THE BATTERED PARTNER'S PARADOX: A CASE FOR *BECKLEY* AND *WILSON* REDUX

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I. INTRODUCTION

A case study of Oakland County, Michigan murder trials from 1986 to 1988 revealed that courts were not only unsympathetic to women who suffered domestic abuse and acted in self-defense but tended to sentence them more harshly.[1] According to the study, domestic abuse victims were convicted more often and received longer sentences than all others who faced homicide charges, including defendants who already had violent criminal records.[2]

While Michigan courts have taken important steps forward in recognizing and accounting for the unique situation of battered women who act against their batterers,[3] it does not appear that the state's court system has improved its track record significantly since the late 1980s.[4]

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1. *See* Carol Jacobsen et al., *Battered Women, Homicide Convictions, and Sentencing: The Case for Clemency*, 18 HASTINGS WOMEN'S L.J. 31, 45-54 (2007).

2. *Id.* The findings paralleled the results of a similar study by Dr. Elizabeth Leonard in California. *Id.* at 53 (citing ELIZABETH DERMODY LEONARD, CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL 27 (SUNY Press 2002)).

3. *See* discussion *infra* Part II.B.1-2. I will refer to this unique situation primarily as intimate partner battering (IPB). IPB is also known as "Battered Women's (or Wife's) Syndrome" (BWS), CAL. EVID. CODE § 1107(f) (West 2012), and "Battered Spouse Syndrome" (BSS), *People v. Wilson*, 487 N.W.2d 822, 824 (Mich. Ct. App. 1992). I will use the acronym IPB, except when another term (i.e., BWS or BSS) is necessary to accurately reflect a court's or jurisdiction's usage or to avoid confusion. The terms are interchangeable; however, for an explanation of why IPB is preferred over other identifiers, see *infra* Part II. Additionally, scholars have advocated for replacing "self-defense" with "self-preservation" as a more gender-neutral term for the legal justification. *See* Jacobsen et al., *supra* note 1, at 33.

4. *See, e.g.*, People v. Schafer, No. 205583, 1999 WL 33444327 (Mich. Ct. App. May 18, 1999). Although Ms. Schafer's attorney never raised self-defense or battered spouse syndrome at trial or on appeal, another source states that Tracy Schafer acted out of fear when she shot "her drug-addicted, abusive husband" during "a 1995 argument of escalating violence." *Women of the Clemency Project: Tracy Schafer*, MICH. WOMEN'S JUST. & CLEMENCY PROJECT, http://www.umich.edu/~clemency/women_sm/24_tracyschafer.html (last visited May 2, 2014).

More recent cases suggest that victims of abuse who act in self-defense do not always receive a "fair trial"[5] in Michigan courts.[6]

The Michigan court system's approach to expert testimony on Intimate Partner Battering (IPB) and its effects is ripe for improvement.[7] Anecdotal evidence suggests little has changed since before IPB expert testimony became admissible in 1992.[8] Courts continue to bar or limit such evidence in trials where the facts do not perfectly fit the classic self-defense scenario[9]—when, in fact, the main function of such evidence is to shed light on the psychology and realities of abuse and, in so doing, elucidate how the facts may well reflect a genuine and reasonable effort by the defendant to protect herself. Improvement is necessary to provide IPB defendants an adequate opportunity to present their version of the facts under the Sixth and Fourteenth Amendments.[10] Furthermore, improvement would enhance efficiency and restore stock in the finality of judgments.[11] By exploring Michigan courts' treatment of expert

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5. This Note will use "fair trial" as shorthand for a defendant's opportunity to exercise her right to present an affirmative defense along with evidence of the circumstances in which she acted. It will also refer to the extent and manner in which the court instructs the jury to consider such evidence and apply the law. *See* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 383 (1991) ("Fair trials should be defined as those in which a defendant is able to put her case fully before the finder of fact, to 'get to the jury' both the evidence of the social context of her action and legal instructions on the relevance of that context to her claim of entitlement to act in self-defense.").

6. *See* People v. Sandoval-Ceron, No. 286985, 2010 WL 3021861, at *3 (Mich. Ct. App. Aug. 3, 2010) (affirming trial court's decision to bar expert testimony on BSS because "the expert failed to close the 'analytical gap' between her expertise on battered woman syndrome and the facts of the particular case"); *cf. id.* at *5 (Gleicher, J., dissenting) (advancing an in-depth and well-reasoned argument that the trial court and majority misapplied the law). *See also* People v. Seaman, Nos. 260816, 265572, 2007 WL 466003 (Mich. Ct. App. Feb. 13, 2007) (reversing the trial court's decision to reverse battered defendant's conviction from first degree murder to second degree), *appeal denied*, 738 N.W.2d 736 (Mich. 2007), *habeas corpus conditionally granted by* Seaman v. Washington, No. 08-CV-14038, 2010 WL 4386930 (E.D. Mich. Oct. 29, 2010), *rev'd*, 506 F. App'x 349 (6th Cir. 2012); People v. Hines, No. 09-019100-01-FC, 2009 WL 7215826 (Mich. 3d Cir. Ct. Dec. 22, 2009) (barring expert testimony of BSS for the reason that it was "common knowledge"), *rev'd*, No. 295863, 2011 WL 890997 (Mich. Ct. App. Mar. 15, 2011) (finding that the trial court erred because the testimony was highly relevant to Hines' defense and credibility).

7. *See* CAL. EVID. CODE § 1107(a) (West 2012).

8. *See infra* Part II.B.

9. *See* cases cited *supra* note 6.

10. U.S. CONST. amends. VI, XIV.

11. Although appellate review is an important instrument in developing the law, the deferential standard of review for challenges to trial courts' evidentiary rulings—abuse of discretion—makes it difficult to develop the law correctly. This is why it is particularly

testimony on IPB since 1992, this Note seeks to expose the paradoxical treatment of IPB evidence, and where and how improvement is possible.

In examining courts' over-conviction of battered women, many scholars focus on the substantive criminal law's inherent inequality.[12] However, an overhaul of Michigan's substantive criminal defenses seems unlikely, and at least one scholar, Holly Maguigan,[13] has argued convincingly that the real barriers are procedural.[14] A look at Michigan case law reveals that some procedural barriers are indeed at play. Therefore, this Note focuses on barriers to IPB defendants that arise at trial through the lens of appellate review. Part II will examine cases for an anecdotal sample of evidentiary barriers. Part III will parse out the existence and extent of these barriers and propose possible solutions.

II. BACKGROUND

A. Battering and Its Effects: An Overview

"Battered woman syndrome" first came to light in 1979 with the publishing of forensic psychologist Lenore Walker's book, *The Battered Woman*.[15] In her book, Walker explained how abuse leads to a state of learned helplessness that compels women to stay with their batterers and cover up the abuse throughout a repetitious three-stage cycle.[16] When Walker's theory received wide acceptance in its field, some attorneys began trying to introduce expert testimony to explain this phenomenon in support of their clients' cases.[17]

In 1991, California's legislature enacted an evidentiary rule specifically mandating that IPB expert testimony be admissible.[18] It

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important for trial courts to apply the evidentiary standards correctly to enable battered women defendants the opportunity to assert a defense.

12. *See, e.g.*, Jacobsen et al., *supra* note 1, at 33 (citing CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 50 (Ohio State University Press 1989)).

13. Holly Maguigan is Professor of Clinical Law at New York University School of Law and a member of the board of directors for the National Clearinghouse for the Defense of Battered Women. *Holly Maguigan*, NYU LAW, https://its.law.nyu.edu/facultyprofiles/profile.cfm?section=bio&personID=20098 (last visited May 2, 2014).

14. Maguigan, *supra* note 5, at 406.

15. *See* LENORE E. WALKER, THE BATTERED WOMAN (1979).

16. The three stages were (1) the tension-building stage, *id.* at 55-59; (2) the acute battering stage, *id.* at 59-65; and (3) the loving contrition stage, *id.* at 65-70.

17. *See* Carrie Hempel, *Battered and Convicted: One State's Efforts to Provide Effective Relief*, CRIM. JUST., Winter 2011, at 24, 25.

18. CAL. EVID. CODE § 1107 (West 2012) (as amended).

included the directive that expert testimony on battering "shall not be considered a new scientific technique whose reliability is unknown."[19]

Soon it became apparent among experts that the effects of battering were much broader and more varied than the learned helplessness that "battered woman syndrome" had come to represent.[20] In a 1996 joint report,[21] the U.S. Departments of Justice, Health and Human Services, and other federal agencies compiled a number of important findings regarding battering and its effects.[22] The report concluded that the cycle of violence originally associated with "battered women syndrome" was not a necessary prerequisite.[23]

Of particular import was the study's finding that more recent scientific and clinical research had observed "a broad range of emotional, cognitive, physiological, and behavioral sequelae" to battering and similar traumatic events.[24] Noting experts' rapidly increasing understanding of the complex and variable reactions to battering, the study concluded that any of these responses may indeed be relevant to the fact-finder in considering the facts of a battered woman's case.[25]

The study averred that the term "battered women syndrome" is obsolete and misleading, for it fails to convey the wide empirical knowledge now available on battering and its effects.[26] The study lamented an oversimplified perception that all battered women react alike and exhibit the same response or set of responses, while the research and clinical findings showed the opposite to be true.[27] Furthermore, the report took issue with the term "syndrome" for its implications of maladjustment or malaise, when in fact the abused woman's keen ability to sense danger from her abusive partner, reflecting highly accurate situational analysis, may often be more pertinent.[28]

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19. *See id.* § 1107(b); *see also* Hempel, *supra* note 17, at 25-26.

20. *See infra* note 23 and accompanying text.

21. U.S. DEP'T OF JUSTICE ET AL., VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT (1996) [hereinafter *DOJ Report*], *available at* https://www.ncjrs.gov/pdffiles/batter.pdf. *See also* Violence Against Women Act, Pub. L. No. 103-322, § 40507, 108 Stat. 1796 (1994).

22. *DOJ Report*, *supra* note 21.

23. *Id.* at 18. The report also determined that post-traumatic stress disorder is a common effect of battering but not always present in or necessary to IPB. *Id.* at 19.

24. *Id.*

25. *Id.*

26. *Id.* at vii.

27. *Id.* at vii.

28. *DOJ Report*, *supra* note 21, at 19. *See, e.g.*, People v. Giles, No. 213401, 2000 WL 33407426, at *2 (Mich. Ct. App. Aug. 22, 2000) ("Nothing in defendant's testimony

B. Intimate Partner Battering Expert Testimony in Michigan

1. Expanded Interpretation of Evidentiary Rules to Encompass BSS Expert Testimony

Michigan courts expanded their interpretation of MRE 702,[29] the evidentiary rule on expert testimony, to encompass IPB testimony in 1992 with *People v. Wilson*.[30] In *Wilson*, the defendant admitted shooting her husband while he slept, but claimed she did so in self-defense after two straight days of abuse and death threats following years of battery.[31] In affirming the trial court's admission of expert testimony on battered spouse syndrome, the court of appeals reasoned that other jurisdictions used such testimony to reveal how battered spouses react to their batterers, to shed light on the reasonableness of battered women's perceptions of imminent danger, and "to rebut the prosecution's inference that the defendant could have left rather than kill the spouse."[32]

The *Wilson* court matched the scope of expert testimony on spousal abuse victims to that of expert testimony on child abuse victims, such that an expert could testify regarding the "syndrome" and its symptoms but not whether the named defendant "suffers from the syndrome or acted pursuant to it."[33] Importantly, however, the court prefaced this limitation by noting that according to *People v. Beckley*,[34] the precedent from which it found IPB expert testimony admissible, the expert *could* render an opinion regarding the individual defendant to the extent that symptoms were already established in evidence.[35] Specifically, an expert could observe on the record that an individual's behavior was common among abuse victims so long as the symptoms were already properly

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suggested . . . that defendant's state of mind was so warped by systematic spousal abuse that she, even irrationally, feared some imminent harm by defendant.").

29. MICH. R. EVID. 702 (amended 2004). This evidentiary rule mirrored FED. R. EVID. 702.

30. *See generally* People v. Wilson, 487 N.W.2d 822 (Mich. Ct. App. 1992). *Wilson* referred to the phenomenon as Battered Spouse Syndrome (BSS). *Id.* at 823. However, the author will continue to refer to it as IPB for consistency's sake.

31. *Id.* at 823.

32. *Id.* at 824.

33. *Id.* at 825. The court came to this conclusion after reviewing precedents regarding expert testimony in child abuse cases, where "the expert could render an opinion that the victim's behavior is common to the class of child abuse victims as long as the symptoms are already established in evidence." *Id.* (citing People v. Beckley, 456 N.W.2d 391, 406 (Mich. 1990)).

34. *See Beckley*, 456 N.W.2d at 406-07.

35. *See Wilson*, 487 N.W.2d at 825.

admitted into evidence under a different evidentiary rule.[36] The *Wilson* court apparently adopted this standard, stating, "We believe the same limitations should apply to experts who testify about the BSS."[37] It thereby affirmed the same allowable scope of testimony that *Beckley*[38] set forth for child abuse experts.

However, a look at *Beckley* reveals a broader standard than the *Wilson* court described when it announced its adoption.[39] In actuality, the Michigan Supreme Court in *Beckley* explained that an expert could discuss an abused child's behavior in relation to the facts of the case if relevant and could proffer specific observations about the individual's behavior if the fact of such behavior was otherwise admissible evidence.[40] Despite the *Wilson* court's failure to spell out these nuances of the *Beckley* standard, it clearly expressed intent to follow *Beckley's* precise lead on the scope of expert testimony.[41]

Given *Wilson's* apparent embrace of *Beckley*, one might have expected that the scope of expert testimony would expand to occupy the full breadth of the scope laid out in *Beckley*.[42] Indeed, one scholar described *Wilson* as "the first in what is likely to be a long line of opinions in Michigan developing and refining the use of battered spouse syndrome evidence."[43]

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36. *Id.* (citing MICH. R. EVID. 702 (amended 2004), and *Beckley*, 456 N.W.2d at 406-07).

37. *Wilson*, 487 N.W.2d at 825.

38. *Beckley*, 456 N.W.2d at 406-07.

39. *See id.* at 407. *See also* Seaman v. Washington, No. 08-cv-14038, 2010 WL 4386930, at *12 (E.D. Mich. Oct. 29, 2010); People v. Sandoval-Ceron, No. 286985, 2010 WL 3021861, at *7 (Mich. Ct. App. Aug. 3, 2010) (Gleicher, J., dissenting).

40. *Beckley*, 456 N.W.2d at 407. The court stated,

> This rule [confining an expert's testimony to the individual's character traits at issue] does not preclude a party from questioning an expert regarding the expert's familiarity or understanding of the victim's behavior at issue. Further, the expert *is allowed* to define the victim's behavior in terms of the factual background that may have a relationship to those aspects of the victim's behavior which become evidence in the case. However, an expert cannot introduce new facts based on personal observations of the complainant unless the evidence *would be* otherwise admissible. We also note that MRE 704 provides that the opinion provided by the expert *can* embrace an ultimate issue to be decided by the trier of fact.

Id. (citing MICH. R. EVID. 704) (emphasis added) (internal quotation marks omitted). MRE 704 states, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." MICH. R. EVID. 704.

41. *Wilson*, 487 N.W.2d at 825.

42. *See Beckley*, 456 N.W.2d at 407.

43. Gail Rodwan & Jeanice Dagher-Margosian, *Michigan Recognizes Battered Spouse Syndrome*, 72 MICH. B.J. 82, 83 (1993). Rodwan went on to comment that the

2. Expansion Meets Limitation: People v. Christel

The first case in which the Michigan Supreme Court addressed IPB saw a limitation of the use of expert testimony on battering. In *People v. Christel*, despite the highly deferential standard of review,[44] the Michigan Supreme Court found the trial court's admission of IPB expert testimony to be erroneous.[45] The court expressed neither "approval [n]or disapproval of" expert testimony to bolster an abused defendant's defense, but it noted the appellate court's *Wilson* decision.[46] The court held IPB testimony, when introduced on behalf of the complainant against the defendant-batterer, admissible only when relevant and helpful to the fact-finder for evaluating the complainant's credibility, and only if the expert was sufficiently qualified.[47]

The court acknowledged that the testimony was "arguably relevant and helpful" to understand the woman's tolerance of the defendant's abuse for multiple years and "may have been relevant" to explain why she made no report of similar abuse earlier.[48] However, the court found that the testimony was not as relevant as that found in similar cases because the abused complainant had ended the relationship.[49] Despite the high standard of review and the utmost importance of her credibility as the victim in a rape trial, the court found that "a more direct connection and factual premise [was] necessary."[50]

Although *Christel* solidified the permissibility of IPB[51] expert testimony in Michigan, it did so waveringly. The state's highest court did not reject outright the admission of such testimony, but it did not explicitly approve of it, nor did it find it appropriate in the case at bar where the battered woman had tried to end the relationship.

Wilson decision "should alert judges and attorneys to the significance of this evidence" and "should alert the public generally to the frightening scope of the battered spouse problem in our society." *Id.*

44. People v. Christel, 537 N.W.2d 194, 199 (Mich. 1995) (reviewing the trial court's admission of expert testimony for an abuse of discretion).

45. *See id.* at 204 (finding the trial court abused its discretion by admitting the expert testimony, but holding that it was a harmless error).

46. *Id.* at 200.

47. *Id.* at 196, 205. *See also* Seaman v. Washington, No. 08-CV-14038, 2010 WL 4386930, at *10 (E.D. Mich. Oct. 29, 2010), *rev'd*, 506 F. App'x 349 (6th Cir. Nov. 21, 2012).

48. *Christel*, 537 N.W.2d at 196.

49. *Id.*

50. *Id.* at 196-97. *See also id.* at 205-07 (Cavanagh, J., concurring in part, dissenting in part) (arguing for an even narrower scope of expert testimony on BSS).

51. Again, BWS and BSS expert testimony are used interchangeably by Michigan courts, while IPB is the modern label for the same phenomena. *See supra* note 3.

3. *The Current Setting and How We Arrived:* Wilson *and* Christel's *Progeny*

The Michigan Women's Justice and Clemency Project (The Clemency Project) maintains that of the 370 women incarcerated in Michigan for first or second degree murder or felony murder, at least one-third constitute battered women who acted to defend themselves against abusive partners but received insufficient due process considering the facts of their cases.[52] The Clemency Project noted that many of these women have served twenty years or more in prison.[53] Although the number of women who killed their batterers in self-defense and *did* receive "fair trials"[54] is unknown, based on information available, in a number of cases since *Wilson* and *Christel* Michigan courts have barred IPB expert testimony when they perceived a less than perfect fit, either in terms of the woman's portrayal of IPB[55] or her reaction as a means of traditional self-defense.[56] In other cases, defense attorneys did not attempt to introduce such testimony at all.[57]

In *People v. Beamon*,[58] Deborah Beamon went on trial for the 1994 killing of her abusive husband in self-defense during a fight.[59] Her

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52. *Position Statement*, MICH. WOMEN'S JUST. & CLEMENCY PROJECT (Nov. 4, 2012), http://www.umich.edu/~clemency/position.html (last visited May 3, 2014).

53. *Id.*

54. *See id.* The Michigan Women's Justice & Clemency Project gives an expansive description of the obstacles facing IPB defendants. *See id.* However, this Note refers to "due process" and "fair trials" mainly as shorthand for the extent to which courts permit IPB defendants to assert a valid defense pursuant to their Sixth and Fourteenth Amendment rights. U.S. CONST. amends. VI, XIV.

55. *See supra* Part II.B.2.

56. *See* People v. Sandoval-Ceron, No. 286985, 2010 WL 3021861, at *3 (Mich. Ct. App. Aug. 3, 2010); People v. Seaman, Nos. 260816, 265572, 2007 WL 466003 (Mich. Ct. App. Feb. 13, 2007), *appeal denied*, 738 N.W.2d 736 (Mich. 2007); People v. Williams, No. 251049, 2005 WL 356322 (Mich. Ct. App. Feb. 15, 2005).

57. *See* People v. Bason, No. 230157, 2002 WL 31012614 (Mich. Ct. App. Aug. 30, 2002); People v. Beamon, No. 190612, 1997 WL 33343372 (Mich. Ct. App. Sept. 23, 1997). *See also* Dando v. Yukins, 461 F.3d 791, 798 (6th Cir. 2006) ("Dando's counsel failed here to adequately investigate the availability of a duress defense and the related possibility that Dando suffered from Battered Women's Syndrome. Dando informed her attorney that she had a long history of violent sexual and physical abuse, and that Doyle beat her and threatened to kill her immediately before she participated in the robberies, and [she] even requested a consultation with a mental health expert before entering her plea. The attorney refused to seek assistance from an expert, informing Dando that it would be too costly. This advice was flatly incorrect, as Dando would have been entitled to have the state pay for a mental expert.").

58. *Beamon*, 1997 WL 33343372, at *1.

husband had beaten her many times, twice resulting in her hospitalization.[60] Although Beamon claimed self-defense, no expert testimony on battering was elicited during trial.[61]

In *People v. Williams*, the Michigan Court of Appeals affirmed Williams' 2003 conviction for second-degree murder following a bench trial.[62] The trial court barred evidence that Williams' boyfriend physically abused her on the grounds that, having occurred five or six years prior, it was "too remote in time to be relevant."[63] Although the court allowed evidence of more recent abuse and evidence that a "commotion" occurred before the fatal stabbing, it rejected Williams' self-defense theory.[64] Relying on police testimony that immediately following the incident, Williams "screamed that she got the knife away" from her boyfriend,[65] the court reasoned that once Williams had wrestled the knife from him, "she no longer had an honest belief that she was going to be killed or seriously injured."[66] It does not appear that IPB expert testimony came in at trial.[67]

In *People v. Seaman*,[68] the appellate court reversed the trial judge's decision to reduce Nancy Seaman's conviction from first-degree murder

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59. *Women of the Clemency Project: Deborah Beamon*, MICH. WOMEN'S JUST. & CLEMENCY PROJECT, http://www.umich.edu/~clemency/women_sm/23_deborahbeamon.html (last visited May 3, 2014).

60. E-mail from Professor Carol Jacobsen, Dir., Mich. Women's Justice & Clemency Project, to author (Nov. 15, 2012, 9:33 EDT) (on file with author).

61. *Id.* This was presumably because her court-appointed defense attorney did not attempt to introduce such evidence. *See also* People v. Schafer, No. 205583, 1999 WL 33444327 (Mich. Ct. App. May 18, 1999); *cf. Women of the Clemency Project: Tracy Schafer*, *supra* note 4.

62. People v. Williams, No. 251049, 2005 WL 356322, at *1 (Mich. Ct. App. Feb. 15, 2005).

63. *Id.*

64. *Id.* at *1-2.

65. *Id.*

66. *Id.* at *2.

67. *See generally id.* Unlike other jurisdictions, Michigan law as set forth in *Williams* appears to preclude as irrelevant evidence of prior abuse in determining the battered defendant's reasonable belief of imminent harm. *See* Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 271, 350 n.328-29 (2003) (citing, e.g., TEX. CODE CRIM. PROC. ANN. art. 38.36(b)(1) (West 2003); Commonwealth v. Fontes, 488 N.E.2d 760, 762-63 (Mass. App. Ct. 1986); State v. Leidholm, 334 N.W.2d 811, 817-18 (N.D. 1983); State v. Dunning, 506 P.2d 321, 322 (Wash. Ct. App. 1973); State v. Kelly, 478 A.2d 364, 377 (N.J. 1984)).

68. People v. Seaman, Nos. 260816, 265572, 2007 WL 466003 (Mich. Ct. App. Feb. 13, 2007), *appeal denied*, 738 N.W.2d 736 (Mich. 2007), *habeas corpus conditionally granted by* Seaman v. Washington, No. 08-CV-14038, 2010 WL 4386930 (E.D. Mich. Oct. 29, 2010), *rev'd*, 506 F. App'x 349 (6th Cir. 2012).

to second-degree despite the deferential standard of review.[69] In this highly publicized case, Seaman put forth a self-defense theory for killing her husband in 2004.[70] Seaman's coworkers testified at trial that she was a peaceful and truthful person but had come to work with a severe black eye and various other injuries during the previous two years.[71]

The morning of the altercation, Seaman's husband awoke abnormally early when she was preparing to go to work.[72] Seaman's husband had discovered her plan to leave him.[73] An altercation ensued in which Seaman's husband cut her hand with a knife and pushed her sprawling into the garage.[74] While she was still on the ground he grabbed her leg.[75] Seaman reached up and grabbed a hatchet she had purchased the previous evening and swung it at him, hitting him repeatedly, then stabbed him with the knife he had brought into the garage.[76]

The expert witness who testified at trial[77] later expressed "shock[] that Michigan law was so restrictive" of IPB expert testimony.[78] The dissenting judge in the decision to reinstate Seaman's first-degree murder conviction observed, "[T]he information regarding battered woman syndrome is presented to the jury in a vacuum. [J]urors are not provided with any instructions with regard to how to incorporate the syndrome into the deliberation process."[79]

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69. *See Seaman*, 2010 WL 4386930, at *1. *See also supra* note 68.

70. *Id.*

71. *Id.* Seaman's son also testified to witnessing his father emotionally and physically abuse his mother, while another son testified that he had not seen any abuse. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *See Seaman*, 2010 WL 4386930, at *1.

76. *Id.*

77. The expert witness was Lenore Walker. *See supra* note 15.

78. *Women of the Clemency Project: Nancy Seaman*, MICH. WOMEN'S JUST. & CLEMENCY PROJECT, http://www.umich.edu/~clemency/women_sm/28_nancyseaman.html (last visited May 3, 2014).

79. People v. Seaman, Nos. 260816, 265572, 2007 WL 466003, at *20 (Mich. Ct. App. Feb. 13, 2007), *appeal denied*, 738 N.W.2d 736 (Mich. 2007), *habeas corpus conditionally granted by* Seaman v. Washington, No. 08-CV-14038, 2010 WL 4386930 (E.D. Mich. Oct. 29, 2010), *rev'd*, 506 F. App'x 349 (6th Cir. 2012) (Fort Hood, J., dissenting). *See also* Maguigan, *supra* note 5, at 439 (showing that jurors require instructions to spell things out for them in order to understand and correctly apply the law).

Seaman brought a federal habeas claim for ineffectiveness of counsel, amongst other claims. *See Seaman*, 2010 WL 4386930, at *1. The federal district court overturned the state court conviction, holding that Seaman's counsel was ineffective in failing to advocate for "the full breadth of expert testimony allowed under Michigan law," to present the same, and to have Dr. Walker personally evaluate Seaman, and that these shortcomings were prejudicial to her case. *Id.* at *12. The court reasoned that Michigan

In *People v. Sandoval-Ceron*, the appellate court affirmed the trial court's 2007 decision to bar expert testimony on battering when "the expert failed to close the 'analytical gap' between her expertise on battered woman syndrome and the facts."[80] Ana Marie Sandoval-Ceron attended a wedding celebration at a friend's house accompanied by Prieto, with whom she had previously been in an abusive relationship.[81] Prieto had physically abused Sandoval-Ceron multiple times in the past, often leaving bruises.[82] Sandoval-Ceron had once even sought a personal protection order.[83] That night, the two began fighting and a drunk Prieto "suddenly struck defendant in the face, and within minutes she fatally stabbed him."[84]

On appeal, the majority in *Sandoval-Ceron* reasoned that since the facts did not by themselves support a traditional self-defense claim, the expert testimony "would not have assisted the jury in understanding the evidence or in determining a fact in issue," as required under a recently amended version of MRE 702.[85] However, Judge Elizabeth Gleicher's dissenting opinion found that the majority misapprehended and misapplied MRE 702, which states,

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[86]

Judge Gleicher pointed out that the trial court judge and the appellate court majority erred when it applied part (3) of the evidentiary standard,

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case law indicates that an expert witness can testify that a defendant's behavior was "consistent with" the behavior of a person who suffered from battered spouse syndrome. *Id.* However, the Sixth Circuit reversed the district court's decision, vacated the writ of habeas corpus, and remanded the case with instructions to dismiss. *See* Seaman v. Washington, 506 F. App'x 349 (6th Cir. 2012).

80. People v. Sandoval-Ceron, No. 286985, 2010 WL 3021861, at *1 (Mich. Ct. App. Aug. 3, 2010).

81. *Id.* at *5 (Gleicher, J., dissenting).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at *3 (citing MICH. R. EVID. 702 (amended 2004)).

86. MICH. R. EVID. 702.

that "the witness has applied the principles and methods reliably to the facts of the case."[87] Judge Gleicher explained that courts found this language, added in 2004, required that trial judges act as gatekeepers[88] to ensure that opinions were formed upon "data viewed as legitimate in the context of a particular area of expertise (such as medicine)" and that they "express[] conclusions reached through reliable principles and methodology."[89] Judge Gleicher noted that in *Beckley*, the Michigan Supreme Court clarified that expert testimony based in the behavioral sciences was not subject to the same admissibility standards as expert testimony based in the physical sciences.[90] Thus, Judge Gleicher reasoned, the trial court erred when it barred expert testimony on battering under the auspices of a standard[91] intended only for testimony based in the hard sciences such as medicine, and the majority erred by affirming the trial court's reasoning.[92]

4. Statistics and Context

Michigan has been far from the forefront in ensuring fair trials for battered defendants. As of 1996, seventy-six percent of states had found expert testimony to be admissible to establish the particular defendant as a victim of battering or as suffering from battering and its effects.[93]

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87. MICH. R. EVID. 702.

88. *See Sandoval-Ceron*, 2010 WL 3021861, at *8 (Gleicher, J., dissenting) (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)).

89. *See id.* at *9 (citing Gilbert v. DaimlerChrysler Corp., 685 N.W.2d 391 (2004)).

90. *See id.* at *7 (citing People v. Beckley, 456 N.W.2d 391, 404 (Mich. 1990)).

91. The *Davis/Frye* test or its Michigan counterpart, the *Daubert/Gilbert* test. *See id.* at *6 (citing *Beckley*, 456 N.W.2d at 403-04) ("The *Davis/Frye* test restricts the admissibility of relevant evidence on the basis of general scientific acceptance to ensure that a jury is not relying on unproven and ultimately unsound scientific methods."); *id.* at *9 ("[T]he rationale for refraining from applying the *Davis/Frye* to syndrome evidence applies equally to the application of *Daubert/Gilbert* and the amended version of MRE 702."); *Gilbert,* 685 N.W.2d at 409 ("[B]oth [the *Davis/Frye* and *Daubert*] tests require courts to exclude junk science . . . .").

92. *See* People v. Sandoval-Ceron, No. 286985, 2010 WL 3021861, at *9-10 (Mich. Ct. App. Aug. 3, 2010).

93. *See* Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 WIS. WOMEN'S L.J. 75, 117 (1996) (Alaska, Alabama, California, Colorado, Connecticut, District of Columbia, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, and West Virginia). *See also* People v. Seeley, 720 N.Y.S.2d 315, 320-21 (N.Y. Sup. Ct. 2000) ("Many States [sic] permit or require that the trial court allow a defense expert to testify that a defendant is a Battered Person [citing authority from a number of states]."). *But see* Maguigan, *supra* note 5, at

Michigan courts never went this far, as *Wilson* implied that experts could testify only generally on the matter.[94] Thus, Michigan has been part of a minority of states that prohibit an expert witness from expressing an opinion linking the defendant and IPB.[95]

Similar to Michigan's case law history, some other jurisdictions saw an initially broad finding of admissibility of IPB expert testimony narrowed by later decisions.[96] In fact, three states with statutes on the issue are noteworthy for their case law interpreting the statute to restrict admissibility of expert testimony on battering.[97] However, of the twelve states with statutes addressing the admissibility of such testimony, at least half broadly accept its admissibility.[98]

As for IBP testimony's relevance to self-defense claims, thirty-seven percent of states have found such expert testimony relevant to a defendant's sense of the imminence of danger to her life or her safety, while over half of all states have found the testimony relevant in assessing whether the defendant's belief or reaction was reasonable.[99] The Michigan Court of Appeals' admission of expert testimony in *Wilson* reflects a similar application of this relevance standard.[100] However, the court's later decision in *Sandoval-Ceron* suggests a more constricted application in which the facts must neatly fit the elements of

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486 n.182 ("Other states place specific limits on expert testimony in order to prevent presentation of opinions on the ultimate issue."). *See, e.g.*, People v. Aris, 264 Cal. Rptr. 167, 180 (Cal. Ct. App. 1989) (stating that "[a]n expert's opinion about a defendant's mental state [is admissible] . . . as long as the expert does not express an opinion on the ultimate issue of whether the defendant had the mental state required for the charged offense"); State v. McClain, 591 A.2d 652, 657 (N.J. Super. Ct. App. Div. 1991) (holding that expert testimony is relevant only to the honesty of defendant's belief, not its objective reasonableness).

94. *See* People v. Wilson, 487 N.W.2d 822, 825 (Mich. Ct. App. 1992).

95. *See* Parrish, *supra* note 93, at 118 ("[T]en states . . . prohibit the expert from expressing an opinion as to whether the defendant herself is a battered woman or 'suffers from battered woman syndrome.'").

96. *See id.* at 92 (noting that in the states where the high court squarely held IPB expert testimony to be admissible (of which Michigan was not one), half of those states saw a subsequent, more restrictive decision).

97. *See id.* at 101 (referring to Ohio, Missouri, and Wyoming). Louisiana is also notable in its high number of court decisions excluding testimony by an expert on battering. *Id.*

98. *See id.* ("Georgia, Massachusetts, Nevada, Oklahoma, and Texas" as well as California).

99. *See id.* at 120-21.

100. *See* People v. Wilson, 487 N.W.2d 822, 823 (Mich. Ct. App. 1992).

traditional self-defense as a prima facie matter, or the court will consider IPB expert testimony too far afield.[101]

As of 1996, Michigan was one of only six states holding IPB expert testimony irrelevant as to why a defendant did not leave her abusive partner, or why she took other actions, such as those taken under claimed duress.[102] This contrasts with thirty-seven states that deem expert testimony relevant to both issues.[103] Michigan was also one of only six states in which a court found expert testimony irrelevant as to the defendant's lack of intent to commit a crime.[104]

In 1991, Holly Maguigan[105] observed that traditional legal definitions could accommodate battered women defendants, but this did not automatically amount to such defendants receiving fair trials.[106] She argued that the outcome of these defendants' cases turns on factors such as whether there is a high bar for admitting relevant evidence and for providing certain jury instructions, as well as the content of the instructions.[107] Maguigan found the "getting-to-the-jury problems" the defendants encountered tended to result not from the substance of criminal self-defense jurisprudence, but from its application.[108]

III. ANALYSIS

This Note posits that Maguigan's words in 1991 still hold true today. The 1996 statistics are surprisingly reflective of recent Michigan case law. Although the number of battered women defendants whose trials included a broad range of IPB testimony is unknown and would shed significant light on this issue, the anecdotal sample of cases suggests that Michigan juries considering battered women defendants regularly consider only a strictly limited evidentiary playing field. This Note seeks to point out the sources of the obstacles battered women face in educating juries about the psychological realities of abuse. Finally, this

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101. *See* People v. Sandoval-Ceron, No. 286985, 2010 WL 3021861, at *3 (Mich. Ct. App. Aug. 3, 2010) (affirming the trial court's 2007 decision to bar expert testimony on battering when "the expert failed to close the 'analytical gap' between her expertise on battered woman syndrome and the facts of the . . . case").

102. *See* Parrish, *supra* note 93, at 122-23. The other states are Alabama, Illinois, Ohio, Montana, and Washington. *Id.*

103. *Id.*

104. *Id.* at 124. Diminished capacity, mental defect, and state of mind generally were issues also found to be irrelevant by a Michigan court. *Id.*

105. *Holly Maguigan*, *supra* note 13.

106. *See* Maguigan, *supra* note 5, at 432.

107. *Id.* at 406.

108. *Id.* at 432 (emphasis added).

Note suggests that in order to correct this persistent problem, Michigan must return to the standard of *People v. Beckley*.[109]

A. Overview: What Went Wrong

Observable Michigan case law suggests that *Wilson* has not lived up to its potential as a watershed case setting a broad standard for admissibility of expert testimony on intimate partner battering and its effects (IPB) to ensure juries have full information before applying the law to the facts.[110] The cases discussed in Part II.B.3 suggest that some court-appointed attorneys continually fail to present IPB expert testimony or to make use of the full scope and value of this evidence, possibly because they do not know about it or do not think it is relevant or worthwhile.[111] Even when defense attorneys do offer such testimony, trial courts have barred it, and appellate courts either agree or find its exclusion to be harmless error.[112] However, based on what has been gleaned about battering and its effects since 1996, this Note argues that in the cases cited, the evidence was indeed relevant and more probative than prejudicial. Furthermore, considering the deferential standard of review on appeal,[113] it is vital for women who acted out of fear of their batterer to be able to present evidence to effectively defend their case at the outset. Indeed, due process and the Sixth Amendment require as much.[114]

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109. People v. Beckley, 456 N.W.2d 391, 406-07 (Mich. 1990).

110. *See supra* notes 5-6 and accompanying text.

111. *See, e.g.*, People v. Seaman, Nos. 260816, 265572, 2007 WL 466003 (Mich. Ct. App. Feb. 13, 2007); Seaman v. Washington, No. 08-CV-14038, 2010 WL 4386930 (E.D. Mich. Oct. 29, 2010), *rev'd*, 506 F. App'x 349 (6th Cir. 2012) (finding that Seaman's trial counsel was ineffective).

112. *See, e.g.*, People v. Sandoval-Ceron, No. 286985, 2010 WL 3021861, at *1 (Mich. Ct. App. Aug. 3, 2010).

113. The standard of review for a trial court's barring of expert testimony is abuse of discretion. *See Sandoval-Ceron*, 2010 WL 3021861, at *3. The standard of review for deciding whether a court denied a defendant her constitutional right to put forth a defense is de novo. *Id.*

114. *See* U.S. CONST. amends. V, XIV, VI. *See also* Washington v. Texas, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts . . . so [the jury] may decide where the truth lies. [An accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.").

1. A Weak Foundation for IPB Expert Testimony

By all indications, the *Wilson* court fully adopted the admissibility standard from *Beckley*, including allowing experts to comment on an individual defendant's symptoms if they already were, or could have been, admitted into evidence under another rule.[115] Because the *Wilson* court did not expressly delineate boundaries of permissible expert testimony, judges and defense counsel have not realized the full extent on which an expert witness could opine.[116]

The standard was muddled by the Michigan Supreme Court's *Christel* decision, which promulgated a somewhat different standard for IPB testimony *against* a batterer defendant, requiring a strong showing that the woman conveyed learned helplessness under the narrow original confines of battered woman syndrome.[117] Notably, by 1995 when the court reviewed this case and found admission of the testimony erroneous, scholarship was available documenting findings that battered women can and do react differently.[118]

2. Unraveling the Standard Further: An Amended MRE 702

Further obscuring the evidentiary standard's parameters as applied to expert testimony on battering and its effects was the 2004 amendment to MRE 702.[119] As *Sandoval-Ceron* reflects, the additional language's effect on the admissibility standards for expert testimony is unclear.[120]

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115. *See* People v. Wilson, 487 N.W.2d 822, 825 (Mich. Ct. App. 1992) (citing People v. Beckley, 456 N.W.2d 391, 406-07 (Mich. 1990)). *See also supra* Part II.B.1.

116. *See id.* The failure of Nancy Seaman's defense counsel resulted in the U.S. district court's finding of ineffective counsel in her habeas corpus case, although the Sixth Circuit ultimately disagreed. *See* Seaman v. Washington, No. 08-CV-14038, 2010 WL 4386930, at *11-12 (E.D. Mich. Oct. 29, 2010), *rev'd*, 506 F. App'x 349 (6th Cir. 2012).

117. People v. Christel, 537 N.W.2d 194, 196-97 (Mich. 1995).

118. *See, e.g.*, Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense:" Towards a New Understanding*, 19 FORDHAM URB. L.J. 567, 581 (1992) (observing a trend by traditional opponents of women's progress whereby they structure opposition to individual females who they say do not "fit the mold" of the battered woman suffering from battered woman's syndrome, e.g., because one has asserted some degree of control instead of pure passiveness).

119. *See* MICH. R. EVID. 702 (amended 2004) (adding "if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case").

120. *See* People v. Sandoval-Ceron, No. 286985, 2010 WL 3021861, at *3 (Mich. Ct. App. Aug. 3, 2010) (affirming the trial court's finding that "the expert failed to close the 'analytical gap' between her expertise on battered woman syndrome and the facts of the particular case" as required by the additional language in MRE 702); *contra id.* at *6-10

The majority in *Sandoval-Ceron* presumed that MRE 702's amendment called for a more stringent test,[121] while Judge Gleicher argued persuasively that the additional language did not alter the admissibility standard for expert testimony on battering and its effects.[122] A recent decision by the Michigan Supreme Court suggests that the added language applies to expert testimony in the behavioral sciences but that courts should apply the factors flexibly to accommodate the type of expert testimony at issue.[123] This suggests that the admissibility test for IPB testimony is substantially the same.

Nevertheless, the erosion of the standard is evident from the stark difference in application from *Wilson* to *Sandoval-Ceron*.[124] The court of appeals initially found expert testimony admissible to explain how a defendant may act in self-defense in light of IPB, beyond or contrary to the common sense inferences of lay jurors.[125] After all, the facts in *Wilson*—killing one's spouse as he slept—would not lend themselves to a self-defense justification in the absence of domestic abuse.[126]

Later, the court found expert testimony inadmissible where the facts did not already support a self-defense justification.[127] Herein lies the paradox. The prevailing view in Michigan seems to be that where a tight temporal link and proportionality are lacking, IPB evidence is irrelevant and will only serve to confuse the jury.[128] However, expert testimony

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(Gleicher, J., dissenting) (delineating the majority's erroneous interpretation of the admissibility standard for expert testimony).

121. *Id.* at *3 (majority opinion).

122. *Id.* at *6-8 (Gleicher, J., dissenting).

123. *See* People v. Kowalski, 821 N.W.2d 14, 34 (Mich. 2012).

124. *See* People v. Wilson, 487 N.W.2d 822, 825 (Mich. Ct. App. 1992); *Sandoval-Ceron*, 2010 WL 3021861, at *3.

125. *See Wilson*, 487 N.W.2d at 825.

126. *See id.* at 823.

127. *See* People v. Beamon, No. 190612, 1997 WL 33343372 (Mich. Ct. App. Sept. 23, 1997); People v. Williams, No. 251049, 2005 WL 356322, at *2-3 (Mich. Ct. App. Feb. 15, 2005); *Sandoval-Ceron*, 2010 WL 3021861, at *3. *See also supra* Part II.B.3.

128. *See, e.g.*, *Sandoval-Ceron*, 2010 WL 3021861, at *3-4. *See also* David L. Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 646-47 (1986). Other scholars have argued that introducing expert testimony on battering may actually undermine the defendant's credibility by focusing on her mental impairment rather than the circumstances under which she acted. *See* Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 90-91 (1994). While this view may have been correct under the initial narrow formulation of the "syndrome," it no longer holds water to the extent that an expert witness sheds light on the battered woman's acuity in sensing danger due to familiarity with her partner's abusive tendencies and the resulting reasonableness of actions that otherwise appear disproportionately violent.

contributes to understanding that very issue: whether the defendant could have honestly and reasonably considered herself in imminent danger, despite it being unreasonable under normal circumstances, because of a history of abuse by her partner.

B. Repairing the Foundation: Back to Beckley *and* Wilson

1. Codification of the Standard of Admissibility and Scope of Expert Testimony

The most effective method of ensuring admission of IPB testimony may be codifying Michigan's admissibility standard as put forth in *Beckley* and *Wilson*.[129] Whether barring IPB expert testimony is a product of bias against expert testimony not based in the hard sciences, individual judges' socio-political views,[130] failures on the part of defense counsel, or other factors, codification of the admissibility standard would override such dynamics.

The benefit of codification is apparent from a comparative perspective. Unlike California and eleven other states where the legislatures promulgated a new evidentiary rule laying out the parameters of admissible IPB expert testimony for courts to follow,[131] the Michigan Court of Appeals initially expanded its interpretation of the existing evidentiary rule, MRE 702.[132] While this expanded interpretation was necessary, it was insufficient in setting forth a clear standard without express approval from the state's highest court.[133] Subsequent decisions have not adequately followed the standard initially set forth.[134]

Codification of that standard would require courts to do so. Although three states' codification of the rule resulted in courts engrafting new restrictions on admissibility of IPB testimony, twice as many states have successfully effected broad admissibility through codification.[135]

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129. *See supra* Part II.B.1.

130. *See* Michelle Michelson, *The Admissibility of Expert Testimony on Battering and Its Effects After* Kumho Tire, 79 WASH. U. L.Q. 367, 391 (2001) (noting the two sources of potential bias against expert testimony on human behavior).

131. *See* CAL. EVID. CODE § 1107 (West 1991); *see also* Hempel, *supra* note 17, at 24, 25-26.

132. MICH. R. EVID. 702 (amended 2004). *See* People v. Wilson, 487 N.W.2d 822, 823-24 (Mich. Ct. App. 1992) (interpreting MICH. R. EVID. 702 to encompass IPB expert testimony).

133. *See supra* Part III.A.

134. *See supra* Part II.B.2-3.

135. *See* Parrish, *supra* note 93, at 100-01.

A statute's effectiveness may depend on the precise language used.[136] In particular, a statute may prevent inappropriate barring of expert testimony due to misconceptions by avoiding outdated terminology such as "syndrome."[137] A statute can clarify the permissible scope of expert testimony by including broad language such as that found in California's[138] or Oklahoma's statute, the latter of which mandates that "testimony of an expert witness concerning the effects of such domestic abuse on the beliefs, behavior and perception of the person being abused *shall* be admissible as evidence."[139] Also, a statute that does not limit the admission of such testimony to certain kinds of trials, claims, or defenses or otherwise preclude the admission of such testimony will better prevent a narrow, restrictive interpretation of the rule by courts.[140] Better yet, a statute can prevent unduly restrictive interpretations by specifying that it is not to be read to preclude the admission of such testimony for purposes beyond those delineated.[141]

In addition to such linguistic precautions, the Michigan legislature could address Michigan courts' restrictive approach by codifying the *Beckley* standard[142] for IPB testimony. This would set a clear course generally requiring admission of such testimony.[143] However, until the legislature enacts such an express rule, judges, practitioners, and the legal community can take measures to ensure battered women receive adequate trials.

2. Even-Handed Gatekeeping under MRE 702.[144]

Michigan courts should note and make use of the flexible standard for admissibility of IPB testimony because not only is it highly probative

136. *Id.*

137. *See supra* Part II.A.

138. *See* CAL. EVID. CODE § 1107(a) ("[E]xpert testimony is admissible . . . regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence . . . .").

139. 22 OKLA. STAT. ANN. tit 22, § 40.7 (West 1992).

140. *See* Parrish, *supra* note 93, at 100.

141. *Id.* (citing CAL. EVID. CODE § 1107 (West 1993), MASS. GEN. LAWS ANN. ch. 233 § 23E(K) (West 1994), and S.C. CODE ANN. § 17-23-170 (West 1995)). California's, Massachusetts' and South Carolina's statutes all specify that they are not to be read narrowly. *Id.*

142. People v. Beckley, 456 N.W.2d 391, 406-07 (Mich. 1990).

143. Although some may argue that such statutes are unconstitutional as they interfere with the Supreme Court's rule-making authority, such challenges are seldom successful. *See, e.g.*, People v. Mack, 825 N.W.2d 541 (Mich. 2012).

144. MICH. R. EVID. 702.

for self-defense, but also for state of mind generally, as well as for credibility.[145] Even when the court is unwilling to admit testimony to support self-defense or to give a self-defense instruction, it is necessary to assist jurors' understanding of why the woman used force when she did.[146] Jurors may not understand why women have stuck around and "placed themselves" in such situations, and this may account for the especially high rate of convictions.[147] Judges should therefore check their own preconceived notions when acting as gatekeepers of expert testimony.[148] Doing so may avoid allowing personal misconceptions to inform decisions of whether to admit the expert testimony necessary to refute these very misconceptions.

Such judicial misunderstanding seemed to play a role in *Sandoval-Ceron*, where the appellate court agreed with the lower court's decision to bar expert testimony and evidence of past abuse because of a perceived analytical gap between the defendant's actions—stabbing her abuser minutes after he struck her—and the effects of battering.[149] The court found the testimony "would be unfairly and improperly prejudicial or confusing to the trier of facts."[150]

Considering the broad acceptance of IPB as a behavioral phenomenon[151] and the limited scope of allowable testimony on the subject,[152] the court's finding begs the question of what an expert witness could possibly say in order to connect the testimony to the facts of the case. Applying the standard as the *Sandoval-Ceron* court did[153] would seem to result in never admitting such testimony unless the facts perfectly fit the elements of a self-defense justification in the first place.

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145. *See, e.g.*, Parrish, *supra* note 93, at 123-25 (analyzing states that allow IPB expert testimony to show lack of intent and credibility of the defendant as a witness).

146. *See DOJ Report*, *supra* note 21, at xi. After all, motive is always relevant in trials for violent crimes.

147. *See supra* Part I.

148. *See, e.g.*, Michelson, *supra* note 130, at 391-93 (discussing facets of judges' bias as gatekeepers of IPB expert testimony).

149. People v. Sandoval-Ceron, No. 286985, 2010 WL 3021861, at *5-6 (Mich. Ct. App. Aug. 3, 2010) (Gleicher, J., dissenting). The expert witness would have testified that these effects could give someone in Sandoval-Ceron's position the perception of imminent harm. *Id.*

150. *Id.* at *6 (quoting the trial court) (internal quotation marks omitted).

151. *See DOJ Report*, *supra* note 21, at 19.

152. *See* Seaman v. Washington, No. 08-CV-14038, 2010 WL 4386930, at *8 (E.D. Mich. Oct. 29, 2010) ("'The Court: [The expert witness] can't even say that [defendant] fits those symptoms.'") (quoting the trial court's discussion with defense counsel regarding the admissible scope of expert testimony), *rev'd*, 506 F. App'x 349 (6th Cir. 2012).

153. *See Sandoval-Ceron*, 2010 WL 3021861, at *6 (Gleicher, J., dissenting).

However, when the facts perfectly fit the traditional self-defense elements, expert testimony would not be necessary to help the fact-finder. When the entire issue requires understanding that a battered person may reasonably perceive threat of imminent harm when the objective observer may not, a court must be very careful not to abuse its discretion.

This necessary care is not always exercised, as is evident not only in *Sandoval-Ceron*[154] but also from the Michigan Supreme Court's reasoning in *Christel*.[155] In *Christel*, despite finding the expert testimony relevant "to assist the jury in understanding the complainant's testimony and actions," the court found a more direct connection necessary because the defendant did not convey the symptoms of IPB as the court understood them.[156] Here again, the court's misperceptions about battering and its effects lead to an unduly restrictive application of the evidentiary standard for admitting evidence to combat these very misperceptions.[157]

Michigan courts can improve their gatekeeping track record by following the U.S. Supreme Court's interpretation of the identical federal standard for expert testimony.[158] The Supreme Court has recognized "the liberal thrust of the [admissibility rules] and their general approach of relaxing the traditional barriers of opinion testimony."[159]

In deciding whether to admit expert testimony on battering and its effects, Michigan courts should also find instructive the Michigan Supreme Court's recent affirmation of the probative value of expert testimony in the behavioral sciences in *People v. Kowalski*.[160] Specifically, the court noted that such expert testimony, like that proffered for a defendant's psychological profile, is especially useful to guide a fact-finder's evaluation of "behavior that would seem counterintuitive to a juror."[161] The counter-argument of scholars and

154. *Id.* at *3 (majority opinion).

155. People v. Christel, 537 N.W.2d 194, 196-97 (Mich. 1995).

156. *Id.*

157. Note that in *Christel*, the lower court had admitted the expert testimony, and though the Michigan Supreme Court found this decision to be erroneous, it found it to be harmless error. *Id.*

158. *Compare* MICH. R. EVID. 702 (amended 2004), *with* FED. R. EVID. 702.

159. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588 (1993) (internal quotation marks omitted).

160. *See* People v. Kowalski, 821 N.W.2d 14, 34 (Mich. 2012).

161. *Id.* The court continued, "Accordingly, and if the proposed testimony otherwise meets the requirements of MRE 702, the circuit court must consider this benefit in assessing the probative value of the testimony." *Id.* Although Judge Elizabeth Gleicher made a strong and convincing argument that the additional factors of the amended MRE 702 should not and do not apply to expert testimony in the soft sciences, People v.

implicit in *Sandoval-Ceron* is that such evidence is not relevant in the first place when the facts do not warrant the affirmative defense.[162] However, such evidence bears on motive and intent generally, and may itself reveal that a defense is appropriate.

This holds true particularly in the realm of intimate partner battering and its effects, since even those familiar with the original scholarship are unlikely to be apprised of the varied responses that battering has more recently been found to evoke.[163] Such testimony is thus necessary for lay fact-finders to receive in order to fairly evaluate a person's actions and reactions towards her abusive partner.

What is more, Michigan's rule for excluding evidence, MRE 403, sets a rigorous standard for excluding evidence: only when the probative value of the evidence is "*substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."[164] Judges must consider—within this evidentiary context—the value of IPB expert testimony to the lay fact-finder trying to determine the defendant's state of mind. Not only is this evidence relevant, it bears directly on the defendant's basic constitutional right to present a defense.[165]

Yet another aspect of the equation is that there is rarely alternative evidence available to supplant IPB expert testimony by shedding light on the defendant's state of mind and perceptions of the situation. Since mens rea is a material element of first and second degree murder as well as voluntary manslaughter, such evidence is factually and legally relevant.[166] These considerations as well as the utility of limiting

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Sandoval-Ceron, No. 286985, 2010 WL 3021861, at *6-8 (Mich. Ct. App. Aug. 3, 2010) (Gleicher, J., dissenting), an in-depth evaluation of this issue is beyond the scope of this Note.

162. *See Sandoval-Ceron*, 2010 WL 3021861, at *3-4; Laurie Kratky Dore, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 753, 763 (1995) (finding the "battered women's defense" unfit for duress cases because it would require modification of the "personal accountability" theory underlying the criminal justice system and the "defense's" subjective focus was inapposite to the objective elements of the crime). The concern that systematically admitting such evidence will eventually compromise personal accountability or increasingly justify murder fails to recognize the strength of our jury system, particularly the ability of our fellow citizens, when presented with both sides' version of the facts and properly instructed, to separate wheat from chafe and reach an appropriate decision.

163. *See supra* Part II.A.

164. MICH. R. EVID. 403 (emphasis added). As the Michigan Supreme Court provided in *Kowalski*, unfair prejudice occurs "when 'there exists a danger that *marginally* probative evidence will be given undue or preemptive weight by the jury.'" *Kowalski*, 821 N.W.2d at 33 (quoting People v. Crawford, 582 N.W.2d 785, 796 (Mich. 1998)).

165. U.S. CONST. amend. VI.

166. *See* MICH. COMP. LAWS ANN. § 750.316 (West 2012); MICH. COMP. LAWS ANN. § 750.317 (West 2012); People v. Datema, 533 N.W.2d 272, 276 (Mich. 1995) (defining

instructions to prevent undue prejudice should lead courts to err on the side of admitting IPB testimony in close cases.[167]

Given the lack of clarity concerning the application of MRE 702, the Michigan Supreme Court should have entertained the appeal from *Sandoval-Ceron* to explore the admissibility of expert testimony in that case.[168] Even if the court ultimately found the error harmless, it could have taken the opportunity to clarify the standards for admissibility and present better guidelines so that evidence vital to a jury's understanding is not unnecessarily barred.[169]

3. Educating Judges to Curb Misapplication

In order to act even-handedly as a gatekeeper, a judge should have some degree of understanding of the behavioral phenomenon in question. In particular, domestic abuse may well *not* follow the classic stages of escalation, violence, and respite that Dr. Lenore Walker introduced in 1979.[170] Likewise, victims of battering may react very differently than the learned helplessness with which Dr. Walker initially characterized the "syndrome."[171] Yet in *Christel*, the appellate court found the lower court's admission of expert testimony on battering to be in error because the victim of battering had successfully left her abusive partner before the events giving rise to the trial took place.[172] The court's misperception as to battering and its effects may have been the result of less available scholarship in 1995 on the varied effects of battering.

Today, however, a court would be remiss to write off an expert's testimony or the relevance of expert testimony simply because the battering did not perfectly align with three stages of abuse, or because the woman tried to leave her abusive partner or did not resemble a meek, helpless woman.[173] As noted in the DOJ report, "empirical evidence contradicts the view of battered women as helpless or passive victims;

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voluntary manslaughter as murder that is not intentional but is done "with a person-endangering state of mind" and under mitigating circumstances).

167. *See* MICH. R. EVID. 105.

168. MICH. R. EVID. 702; People v. Sandoval-Ceron, No. 286985, 2010 WL 3021861, at *1 (Mich. Ct. App. Aug. 3, 2010).

169. Although *Sandoval-Ceron* was a missed opportunity, a future guiding decision on-point from the state's highest court could provide helpful guidance under the vague and flexible standard that MRE 702 sets forth. MICH. R. EVID. 702.

170. *See* WALKER, *supra* note 15.

171. *See DOJ Report, supra* note 21, at 4-5, 22 ("Validity of Battered Woman Syndrome").

172. People v. Christel, 537 N.W.2d 194, 196-97 (Mich. 1995).

173. *See* discussion *supra* Part II.A.

rather, it supports the idea that battered women continue to make active efforts to resist, escape, or avoid violence."[174]

Yet judges cannot be blamed if their continued lack of full understanding of such nuances rests on legal reference materials that do not reflect up-to-date knowledge of IPB. In order to combat the kind of pitfalls observable by the courts in *Christel*, *Williams*, or *Sandoval-Ceron*, authors of treatises, benchbooks,[175] law school casebooks, and other legal reference materials should update and expand their treatment of IPB to reflect its breadth and variability, as gleaned by experts over the past two decades.[176] Namely, such materials should utilize more appropriate terminology[177] and note the variety of characteristics that experts have found to manifest the effects of battering.[178] This would help judges understand the complex phenomenon and the attendant need for an expert to provide lay jurors with insight to competently determine a battered person's credibility, state of mind, or perceptions.[179]

4. Educating Defense Counsel to Curb Ineffectiveness

In a system where judges often rely on the creative vigor of attorney advocates to inform them of pertinent developments—scientific or otherwise—recurrent ineffectiveness of defense counsel may stunt courts' recognition of advancements in psychological phenomena like IPB. Even if judges are cognizant and willing to admit such evidence, it does little good when defense counsel fails to introduce any. For example, a Michigan public defender, when asked by the defendant's

174. *DOJ Report*, *supra* note 21, at 18.

175. *See, e.g.*, J. RICHARDSON JOHNSON, MICH. JUDICIAL INST., EVIDENCE BENCHBOOK § 3.13 (2012). This benchbook covers IPB expert testimony in two paragraphs:

> Expert testimony on the "generalities or characteristics" associated with battered woman syndrome is admissible for the narrow purpose of describing the victim's distinctive pattern of behavior that was brought out at trial.
>
> Expert testimony relating to the characteristics associated with battered woman syndrome is admissible when the witness is properly qualified and the testimony is relevant and helpful to the jury's evaluation of the complainant's credibility. The expert's testimony is admissible to help explain the complainant's behavior, but the testimony is not admissible to express the expert's opinion of whether the complainant was a battered woman or to comment on the complainant's honesty.

Id. (internal citations omitted).

176. *See generally DOJ Report*, *supra* note 21.

177. I.e., "Intimate Partner Battering and its effects" (IPB). *See* CAL. EVID. CODE § 1107 (West 2014). *See also supra* note 6.

178. *See DOJ Report*, *supra* note 21, at 5.

179. *See, e.g.*, Parrish, *supra* note 93, at 123-25 (analyzing states that allow IPB expert testimony to show lack of intent and credibility of the defendant as a witness).

appellate counsel why she did not introduce expert testimony on battering, replied that she did not know it existed.[180] Thus, ineffectiveness of counsel is another contributing factor to the lack of fair trials for battered women.[181]

Along these lines, it appears[182] that no defense attorney has ever so much as attempted to introduce the full scope of permissible expert testimony under *Beckley*, whereby the expert can comment on specific characteristics if such evidence is independently introduced.[183] In light of experts' post-*Beckley* findings that the effects of battering are much more varied and nuanced than originally defined, such an expansion of the scope of allowable testimony would seem highly beneficial to assist jurors in understanding counter-intuitive behavior.[184]

As with educating judges, updates to treatises and legal reference guides to give more comprehensive and accurate treatment to IPB would serve to better apprise defense counsel of the tools at their disposal to advocate for defendants fervently and effectively.[185] Trainings for public defenders with an incentive for participation, such as discounts on malpractice insurance,[186] could also better supply attorneys with available tools and re-instill the sense of duty to advocate to the best of their abilities and resources. Professor Sarah M. Buel[187] has argued for integrating the IPB issue into law school curricula, CLE programs, and advanced certification requirements to bring about discourse in the legal community and further understanding of this oft-misunderstood issue.[188] Until there is a systematic effort to educate about IPB at all levels of the legal community, it is unlikely that large-scale progress will occur.

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180. Telephone Interview with Valerie Newman, State Appellate Defender, Michigan State Appellate Defender Office (Nov. 4, 2012).

181. *See* Buel, *supra* note 67, at 218 (noting the "astonishing degree of incompetence, with catastrophic consequences for battered defendants"); *id.* at 221 (noting the abundance of examples of "attorney malfeasance in cases involving battered women").

182. This observation is based on review of appellate decisions published on the topic. *See, e.g.*, People v. Seaman, Nos. 260816, 265572, 2007 WL 466003, at *17 (Mich. Ct. App. Feb. 13, 2007) (Fort Hood, J., dissenting).

183. *See* People v. Beckley, 456 N.W.2d 391, 407 (Mich. 1990).

184. *See DOJ Report*, *supra* note 21.

185. *See supra* Part III.B.3.

186. As suggested by Valerie Newman. Telephone Interview with Valerie Newman, *supra* note 180.

187. *Sarah M. Buel*, U. TEX. L. SCH., http://www.utexas.edu/law/faculty/cvs/BUELSM_cv.pdf (last visited May 3, 2014).

188. *See* Buel, *supra* note 67, at 336-47.

5. More Instructive Jury Instructions

Education of the legal community on intimate partner battering and its effects would reveal the need for informative jury instructions to apprise the jury of how to consider evidence of abuse and IPB testimony in determining factual issues in a case.[189] However, until judges become educated on the issue, judicial discretion leaves the door open for injustice in the form of improper jury instructions.[190] This matters because jurors are apt to misunderstand how evidence applies unless instructions carefully explain it.[191]

6. The Federal Habeas Claim: An Unlikely Alternative

Federal constitutional habeas claims should not be the main source of justice, as they have been in at least three cases.[192] Federal habeas corpus petitioners must meet a rigorous standard of showing the state courts' decisions rise to the level of injustice at odds with the U.S. Constitution or a federal statute, such as ineffective counsel.[193] Defendants who have encountered other problems at trial are therefore out of luck unless they can show some obstruction of preemptive federal law.[194] In addition to the high bar for success, federal habeas claims' exhaustion requirements are inherently inefficient.[195] Thus, it seems that

189. *See* Maguigan, *supra* note 5, at 439-40. *See also* MICH. MODEL CRIMINAL JURY INSTRUCTIONS § 7:23, *available at* http://courts.mi.gov/Courts/MichiganSupremeCourt/criminal-jury-instructions/Documents/M%20Criminal%20Jury%20Instructions%20All.pdf (Past Violence by Complainant or Decedent).

190. *See* Maguigan, *supra* note 5, at 440. Maguigan has argued that a process in which the judge has the discretion to evaluate credibility of the evidence in determining whether to give a self-defense jury instruction "puts defendants most at risk of judicial misapplication of substantive and evidentiary standards, regardless of the standards' definitions," because the judge "essentially has license to direct a verdict against a defendant." *Id.* Judges' inherent role as arbiters of jury instructions as well as evidence is necessary in our judicial system, but this compounds the necessity of increased understanding of this issue by judges instructing juries.

191. *See id.* at 439.

192. *See* Seaman v. Washington, No. 04-CV-14038, 2010 WL 4386930, at *1 (E.D. Mich. Oct. 29, 2010); Dando v. Yukins, 461 F.3d 791 (6th Cir. 2006); Barker v. Yukins, 199 F.3d 867 (6th Cir. 1999).

193. *See* Strickland v. Washington, 466 U.S. 668 (1984) (promulgating a two-pronged test for ineffective counsel in a federal habeas claim).

194. See the standard of review for federal habeas corpus claims. 28 U.S.C.A. § 2254(d) (West 2013).

195. Federal habeas claims are also unreliable, as the Sixth Circuit's recent decision vacating Nancy Seaman's habeas writ conveys. *See* Seaman v. Washington, Nos. 10-2477, 10-2532, 2012 WL 5870126 (6th Cir. Nov. 21, 2012), *rev'g* No. 08-CV-14038, 2010 WL 4386930 (E.D. Mich. Oct. 29, 2010). State habeas claims are an even less

the most viable and effective changes need to take place in the courtroom.

IV. CONCLUSION

Michigan's initial standard for admissibility of IPB expert testimony has eroded. Statistics from 1996 showed that Michigan had a long way to go in improving the admissibility and scope of IPB testimony.[196] However, recent case law suggests that rather than developing, the standards have derailed.

Beamon, Williams, and *Sandoval-Ceron* reveal that when the facts of a case are anything less than a perfect fit for traditional self-defense—precisely when IPB testimony is vital to shed light on a battered woman's perceptions—due process breaks down.[197] Even when a court admits IPB expert testimony, *Seaman* illustrates that the narrow scope of allowable testimony and insufficient jury instructions act as barriers to jury understanding.[198] Thus, the very misperceptions that make IPB evidence necessary have systematically undermined its value and effectiveness.

The Michigan legislature could address this problem by codifying the standard as set forth in *Beckley* and *Wilson*.[199] Practitioners should educate themselves on and make better use of IPB expert testimony. They should also advocate for a more enlightened and fair adjudication of battered defendants' cases. Courts should develop and maintain a fuller awareness of the deep-rooted misperceptions that still exist regarding battered women and ensure these misperceptions do not dictate trial procedure or jury verdicts. The first step is a return to the standards originally set forth in *Beckley* and *Wilson*.

The more fully judges and juries understand the dynamics of IPB, the fairer and more appropriate their adjudication of such cases. Getting it right the first time will not only further the ends of justice; it will enhance efficiency and restore stock in the finality of judgments. The status quo robs battered women defendants of their constitution rights to

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viable option because of Michigan's "unified system" under MCR 6.508(D), which governs in Michigan in lieu of state habeas corpus relief. MICH. CT. R. 6.508(D).

196. *See* Parrish, *supra* note 93, at 117-18.

197. People v. Beamon, No. 190612, 1997 WL 33343372, at *1 (Mich. Ct. App. Sept. 23, 1997); People v. Williams, No. 251049, 2005 WL 356322, at *3 (Mich. Ct. App. Feb. 15, 2005); People v. Sandoval-Ceron, No. 286985, 2010 WL 3021861, at *3 (Mich. Ct. App. Aug. 3, 2010).

198. *Seaman*, 2010 WL 4386930, at *9-12.

199. *See* People v. Beckley, 456 N.W.2d 391, 406-07 (Mich. 1990); People v. Wilson, 487 N.W.2d 822, 824-25 (Mich. 1992).

due process and to present a defense. It perpetuates the unequal treatment of women while placing needless additional strain on an overburdened prison system. Inasmuch as our court system embodies the society that it serves, we can and must do better.