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The Expert as Educator: A Proposed Approach to the Use of Battered Woman Syndrome Expert Testimony

I. INTRODUCTION

Many women in the United States suffer physical abuse at the hands of their mates,¹ and a significant number of these women eventually kill their abusers.² When these killings occur during brutal batterings, prosecutors often do not bring criminal charges against the women because the circumstances clearly indicate that the women were acting in self-defense. A number of these women, however, have killed their mates hours or even days after the most recent battering incident.³ The delayed response apparently has prompted prosecutors to bring charges against these battered women. Even though the women were not acting in response to a then-existing assault, in a majority of the reported cases these women have asserted self-defense.⁴

The law of self-defense generally requires the defendant's reasonable belief that she was in immediate danger of bodily harm from her attacker's deadly force; thus, defensive force was neces-

1. See L. WALKER, *THE BATTERED WOMAN* (1979). In her book Dr. Lenore Walker cites a study by sociologists Straus, Gelles, and Steinmetz which found that a physical assault occurred in 28% of all American homes in 1976. *Id.* at 20. See also D. MARTIN, *BATTERED WIVES* (1976); Eisenberg & Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 *WOMEN'S RTS. L. REP.* 138 (1977); Meyers, *Battered Wives, Dead Husbands*, *STUDENT LAW.*, Mar. 1978, at 47; Note, *Defense Strategies for Battered Women Who Assault Their Mates: State v. Curry*, 4 *HARV. WOMEN'S L.J.* 161 (1981); Note, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 *HASTINGS L.J.* 895 (1981); Note, *The Battered Wife—The Legal System Attempts to Help*, 48 *U. CIN. L. REV.* 419 (1979); Comment, *The Battered Spouse Syndrome as a Defense to a Homicide Charge Under the Pennsylvania Crimes Code*, 26 *VILL. L. REV.* 105 (1980-81).

2. See Schneider & Jordon, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 *WOMEN'S RTS. L. REP.* 149 (1978); see also L. WALKER, *supra* note 1.

3. See *infra* text accompanying notes 61-152; see also Note, *Defense Strategies For Battered Women Who Assault Their Mates: State v. Curry*, *supra* note 1, at 161-62.

4. Schneider & Jordon, *supra* note 2, at 149 n.3. These authors list over 20 state criminal trials in which the prosecution charged battered women with assault or murder of their mates. Seven of these women were acquitted on the ground of self-defense. *Id.* Although diminished capacity or extreme emotional distress also would appear to be logical defenses, most commentators agree that self-defense is the most effective theory of defense. See, e.g., Note, *The Battered Wife's Dilemma: To Kill or To Be Killed*, *supra* note 1, at 918.

sary for her own survival.⁵ If the batterer neither carried a weapon nor threatened the defendant at the time of the killing, a battered woman defendant may not be able to satisfy this standard as courts traditionally have applied it; rather, the courts find that the defendant did not appear to have been in immediate danger of harm from deadly force. One commentator suggests that a battered woman may perceive her attacker's size and strength as deadly force and the repeated episodes of abuse as threat of immediate bodily harm.⁶ A more flexible approach to the self-defense laws would permit courts to consider the defendant's perception in the context of the battering relationship.

Psychologists, who have studied why battered women remain in battering relationships and have sought to determine what common characteristics these women share, have developed profiles of "classic" battered women.⁷ By examining information gathered during interviews with battered women, psychologists—most notably Dr. Lenore Walker⁸—have formulated theories concerning the psychological make-up of battered women.⁹ According to these theories, battered woman display what clinical psychologists call "learned helplessness" behavior. These women believe that they

5. W. LaFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 53, at 391 (1972). Some statutes also require that the victim have attempted to retreat before resorting to force except when the attack occurs in the home or place of business. *Id.* Model Penal Code § 3.04 bases the use of defensive force on the victim's belief (rather than a reasonable belief) "that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force." MODEL PENAL CODE § 3.04(1) (Proposed Official Draft 1962).

6. Comment, *The Use of Expert Testimony in The Defense of Battered Women*, 52 U. COLO. L. REV. 587, 589-91 (1981). This commentator draws a useful analogy to State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977), in which defendant Yvonne Wanrow, who was not a battered woman, asserted self-defense when charged with killing a male acquaintance who had approached her child. Defendant suspected the man of having raped her neighbor's daughter and had reason to believe that he frequently carried deadly weapons. In addition, defendant was on crutches at the time of the shooting. Recognizing that defendant's knowledge of the victim's dangerous reputation was relevant to her self-defense claim, the Washington Supreme Court held that the jury could consider "all the facts and circumstances known to the defendant" even though they did not occur immediately prior to the shooting. *Id.* at 234, 559 P.2d at 555. The court also found that a jury could properly consider that a woman defendant's perception of what constitutes deadly force may differ from the "reasonable man standard" because women view themselves as lacking adequate physical strength to protect themselves. *Id.* at 240, 559 P.2d at 558-59. The commentator suggests that courts should apply the Wanrow court's holding to battered women cases and admit evidence of events and circumstances known to defendant prior to the killing.

7. L. WALKER, *supra* note 1, at 31.

8. Dr. Walker appears to have been the first psychologist to serve as an expert witness for battered women defendants. See discussion of *Ibn-Tamas v. United States* *infra* text accompanying notes 61-82.

9. L. WALKER, *supra* note 1.

are helpless to change their lives,¹⁰ and they live in constant fear of their batterers.¹¹ Contrary to general belief, they do not stay in battering relationships because they enjoy the beating.¹² This psychological characterization of battered women is called the "battered woman syndrome."¹³

In 1979 the District of Columbia Court of Appeals held in *Ibn-Tamas v. United States*¹⁴ that under certain circumstances a battered woman defendant charged with killing her husband may introduce expert testimony on the battered woman syndrome.¹⁵ The *Ibn-Tamas* court indicated that this expert testimony could be relevant to defendant's self-defense claim.¹⁶

Since the *Ibn-Tamas* decision, many commentators have suggested that expert testimony on the battered woman syndrome could be a useful self-defense tool.¹⁷ Following the *Ibn-Tamas* lead, defense attorneys throughout the country have called on Dr. Walker and other psychologists to testify in criminal trials of battered women.¹⁸ *Ibn-Tamas*, however, is not the final word on the

10. *Id.* at 42-54; see also *infra* note 13.

11. L. WALKER, *supra* note 1, at 50; see *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981) (battered woman syndrome expert explained that primary emotion of a battered woman is fear).

12. L. WALKER, *supra* note 1, at 20. Dr. Walker suggests that most people believe a battered woman is masochistic and experiences pleasure "often akin to sexual pleasure, through being beaten by the man she loves." *Id.*

13. Dr. Walker first offered her evidence on the battered woman syndrome in *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979), in which she told the court that her studies revealed

three consecutive phases in the relationships: "tension building," when there are small incidents of battering; "acute battering incident," when beatings are severe; and "loving-contrite," when the husband becomes very sorry and caring. . . . [W]omen in this situation typically are low in self-esteem, feel powerless, and have few close friends, since their husbands commonly "accuse . . . them of all kinds of things with friends, and they are embarrassed. They don't want to cause their friends problems, too." Because there are periods of harmony, battered women tend to believe their husbands are basically loving, caring men; the women assume that they, themselves, are somehow responsible for their husbands' violent behavior. They also believe, however, that their husbands are capable of killing them, and they feel there is no escape. Unless a shelter is available, these women stay with their husbands, not only because they typically lack a means of self-support but also because they fear that if they leave they will be found and hurt even more.

Id. at 634. In *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981), a clinical psychologist testified that a battered woman becomes increasingly afraid for her own well-being and that her primary emotion is fear. *Id.* at 614, 277 S.E.2d at 680 (1981).

14. 407 A.2d 626 (D.C. 1979).

15. *Id.* at 638-39. See *infra* text accompanying notes 61-82.

16. 407 A.2d at 634-35.

17. See authorities cited *supra* notes 1-2.

18. See Note, *Defense Strategies for Battered Women Who Assault Their Mates*,

use of this expert testimony. Recently, three state supreme courts reviewed trial court refusals to admit expert testimony on the battered woman syndrome. The Ohio Supreme Court in *State v. Thomas*¹⁹ enumerated four deficiencies in the evidence and ruled it wholly inadmissible. In *Buhrle v. State*²⁰ the Wyoming Supreme Court held that although the expert testimony may be admissible under different circumstances it was inadmissible in *Buhrle* because the defense did not present an adequate foundation. The Georgia Supreme Court held in *Smith v. State*²¹ that the evidence was admissible because it was a proper subject for expert testimony.

The conflicting decisions in *Thomas*, *Buhrle*, and *Smith* illustrate the difficulties encountered by state courts in deciding whether to admit expert testimony on the battered woman syndrome. This Recent Development examines the requirements for the admissibility of expert testimony and analyzes the status of battered woman syndrome expert testimony within these general evidentiary rules. The Recent Development then suggests an approach for trial court judges to use in determining whether to admit such evidence and submits that expert testimony on the battered woman syndrome can satisfy admissibility requirements. Finally, this Recent Development proposes that courts should admit the evidence for the limited purpose of educating jurors about the battered woman syndrome and dispelling their mistaken beliefs about battered women.

II. LEGAL BACKGROUND

The Federal Rules of Evidence have liberalized evidentiary standards.²² The intent of the more liberal rules is to admit all relevant evidence unless an important policy reason outweighs admission.²³ For example, the desire to avoid unfairly prejudicing either party or wasting judicial time and resources would justify exclud-

State v. Curry, *supra* note 1; *infra* text accompanying notes 101-52.

19. 66 Ohio St. 2d 518, 521-22, 423 N.E.2d 137, 140 (1981); *see infra* text accompanying notes 101-13.

20. 627 P.2d 1374, 1378 (Wyo. 1981); *see infra* text accompanying notes 114-36.

21. 247 Ga. 612, 619, 277 S.E.2d 678, 683 (1981); *see infra* text accompanying notes 137-52.

22. *See generally Symposium on the Federal Rules of Evidence*, 49 TEMP. L.Q. 860 (1976). The Federal Rules of Evidence have influenced the evidentiary rules of many states. *See P. ROTHSTEIN, FEDERAL RULES OF EVIDENCE* at xii (1978).

23. *See FED. R. EVID.* 401-403.

ing evidence in some situations.²⁴ Traditionally, the courts have limited the use of lay and expert opinion testimony because of a fear that this evidence will usurp the jury's role of forming opinions based upon the facts in evidence.²⁵ Recognizing that expert witnesses can draw inferences which jurors often cannot draw, courts have established special requirements to limit the admissibility of expert testimony.²⁶

A. *The Opinion Rule*

In its early form the opinion rule of evidence prohibited a witness from testifying about his opinion; he could testify only about facts.²⁷ Exceptions to this rule developed, permitting an opinion if it was necessary to an understanding of the testimony or if it supplied a "short-hand rendition" of a total situation.²⁸ If a witness offered testimony about an ultimate issue in a case, the courts were extremely careful to exclude opinion because of the fear that the closer a witness came to telling the jury how to decide a case, the greater the risk was that the opinion would "invade the province of the jury."²⁹ The courts believed that the jury would "forego independent analysis of the facts and bow too readily to the opinion of an expert or otherwise influential witness."³⁰

The Federal Rules of Evidence had the effect of transforming the opinion rule into a rule of convenience. Rules 701 and 702 of the Federal Rules provide that lay and expert witnesses may testify in the form of opinions or inferences.³¹ Further, Rule 704 provides that opinion evidence otherwise admissible "is not objectionable because it embraces an ultimate issue to be decided by the

24. FED. R. EVID. 403 and Advisory Committee note. Rule 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

25. C. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 11 (E. Cleary 2d ed. 1972).

26. *Id.* § 13.

27. *Id.* § 11; *see, e.g.*, *Baltimore & O.R.R. Co. v. Schultz*, 43 Ohio St. 270, 1 N.E. 324 (1885).

28. C. McCORMICK, *supra* note 25, § 11.

29. *Id.* § 12, at 27.

30. *Id.*

31. FED. R. EVID. 701, 702. Rule 701 provides that a lay witness may testify in the form of an opinion if the opinion is rationally based on the perception of the witness and helpful to the understanding of a fact in issue. Rule 702 provides that an expert may testify in the form of an opinion if the testimony will assist the trier of fact.

trier of fact."³² Although some state courts continue to pay lip service to the opinion rule,³³ most courts apply only a rule of preference for fact over opinion. Currently, a majority of the state courts have adopted the Federal Rules' approach, which allows an expert to render an opinion regarding an ultimate issue if the evidence meets the other requirements for expert testimony.³⁴

B. General Requirements for Expert Testimony

McCormick's *Handbook of the Law of Evidence* states the requirements for the use of expert testimony:

the subject of the inference must be so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman . . . and the witness must have sufficient skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier of fact in his search for the truth.³⁵

If the expert testimony meets these criteria the court will admit the testimony unless it finds that "the state of the pertinent art of scientific knowledge does not permit a reasonable opinion to be asserted by an expert."³⁶

Federal Rule of Evidence 702 is a more liberal rule of admissibility than the standard set forth by McCormick. Under rule 702 the evidence need not be "beyond the ken of the average layman,"³⁷ but instead need only "assist the trier of fact to understand the evidence or to determine a fact in issue."³⁸ Under Rule 702 the expert may testify "in the form of an opinion or otherwise."³⁹ Federal courts require, of course, that expert testimony conform to the general rule that its probative value outweigh its prejudicial impact.⁴⁰

32. FED. R. EVID. 704.

33. See, e.g., *Lampkins v. United States*, 401 A.2d 966 (D.C. 1979); *Douglas v. United States*, 386 A.2d 289 (D.C. 1978).

34. C. McCORMICK, *supra* note 25, § 12; see also *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981) (court rejected view that opinion evidence about an ultimate issue is not admissible and stated that a majority of courts agree on this point).

35. C. McCORMICK, *supra* note 25, § 13, at 29-30.

36. *Id.*

37. See, e.g., *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); *State v. Owens*, 112 Ariz. 223, 540 P.2d 695 (1975); *Hestad v. Pennsylvania Life Ins. Co.*, 204 N.W.2d 433 (Minn. 1973).

38. FED. R. EVID. 702.

39. *Id.*

40. See FED. R. EVID. 403; see also *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973).

1. Subject of the Inference Must Be Beyond the Ken of the Average Layman

The requirement that the subject of the inference be beyond the ken of the average layman or that the evidence assist the trier of fact⁴¹ is basically a subject matter limitation.⁴² Courts are reluctant to permit experts to testify about subjects that are within the common knowledge or experience of the average person because of a fear that the "aura" of expertise will unduly influence the jury.⁴³ Expert testimony regarding theories or information that explains evidence in a case, but about which the jury is unfamiliar, probably would satisfy the subject matter requirement.

Generally, courts have held that some subject matter areas are appropriate for expert testimony. Medical expert testimony, for example, in which a medical doctor testifies about the probable cause of death of an individual, is usually appropriate because the average person cannot examine medical evidence with sufficient knowledge and skill to understand its significance.⁴⁴ By contrast, expert testimony concerning character is generally inappropriate. For example, psychiatrists and psychologists may not testify about a criminal defendant's propensity for crime or peaceful character; courts believe that juries are capable of assessing an individual's character without the aid of experts.⁴⁵ Similarly, expert testimony regarding a criminal defendant's state of mind at the time he committed an offense is improper unless the defendant raises insanity or diminished capacity as a defense.⁴⁶ Thus, courts have prohibited psychologists and psychiatrists from testifying that fear motivated a defendant at the time of an offense because trial judges perceive

41. See *supra* text accompanying note 35.

42. See *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); *Farris v. Interstate Circuit*, 116 F.2d 409 (5th Cir. 1941).

43. See *United States v. MacDonald*, 485 F. Supp. 1087, 1096 (E.D.N.C. 1979); *Dyas v. United States*, 376 A.2d 827 (D.C. 1977); *Buhrle v. State*, 627 P.2d 1374, 1377 (Wyo. 1981).

44. See, e.g., *State v. Owens*, 112 Ariz. 223, 540 P.2d 695 (1975) (doctor permitted to testify that severe lacerations could not have occurred accidentally); *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978) (doctor permitted to testify that bruises on a deceased child did not occur from daily activity, but were caused by child battering).

45. See, e.g., *United States v. Webb*, 625 F.2d 709 (5th Cir. 1980) (expert not permitted to testify concerning peaceful character and propensity for crime); *Douglass v. United States*, 386 A.2d 289 (D.C. 1978) (defendant accused of homosexual rape not permitted to introduce expert testimony by psychologist that defendant had a negative reaction to homosexual activity).

46. See, e.g., *State v. Griffiths*, 101 Idaho 163, 610 P.2d 522 (1980); *State v. Matthews*, 221 N.W.2d 563 (Minn. 1974).

fear as an emotion within the scope of the jury's understanding.⁴⁷

2. The Expert Must Be Qualified in the Field

The requirement that an expert have sufficient skill, knowledge, or experience in the field so that his opinion probably will aid the trier of fact is relatively easy to satisfy.⁴⁸ A witness may qualify as an expert based upon education or experience.⁴⁹ Courts have found that purported experts lack the necessary special skill to aid the trier of fact when, for example, a witness holds himself out as an expert in community standards, but lacks experience with the community at large,⁵⁰ or when a generalist in a field attempts to testify about an aspect of the field with which he is unfamiliar.⁵¹ Generally, however, once a witness shows that he is minimally qualified, his level of expertise becomes a question of credibility for opposing counsel to attack.⁵²

3. State of the Pertinent Art or Scientific Knowledge Must Permit an Expert to Assert a Reasonable Opinion

Based on the concern that expert testimony without a recognized theoretical basis will mislead or perhaps deceive juries, courts require that the principle upon which the expert's testimony rests "be sufficiently established to have gained general acceptance in the field to which it belongs."⁵³ When the evidence is of a scientific nature, a showing that the principles and procedures underlying the expert testimony are reliable and sufficiently accurate may satisfy the general acceptance requirement.⁵⁴ The proponent of the testimony often faces a difficult task when he seeks to establish that a new scientific technique has become generally accepted. In

47. See, e.g., *State v. Matthews*, 221 N.W.2d 563 (Minn. 1974).

48. *United States v. Moore*, 604 F.2d 1228 (9th Cir. 1979), provides an example of the relative ease with which an expert can qualify. In *Moore* a witness stated that only one day of training was necessary for his job (studying tapes for copyright purposes). Reasoning that it did not have a duty to train the jury, the *Moore* court found the expert qualified.

49. *C. McCORMICK*, *supra* note 25, § 13.

50. See, e.g., *Fennekohl v. United States*, 354 A.2d 238 (D.C. 1976) (one who has viewed many obscene films over a 15-year period does not qualify as an expert on community obscenity standard).

51. See, e.g., *Hestad v. Pennsylvania Life Ins. Co.*, 204 N.W.2d 433 (Minn. 1973) (deputy coroner's testimony that carbon monoxide poisoning was suicide and not accident inadmissible).

52. See *infra* text accompanying notes 163-68.

53. *Frye v. United States*, 294 F. 1013, 1014 (D.C. Cir. 1923).

54. See *United States v. Brown*, 557 F.2d 541 (6th Cir. 1977).

the early case of *Frye v. United States*⁵⁵ the court, confronted with the new lie detector technique, described the problem with which courts must grapple:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.⁵⁶

In determining whether to admit or exclude testimony about a new technique, courts have considered the following: The number of published articles on the subject;⁵⁷ the number of cases that have allowed testimony based upon the theory;⁵⁸ whether others in the field have duplicated the results of the research;⁵⁹ and testimony by others in the field on whether the theory has gained general acceptance.⁶⁰

C. *The Development of Expert Testimony on the Battered Woman Syndrome*

1. *Ibn-Tamas v. United States*

*Ibn-Tamas v. United States*⁶¹ was the first case to consider whether expert testimony on the battered woman syndrome is admissible in a trial of a battered woman charged with killing her batterer. Defendant in *Ibn-Tamas* shot her husband shortly after an altercation during which her husband threatened her with a pistol.⁶² The evidence revealed that defendant's husband had severely

55. 293 F. 1013 (D.C. Cir. 1923).

56. *Id.* at 1014. The courts are not unduly prejudiced against the introduction of expert testimony that is based upon a theory that is in its infancy. Most courts agree that "neither newness nor lack of absolute certainty . . . suffices to render it inadmissible in court. Every useful new development must have its first day in court." *United States v. Stifel*, 433 F.2d 431, 438 (6th Cir. 1970).

57. *See United States v. Stifel*, 433 F.2d 431, 441 (6th Cir. 1970) (court admitted evidence, noting that over 100 articles on neutron activation analysis, the subject in *Stifel*, had been published).

58. *Id.*; *see also United States v. Baller*, 519 F.2d 463 (4th Cir. 1975) (court recognized that about one-half of the courts admitted voiceprint evidence and that the trend was to admit it).

59. *See United States v. Brown*, 557 F.2d 541 (6th Cir. 1977); *United States v. MacDonald*, 485 F. Supp. 1087 (E.D.N.C. 1979).

60. *See, e.g., United States v. MacDonald*, 485 F. Supp. 1087 (E.D.N.C. 1979).

61. 407 A.2d 626 (D.C. Cir. 1979).

62. *Id.* at 630. Although the facts in *Ibn-Tamas* were in conflict, uncontradicted evidence indicated that, on the morning of the killing, defendant's husband held up a revolver

beaten her many times over the course of their three and one-half year marriage. Defendant asserted self-defense to the charge of second degree murder. At trial she testified about the battering incidents to support her claim that she was in imminent fear of her life at the time she shot her husband.⁶³ On cross-examination the prosecution attempted to discredit her testimony by implying that she had exaggerated the violent nature of her marriage and by suggesting that "the logical reaction of a woman who was truly frightened by her husband (let alone regularly brutalized by him) would have been call the police from time to time or leave him."⁶⁴

Defendant offered the testimony of Dr. Lenore Walker, a psychologist who had studied 110 battered women, to explain the battered woman syndrome.⁶⁵ Dr. Walker planned to inform the jury "that there is an identifiable class of persons who can be characterized as battered women" and to discuss "why the mentality and behavior of such women are at variance with the ordinary lay perception of how someone would be likely to react to a spouse who is a batterer."⁶⁶ Dr. Walker also intended to tell the trier of fact that defendant was a "classic case" of a battered woman.⁶⁷ The defense urged that the testimony be admitted to rebut the prosecution's implications that defendant's failure to leave her violent husband indicated that she did not actually fear him and to "provide a basis from which the jury could understand why [defendant] perceived herself in imminent danger at the time of the shooting."⁶⁸ The trial court refused to admit the evidence on the basis, *inter alia*, that the evidence would invade the province of the jury.⁶⁹ Defendant was convicted of second degree murder and she appealed, contending in part that the trial court had improperly excluded Dr. Walker's testimony. The appellate court reversed and remanded the case to the trial court for a consideration of two of the requirements for expert testimony that the trial court apparently had not addressed.⁷⁰

to defendant's face and said "You are going out of here this morning one way or the other."
Id.

63. *Id.* at 629, 633.

64. *Id.* at 633-34.

65. *Id.* at 634. For a discussion of the battered woman syndrome, see L. WALKER, *supra* note 1; *see also supra* notes 10-13 and accompanying text.

66. 407 A.2d at 634.

67. *Id.*

68. *Id.*

69. *Id.* at 631; *see supra* text accompanying notes 27-34.

70. 407 A.2d at 640. The *Ibn-Tamas* court required that the trial judge rule on each of

The *Ibn-Tamas* appellate court first rejected the trial court's reasoning that the proffered testimony would invade the province of the jury.⁷¹ The court explained that Dr. Walker did not plan to testify about the ultimate issue of whether defendant "actually and reasonably believed she was in danger when she shot her husband."⁷² Instead, the court stated that the purpose of the testimony was to supply background information to aid the jury in deciding that issue.⁷³ According to *Ibn-Tamas*, courts have eroded the "ultimate issue rule" to the point that the only opinions they exclude are those that "submit the whole case to an expert."⁷⁴ The *Ibn-Tamas* court explained that an expert can also improperly preempt the jury's role by testifying about matters that the jury is equally competent to consider.⁷⁵ Dr. Walker's testimony, however, satisfied the requirement that the subject be beyond the ken of the average layman⁷⁶ because it offered an interpretation of defendant's behavior—in particular her failure to leave her husband—that was at variance with the ordinary lay perception.⁷⁷

The *Ibn-Tamas* court then addressed the second and third requirements for expert testimony: the proffered expert must be qualified in the field and the state of the art must permit an expert opinion. Although the court held that it could not determine from the trial court record whether these criteria were present, the court found that the record did not show as a matter of law that the testimony failed to meet these requirements.⁷⁸ The court remanded the question of Dr. Walker's qualifications as an expert apparently because the trial court did not certify her as an expert;

the three elements for expert testimony—subject matter, expert qualification, and state of the art. See *supra* text accompanying notes 41-60. The *Ibn-Tamas* trial judge apparently had not ruled on the latter two elements. For a critical analysis of the *Ibn-Tamas* decision to remand the questions to the trial judge, see Note, *Expert Testimony Relating to Subject Matter of Battered Women Admissible on Issue of Self-Defense*, 11 SETON HALL L. REV. 255 (1980).

71. 407 A.2d at 632.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* This limitation is a variation on the "beyond the ken of the average layman" requirement discussed *supra* text accompanying notes 41-47.

76. 407 A.2d at 635.

77. *Id.* at 634. The *Ibn-Tamas* court compared the expert testimony on battered woman syndrome with the psychiatrists' testimony offered in *United States v. Hearst*, 412 F. Supp. 889 (N.D. Cal. 1976). In *Hearst* psychiatrists testified about the effects of kidnapping, prolonged incarceration, and psychological and physical abuse on defendant.

78. 407 A.2d at 639, 640.

nevertheless the court listed her credentials in a footnote.⁷⁹

The court discussed the third requirement—state of the art—at greater length. Rejecting the government's contention that the battered woman syndrome has not gained general acceptance, the court explained that to meet the general acceptance criteria the *methodology* employed by the expert must be generally accepted—the test *results* need not be.⁸⁰ Thus, the defense must show that Dr. Walker's method of studying battered women—through interviews and compilations of the interviewees' responses—conforms with generally accepted clinical psychological study. The *Ibn-Tamas* court remanded this question to the trial court.

After determining that the expert testimony could be admissible, the court inquired whether the probative value of the evidence outweighed its prejudicial impact. The court reasoned that since the trial judge had already admitted substantial evidence of the beatings, Dr. Walker's testimony would not further prejudice the prosecution.⁸¹ The court concluded that the probative value of the evidence—its bearing on defendant's perception and behavior at the time of the killing—outweighed its minimal prejudicial impact.⁸²

2. Other State Court Reactions to Battered Woman Syndrome Evidence

A few state appellate court opinions since the *Ibn-Tamas* decision have considered battered woman syndrome evidence. Although these courts do not squarely address the admissibility of this evidence, their brief discussions of the evidence offer some insight into the limited history of expert testimony on the battered woman syndrome.

In *People v. Powell* defendant was convicted of second degree murder of her former husband.⁸³ The evidence at trial showed that her husband had battered her for an extended period of time.⁸⁴

79. *Id.* at 637 n.18.

80. *Id.* at 637-38.

81. *Id.* at 639.

82. *Id.*

83. 102 Misc. 2d 775, 424 N.Y.S.2d 626 (Tompkins County Ct. 1980).

84. *Id.* at 776-77, 424 N.Y.S.2d at 628-29. On the night that defendant shot her husband, he had taken defendant and their son at gunpoint to a hotel. Defendant testified that during the night while her husband was sleeping she took the gun and that it went off when her husband jumped up. *Id.* at 777-78, 424 N.Y.S.2d at 628-29.

Defendant did not offer expert testimony on the battered woman syndrome at trial. Defendant appealed her conviction on the theory that expert testimony on the battered woman syndrome was newly discovered evidence that warranted a reversal.⁸⁵ The appellate court held that the expert testimony did not constitute newly discovered evidence and affirmed defendant's conviction.⁸⁶ Although the court did not hold that the evidence would have been inadmissible, it stated that the evidence would "not add anything" to defendant's self-defense claim because defendant already had presented evidence of the history of the battering relationship.⁸⁷

*Morrison v. Bradley*⁸⁸ concerned a wrongful death action for negligence against a battered wife who had killed her husband. Defendant in *Morrison* claimed that severe battering by her husband over a long period of time caused her actions, and she sought to use the battered woman syndrome as a defense.⁸⁹ The *Morrison* court refused to allow this theory as a defense in a wrongful death action.⁹⁰ The court did not reject expressly expert testimony on the battered woman syndrome, and it declined to either "accept [or] reject the validity of the general theory."⁹¹

In *People v. White*⁹² the court held one aspect of expert testimony on the battered woman syndrome irrelevant and immaterial to a battered woman's self-defense claim. In *White* the defendant offered the testimony of a physician who was not an expert on the battered woman syndrome. The defense asked him on direct examination whether battered women "tend to remain with their mates."⁹³ In response to the prosecution's objection, the defense urged that the answer to this question had a bearing on the credibility of defendant's self-defense claim. The *White* court held that the trial court properly excluded the question because it was irrelevant to a self-defense claim.⁹⁴ The *White* court stated that the issue of self-defense should be determined in light of only those

85. *Id.* at 779, 424 N.Y.S.2d at 629.

86. *Id.* at 782-83, 424 N.Y.S.2d at 631.

87. *Id.* The *Powell* court also indicated that the evidence might have been inadmissible at trial to prove self-defense. *Id.*

88. 622 P.2d 81 (Colo. Ct. App. 1980).

89. *Id.* at 82. The facts in *Morrison* do not indicate whether the defendant offered an expert to explain the battered woman syndrome.

90. *Id.*

91. *Id.*

92. 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980).

93. *Id.* at 1072, 414 N.E.2d at 200. The physician in *White* testified that he treated battered women in his practice. *Id.*

94. *Id.*

events that immediately preceded the killing.⁹⁵ The decision in *White*, however, does not necessarily signify that the court would never admit expert testimony on the battered woman syndrome. The *White* court did not reject *Ibn-Tamas*, but rather distinguished it, stating,

[T]hat decision does not assist defendant. There, the expert witness was a clinical psychologist who had studied the cases of 110 battered women. Apparently, this expert had examined the defendant from a psychological point of view because the defendant sought to elicit her opinion as to "the extent to which appellant's personality and behavior corresponded to those of 110 battered women Dr. Walker had studied."⁹⁶

This statement suggests that the *White* court might have permitted a qualified expert to testify about the defendant's similarities to other battered women.

In the final appellate opinion dealing with expert testimony on the battered woman syndrome, *State v. Baker*,⁹⁷ the defendant was a battering husband charged with attempted first degree murder of his wife. At trial defendant pleaded not guilty by reason of insanity. Defendant's wife and daughter testified that defendant had abused them on numerous occasions. In support of his insanity defense, defendant called two psychiatrists who testified that defendant was legally insane at the time of the offense.⁹⁸ On rebuttal the trial court admitted the testimony of the government's expert witness on the battered woman syndrome. The witness testified that wife beating is part of a pattern of domestic violence that does not appear to result from mental illness or insanity.⁹⁹ On appeal the court rejected defendant's argument that this expert testimony was not sufficiently relevant to outweigh its prejudicial impact.¹⁰⁰ Although the *Baker* court did not comment generally upon the admissibility of expert testimony on the battered woman syndrome, its holding that this evidence was proper under these facts indicates that the court, at the minimum, would seriously consider admitting the evidence in a trial in which the defendant is a battered wife charged with killing her mate.

95. *Id.* But see *supra* note 6.

96. 90 Ill. App. 3d at 1072, 414 N.E.2d at 200.

97. 120 N.H. 773, 424 A.2d 171 (1980).

98. *Id.* at 774, 424 A.2d at 172.

99. *Id.* at 775, 424 A.2d at 172.

100. *Id.* at 776, 424 A.2d at 172.

III. RECENT DECISIONS

A. State v. Thomas

In *State v. Thomas*¹⁰¹ defendant shot her husband during an argument in which he pushed her onto a couch. The evidence showed that defendant's husband had battered her for more than three years. Although defendant presented three different versions of the incident to the court, none of the versions indicated that her husband was beating her at the time of the shooting.¹⁰² Defendant asserted self-defense in response to a charge of murder, but was found guilty in a jury trial.¹⁰³

At trial defendant offered expert testimony on the battered woman syndrome to aid the jury in weighing the evidence concerning her subjective state of mind at the time of the killing.¹⁰⁴ The trial court refused to admit the evidence and defendant appealed. The Ohio Court of Appeals reversed her conviction and ordered a new trial on the ground that the trial court had improperly excluded the expert testimony offered to show the state of mind of battered women.¹⁰⁵ The Ohio Supreme Court reversed the appellate court, holding that battered woman syndrome expert testimony is not admissible to show self-defense.¹⁰⁶ The court distinguished *Ibn-Tamas* on the grounds that the expert in that case offered an "unequivocal opinion," based upon personal counseling with the defendant, that defendant was a "classic case" of a battered woman and did in fact perceive herself to be in imminent danger at the time she killed her husband.¹⁰⁷ After distinguishing *Ibn-Tamas*, however, the *Thomas* court stated that "even if the facts in *Ibn-Tamas* . . . were similar to the case at bar, we reject its rationale and decline to follow it."¹⁰⁸

101. 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

102. *Id.* at 518-19, 423 N.E.2d at 138. In one of the versions she presented, defendant got up from the couch, walked to the chair in which her husband was sitting, and shot him. In the second version defendant's husband was rising from a chair to attack her further when she shot him. In the third version, defendant picked up the gun after her husband had pushed her on the couch, followed him as he walked away, and, after saying "I've had enough," shot him. *Id.*

103. *Id.*

104. *Id.* For a description of the battered woman syndrome, see *supra* note 13.

105. 66 Ohio St. 2d at 519, 423 N.E.2d at 138.

106. *Id.* at 522, 423 N.E.2d at 140.

107. *Id.* at 521 n.3, 423 N.E.2d at 139-40 n.3. Apparently the expert in *Thomas* was not a psychologist but a "psychiatric social worker" who had not counseled defendant personally. *Id.* at 521, 423 N.E.2d at 140.

108. *Id.* at 521 n.3, 423 N.E.2d at 139-40 n.3.

The *Thomas* supreme court opinion quoted with approval eight reasons that the appellate court's dissent had presented for excluding the evidence.¹⁰⁹ In addition, the *Thomas* court presented its own list of four reasons for favoring exclusion. First, according to the court, the evidence is immaterial and irrelevant to self-defense because only evidence that establishes a bona fide fear of imminent danger or great bodily harm and a belief that the only means of escape is the use of deadly force is admissible to prove self-defense.¹¹⁰ Second, the court explained that the evidence was inadmissible because juries are "well able to understand" whether the defendant has proven self-defense on the basis of "the participants' words and actions before, at, and following the murder, including defendant's explanation of the surrounding circumstances," and because the testimony is not so "distinctly related to some science, profession or occupation so as to be beyond the ken of the average lay person."¹¹¹ Third, the court simply stated that "no general acceptance of the expert's particular methodology has been established."¹¹² Last, the court found the evidence prejudicial because it might lead the jury to decide the case on the basis of stereotypical facts about battered women presented by the expert testimony instead of the actual facts in the case.¹¹³

B. *Buhrle v. State*

In *Buhrle v. State*¹¹⁴ the Wyoming Supreme Court ruled that the trial judge properly excluded expert testimony on the battered woman syndrome. Defendant's husband in *Buhrle* had abused her repeatedly during their eighteen-year marriage. On September 24,

109. *Id.* at 519 n.1, 423 N.E.2d at 138-39 n.1. These reasons were as follows:

1. There was no proper proffer of expert testimony.
2. Appellant's expert had no personal contact with appellant.
3. No hypothetical question was propounded to appellant's expert witness.
4. There was no determination that appellant was in fact a battered woman.
5. Analysis of the issues raised was within the realm of the jury.
6. The trial court's jury charge more than adequately covered the situation.
7. There was no prejudice to appellant.
8. The trial court did not abuse its discretion.

Id.

110. *Id.* at 520, 423 N.E.2d at 139; see *supra* notes 5-6 and accompanying text.

111. 66 Ohio St. 2d at 521, 423 N.E.2d at 140.

112. *Id.* The *Thomas* court neither explained the basis of its finding that the methodology employed by battered woman syndrome experts had not gained acceptance nor discussed any of the considerations usually mentioned in connection with this question. See *supra* notes 53-60 and accompanying text; see also *infra* text accompanying note 171.

113. *Id.* at 521, 423 N.E.2d at 140.

114. 627 P.2d 1374 (Wyo. 1981).

1979, defendant's husband asked his attorney to prepare divorce papers, and he executed an affidavit to obtain a restraining order against defendant. On the following day defendant and her husband had an argument, and defendant threatened her husband with a shovel. He reacted by beating her about the head, neck, and shoulders with a pair of work boots.¹¹⁵ On September 26, 1979, defendant's husband moved to a motel. Slightly more than a week after the argument during which the beating occurred, defendant's husband came to the family home and, according to defendant's testimony, asked defendant to come to his motel room so that they could talk. That evening defendant drove to the motel and the couple argued through the motel room door (with the night chain fastened) for an hour and forty-five minutes. Defendant then shot her husband with a hunting rifle that she had brought to the motel. When occupants of an adjoining room arrived at the scene, defendant was kneeling over her husband and shouting that someone had shot him. Defendant testified that she did not attempt to run away from the motel. The evidence revealed, however, that she tried to hide the rubber gloves that she had been wearing immediately after the shooting, and that she placed the hunting rifle underneath a nearby house trailer. At the time of her arrest she had her husband's wallet in her possession.

Defendant was tried and convicted of the second degree murder of her husband. At trial the court permitted defendant to describe the violent history of her marriage to prove that she acted in self-defense. In addition, defendant testified that she thought her husband was reaching for a gun that he usually kept with him when she shot him. A search of the motel room after the incident established that defendant's husband did not have a gun with him on the night of the killing.¹¹⁶

The *Buhrle* trial judge did not permit defendant to introduce the expert testimony of Dr. Lenore Walker on the battered woman syndrome.¹¹⁷ Dr. Walker planned to tell the jury the following:

115. *Id.* at 1375.

116. *Id.* at 1376.

117. *Id.* at 1377. The reasons given by the trial judge for excluding the evidence focused on the defense's failure to explain adequately the battered woman syndrome and its application to defendant's particular situation. The trial judge held that the evidence was inadmissible for three reasons: (1) voir dire did not establish that the state of the art permitted a reasonable expert opinion; (2) the expert did not sufficiently explain the basis for her opinions and, therefore, the opinions would not aid the jury; and (3) the testimony about defendant's state of mind at the time of the shooting was inadequate and, therefore, would not aid the jury. *Id.*

- (1) Mrs. Buhrlé was a battered woman and a battered woman's behavior differs from that of other women.
- (2) Mrs. Buhrlé was in a state of learned helplessness resulting in loss of free will.
- (3) Because of learned helplessness, Mrs. Buhrlé's ability to walk away from a situation or escape was impaired.
- (4) Mrs. Buhrlé perceived herself to be acting in self-defense.¹¹⁸

The Wyoming Supreme Court indicated that Dr. Walker also intended to express opinions on whether defendant's fear for her life at the time of the shooting was reasonable and whether defendant was capable of retreating at the time she shot her husband.¹¹⁹

The Wyoming Supreme Court's opinion affirming the trial judge's decision to exclude the evidence focused on three principal problems with the proffered expert testimony. First, Dr. Walker's description of her conclusions on the battered woman syndrome contained in her book and brought out on voir dire appeared overly tentative.¹²⁰ Second, Dr. Walker apparently could not explain why certain of defendant's actions did not conform to the battered woman syndrome.¹²¹ Last, the opinions that Dr. Walker planned to express about defendant's state of mind at the time of the shooting went "far beyond" the proffered testimony in *Ibn-Tamas*.¹²²

The *Buhrlé* opinion revealed that in the preface to her book, *The Battered Woman*,¹²³ Dr. Walker wrote that she felt "uneasy" about stating some of her conclusions because they "seemed too tentative to write down in the positive manner" in which she presented them, but that they were "confirmed repeatedly by all the available data so far."¹²⁴ On voir dire Dr. Walker further cast doubt on the validity of her study of battered women when, attempting to explain these statements from her book, she stated, "That's why I received the research grant, to study the matter in a much more scientific way."¹²⁵ The *Buhrlé* court took the view that "[t]he quotation[s] from Dr. Walker's book . . . and elsewhere in her voir dire suggests that Dr. Walker may make certain conclusions and state certain theories, then engage in research to attempt

118. *Id.* For a more detailed description of the battered woman syndrome, see *supra* note 13.

119. 627 P.2d at 1378.

120. *Id.* at 1376; see *infra* text accompanying notes 123-26.

121. 627 P.2d at 1377; see *infra* text accompanying notes 129-31.

122. 627 P.2d at 1378; see *infra* text accompanying notes 132-35.

123. L. WALKER, *supra* note 1.

124. 627 P.2d at 1376.

125. *Id.*

to substantiate those theories and conclusions."¹²⁶ The court noted that research on the battered woman syndrome is in its infancy, its objectives are difficult to identify, statistical analysis of the syndrome is in the preparation stage, and acceptance of the "phenomenon" is limited to those engaged in the research and to the organizations that make research grants.¹²⁷ On this basis the court, without denying the existence of a battered woman syndrome, concluded that the defense in *Buhrle* did not lay an adequate foundation to demonstrate that the state of the art would permit a reasonable opinion and that this opinion would not aid the jury.¹²⁸

The *Buhrle* court expressed concern over Dr. Walker's inability to explain the reasons that defendant's behavior deviated from "standard battered woman behavior."¹²⁹ The court stated that in explaining her opinions Dr. Walker failed to consider certain questions, including why the killing took place more than a week after the most recent altercation, why defendant took a hunting rifle to the motel, and why defendant hid the gun and the rubber gloves after the shooting. According to the court, this behavior does not fit within the battered woman syndrome or the standard battered woman self-defense situation.¹³⁰ In addition, the court concluded that since the trial judge had difficulty understanding Dr. Walker's explanations, the jury would have had the same problem.¹³¹

The final aspect of the proffered testimony that the *Buhrle* court addressed concerned the scope of the opinions that Dr. Walker intended to offer. The court found that the proposed opinions in *Buhrle* were far more sweeping than the opinions the *Ibn-Tamas* court admitted.¹³² The defense in *Ibn-Tamas*, the *Buhrle* court explained, offered Dr. Walker's testimony for two purposes: "[t]o describe the phenomenon of 'wife battering'" and to elicit an expert opinion about the extent to which the defendant's behavior and personality corresponded to the behavior and personality of the 110 battered women the expert had studied.¹³³ In contrast to the testimony offered in *Buhrle*, the court noted that in *Ibn-Tamas* Dr. Walker merely supplied background information to aid

126. *Id.* at 1377; see *infra* notes 165-66 and accompanying text.

127. 627 P.2d at 1377.

128. *Id.* at 1378.

129. *Id.* at 1377.

130. *Id.*

131. *Id.*

132. *Id.* at 1378; see *supra* notes 72-77 and accompanying text.

133. 627 P.2d at 1378.

in the jury's understanding of defendant's state of mind at the time of the shooting. In *Buhrle*, however, Dr. Walker planned to testify about the "ultimate questions" whether defendant actually and reasonably believed that she was in imminent danger when she shot her husband, whether defendant was capable of retreating at that time, and whether, in the expert's opinion, defendant believed she was acting in self-defense.¹³⁴ The *Buhrle* court reasoned that the *Ibn-Tamas* decision did not justify the proposed testimony.¹³⁵

Although the court in *Buhrle* emphasized that the proposed opinions went too far, this language did not appear as part of the holding. In its concluding paragraph on battered woman syndrome expert testimony the court said, "In our holding here we are not saying that this type of expert testimony is not admissible; we are merely holding that the state of the art was not adequately demonstrated to the court, and because of inadequate foundation the proposed opinions would not aid the jury."¹³⁶ Thus, whether the *Buhrle* court would have permitted the opinions if the defense had presented an adequate foundation is not clear.

C. *Smith v. State*

In *Smith v. State*¹³⁷ the Georgia Supreme Court reversed a battered woman's conviction for the voluntary manslaughter of her live-in boyfriend because the trial court had improperly excluded expert testimony on the battered woman syndrome from the jury's consideration.¹³⁸ Defendant had been dating and intermittently living with her boyfriend for approximately four years. The testimony revealed that he had beaten her throughout the relationship.¹³⁹ On the evening of the shooting, defendant's boyfriend became angry with her when she asked him to stop touching her in bed because she was tired. After he told her not to tell him when to touch her, defendant dressed and started downstairs. When the boyfriend held up his fist and told her she was not going anywhere, defendant sat on the bed. He then kicked her in the back, hit her on the head, choked her, and threw her against the door. Defendant broke loose, ran to the dresser, grabbed her gun, and went

134. *Id.*

135. *Id.*

136. *Id.*

137. 247 Ga. 612, 277 S.E.2d 678 (1981).

138. *Id.* at 619-20, 277 S.E.2d at 683.

139. *Id.* at 613-14, 277 S.E.2d at 679. Defendant stated that her boyfriend's beatings worsened when she dated other men. *Id.*

downstairs to call her mother. Before she was able to use the telephone, however, her boyfriend removed the upstairs telephone from the receiver; he then ran downstairs and took the telephone away from her. As defendant was attempting to run from the apartment, her boyfriend slammed the door on her foot. She then closed her eyes and fired the gun three times. After the shooting defendant went to a neighbor's house and called the police.¹⁴⁰

Defendant asserted self-defense at trial. She told the jury that she was afraid to stop seeing her boyfriend because he threatened her.¹⁴¹ She also testified that after he beat her he would apologize and say he loved her, and, because she believed him, she did not call her friends or the police.¹⁴² According to her testimony, on the day of the shooting her boyfriend had frightened her by saying she should call her mother because "he was going to do something to her."¹⁴³ After receiving this threat defendant feared that her boyfriend would hurt her more than before.¹⁴⁴ Defendant concluded her testimony by stating that she shot her boyfriend "in fear for her life."¹⁴⁵

The defense offered a clinical psychologist's testimony on the battered woman syndrome and on whether defendant's situation conformed with that of other battered women.¹⁴⁶ She planned to explain why battered women generally do not report the abuse and to testify that battered women often choose to remain with their batterers, that battered women typically believe their batterers' promises not to beat them again, that over time battered women become increasingly afraid of their batterers, and, finally, that a battered woman's primary emotion is fear.¹⁴⁷ The witness would have testified that her interviews with defendant and her family were the basis for her conclusion that "defendant fell within the battered woman profile and had the typical battered woman's

140. *Id.* at 612-13, 277 S.E.2d at 679. None of the police officers who came to defendant's apartment after the shooting observed that defendant had received any injuries. *Id.*

141. *Id.*; see *supra* note 139.

142. 247 Ga. at 613, 277 S.E.2d at 679. Battered woman syndrome experts have discovered that this seemingly unreasonable belief is common among battered women. See *supra* note 13.

143. 247 Ga. at 613, 277 S.E.2d at 679.

144. *Id.*

145. *Id.*

146. *Id.* at 614, 277 S.E.2d at 680. The testimony proposed in *Smith* is similar to that which was approved in *Ibn-Tamas*. Apparently the expert in *Smith* did not plan to render opinions about defendant's state of mind at the time of the shooting. See *infra* text accompanying notes 178-88.

147. 247 Ga. at 614, 277 S.E.2d at 680.

syndrome."¹⁴⁸

The prosecution did not challenge either the expert's qualifications or the state of the art of the battered woman syndrome. The trial court, however, found the testimony to be inadmissible because it would improperly invade the province of the jury.¹⁴⁹ In affirming the trial court's decision, the Georgia Court of Appeals held that the trial court properly excluded the expert's testimony because it was opinion evidence on an ultimate fact that was for the jury to decide.¹⁵⁰ The Georgia Supreme Court reversed, holding that expert opinion testimony on an ultimate fact is admissible if the expert will draw conclusions that a jury ordinarily would be unable to draw.¹⁵¹ The court ruled, therefore, that the trial court should have admitted the expert testimony because the testimony explaining why battered women do not leave their mates, why they do not report the abuse, and why they fear increased aggression "would be such conclusions that jurors could not ordinarily draw for themselves."¹⁵²

IV. ANALYSIS

The courts in *Thomas*, *Buhrle*, and *Smith* all employed a similar analytical framework to determine the admissibility of the proffered expert testimony on the battered woman syndrome. Nevertheless, the application of this theoretically uniform standard produced significantly divergent results. This Recent Development acknowledges the legitimate judicial concerns that surround this testimony. Some courts probably fear that permitting experts to explain why battered women behave as they do represents a subtle endorsement of homicide as a justifiable retaliation against battering.¹⁵³ This Recent Development maintains, however, that ex-

148. *Id.*

149. *Id.* at 613, 277 S.E.2d at 680.

150. *Id.* at 614-15, 277 S.E.2d at 680. The court of appeals did not explain which aspects of the proposed expert opinion in *Smith* concerned an ultimate fact. The expert in *Smith* was planning to state only that defendant was a typical battered woman. Although the expert had stated previously that the primary emotion of battered women is fear, the expert apparently did not intend to render an opinion whether defendant was afraid when she shot her husband. The expert would have left this inference for the jury.

151. *Id.* at 619, 277 S.E.2d at 683.

152. *Id.* The *Smith* opinion focuses almost entirely on the ultimate issue question and reviews Georgia case law on that topic. The only aspect of the opinion that deals specifically with battered woman syndrome evidence quotes extensively from *Ibn-Tamas*. *Id.* at 618-19, 277 S.E.2d at 682-83. Because the prosecution had challenged only the subject matter element, the *Smith* court did not consider the other requirements for expert testimony.

153. See Note, *Does Wife Abuse Justify Homicide?*, 24 WAYNE L. REV. 1705 (1978).

pert testimony on the battered syndrome does satisfy the general requirements for the admissibility of expert testimony.¹⁵⁴ Rather than excluding the testimony under the guise of failure to satisfy expert testimony standards, courts instead should restrict the scope of the testimony to that which is necessary to dispel mistaken beliefs about battered women.¹⁵⁵

The first requirement of proper expert testimony is that the subject of the inference be beyond the ken of the average layman. The *Ibn-Tamas* and *Smith* courts correctly found this element present in battered woman syndrome expert testimony.¹⁵⁶ The prosecutor's suggestion in *Ibn-Tamas* that the "logical reaction" of a frightened battered woman would be to call the police or to leave her batterer¹⁵⁷ probably represents the viewpoint of the average person. Reasoning in this way, a jury would infer that a battered woman who stayed with her batterer did not fear him. Therefore, as the courts in *Ibn-Tamas* and *Smith* recognized, testimony by battered woman syndrome experts that battered women are afraid of their batterers, but do not leave them because they believe that "they will be found and hurt even more," leads to an inference that is beyond the ken of the average layman.¹⁵⁸ Without this expert testimony, jurors ordinarily would not be able to draw this inference for themselves. The *Thomas* court's cursory statement that juries are capable of understanding and deciding for themselves whether a defendant has proved self-defense and that this expert testimony is not beyond the ken of the average layman,¹⁵⁹ without any further discussion of the subject matter requirement, fails to recognize the purpose of battered woman syndrome expert testimony. Indeed, the statements illustrate the *Thomas* court's refusal to consider seriously and to examine the implications of the expert's findings on battered woman syndrome. Courts applying either the Federal Rules of Evidence standard, which requires only

Some commentators fear that acquittals in murder trials involving battered women defendants will result in "open season on men." See Schneider & Jordon, *supra* note 2, at 150 n.4.

154. See *infra* text accompanying notes 156-74. Of course, this statement assumes that the proponent of the expert testimony will present an adequate foundation. See *supra* notes 35-60 and accompanying text. Defense attorneys should not attempt to use the battered woman syndrome phenomenon without the aid of a qualified expert. This problem appeared in *People v. White*, discussed *supra* text accompanying notes 92-96.

155. See *infra* text accompanying notes 178-88.

156. See *supra* notes 71-77, 152 and accompanying text.

157. See *supra* note 64 and accompanying text; see also L. WALKER, *supra* note 1, at 20, 26, 29.

158. See *supra* notes 75-77, 152 and accompanying text.

159. See *supra* text accompanying note 110.

that the testimony assist the trier of fact,¹⁶⁰ or the more stringent common-law standard, which requires that the subject be beyond the ken of the average layman,¹⁶¹ should find on the basis of the courts' reasoning in *Ibn-Tamas* and *Smith* that the subject matter element is present.

The *Thomas* and *Smith* courts were apparently satisfied that the expert witness possessed sufficient skill, knowledge, or experience in the particular field "as to make it appear that his opinion or inference will probably aid the trier in his search for truth."¹⁶² The *Buhrle* court, however, excluded the evidence in part because of a concern that the expert did not satisfy this qualification requirement. Although the *Buhrle* court stated that Dr. Walker, the expert in that case, possessed "impressive academic and professional credentials,"¹⁶³ it went on to hold in part that Dr. Walker's proposed opinions would not aid the jury.¹⁶⁴ This holding apparently resulted from the court's examination of Dr. Walker's voir dire in which she noted that her conclusions were "too tentative" to be stated in a positive manner and that she was preparing to study the matter "in a much more scientific way."¹⁶⁵ These facts led the court to criticize Dr. Walker and to suggest that she made conclusions and then engaged in research to substantiate her conclusions.¹⁶⁶ Thus, although the *Buhrle* court did not state expressly that Dr. Walker did not satisfy the qualification requirement, the court, in holding that Dr. Walker's opinions would not aid the jury, implicitly rejected her status as an expert. The qualification requirement, however, should not have been at issue in *Buhrle*. The purpose of this requirement is to ensure that courts allow only witnesses who have special knowledge in a field to testify as experts because permitting witnesses without special knowledge to testify would not aid the jury.¹⁶⁷ The *Buhrle* court should have found that

160. FED. R. EVID. 702; see *supra* text accompanying note 38.

161. See *supra* notes 41-47 and accompanying text.

162. C. McCORMICK, *supra* note 25, § 13. The *Thomas* court did not mention this second requirement for expert testimony, and the *Smith* court assumed it to have been met because the state did not challenge the expert's qualifications.

163. *Buhrle v. State*, 627 P.2d 1374, 1376 (Wyo. 1981). Indeed, the *Buhrle* court described Dr. Walker as the "pioneer" in the study of battered women. *Id.*

164. *Id.* at 1378; see *supra* notes 120-28 and accompanying text.

165. 627 P.2d at 1376; see *supra* text accompanying notes 124-25. In addition, before stating that the opinions would not aid the jury the court emphasized Dr. Walker's inability to explain why the *Buhrle* defendant's behavior was not entirely consistent with typical battered woman behavior. *Id.* at 1377.

166. *Id.*

167. Additionally, some courts fear that expert witnesses will influence juries unduly

Dr. Walker's concededly impressive credentials established that she had sufficient special knowledge in the study of battered women to ensure that her testimony would assist the jury in understanding battered women.¹⁶⁸ Finally, the court should have left any doubts about Dr. Walker's qualifications as an expert to the prosecution to present to the jury on cross-examination. Then the jury could determine what weight should be given to the expert testimony in light of any deficiencies raised by the prosecution.

The *Thomas* and *Buhrle* courts' holding that the state of battered woman syndrome research did not permit a reasonable expert opinion resulted from improper applications of this final expert testimony requirement.¹⁶⁹ In *Ibn-Tamas* the court explained that this state-of-the-art standard does not require that an expert's findings have gained general acceptance in the relevant field;¹⁷⁰ instead, the *methodology* employed by the expert in reaching the findings must have gained general acceptance.¹⁷¹ The *Thomas* court correctly articulated this standard, but summarily concluded that the proffered testimony failed to meet the standard.¹⁷² This court neither discussed the methodology used in developing the battered woman syndrome nor cited any evidence suggesting that the methodology is not accepted. The *Buhrle* court conducted a more thoughtful inquiry into the methodology used by Dr. Walker.¹⁷³ After questioning Dr. Walker's methodology, however, the *Buhrle* court, curiously, stated that the "phenomenon" (presumably the battered woman syndrome), as opposed to the methodology, has gained only limited acceptance.¹⁷⁴ Although the prosecution in either *Thomas* or *Buhrle* could have presented evidence to show that other psychologists do not recognize the methodology employed as a proper one, doubts about the validity of the battered woman syndrome theory should be resolved as the *Ibn-*

because of a special "aura" of expertise. See *supra* text accompanying note 43.

168. The *Buhrle* court's concerns regarding Dr. Walker's testimony more appropriately address the requirement that the expert's methodology be generally accepted in the field. When the court discussed this requirement, however, it focused not on the methodology, but on the phenomenon of the battered woman syndrome. See *infra* text accompanying notes 173-74.

169. See *supra* notes 53-60 and accompanying text.

170. *Ibn-Tamas v. United States*, 407 A.2d 626, 637-38 (D.C. 1979); see *supra* text accompanying note 80.

171. *Ibn-Tamas v. United States*, 407 A.2d 626, 637-38 (D.C. 1979); see *supra* text accompanying note 80.

172. See *supra* note 112 and accompanying text.

173. See *supra* text accompanying notes 124-28.

174. *Buhrle v. State*, 627 P.2d 1374, 1377 (Wyo. 1981).

Tamas court suggested—by allowing the prosecution to present other experts to challenge the findings before the jury.¹⁷⁵ The jury should have the opportunity to hear this conflicting testimony concerning the validity of the battered woman syndrome theory and to determine what weight, if any, the battered woman syndrome testimony deserves.

V. PROPOSALS AND CONCLUSION

As the above analysis indicates, the *Thomas* and *Buhrle* courts should have found that the proffered expert testimony satisfied the three requirements for admissibility of expert testimony. The compelling analysis in *Ibn-Tamas* shows that battered woman syndrome expert testimony can meet the traditional expert testimony requirements and demonstrates that this evidence presents no special problems. The courts in *Thomas* and *Buhrle*, however, expressed serious concern about the novel use of this testimony in a murder trial. The *Thomas* court questioned the testimony's relevance to self-defense.¹⁷⁶ The *Buhrle* court focused much of its analysis on the far-sweeping nature of the opinions that the expert proposed to render.¹⁷⁷ These courts' discomfort with the proffered testimony is understandable because the notion that a defendant apparently motivated by retaliation might instead have been motivated by fear is difficult to accept. These concerns, however, are indicative of the misconceptions that surround battered women, and forcefully illustrate the need for this type of testimony.

This Recent Development proposes that courts should permit the use of battered woman syndrome expert testimony, but restrict its use to informing juries of the peculiar mental and emotional state of battered women.¹⁷⁸ This role of the expert as educator would serve to dispel a jury's misconceptions about battered women and, at the same time, draw the focus of the testimony away from the implication which troubled the *Buhrle* court—that the battered woman syndrome represents a new defense to murder. The Advisory Committee explains in a note that rule 702 of the

175. *Ibn-Tamas v. United States*, 407 A.2d 626, 638 n.24; see also *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975) ("it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation").

176. See *supra* text accompanying note 109.

177. See *supra* text accompanying notes 132-35.

178. For example, an expert could describe the syndrome in lay terms as in *Ibn-Tamas* and *Smith*. See *supra* note 13.

Federal Rules of Evidence suggests the use of expert testimony as a vehicle to educate juries.¹⁷⁹ This note states,

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. . . . [I]t seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference.¹⁸⁰

Expert testimony on the battered woman syndrome would adapt well to this educational approach. A battered woman defendant may testify about previous physical aggression by the victim.¹⁸¹ Courts admit this evidence of prior batterings when the defendant claims self-defense because this evidence helps the jury evaluate the defendant's state of mind¹⁸²—a critical element of the self-defense assertion.¹⁸³ When the jury hears the testimony, it probably will begin to question both the defendant's reasons for staying with her batterer and her assertions that she feared him.¹⁸⁴ To further aid the jury in evaluating the defendant's state of mind, courts should admit expert testimony explaining the effects that physical abuse has on a battered woman's mental state. With the evidence of defendant's prior beatings and the expert testimony about the psychological effects of beating on battered women, a jury could then better evaluate defendant's state of mind.

Although the modern trend encompassed in the Federal Rules of Evidence is to permit virtually all opinions,¹⁸⁵ expert opinions on battered woman syndrome are not necessarily valuable testimonial tools. In fact, as in *Buhrle*, battered woman syndrome experts' inability to explain their opinions adequately may even discredit their findings.¹⁸⁶ The *Smith* court quoted with approval the *Ibn-Tamas* court's reasoning that expert testimony on battered woman syndrome can serve as background information for juries.¹⁸⁷ Indeed, the restriction of this expert testimony to the information

179. FED. R. EVID. 702 advisory committee note.

180. *Id.*

181. See, e.g., *State v. Dozier*, 255 S.E.2d 552, 555 (W. Va. 1979).

182. See *Ibn-Tamas v. United States*, 407 A.2d 626, 633 (D.C. 1979); *State v. Dozier*, 255 S.E.2d 552, 555 (W. Va. 1979).

183. See *supra* note 6 and accompanying text.

184. See *supra* text accompanying notes 157-58.

185. See FED. R. EVID. 701, 702, 704.

186. The *Buhrle* court indicated that Dr. Walker's conclusions about defendant were without any apparent empirical basis. *Buhrle v. State*, 627 P.2d 1374, 1377 (Wyo. 1981).

187. *Smith v. State*, 247 Ga. 612, 618-19, 277 S.E.2d 678, 682-83 (1981).

needed to dispel misconceptions about battered women would vitiate the perception, such as that expressed in *Buhrle*, that these experts encourage juries to excuse killing.¹⁸⁸

The findings of battered woman syndrome experts provide important and valuable insights into the mental state of a surprisingly large group of criminal defendants.¹⁸⁹ Although courts cannot accept these findings as a basis for excusing killing, they should accept the information that these experts can provide to jurors. Courts should recognize the expert's testimony as proper, but limit it to the role for which it is presently best suited—to educate jurors on the findings of battered women studies so that jurors will understand the mental state of a widely misunderstood segment of the population.

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188. The proposed expert opinion in *Buhrle* would have consisted of a statement that defendant reasonably feared for her life when she went to the motel and shot her husband, and that defendant had an impaired ability to escape her husband's abuse. See *supra* text accompanying notes 118-19.

189. See Schneider & Jordon, *supra* note 2, at 149 n.3. These authors include an extensive list of trials in which the prosecution charged battered women with assault or murder of their mates.