overt act at the time of the incident; 3) the Louisiana Code restricted the admission of evidence of prior hostilities between the couple; and 4) the jury needed to focus exclusively on “the incident in question” and not be made aware of the victim’s “undesirable nature”).


61. See id. at 478.

62. See id. For a discussion of the difference between expert and non-expert testimony, see Bradley v. Poole, 47 S.E.2d 341, 344 (Va. 1948).
based on the expert's knowledge, the testimony's relevance to a fact at issue, and its helpfulness to a trier of fact. Expert testimony will be inadmissible if the jurors are as capable as the expert in reaching an informed decision on the matter. The jury is entitled to determine how much weight to accord the testimony of an expert witness, with the aid of jury instructions to that effect.

Evaluating the admissibility of expert testimony by mental health professionals is more difficult, but the same basic rules apply. The admissibility of an expert's testimony, when pertaining to the question of the presence of a mental disease or defect, depends largely on the "nature and extent of his knowledge." The expert must not express opinions that involve the ultimate issue of fact, which remains the sole province of the jury. In Virginia BWS cases, this ultimate fact is whether the defendant was in imminent harm at the time of the crime. BWS testimony, however, may not help the fact finder determine these questions.

**Battered Woman Syndrome**

Dr. Lenore Walker, the psychologist who coined the term Battered Woman Syndrome in the late 1970's, defines that term rather broadly. Generally, a battered woman is defined as a woman who suffers repeated physical and mental abuse by her partner, to the point that he can force her to do something against her will.

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65. The standard Virginia jury instruction allows the jury to assess each expert's education and experience, as well as the relevance, common sense, and saliency of their expert opinions in the face of other facts of the case. *See Lee v. Adrales*, 778 F. Supp. 904, 906 (W.D. Va. 1991).
66. "[Psychiatric experts . . . include all mental health professionals who by education and training are competent 'to identify the elusive and often deceptive symptoms of insanity' and who can translate those findings into meaningful information for courts and juries in deciding legal insanity or other relevant issues involving mental states."
70. There also may be a question of determining who was "at fault" in the violent incident. *See supra* notes 30-32, 52-53 and accompanying text.
71. *See infra* notes 81, 87-91 and accompanying text for a discussion of how BWS testimony may ask the jury to find ultimately contrary conclusions.
72. *See generally id.* at 71-184 (discussing methods of coercion in abusive relationships).
One of the first state supreme courts to look favorably on BWS testimony and rule it admissible in a self-defense case was New Jersey. The court looked at the work of Dr. Walker and summarized her diagnosis of BWS as follows:

According to Dr. Walker, relationships characterized by physical abuse tend to develop battering cycles. Violent behavior directed at the woman occurs in three distinct and repetitive stages that vary both in duration and intensity depending on the individuals involved.

Phase one of the battering cycle is referred to as the "tension building stage," during which the battering male engages in minor battering incidents and verbal abuse while the woman, beset by fear and tension, attempts to be as placating and passive as possible in order to stave off more serious violence.

Phase two of the battering cycle is the "acute battering incident." At some point during phase one, the tension between the battered woman and the batterer becomes intolerable and more serious violence inevitable. The triggering event that initiates phase two is most often an internal or external event in the life of the battering male, but provocation for more severe violence is sometimes provided by the woman who can no longer tolerate or control her phase-one anger and anxiety.

Phase three of the battering cycle is characterized by extreme contrition and loving behavior on the part of the battering male. During this period the man will often mix his pleas for forgiveness and protestations of devotion with promises to seek professional help, to stop drinking, and to refrain from further violence. For some couples, this period of relative calm may last as long as several months, but in a battering relationship the affection and contrition of the man will eventually fade and phase one of the cycle will start anew.

The New Jersey court determined that admitting Walker's BWS research could help a jury by explaining the effect of BWS on the woman's behavior throughout the relationship, such as why she entered the relationship, stayed with the abuser, and failed to save

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74. Courts looking to admit such testimony often cite this case and its citations to Dr. Walker's text approvingly. Courts that cite this text provide two insights: 1) which citations of Dr. Walker's work proved significant to their decision, and 2) which parts of Dr. Walker's work influenced other courts and made this New Jersey court decision persuasive. But see supra notes 14-15 and infra note 131 for examples of cases that rejected BWS testimony.
75. Kelly, 478 A.2d at 371 (citations omitted).
herself sooner. The cyclical nature of the abuse coupled with "[t]he loving behavior demonstrated by the batterer during phase three reinforces whatever hopes these women might have for their mate's reform and keeps them bound to the relationship."77

The court also placed some emphasis on society's failure to help these women earlier in their lives, as Dr. Walker found that many battered women grew up in violent households themselves and therefore perceive violence as "normal."78

Other women, however, become so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation. There is a tendency in battered women to believe in the omnipotence or strength of their battering husbands and thus to feel that any attempt to resist them is hopeless.79

The New Jersey court also found Dr. Walker's explanation of external factors that prevent battered women from leaving their abusers—such as financial concerns, limited child care options, and the general lack of support in our society for women, especially those with children, seeking to escape violent relationships80—as helpful to dispel a juror's assumptions about why women would choose to stay in such relationships.81

In addition, battered women, when they want to leave the relationship, are typically unwilling to reach out and confide in their friends, family, or the police, either out of shame and humiliation, fear of reprisal by their husband, or the feeling that they will not be believed.82

The New Jersey court also looked to the factors Dr. Walker and other psychologists found to be important in determining whether a woman suffers from BWS.83 Several personality traits are

76. See id. at 371-72.
77. Id.
78. See id. at 372.
79. Id.
80. See id. at 372.
81. See id.; see also WALKER, supra note 8, at 127-44 (discussing the inherent inconsistency underlying why a woman would be helpless to leave her abuser and yet be able to engage in the rational analysis of her financial situation to determine whether she should stay despite the abuse).
82. Kelly, 478 A.2d at 372.
83. See id. at 372.
common among battered women, including "low self-esteem, traditional beliefs about the home, the family, and the female sex role, tremendous feelings of guilt that their marriages are failing, and the tendency to accept responsibility for the batterer's actions." These women fail to leave their husbands, not only because they hold out hope of their partner getting better, but also for fear of provoking an even more vicious attack. Finally, the New Jersey court urged that an understanding of the depth and complexity of these factors, both societal and individual, was needed in order to evaluate a battered woman's mental state.

BATTERED WOMAN SYNDROME TESTIMONY AND THE IMMINENT HARM REQUIREMENT

Dr. Walker's work on Battered Woman Syndrome does not provide the only example of conflicting conclusions. BWS portrays battered women as suffering from a mental ailment short of insanity, but some scholars debate whether research regarding BWS nevertheless could support a defense of full-blown insanity. In order to prove a defendant insane, the court must find that the defendant was suffering from a mental disease or defect that precluded the defendant from understanding right from wrong. This juxtaposition is extremely problematic in that proponents of BWS expect a jury to believe (1) that a battered woman is both helpless to understand or change her situation; (2) that she has an acute sense of the events in the battering cycle to predict when she is in imminent harm; and (3) that she was able to judge the situation and act in her defense, while believing in the justification of her actions.

84. Id.
85. See id.
86. See id.
87. See SCHOPP, supra note 43, at 103-04.

The perplexing nature of the discussion arises from the apparent tension in describing those who suffer battered woman syndrome in a manner suggesting that this syndrome distorts their perceptions and judgment regarding the battering relationship yet simultaneously provides them with a special capacity to predict events within that relationship with superior accuracy.

Id.
88. See id. at 116.
89. See id. at 116-25.
91. See id.
The problem of the “imminent harm” requirement has been scrutinized in cases involving battered women. Courts that follow the rationale of Harper v. Commonwealth, require an overt act: anything short of a lunging attack is not “immediate” enough to sustain a claim of self-defense. For example, in Lumpkin v. Ray, a woman unsuccessfully challenged her murder conviction that resulted from the trial court barring testimony concerning her “fear of her husband and his violent behavior unless” she could show “sufficient other evidence of self-defense.” Without a precursory, conventional self-defense claim, neither experts nor lay witnesses could testify about the abuse she had suffered. On appeal, she challenged the imminence requirement on equal protection grounds. The Tenth Circuit held that the law neither discriminated against her because she was a woman nor because she was a battered woman.

BATTERED WOMAN SYNDROME EXPERT TESTIMONY IN VIRGINIA

The court system in Virginia has refused to allow BWS expert testimony regarding a defendant’s mental state to be considered by a jury in either the guilt phase or the sentencing phase of a trial. In contrast, the recent trend in other jurisdictions allows consideration of this evidence. Virginia allows evidence of abuse, but

92. See supra notes 22, 41-47 and accompanying text.
93. 85 S.E.2d 249 (Va. 1955).
94. See supra notes 41-47 and accompanying text (discussing the overt act requirement).
96. 977 F.2d 508 (10th Cir. 1992).
97. Id. at 508.
98. See id.
99. See id. at 509.
100. See id. at 510.
103. See Va. CODE ANN. § 19.2-270.6 (Michie 1995); see also Va. CODE ANN. § 19.2-271.2 (Michie 1995) (compelling testimony of one spouse against the other in criminal cases concerning acts committed against each other or in cases of sex crimes against each other or their children); cf. Wilson v. Commonwealth, 162 S.E. 15, 16 (Va. 1932) (stating that the
not necessarily expert testimony of the effects of the abuse. Virginia will not allow any psychological testimony when there is a danger that it will reach a conclusion on the ultimate issue of fact, that is, whether the battered woman was justified in her claim of self-defense at the time of the crime in question.

CRITICISM OF BATTERED WOMAN SYNDROME AND ITS USE IN THE COURTROOM

The existence and underlying research of Battered Woman Syndrome is not without its criticisms. Many scholars and courts challenge both the research methods of those social scientists engaged in the task of exploring BWS and its ultimate use in the courtroom. Expert testimony is especially confusing to a fact finder when admitted in cases in which competing experts line up to testify in even the most marginal of cases.

Perhaps the most compelling critique of BWS testimony focuses not on its use, but its conclusions. Dr. Walker wrote about the cyclical nature of the violent relationship and how these women fail to leave their abuser due to their “learned helplessness.” Yet this testimony often is offered to show how the battered woman rationally believed she was in danger of imminent harm and acted justly.

burden of obtaining consent for the waiver of spousal privilege rests on the Commonwealth). 104. See Hackett, 32 Va. Cir. at 338.
106. Among other problems, authors cite the inadequacy of the research, the lack of scientific data, self-selection of subjects, and the charge that studies were conducted with preconceived conclusions already in mind. See SCHOPP, supra note 43, at 96.
110. See WALKER, supra note 8, at 16.
Even before a BWS-admissibility question is determined by a court, a prima facie case of self-defense is necessary. In the self-defense cases in which the defense hopes to admit BWS testimony, it is because traditional self-defense or insanity pleas would be unsuccessful and the proffered BWS testimony could “contextualize” the circumstances surrounding the crime for the jury. Often, there is a timing or reasonableness problem. For example, when a woman kills her abuser when he is asleep, the key prong of a successful self-defense claim, that of “imminent harm,” is no longer available. In order to get beyond this problem, the defendant introduces BWS not only to allow the evidence of the previous abuse to be heard, but also to introduce the defendant’s perception of imminent harm and the ultimate reasonableness of her actions. What results is a diminished capacity defense.

Unfortunately, this line of inquiry logically leads to a stereotype of a “typical” battered woman. BWS testimony can mischaracterize battered women by forcing its adherents to conclude that a battered woman can no longer face either her

112. See Bechtel v. State, 840 P.2d 1, 10-13 (Okla. Crim. App. 1992) (holding that a defendant asserting BWS must still “show that she had a reasonable belief as to the imminence of great bodily harm or death and as to the force necessary to compel it,” but that BWS testimony may illuminate the defendant’s conceptualization of reasonableness and imminence).


114. In Lentz v. State, for instance, a woman followed her batterer 100 feet to another house after already shooting him twice, to shoot him again. See Lentz v. State, 604 So. 2d 243, 246-47 (Miss. 1992) (finding BWS testimony inadmissible in determining the woman’s reasonableness because the objective standard of reasonableness applies to all self-defense cases in Mississippi, including BWS cases, and an expert’s explanation of this behavior would not have helped the jury because the behavior was just too unreasonable for BWS to provide an adequate explanation).

115. This is the so-called “Burning Bed” scenario introduced to the public consciousness in the TV movie of the same name. See Minnis, 455 N.E.2d at 211.

116. See supra notes 22, 41-47 (defining and discussing imminent danger).

117. This approach introduces expert testimony as to the reasonableness of self-defense and the provocation element necessary to prove the justified homicide theory of self-defense as defined under Virginia common law. See Va. CODE ANN. § 19.2-270.6 (Michie 1995).

118. This tactic introduces a broadened view of “imminent harm,” the woman’s reaction, and the severity of force used against her abuser. See, for example, Minnis, 455 N.E.2d at 217-18, in which the defendant introduced BWS testimony to explain why she dismembered her abuser after she killed him; State v. Anaya, 438 A.2d 892, 894 (Me. 1981), in which the defendant offered BWS testimony to explain her continuous relationship with her abuser and numerous suicide attempts as not inconsistent with her claim of self-defense; and State v. Walker, 700 P.2d 1168, 1172 (Wash. Ct. App. 1985), in which the defendant asserted, unsuccessfully, that stabbing her husband in the back was justified by her perception of imminence as influenced by BWS.
abuser or her situation rationally.\textsuperscript{119} Ostensibly the battered woman's experiences have reduced her to a state of being that renders her unable to determine rationally whether she is in "imminent harm," as defined under the law.\textsuperscript{120}

In a very compelling argument, Donald Alexander Downs reasons that the battered woman is not merely acting in a way that is irrational, but is instead hyper-rational.\textsuperscript{121} Presumably, she is the only one who really knows the cycle of violence in the domestic relationship. That experience gives her reasons and clues beyond what either a jury or an expert could ascertain as to what constitutes a justified realization of "imminent harm" at the hand of her abuser.\textsuperscript{122} Downs contends that it is these survival skills, and not "learned helplessness," that keep the woman alive and give her the ultimate strength to end the relationship, often through the only way she knows—violence.\textsuperscript{123}

It is perhaps even more remarkable that it is this notion of "learned helplessness" or the woman-as-ultimate-victim that receives the most sympathy in our society, both intuitively and through the popular media.\textsuperscript{124} Even while other diminished-capacity defenses or "abuse excuses" lose favor in the public eye,\textsuperscript{125} society is still able to see women collectively only as victims.\textsuperscript{126} BWS experts continue to depict women as acting without wills of their own,\textsuperscript{127} and the continued debate over diminished capacity in these cases furthers that paradigm.\textsuperscript{128}

Merely recognizing the legal problems with the use of BWS expert testimony may not be enough to help those women who kill or attempt to kill their abusers. When the testimony is allowed, it

\textsuperscript{119} See Downs, supra note 44, at 166-68.  
\textsuperscript{120} See supra note 22.  
\textsuperscript{121} See Downs, supra note 44, at 97-98. In fact, some court opinions seem to adopt both views of the battered woman: that she is in a state of "learned helplessness" and is incapable, through her despair, of leaving the relationship or of discovering her own survival skills \textit{and} that she has a heightened perception of the danger she is in and was acting rationally by striking back at her abuser. See State v. Kelly, 478 A.2d 364, 377 (N.J. 1984).  
\textsuperscript{122} See id. at 97-98.  
\textsuperscript{123} See id. at 97-98.  
\textsuperscript{124} See id. at 182-220 (theorizing that this phenomenon has more to do with broader political concepts of citizenship and equality than misconstrued psychological research).  
\textsuperscript{125} See Dershowitz, supra note 23, at 45.  
\textsuperscript{126} See Downs, supra note 44, at 141.  
\textsuperscript{127} See id. at 147.  
\textsuperscript{128} See generally id. at 138-81 (discussing the pitfalls of introducing BWS as a diminished capacity defense).
often is used to explain such questions as "why didn't she leave?"\textsuperscript{129} rather than "what could we, as a society, have done to intervene?"\textsuperscript{130}

\textbf{ADMISSIBILITY OF BATTERED WOMAN SYNDROME TESTIMONY}

Jurisdictions differ in deciding whether to admit BWS testimony,\textsuperscript{131} presumably both because of the above-labeled criticisms of BWS and the lamentable continuation of myths surrounding domestic violence in the courts.\textsuperscript{132} BWS expert testimony, when deemed admissible, also can open the door to evidence of the domestic violence.\textsuperscript{133} This evidence may prove crucial to providing juries with the totality of the circumstances, or context, of the crime.\textsuperscript{134} Courts may continue to rely on such testimony without relying solely on lay witnesses or without relying too much on questionable expert testimony that either confuses jurors or re-victimizes the battered woman.

\textbf{IS VIRGINIA LEANING TOWARD ADMISSION? COMMONWEALTH V. HACKETT}

In \textit{Commonwealth v. Hackett},\textsuperscript{135} a Virginia Circuit Court denied a motion \textit{in limine} to introduce BWS expert testimony, but allowed, "within reason,"\textsuperscript{136} testimony by lay witnesses of the defendant's "circumstances predating her act."\textsuperscript{137} The court reasoned that admitting this testimony would allow the jury to "evaluate the defendant's act in light of all facts and circumstances known to her

\begin{footnotes}
\item 129. See, e.g., State v. Kelly, 478 A.2d 364, 377 (N.J 1984) (stating that BWS testimony counters the myth "that battered wives are free to leave").
\item 130. See WALKER, \textit{supra} note 8, at 251-59.
\item 131. For a court opinion rejecting BWS testimony, see, for example, State v. Mott, 931 P.2d 1046, 1048 (Ariz. 1997) (en banc), cert. denied, 529 U.S. 1239 (1997). For an opinion admitting BWS testimony, see, for example, United States v. Willis, 38 F.3d 170, 175-76 (5th Cir. 1994), cert. denied, 515 U.S. 1145 (1995).
\item 132. See supra notes 15, 47-49 and accompanying text.
\item 133. See, e.g., State v. Baker, 424 A.2d 171, 173 (N.H. 1980) (finding BWS testimony to be neither irrelevant nor unduly prejudicial in being offered to counter defendant's claim he attempted to murder his wife in a moment of insanity). \textit{But see} State v. Burton, 464 So. 2d 421, 427-28 (La. Ct. App. 1985) (finding inadmissible evidence of prior abuse because it would cause prejudice to the victim and mislead the jury from focusing on "the event in question").
\item 134. See, e.g., \textit{Kelly}, 478 A.2d at 373-78 (discussing admission of expert testimony on BWS and defendant's state of mind with respect to fear of imminent harm). \textit{But see Burton}, 464 So. 2d at 427 (holding BWS testimony inadmissible when there was no evidence of an overt act at the time of the incident).
\item 135. 32 Va. Cir. 338 (1994).
\item 136. Id. at 339.
\item 137. Id.
\end{footnotes}
before the shooting. Thus, the defendant and others may testify about the violence, if any, in the defendant’s relationship with the decedent.”

Obviously, only allowing testimony of lay witnesses and the defendant herself presents its own problems. First, the defendant has a constitutional right not to testify; furthermore, her decision to take the stand and speak about the abuse may expose her case to damaging character evidence. Second, the defendant may not be physically or emotionally ready either to testify or to endure harsh questioning under cross-examination by the prosecutor. Third, if lay testimony is indeed the better option, it may be severely limited in scope and probative value by the reality that domestic violence typically occurs in the home where there are no witnesses other than the couple involved. In such a scenario, the only potential witnesses may be children who are emotionally and physically damaged themselves by the violence they have witnessed. In a situation in which other people are aware of the existence of violence in the home, they may not be intimately aware of “all facts and circumstances” relating to the abuse. Those involved in this cycle of violence are often reluctant to share the details of their circumstances to anyone, much less to those who would be in a position to testify in court. Overall, the lay testimony option may be favorable only in those courts that are not willing to allow a parade of experts to testify. Lay testimony, however, may not help either a criminal defendant supporting her claim of self-defense or a jury evaluating that claim. As indicated above, lay testimony may not help a defendant’s case if there were no witnesses to the crime in question, evidence of battering was

\[138. \text{Id.}\]
\[139. \text{See U.S. CONST. amend. V; see also Hess v. Macaskill, No. 94-35446, 1995 WL 564744, at **2 (9th Cir. Sept. 20, 1995) (finding that an offer of BWS testimony effectively waived defendant’s Fifth Amendment right to refuse mental examination by State’s experts).}\]
\[140. \text{See Fed. R. Evid. 404(a)(1).}\]
\[141. \text{See Walker, supra note 8, at 149-50.}\]
\[142. \text{Hackett, 32 Va. Cir. at 339.}\]
\[143. \text{See Walker, supra note 8, at 74.}\]
\[144. \text{In fact, even in those circumstances in which a battered woman seeks help from social services, the value of these reports as evidence in her criminal prosecution may be limited. Cf. Va. CODE ANN. § 19.2-271.2 (Michie 1995) (excluding such records from the Virginia Freedom of Information Act, unless they are disclosed by the custodian of such records within her discretion and where such disclosure is not prohibited by law).}\]
\[145. \text{See Patton, supra note 16, at *13.}\]
explained away, or because, in a society such as ours, domestic abuse is seen by the defendant's friends or family as "normal."\textsuperscript{146}

\textbf{THE CASE THAT COULD CHANGE VIRGINIA LAW: \textit{PEEPLES V. COMMONWEALTH}}

In \textit{Peeples v. Commonwealth},\textsuperscript{147} the Court of Appeals of Virginia departed from its previous stance against expert testimony on a defendant's mental state when claiming self-defense.\textsuperscript{148} The \textit{Peeples} court allowed the admission of expert testimony to show that a murder defendant lacked the mental capacity to reasonably understand the circumstances around him.\textsuperscript{149} The court admitted proffered expert testimony regarding the defendant's general mental characteristics as merely probative evidence to the fact finder on the ultimate issue.\textsuperscript{150}

The charges for which the trial court convicted Peeples, a juvenile, were of "aggravated malicious wounding and use of a firearm in the commission of aggravated malicious wounding."\textsuperscript{151} The crimes stemmed from a drug transaction involving four youths.\textsuperscript{152} Peeples sold two other boys a "blunt"—a marijuana cigar.\textsuperscript{153} Immediately following the exchange, Peeples mistook the actions of one of the boys as reaching for a gun, thinking the boy was trying to rob him.\textsuperscript{154} The testimony of the two boys, however, tended to show that they, in fact, were not armed, nor were they trying to rob Peeples, although they had been arguing with Peeples over the drug transaction.\textsuperscript{155} Peeples shot both boys multiple times.\textsuperscript{156} Peeples testified that he was afraid he was being robbed and that he had reason to fear that he would be hurt, because one of the boys he had shot had a reputation for violence in the neighborhood.\textsuperscript{157}

\begin{footnotesize}
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\item \textsuperscript{146} See generally \textit{WALKER, supra note 8, at 11-17 (discussing societal indifference to domestic violence)}.
\item \textsuperscript{147} 504 S.E.2d 870 (Va. Ct. App. 1998).
\item \textsuperscript{148} See \textit{id.} at 872.
\item \textsuperscript{149} See \textit{id.} at 873-75 (holding that the expert testimony was admissible to aid in his claim of self-defense).
\item \textsuperscript{150} See \textit{id.} at 875 n.4.
\item \textsuperscript{151} \textit{Id.} at 872.
\item \textsuperscript{152} See \textit{id.}
\item \textsuperscript{153} See \textit{id.}
\item \textsuperscript{154} See \textit{id.}
\item \textsuperscript{155} See \textit{id.}
\item \textsuperscript{156} See \textit{id.}
\item \textsuperscript{157} See \textit{id.}
\end{itemize}
\end{footnotesize}
The admissibility of psychological expert testimony offered regarding Peeples's diminished capacity, composed of various social problems and an IQ of fifty-five, was at issue on appeal. The defense contended that Peeples's subjective evaluation of the situation was crucial to his claim of self-defense. The Virginia Court of Appeals agreed and held that expert testimony concerning Peeples's general mental condition was admissible because his state of mind was at issue in evaluating the truthfulness of his claim of self-defense. The court distinguished the present case from what previously had been controlling on this issue, Stamper v. Commonwealth, which held that "evidence of a criminal defendant's mental state at the time of the offense is, in the absence of an insanity defense, irrelevant to the issue of guilt."

**EXPERT TESTIMONY ON BATTERED WOMAN SYNDROME AND JURY DELIBERATION**

The Peeples decision suggests that Virginia courts may now be open to reevaluating the admissibility of BWS expert testimony when the mental state of the defendant is at issue, even in the absence of an insanity defense. Although it is difficult to generalize, as all cases turn on specific facts, BWS often is offered to dispute the common assumptions that jury members bring to the deliberation room. Dr. Walker's expertise two decades ago was offered mainly to dispel the myths surrounding domestic violence and to answer the question of why a battered woman would choose to remain with her abuser. Battered Woman Syndrome testimony also is offered to compel the jury to find that the ultimate use of deadly force was justified, as required in the law of self-defense in Virginia.

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158. See id. at 873.
159. See id. at 873-74.
160. See id. at 876.
162. Id. at 688.
164. See id. at 370.
165. See id. at 373-74.
IS THERE ANOTHER WAY? HOW VIRGINIA MAY SUCCESSFULLY AVOID THE BATTERED WOMAN SYNDROME TESTIMONY QUAGMIRE

Courts in many jurisdictions have accepted BWS testimony when offered to show a defendant’s general state of mind. Many scholars, however, argue that BWS testimony is a completely inadequate, and even detrimental, remedy to the plight of battered women defendants.

The problem is that traditional reliance on BWS testimony asks juries to accept that the defendant was not rational in staying in the relationship due to her “learned helplessness,” but that her one affirmative act, killing the abuser, was rational and justified.

What the previous unmodified BWS testimony tried to make up for was the sins of the society at large in perpetuating the problem of domestic violence. BWS, in effect, gives an excuse for jury nullification.

Donald Alexander Downs has proposed that the proper solution is a modified Battered Woman Syndrome testimony. What is needed is expert testimony that does not imply that the defendant should be exonerated from culpability because of diminished capacity. Instead, this testimony should attempt to explain the psychological complexities of her situation and answer the question of her “choosing” to remain with her abuser—in a way that does not

167. See, e.g., People v. Minnis, 455 N.E.2d 209, 218 (Ill. Ct. App. 1983) (stating that “[t]he defendant had a right to present evidence relevant to her explanation of her conduct, no matter how far-fetched it might appear to the average individual”); Kelly, 478 A.2d at 375-77 (finding BWS testimony relevant in showing that the defendant “honestly believed she was in imminent danger of death,” as well as the reasonableness of that belief).

168. See DONWS, supra note 44, at 6-11; Downs & Gerstmann, supra note 44, at 242.

169. See DONWS, supra note 44, at 6-11.

170. See DONWS, supra note 44, at 5-11.

171. See id. at 225.

172. See, e.g., id. at 227 (“The focus should be on battered women’s situation, not battered women’s syndrome.”).

173. See DONWS, supra note 44, at 9-10.
further victimize the defendant by portraying her as incapable of making a rational choice.174

A case-specific jury instruction could read as follows:

[I]f the defendant's fears [of an overt threatening act by the victim against the defendant or another person] were reasonable under the circumstances of the case (which include the nature of the relationship as well as the activities of the [proximate] time in question), then she has a right to defend herself [with force necessary to repel the attack] even if [you believe] she factually misjudged the situation. Evidence of her previous beatings do not justify her actions at the time at issue, but it [may] show[] why her perceptions of danger might have been reasonable [for a woman in that abusive relationship to believe that lethal force was necessary to prevent serious bodily harm to herself] under the circumstances.175

An expansion of the traditional jury instruction on self-defense seems to be the only way to properly resolve this question.176

CONCLUSION

The Virginia courts are now at a crossroads in the debate over whether to admit BWS expert testimony. If the purpose of the testimony is to provide an explanation for a battered woman defendant's "unusual" behavior, admitting it without modifying self-defense law will lead a jury to simultaneous and inconsistent conclusions as to the mental health and ultimate culpability of the defendant.177 Clearly, this testimony begs more questions than it

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174. See id. at 8.
175. Downs & Gerstmann, supra note 44, at 250 (alterations added). "Accordingly, instructions about imminence and contextualized reason should include references to the exculpatory nature of reasonable mistakes of fact." Id.
177. See Downs, supra note 44, at 6-7.

Trauma can compromise mental competence or functionality when it comes to such things as assessing the destiny of the relationship or the feasibility of extricating oneself from the clutches of violence. But trauma often has the opposite effect on other perceptions, including discerning the inclinations, needs, and potential violence of the batterer to whom the woman is "traumatically bonded". . . . The more we understand the intersubjectivity of such bonding, the more we come to appreciate the counterintuitive link between
answers and should not be admitted alone. If, however, the purpose of self-defense law is to prevent those women who justifiably kill their batterers from being sentenced to prison for murder, then further modifications of the law of self-defense, by way of adjusted jury instructions, will be needed. Perhaps necessary too, then, is an admission by our court systems that until our society is able to prevent violent relationships from continuing, we should not let these abused women suffer further consequences for their crimes. Rather than letting BWS testimony in through the back door, in the form of a “contextualized” self-defense claim, the criminal justice system should recognize the reasonable belief these women had when they acted—the belief that they were fighting for their lives.

MARYBETH H. LENKEVICH