

Domestic Violence Expert Witnesses: Overcoming Challenges in Battered Women's Self-Defense Cases

by
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NATIONAL CLEARINGHOUSE FOR
THE DEFENSE OF BATTERED WOMEN
Working for justice for victims of battering charged with crimes

Domestic Violence Expert Witnesses: Overcoming Challenges in Battered Women's Self-Defense Cases

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Contents

| | |
|---|-----|
| Preface..... | iii |
| Introduction..... | 1 |
| Audience..... | 1 |
| Self-Defense Law..... | 3 |
| Challenge: Claims that the defendant is not (really) a battered woman..... | 5 |
| Dynamics of domestic violence can impact defendant’s perceived credibility..... | 6 |
| Fails to Report a History of Domestic Violence..... | 9 |
| Unaware that abusive partner is dead..... | 9 |
| Prior experiences with the police are negative..... | 10 |
| Police unskilled in interviewing about domestic violence..... | 11 |
| Memory impaired because of trauma..... | 13 |
| History of domestic violence cannot be corroborated..... | 15 |
| Expert’s credibility is attacked..... | 17 |
| Defendant also used violence..... | 18 |
| Battered woman appears autonomous..... | 20 |
| Battered woman defendant does not otherwise “fit the profile”..... | 21 |
| Prosecution’s expert witness claims the defendant is not a battered woman..... | 21 |
| Definition of “battered woman”..... | 22 |
| Experience of abuse..... | 22 |
| Context of coercive control and manipulation..... | 23 |
| Common coping strategies..... | 23 |
| Challenge: Prosecution argues the defendant did not act in self-defense..... | 26 |
| Acquired a weapon before the incident..... | 27 |
| Used a weapon during the incident..... | 29 |
| Used seemingly “disproportionate” force..... | 31 |
| Used “overkill”..... | 34 |
| Acted “guilty” after the killing..... | 38 |

| | |
|---|----|
| Addressing experiences of past abuse as an adult or child | 40 |
| Parting advice for new experts..... | 42 |
| References..... | 43 |
| Appendix: Bibliography | 46 |

Preface

This paper is one in a series about expert witness-related issues developed by the National Clearinghouse for the Defense of Battered Women. The other papers include:

- *Advocates as Expert Witnesses: Weighing Benefits and Drawbacks* by Cindene Pezzell
- *Domestic Violence Expert Testimony: Legal Settings and Issues* by Cindene Pezzell
- *Domestic Violence Expert Witnesses: Tips to Help Prepare for Your First Case* by Scott Miller and Melissa Scaia
- *Domestic Violence Expert Witnesses: Immigration Proceedings*, Noël Busch-Armendariz and Edna Young

Between April 2013 and November 2016, the National Clearinghouse conducted 15 webinars related to the use of expert witnesses. Topics include weighing possible benefits and drawbacks of advocates being experts, use of expert witnesses in immigration proceedings involving victims of battering, lessons learned from the witness stand, and the use of expert witnesses in civil legal proceedings. Except for this paper, the papers in the expert witness series are based on the webinars.

Download the papers at <http://www.ncdbw.org/>.

Find the webinars at http://www.ncdbw.org/experts_recordings.htm.

Karla Fischer, the author of this paper, was trained as a lawyer and as a psychologist. She taught at Duke University from 1992 to 2000, where she conducted domestic violence-related research projects. Since 2000, she has taught at the University of Illinois College of Law. She maintains a criminal law consulting practice, serving as an expert witness in cases involving the psychology of domestic violence, including testimony on behalf of victims charged with killing their abusive partners and coercion- or duress-related crimes. She currently directs the Domestic Violence — Immigration Clinic at the University of Illinois College of Law where law students learn to represent undocumented victims of domestic violence seeking immigration relief.

Introduction

Successful self-defense claims in homicide cases are rare. An acquittal of any homicide charge occurs in only 30% of all cases (Bureau of Justice Statistics). Self-defense claims often fail at trial because the unique facts of each case make it difficult to predict how jurors will react.

Battered women's self-defense cases are often complicated, involving many witnesses, exhibits, and complex arguments.¹ Emotions run high among the case participants, as well as among the family and friends of the decedent and defendant.

Although "battered woman defendant" cases involve the same self-defense laws as those that apply to any other defendant, there are additional hurdles that must be overcome for battered women's self-defense claims to succeed. For instance, it is likely that the jury will need to hear about the defendant's experiences of being abused by the decedent to properly assess her self-defense claim. However, common myths and misconceptions about domestic violence and domestic violence victims may cause fact-finders to incorrectly evaluate facts, assess credibility, and determine culpability. The goal of this paper is to assist the reader in understanding and applying factors that increase the success of battered women's self-defense arguments.

AUDIENCE

New and experienced domestic violence expert witnesses who conduct domestic violence evaluations and give case-specific testimony are the intended audience for this paper.² Others who work with battered women defendants, such as defense attorneys, investigators, mitigation experts, and domestic violence advocates, may also find it helpful. Experts who provide general testimony, such as advocate experts, may find this material helpful as well. Even experts who find that some this paper is beyond the scope of their expertise may benefit from much of the content.

¹ The term "battered woman" reflects the gendered nature of domestic violence, where four out of five victims, including intimate homicide victims, are women (Catalano, 2012). The research literature on domestic violence, the relevant appellate case law, and my twenty-plus years of experience as a testifying expert are centered around heterosexual relationships where women are victims. The term is not intended as an exclusion of defendants who do not fit this paradigm; I have consulted on cases where men are the victims and where defendants are members of the LGBTQ community. Whether battering and its psychological impact on the defendant fits is an open question for the consulting expert and the defense attorney to answer in any specific case

² Practitioners who serve as expert witnesses may use different terminology to describe their interview with or evaluation of a battered woman defendant, such as "forensic assessment" or "forensic interview."

The purpose of this paper is not to teach the substantive psychology of domestic violence, but to help expert witnesses apply their expertise about domestic violence in relevant ways to self-defense cases. Although this paper is about self-defense cases, experts may find it helpful in other settings in which a battered woman is the defendant, such as assault cases, child welfare proceedings, or family court actions. Because my experience has been primarily as an expert witness in cases involving women who have been battered by their male partners, the paper addresses the dynamics of battering in the context of heterosexual relationships.³

The bibliography included in the Appendix provides additional resources related to the topics and aspects of domestic violence discussed in this paper, including:

1. The broad and varied types of domestic violence, including physical abuse, sexual assault, emotional/psychological violence, financial and familial abuse
2. The centrality of coercive control in domestic violence, including the distinction between this model of domestic violence and “battered woman syndrome.”⁴
3. The common coping strategies used by victims of domestic violence, including those puzzling to laypersons
4. The psychological response to trauma, including the physiology of fight-or-flight reaction and the effects of chronic and/or repeated trauma
5. Brain injury caused by domestic violence, and the medical effects of strangulation

Applying what we know about domestic violence to self-defense cases is often an exercise in re-education, as most of what laypersons believe about how violence impacts victims is simply wrong. Battered women’s defense attorneys use domestic violence experts to present background information — both general information about battering and specific information about the defendant’s personal history of experiencing violence — that educates the judge and jury about domestic violence and illuminates the context of terror and trauma that coexisted during the homicide.

A domestic violence expert who testifies in support of a battered woman’s self-defense claim assists a jury in understanding the defendant’s fear in three broad ways. Expert testimony can help the defense attorney:

³ When I have consulted on cases involving women defendants with female partners, or male defendants charged with violence against their female partners or other female family members, I have approached the case as if it were an open question or hypothesis about whether these same dynamics would apply. In general, I have found they have.

⁴ The National Clearinghouse favors the use of the term “battering and its effects” to describe lay and expert evidence regarding a defendant’s experiences of abuse, including “the nature and dynamics of battering, the effects of violence, battered women’s responses to violence, and the social and psychological context in which the violence occurs” (Osthoff and Maguigan, 2005). The term “battering and its effects” is a more accurate and inclusive term for what was initially labeled “battered woman’s syndrome” and is now widely used by courts, legislatures, and in the scholarly literature. However, it must be noted that “battered women’s syndrome” still appears frequently in statutes and case law.

1. Describe how a battered woman's assessment of the danger she is in at any given moment is grounded in the catalog of past abuse that she has experienced with her abusive partner or ex-partner. By a "catalog of abuse," I mean that battered women are the experts on the history of their abuse, the acts their abusive partners can commit, and the cues that signal his abuse is escalating into increased danger.
2. Present a portrait of a battered woman's fear of being killed as based on an informational scan of the setting that led to the killing. Such a scan includes the abusive partner's nonverbal behavior, threatening statements or behaviors, and/or the battered woman's judgments about the potential lethality of her abusive partner's violence.
3. "Connect the dots" between the battered woman defendant's history of abuse and the psychological and physical events of the time around the killing. The domestic violence expert can help illustrate how the battered woman's experience of abuse produced a reasonable belief that the decedent was about to harm or kill her. The domestic violence expert can explain why the battered woman defendant's fear of being harmed or killed was not a product of insanity or over-reaction, but rather a reasonable assessment based on her experience of exposure to the decedent's violence.

This paper explores these three ways that testimony by a domestic violence expert may assist the jury in understanding a battered woman defendant's case. The discussion focuses on the two most common problems that arise in battered women's self-defense claims: (1) when the prosecution claims that the defendant was not battered, and/or (2) when the prosecution concedes that she was battered, but argues that her actions do not constitute self-defense. Usually both arguments are asserted, but if the fact finder does not believe a defendant was battered by the decedent, they need not go further and decide if it was self-defense. A negation of prior victimization effectively eliminates the possibility of self-defense. This paper presents possible strategies for domestic violence experts to use in addressing these problems through their testimony.

SELF-DEFENSE LAW

Any discussion about self-defense claims and the relevance of expert testimony requires a preliminary discussion of self-defense law. An in-depth exploration of self-defense law in a particular jurisdiction is beyond the scope of this paper. Domestic violence experts, however, need to have a general idea about how the law applies in the jurisdiction in which they are testifying and to explore any questions with the defense attorney who is retaining them.

Self-defense, at its legal and psychological core, is about the defendant's fear of being attacked and/or killed at the time that she used lethal force. Whether a battered woman defendant was acting in legal self-defense does not turn on how

many stab wounds she inflicted or how many gunshots she fired, whether the parties were standing or sitting, whether there is a paper trail of evidence that the defendant was abused, or any other circumstance that may, at first blush, make a self-defense claim more complicated. Rather, at its most basic level, a successful self-defense claim explains to the jury why the battered woman defendant was so afraid of her abusive partner at the time that she picked up a weapon to defend her life, and why she was reasonable in fearing that the decedent would seriously harm or kill her.

In most jurisdictions, self-defense involves establishing that the defendant had an objectively reasonable belief that she was in danger of imminent (or immediate) serious bodily injury or death by the decedent; and, that the defendant had an actual, subjective fear that the decedent was about to cause serious bodily injury or death to the defendant. Individual states may also require: (1) that the force the defendant used was proportionate to defend herself against the harm she faced, (2) that the defendant was not the initial aggressor, and (3) that the defendant tried to retreat before using force in certain circumstances. This last element, the retreat doctrine, varies widely by state and is interpreted inconsistently by prosecutors and judges.

It is advised that experts testifying in cases involving battered defendants review the elements of the charges and the corresponding self-defense law with the attorney before testifying to ensure that the testimony is as relevant and helpful to the jury's deliberation process as possible. To open this discussion, I often ask attorneys what "bad facts" they need to have explained by an expert. Most defense attorneys, even those experienced with murder cases, have not presented a self-defense theory, nor have they usually worked with a domestic violence expert.

Challenge: Claims that the defendant is not (really) a battered woman

Introducing skepticism to claims of a history of abuse is an easy way for a prosecutor to pull the rug out from under a defendant's self-defense claim, while simultaneously evoking a handful of the most common myths to encourage disbelief that the defendant was abused. These stereotypes undermine the defendant's credibility without ever calling her a liar. By educating the judge and jury about domestic violence victims' experiences, expert witnesses can play a key role in producing a fair evaluation of the defendant's self-defense claim.

The issue of a defendant's credibility is central to criminal defense in general. Prosecutors often assert that individuals accused of crimes lie to escape criminal responsibility; claiming that battered women defendants make up a history of abuse is a specific version of this claim. Experts and defense lawyers should always be prepared for the prosecution to ask repeated questions intended to negate a battered woman defendant's claim of victimization.

When women approach the criminal legal system with claims of abuse, they face a disbelief that has deep-seated cultural roots. Courts and law enforcement are often skeptical of claims of male violence against women (Coker, et al., 2015; Krakauer, 2015).⁵ Prosecutors defend against attacks on domestic violence victims' credibility when they seek convictions against batterers. These same prosecutors will turn and use the same attacks to plant doubt about the abusive experiences of battered women defendants. The skill of a prosecutor to convince a jury that a battered woman defendant is lying, even without facts to support that claim, should not be underestimated.

Defense experts should anticipate being questioned about whether their opinions would change if the information reported to the expert consisted of lies, whether criminal defendants are motivated to lie, whether "common sense" dictates that defendants inevitably will lie, and how experts are able to determine the veracity of defendants' reports. I have also had the experience of a prosecutor arguing that "malingering tests" would determine whether a defendant was lying and my failure to administer one was grounds to assert that I was unable to determine the truth; therefore my testimony lacked usefulness at trial.⁶ As in any criminal prosecution, battered women defendants who are shown (or are perceived) to have lied, misled, or deceived authorities about a particular fact are subject to the argument that people who lie about one thing cannot be believed about anything.

⁵ "Rape," Krakauer (2015) quotes one of the prosecuting attorneys, "is the only crime in which the victim is presumed to be lying." I believe this extends to all claims of gender-based violence.

⁶ Experts from some professional backgrounds use malingering tests, which are structured assessments designed to detect gross exaggeration and fabrication.

DYNAMICS OF DOMESTIC VIOLENCE CAN IMPACT DEFENDANT'S PERCEIVED CREDIBILITY

There are some common themes in domestic homicides that may make it more likely that battered women defendants will be subjected to sweeping generalizations about their credibility. For example, it is relatively common for a battered woman defendant to not tell authorities that she caused the fatal injuries to the decedent, and the reasons for this can be understood as part of the side effects of being battered.

It is also common for battered women to use minimizing and vague language to describe the abuse they have experienced in their accounts of what happened to authorities.⁷ For example, during recorded 911 calls reporting the homicide, a defendant might state in a calm, emotionless, and passive voice that "there has been a stabbing," or "my husband has been stabbed." If one were looking for incriminating evidence in these statements, it could be argued that these are denials of responsibility for committing the murders. Because a 911 call is often the first statement given to authorities, every syllable and intonation and emotion will be parsed as the most significant evidence in the case, especially in the absence of other evidence that suggests murder rather than self-defense.

Battered women defendants often use similarly vague or imprecise language when speaking to police, including characterizing the killing as an "accident" or reporting the events in a way that suggests a lack of agency in what happened, such as "he fell on the knife." Police and prosecutors treat such statements as an attempt to evade criminal responsibility, which flags a lack of credibility.

In response to their perception that defendants are attempting to evade responsibility, police officers interviewing the defendant may confront her and accuse her of withholding information or not telling the truth. The defendant's reaction then becomes "demeanor evidence," especially when it indicates the defendant appears uncertain, lacks confidence, or is inconsistent in her story. Officers are trained to use these cues to determine whether the suspect is lying, despite the science that reveals that trained police officers are just as terrible at judging credibility as the rest of us — rarely significantly better than chance (Benforado, 2015, pp. 141-142).

⁷ In the legal clinic where my students represent victims seeking court orders of protection, vague and minimizing language to describe violence is the norm, not the exception. Judges routinely deny petitions because of their lack of specificity. Descriptions such as "we fought" and "he jumped me" and "he called me out my name" and "he makes threats" are not descriptive enough to qualify for legal relief. Victims use vagueness and minimization as ways to cope with the way that describing violence impacts other people as well as to cope with the pain and shame of being abused.

In the Reid technique, the most dominant and prevalent method of police interrogation, officers are instructed to interpret these nonverbal cues as evidence that the suspect is not telling the truth. As Adam Benforado (2015, pp. 139-140) compellingly explains in his review of the scientific bases underlying the criminal justice system's daily practices, a person's confidence when speaking bears no actual relationship to truth-telling.⁸ It is important for an expert to identify the nonverbal cues that may be misinterpreted as indicative of lying, as they will surely be flagged by the prosecutor as relevant in the judge's instructions that jurors should look to the demeanor of a witness when judging their credibility.

There are multiple strategies available to a domestic violence expert to explain behaviors that might otherwise signal a lack of credibility. A battered woman defendant's case may warrant a closer look at the situation in which the "lie" was told. The uncertainty in a battered woman defendant's demeanor, especially if she is giving a statement shortly after the events that led to the killing, may be a function of the mental fogging of memory that would be expected as the result of physical and/or psychological trauma. The aftermath likely lasts for hours (up to several days) and in the meantime, the outer cortex, the problem-solving part of the brain, remains compromised (Van der Kolk, 2014).⁹ Chaotic or confused behavior after a killing may be explained as still under the influence of the trauma.

A police detective questioning a battered woman defendant, even what appears to be a gentle confrontation, may unwittingly evoke the dynamics of the abuse in the relationship. Questions that sound like accusations may make the defendant afraid of "breaking the rules" if she voices disagreement or acts assertive. Back-peddling or changing her demeanor to be more passive in response may have protected her during the abusive relationship when her batterer made accusations against her. A defendant may consciously or unconsciously evoke either strategy to reduce the anxiety elevated by the interview itself. When the police questioning sounds like the batterer's interrogation of her whereabouts or behavior — which can so easily occur especially when the defendant is still in the grips of recent trauma — the defendant might tell the police whatever she believes they want to hear, in the hope it will simply end.

Many defendants have said they thought if they agreed with the police or told them what they wanted to hear, they'd let them go home. My clients have often expressed a certain kind of faith — because of the strength of the internal story they feel — that

⁸ Similarly, other demeanor evidence, such as gaze aversion, "jittery legs" or other nonverbal signs of anxiety, is regularly reported as dispositive of judgments of credibility. People think that these nonverbal behaviors, like all folk wisdom, reflect credibility when the scientific studies demonstrate the opposite. Although individuals believe they can judge deception — especially those who receive training such as in the Reid technique — the research suggests people are hardly better at it than chance, and that professionals (including police officers, judges, and psychiatrists) are not more accurate than laypersons.

⁹ Van der Kolk provides an excellent summary of how traumatic events impact the brain, behavior, and cognitions during and after the trauma.

the police will certainly see their actions as self-defense. What battered women defendants do is not different from others who make false confessions to the police.¹⁰

In my experience, battered women are often afraid to correct officers or to ask questions if they are confused, which may also be the result of coercive control in a battering relationship, where a victim may be reluctant to challenge her abuser. Battered women are at greater risk of being (even unintentionally) coerced by police interrogation because the issue is not whether she used force, but why (Jones, 2011, p. 77).

While some statements made by battered women to the police need to be acknowledged and explained, an expert can also be useful in deflecting attacks on the defendant's overall credibility by conceptualizing the expert's evaluation within the scientific model of hypothesis-testing. Although the criminal discovery materials, such as the written record of the defendant's interrogation, may offer pieces of the puzzle, I often emphasize that the defendant's responses evoked by my questions — not those asked by a police detective — are my best source of data, emphasizing my approach to interviewing as based on social science methodology.¹¹

As I conduct the evaluation, the first hypothesis that I am testing is whether the defendant was battered. Listening to the story and examples that the defendant provides, I hold her answers and descriptions up against the backdrop of what we know about what domestic violence is and how victims talk about it. If there is not a "match" (meaning that if something the defendant says, or the way she says it, does not fit with what I understand about domestic violence and how victims talk about it), then I try to understand why. The more data that is provided by the defendant, and the more data she provides that is consistent with external sources, the stronger my opinion that she was battered and is not lying about it.

Often, the prosecutor's set of questions aimed at exposing how a battered woman defendant is lying culminates with asking whether my opinion would be valid if the defendant is lying about her experiences of abuse. The answer, of course, is that it would not — just as any other expert's opinion would be invalid if based on

¹⁰ "Many who falsely confess later say that they admitted to committing the crime simply to escape the [police] abuse . . . When we have an opportunity to end the stress, fatigue, and fear we are feeling in the moment, we find it hard to appreciate the ruinous repercussions that may result from admitting to something that we did not do" (Benforado, 2015, pp. 30-32).

¹¹ "Experts providing victim-specific expert testimony answer questions about the individual victim involved in the case being tried in court. Experts providing victim-specific testimony are usually, though not always, qualified to conduct forensic interviews and may also be qualified to perform psychological tests. Experts who offer victim-specific testimony tend to have a professional background, such as psychology or clinical social work, that the court will accept as a basis for an expert's qualification to evaluate the specific facts of a case. Many, though not all, domestic violence advocates do not have the background or training to offer victim-specific testimony" (Pezzell, 2016).

inaccurate information. It is important to acknowledge that we as experts can never determine what the truth is. That is the function of a jury, and I believe it is also outside my expertise. On the other hand, I approach the issue of credibility by explaining why it makes sense that she is telling the truth, from my cumulative expert knowledge. Some of these explanations are detailed in the sections below, as examples of further strategies for responding to the argument that people who lie about one thing cannot be believed about anything.

FAILS TO REPORT A HISTORY OF DOMESTIC VIOLENCE

Prosecutors attempt to use a lie (or a perceived lie) to make a direct link that a battered woman defendant is therefore a murderer. Prosecutors present the lie (or perceived lie) as an attempt to cover up murderous intent and/or behavior. To address this, experts can use their knowledge of the dynamics of domestic violence to offer alternative explanations for why defendants might lie to the police. The most common “lie” (meaning that it may or may not be deliberate) is when the defendant gives a statement that denies a history (or an extensive history) of domestic violence.

Although there have been a few exceptions, most of the battered woman self-defense cases that I have worked on have involved cases where the defendant gave a statement to police, usually soon after the killing. It is this statement, either in its entirety or cherry-picked for the most incriminating pieces, that the prosecution will use to convict the defendant.

Battered women defendants are accused of lying if they do not acknowledge or if they outright deny a history of abuse when giving a statement to police, but later report it to the expert. In the cases I have worked on, there are three common reasons why battered women may deny or fail to disclose to police that there has been prior abuse: (1) the defendant does not know that her abusive partner is dead; (2) her prior experiences with the police are negative; and (3) police are unskilled in interviewing defendants about domestic violence.

UNAWARE THAT ABUSIVE PARTNER IS DEAD

Defendants may not disclose their experiences of abuse if they don't know whether their abuser is alive or dead. It is common for police to tell battered women defendants at the beginning of an interview that they do not know whether “he is okay.” The police may deliberately conceal the abuser's death from the defendant because they believe that defendants may refuse to talk when their potential criminal liability is for murder as opposed to assault. Battered women defendants often believe their abusive partner is not actually dead and/or can be saved at the hospital because they have seen stories on television or the internet where people are revived after their hearts were stopped and/or they appeared not to be breathing.

I have observed many police interviews where the officers have mocked the defendant for not knowing the abuser was dead, or the prosecutor has done so during the officers' testimony or cross examination of the defendant. Contrary to what most people believe, laypersons cannot determine whether someone has died by simply looking at them. Even medical professionals use a stethoscope and they are the only professionals that can pronounce death.

Many battered women defendants are too afraid to physically approach their abusive partner after acting in self-defense, out of fear that their partner will not actually be incapacitated and will react by hurting them. These defendants may not have observed the same signs of death the police did when they arrived on the scene. A part of the history of abuse for some victims is that their abuser may "play possum" and deliberately lure them closer in order to attack them for fighting back or to frighten them. This is also a way for abusers to prevent their victims from engaging in future self-defense.

Trauma can also constrict an individual's senses, narrowing the input of sensory information. Some of the defendants I have worked with describe the moments surrounding the killing as if they had "tunnel vision" and many report that they did not hear the gunshots or feel the stabbing. Trauma can prevent individuals from observing the available signs of death, while the human nature of hope more likely stops defendants from accepting what they may fear has happened. Nonetheless, like anyone else, defendants cannot know that someone is dead until they are told this information by an appropriate professional.

When the defendant does not know that her abuser is dead, she may approach the police interview as if she must *protect her abusive partner* from potentially being prosecuted for beating her. She may fear that if she says the "wrong" thing and he is arrested, he will retaliate against her or otherwise enact the revenge that he has promised to engage in the past. It is extremely common for abusers to threaten victims in this way. Thus, she may lie to the police about the history of abuse and/or her abusive partner's violence leading up to the incident because she is afraid that her words can be used against him, which could in turn expose her to increased danger.

PRIOR EXPERIENCES WITH THE POLICE ARE NEGATIVE

One of the tactics of control the abusive partner may have used is turning the police against the victim-defendant. For example, the batterer in one case I was involved with told the defendant that the police would never believe her about anything because she was "just a tired old whore." Further, some battered women have experienced violence by law enforcement officers, probation or parole officers, correctional officers, immigration detention staff, or others in positions of State

authority, or may know friends or family who have been so harmed. These experiences may affect a defendant's beliefs about the police (INCITE! n.d.).

Such dynamics are often at play when a defendant gives a statement after the killing, even if she knows that her abusive partner has died. Sometimes batterers can convince their victims that if police are called to the house, the victim will be the one who ends up getting arrested. Some batterers are manipulative around the police and may have succeeded in convincing police officers to arrest the defendant in the past. Because of prior experiences with law enforcement or beliefs about the police, defendants may lie to the police (including denying that they were abused) because they are afraid that they will not be believed or because they feel that the police might use the evidence of abuse *against them*, as proof of motive for a deliberate killing.

It is a powerful mythology that individuals who are telling the truth will not withhold information or lie to the police. The message to battered women defendants is that "real" victims always know that it is their best interest to disclose abuse to the police. An expert witness' testimony about why defendants "lie" or otherwise provide inaccurate or inconsistent information can be valuable in providing an alternative and plausible explanation grounded in the defendant's experience of abuse.

POLICE UNSKILLED IN INTERVIEWING ABOUT DOMESTIC VIOLENCE

A battered woman defendant may deny a history of violence to the police because the specific questions that the officers ask do not probe directly for her past experiences of abuse by the decedent. Any defendant who is being interviewed about any crime may interpret a police investigator's question differently than intended, without either the defendant or the investigator realizing it.

There are different scenarios in which police questioning does not successfully uncover the defendant's experiences of abuse. Officers can use overly broad questions, such as "has he ever beaten you before?" Battered women may have a very idiosyncratic idea of what is meant by "beaten" that does not include their own personal experiences of being raped, slapped, held at gunpoint, strangled, or otherwise harmed and so they may deny being "beaten."

Another example of police questioning that I have observed is a vague inquiry, such as "Has he ever done anything like this before?" Again, a battered woman defendant will understand each question within the context of her own experience. Often the killing was preceded by events that were escalated in some way, not necessarily in terms of physical assault but in threats or emotional intensity. In such circumstances, the answer to whether "anything like this" has happened before will be "no" because *this time* was not like the others. In other words, her answer is not a denial

that abuse occurred but a reflection that *this* incident was more severe or otherwise different than any she had experienced before.

In one of my cases, a police investigator asked the defendant, who had experienced a trio of brutal strangulations from her partner just prior to the killing, whether she had ever been “choked” before. The defendant answered “no” and the police detective continued the interview without probing further. When I interviewed the defendant, I asked about prior “strangulations” (after specifically defining the term) and she reported several incidents — one that she said felt more like a grab and the other involved a necklace twisted around her throat. She said she had never been “choked” because the specific “chokings” that happened the night of the killing were of a different type.

The history of domestic violence experienced by battered women defendants may be minimized by the imprecision of police questioning. We know from the research literature that specific questions about abusive actions, such as a checklist or inventory, reveals more abuse than generic questions about “hitting” or “beatings” or “incidents.” It would be expected, therefore, that the extensive interviewing about abuse by an expert would extract more memory as well as more reporting of prior violence. This is not because defendants are creating a “fish story,” where the tales of what happened are exaggerated, as prosecutors might claim. Instead, the interview techniques of experts mine traumatic memory more effectively. At the same time, the experts’ approach may assist battered women defendants in acknowledging their intense feelings of shame, guilt, and grief. These emotions are often heightened in the period immediately after a killing and may depress a defendant’s desire to focus on the past because they feel so bad about the present. When aware of his death, defendants may want to avoid dwelling on events that make the decedent look bad for the same emotional reasons.

To summarize, one of the important strategies a domestic violence expert can employ when anticipating or addressing prosecutors’ efforts to discredit a battered woman defendant is to help contextualize the statements she has made to the police, whether those statements involve the defendant’s denial of violence by the abusive partner during the incident leading to the homicide or a minimization of the prior violence she experienced from her abusive partner. It is important for the expert to explain to the judge or jury that not providing every detail about the incident, not disclosing prior abuse or the extent thereof, or having inconsistencies in her statement is not the equivalent of lying. Disclosing abuse is often not a linear or straightforward process and victims often speak about their experiences of abuse in ways that are vague or open to interpretation. Finally, as trauma experts such as

Russell Strand have noted, we should expect trauma victims to give inconsistent statements, not the other way around (Strand, n.d., 2013, 2014).¹²

MEMORY IMPAIRED BECAUSE OF TRAUMA

To continue with this idea that victims of trauma are expected to give inconsistent statements, the first issue is that police investigators usually fail to see is that battered women defendants could be suffering from the effects of trauma. Investigators may understand how and when their interviewing should change for witness statements from trauma victims, but consider a suspect interview outside the parameters of trauma considerations. At trial, defense lawyers are often able to establish with detectives who are testifying that their department has a policy of waiting after an officer-involved shooting before the officer may give a statement about what happened — perhaps waiting up to 72 hours — in recognition that an officer’s memory, even though he was not a “victim” in the shooting, may be severely impaired before this amount of time has passed.

As has been consistently reported in the traumatic memory research, traumatic memory is different from normal memory (Van der Kolk, Hopper, & Osterman, 2008). In normal memory, events are captured and stored in the mind as a whole — including what that individual saw, heard, smelled, the sequence of the things that happened, how that individual felt about what happened, and so forth. In contrast, a memory for a traumatic event is fragmented and stored in bits and pieces in a person’s brain. For example, the individual’s memories of what she saw might be stored in one location, but the emotions attached to those memories might be stored in another location. This fragmentation means that it is much harder to completely recall a traumatic event. This fragmentation may also cause memories to be inaccurate, especially about peripheral details such as the order in which events occurred and relative positions of people or objects during the event. In many cases I have worked on, fragmentation plays a role when retelling the events to others and likely accounts for the disparate recall of details in the battered woman defendant’s reports of some events. Omission of details surrounding traumatic events may also be the product of the fragmented memories. Accounts of a traumatic event usually become more complete as time passes and an individual’s memory integrates the pieces.

The inaccuracy of a defendant’s traumatic memory for a specific incident, including the lethal one, also reveals a general principle of memory loss. On one hand, shifting

¹² Developed by Russell Strand, the Forensic Experiential Trauma Interview (FETI) is an approach to interviewing sexual assault victims that is designed to enhance experiential memory by incorporating best practices from child forensic interviews, critical incident stress debriefings, and neuroscience research. We are also learning from the research that the victim’s memory of events is likely to improve after a day or two, with the benefit of sleep and support, rather than deteriorate as we have long believed.

details of a traumatic memory may be the result of the faulty encoding and retrieval processes of the mind, where a fragmented piece of another memory is mistakenly linked together with the incomplete memory of the trauma — analogous to filling in a “hole” in that memory. On the other hand, basic research in the fallibility of human memory suggests that peripheral details of memories are much more likely to be forgotten than central details. The central details of a memory are what happened (e.g., he strangled her), while the peripheral details might be the sequence of events (e.g., first he pushed her down, then he sat on her) or with which hand he strangled her. The parts of traumatic memory, especially peripheral details, that are most likely to be dissociated away and not recalled until much later, if ever, are the elements of an attack that the individual finds the most difficult to cope with (Van der Kolk, 1996).

Some battered women I have worked with can more easily recall the physical details of events than their emotional reactions, including fear — and fear being what may be most important for them when testifying in court. For example, one defendant did not recall until later in the evaluation that her abusive partner had a “calm demeanor” when he strangled her. It was only after she recalled that he acted as if he was drinking a cup of coffee when he strangled her until she passed out that she also remembered that her fear escalated when he did this. Her enhanced fear was because he usually acted angry when he assaulted her and for him to act calm meant that he was capable far worse harm to her than she had imagined.

Traumatic memories of the most serious attacks are the most likely to be impaired. In the case of sexual abuse, shame runs particularly deep in response to experiencing sexual trauma and often prevents victims from disclosing abuse to individuals with whom they have ongoing relationships, including their family, spouses, counselors, and lawyers. After 20 years of conducting domestic violence evaluations, my impression is that it is much easier for victims to disclose sexual trauma to someone like me who is asking the questions for assessment purposes — meaning that the victim does not have to confront this experience in a therapeutic or extensive way during the disclosure — and whom she will not have to see again for future services or assistance, than it is to disclose to someone with whom she has an ongoing relationship. The context of a domestic violence evaluation tends to break down both the psychological barriers that impair memory and the emotional barriers that make it difficult for victims to voice these experiences.

There is a last psychological process that may be at work in battered women defendants’ cases when new details of the assaults emerge gradually over time. Dissociation makes it more difficult for someone to bring the details of the memories of trauma into conscious awareness. Dissociation refers to a process where individuals split off traumatic memories from their awareness; it is like repression, in that they have forgotten these memories and then have forgotten that they forgot. As individuals attempt to recall these events, the painful emotions attached to them can be overwhelming and they typically dissociate in the moments where they are trying to remember. When people are dissociative, asking very specific and focused

questions, as opposed to open-ended questions, results in more accurate reporting of a history of abuse, especially if the abuse has been extensive. For example, an open-ended question asking someone to “describe the other incidents when your partner was abusive” would be expected to reveal much less information, both in terms of omitted incidents and forgotten details, than a series of questions that asks whether a person’s partner ever hit, kicked, bit, or strangled her, such as the Abusive Behavior Observation Checklist — or ABOC — (Dutton, 1992) that I use asks.¹³

HISTORY OF DOMESTIC VIOLENCE CANNOT BE CORROBORATED

Battered women defendants typically have no corroboration of a prior history of domestic violence — or only minimal corroboration by friends and family. The records from official sources, even if defendants have sought help, often lack critical documentation such as patrol officer’s observations in a police report or a doctor’s evaluation of injuries in a medical record. The prosecution will argue that if the defendant were really battered in the way she claims to have been, there would be “hard evidence” of this. The defense lawyer and the expert should be ready to explain, preferably on direct examination, that it is common for battered women to not disclose the abuse to family or friends (or do so in a limited way) and it is far more likely, statistically, that the abuse will never be reported to official sources.

Cultural stereotypes teach that a battered woman would call the police or file for an order of protection as a first step towards achieving safety, but the research negates this. Only a tiny proportion of domestic violence incidents lead to a police call and only a fraction of those result in a police report and/or arrest (Klein, 2009, p.5). We know very little about the victims who may, like the defendant, have never disclosed the abuse to anyone and may have denied it to themselves for years.

Battered women do not reach out for help for two key reasons: (1) their emotional response to the abuser’s threats and the interpersonal dynamics of abuse in the relationship and/or (2) systemic barriers to receiving assistance from service providers, including discrimination, such as institutional racism and/or sexism, that battered women are aware of or directly encounter. Part of the emotional experience of being abused is to be isolated or actively restricted by the abuser from breaking the silence to others, including friends and family members.¹⁴ Victims report being ashamed to let others know of the abuse and control in their lives and/or may anticipate guilt from disclosure, lest people think badly of him. An abuser may

¹³ See the ABOC at <http://training.familyvio.csw.fsu.edu/manuals/cbt/rural/aboc.pdf>.

¹⁴ Beth E. Richie (2012) details the experiences of low-income Black women in urban communities, including queer and transgender or gender non-conforming women, who are more likely to be excluded from mainstream services for battering, and more likely to end up arrested and in prison.

recognize that his victim is much easier to control if she is isolated from others and may preempt any attempts to disclose by threatening to hurt her or people close to her if she tells anyone about the abuse. An abuser might also convince the victim that no one would ever believe her word against his or that her report will trigger negative consequences for him or the family, such as job loss or involvement of child protective services.

Sometimes when battered women do seek help, either through the informal sources of family or friends or the formal institutions set up to help, those individuals or agencies fail to respond appropriately. Family members and friends may not hear disclosures of abuse in the way that the victim believes she has told them. One defendant I interviewed recalled that she fled to her brother's house after the first incident of physical violence and told him "everything that had happened." It was many years later, but the brother reported to me that the defendant had told him only that she "felt threatened" by her boyfriend and it did not provoke much concern in him. The defendant's brother was very committed to helping his sister's case, including paying for her defense, but he could not recall her disclosing any violence to him.

Even when a victim reaches out to formal sources of help, the abuse she discloses may not be documented. Police do not always make reports of domestic violence calls, doctors may not record what patients tell them in their notes, and community agencies may not keep records of initial inquiries. In numerous cases I have worked on, defendants have remembered disclosures that their attorneys have followed up on with private investigators, only to pursue leads that eventually dead-ended without records or witnesses. When it has been years, even decades, since the defendant's disclosures of abuse, finding corroboration is undoubtedly more difficult.

A lack of corroboration may also be linked to the dynamics of abuse in the relationship. Batterers often prevent victims from accessing services. Many abusive men can inflict pain and suffering without producing visible injuries from their attacks, either because marks are hidden underneath clothing or because the victim avoids other people until the bruises fade away. Sexual and non-physical forms of violence typically do not leave any physical signs. Even children living in the house often do not witness the violence if the abusive partner is careful to avoid engaging in it when the children are home and/or awake. Children who grow up in abusive homes may not acknowledge the abuse that they do witness or their guilt and grief over losing one parent may result in an unconscious denial of what they have seen.

Reporting the abuse to authorities does not necessarily mean that there will be adequate records made that verify the defendant's reports. If the battered woman defendant has sought help from a physician or a hospital or the police, she is not in control of what got documented or recorded. On their own initiative, physicians may choose to omit disclosures of abuse for a patient's privacy. Police reports may not

include accurate statements by the defendant or other witnesses. It is not uncommon for police to fail to document incidents.

It is important to emphasize that the definition of a battered woman does not turn on whether she sought help after experiencing abuse. A battered woman who does not seek help for the violence is no less battered because she did not.

EXPERT'S CREDIBILITY IS ATTACKED

In some cases, prosecutors indirectly attack the veracity of the defendant by going after the credibility of the expert witness. Domestic violence experts are subject to scrutiny about their personal lives and/or politics on the speculative theory that this may make us biased in favor of anyone identifying as a domestic violence victim. Occasionally, I and other experts have been asked about our marital status and sexual orientation. I have also fielded questions about my beliefs on the death penalty and the criminal justice system.

Prosecutors attack the expertise of experts by challenging the basis of their expertise. If the expert is not a clinical psychologist, then she cannot be qualified in "mental health." It is in the best interests of the state to claim that experts on domestic violence must have certifications or licensures in some mental health field and to deny that domestic violence is an interdisciplinary field. However, domestic violence experts who are clinical psychologists are criticized because they lack research training or experience or university positions.

A defense lawyer can help illuminate for the jury that there is more to a domestic violence evaluation than nodding sympathetically for a few hours while a defendant spins a sad yarn about her life as a victim, as the prosecution may have characterized the expert's work. The research-based reliability of the interviewing tools and interview techniques used by the expert can be explained. For example, I use the Abusive Behavior Observation Checklist — ABOC — (Dutton, 1991) and regularly testify to its validity and development as a research instrument and to how it helps me generate a complete portrait of the domestic violence the defendant has experienced. On cross examination I have sometimes been asked whether the ABOC is available on the internet, with the implication that somehow the defendant could both access it in jail and somehow know that I would use it in evaluating her and study ahead for her answers.

Experts should also expect to be attacked for basing their conclusions on their interviews with the defendant, without additional corroborating information. The social science methodology of interviewing people, however, does not include or require corroboration of the abuse. I'm almost always asked on cross why I didn't talk to this witness or that witness (or otherwise do exactly what police detectives do). When I conduct a domestic violence evaluation I often learn of potential evidence

that could be used to corroborate the defendant's reports of abuse. If the evidence is an official record, either medical or legal, I pass this information along to the defense attorney and suggest that they obtain it. The way I understand being mindful of the boundary between expert and lawyer is that I am an opinion expert while the lawyer is responsible for investigating and establishing facts.

It is also important not to confuse what an expert does and what police and defense investigators do. Psychological experts are not investigators who look at all the same evidence and come up with an opinion favorable to the defense. My expertise is not in combing through forensic reports and witness accounts, finding inconsistencies, and proclaiming the truth. Instead, my expertise is on sorting through the psychological data, understanding why there might be inconsistencies with other data sources, and making sense out of it all.

On the other hand, there are some kinds of corroboration I rely upon, not as proof that the defendant is telling the truth about the abuse but as vehicles to help me understand the defendant's experience more fully. If the defendant reports to me that she disclosed the abuse to others, I attempt to interview these family or friends, usually by phone. Sometimes the family or friends report they noticed the defendant's isolation once the abusive partner came into her life, observed injuries on the defendant or damage to her home, or even directly observed threats or acts of violence. Friends and family sometimes have stories about ways that the batterer attempted to prevent the family member or friend from communicating or interacting with the defendant. One family member, for example, told me that every time she visited the defendant, the batterer started cleaning his numerous guns on the table across from the room where they were sitting. Other friends or family members have reported witnessing humiliating emotional abuse which evoked such shame in the defendant that she refused to take their calls or answer the door again.

DEFENDANT ALSO USED VIOLENCE

The discussion of "mutual" violence, or the idea that the defendant was the repeated perpetrator of violence against the decedent, is common ground for prosecutors in their cross-examination of domestic violence experts. Many prosecutions include testimony by witnesses who may have truthfully observed the defendant engage in behaviors that appeared controlling and/or abusive. There is nothing in the definition of "battered woman" that excludes victims who engage in violence against their perpetrators. The psychological effects of being battered are not undone by her own use of force. I often see cases where battered women have committed one or more acts of physical violence — sometimes decades prior to the killing, sometimes days earlier — but every single one of these cases also involved a decedent whose use of violence to support an ongoing pattern of coercive control greatly exceeded the isolated use of violence or force perpetrated by the defendant. Domestic violence

experts can help judges and juries analyze the defendant's actions in the context of living with a partner who is engaging in a pattern of coercive control.

Battered women defendants may have used force against their abusers in self-defense or there may be another context for their use of violence. Victims can lash out in retaliation for their abusive partner's recent violence against them. Using retaliatory violence against a batterer is often perceived as safe when it is done in front of others — including in front of police. Nearly every police officer I know has a story of the victim who slapped or punched the abuser after he'd been put in handcuffs. A victim's use of violence also may be a way to feel powerful in the moment. I once worked with a battered woman who used to pound on her partner with her fists after he passed out from drinking.

Battered women may also suspect an imminent attack and choose to "start" a fight to get it over with or to attempt to minimize the harm. An abusive partner may taunt the victim in public, knowing that it will provoke her into what he considers a weak attack, which he will then use against her at another time. For example, he will later mock her for her lack of ability to hit hard enough to cause him pain or tell her that she is just as bad as he is because she hits him, too. By using an abuse inventory such as the ABOC, an expert can pinpoint how often the battered woman defendant engaged in violence and establish the context for her use of violence when the batterer has engaged in a pattern of coercive control.

"Mutual" violence is probably not actually mutual. There is a substantial difference between a case of true mutual violence, where both partners assault each other in parallel ways, and a case where a woman who is a victim of battering uses violence to resist or otherwise manage the reality of the battering. Three factors are useful to analyze: (1) the intent behind the violent actions, (2) the force used, and/or (3) the frequency of the violent actions.

Battered women defendants are often keenly aware of the motives behind their partner's violence, including beliefs such as "he wanted to make me upset," while their own use of violence is internally produced: e.g., "I was fed up" or "I knew that a beating was coming, and I just wanted to get it over with." Even when using similar forms of violence, partners can differ greatly in their ability and willingness to use greater force that injures and/or frightens. A "minor" slap, for example, can leave no marks or it can shatter an eardrum. A punch to the forearm can result in a red mark or eventual bruise or it can break the bone. Kicking someone with steel-toed boots is likely to be much more painful than kicks with bare feet. If the defendant's use of force — whether due to her lesser strength or lesser willingness to harm — was less than her abusive partner's uses of force, it cannot be said that the violence was truly "mutual," even if their acts were the same. Similarly, if a defendant used violence less frequently than her partner, then the violence was not mutual.

It is also important to emphasize that even if the defendant engaged in violence against the batterer, this does not negate the psychological impact of his violence against her. Even if she has slapped or hit or kicked him, his assaults against her are no less frightening or threatening and are just as physically painful and predictive of future and perhaps lethal violence.

A prosecutor may argue that the battered woman defendant was the batterer because of threats she allegedly made against him. Witnesses can come out of the woodwork after a domestic violence homicide and repeat statements the defendant made about her abusive partner years or even decades earlier. Without further exploration, a barstool “confession” that she was going to “beat his ass” because he was spending the family money on drugs and alcohol or threats that she would leave, harm, or kill him if he “ever” beat her, or similar statements, can support the prosecution’s theory that *she* was the batterer or that she planned the attack against him. Assuming these witness statements are available prior to a defense expert’s evaluation, talking with the defendant and assessing whether she said these things and, if so, what she meant by them may reveal that such statements were a product of psychological coping and not indications that she battered the decedent or premeditated his death.

BATTERED WOMAN APPEARS AUTONOMOUS

Because coercive control is critical to the experience and definition of a “battered woman,” the prosecution can and usually will use any perceived autonomy, independent activities, or open conflict between the decedent and the defendant to argue that the defendant was not battered. She was not “really” battered if she had her own checking account, worked outside the home, purchased a gun at a pawn shop, or lived in her own apartment. Although the logic of the prosecutors may seem absurd to a domestic violence expert, it may be explicitly necessary for the expert to contextualize how complicated an assessment of control can be and how its effects can be idiosyncratic to each individual battered woman.

Just as it is not unusual for battered women to use violence against their abusive partners, battered women are not always cringing and flinching in the corners of their homes, waiting to be told what to do next by their abusers. When describing to a jury the nature of control that the batterer held over the defendant, I emphasize that a batterer’s wielding of control is rarely all-encompassing. In other words, most abusers cannot be bothered to control every aspect of a victim’s life, from her clothing to her employment to her mothering to her hobbies. Some batterers focus their control tactics on the arenas they care most about, such as her sexual availability to him, her money, or how she spends her time out of work. Many batterers are content to let the household and matters involving the children be “women’s work.” He may want her to work outside the home so that he can spend her money or their household can

have greater financial resources. He may be willing to allow her to pursue activities in her spare time if she is home or available when he wants her to be.

Battered women may appear to have freedoms that one would not expect from a severely controlling man. A batterer may “give away” control that he can just as easily take back. A batterer needs only to take as much control as he needs and this rarely includes all domains of his victim’s life. Similarly, a batterer does not need to threaten to kill his victim every day to maintain control over her, when other threats are enough to reinforce his control over her. On the other hand, if threats to kill her cease to motivate her to meet his demands, he will often escalate his threats to include her children, family, friends, or pets.

BATTERED WOMAN DEFENDANT DOES NOT OTHERWISE “FIT THE PROFILE”

The extensiveness of stereotypes and mythology surrounding domestic violence can result in numerous claims by prosecutors that the defendant does not “fit the profile” of a battered woman. The prosecution may use their own expert to establish that most battered women are like “this” (e.g. smaller than their abusers, have children with their abusers, are financially dependent on their abusers). After confirming that this defendant is not like “this,” the assertion is that the defendant was not truly battered.

Prosecutors often interpret some types of abuse history as outside the profile of a “real” battered woman, especially when they must grudgingly acknowledge that the abuse is corroborated. There is not a specific type of violence required to satisfy the definition of “battered woman,” however, nor any measure for what kind of abuse history qualifies as an adequate basis for acting in self-defense. The prosecution’s assertion to the contrary may be an attempt to distract the judge or jury from properly focusing on the relevance of the evidence of abuse to an understanding of why she was so afraid of her batterer. The prosecution may be trying to convince the fact-finder that the real issue is whether the defendant is a battered woman.

PROSECUTION’S EXPERT WITNESS CLAIMS THE DEFENDANT IS NOT A BATTERED WOMAN

It has become more common for prosecutors to have the defendant evaluated by their own expert, although state law does not always permit the use of an “adverse expert” for evaluation and/or testimony. Adverse experts may rely on any the points discussed above to conclude that the defendant is not a battered woman. In one case I worked on, the defense lawyer defeated the prosecution’s motion to have the defendant evaluated by the prosecution’s expert by arguing that the domestic violence evaluation I conducted was not a “psychiatric evaluation” according to the

statutory language that defined when the State could force the defendant to be evaluated. Domestic violence experts can suggest that defense lawyers object to an adverse evaluation as well as challenge the expertise of the evaluator, particularly when the prosecution's expert is a mental health professional who regularly works for the prosecutor in criminal mental health cases but does not have specific experience in domestic violence.

In my experience, the prosecution's expert may acknowledge that the defendant was abused but claim that the level of violence disclosed by the defendant was minimal compared to the defense expert's report. As discussed earlier, if the prosecution's expert relies on open-ended questioning about abuse rather than a specific assessment such as the ABOC, a conclusion of minimal violence would be the expected result.

Prosecution experts often confuse the issues. For example, they may conclude that even if the defendant experienced abuse, she was not a battered woman or "didn't suffer from battered woman syndrome." Occasionally the expert concludes that the defendant is not insane (an opinion I would usually concur with), even when her sanity is not raised as an issue. I have also worked on cases where the prosecution expert's written opinion does not state a psychological opinion, but rather a legal one, such as "the defendant bears ultimate culpability for the killing" or "the defendant was not in fear of the decedent at the time of the crime." Explaining the confusing opinions of the prosecution's expert and distinguishing them from one's own to the defense attorney can be difficult. A focus on the expertise and methodology between the experts goes quite far in making sense of the differences.

DEFINITION OF "BATTERED WOMAN"

To counter the prosecution's interpretations that the defendant was not truly a "battered woman," it is useful for the defense expert to proactively assert a definition of battering based in the research literature. In my opinion, there are three elements that define what makes someone a "battered woman": (1) the experience of one or more forms of abuse; (2) abuse that occurs in a relationship context of coercive control and manipulation; and (3) the use of common strategies to cope with the violence and control in her relationship, including denial and hiding, minimization, and/or rationalization.

EXPERIENCE OF ABUSE

All forms of abuse must be considered, not just physical abuse. For example, many victims consider a punch to be physical abuse, but not when their partner grabbed, shoved, or threw objects at them, pulled their hair, or intentionally drove the car recklessly when they were passengers. Sexual abuse is justifiably a separate category from physical abuse, but it is also physical in nature, even without a physical assault

accompanying it. In response to specific questions such as those posed in the ABOC, it is common to uncover physical abuse that a defendant has not acknowledged to her own lawyer or to herself (Dutton, 1991).

Although it is somewhat rare, in my experience, for defendants to not have experienced physical abuse, psychological abuse can be the basis for a theory of self-defense because the victim reasonably believes he will carry out threats to physically harm her and/or others. More sophisticated and/or educated abusers may be particularly skilled at controlling victims without physical assaults. There is no magic number of incidents that a victim must have experienced to be considered a battered woman.

CONTEXT OF COERCIVE CONTROL AND MANIPULATION

Similarly, there is no bright-line test for how much control and coercion a woman must experience from her abusive partner before she is a “battered woman.” As discussed earlier, some batterers fit the stereotype of the man who keeps a tight rein on the minutia of his family life, laying out an extensive list of rules that might range from what the children can watch on television to the clothes the victim is allowed to wear. The victim may not be allowed to work, call or visit friends, or go outside the home when he is at work. A batterer might give a victim a certain number of minutes to go shopping or run errands, enacting punishment if she is more than a minute late.

In other situations, the control the batterer wields might be more focused on trying to maintain the relationship after she has broken it off. He might literally break into the victim’s house and force himself into her life when she does not want him there, but cannot or is too afraid to make him leave. A batterer might use manipulation rather than control — including threatening his own life or threatening to obtain custody of the children if she leaves him — to elicit a particular response or action from the victim. The tactics of control usually manifest in the multiple ways that the batterer has controlled or attempted to control the defendant.

COMMON COPING STRATEGIES

The third element in the definition of “battered woman” refers to the common coping strategies victims use to reduce the stress of living in a coercive and violent relationship. These strategies are more psychological in nature, meaning that they tend to be a battered woman’s internal responses to battering, as opposed to external behavior that others can see. For example, “denial” can occur when a battered woman responds to a question from her mother about the bruises on her arm by explaining that she “ran into a door.” However, denial is most often what a victim tells *herself* to cope with her partner’s ongoing violence and control and the fear generated by these experiences. “He doesn’t mean to hurt me,” is one thing a victim might tell herself, particularly in the early days of the abuse.

In cases of psychological abuse, “gaslighting,”¹⁵ or making the victim feel “crazy” because she cannot trust her perception that abuse happened, is common. Gaslighting can cause a victim to deny that anything at all is wrong in her relationship — to believe that she just “makes things up” or is prone to exaggeration or distortion. Examples of gaslighting from cases I have worked on include an abusive partner who would take money from the cookie jar where rent money was saved and then claim that he had not done it; an abusive partner who would coerce the battered woman into taking the children to a babysitter so they could go out at night and then taunt her that she was a bad mother for leaving her children; and an abuser who engaged in extramarital affairs but would accuse his partner of cheating when she had not. Denial that one is being abused, whether from gaslighting or other coercive tactics, is a powerful way to pretend that one is not living in a relationship where love, pain, and/or fear co-exist, and this pretense may be adaptive to victims’ survival if their batterer wants them to act as if they are “perfect family.”

Other common psychological coping strategies some victims engage in include physical “hiding,” such as not leaving the house if they have observable injuries, or wearing long sleeves or hats or make-up to cover up injuries. Such strategies may be an effort to avoid inquiries from others that could put the victim in greater danger of retaliatory violence by the abusive partner and/or an attempt to avoid feeling the shame and embarrassment that many victims feel when others learn that the victim has been hurt by her partner. Other victims may not hide at all or their hiding may be psychological — they may pre-emptively avoid family and friends during times of stress or tension, or they may censor themselves emotionally or verbally from communications that might implicitly reveal that their partner is abusing them.

Minimization and rationalization are both coping strategies that can be external or internal. If the defendant has disclosed the abuse to others, she may have sanitized it and diminished its severity to the point that friends and family might not have recognized that she was being abused. In many cases, minimization and rationalization are ways for victims to internally cope by telling a story to themselves that blunts the pain of living with abuse. Many victims believe that what they have experienced, even if it seems to an outsider to be truly horrific, is nothing in comparison to newspaper or television accounts (real or fictionalized) of domestic violence.

This three-element definition of a battered woman frames my explanation of battering to a jury. This definition also helps track how the abuse and control

¹⁵ “Gaslighting” is a psychological term that comes from the 1944 George Cukor film starring Ingrid Bergman and Charles Boyer (and the 1938 Patrick Hamilton play on which it is based). In the film, a husband manipulates his new wife into doubting her own reality. Among other forms of deception, he repeatedly denies lighting the gaslights of the couple’s nineteenth-century home, knowing that when one light is lit, it reduces the gas supply, causing nearby lights to dim. The wife believes she is losing her mind when she repeatedly sees the lights dimming, and when her husband falsely tells her that she has engaged in behaviors that she has no memory of.

manifested and changed over time, emphasizing its dynamic nature. Understanding the nuances of the violence the battered woman defendant has experienced, the various forms that control that her abusive partner exerted or attempted to exert over her, and the ways that she coped with the violence and control all reveal the important dynamics of the relationship as she has experienced it.

Challenge: Prosecution argues the defendant did not act in self-defense

The second type of broad challenge in prevailing on a claim of self-defense is convincing a jury (or judge) that the circumstances surrounding the killing were consistent with self-defense. The expert's job here is to "connect the dots" between a battered woman defendant's history of abuse and the circumstances of the killing. Battered women's self-defense often does not conform to the stereotype of what laypersons imagine (or fantasize) that self-defense to look like, namely, something that involves a sudden attack by a stranger with a weapon. A successful self-defense claim by a battered woman must also rise above the cultural beliefs attached to "battered woman syndrome" that implies that women who defend themselves are irrational or crazy.

The work of domestic violence experts can be distilled to this task: educating others — beginning with the battered woman defendant's attorney and continuing through to the jury if she goes to trial — about how the defendant's experience with her abusive partner gave her the ability to accurately assess that she was in lethal danger at the time of the incident. In other words, the expert helps identify relevant facts that may be missed a layperson focusing on how the abuser was unarmed or how many times he was stabbed, thereby helping the jury understand why the defendant was so afraid of him at the time of the killing.

For some battered women defendants, the central issue may not be the specific violence at the time of the killing, but violence and fear that have been so ever-present that the defendant perceived an attack was always imminent. For these victims, it is as if a loaded gun were always trained on her head, ready to go off, regardless of whether the abuser (or a gun) was physically present at any given moment. Defendants in these kinds of cases believe a version of "I knew that he could kill me at any time." Defendants may experience their abusers as focused on a desire to kill them, often facilitated by repeated and very specific death threats, accompanied by a plan or belief that he could get away with it. Some defendants believe that the kinds of physical assault their abusers repeat are highly likely to cause death or serious harm. They live in constant fear that he will "choke me too hard" or knock her down hard enough to cause a head injury. In this kind of case, it may be helpful for the expert to explain that understanding the defendant's fear of imminent danger has less to do with the abuser's proximity to her and more to do with how what he said or did signaled that she was going to be in danger in the very near future.

Regardless of the specific nature of the prior history of abuse, a prosecutor will attempt to defeat a defendant's self-defense claim by asserting that certain facts or circumstances surrounding the killing are inconsistent with self-defense. "It isn't

self-defense," a prosecutor will insist, "if she bought a gun only a week before she shot him with it" or "if she reloaded the gun" or "if he was unarmed at the time." Among the cases I've consulted on, this approach and these idiosyncratic definitions of self-defense have characterized most of what I've seen in the criminal justice system. In the following discussion, the most common assertions of "but it isn't self-defense" are explained, along with potential responses that illustrate how those factual circumstances can still be consistent with self-defense.

ACQUIRED A WEAPON BEFORE THE INCIDENT

Recent weapons purchases pose a potential hurdle to a successful self-defense claim because prosecutors consider the timing as well as the decision to acquire a gun as two pieces of evidence that show that the killing was premeditated. Usually premeditation is defined as consideration or thought of killing the individual, hence a history of violence experienced by the defendant may be used against her as motive ("revenge") for the abuse committed against her. A thorough evaluation by an expert and careful examination of the facts may reveal an alternative explanation that is consistent with self-defense rather than a specific desire to kill the decedent out of revenge. Premeditation, as it's understood in most state laws, is what distinguishes first degree murder (and the often-resulting mandatory sentence of life in prison without parole) from second degree or other forms of homicide. If a domestic violence expert can help cast reasonable doubt that the defendant engaged in premeditation, this can be the difference between a first-degree conviction and a conviction of a lesser offense.

Because the defendant purchased a gun, it doesn't mean that she wanted to kill her abuser with it. In one case I worked on, the purchase of the gun was tied to the coercive control of her batterer, as were most of the defendant's actions. She purchased the gun because he demanded she do so, because he believed she needed to protect herself from the "dangerous conditions" in the changing character of their neighborhood. In some cases, the abusive partner may have been ineligible to purchase a gun because of a criminal record or mental health history. Understanding the circumstances of the gun purchases may illuminate the pattern of coercive control in the relationship or otherwise explain the acquisition of the gun as something other than bought for a murderous purpose.

In another case, the defendant purchased the gun earlier in the day that she shot her abusive partner. This sounds bad as a circumstantial fact, but the timing was partly coincidental and partly preparatory. When I asked about the history of the abuse as it related to the purchase of the gun, the defendant reported that she applied for a gun permit on the same day that she sought and obtained an emergency order of protection against her ex-boyfriend. It was coincidence that the length of time for approval of a gun permit is the same duration as an emergency order of protection (about two weeks in this state). The defendant had a court date to return for her

permanent order on the same day her approved gun permit arrived in the mail. She took the permit and purchased a handgun after court then returned home to find her ex-boyfriend inside her home. He had broken the back door and let himself in.

In this case, as in others, the defendant bought the gun for protecting herself against her abusive partner. “Aha,” the prosecutor says, “she premeditated her killing of him!” But thinking (accurately) that you need to protect yourself from a known danger is not the same as premeditating a murder. There is no requirement in the law that self-defense be spontaneous or accidental. When individuals realize that they are likely to be in future danger — as police officers do when they draw their weapons or call for backup — it makes sense that they take steps to improve their safety. I’ve used the term “anticipatory self-defense” to explain how it is not premeditating murder when a battered woman buys a gun because she believes her abuser plans to come after her.

Contrary to the perceived requirement that self-defense is only justified to repel an attack that comes as a surprise or “out of the blue,” the element of a “reasonable” perception of danger carries a presumption that defendants be rational, which naturally includes taking steps to protect themselves.

Individuals who purchase weapons to defend themselves against the strangers who break into their homes are considered reasonable. These reasonable people never know when or who will be attacking them. It should be considered no less reasonable for a battered woman, who knows she is in danger and from whom she is in danger, to secure a gun or other weapon.

In the case where my former client purchased a gun on the same day that she received permanent court protection from her abuser — after recently ending the relationship, which is why she sought help in the first place — the pattern of coercive control perpetrated by her batterer helped explain the timing. She knew that obtaining a protection order to reinforce her desire to leave him put her at increased risk for lethal harm. The timing of the purchase and the earlier request for a permit demonstrated her fear of him rather than a desire to kill him. He had threatened her about this exact circumstance in the past: “If you bring the law into my business, I will hurt you.” She anticipated that she would need to defend herself against an attack and her assessment turned out to be correct. She found him waiting for her in her home after she left court with her order and then purchased the gun. She loaded the gun before she stepped into the house because this man had repeatedly broken in. In this context, the defendant’s experiences of abuse make clear that her choices about applying for a gun permit, purchasing a gun, and loading it were a reasonable anticipation that she would have to defend her own life.

One of the myths about self-defense and battered women is that the killing of abusers is about retaliation/revenge or “snapping” rather than a legitimate need to defend against a lethal attack. The cultural minimization of the seriousness of

domestic violence makes it difficult for juries to understand how a battered woman defendant's life was in danger, particularly if the decedent was unarmed. As one prosecutor asked on cross examination, "How is it that she knew he was going to kill her this time — he'd never killed her before, had he?" At trial, prosecutors exploit the myth that domestic violence is trivial, largely "just threats," even when there have been specific acts of violence like strangulation.

If prosecutors can argue the killing was premeditated, they may be able to sway the jury that there does not otherwise need to be a motive for the killing. Motive is not an element of a murder charge, but is often part of the State's theory of the case. In my experience with battered women defendant cases, however, I have rarely seen evidence of motive, whether an extra-marital affair or an expressed desire for revenge. I can recall one life insurance policy benefitting the defendant (with a value of \$15,000, barely more than the burial costs were). In the cases I have been involved with where the battered woman defendant was acquitted of the most serious charges, it was because the defense was able to defeat the prosecutor's evidence of premeditation. In two of these cases, where the judge understood the domestic violence evidence, the defendants received a sentence of probation.

USED A WEAPON DURING THE INCIDENT

Even when the weapon is a dirty steak knife desperately grabbed from the kitchen sink or a gun she's owned for decades, the action of a battered woman defendant arming herself against an ongoing attack by her abuser is interpreted as evidence of premeditation. In my experience, prosecutors often overcharge battered women defendants with first degree murder even in the absence of specific evidence of premeditation, including times when she has injuries (identified by their own forensic nurses) and/or when the decedent attacker was also armed with a weapon. By overcharging crimes, the prosecutors attract more media coverage and can obtain higher bail, meaning that most battered women defendants will be incarcerated (often for two or three years) before a domestic violence expert is called to assist in their defense.

In cases where the degree of murder is based on the defendant arming herself with a weapon, the defense is most successful when it highlights her intended purpose for the armed action. Battered women defendants do not, in my experience, arm themselves to use the weapon. Rather, her purpose is to ward off an ongoing, threatened, and/or imminent attack. In my opinion, it's a reasonable assumption to believe that if you show an attacker that you have a weapon, especially when he is unarmed, he will back off.

Another example of a defendant who anticipated her need to defend herself was a woman who planted a kitchen knife beneath her couch cushions several weeks before she ultimately used it to stab her live-in boyfriend. This defendant had been

subjected to nearly daily assaults, almost always on or near that living room couch. A couple of weeks prior to the killing, after a particularly brutal beating, she had grabbed a knife from the sink and slashed at him, cutting his buttocks, an injury that required stitches at the emergency room. For almost an entire month afterwards he did not assault her and she thought it was her use of the knife that kept her safe during this period of respite. She thought he'd "learned his lesson." When he punched her in the mouth that last evening, she pulled the knife out of the couch and told him to back away. Instead, he lunged towards her and she jabbed at him with the knife, slicing an artery. He bled to death before the ambulance arrived.

What I have seen most often, especially in long-term relationships where the abusive partner's violence has solidified as a tactic of control, is that the victim's survival may depend on her ability to plan to keep herself safe. A battered woman defendant may feel as if she must be ready to protect herself from danger at any time. Her motive is safety and she may develop a plan and/or acquire a weapon to enact it. A defendant who anticipates the need for self-defense, especially when her experience involves arming herself or even using a weapon in a non-lethal way, is acting in rational, even expected ways, especially considering her history of abuse. In my narrative of the reasonableness of her actions prior to the killing, I attempt to transform the reasonableness inquiry into one that includes the abuser's actions. Backing off physically or assuring the obviously frightened person that you do not intend more harm seems the more "normal" response than escalated violence. Facilitating the accurate perception that it is the abuser, not the battered woman, who behaves in an unreasonable fashion — not just at the time of the killing, but in abusing her beforehand — bolsters the defendant's claim of self-defense.

By addressing the reality of her relationship, a battered woman who thinks about her personal safety in the weeks, months, or years prior to the killing does not negate a claim of self-defense. Self-defense focuses on the defendant's state of mind at the time of the killing, not the days or weeks or months prior to it. The alternate explanation of "premeditation" can be part of the refrain of the defense's case: i.e., that the defendant's purpose in picking up a weapon was for protection to stop an attack against her, not to use the weapon.

Many of the cases I have worked on over the years involve anticipatory self-defense as well as the paradoxical reaction of the abuser to escalate the violence rather than withdraw. It seems reasonable to believe that a person lunging toward you after you warn them to back off intends to harm you and is undeterred by the presence of a weapon. From what we know about the dynamics of domestic violence, the aggressive actions of batterers who respond to victims who resist their control by arming themselves are very predictable. It is as if the batterer believes that his control over her extends even when she is holding a weapon. In a similar vein, a batterer who engages in aggression after being warned to stay away is using the same tactic of control (aggression, threats, domination, etc.) that he has consistently used in the past to get her to do what he wants.

USED SEEMINGLY “DISPROPORTIONATE” FORCE

In general, self-defense laws make a distinction between “deadly” force and force. Prosecutors often argue that a woman armed with a weapon facing an unarmed man is not lawfully acting in self-defense because the force used is disproportionate. In other words, prosecutors will argue that the defendant’s actions, even if defensive in nature, were more severe than what is allowed by self-defense law. The language prosecutors use can focus on the presence of a weapon (see the previous section: *Used a Weapon During the Incident*). The battered woman’s defense must help a jury understand that prior abuse from the decedent, when it rises to lethal levels, means that the defendant would be reasonable to anticipate deadly force being used against her even when her attacker is not armed. Hands (and/or feet and/or body weight) can make the force used equivalent to the deadliness of a weapon.

When the batterer’s history of assaulting the defendant includes strangulation, an expert can be helpful in refuting stereotypes that being strangled is trivial or minor violence. The serious nature of strangulation is consistent with medical research that has been conducted on the subject. Strangulation is a very common and potentially very lethal tactic used by batterers, occurring in up to 68% of relationships with a history of violence (Wilbur, et al., 2001, pp. 297, 299). Even though strangulation is common, only 15% of domestic violence victims who have been strangled — including some who have died — have any visible injuries (Strack, McClane, & Hawley, 2001, pp. 303, 308).¹⁶ According to Strack, McClane, and Hawley, in domestic violence cases strangulation usually co-occurs with death threats (87%) and most victims (70%) believe during the strangulation that their abusive partner will kill them. They note that research underscores the serious nature of strangulation, both in terms of its predictive value for future lethality and because of the physical and psychological impact it has on the victim. Strangulation is one of the most powerful predictors of future attempts to kill — with or without a weapon (Glass, et al., 2008). Consequently, evidence of past strangulation indicates that a batterer is not only ready and willing to kill his victim but that he is capable of killing with his bare hands, without a weapon.

A second way that an expert can help the jury understand proportionate force is when words (threats) of lethal force stand in for physical actions. We might all reasonably find that someone who threatens to kill another person and then reaches inside his jacket presents an immediate, lethal threat. Even if it turned out he had a hanky rather than a gun, a defendant who used lethal force in that situation could still have acted in legal self-defense.

Some batterers use threats just as or more frequently than physical violence to control their partners or coerce them into meeting their specific demands. Threats

¹⁶ Another 35% of victims who have been strangled have injuries, but are not visible on photographs.

may be obvious at face value, such as threats to kill or engage in specific harm like burning down the house. Some threats that batterers use depend on understanding the defendant's history of violence, including with other perpetrators, for interpretation. "I'm going to do what your father did to you" means to the defendant that he plans on sexually assaulting her when she's asleep. "I should treat you like your first husband did" sounds to the defendant like a threat for a beating so vicious that it left her hospitalized with bite marks all over her face and only a small portion of one of her ears.

In addition to translating the meaning of threats, domestic violence experts can also educate a jury on how threats can be as frightening as living through physical abuse. Many laypersons believe that most threats are rarely serious — "oh, it's just talk." This may be particularly true given the proliferation of threatening abuses made via technology (e.g., text, email, social media) in an Internet age where a lack of civility, as well as gendered attacks on women in the public eye, are accepted as inevitable. In my experience, judges and other legal professionals discount threats communicated electronically as less likely to be enacted, compared to those uttered live in front of the intended victims.

Threats made in the context of an abusive relationship have a specific context and meaning. Threats are more effective if there has been physical violence in the past to back them up. A battered woman defendant has usually been subjected to multiple threats in the past because they serve as shorthand coercion when the batterer does not have the time or inclination to reinforce his demands with physical abuse. Regardless of whether the history of violence includes physical abuse, the success of threats as a strategy for controlling a domestic violence victim relies on her perception that the batterer is willing and able to carry out these threats. As one defendant explained to me, "he always did everything he said that he would."

Some batterers are so coercive that a battered woman defendant may never have risked not doing what he demanded. Under any circumstance, if a decedent made a direct threat to kill the battered woman defendant at the time of the killing, a defense lawyer can use an expert's opinion about the history and/or meaning of that threat to the defendant to argue that the defendant's deadly force was proportional to the danger posed by the decedent.

A third way that a battered woman's force can be understood as proportionate is when the batterer engages in actions that imply he will seriously hurt her. An individual's right to use deadly force does not require she be facing death, but is invoked when the harm constitutes "serious bodily harm." Although state laws vary in terms of what is considered serious bodily harm, incidents that may qualify include sexual assaults and/or acts that result in serious injuries such as internal damage (including miscarriages), broken bones, permanent injury, or chronic pain. This is where the expert's use of a specific domestic violence assessment that includes a history of injuries can be useful for the defendant's argument that her force was

proportional: namely, because the decedent committed serious bodily harm in the past, it was reasonable for the defendant to believe that the decedent's implicit or explicit threat to hurt her could result in serious bodily harm now. A defense lawyer can use the expert's knowledge about the battered woman defendant's prior injuries to help a jury or judge understand that the unarmed batterer, at the time prior to the killing, was capable of hurting the defendant in a way that justified deadly force.

The importance of assessing sexual violence in an evaluation cannot be overstated. In a case where there is sexual abuse, experts may have to educate the defense lawyer as well as the fact-finders about the physical and psychological pain of rape within marriage or a long-term relationship.¹⁷ Where there is little or no prior non-sexual physical violence, an expert may be critical to helping the jury understand that the fear of being killed can be easily generated by a sophisticated batterer who knows how to instill fear with his words. Proportionate force, in other words, involves understanding how a battered woman could have been so frightened of her abuser at the time that she killed him that she reasonably thought it was necessary to use a weapon to defend herself.

As a final note on proportionate force, let me reinforce the importance of educating the legal actors in the criminal justice system that domestic violence is not trivial. Defendants can suffer physical harm not only through injuries from the abuse, but also from the deterioration of their physical health or emotional well-being. Domestic violence is associated with many chronic health problems, including gastro-intestinal problems, migraines, and gynecological/reproductive conditions (Black, 2011; Leserman and Drossman, 2016). Asking defendants about PTSD symptoms that are physiologically based reveals how common it is for victims to have difficulty sleeping, disturbances in their appetite or eating, trouble concentrating, and other symptoms that reduce their quality of life and increase their suffering while living with the ongoing violence.

I regularly report with specificity when the defendant's history of abuse includes incidents that could trigger brain injury. Trauma to the head caused by direct blows, strangulation, shaking, or other abuse can lead to brain injury. Brain injury in battered women has been only recently investigated in the research literature, resulting in the striking finding that up to 74% of domestic violence victims sustain some type of brain injury from their partner's assaults (Valera and Berenbaum, 2003, pp. 797, 799). Brain injury (not brain damage) is typically described as a bruise on the brain or "diffuse axonal injury" (tearing of the neuronal fibers connecting various parts of the brain) and can result from blows to the head, being violently shaken, or the oxygen deprivation from being strangled (Valera and Berenbaum, p. 797). The main

¹⁷ While the legal spousal exemption to rape has been largely eliminated in the U.S., forced sex in marriage is still largely condoned and often treated differently than stranger rape (as is true of sexual violence in intimate partner relationships generally). Evidence remains that marital rape is still widespread, affecting 10%-14% of married women. (Bergen, 2016; Russell, 1990).

symptoms of brain injuries include problems with memory and concentration, sleep, headaches, depression and anxiety. In contrast to brain damage, brain injuries typically heal over time, although individuals can continue to experience the psychological effects common in these injuries for years afterwards.¹⁸ In a couple of cases I have worked on, an additional consultation with a neurological expert revealed confirmation of the brain injury I suspected the defendant had experienced.

USED "OVERKILL"

"Overkill" is a term often used by police to describe a killing in which there were many wounds, more than "necessary" to kill, such as a 10-clip round emptied into the decedent's back, dozens of stab wounds, reloading the gun and shooting again, or the use of more than one weapon. In one case I worked on, the "overkill" was considered extreme. The defendant kicked her batterer in the groin, which caused him to drop the gun he had been threatening her with. She grabbed the gun and fired all five bullets into his chest and abdomen. Terrified because he was still standing and threatening her, she hit him over the head with butt of the gun, fracturing his skull in several places. His injuries would eventually be lethal. She ran to the kitchen because he blocked the only exit from the apartment. When he followed her, she grabbed a knife and stabbed him approximately 70 times. He fell to the floor, and she continued to stab him because, as she explained, his fingers were still moving. She believed that as long as his fingers were moving, he had the potential to use his hands and hurt her. The prosecutor asserted that the "overkill" negated the defendant's claim of self-defense because she used way more force than actual self-defense would have required.

To explain "overkill," an expert must discuss how the defendant's ongoing fear, fueled by the continued threats or actions of the batterer, prompted her to continue to use defensive force. After I had worked on multiple "overkill" cases, I felt I began to understand why defensive responses to danger can be activated so quickly and strongly when the defendant has experienced chronic abuse. These cases involved similarities in how defendants described their emotional and cognitive states during the terrifying events leading up to their defensive actions. Their memories were rarely intact, as we know is to be expected with traumatic events (see *Memory Impaired Because of Trauma*). These defendants tended to recall specific sensory details — such as the texture and weight of the gun in their hand or the shininess of the blade of the knife. They often didn't remember when they picked up the weapon, however. Time was distorted in their memories. For example, the minutes before they armed themselves seemed to go in slow motion while the time after they armed themselves "happened so fast."

¹⁸ Battering can also result in lasting brain damage, which is a subject beyond the scope of this paper. Defendants who have experienced brain damage may also need a neurologist or other specialist on their defense team.

Central to the defendants' descriptions about the killing were emotional and physiological reactions, not cognitive ones. For example, a defendant might recall feeling terrified and nauseous, but her finger on the gun or the swing of the arc of the knife in her hand did not feel like the product of her decision-making or it felt as if it were done by someone else. One defendant I worked with, who had been stabbed in the shower before she wrangled the knife away from her abuser and killed him, said "the devil made me do it." Later she said that what she meant was that her memory of the incident did not feel like an event that happened from her own mind, as her other memories did. Many defendants cannot produce memories of what they were thinking at the time of the incident or otherwise name their intentions. The more open-ended questioning I use contrasts with police interviewing, which often includes repeated questions about "why" because officers presume the intentionality of the killing and therefore pressure defendants to produce the thoughts behind the intentions.

It seemed to me that these defendants were describing in their own words what it feels like to be attacked and to respond with what psychologists have long termed as the "fight or flight, or freeze reaction." The concept of fight, flight, or freeze, which many jurors may remember from psychology courses, can help juries understand how "overkill" can be self-defense.

When a person faces danger, or is attacked in a life-threatening manner, one of these three psycho-physiological responses may take over and make conscious action difficult and highly unlikely for most people (without specific training to counteract them, such as a Navy Seal or an astronaut might receive). This does not mean that an individual's reaction is unreasonable. The defense could argue that the rationality of the primitive part of the brain — our smart survival instinct — is hyper-reasonable because it filters out confounding or messy details in its process of knowing the accuracy of the danger in front of us.

Some individuals "freeze" when under traumatic stress, a condition called "tonic immobility" — commonly known by laypersons as "deer in the headlights" — a reaction driven by the parasympathetic nervous system. Alternatively, the sympathetic nervous system activates to produce powerful and elaborate hormonal changes that increase blood supply to the muscles to allow for rapid and energetic movement, necessary for either "fight" or "flight."¹⁹ These internal changes in the body are very dramatic and are thought to account for the ability of individuals to

¹⁹ The system that underlies the fight or flight response is called the HPA Axis, and its initial twin activities include the activation of the sympathetic nervous system and the release of CRH, a corticotrophin-releasing hormone. In turn, the simultaneous release of epinephrine and nor epinephrine increase respiration and heart rate. Elevated heart rate and respiration provide increased oxygen and greater blood supply to the muscles. The pituitary gland also releases cortisol (a "steroid" hormone), which maintains blood pressure to stabilize the body under severe stress. Cortisol also assists in disarming the fight or flight response after the threat is over. See generally, Babette Rothschild, *The Body Remembers: The Psychophysiology of Trauma and Trauma Treatment* (2000), 8-9.

perform acts of remarkable strength, such as mothers who are able to lift heavy objects off their trapped children, soldiers' acts of heroism in war, or injured persons' endurance to crawl or walk extensive distances for help. Not only do individuals who have experienced this level of traumatic stress typically describe their actions as "without thought" or automatic in nature, but fight-or-flight and freeze (tonic immobility) are considered automatic survival actions programmed into humans since primitive times. They are instantaneous like physical reflexes, although with a more complicated and time-consuming mechanism of activation.

The flight or fight reaction was first described almost 100 years ago, as a normal reaction to what we now call traumatic stress. As such, the application of the fight-or-flight response to battered women's self-defense cases is not intended to stress that the defendant's response is a "crazy" one, but rather one that anyone with a similar history of violence who was attacked in this manner would have a similar reaction to the defendant's.

Three factors determine whether an individual will respond with fight, flight, or freeze. As one trauma researcher describes: "If . . . there is adequate strength, time, and space for flight, then the body breaks into a run. If . . . there is not time to flee but there is adequate strength to defend, the body will fight. If . . . there is neither time nor strength for fight or flight and death could be imminent, then the body will freeze" (Rothschild, 2000, p. 9).

In a battered women's self-defense case, the trigger to enact the fight or flight response is the defendant's assessment that she is in heightened danger. By "heightened danger," I mean that the defendant identified the presence of one or more signals of danger that indicate that the circumstances that she is facing now are lethally dangerous and likely to be far deadlier than she has ever experienced before. Some defendants identify cues in the batterer's nonverbal signals, the force he is using to physically attack her, or the nature of his threats against her.

Whatever the specific content of the danger, defendants often speak about the events that led up to the killing as terrifying in a way they had not experienced before, that their abusive partner was in a kind of unchangeable rage they had never seen before, or there were other critical differences between what happened during that final incident and the collective episodes before. "This time was different," I recall more than one defendant asserting, further explaining that, "he had never hit me that hard before" or "the look in his eyes was deadly, cold, and I knew that he planned to carry out his threat to kill me."

After the triggering condition (i.e., heightened danger) activates the fight or flight response, the defendant's prior experiences with fighting back and attempting to flee may also shape how she reacts. "Flight" may not be a viable choice when defendants believe that they cannot escape from their abusive partners, either because they have tried to run in the past and he has always caught them or because

their batterers have cultivated the reasonable belief in them that escape is impossible. Defendants who have experienced a great deal of physical restraint by their abusive partner, such as being held immobile during assaults or threats, may not believe they have the physical space or strength necessary for successful flight. In perhaps the most extreme case I have ever seen, a defendant's batterer repeatedly and ritualistically assaulted her by hitting her with a wooden board from her shoulders to her feet. He would strike her until she remained perfectly still, as if nothing at all were occurring: no moving away, no crying, no flinching. He effectively beat the normal, human reaction to attempt to get away from him — the normal reaction to flee — out of her, so escaping would never cross her mind.

The activation of the fight or flight response is not "chosen by thoughtful consideration" (Rothschild, 2000, p. 10). or the result of an individual's free will. Rather, it is a bodily reaction to trauma and the strong emotions that accompany trauma. As Walter Cannon (1927), the famous physiologist who first identified fight or flight, explains: "they are of the nature of reflexes — they are not willed movements, indeed they are often distressingly beyond the control of the will . . . deeply inwrought in the workings of the nervous system" (p. 194). A battered woman defendant does not choose to "fight" rather than to flee. If her past experiences include difficulty escaping immediately (such as not being able to run away or the abuser blocks the exit or otherwise prevents her from leaving) or over the long term (such as being coerced into returning to the relationship), she may be more predisposed to "fight" rather than to "flight."

The activation of the fight or flight response, together with its powerful physiological changes inside the body, is instantaneous as well as instinctive. Fight or flight assures the goal of survival, in part because its tendency is to provide more mobilization and strength than may be necessary to fight or to flee. The alternative would be to leave an individual with not enough strength to engage in a defense, which would limit survival. Cannon (1927) observes that "in every person there are 'reservoirs of power' which are not ordinarily called upon, but which are nevertheless ready to pour forth streams of energy if only the occasion presents itself" (p. 227).²⁰ A battered woman defendant who uses this "reservoir of power" may empty the gun, stab repeatedly, or otherwise fight swiftly and surely until she believes that the threat against her is completely neutralized. It would not make sense to engage in a timid or gingerly assertive attack, especially if her assailant amps up his aggression against her after she arms herself.

In the dynamics of an abusive partner's coercive control, it is common for the abusive partner to punish the victim for resisting the batterer's control during incidents that occur before the lethal assault. In some cases, the battered woman is aware that one of her partner's "rules" is that she is not ever supposed to touch him or act against

²⁰ Cannon (1927) notes that this evolutionary function of the fight or flight response is supported by Charles Darwin (p. 226).

him, a rule her abusive partner has likely enforced by responding with increased force or threats to any of her attempts to break it. During a “fight” reaction, the battered woman’s terror would likely increase with the knowledge that she has acted against him by shooting or stabbing him. Subconsciously, she may believe that he is still capable of killing her, and certainly willing to kill her; this fear may provoke continued attack until she is secure that he cannot retaliate against her.

Occasionally, some forms of the psychological abuse or coercive control abusive partners use inform battered women defendant’s perceptions during the “overkill.” In a few cases I have worked on, abusers have faked being seriously injured, or have “gaslighted” their victims into believing that the victim was the cause of the abusive partner’s injuries. For the woman who shot, pistol-whipped, and stabbed her abusive partner (discussed earlier), her batterer had previously engaged in “pranks” where he pretended to be dead when she entered their apartment. On one occasion, he poured ketchup all over himself and sprawled on the kitchen floor. If a batterer distorts the defendant’s ability to accurately predict or assess his injuries based on her own perceptions, then it is not surprising that she might engage in “overkill.” In many of the cases I have worked on, defendants have been unsure whether their batterers were dead, even if she covered his body with a sheet, knew he was no longer breathing, or observed the pools of blood. Part of this distortion may be the result of the control that the batterer has held over the battered woman, as if she could not possibly succeed in killing him because he is the one with the power, not her.

It is also important to note that the physical environment shapes which survival response a battered woman will utilize. Once the “fight” response is activated, there is no time for conscious reflection on one’s options. The fight response is very much located in the body, not in the conscious decision-making of the individual. The dramatic physiological changes compel the body to act, not to stand around processing the various options that may or may not exist in the situation. In the instinctual quest to survive, an individual who stops to consider whether a fight is really a good idea or whether there might be a potential escape option not yet revealed will be an individual who is swiftly killed. In battered women’s self-defense cases, the flight-or-fight responses are instantaneous and extreme, given the severity of abusive partners’ attacks and the multiple signals of danger evidenced by batterers’ words and actions.

ACTED “GUILTY” AFTER THE KILLING

Battered women often engage in post-incident behaviors that prosecutors frame as proof of guilt. Some behaviors, such as running from the police or hiding evidence, are classic “guilty mind” behaviors that jurors are allowed to use as proof of guilt. Other examples of post-incident behaviors that prosecutors use against battered women defendants include failing to call 911, attempting to clean up the home

and/or themselves, and hiding the body. Defendants often have no recall of their post-incident actions after the killing and cannot explain what they were thinking at the time. When a defendant can explain her post-incident behaviors, the usual explanations are either that she was afraid of the police, afraid of her abusive partner, or both.

The clearest example of a defendant who was afraid of the police and who remembered why she ran away from the home after she stabbed her boyfriend was a woman who was an undocumented immigrant from Honduras. She referenced the well-known and widespread police corruption in her country, where all alleged crimes (including murder) are resolved through some type of payment to the police — the more serious the crime, the greater the payment. She knew that American law was different and believed that the death penalty for murder would apply to her if she called the police. But she did not understand that defendants go through a trial process where, at least in theory, they are presumed innocent until proven guilty and have an opportunity to present their own evidence. She believed that if she called the police they would kill her instantly when they arrived. Consequently, she attempted to hide after the stabbing.

Negative experiences with the police can also influence battered women defendants' fear of police action after the killing. A battered woman is more likely to be afraid of the police if the police have treated her poorly in the past, especially if the police were responding to a domestic violence call. As discussed earlier (under failure to disclose history of domestic violence), these negative experiences may influence the way battered women interact with police officers. The negative experiences may also cause them to avoid the authorities completely and flee the scene, especially if they think the police won't believe them.

Cleaning up the crime scene or one's own body and clothes may sometimes be less of a function of destroying evidence and more of an automatic reaction or a desire for cleanliness. Most often, in the cases I have been involved with, the clean-up consisted of mopping up blood with towels and putting them in the washing machine — not exactly an attempt to remove all signs that a crime was committed. Battered women who are fastidious housekeepers may clean up because that is what they routinely do and the cleaning may provide a kind of soothing routine or a veil of normalcy. Battered women will sometimes change clothes and/or wash their hands and faces after having killed their abusive partner, especially if they are splattered with blood. As some defendants have explained to me, blood feels sticky and unpleasant on the skin and heavy and stiff on clothing. This is a common post-trauma reaction and is observed in other victims of trauma, such as victims of rape.

There are a handful of actions sometimes committed by defendants after the killing, including hiding or covering the body or running away from the body (as opposed to fleeing the scene), that may demonstrate a defendant's continued fear of her abuser, as if she lacks awareness that her abusive partner is dead and no longer a threat to

her. Some defendants emphasize that they thought he might only be pretending to be dead, while others felt that it was impossible that he could die because he seemed enormously powerful, physically and emotionally. It is possible that some of this is a normal grief reaction of disbelief that a person could die so suddenly.

The reason why battered women defendants engage in any of these purportedly “guilty mind” behaviors may be driven by a panic that is the product of the lingering effects of a post-traumatic reaction. The adrenaline and hormonal changes that produce the fight-or-flight response in terrorized women are still present in the hours following the killing. Fleeing is a normal reaction in this state, as are the impulsive actions to pretend that nothing ever happened, which is also a psychologically sound coping strategy — a sort of “I’ll feel less threatened if I get rid of everything that just recently terrified me” response. Such a reaction is a form of denial of the incident that just happened, which may be an automatic response for battered women who have repeatedly used denial to cope with the violence and coercive control exerted by their partners during the relationship.

ADDRESSING EXPERIENCES OF PAST ABUSE AS AN ADULT OR CHILD

In my opinion, it is critical for an expert to assess the nature of any abuse the defendant experienced in childhood or in prior relationships. In trauma theory as well as in my own work with battered women, evaluating threats of danger is based on someone’s entire life experience. If considered through a social learning model, children who are abused, for example, understand that appeasing the demands of the violent parent increase their safety. A woman who escaped a prior abusive relationship may be particularly attentive to shifts in nonverbal cues because identifying the signals of impending violence, whether the gait of the abuser up the stairs or the look in his eyes, created the opportunity to avoid it. Evidence of prior abuse and its impact on the battered woman defendant will be particularly critical to the credibility of her claim that she was afraid. Jurors seem to understand this intuitively and may be particularly open to this kind of evidence. An adult who is afraid of clowns might seem silly until you hear about his childhood experience at a circus where he was chased by one.

Trauma researchers have firmly established that repeated experiences of traumatic events are likely to have increasingly severe psychological effects on victims (Herman, 1995, p. 87). For battered women defendants, a previous partner’s violence and/or trauma from childhood — whether direct abuse or witnessing violence against their mothers or other family — can help explain why they were so afraid at the time of the killing. Although some defendants possess great insight and awareness about the impact of the past on the present, the domestic violence expert is likely to be the source of identifying and linking these experiences.

Often, I recognize these connections in the way the defendant describes the experiences, usually hours apart in time. It could be in her tone of voice as she recalls the words used by her father and those by her batterer. It could be in how she perceived the beginning of the assaults, such as physical violence that always occurred before a sexual assault. It could be in the emotional emphasis she places on a prior abusive experience, such as humiliation, or the way that each abuser engaged in physical retaliation if she refused to perform the sexual acts demanded of her. At times, the associations between abusers can seem symbolic rather than physically similar. For one of my former clients, for example, the helplessness she felt during sexual assaults when she was a teenager was replicated by her adult partner when he tied her up and threatened her.

Abuse by prior partners may also be used against the battered woman defendant, who may have bared her soul and disclosed their history to the abuser, usually encouraged by the intimacy of a new relationship. A common reaction from their new partners is often great empathy, comforting and reassuring the victims that they will never “do what those others did to you.” When the relationship turns violent, some abusers purposefully attempt to replicate the earlier assaults in their physical actions, sometimes while identifying they are doing so. Abusers might taunt that the defendant likes to be hurt in that way since it was done before. Abusers also use their knowledge of these assaults to humiliate victims for being “used up” or to blame them for “letting this happen to you before.”

Parting advice for new experts

When a defense lawyer hires a domestic violence expert to consult on a self-defense case, it is usually because he or she identifies that the circumstances of the killing or the background of the defendant includes “bad facts” that may undermine the defense. Assuming the expert finds evidence that supports the battered woman’s claim of self-defense, my best advice is to be clear that the expert’s role is not to prove the case. That is the defense lawyer’s job. In battered women’s cases, part of the attorney’s job includes obtaining evidence that corroborates the defendant’s history of battering. Often this information is not known to the lawyer before the evaluation by the expert. Therefore, it is important for the attorney to review the evaluation and consult with the expert with an eye toward other potential sources of information about the defendant’s experiences of abuse, including witnesses, medical records, court documents, and other records.

In addition, I find it helpful to be clear with defense lawyers about the specific nature of my expertise; I am a domestic violence expert who draws on research about trauma. If the lawyer is looking for someone who studies trauma in a laboratory, I am not the right expert. Experts and attorneys can save themselves a lot of time, energy, and money by making sure they are on the same page from the beginning.

Expert witnesses can be very helpful in cases when battered women kill their abusive partners, especially in those cases when there are what initially appear to be “bad facts.” These “bad facts” tend to be either about the prosecutor’s claim that the defendant is not a battered woman or about the defendant not acting in self-defense. Given this reality, it is important to conduct the domestic violence evaluation with two goals in mind: (1) obtaining evidence that supports a conclusion that the defendant was a battered woman and that her report of the abuse is credible; and (2) obtaining evidence that helps to explain why the circumstances surrounding the killing (including its immediate aftermath) are not inconsistent with self-defense and are likely the product of a traumatic reaction. Too often in these cases, prosecutors create doubt or skepticism about a defendant’s claims of a history of abuse and evoke many of the most common myths to encourage disbelief that the defendant was abused. The defendant’s credibility is undermined without ever calling her a liar. Regardless of the specific nature of the prior history of abuse, prosecutors often attempt to defeat a defendant’s self-defense claim by asserting that certain facts or the circumstances surrounding the killing are inconsistent with self-defense. Experts can do much to counter challenges of the defendant’s credibility and other harmful claims raised by the prosecution. By educating the judge and jury about domestic violence victims’ experiences, expert witnesses can help to ensure that the fact-finder makes a fair evaluation of the defendant’s self-defense claim.

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Appendix: Bibliography

The following resources are examples of the research available on the topics referenced in the Introduction. Please note that not all domestic violence experts have expertise in the same areas, and not all cases require the same areas of expertise.

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