Expert Testimony on the Batered Woman Syndrome in Maryland

Jeanne-Marie Bates

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

Part of the Evidence Commons

Recommended Citation
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol50/iss3/11
Comment

EXPERT TESTIMONY ON THE BATTERED WOMAN SYNDROME IN MARYLAND

INTRODUCTION

The "battered woman syndrome" is not a new defense. Nor is it a legal justification or excuse for the killing of an abusive husband or partner. Rather, the term "battered woman syndrome" refers to a set of common characteristics unique to women who are physically and/or psychologically abused by their mates. In the last decade this psychological profile has found its way into the nation’s courts. This new interplay between psychology and the law has resulted from the introduction of expert testimony on the syndrome by battered women on trial for killing their batterers, to aid their claims of self-defense. The expert testimony is introduced to assist the trier of fact in determining whether the defendant acted out of a reasonable belief that she was in imminent danger of death or great bodily harm.

Once treated with hostility and skepticism, courts in a number of states now support admissibility of expert testimony on the battered woman syndrome. The clear trend among courts today is to

1. Other sources use the term "battered wife syndrome" or "battered spouse syndrome." For consistency, "battered woman syndrome" will be used throughout.
2. As this Comment argues, it is relevant to the justification of self-defense.
4. The first case to admit expert testimony on the syndrome was Ibn-Tamas v. United States, 407 A.2d 626, 630-31 (D.C. 1979), rev’d, 455 A.2d 893 (D.C. 1983). Though the initial Ibn-Tamas decision later was reversed, it was quite influential in other jurisdictions.
5. See, e.g., Chapman v. State, 259 Ga. 706, 707, 386 S.E.2d 129, 131 (1989) ("Evidence of the [battered woman] syndrome is admissible in an attempt to show that the defendant had a mental state necessary for the defense of justification although the actual threat of harm does not immediately precede the homicide.").
acknowledge that the testimony is highly probative and more helpful than confusing to the jury in deciding whether a battered woman’s conduct was consistent with her claim of self-defense. Maryland courts, however, have thus far refused to admit evidence on the syndrome. Although Maryland recently has enacted a new law that permits courts to admit evidence on the syndrome, this


9. The new law provides in pertinent part:

(B) Notwithstanding evidence that the defendant was the first aggressor, used excessive force, or failed to retreat at the time of the alleged offense, when the defendant raises the issue that the defendant was, at the time of the alleged offense, suffering from the battered spouse syndrome as a result of the past course of conduct of the individual who is the victim of the crime for which the defendant has been charged, the court may admit for the purpose of explaining the defendant’s motive or state of mind, or both, at the time of the commission of the alleged offense:

(1) Evidence of repeated physical and psychological abuse of the defendant perpetrated by an individual who is the victim of a crime for which the defendant has been charged; and

(2) Expert testimony on the battered spouse syndrome.

Act of May 14, 1991, ch. 337, 1191 Md. Laws 2275. Attempts to pass similar legislation in previous years failed, but recent political developments and media attention brought the issue to the forefront of Maryland politics in 1991. On February 20, 1991, Governor William Donald Schaefer commuted the sentences of eight women imprisoned for assaulting or murdering their abusive husbands and boyfriends. See The Sun (Baltimore), Feb. 20, 1991, at 1A, col. 2. The circumstances of the commutation were a first for Maryland, and followed a similar decision last December by former Ohio governor Richard Celeste to release 25 women inmates. Subsequent to the eight Maryland women's release, the Baltimore Sun published an article that suggested the decision to commute some of the women's sentences was made without all of the facts. Regardless of the merits of the individual commutation decisions, the situation illustrates how the failure of Maryland courts to allow testimony on the syndrome at trial has resulted in some problematical convictions. Had testimony on the syndrome been presented to the juries
Comment suggests that Maryland courts need not rely on the statute to admit such testimony. An examination of Maryland law governing admission of expert testimony reveals that there is no reason why testimony on the syndrome should be excluded in cases involving battered women who claim self-defense for killing their batterers, even absent the new statute.10

Other jurisdictions have determined that the expert testimony is necessary to insure that these women receive their constitutional right to a fair trial.11 This Comment argues that Maryland courts should apply the same reasoning and admit expert testimony on the syndrome. Part I presents an overview of the battered woman syndrome, including an examination of the profile of battered women who kill. Part II discusses using expert testimony on the battered woman syndrome to help support the battered woman's claim of self-defense, and recent judicial responses to the issue in other jurisdictions. Part III examines relevant Maryland cases, and analyzes the prospect of admitting the testimony under the rules governing expert testimony. Part IV reviews legislation regarding admissibility of expert testimony on the battered woman syndrome in other jurisdictions, analyzes Maryland's recent legislation, and concludes that, as written, the Maryland statute will undoubtedly help remedy some of the unique problems battered women encounter in raising their claims of self-defense.

I. AN OVERVIEW OF THE BATTERED WOMAN SYNDROME

A woman is battered every fifteen seconds in the United States,12 and Maryland is not exempt from this insidious violence. An estimated 150,000 Maryland women are battered each year, and in 1990 approximately 50 were killed by their spouses or boyfriends.13 Although domestic violence traditionally has been considered a private matter,14 sometimes the shocking consequences of

10. See infra notes 116-126 and accompanying text.
11. See, e.g., Commonwealth v. Stonehouse, 521 Pa. 41, 58, 555 A.2d 772, 781 (1989) (the testimony is so important to a battered woman's claim of self-defense that defense counsel was ineffective for his failure to introduce the testimony); State v. Anaya, 438 A.2d 892, 894 (Me. 1981) (testimony is central to the defendant's claim of self-defense).
12. Fact Sheet, Battered Spouse Syndrome Bill (H.B. 49, S.B. 141, 1991 Sess.) (statistical data available at the Public Justice Center, Baltimore, Maryland). A woman is more likely to be injured from battering than from rape, auto accidents, and muggings combined. Id.
13. Id.
14. The complex reasons for this largely are grounded in traditional values regard-
BATTERED WOMAN SYNDROME

this abuse force their way into the public eye. Spousal homicide is one such public consequence.

Researchers have developed several theories to account for the widespread phenomenon of physical, sexual, and psychological abuse of women by men in intimate relationships that has come to be known as the "battered woman syndrome." These psychological theories help to explain, first, why battered women remain in these relationships, and second, why, under certain circumstances, these women have resorted to killing their batterers.

A. Learned Helplessness Theory

The psychological theory known as "learned helplessness" helps explain why the battered woman is not free to leave the situation. The theory describes a psychological condition first tested in a series of laboratory experiments in which dogs were taught that their behavior did not affect whether they received electric shocks. Instead of trying to escape, the dogs developed coping responses.


16. The pioneering work in the field can be largely attributed to Dr. Lenore Walker for applying the "learned helplessness" theory to battered women, and for developing her "cycle theory of violence." See L. Walker, supra note 2; L. Walker, Terrifying Love: Why Battered Women Kill and How Society Responds (1989) [hereinafter Terrifying Love]. By 1989, Dr. Walker had testified as an expert in more than 150 cases involving battered women charged with killing their batterers. Id. at 7.


19. L. Walker, Terrifying Love, supra note 16, at 49-50. The dogs eventually ceased all voluntary escape activity. Passive, the dogs remained in their own excrement. Closer study revealed that they were not really "passive," but had developed coping skills to minimize the pain. Their fecal matter helped insulate them from the electrical impulses. The animals had to be repeatedly dragged from their cages before they
Similar results were found in studies involving people. When this theory is applied to battered women, it does not mean that they "learn" how to be helpless. Rather, it means that battered women quickly learn that they cannot safely predict their behavior's effect on their batterers. They perceive that escape is impossible, and concentrate on learning to cope with their situations.

B. The Cycle Theory of Violence

Lenore Walker's "cycle theory of violence" explains the victimization process leading to the battered woman's development of learned helplessness behavior. Within relationships involving battering behavior, three "cycles" of battering can be identified.

Phase one of the cycle, the "tension-building stage," involves incidents of "minor" physical and mental abuse. During this stage, the woman often tries to cope by responding with kindness or merely by staying out of the batterer's way. Because the woman is apparently passive, the batterer is not forced to control his behavior, stopped their "learned helplessness" behavior. Learned helplessness is the act of choosing predictable coping strategies over unpredictable escape responses.

20. M. SELIGMAN, supra note 18, at 30. The distortions in human subjects' perceptions caused significant changes in their motivation, thinking, and behavior. Id. at 49-56.

21. L. WALKER, TERRIFYING LOVE, supra note 16, at 50-51. Because battered women cannot predict their own safety, they do not believe that anyone else will be able to help them. They limit their behavior to responses they know are possible and safe to make.

22. Id. Walker lists seven factors that occur in adulthood during the battering relationship itself that are associated with development of learned helplessness.

(1) A pattern of violence, particularly the occurrence of the Cycle of Violence . . . . An observable escalation in frequency and severity of the abuse . . . .

(2) Sexual abuse of the woman.

(3) Jealousy, overpossessiveness, intrusiveness of the batterer, and isolation of the woman.

(4) Threats to hurt or kill the woman.

(5) Psychological torture [defined as including verbal degradation, denial of powers, isolation, monopolizing perceptions, occasional inducements, hypnosis, threats to kill, induced debility, drugs or alcohol].

(6) Violence correlates (including the woman knowing about the man's violence against others, including children, animals, pets, or inanimate objects).

(7) Alcohol or drug abuse by the man or woman.

Id. at 52.


25. Id. "Minor" incidents include slaps, pinches, and verbal and psychological abuse. Id.

26. Id. The woman's primary concern at this stage is to prevent the violence from escalating. Id. at 43.
and his abusiveness often is reinforced.\textsuperscript{27}

The second phase of the cycle is the "acuce battering incident," and is "characterized by the uncontrollable discharge of the tensions that have built up during phase one."\textsuperscript{28} Phase two incidents last two to twenty-four hours, and are more serious and marked by increased destructiveness.\textsuperscript{29} Most women realize that the batterer's violence is uncontrollable, and that therefore, he will not listen to reason.\textsuperscript{30} Thus, many women report that they try to protect themselves by not resisting, choosing instead to "wait out the storm."\textsuperscript{31}

In the last phase of the battering cycle, "kindness and contrite loving behavior," batterers often promise that the violence will never happen again.\textsuperscript{32} Relieved that the violence has temporarily ceased, "[i]t is in this phase of loving contrition, [the experts believe,] that the battered woman is most thoroughly victimized psychologically."\textsuperscript{33} Ultimately, the psychological abuse escalates, and the physical abuse recommences.

C. A Profile of Battered Women Who Kill

The "typical" battered woman is not an uneducated woman liv-

\textsuperscript{27} Id. Walker notes that the battered woman's desire to keep the batterer's violence from growing proves to be a "double-edged sword." Her passivity legitimizes the batterer's belief that he has the right to abuse her. Id.

\textsuperscript{28} L. WALKER, supra note 3, at 59.

\textsuperscript{29} Id. at 60. Although many women are seriously injured, they often wait days before seeking medical treatment, if they decide to go at all. Id. at 63.

\textsuperscript{30} Id. at 62. Some women in Walker's initial study reported that occasionally they provoked the incident. Walker explains that when this happens, the couple usually has been in a period of prolonged battering, and the woman knows that the acute violence is inevitable. Thus, the woman initiates what she considers an inevitable result because she can no longer tolerate her terror or anxiety. Id. at 60.

\textsuperscript{31} L. WALKER, TERRIFYING LOVE, supra note 16, at 44. Walker argues that there is sound reasoning behind the battered woman's apparent passivity in the face of severe violence. Id. Many women reported that once they tried to resist, their batterer would only become more violent. Id. See also L. WALKER, supra note 3, at 61-62.

\textsuperscript{32} L. WALKER, TERRIFYING LOVE, supra note 16, at 44. The batterer begs for forgiveness, and she convinces herself that he has truly changed. Id. at 45. See also L. WALKER, supra note 3, at 65-70.

\textsuperscript{33} L. WALKER, TERRIFYING LOVE, supra note 16, at 45. Specifically, women and their batterers are extremely emotionally dependent upon one another. Walker explains that during this phase, each partner may believe that death is preferable to separation. Moreover, many women do not leave because they believe they are responsible for their batterers' stability. The woman's assessment of her importance to the batterer is not unreasonable. In one study, almost 10\% of the batterers committed suicide after the woman left. Id.

In order to be classified as a battered woman, the couple must go through the battering cycle at least twice. If a woman is abused a second time, and she remains in the situation, she is a battered woman. L. WALKER, supra note 3, at xv.
ing in poverty. Rather, battered women are found in all age groups, races, income levels, and educational backgrounds. The similarities are found in their values and attitudes. They usually have a poor self-image and low self-esteem. Battered women often state that they feel at fault for not being able to stop their batterer’s behavior and blame themselves for their failing relationship with the batterer. Unfortunately, guilt and shame often prevent them from seeking outside help.

Researchers have identified several characteristics common to battered women who killed their abusers. First, those who killed perceived their batterers as inflicting even greater levels of violence than is typical in battering relationships. Their batterers were more likely to use weapons, and consequently, these women suffered serious injuries. In addition, these women generally received more death threats. Most significant, those who killed reported that they sincerely believed that their batterer was capable of killing either her or himself.

35. D. Martin, supra note 15, at 19; L. Walker, supra note 3, at 19. Most battered women are from middle-class and upper-income backgrounds, and as a group, are less likely to leave the battering relationship than are working-class or lower-income women. Id. See also L. Walker, Terrifying Love, supra note 16, at 107. One reason for this may be that lower-income women have greater contacts with social services agencies and are thus more apt to realize that help exists outside of their homes and immediate families. Id.
37. Id. at 102-03. The constant stress and anxiety that the battered woman undergoes often leads to psychosomatic ailments and depression. Id. at 103.
38. Id. The combination of the batterer’s extreme possessiveness and her fear of exposing the truth about the abuse often causes the battered woman to remain isolated. Id.
39. See A. Browne, When Battered Women Kill (1987). Browne compared the 40 homicide cases that she worked on and completed by 1983 with a subsample of 100 battered women who had been living outside of the battering relationship for less than a year.
41. Id.
42. Id. Common characteristics of batterers most likely to be killed are also identifiable. For instance, many of these men had sexually abused the battered woman or her children. Some had extreme suicidal tendencies and would order the woman to kill them. All of the battered women who killed described their batterers as unusually suspicious and possessive. They often threatened to hurt or kill her relatives and friends. In addition, these men had all threatened the women with guns, knives, or other weapons. Id. at 104-05.
43. Id. at 105. Walker explains that “[b]attered women who kill have almost invariably done so after having experienced . . . an uncontrollably savage acute incident,” and do so in order to keep one from happening again. Id. at 106. Many said that they did
II. SELF-DEFENSE AND EXPERT TESTIMONY ON THE BATTERED WOMAN SYNDROME

The cases involving battered women on trial for killing their batterers can be divided into two categories: traditional confrontation cases, in which the battered woman kills while being physically attacked; and non-traditional confrontation cases, in which she kills either during a lull in an attack, or no attack at all is taking place. Most courts have allowed expert testimony in traditional confrontation cases but have excluded it in non-traditional cases. Although it may be a partial success for the testimony to be admitted in any battered woman’s case, by permitting expert testimony only in traditional confrontation cases, courts are allowing the testimony where battered women least need it, and denying it to those who need it most. The reasons for this phenomenon become

not intend to kill, but rather sensed that the level of violence had escalated so far out of control that they sincerely believed that it would never diminish again. Id.

44. Some courts use this terminology. See People v. Minnis, 118 Ill. App. 3d 345, 347, 455 N.E.2d 209, 211 (1983) (suggesting that syndrome testimony should be admitted when the defendant has killed her husband in a “non-confrontational situation, the classic example being where a battered woman has killed her husband while he slept”); see also Crocker, The Meaning of Equality for Battered Women Who Kill Men in Self-Defense, 8 Harv. Women’s L.J. 121, 138-40 (1985).

45. See, e.g., Strong v. State, 251 Ga. 540, 307 S.E.2d 912 (1983) (battered woman syndrome testimony was admitted where the defendant fatally stabbed her husband after he knifed her).

46. See, e.g., Fultz v. State, 439 N.E.2d 659, 663 (Ind. Ct. App. 1982) (expert testimony inadmissible where the defendant killed her husband after he pointed his finger at her in a menacing way); State v. Thomas, 66 Ohio St. 2d 518, 519, 423 N.E.2d 137, 138 (1981) (testimony properly excluded where the defendant shot her husband during a verbal argument).

47. Some commentators disagree, however, and argue that inappropriate use of the testimony could encourage stereotyping. See Schneider, Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense, 15 Harv. C.R.-C.L. L. Rev. 623, 646 (1980). The problem is not with defendants using the testimony where it does not accurately portray their situation, thereby running the risk that the testimony might harm their case, but rather, the problem is that courts misinterpret the testimony. See Crocker, supra note 44, at 132 n. 56 (citing Women’s Self-Defense Cases: Theory and Practice 179-203 (E. Bochnak ed. 1981)).

48. Arguably, battered women should not need the aid of expert testimony to support the reasonableness of their fear of imminent harm in classic self-defense situations. See Crocker, supra note 44, at 142. In reality, however, women need evidence of past abuse to counter the cultural assumption that they cannot reasonably assess the danger presented by their batterers. Id. at 143. This same evidence can sometimes be turned against them to cast doubt on the need for deadly force, because they did not act similarly in past beatings. Id. Thus, the expert testimony is needed to put into perspective the evidence of past abuse. The basis for this “twisted line of reasoning,” is not very complicated, but courts continually overlook it and confuse the issues. Id.

49. See infra notes 68-86 and accompanying text discussing cases involving non-confrontational situations.
more clear after an examination of traditional self-defense theory and how it has been applied to cases involving battered women.

A. Traditional Self-Defense

In Maryland, self-defense is a complete defense to homicide only when the defendant acted under an honest and reasonable belief that he was in imminent danger of death or serious bodily harm. In addition, the defendant cannot claim self-defense if he was the aggressor or introduced unreasonable force. The standards of this traditional self-defense model often are difficult for the battered woman to meet for several reasons. First, the traditional rule of "reasonable force" assumes that equal force is matched against equal force. Even though the modern trend is to take account of the parties' respective size and gender, the woman's introduction of a deadly weapon can still preclude her self-defense claim. This is true despite the reality that most batterers are capable of killing their victims by kicking, punching, and choking.

Second, the battered woman's self-defense claim can fail because she killed during "a momentary lull," and thus the danger was

50. State v. Faulkner, 301 Md. 482, 485, 483 A.2d 759 (1984). This is the traditional objective standard that most states require. Some states employ a purely subjective standard where

[A] defendant's conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under like circumstances, but what he himself in good faith honestly believed and had reasonable ground to believe was necessary for him to do to protect himself from . . . great bodily injury.

State v. Leidholm, 334 N.W.2d 811, 818 (N.D. 1983) (quoting State v. Hazlett, 16 N.D. 426, 113 N.W. 374 (1907)).

51. Faulkner, 301 Md. at 485. The court stated that the accused "must not have been the aggressor or provoked the conflict; and . . . [t]he force used must not have been unreasonable." Id.


53. See Lafave & Scott, supra note 52, at 457.

54. Id.

55. The common law view of nondeadly force presupposes two men of approximately equal size, weight, and strength, fighting each other. See R. Perkins, supra note 52, at 457. Women are raised to be physically passive. They may perceive danger and imminence differently than do men. See Schneider & Jordan, Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault, 4 Women's Rts. L. Rep. 149, 156 (1978) (discussing women's different perceptions of danger, provocation, and time restrictions); Crocker, supra note 44, at 126-28 (arguing that it is a white male's perception of danger, immediacy, and harm, that forms the definition of reasonable physical responses for purposes of self-defense claims).
not "imminent." The fundamental problem that some courts still refuse to acknowledge is that many women simply are unable to defend themselves during an attack. The temptation to automatically decide that the woman was the aggressor in a situation in which she seized the first opportunity to protect herself from deadly force is understandable, given the reasonable-man definition of self-defense. By so doing, however, courts run the risk of denying a battered woman the opportunity to prove the legitimacy of her fear and the reasonableness of her actions, and thereby precluding her right to a fair trial.

B. The Role of Expert Testimony

Expert testimony is offered by defendants to help prevent courts from automatically placing the battered woman outside the definition of self-defense. Without expert testimony lending credibility to the woman's assertion that her perceptions of danger were reasonable, it would be difficult for a jury to find that a battered woman's conduct in non-confrontational cases was consistent with

56. The battered woman's failure to comply with the immediacy requirement in self-defense can cause the court to determine that her assessment of the potential for danger was unreasonable. See State v. Nunn, 356 N.W.2d 601, 603-04 (Iowa Ct. App. 1984) (the defendant's fear of imminent danger was unreasonable if the argument ended several minutes before the stabbing). See also L. Walker, supra note 2, at 60 (noting that battering incidents can last for hours, and are not single isolated hits and punches). Similarly, if there is a time lapse, courts frequently decide that the woman was the aggressor, and consequently deny her self-defense instruction. See Commonwealth v. Grove, 363 Pa. Super. 328, 331-32, 526 A.2d 369, 371 (1987) (refusing to grant self-defense instruction where the defendant shot her sleeping husband). See L. Walker, Terrifying Love, supra note 16, at 44.

57. At least one court has determined that failure to use gender-specific instructions may violate a female defendant's rights to equal protection. The Supreme Court of Washington in State v. Wanrow, 88 Wash. 2d 221, 240-41, 559 P.2d 548, 559 (1977) (en banc) held:

The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination.' ... Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual women involved to trial by the same rules which are applicable to male defendants.

Id. (citation omitted).

58. See Hawthorne v. State, 408 So. 2d 801, 806-07 (Fla. Dist. Ct. App. 1982) (explaining that the testimony is offered to assist a jury in assessing how the syndrome relates to the defendant's claim of self-defense).
the requirements of traditional self-defense. If expert testimony is admitted, however, the "leap" in legal reasoning is not as great as one might expect.

Expert testimony works to discredit the assumption that the battered woman who killed in non-confrontational situations must have been the aggressor. Because the primary purpose of expert testimony is to give the battered woman an opportunity to explain how she reasonably perceived a danger that required self-defense, it is intended to clarify how a battered woman can recognize a legitimate threat of harm when others might not. The expert can show

60. See supra notes 52-57 and accompanying text.

61. Before any extensive research on battering relationships had been conducted, many attorneys defending battered women who killed, resorted to insanity or diminished capacity defenses precisely because they could not make the case fit a self-defense claim. Unfortunately, defenders of battered women still are trying to overcome the detrimental effect of such precedents, and courts continue to misperceive the battered woman syndrome as an impaired mental state defense and thus find that her self-defense claim must be based on excuse rather than justification. A recent example of this confusion is illustrated in Judge Holmes' concurring judgment in State v. Koss, 49 Ohio St. 3d 213, 221, 551 N.E.2d 970, 977 (1990), in which he wrote separately to emphasize his belief that the battered woman's self-defense plea is one of excuse. He stated that "acquittal is dependant upon proving that defendant had... a disability that caused a mistaken, but reasonable, belief in the existence of circumstances that would justify self-defense." Id. This view, if accepted, automatically assumes that a battered woman's perception of imminent harm could never be correct. This type of reasoning reinforces false societal views that battered women must suffer from some type of disease of the mind that causes them to lose all sense of rational thought, and conflicts with medical research on the syndrome. Fortunately, most courts consider it well settled that expert testimony is not offered to show that the battered woman suffered from a mental defect. See, e.g., Commonwealth v. Craig, 783 S.W.2d 387, 389-90 (Ky. 1990) (the battered woman syndrome is not a mental condition and is not presented to show mental impairment); Hawthorne, 408 So. 2d at 806-07 (a defective mental state on the part of the accused is not being offered as a defense; rather, the testimony applies to the specific defense of self-defense, which requires a showing that the accused acted reasonably).

Moreover, perpetuation of the myth that the battered woman is somehow to blame for her batterer's behavior would result if self-defense claims were presented as merely excusable and not justifiable. Excusable acts carry the stigma of "blameworthiness." The defendant is not punished for committing the act based on her state of mind, but is punished because society determines that a net wrong or harm to society resulted from the act. Conversely, justifiable acts are not punishable because society views the actor's conduct as the proper and correct one, given the circumstances.

62. In the non-confrontational cases in which expert testimony has been admitted, courts have found that the defendant was not the initial aggressor, and a self-defense instruction was warranted. In each of the following cases, a self-defense instruction was given despite the fact that the batterer was asleep when the defendant killed him: People v. Emick, 103 A.D.2d 643, 481 N.Y.S.2d 552 (1984); People v. Powell, 102 Misc. 2d 775, 424 N.Y.S.2d 626 (1980), aff'd, 83 A.D.2d 719, 442 N.Y.S.2d 645 (1981); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983).

how battered women who experience patterns of cyclical abuse learn to identify the early signs of impending physical violence, and the severity of harm an oncoming attack is likely to bring.  

This testimony is crucial to the battered woman's credibility. When evidence such as threats, changes in tone of voice, and promises of future violence, is considered outside the context of the battering relationship, the average juror instinctively would assess the approaching violence to be far removed from the legal definition of "imminent harm."  

Thus, without expert testimony in non-confrontational cases, a fully informed determination cannot be made of the "reasonableness" of a battered woman's perception of imminent harm. This usually occurs when the court first determines that the legal require-

_________

describes the dilemma all battered women face after they have killed their batterers, whether they killed in a confrontational situation or not. Schneider explains:  

A battered woman who has been the victim of abuse for many years and has survived it before, must credibly explain why it was necessary to act on that occasion. Expert testimony . . . highlights a contradiction implicit in the message of the battered woman's syndrome—if the battered woman was so helpless and passive, why did she kill the batterer?  

. . . [E]xpert testimony enable[s] the jury to find that the battered wife, because of the prior beatings is particularly able to predict the extent of violence in any attack against her . . . . This is a crucial point, indeed in most cases this is the real importance of the testimony . . . . The reasonableness of the women's fear and the reasonableness of her act are not issues which the jury knows as well as anybody else. The jury needs expert testimony on reasonableness precisely because the jury may not understand that the battered woman's prediction of the likely extent and imminence of violence is particularly acute and accurate.  

Id.  

64. Id.  

65. Numerous myths concerning battered women must be dispelled to bolster battered women's credibility, and to insure that they are not unfairly prejudiced at trial. One important myth being that she is free to leave the relationship but freely chose to remain. The average lay person may believe that a battered woman is masochistic, as evidenced by her inability to leave. See State v. Kelly, 97 N.J. 178, 205-06, 478 A.2d 364, 377-78 (N.J. 1984) (expert testimony is needed because it is aimed at an area in which the purported common knowledge of the jury may be very much mistaken, and may lead to a wholly incorrect conclusion).  


[W]hen the defendant is a battered woman, the very intimacy of the relationship explains the reasonableness of her perception of danger.  

The battered woman learns to recognize the small signs that precede periods of escalated violence. She learns to distinguish subtle changes in tone of voice, facial expression, and levels of danger. She is in a position to know, perhaps with greater certainty than someone attacked by a stranger, that the batterer's threat is real and will be acted upon.  

Id.
ments for self-defense are not met, and thus the issue of reasonableness and, consequently, the issue of expert testimony, are never reached. This is the battered woman's quandary. Courts demand that she prove facts sufficient to raise the claim of self-defense before expert testimony on the syndrome will be admitted. Yet, she needs the expert testimony to prove that her perceptions were reasonable in order to establish the imminence of the danger she faced. It is in this manner that the proper use of expert testimony on the battered woman syndrome has been thwarted.67

A recent example of this is illustrated in State v. Stewart,68 in which the Supreme Court of Kansas reiterated its view that expert testimony on the syndrome is admissible in cases of self-defense, but reversed as error the trial court's decision to grant the defendant a self-defense instruction where no overt act by the aggressor was shown.69 The defendant in Stewart was unquestionably the victim of her husband's repeated abuse. He once ordered the defendant to kill and bury her own daughter.70 In the middle of the night he roused her from sleep by beating her with a baseball bat.71 The victim shot a family pet, and held a loaded gun to the defendant's head and threatened to kill her.72 The defendant shot her husband while he was asleep.73

The court first noted that traditional self-defense concepts may not apply to victims of long-term abuse, such as battered spouses.74 It further acknowledged that battered women may find it necessary to defend themselves during a "momentary lull in the abuse" because of the prior history of abuse and the differences in size and strength between the woman and her batterer.75 It ultimately determined, however, that the facts of the case must still show that the spouse was in imminent danger "close to the time of the killing."76

By making this preliminary determination that the battered woman's

67. There is some indication that this trend might be changing. Some courts have decided to permit the testimony in non-confrontational cases, rather than automatically denying a self-defense instruction. See People v. Scott, 97 Ill. App. 3d 899, 424 N.E.2d 70 (1981); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Gallegos, 104 N.M. 247, 719 P.2d 1268 (1986).
69. Id.
70. Id. at 641, 763 P.2d at 574-75.
71. Id. at 642, 763 P.2d at 575.
72. Id.
73. Id. at 643, 763 P.2d at 575.
74. Id. at 645, 763 P.2d at 577.
75. Id.
76. Id.
apprehension of imminent harm was unreasonable, the court effectively precluded the jury from determining whether the "lull" in this case was sufficient to remove her from imminent danger.

In contrast, the New Mexico Court of Appeals in *State v. Gallegos,* held that evidence of past incidents of violence "bears directly on the . . . apparent immediacy of danger," and allowed a self-defense instruction in a non-confrontational situation. The trial court refused to instruct the jury on the issue of self-defense because the defendant failed to prove an obvious immediate threat. The victim repeatedly subjected the defendant to sexual and physical abuse. On numerous occasions, the victim held a loaded gun to the defendant's head and threatened to shoot her if she ever left him. While the defendant was pregnant, the victim threw her against a wall, causing premature birth. On the day of the killing, he struck their child in the face with a belt buckle, sexually abused the defendant, and threatened to kill her. She shot him while he was lying in bed. The trial court admitted testimony on the battered woman syndrome but refused to permit the use of the term "battered wife syndrome" or to grant a self-defense instruction.

The North Carolina intermediate appellate court in *State v. Norman,* found a self-defense instruction warranted despite non-confrontation circumstances. On the day of the killing, the defendant's husband subjected her to continuous beatings, and made repeated threats to either cut her throat, kill her, or cut off one of her breasts. When he fell asleep that afternoon, the defendant shot him. The North Carolina court reasoned that imminent harm still existed because the husband's nap was "but a momentary hiatus in a continuous reign of terror."

77. 104 N.M. 247, 719 P.2d 1268 (1986).
78. Id.
79. Id. at 250, 719 P.2d at 1271.
80. Id. at 251, 719 P.2d at 1272.
81. Id.
82. Id.
83. Id.
84. Id.
85. Id. at 253, 719 P.2d at 1274.
86. Id. at 249, 719 P.2d at 1268.
88. Id.
89. Id. at 387, 366 S.E.2d at 588.
90. Id. at 388, 366 S.E.2d at 588.
91. Id. at 394, 366 S.E.2d at 598. The court stated:

[W]ith the battered spouse there can be, under certain circumstances, an un-
nately, this decision later was reversed by the North Carolina Supreme Court.92

Despite the logic of the Gallegos decision, most courts adhere to the reasoning set forth in Stewart, as the ultimate outcome of the Norman case demonstrates. Consequently, establishing a self-defense instruction continues to present the greatest hurdle for the battered woman who killed at a time when she was not under direct attack.

### III. MARYLAND CASES

Expert testimony on the battered woman syndrome should be admissible in Maryland. The Court of Appeals has not ruled on the issue, but two unreported Court of Special Appeals decisions discuss the possibility.93 Although both decisions affirmed the lower courts’ refusal to admit the testimony, neither case indicates that Maryland courts would preclude evidence on the syndrome in cases in which a battered woman has succeeded in generating a self-defense instruction.

#### A. Kriscumas v. State

In Kriscumas v. State,94 the Court of Special Appeals upheld the defendant’s second degree murder conviction for the shooting

lawful killing of a passive victim that does not preclude the defense of self-defense. Given the characteristics of battered spouse syndrome, we do not believe that a battered person must wait until a deadly attack occurs or that the victim must in all cases be actually attacking or threatening to attack at the very moment defendant commits the unlawful act for the person to act in self-defense. Such a standard, in our view, would ignore the realities of the condition.

*Id.*

92. 324 N.C. 253, 378 S.E.2d 8 (1989). The North Carolina Supreme Court stated: The relaxed requirements . . . proposed by our Court of Appeals would tend to categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives’ testimony concerning their subjective speculation as to the probability of future felonious assaults by their husbands. Homicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution to this problem. . . . It has even been suggested that the relaxed requirements of self-defense found in what is often called the “battered woman’s defense” could be extended in principle to any type of case in which a defendant testified that he or she subjectively believed that killing was necessary and proportionate to any perceived threat.

*Id.* at 265-66, 378 S.E.2d at 15-16.


death of her husband. The court affirmed the trial judge's refusal to instruct the jury on self-defense and imperfect self-defense. Because the court agreed that the issue of imperfect self-defense was not properly generated, it concluded that there was no need to address the admissibility of evidence on the battered woman syndrome.

The defendant in Kriscumas offered evidence of numerous beatings and death threats by the victim. For instance, "the victim would load a gun, take a couple of bullets out, spin the barrel and then point the gun at her and pull the hammer back." The defendant testified that the day before the shooting, the victim had beaten her because she refused to shoot him as he had instructed her. He threatened to "waste" her if she refused to shoot him.

The court reasoned that imperfect self-defense is warranted only if the defendant produces evidence both negating her aggressor status and proving that she honestly but unreasonably believed force was necessary to prevent imminent harm. The court determined that battered woman syndrome evidence only would go to her subjective state of mind, but that aggressor status must be

95. Id., slip op. at 24.
96. Id., slip op. at 20-21. Imperfect self-defense mitigates murder to manslaughter when the defendant shows that he honestly held a subjective belief that he was in imminent danger, even though the belief may be found to be objectively unreasonable. Sims v. State, 319 Md. 540, 554, 573 A.2d 1317, 1323 (1990). The court in Watkins v. State, 79 Md. App. 136, 138, 555 A.2d 1087, 1089 (1989) explained:

Where . . . the defender unreasonably (though honestly) perceives the danger or unreasonably (though honestly) responds with more than necessary force, it is a case of imperfect self-defense, which mitigates the level of blameworthiness down to the manslaughter level even though it does not totally exculpate. Id. (emphasis in original).

98. Id. at 4-7.
99. Id. at 6.
100. Id. at 4-5.
101. Id. at 5. The defendant testified as to what would happen if she did not shoot him as he told her to:

And he took, and he telling me how he wanted me to kill him, and I says, no. I says, I love you. I said, I don't want to do that. And he hit me. He says, you are mine. You are my possession. I don't care what you feel or not, he says, you are going to do what I say. When I say it, he says. And if you don't, he said, I am going to get tired of waiting and then I am going to waste you. He says I will make your life miserable. He says, I will give you pain and cause you pain until you do it.

Id.
102. Id. at 17-22.
103. Id. at 20.
evaluated on an objective basis. Because it found that the defendant clearly was the aggressor in this case, the court found no cause to hear expert testimony on the syndrome.

B. Friend v. State

In Friend v. State, the Court of Special Appeals of Maryland affirmed the defendant’s conviction of murder in the second degree for the shooting death of her husband. Because the trial judge found that the defendant was the aggressor, she was not entitled to invoke the doctrines of perfect or imperfect self-defense.

The defendant in Friend, a Baltimore City police officer, claimed that expert testimony on the syndrome was relevant to both her subjective and objective belief that her actions were necessary to prevent her own death. She presented evidence of extreme physical and psychological abuse. The victim told the defendant that he would kill her if she ever left him. The defendant believed him, and testified that she believed this on the morning of the killing when she made the decision to leave. There was conflicting evidence about the events surrounding the killing. The defendant testified that the victim saw her with the gun, started yelling and came right at her. When she saw him coming, she fired the gun. The State offered evidence that the victim was shot lying down in bed with a sheet over him. The court agreed that evidence on the syndrome was properly excluded because once evidence proves aggressor status, the honesty and the reasonableness of the defendant’s belief that her actions were necessary to defend herself are utterly immaterial.

104. Id. at 20.
105. Id. at 21.
107. Id., slip op. at 1.
108. Id., slip op. at 10. The court stated “when the evidence shows that the accused was the aggressor, both the honesty and the reasonableness of his belief that his actions were necessary to defend himself are utterly immaterial.” Id.
109. Id. at 9-10.
110. Id. at 7-8.
111. Id. at 8.
112. Id. at 4.
113. Id. at 8.
114. Id. at 2. The State’s evidence consisted of a ballistics expert who testified that the victim was shot lying down. Id.
115. Id. at 10.
A close reading shows that neither case suggests that expert testimony should be excluded if offered to bolster a self-defense claim. Specifically, *Friend* merely reaffirms the proposition established in *Kriscumas* that expert testimony on the battered woman syndrome is inadmissible if the defense of self-defense is itself unavailable because of the defendant's aggressor status. Thus, there is no direct indication in either case that expert testimony concerning the battered woman syndrome would not be relevant to a self-defense plea. What is troubling about these cases, however, is the fact that the courts failed to see that expert testimony factors into the analysis of whether the woman's actions were objectively reasonable, not merely subjectively honest, and thus the testimony is directly relevant to her aggressor status. By making the preliminary judgment as to the woman's aggressor status before expert testimony is allowed, the court has placed the battered woman in an impossible position. If circumstances vary from a direct confrontational situation, a battered woman's fear, possibly reasonable and legitimate, may never be properly assessed.

These cases also reveal another cause for concern. Misinformation regarding spousal abuse and the true purpose of expert testimony on the subject underlies both opinions. Courts in other states consider it well settled that one reason expert testimony on the syndrome is necessary in these cases is for the purpose of dispelling the false notion that evidence of the battered woman's attempts at fighting back in the past indicate that she is not the passive battered woman she claims to be. Maryland courts, however, continue to

116. The court in *Kriscumas* distinguished the facts there from non-confrontational cases in other jurisdictions in which the testimony was allowed by reasoning that there "was at least conflicting [evidence] on the aggressor question," *Kriscumas* v. State, No. 86-1072, slip op. at 19 (Md. Ct. Spec. App. July 9, 1987), but this issue was not discussed in *Friend*, despite conflicting evidence regarding the aggressor question. Moreover, the court in *Kriscumas* insisted that the inference that the victim was the aggressor could not be drawn simply from evidence of her subjective honest belief that, because of past abuse and threats, she was in imminent harm, and reasonably, from the standpoint of a battered spouse, perceived the victim to be the aggressor. *Id.* at 16. This is, however, exactly what courts in other jurisdictions have held. See, e.g., People v. Scott, 97 Ill. App. 3d 899, 424 N.E.2d 70 (1981); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Gallegos, 104 N.M. 247, 719 P.2d 1268 (1986).

117. See, e.g., Commonwealth v. Stonehouse, 521 Pa. 41, 64, 555 A.2d 772, 784 (1989). The court explained:

An additional myth was advanced by the prosecutor, i.e., that appellant used weapons to defend herself and having used weapons did not conform to the stereotype of battered women who suffer their beatings passively. Although there are battered women who do not defend themselves and die as a result of
believe that evidence that shows the defendant attempted to defend herself on past occasions is probative evidence establishing that the battered woman "while clearly a victim of abuse, was not as totally passive as [she] sought to establish."\textsuperscript{118}

Except for these two unreported cases, no Maryland appellate court has ruled on the admissibility of expert testimony on the battered woman syndrome in cases of self-defense, and therefore, defense counsel must be prepared with persuasive arguments to gain its admission. The new legislation alleviates some of the more obvious hurdles defendants might expect to encounter in their effort to introduce the testimony,\textsuperscript{119} but examination of Maryland law concerning admissibility of expert testimony reveals that the statute does not really add anything to existing law. Where self-defense is properly raised, under Maryland's well-settled evidentiary rules, expert testimony on the syndrome should not be denied admission, regardless of the new statute.

\textbf{D. Admissibility of Expert Testimony}

The admissibility of expert testimony is an area in which the trial court is given broad discretion, and it rarely constitutes a basis for reversal.\textsuperscript{120} In Maryland, the standard for admissibility of expert testimony is whether the finder of fact can receive "appreciable help" from an expert on the subject matter.\textsuperscript{121} The expert's opinion, even on the ultimate issue, is admissible if it is relevant and will aid the trier of fact.\textsuperscript{122} The particular subject also must be generally

\textsuperscript{118} Friend, No. 88-488, slip op. at 12.

\textsuperscript{119} Because of the new law's requirements, a court will be unable to refuse the testimony on the grounds that the syndrome is not generally recognized in the medical community, that it will not appreciably help the jury, or that it will usurp the jury's function. See supra note 9.


\textsuperscript{121} See, e.g., Cider Barrel Mobile Home Court v. Eader, 287 Md. 571, 584, 414 A.2d 1246, 1254 (1980).

\textsuperscript{122} Id. The expert testimony will be relevant to explain why a woman who exhibits characteristics common to the battered woman syndrome would believe herself in imminent danger at the time of the killing. See, e.g., State v. Anaya, 438 A.2d 892, 894 (Me. 1981) (the testimonial evidence is highly probative and is likely to prove that her conduct was consistent with the theory of self-defense); State v. Allery, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984) (the testimony was relevant and would have substantial bearing on her perceptions at the time of the killing).
accepted in the relevant scientific community, and the expert must be properly qualified.

Some courts employ an even stricter standard than Maryland's "appreciable help" requirement and demand that the testimony concern matters beyond the jury's understanding. Many of these courts have concluded that testimony on the syndrome satisfies this "beyond-the-ken" test, and should be admitted because it can correct common misconceptions and prejudices concerning battered women. Given Maryland's more lenient standard, and the majority consensus among other jurisdictions and experts that extremely abusive relationships are beyond the average layman's comprehension, the "appreciable help" requirement should not preclude admissibility.

Moreover, even absent the statute, syndrome testimony should not be denied admission on the grounds that the relevant scientific community has failed to accept it. According to the majority of the cases, the battered woman syndrome has a sufficient scientific basis to produce uniformly reasonable results, and has developed enough general acceptance to warrant admissibility. For instance, as a New York court in People v. Torres stated:

[T]he theory underlying the battered woman's syndrome has indeed passed beyond the experimental stage and gained a substantial enough scientific acceptance to war-
rant admissibility. . . [N]umerous articles and books have been published about the . . . syndrome; and recent findings of researchers in the field have confirmed its presence and thereby indicated that the scientific community accepts its underlying premises.129

Provided that the testimony on the syndrome comes from a qualified expert, it should be admissible in Maryland courts.

Indeed, the analysis under the admissibility standard is straightforward, and no immediate basis for refusal is apparent.150 Evaluation of the literature on the syndrome and of the cases that have admitted evidence on the issue should convince Maryland courts that the battered woman syndrome is beyond the average layman’s understanding, and that the theory of the syndrome is both well-researched and well-recognized in the relevant scientific community. Nevertheless, because Maryland courts were slow to accept evidence on the battered woman syndrome, the legislature determined that it was necessary to take action.

IV. LEGISLATIVE APPROVAL OF THE BATTERED WOMAN SYNDROME

A. Legislative Action in Missouri and Ohio

In addition to Maryland, Missouri and Ohio have passed laws addressing the issue. In an effort to eliminate the inconsistency among trial courts, Missouri became the first state to enact legislation regarding testimony on the battered woman syndrome.131 Passed in 1987, the Missouri law simply provides that “evidence the actor was suffering from the battered spouse syndrome shall be admissible upon the issue of whether the actor lawfully acted in self-defense or defense of another.”152 The statute thus requires that self-defense be an issue in the case before testimony on the syndrome will be admitted. Once the issue of self-defense is properly generated, the testimony assists the battered woman in demonstrating the reasonableness of her actions. Two years later, the Ohio legislature followed Missouri’s initiative and enacted a law specifi-

129. Id. at 135, 488 N.Y.S.2d at 368.
cally authorizing that expert testimony be admitted to assist the trier of fact in determining whether the defendant acted in self-defense where evidence establishes that she is a battered woman.\textsuperscript{133}

Although these statutes do not answer all of the questions or solve all of the problems surrounding the issue of admitting this testimony, both correctly acknowledge the unique problems battered women have in sustaining their claims of self-defense.\textsuperscript{134} Nevertheless, because the legislation makes no provision for cases that do not meet the traditional requirements for self-defense, there is the danger that the laws will be of no help to the battered woman who kills in non-confrontational circumstances. Each statute appears facially to require that self-defense must be established before expert testimony on the syndrome can be admitted. Consequently, a court logically could construe these statutes as mandating that only battered women who fight back when they are under direct attack have the right to offer expert testimony on the syndrome.

Recent decisions from both jurisdictions, however, indicate that the legislation indeed has helped battered women receive self-defense instructions in non-classic cases of self-defense. In \textit{State v. Koss},\textsuperscript{135} the Supreme Court of Ohio noted the legislation and allowed expert testimony on the syndrome.\textsuperscript{136} The defendant in \textit{Koss} testified that on several occasions her husband beat or threatened to kill her.\textsuperscript{137} The defendant testified that, on the night she killed him, when she arrived home her husband was in bed, but as she undressed, he "hauled off" and hit her.\textsuperscript{138} She noticed his gun, which had never been left out, and picked it up and shot him.\textsuperscript{139} The court admitted the testimony in order to aid the trier of fact in determin-

\textsuperscript{133} \textit{Ohio Rev. Code Ann.} \textsection{}2901.06 (Baldwin 1989). The statute provides in pertinent part:

\begin{quote}
(B) If a person is charged with an offense involving the use of force against another, and the person, as a defense to the offense charged, raises the affirmative defense of self-defense, the person may introduce expert testimony of the "Battered Wife Syndrome" . . . as evidence to establish the requisite belief of an imminent danger of death or great bodily harm . . . .
\end{quote}

\textit{Id.}

\textsuperscript{134} Indeed, at the very least, the statutes insure that the trial court will not refuse the testimony on the basis of a lack of scientific acceptance in the general field, or that it is not a subject beyond the ken of the average juror.

\textsuperscript{135} 49 Ohio St. 3d 213, 551 N.E.2d 970 (1990).

\textsuperscript{136} \textit{Id.} at 217 & n.2, 551 N.E.2d at 974 & n.2. Accordingly, the court overruled \textit{State v. Thomas}, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981) to the extent that it held inadmissible expert testimony on the battered woman syndrome.

\textsuperscript{137} \textit{Koss}, 49 Ohio St. 3d at 213, 551 N.E.2d at 971.

\textsuperscript{138} \textit{Id.}

\textsuperscript{139} \textit{Id.} at 214, 551 N.E.2d at 971.
ing whether she acted in self-defense. 140

In State v. Williams, 141 the Missouri Court of Appeals reversed the trial court’s decision denying the defendant a self-defense claim and thereby excluding expert testimony on the syndrome. 142 In Williams, the defendant suffered numerous beatings and often had to seek medical help. 143 On the evening of the killing, the defendant had gone to pick up her house keys from her boyfriend who was with an acquaintance named Robinson. 144 An argument ensued on the front steps of Robinson’s house between the defendant and her boyfriend. 145 Her boyfriend knocked the defendant down the steps, then struck her while she was on the ground. 146 The defendant’s glasses were knocked off, and she had them in her hand when she started her car to leave. 147 She saw her boyfriend approach the car, but unbeknownst to her, Robinson had entered the street, and she hit him when she side-swiped another car. 148 She saw Robinson climb to his knees, and thinking that he was her boyfriend, she turned around, came back and ran over him. 149

The court determined that if evidence of the syndrome is to have meaning under the new Missouri legislation, it must be that if the syndrome creates a perception in the battered woman so that, as to her, the required elements have been met, then the issue of self-defense should go to the jury. 150 The court further reasoned that a self-defense instruction should not automatically be denied under these facts and circumstances, because the self-defense issue would be a question for the jury once it had before it evidence of the battered woman syndrome. 151

B. Legislative Action in Maryland

Maryland’s newly enacted legislation differs from the Missouri and Ohio laws in several important respects. First, the statute states that the trial judge “may” admit expert testimony. 152 The Missouri
statute, by contrast, dictates that courts “shall” admit the testimony.\textsuperscript{153} Thus, by taking the decision whether to admit the testimony on the syndrome away from the trial judge’s discretion, the Missouri law will ensure greater uniformity. Conversely, because of the Maryland law’s permissive language, Maryland trial judges still may refuse to allow the testimony, notwithstanding evidence tending to show a valid self-defense plea.\textsuperscript{154}

Clearly, the most important aspect of the Maryland legislation is the provision allowing expert testimony on the syndrome despite evidence tending to show that the defendant was “the aggressor, used excessive force, or failed to retreat at the alleged time of the offense.”\textsuperscript{155} Because expert testimony can be admitted despite evidence tending to show that the defendant acted in a manner not in accordance with traditional self-defense, the legislation provides a way to circumvent the quandary into which the law has placed battered women.\textsuperscript{156}

The statute’s greatest shortcoming is its failure to require trial courts to admit the testimony.\textsuperscript{157} An instruction that courts must state with particularity the reasons for excluding such evidence would add strength to the statute, although the matter ultimately would continue to rest in the trial court’s discretion. Regardless of its weakness and the extent to which it merely restates existing evidentiary rules, the statute will serve to influence judicial decisions on the issue, and help to provide a fair trial to all defendants seeking to introduce the testimony.\textsuperscript{158}

\textsuperscript{153} Mo. REV. STAT. § 563.033 (Supp. 1988).
\textsuperscript{154} Under the statute, the testimony can be admitted only for the purpose of explaining the defendant’s state of mind. See supra note 9. Clearly, evidence merely directed to her state of mind cannot negate a trial judge’s finding, as a matter of law, that she was the aggressor. Thus, the legislation’s effectiveness could prove even weaker than originally thought. This is precisely why Maryland courts should look to other jurisdictions where courts have not rejected a battered woman’s claim of self-defense based on the issue of aggressor status. See People v. Scott, 97 Ill. App. 3d 899, 424 N.E.2d 70 (1981); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Gallegos, 104 N.M. 247, 719 P.2d 1268 (1986). A proper understanding of the battered woman syndrome and of the “typical” battering relationship, reveals that, in a real sense, the batterer is the only true "aggressor." Whether the batterer is actively threatening his victim at a specific moment does not automatically negate the possibility that his victim is reasonably in fear of great bodily harm.

\textsuperscript{155} See supra note 9.
\textsuperscript{156} See supra notes 59-67 and accompanying text. Arguably, had this legislation been available for the defendants in Friend and Kriscumas, each woman would have been allowed to more fully present her self-defense arguments.

\textsuperscript{157} See supra note 9.
\textsuperscript{158} There is no question that this legislation is available to all defendants who show some evidence that they display characteristics of the battered woman syndrome. The
CONCLUSION

Absent a clear confrontational situation, it is evident that the greatest hurdle a battered woman must overcome in her effort to introduce expert testimony on the syndrome will be to establish her claim of self-defense by showing that she was not the “aggressor.” While some courts have shown willingness to allow the testimony in non-classic cases of self-defense, many jurisdictions adhere to a legal construct of self-defense that simply cannot accommodate the battered woman who, for whatever reason, kills at a moment when she is not under attack. Although statutory remedies may be helpful on the issue, Maryland courts need not rely solely on the legislation.159 Admission of testimony on the syndrome has not caused “an open killing season on men.”160 It has, however, allowed battered women to receive their constitutional right to a fair trial.

JEANNE-MARIE BATES

legislation’s gender-neutral language should make it clear that equal protection questions are not an issue. As written, the statute is available to men and women. Although there is no relevant case law, arguably, syndrome testimony should also apply to homosexual couples. Moreover, because the terms “spouse” and “cohabitant” are each included in the statute, the statute’s use should not be barred on the basis of marital status. The law clearly is intended to apply to boyfriends and live-in companions, as well as to former cohabitants and spouses.

159. Given the standards for admissibility of expert testimony, the testimony should come in if a battered woman has killed during a confrontational situation. The legislation’s contribution to the law would of course occur only in cases in which the defendant killed during a momentary lull. If the recent Ohio and Missouri cases are any indication of how a Maryland court would respond to similar legislation, the failure to include language mandating admissibility will not prove troublesome. Nevertheless, if the statute’s purpose is designed to admit expert testimony for the purpose of raising a sufficient self-defense claim, then the language should clearly reflect that purpose. Until such legislation is passed, Maryland courts should adopt the persuasive reasoning presented in cases from other jurisdictions, and acknowledge the central role the testimony plays in a battered woman’s claim of self-defense.

160. Reference to statements made by prosecutor Ron Johnson during the first trial of Joyce Hawthorne in which Dr. Walker’s testimony was refused. This decision later was overruled and the syndrome testimony admitted. See Hawthorne v. State, 408 So. 2d 801, 807 (Fla. Dist. Ct. App. 1982), rev. denied, 415 So. 2d 1361 (Fla. 1982). In reference to Dr. Walker’s testimony, Mr. Johnson stated to the court:

If you let her testify, Judge, then she takes away the role of the jury to decide if Joyce Hawthorne’s perceptions of danger were reasonable. You’ll open the door to allow any woman to kill a man she doesn’t like and get away with it! . . . She is a noted feminist, she admits to it right here on page 15 of the introduction to her book The Battered Woman, so we all know she’s biased against men. This woman would have decent people justify the actions of any woman who kills a man, just because he tells her to obey him. It will be an open season on killing men, your Honor, and you mustn’t allow it!

L. WALKER, TERRIFYING LOVE, supra note 16, at 33.