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BATTERED WOMEN: SOCIETY'S OBLIGATION TO THE ABUSED

by

DAVID WINTHROP HANSON*

INTRODUCTION

Abuse in our society is overwhelming and can only be combatted through effective deterrence, education and a legal process which does not tolerate any form of human battery. Since Biblical times women have been beaten into submission and considered to be "property" by their men.¹ Unfortunately, many women have chosen to accept this "right of discipline" due to the physical and economic strength of the men who abuse them.² Violence in our nation is a problem which should be everyone's concern. In 1990, the incidence of murder³ increased nine percent over the previous one year period.⁴ Although the most common victims were black males, aged twenty to twenty-four, nearly twenty-two percent of murder victims were females.⁵ It is also saddening to note that sixty percent of all murder, or homicide, victims were killed by some form of firearm, including handguns, shotguns and rifles.⁶ The most startling statistic is that over half of all murder victims actually knew their attackers and six percent of all victims were married to their killer.⁷ Whereas the nation's murder

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¹ LENORE E. WALKER, *THE BATTERED WOMAN* 11 (1979).

² *Id.* It is interesting to note that at least one author believes that man's battering of women did not predate the Bible. *Id.* (citing Terry Davidson, *Wifebeating: A Recurring Phenomenon Throughout History*, in *BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE* 2 (Maria Roy ed., 1977)). Davidson states that once men realized that their participation in the creation of life was required, men assumed a "patriarchal" attitude with harsh attitudes towards women. *Id.* at 12.

³ FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, *UNIFORM CRIME REPORTS FOR THE UNITED STATES*, (1991). The term murder is defined as "the willful (nonnegligent) killing of one human being by another. *Id.* at 8. Furthermore, the term murder and the related statistics in this article also encompass nonnegligent manslaughter. *Id.*

⁴ *Id.*

⁵ *Id.* at 11.

⁶ *Id.* at 12.

⁷ *Id.* at 13. The actual figures for the calendar year 1990 are as follows: 2.1 percent of all victims were the attacker's husband, 4.3 percent of all victims were the attacker's wife, and only 49.1 percent of all

rate increased by nine percent, the increase in aggravated assaults⁸ from 1989 to 1990 was over ten percent.⁹ At first glance, these statistics may cause only a slight concern, for how many people are actually touched by the murder or aggravated assault of a loved one? However, after compiling all of the pertinent data, the Federal Bureau of Investigation maintains that one murder occurs every twenty-two minutes, and one aggravated assault occurs every thirty seconds.¹⁰ Those who think that our nation is not plagued by violence are, unfortunately, incorrect.

Our nation's ability to fashion constructive laws to serve society is unique within this modern world and separates our nation from so many other less fortunate societies. Although victims of violence come in every shape, color, creed and sex, of particular concern is the battered wife who lives in perpetual fear. The disturbing fact is that women in our society are traditionally discriminated against in several areas including, but not limited to; economics, education, science, labor, and law. In fact, at one time in both American and British history, the law actually allowed men to beat their wives with a "stick no bigger than his thumb."¹¹ This societal incidence is patently ironical, as women throughout history have been major contributors to the very fields in which they are discriminated. Take for example Joan D'Arc, Madame Curie, Margaret Thatcher and Justice Sandra Day O'Connor, each of whom has made sweeping contributions to their respective fields of leadership, science, politics and jurisprudence.

It is unfortunate that so many battered women today are faced with a judicial wall of discrimination over which they are unable to climb in order to admit pertinent evidence surrounding the crimes for which they are charged. The Battered Women's Syndrome (BWS) is a relatively recent innovation of defense attorneys who seek to introduce into evidence the torture through which their clients were placed to the trier of fact. However, when faced with a new Syndrome, defense, or theory, judges are understandably hesitant to bend the rules of evidence and procedure in order to placate an overly enthusiastic defense counsel. However, the BWS should be granted the same status as any other accepted homicidal defense in our criminal law. Our rules of evidence and procedure should uniformly allow defense attorneys to admit both expert

victims were either a stranger or otherwise had an unknown relationship to their attacker. *Id.*

⁸ *Id.* Aggravated Assault is defined as "an unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault is usually accompanied by the use of a weapon or by means likely to produce death or great bodily harm." *Id.* at 23.

⁹ *Id.* at 23.

¹⁰ *Id.* at 7.

opinions and evidence concerning the stages of the Syndrome with respect to the situation of the particular accused. Judicial, prosecutorial and scholarly skepticism should yield to the ever increasing need to recognize that women in our society are being driven to the boundaries of homicidal insanity. Why should these already tortured women be forced to endure the rigors of an antiquated judicial process and be sentenced to prison when their acts were in self-defense? Why should these women be at the mercy of bureaucratic legislatures which are often too back-logged to pass needed legislation? Why should these women be forced to depend upon the executive branch and potential clemency, when the judiciary can properly serve justice?

“Thou shalt not kill.”¹² Even as children we are encouraged to seek peaceful means to every end. We are told that killing is wrong and immoral. But, are we told how to cope with torture and abuse? Are we told to endure pain, only to be beaten again? Our courts, media, legislatures, and politicians have within their power the ability to send powerful messages to the citizens of this nation. Combined efforts from each of these mediums is required to educate those in need, and to deter those who abuse. The judiciary has within its power a special ability to send strong personal signals concerning the limitations within which citizens may act. Abuse, battery and assault must, necessarily, fall outside of those limitations. Of course, the judiciary also has the power to establish bright line tests, guidelines and potential punishments for every aspect of our criminal law. Our courts need to focus less on existing, antiquated law, and more on justice in order to serve those who need it most - our battered women. Complete judicial acceptance of this Syndrome, accompanied by clear guidelines for when it will be accepted, shall result in a punishment which fits the crime. Additionally, judicial acceptance will send a message to proponents of abuse that their conduct will not be tolerated and that deadly force, as self-defense, is an option afforded to their victims.

CRIMINAL DEFENSES TO HOMICIDE

This section is, by no means, constructed in an effort to cover an entire course in criminal law and homicide. The intention of the following paragraphs is to briefly cover the legal definition of homicide, as well as several general defenses which could potentially be raised by an accused.

¹¹ *Id.* at 12. In fact, early in the nineteenth century, both English and American courts allowed wife beating as a “husband’s right.” *Id.* Many courts felt that, unless the beating was excessive, a posture of noninterference was best in domestic disputes. *Id.*

¹² The Bible

Homicide is most commonly defined as “[t]he killing of one human being by the act, procurement, or omission of another . . . [It is] the act of a human being in taking away the life of another human being.”¹³ Furthermore, a person is only guilty of criminal homicide if that person “purposely, knowingly, recklessly or negligently causes the death of another human being.”¹⁴ There are various types of homicide, some of which incur absolutely no punishment.¹⁵ For instance, one can commit homicide by necessity,¹⁶ or justifiable homicide.¹⁷ The defenses to a charge of homicide are numerous, but the most commonly known is that of self-defense.¹⁸ Naturally, the focus of this article will center around cases in which a woman has been charged with criminal homicide after having killed the husband or lover who battered her.

Generally, one seeking to excuse her act in killing another on the ground of self-defense may enter into evidence all factors under which the homicide occurred so that the jury can understand what the accused felt regarding her apprehension of immediate danger.¹⁹ Furthermore, the accused may admit evidence of any fact which would show the jury that she had a reasonable apprehension of great bodily harm from the victim just before the killing.²⁰ The accused may also admit testimony and evidence which would establish that, under the circumstances, she acted as a reasonably prudent person would have acted.²¹ The unfortunate reality for battered women, as the case studies discussed *infra* will detail, is that the homicide which they commit does not result from immediate apprehension of bodily harm or death. Thus, the traditional defense of self-preservation is not available to many of these women.

¹³ BLACKS LAW DICTIONARY Fifth Edition, page 661 (1979)

¹⁴ *Id.* (citing MODEL PENAL CODE § 210.1 (1962)).

¹⁵ *Id.*

¹⁶ See *The Queen v. Dudley & Stephens*, 14 Q. B. D. 273, 15 Cox C. C. 624 (1884). The jury concluded that Dudley and Stephens were justified in killing Parker for food because they would have died of starvation before being rescued. *Id.*

¹⁷ BLACKS LAW DICTIONARY. Justifiable homicide “is committed intentionally, but without any evil design.” *Id.*

¹⁸ Self-defense is defined as “protection of one’s person or property against some injury attempted by another.” Blacks at 1219. However, deadly force may *only* be used against “an attack threatening death or serious bodily harm.” *Id.* at 1220. Furthermore, deadly force may only be used when the defender has a reasonable belief of immediate danger, and never when the attack does not pose a deadly threat. *Id.*

¹⁹ See *Wallace v. United States*, 162 U.S. 466 (1896). The accused is generally allowed to admit evidence concerning what he thought the victim was about to do, when previously the victim had threatened to kill the accused. *Id.* at 476. See also *People v. Hecker*, 42 p. 307 (Cal. 1895) (allowing the accused to admit evidence concerning confrontations with the victim earlier in the day of the killing to enlighten the jury on the mental attitude of the victim and the accused at the time of the killing).

²⁰ *Smith v. United States*, 161 U.S. 85,90 (1896).

²¹ See generally *People v. Powell*, 25 P. 481 (Cal. 1891) (allowing evidence that the accused had been warned of the victim’s dangerousness to prove that the accused acted in an honest belief that he was in danger of great bodily harm).

Various other defenses exist to the charge of criminal homicide, including the defense of another.²² However, the same standard generally applies, in that the accused must have an *immediate* apprehension of great bodily harm or death for the other person.²³ Thus, unless a battered woman kills her husband or lover while that attacker is severely beating the woman's child or family member in her presence, it is questionable whether this defense will be successful.

Additionally, when insanity of the accused is offered as a defense to criminal homicide, great latitude in allowing evidence is generally allowed to establish their mental condition at the time of the killing.²⁴ However, the rules of evidence concerning relevancy, competency, and materiality must always be followed when proof of insanity is offered.²⁵ Perhaps the greatest stumbling block to battered women is that the prosecution can rebut the insanity defense by entering evidence which proves legal sanity of the accused at the time of the killing.²⁶ Such evidence which can prove legal sanity consists of, but is not limited to; the ability of the accused to form and execute a deliberate plan, no change in behavior of the accused after the crime, cooperative efforts of the accused after the crime, and that the accused appeared rational after the crime.²⁷ Furthermore, it is no defense to criminal homicide that the accused merely suffers from a weak mind.²⁸ The insanity defense in BWS cases is particularly troublesome, since experts generally wish to testify that the accused acted as a "reasonable battered woman" would have, not that the woman was mentally ill.²⁹ Thus, the entire focus of the Syndrome is really inapplicable to the insanity defense and does not fit squarely within its borders.

Legality, or justifiable homicide is another defense which an accused can

²² See generally *Wood v. State*, 29 So 557 (Ala. 1900); *State v. Turner*, 152 SW 313 (Mo. 1912) (allowing testimony that the accused feared that his brother's life was in danger); *Foster v. State*, 49 SW 747 (Tenn. 1899) (allowing evidence to support a well-grounded apprehension for the accused's father's life).

²³ See *supra* note 14.

²⁴ See generally *People v. Loper*, 112 p. 720 (Cal. 1910); *People v. Haun*, 217 N.E. 2d 470 (Ill. App. Ct. 1966); *State v. McCauley*, 43 S.E.2d 454 (W. Va. 1947).

²⁵ See generally *James v. State*, 69 So. 569 (Ala. 1915) (disallowing evidence of insanity produced by intoxication as irrelevant); *State v. McCauley*, 43 S.E.2d 454 (W. Va. 1947) (disallowing evidence concerning one childhood incident not connected to the mental condition as irrelevant).

²⁶ *People v. Wolff*, 394 P.2d 959 (Cal. 1964).

²⁷ *Id.* Although this case is factually dissimilar from most BWS cases, it should be understood to stand for a general proposition of what factors the prosecution would attempt to introduce in order to convince a jury of the accused's sanity.

²⁸ *Rogers v. State*, 57 S.E. 227,228 (Ga. 1907).

²⁹ Mira Mihajlovich, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L. J. 1253, 1276-1277 (1987). Ms. Mihajlovich also states that experts testify concerning the psychological effects of prior beatings, learned helplessness and clinical depression related to the accused's state of mind. *Id.*

raise.³⁰ However, justifiable homicide is limited to those instances when the killing is committed with no "evil design" and under a necessary situation.³¹ For example, when a death row inmate is executed, or when a soldier kills in the line of duty, there has been no evil design; thus, the killer cannot be prosecuted.³² For the obvious reasons, this defense to homicide is not available to a woman who kills her batterer.

Many women who claim the BWS defense attempt to offer it as a "subchapter" to self-defense.³³ However, as battered women are often not faced with *immediate* danger to their life, self-defense is a tenuous theory upon which to rely.³⁴ The BWS should be granted its own chapter within the book of defenses to a charge of homicide. The Syndrome should be uniformly applied and standards should be defined in order to properly inform battered women when they may act, and when they may not. Difficulties exist in attempting to squeeze the Syndrome into any of the current standing and accepted defenses to murder, thus the Syndrome must be allowed its own legal pillar upon which to stand.

THE BATTERED WOMEN'S SYNDROME

"I was really afraid that he was going to come after me, the whole way downtown, where I was going to meet my friend at work. He drove me over to a girl friend's house, where I stayed overnight, wondering the whole time, when is he going to come for me?"³⁵ This statement is indicative of the common fear held by the numerous women in our nation who are battered every day. A battered woman has been defined as "a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights."³⁶ Fur-

³⁰ BLACKS LAW DICTIONARY, *supra* note 13, at 661.

³¹ *Id.*

³² *Id.*

³³ See generally Elizabeth Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RIGHTS L. REP. 195 (1986). Ms. Schneider comments on the ability to fashion a self-defense case from the testimony of experts on the BWS and the belief's of the accused. *Id.* at 211-12. However, Ms. Schneider also points out that the testimony offered by the BWS experts may be minimized, as judges may instruct juries that the testimony may not be considered in the determination of the accused's reasonableness. *Id.*

³⁴ *State v. Felton*, 329 N.W.2d 161 (Wis. 1983) (the BWS defense was rejected where the woman shot her husband while he was sleeping).

³⁵ WALKER, *supra* note 1, at 7. Dr. Walker is considered one of the most well known scholars and advocates for the acceptance of the BWS. This book was published long before the BWS was first judicially accepted and so labelled. This particular book was written in order to make specific generalizations concerning the typical "battered woman" from a self-volunteered sample. *Id.* at xiii.

³⁶ *Id.* at xv.

thermore, battered women include not only wives, but also any woman in any type of relationship with a man.³⁷ The status of a battered woman is not achieved unless the couple has gone through the "battering cycle" at least twice.³⁸

The battering cycle is defined as a cycle of abuse involving three distinct phases.³⁹ These phases include; the tension-building phase, the acute battering incident, and finally the "honeymoon stage."⁴⁰ The initial stage encompasses tension between the parties which escalates into name calling or less severe physical abuse.⁴¹ Following that, the second phase is characterized by a severe beating through which the batterer releases his tension.⁴² Finally, the parties endure a "loving-contrition" stage where the batterer expresses guilt for his actions and promises to change.⁴³ During the final stage, the batterer will generally offer gifts and kindness to the victim of his abusive acts.⁴⁴ Thus, the woman who has been severely beaten will find a glimmer of hope in the batterer's remorse and will stay with her abuser hoping that he will change his wicked ways.⁴⁵ Unfortunately for the trusting woman, the cycle repeats.⁴⁶

The greatest problem with the Syndrome's acceptance is that it is *not* considered as a separate "defense in and of itself."⁴⁷ Instead, the accused must submit expert testimony which shows that she fell within the BWS and that her victim was properly defined as a batterer.⁴⁸ By so doing, the accused hopes that a jury will consider the aforementioned outlined theories of self-defense or insanity.⁴⁹ But, because these defenses have holes upon which the prosecution capitalizes, battered women are not availed of the full justice which they deserve.

³⁷ *Id.*

³⁸ *Id.*

³⁹ SARA L. JOHANN & FRANK OSANKA, REPRESENTING . . . BATTERED WOMEN WHO KILL 28 (1989).

⁴⁰ *Id.*

⁴¹ *Id.* at 28. The author of this comment would, at this point, like to make a brief commentary on the terminology given to this initial phase. The phase is characterized by "less severe abuse," which seems to be a tautology, as it is befuddling to acknowledge that *any* form of abuse could be labelled as less than severe. All abuse, of any form, should be considered severe.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* Furthermore, the fact that the battered woman can neither anticipate nor predict when the abuse will be inflicted creates a "learned helplessness." *Id.*

⁴⁷ JOHANN & OSANKA, *supra* note 39, at 27.

⁴⁸ *Id.*

⁴⁹ *Id.*

The anti-BWS origins of judicial intolerance towards this defense can best be expressed by the holding of *State v. Thomas*.⁵⁰ After three years in a turbulent relationship, Kathy Thomas shot and killed her common-law husband, Reuben Daniels.⁵¹ Thomas gave three differing accounts of the incident to the police, and then at trial claimed self-defense.⁵² On appeal, Thomas claimed that the trial court had improperly excluded expert testimony on the subject of the BWS defense.⁵³ Nevertheless, the appellate court excluded the testimony.⁵⁴ Finally, the Ohio Supreme Court affirmed the appellate court's decision by reiterating the intermediate court's rationale.⁵⁵ Basically, the Ohio Supreme Court concluded that BWS expert testimony was irrelevant and immaterial to the issue of self-defense, in addition to being less probative than prejudicial.⁵⁶ Furthermore, the court concluded that the BWS was not judicially accepted as scientific and that the jury was fully capable to decide the issues without the expert's testimony.⁵⁷ Thomas' case ultimately made it to the United States Supreme Court; however, only procedural issues were decided and the BWS expert testimony issues were never expressly discussed.⁵⁸ Since *Thomas*, the law in Ohio has changed.⁵⁹ However, the state of the law in Ohio will be discussed in the forthcoming paragraphs.

Thomas represented a judicial skepticism towards a new theory which ultimately forced a battered woman to serve time in prison. That holding precisely

⁵⁰ 423 N.E.2d 137 (Ohio 1981), *overruled by State v. Koss*, 551 N.E.2d 970 (Ohio 1990). The Ohio Supreme Court first explicitly encountered the BWS in this case. *Id.*

⁵¹ *Id.* at 138.

⁵² *Id.* First, Thomas claimed that the couple argued over cooking resulting in her being slapped, whereupon she obtained the gun and shot Daniels. *Id.* Second, Thomas claimed that they argued over a pawn ticket and she was subsequently pushed onto the couch. Thereafter, Daniels lunged to attack her and she shot him in self-defense. *Id.* The final version was that Daniels pushed Thomas onto the couch and then walked away from her. Thomas then obtained the gun, stated, "I've had enough," and shot Daniels. *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 138 n.1. The intermediary appellate court listed eight reasons for excluding the evidence, including; (1) no proper proffer of the evidence, (2) the expert was unfamiliar with this defendant, (3) no hypotheticals were directed at the expert, (4) it had not been proven that the accused was a battered woman, (5) the jury could adequately determine the issues, (6) the jury instruction covered all relevant issues, (7) the accused was not prejudiced, and (8) the trial court acted within its discretion. *Id.*

⁵⁶ *Id.* at 140.

⁵⁷ *Id.*

⁵⁸ See *Thomas v. Arn*, 474 U.S. 140 (1985). Thomas applied for habeas corpus, but the federal magistrate denied relief, as Thomas' fundamental rights were not sacrificed by the exclusion of the expert testimony. *Id.* at 144. The Supreme Court agreed with the Sixth Circuit Court of Appeals that Thomas' failure to file timely objections to the magistrate's findings waived her right to appeal. *Id.* at 144-45. It seems as though the Supreme Court was unwilling to decide substantive issues, while instead disposing of the case through formal means.

⁵⁹ See *State v. Koss*, 551 N.E.2d 970 (Ohio 1990). This case expressly overruled that portion of *Thomas*

evidences the need to establish a broad and comprehensive set of rules, to be uniformly applied, in order to allow battered women their fair day in court. Furthermore, the majority in *Thomas* rested part of their decision on the fact that the BWS was not scientifically accepted.⁶⁰ Perhaps the court should have invested in a copy of Ms. Lenore Walker's widely accepted book on battered women, which was published two years prior to their decision.⁶¹ When a court is presented with the means through which to serve justice, shouldn't that court interpret the law in an effort to serve that goal? The *Thomas* court could have been one of the first state supreme courts to pave the way toward complete judicial acceptance of the BWS. Yet, by failing to seize that chance, nearly a decade's worth of battered women in Ohio were forced to endure an antiquated judicial process.⁶² Those ten years indicate the need for our United States Supreme Court to decide this issue in order to establish national uniformity for BWS sufferers.

The acceptance and the reasons for acceptance of the BWS were clearly expressed by the landmark, textbook case of *State v. Kelly*.⁶³ As early as 1984, the New Jersey Supreme Court determined that the BWS was, in fact, worthy of judicial acceptance.⁶⁴ The Kelly's seven year marriage was riddled with violence.⁶⁵ Mrs. Gladys Kelly endured vicious beatings from her husband, as often as once per week.⁶⁶ Finally, after being told that she would be killed and after suffering the agony of repeated abuse, Mrs. Kelly stabbed and killed her husband with a pair of scissors.⁶⁷ The trial court expressly disallowed any form of testimony regarding the BWS, offered by the defense to support Mrs. Kelly's state of mind in order to support her self-defense claim.⁶⁸ Mrs. Kelly was subsequently convicted of reckless manslaughter.⁶⁹

which held that the BWS had not gained scientific acceptance. *Id.* at 972-73. However, the precise facts and issues presented by this case will be expounded upon *infra* part VIII.

⁶⁰ *Thomas*, 423 N.E.2d at 140.

⁶¹ WALKER, *supra* note 1. Ms. Walker's book was first published in 1979. *Id.*

⁶² See *Koss*, 551 N.E.2d at 972. As *Thomas* was decided in 1981 and *Koss*, which overruled *Thomas*, was not decided until 1990, almost ten years elapsed during which time battered women in Ohio were given only the partial ability to fully defend themselves in classic BWS cases.

⁶³ 478 A.2d 364 (N.J. 1984).

⁶⁴ *Id.* at 368.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 369. The stabbing occurred after a public beating in which Mr. Kelly had choked his wife nearly to the point of unconsciousness. *Id.* She claimed that he was running towards her with the intention to kill and that she acted in self defense by stabbing him first. *Id.*

⁶⁸ *Id.* at 368.

⁶⁹ *Id.*

The New Jersey Supreme Court reversed the trial court's decision which disallowed the expert testimony on the BWS.⁷⁰ The New Jersey Supreme Court took the opportunity to recognize and accept the BWS, based partly on its relevance and also on Ms. Lenore Walker's theories concerning the Syndrome.⁷¹ The New Jersey law regarding self-defense was typical,⁷² and the supreme court reasoned that the expert testimony was critical in establishing whether Mrs. Kelly acted in self-defense as well as supporting her credibility to the jury.⁷³ Furthermore, the supreme court determined that the expert on the BWS could have cleared up any myths surrounding the effects of the beatings, the reasons why battered women don't leave their abusers and also to explain other effects of the syndrome.⁷⁴ The supreme court felt that the jury needed the testimony to accurately determine whether Mrs. Kelly was honest and reasonable in her actions and beliefs concerning the immediate threat of death by her husband.⁷⁵ In addition, the supreme court determined that the expert testimony on the BWS fell within the required guidelines concerning admissibility of expert testimony in general; namely that it was information beyond the ken of the average juror, was reliable and was offered by a witness which had "sufficient expertise" in the field.⁷⁶ The only aspect of the testimony which would not be allowed, as expressed by the supreme court, was the expert's opinion that Mrs. Kelly was a victim of the syndrome.⁷⁷ The connection between a specific defendant and the BWS must be determined by the finder of fact, or in the *Kelly* case, the jury.

The *Thomas*, *Koss*, and *Kelly* cases summarize some of the basic issues and bases upon which courts determine the admissibility of the BWS, as offered by expert witnesses. These three sample cases evidence judicial attitudes concerning the syndrome and the way in which it can affect the outcome of a particular controversy. However, the BWS is far more complex than these summaries are able to portray. The scope of the BWS and its prevalence in our society is also much more expansive than many imagine.

⁷⁰ *Id.*

⁷¹ *Id.* at 371.

⁷² *Id.* at 373. The Supreme Court stated that self-defense in New Jersey was based upon a finding that "the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." *Id.*

⁷³ *Id.* at 375.

⁷⁴ *Id.* at 377.

⁷⁵ *Id.* at 375-76.

⁷⁶ *Id.* at 381.

⁷⁷ *Id.* at 378.

Estimates of wife abuse are simply that – estimates. Because of the likelihood that incidents are underreported, the best that social scientists can accomplish are guesses at the prevalence of abuse within our society.⁷⁸ However, even though many estimates are considered lower in number than the actual incidents of abuse, at least 1.8 million women are abuse each year by their husbands.⁷⁹ Theoretical research indicates that nearly thirty percent of all marriages are touched by physical violence at least once, with actual estimates considered to reach fifty to sixty percent of all marriages.⁸⁰ The most sickening estimate states that nearly 1,700 women each year die from abuse inflicted by their husbands.⁸¹

Sadly, battering does not confine itself to the boundaries of wedlock. Those who believe that battering occurs primarily to older, married women are misinformed.⁸² Again, although estimates are notoriously low because violent relationships are underreported, one major University's reports indicate that up to sixty percent of abused wives experienced violence while dating their present abusive husband.⁸³ "Moreover, one-third of all women under [twenty] experience violence in their dating relationships."⁸⁴ Thus, these figures indicate that relationship violence does not magnetize itself to those who are married, but rather pervades all phases and types of relationships. Furthermore, the statistical evidence leads to the inevitable conclusion that violence against women affects a large percentage of our population, displacing the common myth that violence against women is not commonplace.⁸⁵

Researchers have also tried to outline the warning signs of which women must become aware.⁸⁶ Abusive men are known to show extreme jealousy and possessiveness, rapid mood swings, clusters of grouped behaviors and the desire

⁷⁸ Michael J. Strube, *The Decision to Leave an Abusive Relationship: Empirical Evidence and Theoretical Issues*, 104 PSYCHOL. BULL. 236 (1988).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* One major national survey indicated that over two-thirds of all women who reported that they were battered, a term not encompassing slapping or pushing, stated that the abuse occurred at least twice per year. *Id.* Additionally, over half of this same sample indicated that their abusers violently attacked them five or more times per year. *Id.*

⁸² See *Domestic Violence Battering Begins While Dating*, USA TODAY, Dec. 1990, at 5 [hereinafter *Domestic Violence Battering*].

⁸³ *Id.* The report was prepared and researched by the University of New Hampshire's Family Research Laboratory. *Id.*

⁸⁴ *Id.* This estimate was reported by the Family Services of Philadelphia. *Id.*

⁸⁵ See WALKER, *supra* note 1, at 19.

⁸⁶ See *Domestic Violence Battering*, *supra* note 82, at 5.

to maintain control over a relationship.⁸⁷ Furthermore, women who are dating should beware of men who withdraw "love, money, or approval as punishment; undermine their partner's feelings or accomplishments; isolate their partners from friends and family; and may have a problem with drugs or alcohol."⁸⁸ Sadly, one commentator has noted that "[a]lthough moonlight cruises, flirtations, and the first kiss are all part of the American way of dating, unfortunately, so are hitting, beating, and abuse."⁸⁹

What exactly constitutes abuse? "Abuse takes many forms. It can be physical or psychological and may run the gamut from threats to intimidation to sexual assault."⁹⁰ The next logical question seems to be, "Why do people inflict abuse on others?" Battering seems to occur when the batterer believes that he has the right to control his partner and when battering produces a desired goal, or "effect."⁹¹ Furthermore, battering occurs when the batterer balances the consequences and determines that they are outweighed by the resulting benefits.⁹² It is also interesting to note that although men are actually hit more often than women in relationships, women suffer far greater injuries than their male counterparts.⁹³ Hence, battering and abuse take many forms, are imposed by both men and women to different extents, and are inflicted in various ways. Why does our society tolerate this conduct? More questionably, why do the victims accept and tolerate this conduct? Conversely, why is this punishment inflicted and who inflicts it? Outlined below are the basic demographics of this Syndrome and the reasons why a battered woman remains in a violent relationship.

WHO ABUSES?

"The one shedding blood of humankind-[i]n humankind will his own blood be shed. F[or] in the image of God [w]as humankind made."⁹⁴ He who chooses to abuse and shed the blood of another should be punished, both by society and

⁸⁷ *Id.*

⁸⁸ *Id.* These characteristics were determined to be common among abusive men by Ms. Hedy Nuriel, Executive Director of the National Domestic Violence Hotline, in 1990. *Id.* Anyone involved with domestic violence can obtain help, free of charge, by calling this hotline at 1-800-333-SAFE anytime twenty-four hours per day.

⁸⁹ *Id.* This statement was made by Mr. Richard Gelles, a sociology professor at the University of Rhode Island. *Id.*

⁹⁰ Maureen Callahan, *Hard Facts About Spouse Abuse*, PARENTS MAG., Oct. 1989, at 240.

⁹¹ *Id.* (citing the National Coalition Against Domestic Violence).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ VERNON W. REDEKOP, *A LIFE FOR A LIFE?: DEATH PENALTY ON TRIAL* 29 (1990). This quotation is the author's translation of Genesis 9:6 in which he has chosen to replace the name of Adam with the word humankind. *Id.*

the Divine Entity. Yet, who abuses? Who are those men⁹⁵ who choose violence as an alternative and abuse the very one's they claim to love?

Often, "[t]he man may be a loving, charismatic figure, successful at work, someone who never loses control at the office or in front of witnesses."⁹⁶ Therefore, attempting to assert the BWS at trial can be nearly an insurmountable task for the victim who has no eyewitnesses. Judicial denial of the BWS serves only to thwart the already burdensome and nearly impossible defense.

However, this same man who is outwardly always in control becomes a violent abuser when in the confines of his castle, and his wife's prison.⁹⁷ Because domestic violence is the family's best kept "secret," many men are never publicly identified as an abuser.⁹⁸ There are several characteristics which are common to the abusive man. These include; having low self-esteem and/or a dual personality which rapidly and suddenly changes from gentle kindness to cruel violence.⁹⁹ Additionally, the typical batterer exhibits pathological jealousy and extreme possessiveness toward their women.¹⁰⁰ They "[t]end to use sex as an outlet for aggression and blame others, usually their women, for their actions."¹⁰¹ An abusive man suffers from severe stress reactions and, interestingly, maintains the belief in the traditional female home and sex roles.¹⁰² As noted earlier, the batterer does not limit his abuse to physical attacks, but instead violates every aspect of his female victim including her emotions and psyche.¹⁰³

Most men who abuse "are likely to be [the] product[] of [a] violent famil[y], where they were abused themselves."¹⁰⁴ Theories suggest that men who abuse were likely to have witnessed abusive behavior in their childhood,

⁹⁵ The word "men" and the pronouns "he" and "him" are used throughout this article in a very sexist fashion amounting to an indication that the author believes that men are the only ones who abuse. It should be noted that both men and women abuse each other, yet the focus of this comment is taken from a battered woman's point of view.

⁹⁶ David Gelman and Regina Elam, *Prisoners of Pain*, NEWSWEEK, Dec. 12, 1988, at 65.

⁹⁷ *Id.*

⁹⁸ See Susan Kaye Wilson, et al., *Children Exposed to Wife Abuse: An Intervention Model*, 70 SOC. CASEWORK J. 180,181 (1989).

⁹⁹ See JOHANN & OSANKA, *supra*, note 39, at 27.

¹⁰⁰ *Id.* at 28.

¹⁰¹ *Id.*

¹⁰² *Id.* at 27-28. The author fails to define what constitutes a "traditional home or sex role"; however, the author is most likely referring to that role which places the woman as a housewife and in a subservient status to her husband or boyfriend.

¹⁰³ Gelman & Elam, *supra* note 96, at 65.

¹⁰⁴ *Id.* It is interesting to note that the authorities used in this comment and the research leading to its

rather than being the actual victim of such abuse.¹⁰⁵ The batterer attempts to “master” his own trauma by pushing it outward onto his victims in attempting to control them the only way he has been taught, which is through violent behavior.¹⁰⁶ The next logical question which interested readers, and juries, often ask is why do these women remain with their abusers?

WHO IS ABUSED?

“The relationship between a battered woman and the man who batters her is a complicated one. It is not usually the lurid, sadomasochistic dance imagined by sidewalk psychiatrists, but something even more insidious”¹⁰⁷ What components make up the typical battered woman?

“We all say we would leave if we were beaten once . . . [b]ut we can all think of a situation that wasn’t good with us, and that we stayed with long after. It’s rare for a person to extricate [herself] at exactly the [right] moment.”¹⁰⁸ It is extremely important that at this point in this article that the reader embrace the empathic part of herself and assume a posture of unyielding open-mindedness. Battered women are subjected to juries of their peers and “sidewalk psychologists” who never really attempt to understand their mental impressions or attempt to wear their shoes. The reader must try to place herself in the exact situation of the victim, without prejudice, to fully appreciate their actions and reactions.

Just as several traits pervade the persona of the batterer, so too are there several common traits of the abused. “Although the primary emotion of a battered woman is fear, such women become so emotionally and economically dependent on their batterers that they can’t leave.”¹⁰⁹ Battered women, obviously, have very low self-esteem, just like their batterers.¹¹⁰ Coincidentally, they also have the same traditionalist ideas concerning their home and sex roles.¹¹¹

Battered women generally “[a]ccept [both] the guilt and blame for the battering actions, and think the men would stop beating them if they could im-

final draft were devoid of any demographic characteristics concerning typical races, creeds or national origins of the common abuser.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (quoting Dr. Penelope Grace of the Boston Children’s Hospital).

¹⁰⁹ See JOHANN & OSANKA, *supra*, note 39, at 27.

¹¹⁰ *Id.*

¹¹¹ *Id.*

prove."¹¹² But these same battered women feel that nobody else can help them until and unless they improve themselves.¹¹³ So why don't they just leave? Isn't it that simple? No, unfortunately for the thousands of battered women, leaving the situation is not possible, because the situation follows them. According to one author, "[o]ver [fifty] percent of all women killed are killed by former or present partners."¹¹⁴ Furthermore, the highest risk of death in BWS scenarios is during separation between the man and woman.¹¹⁵ Thus, even if the woman chooses to leave the confines of her home, the actual prison in which she lives has no boundaries, but rather surrounds her continuously.

Women tolerate the beatings and abuse since many feel as though they can weather the violence.¹¹⁶ The "cycle of violence," discussed *infra*, also includes periods of abatement and relational tranquility which actually "encourage the woman to believe she can soothe her husband and outlast his rages."¹¹⁷ Finally, when the beatings become so commonplace in a relationship, the woman is too emotionally and physically weak to consider leaving.¹¹⁸ Some psychologists compare battered women to Vietnam veterans who suffered and suffer Post Traumatic Stress Disorder (PTSD) which totally numbs one's emotions and psychological composition.¹¹⁹ Thus, even when a woman's child or children are also suffering through the violence, the woman is too numb to respond as a neutral, rational person would in the same or similar situation.¹²⁰ Although it is easy for the public to condemn a mother who allows her children and herself to be victimized, this same judgmental public is analyzing a situation from the outside. The most expressive comparison which offers the non-battered a method by which to increase their empathy towards these women states: "You cannot walk around in the middle of a firing range all the time without growing numb."¹²¹ Battered women are not reasonable and do not feel the same emotions that the fortunate non-battered feel. Asking the woman to "just leave" is demanding the impossible in many instances.

Since both the abused and their abusers embrace the traditionalist con-

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See Gelman & Elam, *supra* note 96, at 65.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* (citing WALKER, *supra* note 1).

¹²⁰ *Id.*

¹²¹ *Id.* (quoting Dr. Lenore Walker, who, besides authoring *The Battered Woman*, also conducted a major

cepts of the comparative roles of men and women, leaving becomes even more difficult for the abused. "Often the abused spouse has conflicting feelings. Love and loyalty are mixed with hurt and anger. Women grow up learning to be the responsible, nurturing partner . . . making it difficult for them to break away from an abusive relationship."¹²² To complicate the process of leaving an abusive relationship, quite often the abused woman has nothing upon which to fall back for security.¹²³ She has no self-esteem, no job, no money, and no other identity in order to support herself and, if concerned, her children.¹²⁴ Furthermore, the battered woman feels ashamed and at fault for the violence; she would rather not expose her "family secret."¹²⁵

Battered women are *neither* masochistic nor crazy.¹²⁶ Unfortunately, like the Vietnam veteran, battered women are forced to take on survival characteristics, and allow normal emotional responses to dwindle into their innermost shell.¹²⁷ There are no socioeconomic traits common to the abused.¹²⁸ Battered women do not exist only within the lower class, are not predominantly minorities and do not comprise one specific religious belief.¹²⁹ They are both educated and maintain profitable employment and, most of all, they do not deserve to be beaten.¹³⁰

The foregoing paragraphs are only a scratch off the surface of the emotional and psychological characteristics commonly found in abusers and their victims. Complete psychoanalytic commentary is not only beyond the scope of this article, but beyond its author's education and ability, as well. However, it should be noted that anyone can be abused and anyone can be guilty of inflicting abuse. Notwithstanding those facts, batterers deserve no sympathy or empathy. Instead, the emotional, judicial and societal support should be directed toward building the esteem of the abused. It should be clear even from the limited nature of this article that battered women cannot simply exit their particular

research program funded by the National Institute of Mental Health on the BWS).

¹²² See Callahan, *supra*, note 90, at 242 (quoting Dr. Luella Klein, M.D., an advisor to former U.S. Surgeon General C. Everett Koop).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See WALKER, *supra*, note 1, at 20. These and twenty-one other myths concerning the battered woman are thoroughly detailed and rebutted by Dr. Walker. *Id.* at 18-31.

¹²⁷ *Id.* at 21.

¹²⁸ *Id.* There are also no socioeconomic or racial characteristics common to abusers. See Marchelle R. Barber, *Why Some Men Batter Women (And Why Some Women Take It)*, EBONY, Oct. 1990, at 58.

¹²⁹ See WALKER, *supra* note 1, at 21-22.

¹³⁰ *Id.* at 22-29.

situations. Their prison does not parallel the traditional concept of four cement walls, barred gates and barbed wire fences. The prison in which the battered woman lives is internal, yet ironically has an even greater ability to sever her from society. The battered woman is secluded by unstationary walls comprised of fear and pain. Although a prison cell may be preferred, it is not the punishment which society should impose for the woman who truly personifies the BWS.

THE MEDIA AND THE BWS - WHAT'S PORTRAYED AND HOW IS IT PERCEIVED?

The average citizen of the United States neither attends law school nor has a clear understanding of our judicial processes.¹³¹ Hence, the majority of our society relies on the national media¹³² in order to form its opinions concerning national and international events, societal issues, as well as, legal theories. Our media enjoys a profound monopoly on helping to form the publics' perceptions on many aspects of our society and therefore has a responsibility to properly inform and educate its targets.

The controversy surrounding the BWS has been recent fair game in our national media. The public's perceptions surrounding this Syndrome are vitally important, as prosecutors have the power to refuse to prosecute a battered woman in any given case. Should a prosecutor feel that the public would be best served by not prosecuting, or that the woman in question truly was insane or acted in self-defense, the battered woman would go free. If the BWS enjoyed a separate and distinct level of public acceptance, as does traditional self-defense and, to a lesser extent, insanity, then more battered woman would be likely to evade a tortuous prosecution. Are society's goals truly served by forcing a battered woman, who has killed her lover, through a second prolonged agony, namely her own trial? If the media, our courts and prosecutors endeavored to educate the public and fully accept the BWS as its own separate homicidal defense, apart from traditional self-defense and insanity, fewer women would be unjustifiably and unnecessarily prosecuted and imprisoned.

Generally, the media's attention to detail and exposure of this issue has been comprehensive and fair. The following stories and recent television programs have helped to give the judicially-unaware public a better understanding of the nature, effects and concepts comprising the BWS.

Recently, *20/20* broadcasted a documentary-styled episode on the plight

¹³¹ This statement is entirely founded upon the author's own perceptions since entering his legal studies in August, 1989.

¹³² "Media" as used in this comment include television, newspapers, and national magazines.

of abused, raped and otherwise victimized women in our society.¹³³ The program began with yet another statistic: that 200 women are assaulted every hour in America.¹³⁴ Additionally, over two-thirds of battered women have been told by their attackers that they would kill them.¹³⁵ The object of the program was to shine a scrutinizing light upon the law enforcement and judicial bodies in our society in an effort to correct the inherent problems faced by abused women.¹³⁶

Granted special attention was the landmark Tracy Thurman case decided in Connecticut, in September, 1983.¹³⁷ Tracy lived in Torrington, Connecticut with her young son in an effort to evade her violent husband, Buck Thurman.¹³⁸ Tracy's story is particularly gruesome, regarding both her own tragedy and also the way in which her situation was handled by the law enforcement officials of Torrington, Connecticut. Buck Thurman had previously severely beaten and threatened to kill both Tracy and their son.¹³⁹ Finally, after past threats, Buck embarked on his final mission in order to kill his then-wife and child.¹⁴⁰ He showed up at their home and dragged Tracy, within their son's view, out onto the backyard lawn where he began a savage course of beatings.¹⁴¹ In anticipation of his arrival on the day in question, Tracy had phoned the police to request their help.¹⁴² The police had adequate notice to arrive prior to Buck, yet within thirty minutes, Buck was able to stab his wife fifteen times and managed to break her neck with the heel of his boot.¹⁴³ In fact, the most disgusting aspect of this case was that the police were *actually present* during the majority of the beatings.¹⁴⁴

Tracy Thurman managed to survive the attack, yet is permanently disabled and disfigured.¹⁴⁵ She sued the Torrington Police Department and was awarded

¹³³ *20/20: Pushed To The Edge* (ABC television broadcast, Sept. 17, 1991).

¹³⁴ *Id.* Furthermore, Barbara Walters noted that twelve women each hour are raped in America. *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* It is interesting to note that Tracy Thurman's personal tragedy was also the focus of a full length television feature film. *Id.* Also, the Supreme Court of Connecticut is among those state supreme courts which have not yet expressly ruled upon the admissibility of BWS expert testimony.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* Note also that this beating was accomplished while the son watched, as Buck had retrieved him from the house prior to crushing his wife's neck. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* Although Tracy is able to walk with a cane, her mobility is greatly impaired. Furthermore, she has

\$2 million in a pretrial settlement.¹⁴⁶ Buck was sentenced to fourteen years in prison, but is presently on parole as his sentence was reduced by six years due to "good behavior."¹⁴⁷

The story adequately presented a severe case of the effects of a battered woman, but left open-ended several important questions. What if Buck attempts to kill Tracy again?¹⁴⁸ What if Tracy decides that she will kill him first in order to release herself from the perpetual prison in which Buck has placed her? Society must be forced to ask and answer whether women have the legal right to fight back.

The same episode also explored stories of several California women who are currently serving prison sentences for killing either their husband or boyfriend.¹⁴⁹ Commentators suggested that seventy percent of women are turned away from shelters due to overcrowding and, as a result, the police suggest that these victims obtain a temporary restraining order (TRO).¹⁵⁰ However, before her attack, Tracy Thurman had a TRO issued against her husband. That, combined with the law enforcement's failure to protect her, resulted in what has already been described. This particular episode of *20/20* made viewers increasingly aware of many police department's failure to adequately intervene during domestic disputes.¹⁵¹

Also given attention during the episode was the fact that the BWS has been around for over ten years, but since women don't run from their attackers, the Syndrome fits only marginally within a self-defense plea.¹⁵² Particularly inciteful were comments elicited from Ms. Gloria Allred, a California licensed attorney who represents battered women.¹⁵³ She argued that our judicial system will neither be condoning murder nor granting a "hunting license" against husbands by accepting the BWS as a complete homicidal defense.¹⁵⁴ It is not

a scar which constitutes half of the circumference of her neck. *Id.*

¹⁴⁶ *Id.* Amazingly, Tracy sued the police department on equal protection and civil rights claims due to their failure to respond to a women's cry for help in a domestic dispute. *Id.*

¹⁴⁷ *Id.* Buck also has a permanent restraining order which prohibits him from entering Torrington, Connecticut. *Id.*

¹⁴⁸ *Id.* Tracy is now happily married, yet even after eight years truly believes that Buck will stalk her and their son. She still undergoes psychiatric and physical treatments. *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* Ms. Allred is a Los Angeles attorney who specializes in Women's Civil rights advocacy.

¹⁵⁴ *Id.*

about a license to kill, but rather realizing that there is no other recourse for these women. This is never fully understood by juries since the BWS is often excepted from evidence. Ms. Allred concluded her interview by stating that the cycle of violence does not limit itself to the battering relationship, but extended even farther.¹⁵⁵ She expressed her fears, share by others and discussed *infra*, that the cycle affects future generations of abused, as boys grow to learn violence from their father and girls learn acquiescence from their mother.¹⁵⁶ Naturally, the effect of these teachings will allow men to increase their dominance over women who will accept abuse. One way to empower women and to show them that abuse is never tolerable is for the media, judiciary and legislatures to send that exact message. This particular episode accomplished that task entirely. It informed the public of a current societal problem and expanded upon the problems which battered women face.

Even *L.A. Law* has been able to accomplish public education during two episodes of its all too often less-than-believable dramatic series.¹⁵⁷ The story line concerned Mrs. Ralph Chandler who was being prosecuted for shooting her husband at close range in his office.¹⁵⁸ The Chandler marriage had lasted twelve years during which Mr. Chandler had been raped, beaten, stabbed, and sodomized by her husband.¹⁵⁹ The educational aspects of the story were two-fold; viewers were able to understand the difficulties encountered while preparing an adequate defense for a truly battered woman, as well as seeing how a battered woman, like rape victims, are actually made to look like the abuser.¹⁶⁰

The prosecution attempted to minimize the extent of the abuse and tried to divert the jury's attention to collateral, yet relevant matters.¹⁶¹ The story was well researched, as its components were very realistic. For instance, Mr. Chandler had apparently never been abusive in the presence of witnesses and

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *L.A. Law: The Chandler Trial* (NBC television broadcast, Oct. 10-17, 1991) [hereinafter *L.A. Law*].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* Her husband had also played "Russian Roulette" with his revolver on his wife's temple, and had locked her out of their home after tearing off her clothing. *Id.*

¹⁶⁰ *Id.* The producers were able to show, in layman's terms, how a defense counsel must choose between an insanity defense or traditional self-defense, as there is no *per se* BWS defense. Furthermore, the producers were able to explain, via the actors and actresses, how the elements of the BWS do not easily fit within the parameters of either defense. *Id.*

¹⁶¹ *Id.* The prosecution attempted to make Mrs. Chandler look like a money-hungry schemer who killed her husband for his millions. The prosecution also focused on the actual minutes before and after the killing, as Mr. Chandler made no attempt to kill his wife immediately prior to the deadly shot. Furthermore, the prosecution attempted to thwart any insanity defense by showing the Mrs. Chandler was calm, cool and collected, even "relieved" after the murder. *Id.*

was a distinguished, respected community leader.¹⁶² These characteristics are somewhat common to the parties involved in the BWS.¹⁶³ Added realism included the traditional roles assumed by Mr. and Mrs. Chandler, as he was a working breadwinner and she was a quiet, feminine housewife.¹⁶⁴ Despite all of the dramatic effects, this episode was able to portray a realistic situation in which the battered woman ultimately prevailed, and by doing so was able to inform the general public.¹⁶⁵ Society would be better informed if every citizen was literate and able to understand judicial process and courtroom rules, however that utopia is non-existent. Therefore, the media must provide a forum through which a layperson, who has not had the benefit of legal education, is able to understand this Syndrome and its place in our culture.

These two programs must have touched thousands of viewers and helped to suffocate ignorance with respect to the BWS. Each portrayed the realistic plight of female victims and hopefully had the effect of creating the needed awareness in those who were unaware of this problem.

Thankfully, many of our citizens are not illiterate and are able to become informed through other forms of media. However, these forms do not always take the form of enlightened and thoroughly researched law reviews and judicial opinions. Perhaps inclusion of this section in this article could be labeled foolhardy, as the authorities used are far from being judicially acceptable. Yet, the BWS does not begin and end at the law school, or courtroom doors. It permeates society at all racial, religious, social, and economic levels.¹⁶⁶ Thus, it is important to examine the other, non-legal, mediums which explore legal issues.

The BWS has been explored in a variety of our written media's forums, read by thousands who may otherwise never have encountered its concepts. For instance, *The New York Times* caught readers attention with the following quotation:

For four years I was abused by my boyfriend. . . . I loved him and I thought he loved me. . . . I was scared to death of him. I didn't seek help because I was afraid of what he would have done to me. . . . I got fed up with him and then it was too late. . . . I'm sorry for tak-

¹⁶² *Id.*

¹⁶³ See *supra* text accompanying note 96.

¹⁶⁴ See *supra* text accompanying note 122.

¹⁶⁵ *L.A. Law*, *supra* note 157. Mrs. Chandler was found not guilty of first degree murder by the jury. *Id.*

¹⁶⁶ See *supra* text accompanying note 128.

ing my boyfriend's life.¹⁶⁷

The article went on to define the BWS as a defense "characterized by 'a decrease in self-esteem, an emotional dependence upon the dominant male and a type of psychological 'learned' helplessness arising out of an inability to predict or control the violence directed against [the abused].'"¹⁶⁸ Also explained in the short article were other aspects of the BWS, including; its effect upon jurors, the possibility of a guilty verdict when a woman does not fit the Syndrome, the option of executive clemency, and the facts of a typical case.¹⁶⁹ Articles like these only serve to educate the public about all relevant aspects and therefore are vitally important. Thankfully, the major news mediums are using their power to *correctly* inform the public about this Syndrome.

Aside from physical battering, emotional battering has also been explored in the media.¹⁷⁰ One such article tells the tale of a woman who lasted two years in an almost crippling abusive marriage.¹⁷¹ Her husband sought to control her entire personality and environment from the car she drove to her clothes and make-up.¹⁷² He even went so far as to force her to quit her job and used bouts of silence lasting up to four weeks in order to coerce her into submission.¹⁷³ The battered wife stated: "Through it all, I was very much alone with my secret, having had no one to confide in, no one to talk to about my fears and frustrations."¹⁷⁴ Although her "emotional wounds . . . [were] invisible[,] . . . [they] hurt as much as the broken bones and blackened eyes of the physically battered wife."¹⁷⁵ Until her "self-defense mechanism" kicked in, she had neither the strength nor the mental ability to leave.¹⁷⁶

¹⁶⁷ *Battered Women, Battered Justice*, N.Y. TIMES, Mar. 13, 1991, at A24.

¹⁶⁸ *Id.* (quoting a New York judge who included those words in the 1985 landmark *Torres* case which helped to pave the way for several other New York courts which subsequently chose to allow expert testimony on the BWS).

¹⁶⁹ *Id.*

¹⁷⁰ Maria Mathews, *Secrets We Keep: Diary of an Emotionally Battered Woman*, COSMOPOLITAN, Sept. 1991, at 174. See also *SLEEPING WITH THE ENEMY* (Touchstone Films 1991) (showing the lengths to which a woman is forced in order to extricate herself from an abusive relationship).

¹⁷¹ See Mathews, *supra* note 170.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 176.

¹⁷⁵ *Id.* at 178. This woman endured agonizing emotional abuse including a miscarriage caused by the severe stress under which her husband placed her. *Id.* at 176.

¹⁷⁶ *Id.* at 178. It was only after meeting another battered woman who had been through the same type of situation that this victim had the guts to leave her batterer. *Id.* at 176-78. It should also be noted that this batterer exhibited no signs of emotional abuse while in public or among friends. It was only in the solitude of their home that he abused his wife. *Id.* at 176. See also Karen S. Schneider, *Breaking Away*, PEOPLE MAG., Oct. 14, 1991, at 97.

These and other stories pervade the media today and benefit the plight of all victims. The media is using its power, through testimonials, both of fact and fiction, to educate the public about the BWS. Naturally, courts should never rely solely on articles from *Cosmopolitan* or television broadcasts including *L.A. Law*, however courts and juries alike should challenge themselves to consider these authorities. Societal concerns and values are expressed in many ways, examples of which have been synopsisized above. Though there must be other bases upon which to allow expert testimony at trial or to judicially create a separate and distinct homicidal defense, notice must be given to the concerns elucidated by our national media. It is partially through the media that one learns about his world and with that knowledge can further research issues in order to make that world a fairer place to live. The coverage given to the BWS seems to be escalating, indicating that the problem is not subsiding and needs to be addressed both by our courts and legislatures. The purpose of this section was merely to point out that when issues find themselves expressed in mass media, as well as in our courts, special attention should be granted to those who claim to be victimized by an unfair judicial system.

THE ADMISSABILITY OF THE SYNDROME - STATES AND FEDERAL COURTS

After analyzing all of the relevant demographic and psychological aspects surrounding the BWS, the next step is to cover the state of the law in both the states' and the federal courts. Although the United States Supreme Court has been petitioned to grant *certiorari* in at least three cases involving the BWS, it has refused to grant any of these appeals.¹⁷⁷ The Supreme Court should seize the opportunity to resolve this issue in order to establish a uniform procedural policy on BWS expert testimony admissibility. Furthermore, the Court should take one further step and allow the Syndrome to stand alone as a defense without requiring it to fit within the strictures of other defenses. Only by seizing this opportunity will there exist a uniform and fair body of law upon which to serve the needs of BWS sufferers.¹⁷⁸

The most interesting refusal to grant *certiorari* can be found in *Moran v.*

¹⁷⁷ See *Thomas v. Arn*, 474 U.S. 140 (1985) (ruling on procedural aspects of the case only and not reaching the merits of the BWS). See also *Neely v. Alabama*, 488 U.S. 1020 (1989) (refusing to grant *certiorari* concerning the imposition of the death penalty where the BWS was a collateral issue) (Brennan and Marshall, JJ., dissenting); *Moran v. Ohio*, 469 U.S. 948 (1984) (refusing to grant *certiorari* to a battered wife who claimed that the Ohio court system unfairly allocated burdens of proof with respect to her claim of self-defense) (Brennan & Marshall, JJ., dissenting).

¹⁷⁸ Although the author of this comment and several thousand battered women would rejoice such a bold move by our nation's highest Court, the realistic possibility of the occurrence is highly doubtful. In fact, the likelihood of the Court granting any broad based review which would benefit thousands of repressed women has most likely just become a faded dream with the confirmation of Justice Clarence Thomas to that bench.

Ohio¹⁷⁹ and the accompanying persuasive reasoning lodged by Justices Brennan and Marshall who would have granted *certiorari*.¹⁸⁰ In *Moran*, a wife was convicted by an Ohio trial court of aggravated murder for killing her abusive husband while he slept quietly.¹⁸¹ Mrs. Moran claimed that the state unconstitutionally shifted the burden of proving self-defense onto her and thereby violated her rights at trial.¹⁸² Furthermore, Mrs. Moran claimed that she was a battered woman and thus, a sufferer of the BWS.¹⁸³ The interesting portion of the Justices' dissent was that the BWS, as espoused by Ms. Lenore Walker,¹⁸⁴ was fully explained, leading to the conclusion that at least two Justices agree with its admissibility.¹⁸⁵ Had neither Justice agreed with the effects of the Syndrome, their attention would have been focused upon other matters. The dissent acknowledged that "[d]escriptions of this syndrome emphasize the husband's repeated and violent beatings and the wife's dependency-economic and emotional-that make it practically impossible for her to leave."¹⁸⁶ Also acknowledged by both Justices was the fact that "victims [of the syndrome] may be driven to take the lives of their mates as the only possible method of escaping the threat."¹⁸⁷

Recognizing that the Syndrome has received more support in recent years, the dissent also realized that the theory fits "only imperfectly" into the self-defense situation.¹⁸⁸ In *Moran*, the wife did not claim that her actions were provoked¹⁸⁹ or that she suffered severe emotional disturbance;¹⁹⁰ rather, she claimed pure self-defense.¹⁹¹ However, like most states, Ohio requires that deadly self-defense be used only when there is an "imminent" danger of death or great bodily

¹⁷⁹ 469 U.S. 948 (1984)

¹⁸⁰ *Id.* at 956.

¹⁸¹ *Id.* at 949-50.

¹⁸² *Id.* at 950.

¹⁸³ *Id.*

¹⁸⁴ See WALKER, *supra*, note 1.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* See Loraine P. Eber, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L. J. 895, 917-931 (1981); Donald L. Creach, Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615 (1982).

¹⁸⁹ See generally *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (outlining aspects of the provocation defense to homicide).

¹⁹⁰ See generally *Patterson v. New York*, 432 U.S. 197 (1977) (outlining the aspects of defending a homicide case by claiming that the killer acted under extreme emotional disturbance).

¹⁹¹ *Moran v. Ohio*, 469 U.S. 948, 953 (1984) (pure self-defense acts as a justification, not mitigation, to committing homicide).

harm.¹⁹² Although Mrs. Moran had constitutional arguments aside from the BWS, her conviction was never reversed, as both the Ohio and Supreme Courts refused to hear her case.¹⁹³ Had the Supreme Court granted *certiorari*, they could have reversed that conviction and used the opportunity to discuss the BWS. The Court could have taken judicial notice of the BWS, either in dicta or the holding, and given that defense supreme legal foundation. Such action would have begun a wave of judicial acceptance to the syndrome's validity.

The Federal Circuit courts have also had the opportunity to deal with the BWS;¹⁹⁴ although, unlike the United States Supreme Court, at least one of these appellate courts has afforded the needed attention to this syndrome.¹⁹⁵ In *Arcoren v. United States*, the Eighth Circuit took the initiative, as the first federal appellate court, in holding that expert testimony regarding the BWS is relevant and admissible at trial.¹⁹⁶

The *Arcoren* court was presented with an unusual set of facts.¹⁹⁷ Brenda Brave Bird had separated from her husband, the accused, two days prior to the events leading to the initial prosecution.¹⁹⁸ After attending a dance, Arcoren returned home in the early morning hours accompanied by his brother, nephew and fifteen-year-old Charlene Bordeaux.¹⁹⁹ Later that morning, after an earlier altercation with her husband, Brave Bird returned and discovered Bordeaux having consensual intercourse with Arcoren.²⁰⁰ "Arcoren [then] forcefully pulled Brave Bird into the bedroom; verbally and physically abused her; prevented Brave Bird from leaving the bedroom; and, for the next several hours, forced both women to have sexual intercourse with him."²⁰¹ Brave Bird was later able to escape, while her husband was sleeping, and notified a police officer

¹⁹² *State v. Robbins*, 388 N.E.2d 755 (Ohio 1979).

¹⁹³ *Moran*, 469 U.S. at 948-51.

¹⁹⁴ See *United States v. Santos*, 932 F.2d 244 (3d Cir. 1991) (dealing primarily with the allocation of the burden in a homicidal duress defense); *Arcoren v. United States*, 929 F.2d 1235 (8th Cir. 1991) (dealing squarely with the issue of the admissibility of expert testimony of the BWS and holding the testimony admissible); *Taylor v. Dawson*, 888 F.2d 1124 (6th Cir. 1989) (dealing with the BWS, but focusing on double jeopardy claims); *United States v. Gordon*, 812 F.2d 965 (5th Cir. 1987) (holding that *Miranda* rights were not waived by a woman who claimed psychological impairments due to the BWS).

¹⁹⁵ See *Arcoren*, 929 F.2d at 1235.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1237-38. The facts were unusual because the BWS testimony was offered to clarify the battered wife's prior testimony and her reasons for switching it at trial, rather than the usual case of a battered wife killing her husband. *Id.*

¹⁹⁸ *Id.* at 1237.

¹⁹⁹ *Id.* Bordeaux was Brave Bird's niece. *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

of the crimes before being examined at a local hospital.²⁰² Brave Bird described the assaults to the initial police officer, a criminal investigator and a South Dakota federal grand jury.²⁰³ However, the prosecutor was shocked when, at the subsequent trial, Brave Bird totally recanted her grand jury testimony.²⁰⁴ Brave Bird claimed that she was telling the truth at trial and that during the grand jury she had lied because she was angry that Arcoren had been with another woman.²⁰⁵ Ironically, the *prosecution* then called an expert witness to testify to the effects suffered by battered women.²⁰⁶ The prosecution offered the testimony under Rule 702 of the Federal Rules of Evidence²⁰⁷ in order to show that Brave Bird was lying in court and that her grand jury testimony was actually the truth.²⁰⁸ Over defense counsel's objection, the trial court admitted the expert testimony and the appellate court affirmed that decision.²⁰⁹

Several reasons were given for affirming the trial court's decision to allow the expert witness's testimony.²¹⁰ However, the major reason was that the jury was faced with a "bizarre situation" when the prosecution's key witness suddenly recanted her past incriminating testimony.²¹¹ Thus, the expert could clarify that Brave Bird had reversed her testimony as a result of the effects of an abusive relationship.²¹² The expert could tell the jury that "the syndrome is a psychological condition, which leads 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."²¹³ Admission of the testimony allowed the jury to make an enlightened decision concerning which

²⁰² *Id.*

²⁰³ *Id.* Her testimony "describ[ed] in detail Arcoren's violent sexual and physical assaults of both herself and Bordeaux" *Id.*

²⁰⁴ *Id.* at 1238. Brave Bird denied being raped and beaten, as well as denying having seen Bordeaux and Arcoren having sex. *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1239. The defense counsel usually calls the expert on the BWS in order to establish a defense for the accused.

²⁰⁷ FED. R. EVID. 702. This rule relates to the admissibility of expert testimony and provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*

²⁰⁸ *Arcoren*, 929 F.2d at 1239.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1239-1243. The expert witness was Ms. Carol Maicky who has a degree in psychology from the University of Michigan, which was judicially accepted as a respected institution. *Id.* at 1240.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

of Brave Bird's testimonies to credit.²¹⁴ The Eighth Circuit went even further to state that there is "no persuasive reason" to limit this testimony to cases in which a woman wishes to use it to support her self-defense in a homicide prosecution.²¹⁵

An interesting point to note is that the admission of expert testimony generally lies within the discretion of the trial court.²¹⁶ However, without holdings of appellate courts such as that found in *Arcoren*, trial courts have no guidelines to determine where their discretion begins and where it ends. It is imperative that the United States Supreme Court decide this issue in order to regulate the admissibility of BWS expert testimony, as the Court has already held that: "As a general proposition a defendant is entitled to an instruction as to *any recognized defense* for which there exists evidence sufficient for a reasonable jury to find in [her] favor."²¹⁷ Hence, why shouldn't the Supreme Court identify the BWS as a defense worthy of express recognition? The Court could accomplish such a task by granting *certiorari* in a case similar to *Arcoren* and affirming the decision to allow the expert testimony. Without such action, women will continue to receive unequal treatment for factually equal cases across our fifty states.²¹⁸

How do the fifty state's treat the admissibility of expert testimony regarding the BWS? The following paragraph outlines only those states which have dealt with the syndrome at their highest appellate court.

Although there are hundreds of appellate cases involving the BWS, very few state supreme courts have resolved the issue concerning admissability of the Syndrome. The eleven states which expressly allow expert BWS testimony during trials include: Georgia, Kentucky, Kansas, Maine, Minnesota, New Hampshire, New Jersey, Ohio, Pennsylvania, Washington, and West Virginia.²¹⁹ These states represent too small a portion of our nation to properly afford the

²¹⁴ *Id.*

²¹⁵ *Id.* at 1241.

²¹⁶ *United States v. Rose*, 731 F.2d 1337 (8th Cir. 1984), *cert. denied*, 469 U.S. 931 (1984). Only in cases of abuse of discretion will a trial court's decision to admit or deny expert testimony be reversed. *Id.*

²¹⁷ *See Mathews v. United States*, 485 U.S. 58, 63 (1988) (citing *Stevenson v. United States*, 162 U.S. 313 (1896)) (emphasis added).

²¹⁸ It would be easier for a battered women to petition the Supreme Court for *certiorari* in a BWS case if the Sixth Amendment to the United States constitution provided for "the right to a speedy and public" and fair or nationally uniform trial. However, no such right was written as the supreme law of the land by the drafters of our Constitution. *See* U.S. CONST. amend. VI.

²¹⁹ *Smith v. State*, 277 S.E.2d 678 (Ga. 1981); *State v. Hundley*, 693 P.2d 475 (Kan. 1985); *State v.*

victims of violent abuse, or any relational abuse at all, their fair day in court. Although these states may allow the experts to testify, there is no guarantee that the jury will “buy the defense.” Thus, what could be the potential harm in allowing a group of one’s peers to be educated on a syndrome which is beyond their “average ken” in order to deliver justice, either guilt or innocence, to the accused.

National uniformity is needed. A uniformly applied standard set of guidelines, not necessarily a bright-line rule, canopying this area of law will neither open a Pandora’s box nor create a panacea for all women. Allowing testimony at trial does not equate to a “not guilty verdict” in every case. It merely ensures that every contestant in the battlefield of trial will be subjected to the same rules of war. Those who consider this analogy to be overstated should consider the battles endured by those for whom this article was written.

THE BWS IN OHIO - A CHANGE IN JUDICIAL PERSPECTIVE

This article has already briefly stated that the past law in Ohio has been overruled and that BWS testimony is now admissible in Ohio trials.²²⁰ The decision rendered in *State v. Koss* expressly and unequivocally overruled *State v. Thomas*, yet it did not quite go far enough in order to allow ultimate fairness to battered Ohioans.²²¹ *Koss* did not establish the BWS as a separate and distinct legal defense to homicide and thus did not “extend to [the accused] every reasonable opportunity to present every legal defense available within the realm of our evidentiary process.”²²²

The facts of *Koss* are amazingly common to the typical battered woman’s case. On May 2, 1986, Michael Koss’ body was found in his Cleveland, Ohio, home with a bullet wound which penetrated his skull and brain.²²³ Mrs. Brenda J. Koss, the deceased’s wife returned to their home at approximately midnight

Green, 652 P.2d 697 (Kan. 1982); Commonwealth v. Craig, 783 S.W.2d 387 (Ky. 1990); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Hennem, 441 N.W.2d 793 (Minn. 1989); State v. Baker, 424 A.2d 171 (N.H. 1980); State v. Kelly, 478 A.2d 364 (N.J. 1984); State v. Koss, 551 N.E.2d 970 (Ohio 1990); Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989); State v. Ciskie, 751 P.2d 1165 (Wash. 1988); State v. Kelly, 685 P.2d 564 (Wash. 1984); State v. Allery, 682 p.2d 312 (Wash. 1984); ; State v. Steele, 359 S.E.2d 558 (W.Va. 1987); State v. Dozier, 255 S.E.2d 552 (W.Va. 1979).

²²⁰ See *supra* text accompanying note 59.

²²¹ *Koss*, 551 N.E.2d at 974. It is interesting to note that the *Koss* decision was written by the one female on the Ohio Supreme Court, Justice Alice Robie Resnick. *Id.*

²²² *Id.* at 978 (quoting the concurring opinion of Justices Holmes, Moyer, and Sweeney).

²²³ *Id.* at 971.

²²⁴ *Id.*

²²⁵ *Id.* Apparently the noise that Mrs. Koss heard was “gurgling blood” from her husband’s head. *Id.*

on May 2, 1986, and suffered a telling blow from her husband as she was undressing.²²⁴ The next thing that Mrs. Koss remembered was hearing a "noise or something," at which point she fetched a holster which she had seen earlier, and left their home.²²⁵ She stated that the first time she remembered seeing the gun was in her car and that she did not intentionally kill her husband but did it by "accident."²²⁶ At trial, Mrs. Koss attempted to introduce expert testimony on the BWS after testimony from both her and others was offered concerning her past beatings.²²⁷ However, pursuant to *Thomas*, the trial court denied her proffered expert testimony.²²⁸

Thankfully, the Supreme Court of Ohio reversed *Thomas* and decided that the Syndrome's widespread acceptance merits its admissibility during trial.²²⁹ However, there are many fundamental flaws in both the logic of the majority and the concurrence written by Justice Holmes. First, the court relied on the aforementioned book *The Battered Woman*, written by Ms. Lenore Walker in 1979 in holding that the BWS is a respectable and judicially acceptable syndrome.²³⁰ Yet, the court stated that "since 1981, several books and articles have been written on this subject."²³¹ Well, the court seemed to overlook the unmistakable fact that the same authority upon which they relied in *Koss*, namely *The Battered Woman*, was already published two full years prior to deciding *Thomas*.²³² If the court had used some initiative and progressive thinking, it would have granted judicial notice to Ms. Walker's book ten years ago thereby affording a decade's worth of battered women a fair trial. Although the court must be commended for being one of only a minority of state supreme courts to even decide the issue, ten years is far too long to allow injustice to endure. Thus, any thanks given to the court by proponents of the syndrome should be accompanied by criticism as well.

"Expert testimony in Ohio is admissible if it will assist the trier of fact in search for the truth."²³³ Furthermore, expert testimony will be allowed at

²²⁶ *Id.*

²²⁷ *Id.* at 971-72. The witnesses for Mrs. Koss included a counselor at the Witness and Victim Services Center. Mrs. Koss' testimony included details of her past beatings and one incident when her husband attempted to electrocute her by placing a hot radio in the bathtub while she was in it. *Id.* at 971.

²²⁸ *Id.* at 972.

²²⁹ *Id.* at 974.

²³⁰ *Id.* at 973.

²³¹ *Id.* at 972. The court also relied on several other articles and books, all published between 1982 and 1988. *Id.* at 972 n.1.

²³² *State v. Thomas*, was decided in 1981.

²³³ *Koss*, 551 N.E.2d at 973 (citing *Kitchens v. McKay*, 528 N.E.2d 603 (Ohio Ct. App. 1987)).

trial to help the jury understand the BWS, as well as to determine whether the accused had “an honest belief that she was in imminent danger when considering the issue of self-defense.”²³⁴ This statement still requires that the battered woman squeeze her situation into the traditional self-defense framework, which will not always amount to justification in the juries’ eyes. The most positive aspect of the court’s opinion in *Koss* was that it recognized that the Syndrome is far beyond the ken of the average juror, who would normally ask why the woman didn’t just leave.²³⁵ Finally, the court also noted that the accused must still establish, via independent evidence, that her situation qualifies her as one to whom the BWS applies.²³⁶ Thus, the admission of testimony, as alluded to earlier, does not amount to a risk that every women asserting a BWS defense will be found not guilty. Therefore, fears of those critics who oppose admissibility are *de minimus* at best.

A final criticism of *Koss* can be found in Justice Holmes’ concurring opinion where he agreed with the majority, but then suggested that the accused should be granted “every reasonable opportunity to present every legal defense available within the realm of our evidentiary process.”²³⁷ However, the majority determined that the “syndrome does not establish a new defense or justification.”²³⁸ It is inconsistent to desire granting every defendant every possible defense, but then agree to disallow the creation of a separate defense which the court accepted as judicially recognized and respected. Justice Holmes must take a position and not ride the wave of fence-sitting neutrality. Furthermore, although Justice Holmes’ desire was limited by our “evidentiary process,” that process can be corrected to allow for separate and distinct defenses as well. Humans create judicial opinions and humans create legislative rules; there is no reason why the two cannot work together to benefit the citizens of Ohio and the other forty-nine states as well.

THE UNDESIRABLE ALTERNATIVE – CLEMENCY

Clemency²³⁹ is a beneficial solution to the thousands of unjustifiably imprisoned women who are currently serving out their individual sentences. How-

²³⁴ *Id.*

²³⁵ *Id.* at 974. The court stated that the “common knowledge of the jury may be very much mistaken, an area where jurors’ logic, drawn from their *own* experience, may lead to a wholly incorrect conclusion.” *Id.* (emphasis added).

²³⁶ *Id.*

²³⁷ *Id.* at 978.

²³⁸ *Id.* at 974.

²³⁹ BLACK’S LAW DICTIONARY, *supra* note 13, at 228. Clemency is defined as an “act of a governor of a state when he commutes death sentence[s] to life imprisonment, or grants pardon[s].” *Id.*

ever, it is not an alternative to uniform and national acceptance of the BWS in our society.

On December 21, 1991, Governor Richard Celeste of Ohio granted clemency to twenty-five women who were serving prison sentences for either killing or assaulting their husbands or lovers.²⁴⁰ It was the very first "mass release" of battered women in the United States, which was praised by many womens' rights groups and criticized by both judges and prosecutors.²⁴¹ After reviewing over one hundred case files, Governor Celeste chose twenty-five women, who he claimed had been "trapped emotionally and physically," to be granted pardons. However, these same women were also required to perform two-hundred hours of community service and the Governor refused to wipe their records clean of their charges and prison sentences.²⁴² The Governor's actions actually stemmed from the Ohio Supreme Court's holding and dicta in *State v. Koss*.²⁴³

Governor Celeste's actions should be praised, but rather have come under fire from judges and state prosecutors.²⁴⁴ Prosecutors feel that such a decision, to grant clemency, only adds to the ability of women to use violence to escape abuse and get away with it.²⁴⁵ A common prosecutorial statement is that: "The fact that you're battered does not give you the license to kill."²⁴⁶ Furthermore, prosecutors fear that instead of "going to the courts or getting a divorce, these women will think, '[m]aybe I'll kill him.'"²⁴⁷ Also feared is the notion that acceptance of the BWS will be promoting taking of human lives.²⁴⁸ However, these fears are completely unfounded. The proper application of the BWS will not send the wrong message, but will serve to benefit society. Using the syndrome loosely will encourage women to take matters into their own hands.

²⁴⁰ Isabel Wilkerson, *Clemency Granted to 25 Women Convicted for Assault or Murder*, N.Y. TIMES, Dec. 22, 1990, at 1. See also Kay Bartlett, *Battered Woman Syndrome still debatable defense*, LIMA NEWS, Mar. 11, 1991, at B6.

²⁴¹ See Eilkerson, *supra* note 240, at 1.

²⁴² *Id.* It seems odd that Governor Celeste was willing to pardon these women only conditionally, because they are still considered to have been guilty of their crimes, but unworthy of a prison sentence. Although a conditional pardon allows these women to be freed from prison, their sentences will still follow them to job interviews and housing applications. The purest form of clemency is the best alternative which would have wiped their records totally clean of their past prison sentences.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1-11 (quoting Dennis Watkins, the Trumbull County, Ohio prosecutor and President of the Ohio Prosecuting Attorney's Association).

²⁴⁷ *Id.* at 11.

²⁴⁸ *Id.*

However, using the syndrome in a narrowly defined manner will ensure that only those who truly fit within its boundaries will be allowed to benefit from it.

A major flaw in these prosecutorial arguments is that battered women cannot just “go to court” or seek a divorce. These women are financially, physically, and emotionally strapped to their abusers. As stated earlier, most severe abuse occurs while the couple is separated. Also, as seen from the Tracy Thurman case in Torrington, Connecticut, women’s reliance on the police, TRO’s and the court system is totally misplaced. If Tracy Thurman could not expect protection from officers *who were present* during her beatings, how could she expect protection from a TRO or analogous court order? In short, she, like thousands of other battered women, could not.

Prosecutors also argue that decisions such as *State v. Koss* were not made expressly retroactive by their deciding courts.²⁴⁹ However, retroactivity arguments should be limited to judicial tribunal decisions and should not apply to the decisions from another branch of government, namely the executive branch. If a battered woman who was recently convicted sought use of a landmark decision born after her case, then retroactivity arguments would apply. However, the Governor was merely using his vested authority to review those cases worthy of pardons.

The most misguided and seemingly ignorant argument elicited from prosecutors is that “some of these women are making it up.”²⁵⁰ Rebuttal to this argument is simple – facts don’t lie, or make up stories. The women who were granted clemency all produced medical records of abuse documenting broken bones and bruises, offered police reports and doctor’s statements, and even brought in eye witnesses to testify.²⁵¹ One woman who was released had lost sight in one eye and hearing in one ear as a direct result of her beatings.²⁵² Prosecutors who claim that these facts are made up should, perhaps, try to find a little human compassion.

One positive result from Governor Celeste’s decision to grant clemency, other than the obvious result of freeing deserving women, is that at least one other Governor has followed suit in doing the same.²⁵³ On Tuesday, February

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 12.

²⁵² *Id.*

²⁵³ Tamar Lewin, *More States Study Clemency for Women Who Killed Abusers*, N.Y. TIMES, Feb. 21, 1991, at A19.

19, 1991, Governor William D. Schaefer of Maryland commuted the prison sentences for eight BWS inmates.²⁵⁴ Governor Schaefer stated that “he was convinced that the women had acted in self-defense and posed no threat to society.”²⁵⁵ One commentator has suggested that these grants of clemency have “propelled the issue into the national forefront, and . . . that there is a real movement toward recognizing that our prisons are filled with women with long histories of abuse, linked to the crimes [for which they are] in prison.”²⁵⁶

Hopefully, these gubernatorial decisions have propelled the issue of the BWS into the public’s eye. Hopefully, at least one member of our Supreme Court has taken notice of these decisions. Hopefully, one day there will be no need to compensate for a judicial system which should provide relief through justice where such relief is needed. Clemency is one alternative to full legal recognition of the BWS, but it is hardly a realistic one. Why should these severe abuse victim live through punishment in prison only to later be told by a state’s highest official that the punishment was undeserved?

REALITY AND PROPOSED SOLUTIONS

The Tracy Thurman case is representative of many police forces nationwide which do not adequately deal with domestic violence disputes. Domestic violence victims, like Ms. Thurman, refuse to stand idly by while their tax dollars are spent on ineffective police departments. The United States Courts of Appeals have recognized that domestic violence victims do, in fact, have a right to file suit alleging failure of a police officer to protect them.²⁵⁷ Such suits involve both equal protection and due process claims by the victims.²⁵⁸ In fact, failure of a police department to act on the basis of race or the marital status of the victim may be adequate grounds for a section 1983 Civil Rights Action.²⁵⁹

If police stations around the nation failed to act before, there are now monetary reasons to correct past practices. All police forces are not delinquent in their duties. In fact, at least one, in Albuquerque, New Mexico, is exemplary.²⁶⁰ On October 15, 1988, the District Attorney for the State of New Mexico (DA),

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* (quoting Sue Osthoff, Director of the National Clearinghouse of the Defense of Battered Women).

²⁵⁷ See *Watson v. Kansas City*, 857 F.2d 690 (10th Cir. 1988); *Balistereri v. Pacifica Police Dep’t*, 855 F.2d 1421 (9th Cir. 1988).

²⁵⁸ See *supra* note 257.

²⁵⁹ *Bartalone v. County of Berrien*, 643 F. Supp 574 (W.D. Mich. 1986).

²⁶⁰ Memorandum from the Supreme Judicial District Attorney, State of New Mexico 1 (Oct. 1989) (on file with author).

along with the Albuquerque Police Department, assembled a Domestic Abuse Response Team Program [hereinafter DART].²⁶¹ The interagency initiative was formed as a direct response to the increase in domestic violence issues within their community.²⁶² The DART program consists of a "DA DART unit" composed of a DA Victim Impact Program staff member and a citizen volunteer.²⁶³ This unit is on duty in a radio equipped and police-dispatched vehicle Tuesday through Saturday from 6:00 p.m. until 2:00 a.m.²⁶⁴ The units' duties include giving emotional support to victims, handing out TRO instructions, referring victims to community agencies, and informing victims of their rights.²⁶⁵ These units also transport victims and their families to safety, which greatly assists the on-duty police officers.²⁶⁶

This program is considered to be "proactive" which provides a "uniform and efficient response to domestic violence."²⁶⁷ Furthermore, there are several benefits to the DA DART program, including reducing repeated calls with the same parties, higher conviction rates in court, and intervention at less violent levels of domestic violence situations.²⁶⁸ Most importantly, the program "addresses the cycle of violence that exists in domestic situations."²⁶⁹

This DA DART program should be commended for its ability, as early as 1988, to recognize the level of domestic violence and abuse in our communities and to adequately deal with those situations. The program uses volunteers, who can provide support to victims who may not trust a police officer. Additionally, the program continues to help the victims by removing them from the violent situation and addresses the cycles of violence which may be beyond the understanding of many victims. This prevention model should be implemented by police forces around our nation to both deter violence, as well as educate all parties involved in the violence. However, in those cases which escape the benefits of programs such as DA DART and end in a BWS homicide, the judiciary must be able to fairly and adequately handle all parties to the violence. Unconditional acceptance of the BWS as a defense will allow equal and fair judicial treatment for those who are not fortunate enough to live

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

in Albuquerque, New Mexico or similar communities.

PLEASE, REMEMBER THE CHILDREN

Although the majority of this article has been focused on the adult participants involved in domestic violence scenarios, equal attention in our communities must be afforded to the children involved in those same scenarios. What exactly are the effects of an abusive home life on the children? Or, what effects are there on those children who have not yet even been born?

“Violence during pregnancy does more than harm a woman physically and psychologically. Battered women are also two to four times likelier to give birth to [low-birth-weight] infants.”²⁷⁰ Stress is included as one contributing factor of low-birth-weight babies, which can be caused by battering.²⁷¹ Although statistics vary, as many as twenty-three percent of all pregnant women suffer battering.²⁷² Few people would consider these pre-birth effects of battering, yet there is scientific proof of a positive correlation.²⁷³ The suggested remedies for this problem include early screening, immediate counseling, teaching, referrals, and offering advocacy for pregnant victims.²⁷⁴

Also affected are the children who endure the violence post-birth.²⁷⁵ In families “characterized by husband’s marital aggression, boys and girls experience similar amounts of parental aggression.”²⁷⁶ However, the more severe the level of the marital aggression, the more likely that the son in the family will experience aggression from both parents.²⁷⁷ This seems logical, as a mother is much more likely to exhibit and displace anger onto her sons than her daughters.²⁷⁸ However, both parents are more likely to show sons more abuse, as sons are more likely to interfere in domestic violence situations.²⁷⁹ Furthermore,

²⁷⁰ Linda F. Bullock & Judith McFarlane, *The Birth-Weight/Battering Connection*, 89 AM. J. NURSING 1153 (1989).

²⁷¹ *Id.*

²⁷² *Id.* Statistics have been reported to range from 10.9 percent to 23 percent, with this particular source listed as 20.4 percent. *Id.*

²⁷³ *Id.* at 1154.

²⁷⁴ *Id.* at 1155.

²⁷⁵ Ernest N. Jouriles & Stephanie H. LeCompte, *Husband's Aggression Towards Wives and Mother's and Father's Aggression Toward Children: Moderating Effects of Child Gender*, 59 J. CONSULTING & CLINICAL PSYCHOL. (1991).

²⁷⁶ *Id.* at 191.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

young boys are more likely to have conduct problems and sociocultural factors may force a family to believe that boys need “toughening up,” whereas girls do not.²⁸⁰ Thus, as a result, boys grow up to experience the worst abuse and side effects of martial violence. These same boys can then carry on the only pattern which they have learned.

The Albuquerque police department has taken a proactive position by formulating a prevention model in order to combat abusive tendencies in children before they fully develop.²⁸¹ In fact, children from abusive family structures can be over two times as likely to exhibit emotional and adjustment problems than their peers who do not live in an abusive atmosphere.²⁸² These abused children are likely to learn several different lessons from their parents, including violence as a form of conflict resolution, that violence has a place in the family, that reporting violence has no effect, that sexism is to be encouraged, that violence is a good way to relieve stress, and that victims can be responsible for their own abuse.²⁸³ “Clearly, children in this population are good candidates for early intervention and prevention programs.”²⁸⁴

The proposed program is an ongoing ten-session counseling scheme which attempts to help juveniles work through their family problems.²⁸⁵ Basically, the program involves a group of similarly situated children between ages eight and thirteen and attempts to educate the children into realizing that they are not to blame and that violence does not solve problems, but rather creates them.²⁸⁶

Children are our future and are affected by domestic violence. Our world is not perfect, violence will not simply vanish and education will not form itself. Our nation must attempt to end domestic abuse by every reasonable method, both before it occurs and by keeping it from reoccurring. Naturally, education, intervention programs, and proactive steps are the best ways to end battering. Yet, what if they fail? What should occur if these perfect “theories” do not materialize? Must women still be forced to endure abuse and possible prison sentences for acting in the only way they could? For those cases which “slip through the cracks” of these intervention approaches, courts must be ready

²⁸⁰ *Id.*

²⁸¹ *See Wilson, supra* note 98, at 180.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 181-84. The program is called “An Intervention Model.” *Id.* at 181.

²⁸⁶ *Id.* at 181-84.

and willing to properly handle potential defendants. Thus, courts must extend themselves, the way Ohio and other states have, to set formal guidelines for the admission of BWS expert testimony.

CONCLUSION

The BWS has received overwhelming recent attention, both from judicial and non-judicial bodies. The Syndrome is real. Doubters and critics of the Syndrome are usually those who hold unfounded fears over the scope of the BWS, and also those who are smothered by ignorance. After reading voluminous case studies and methods by which women are tortured, one cannot help but feel compassion and sympathy. Yet, compassion is not what a battered woman needs most. She needs support from the media, the courts, the politicians, and from our legislatures. The battered woman needs strength and counseling, as well as an ability to reasonably rely on our nation's law enforcement officials. Finally, battered women don't need clemency, as they should not be placed in prison to suffer undeserved punishment. These women do not pose threats to society, but are usually contributing citizens.

The BWS does not properly fit into either the insanity defense or self-defense to a homicide charge. This is primarily due to the way self-defense is defined, as requiring "immediate apprehension or fear of bodily injury or death." Additionally, battered women act outwardly normal after killing their husbands, since violence is nothing new to them. For this reason, the average juror who has never been abused cannot fathom the applicability of the insanity defense. Our legislatures must construct statutes which obviate the need for these limitations and accord the BWS its own acceptability as a homicide defense. Critics need not worry, as narrowly constructed statutes and proper judicial treatment will ensure that only the worthy benefit from the syndrome at trial.

While we wait for our legislatures to fashion appropriate laws, our courts must anticipate that outcome and attempt to grant the BWS the respect it deserves. Foremost, our United States Supreme Court should grant *certiorari* to a BWS case in order to lay a uniform blanket over our fifty state and federal court systems. The knowledge and wisdom of the Court must be tapped in order to provide justice, not simply to follow existing laws.

Finally, our citizens must attempt to show compassion to one another. National problems deserve, even require national remedies. No single person alone can end domestic violence and abuse; and no one person can stop the generational continuation of that same abuse. Our media, schools, and yes, even our politicians, must educate our nation's masses to the reality that violence

does not pay and abuse will not be tolerated, on any level. Society should never encourage abuse, even from battered wives. However, until the unprovoked abuse from husbands ends, battered women are given no choice but to fight back and end their torture. Granting full legal recognition to the BWS will neither be granting a license to kill, nor encouraging murder. What it will do is force our nation to realize that abuse is real, that it touches us all, and that we must invent adequate support systems to assist its victims. However, until a perfect victimless utopia is created, our battered women deserve their own legal defense.