NOTE

State v. Riker, Battered Women Under Duress: The Concept the Washington Supreme Court Could Not Grasp

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INTRODUCTION

Domestic violence does not discriminate. It strikes with equal force to all victims. There is no typical battered woman. She is a neighbor, a friend, a co-worker, a boss, a sister, a child, a mother. With statistics evidencing that a woman is beaten every eighteen seconds,[1] it is difficult for one to ignore this issue.

Fortunately, society is becoming increasingly aware of the domestic violence problem in America. Since 1979, courts have held that expert testimony regarding the existence of the battered woman syndrome (BWS) is admissible.[2] Through these judicial decisions and legislative action,[3] many battered women are now allowed to present

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1. Note, *Developments in the Law - Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1501, 1501 (1993) (citing Donna Moore, *Editor's Introduction: An Overview of the Problem* in BATTERED WOMEN 7, 14 (Donna Moore ed., 1979)). Some reports indicate that there are as many as four million domestic violence incidents against women each year. *Id.* at 1501 (citing *Women and Violence: Hearings Before the Senate Committee on the Judiciary*, 101st Cong., 2d Sess. 117 (1990) (testimony of Angela Browne, Ph.D.)).

2. People v. Romero, 13 Cal. Rptr. 2d 332, 337 n.8 (Ct. App. 1992) (citing cases), *rev'd on other grounds*, 883 P.2d 388 (Cal. 1994).

3. Section 1107 of the California Evidence Code provides for the admission of BWS evidence in criminal actions. Section 1107(a) provides:

> In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the physical, emotional, or

evidence of the BWS to support a defense to criminal acts related to their batterers. Unfortunately, not all battered women defendants are allowed to introduce BWS testimony to support their defenses. Deborah Riker is one of the battered women to whom the Supreme Court of Washington chose to deny this opportunity.[4]

Although some people have the option of going to the police after receiving threats on their lives, this was not the case for Deborah Riker: Deborah is a battered woman.[5] Since age nine, Deborah suffered repeated torture and abuse at the hands of men who were in her life.[6] In 1987, Deborah met Rupert Burke, a man who abused both women and drugs.[7] When Burke threatened both Deborah and her sister, Deborah did what he told her to do: she sold him cocaine.[8]

As a result, Deborah was charged with delivery and possession of cocaine.[9] Deborah's case presented the classic defense of duress, but she was not allowed to introduce evidence to adequately support this defense.[10] Although Washington courts admit BWS testimony in cases where a battered woman's state of mind is at issue, in *State v. Riker*,[11] the Washington Supreme Court upheld the trial court's refusal to admit this evidence to support Deborah's defense of duress.[12]

This Note argues that prior Washington case law, current literature on the BWS, and proper application of evidence rules with

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mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.

CAL. EVID. CODE § 1107(a) (West 1995).

4. State v. Riker, 123 Wash. 2d 351, 869 P.2d 43 (1994).

5. Battered women are similar to trauma victims and develop learned responses to repeated abuse. Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 326 (1992). In particular, battered women experience a sense of powerlessness to do anything to stop the violence. *See* State v. Allery, 101 Wash. 2d 591, 596-97, 682 P.2d 312, 315 (1984) (citing Loraine P. Eber, *The Battered Wife's Dilemma: To Kill or to Be Killed*, 32 HASTINGS L.J. 895 (1981)).

6. Appellant's Opening Brief at 10-11, State v. Riker, 123 Wash. 2d 351, 869 P.2d 43 (1994) (No. 58970-4). (Although the brief was submitted to the state court of appeals, the Washington Supreme Court heard argument and issued a decision without a decision at the intermediate appellate level.)

7. *See* text accompanying note 129.

8. Appellant's Reply Brief at 2-3, *Riker* (No. 58970-4).

9. Respondent's Opening Brief at 3, *Riker* (No. 58970-4).

10. State v. Riker, 123 Wash. 2d 351, 869 P.2d 43 (1994) (affirming the trial court's decision to exclude expert testimony on the BWS).

11. 123 Wash. 2d 351, 869 P.2d 43 (1994).

12. *Id.* at 365, 869 P.2d at 50-51. The court held this evidence inadmissible even though the duress defense implicates the defendant's state of mind. *See infra* note 140. For a complete discussion of the defense of duress, see *infra* text accompanying notes 236-265.

regard to expert testimony mandate that courts admit BWS testimony where the defendant claims a defense of duress, regardless of the factual context in which the duress occurred. Because of the *Riker* court's result-oriented approach, the erroneous decision will adversely impact criminal defendants for years to come. Part I of this Note provides background on the admissibility requirements for novel scientific evidence and expert testimony in Washington. Part II discusses the history of the BWS, including the original research, the effects of the syndrome, and the scientific acceptance of this phenomenon. Part III more closely examines Washington's use of BWS testimony in cases where a battered woman's state of mind is at issue. Part IV discusses both the trial court and Washington Supreme Court decisions in *State v. Riker*. Part V argues that the majority's decision was erroneous because, in an effort to reach a particular result, the majority misapplied both the *Frye* rule[13] and Washington Evidence Rule 702 (ER 702).[14] Further, Part V argues that the majority ignored the similarities between self-defense and duress, a proper analysis of which would require admission of BWS testimony in cases of duress.

I. SCIENTIFIC EVIDENCE AND EXPERT TESTIMONY IN WASHINGTON

Because trial judges lack scientific expertise, courts are reluctant to admit scientific evidence unless the theory or procedure used has been carefully scrutinized, thereby ensuring its validity.[15] Further, because the average person lacks the training and experience necessary to interpret scientific evidence, experts are needed to explain the foundation for such evidence to the jury.[16]

Washington courts engage in a two-step inquiry to determine the admissibility of expert testimony regarding *novel* scientific evidence.[17]

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13. For a description of the *Frye* rule, see *infra* part I.A.

14. For a description of ER 702, see *infra* part I.B.

15. *See* State v. Cauthron, 120 Wash. 2d 879, 886-87, 846 P.2d 502, 505 (1993) (stating that because trial judges lack scientific expertise, the *Frye* analysis requires that courts admit only that testimony which scientists agree is reliable). In determining whether or not certain expert testimony has a valid scientific basis, courts may rely on opinions from other jurisdictions, literature on the subject, law reviews, and other journals. *Id.* at 888, 846 P.2d at 506.

16. *C.f.* State v. Allery, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984) (explaining that the jury must be given a "professional explanation of the battering syndrome and its effects on the woman through the use of expert testimony").

17. *Riker*, 123 Wash. 2d at 359, 869 P.2d at 47.

First, the evidence must satisfy the *Frye* standard.[18] Under *Frye*, courts determine, as a matter of law, whether such evidence has "achieved general acceptance in the relevant scientific community."[19] Second, the proposed testimony must be properly admissible under ER 702.[20] Under ER 702, courts will admit expert testimony if the witness qualifies as an expert and if the testimony would be helpful to the trier of fact.[21] In determining whether expert testimony regarding scientific evidence is admissible, a trial court must analyze the *Frye* issue first.[22]

A. *The* Frye *Standard*

The standard applied by Washington courts for determining the admissibility of novel scientific evidence was originally set out in *Frye v. United States*.[23] In *Frye*, the court determined that novel scientific

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18. *Id.* The *Frye* standard was originally set out in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). *See infra* part I.A. for further discussion of the *Frye* standard.

19. State v. Martin, 101 Wash. 2d 713, 719, 684 P.2d 651, 654 (1984) (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).

20. *Riker*, 123 Wash. 2d at 359, 869 P.2d at 47.

21. *Cauthron*, 120 Wash. 2d at 890, 846 P.2d at 507.

22. *Id.* at 890 n.4, 846 P.2d at 507 n.4. Early decisions interpreting ER 702 and *Frye* mistakenly characterized this process in three steps. Any confusion regarding the correct analysis was firmly clarified in *Cauthron*:

> To reiterate, trial courts should initially make a *Frye* determination as to the general acceptance of the scientific principle underlying the expert's proposed testimony. Once the court is satisfied that there exists general acceptance in the appropriate scientific community, the court should look to ER 702 to determine the admissibility of the expert's testimony.

Id. While the trial court's application of ER 702 is reviewed for abuse of discretion, the *Frye* application is reviewed de novo. *Id.*

23. *Id.* at 886, 846 P.2d at 505 (citing Frye v. United States 293 F. 1013 (D.C. Cir. 1923)). The jurisdictions in which the following cases were decided join Washington in applying the *Frye* standard: State v. Bible, 858 P.2d 1152 (Ariz. 1993), *cert. denied*, 114 S. Ct. 1578 (1994); People v. Leahy, 882 P.2d 321 (Cal. 1994); Flanagan v. State, 625 So. 2d 827 (Fla. 1993); People v. Watson, 629 N.E.2d 634 (Ill. App. Ct. 1994), *appeal denied*, 157 Ill. 2d 519, *vacated*, 650 N.E.2d 1037 (Ill. App. Ct. 1995); Petrey v. Commonwealth, No. 94-CA-000360-MR, 1995 WL 457212 (Ky. Ct. App. Aug. 4, 1995); State v. Klawitter, 518 N.W.2d 577 (Minn. 1994); State v. Hill, 865 S.W.2d 702 (Mo. Ct. App. 1993); State v. Carter, 524 N.W.2d 763 (Neb. 1994); People v. Wesley, 633 N.E.2d 451 (N.Y. 1994); State v. Vandebogart, 652 A.2d 671 (N.H. 1994); Commonwealth v. Crews, 640 A.2d 395 (Pa. 1994); Dickeou v. Osborn, 881 P.2d 943 (Utah App. 1994).

In 1993, the United States Supreme Court abolished the *Frye* standard in favor of a more lenient rule for admitting expert scientific testimony. Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993). The *Daubert* court abolished the "general acceptance" test mandated by the *Frye* standard because *Frye* was at odds with the "liberal thrust" of Federal Rule of Evidence 702. *Id.* at 2794. Although four jurisdictions have adopted *Daubert* in favor of *Frye*, *see* State v. Albericao, 861 P.2d 192, 203 (N.M. 1993); Taylor v. State, 889 P.2d 319, 327 (Okla. Crim. App. 1995); Department of Social Servs. v. McCarty, 506 N.W.2d 144, 146-47 (S.D. 1993); State v.

evidence "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[24] The *Frye* standard is not a separate rule of evidence. Rather, it is a limitation on the admissibility of *novel* scientific evidence under ER 702.[25]

Under the *Frye* standard, expert testimony regarding novel scientific evidence must satisfy a two-part test: First, the expert's *underlying theory* must be "generally accepted in the scientific community."[26] Second, there must exist "*techniques, experiments, or studies* utilizing that theory which are capable of producing reliable results and are generally accepted in the scientific community."[27] Once a jurisdiction has accepted a scientific theory under *Frye*, the theory is no longer novel and need not undergo a *Frye* analysis again.[28]

B. *Evidence Rule 702*

After a court determines that novel scientific evidence satisfies the *Frye* standard, the court must analyze the proposed testimony under ER 702.[29] Although *Frye* applies only to the admissibility of novel scientific evidence, ER 702 is the rule of evidence by which all expert testimony is admitted. ER 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[30]

Thus, in Washington, expert testimony is admissible under ER 702 when (1) "[t]he witness qualifies as an expert," and (2) "the testimony

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Streich, 658 A.2d 38, 46 (Vt. 1995), the Washington Supreme Court has consistently applied the *Frye* standard and continues to employ it. *Cauthron*, 120 Wash. 2d at 886, 846 P.2d at 505. Currently, there are three cases pending before the Washington State Supreme Court in which the court is considering application of the *Daubert* standard in the criminal context: State v. Copeland (No. 62417-8), State v. Jones (No. 62317-1), and State v. Cannon (No. 62416-0). However, it is unlikely that the Washington Supreme Court will abandon the *Frye* standard in favor of *Daubert* in light of its recent ruling in Reese v. Stroh, 128 Wash. 2d 300, 907 P.2d 282 (1995) (declining to adopt *Daubert* in a civil case).

24. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

25. *See Cauthron*, 120 Wash. 2d at 890 n.4, 846 P.2d at 507 n.4.

26. *Riker*, 123 Wash. 2d at 359, 869 P.2d at 47-48 (emphasis added).

27. *Id.* (emphasis added). The techniques used to determine whether or not one is a battered woman include questionnaires, interviews, and behavioral characteristic tests. Telephone Interview with Karil Klingbeil (Mar. 6, 1995).

28. *See Cauthron*, 120 Wash. 2d at 888 n.3, 846 P.2d at 506 n.3.

29. *Id.* at 889-90, 846 P.2d at 507.

30. WASH. R. EVID. 702.

is helpful to the trier of fact."[31] While both elements of ER 702 must be satisfied, admissibility will typically turn on prong two—whether the testimony will be helpful to the trier of fact.[32] Expert testimony is helpful to the trier of fact if it is relevant.[33]

Relevant testimony is governed by Evidence Rule 401 (ER 401)[34] and Evidence Rule 403 (ER 403).[35] ER 401 provides a liberal definition of relevance, requiring only the following: (1) the testimony must have the "tendency to prove or disprove a fact," and (2) the testimony "must be of some consequence in the context of the other facts and the applicable substantive law."[36] Traditionally, these requirements are referred to as probative value[37] and materiality.[38]

ER 403 is a limitation on ER 401.[39] Under ER 403, even relevant evidence may be excluded if it is unfairly prejudicial, confusing, or a waste of time.[40] Applying a balancing process, courts will exclude evidence if its negative character outweighs its general relevance.[41] However, a judge may not exclude evidence merely because she disbelieves it.[42] This question is a matter of credibility and is strictly for the jury to decide.[43]

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31. *Cauthron*, 120 Wash. 2d at 890, 846 P.2d at 507.

32. *See, e.g.*, State v. Cauthron, 120 Wash. 2d 879, 846 P.2d 502 (1993).

33. State v. Petrich, 101 Wash. 2d 566, 575, 683 P.2d 173, 180 (1984).

34. Evidence Rule 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WASH. R. EVID. 401.

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

36. *See* State v. Sargent, 40 Wash. App. 340, 348 n.3, 698 P.2d 598, 604 n.3 (1985) (citing 5 KARL B. TEGLAND, WASHINGTON PRACTICE, EVIDENCE § 82 (2d ed. 1982)), *rev'd on other grounds*, 111 Wash. 2d 641 (1989).

37. State v. Bebb, 44 Wash. App. 803, 814, 723 P.2d 512, 518 (1986) (citing 5 KARL B. TEGLAND, WASHINGTON PRACTICE, EVIDENCE § 83 (2d. ed 1982)), *aff'd*, 108 Wash. 2d 515, 740 P.2d 829 (1987). Probative value is established by a minimum showing of relevance. That is, if testimony has *any* tendency to make the existence of a fact more or less probable, it is relevant. *Id.*

38. State v. Rice, 48 Wash. App. 7, 12, 737 P.2d 726, 729 (1987) (citing 5 KARL B. TEGLAND, WASHINGTON PRACTICE, EVIDENCE § 82 (2d. ed 1982)). Material evidence includes facts bearing on the credibility or probative value of other evidence. *Id.* Thus, evidence that is introduced to prove an element of a defense is material evidence. *Id.*

39. WASH. R. EVID. 403.

40. *Id.*

41. *Id.*

42. 5 KARL B. TEGLAND, WASHINGTON PRACTICE, EVIDENCE § 106 (2d. ed 1982) (citing United States v. King, 713 F.2d 627, 631-33 (11th Cir. 1983); Ballon v. Henri Studios, 656 F.2d 1147, 1153-55 (5th Cir. 1981)).

43. *Id.*

Relevance under both ER 401 and ER 403, then, is intricately related to the jury's role in the case. Washington courts have held that testimony is relevant if it assists the jury to understand a phenomenon that is outside the competence of the average lay person.[44] The BWS is an example of just such a phenomenon.

II. THE BATTERED WOMAN SYNDROME

The BWS is a psychological term of art that explains "the measurable psychological changes that occur after exposure to repeated abuse."[45] The BWS is not an illness, "it is a collection of thoughts, feelings, and actions that logically follow a frightening experience that one expects could be repeated."[46] Dr. Lenore E. Walker is largely responsible for the development of the BWS and is a nationally recognized expert in this area.[47] Dr. Walker defines a battered woman as "one who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights."[48] There is no typical battered woman because the syndrome affects women from all socio-economic groups and religions.[49]

A. The Study

Dr. Walker conducted one of the first scientific research projects studying the psychological effects of repeated abuse on battered women.[50] The results of Dr. Walker's study are based on tests conducted on 435 battered women.[51] According to Dr. Walker, a woman is diagnosed as a battered woman when she has experienced at

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44. *See* State v. Ciskie, 110 Wash. 2d 263, 275, 751 P.2d 1165, 1172 (1988) (citing State v. Allery, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984)).

45. Walker, *supra* note 5, at 326. The BWS is a sub-category of the Post Traumatic Stress Disorder, *id.* at 327, and is a "recognized phenomenon in the psychiatric profession." Colette M. Smith, Comment, *Recovered Memories of Alleged Sexual Abuse: An Analysis of the Theory of Repressed Memories Under the Washington Rules of Evidence*, 18 SEATTLE U. L. REV. 51, 78 (1994).

46. Walker, *supra* note 5, at 327.

47. People v. Aris, 264 Cal. Rptr. 167, 177 (Ct. App. 1989).

48. LENORE E. WALKER, THE BATTERED WOMAN 15 (1979). Battered women suffer many forms of abuse including non-verbal abuse and verbal threats of future punishment. Beth I.Z. Boland, *Battered Women Who Act Under Duress*, 28 NEW ENG. L. REV. 603, 608 (1994).

49. State v. Ciskie, 110 Wash. 2d 263, 277, 751 P.2d 1165, 1172 (1988) (referring to testimony by Karil Klingbeil).

50. LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984) [hereinafter SYNDROME].

51. *Id.* at 208. Originally the study began with 435 women; however, the actual results and conclusions reached by Dr. Walker are based on her analysis of 403 women. *Id.*

least two cycles of violence with the same intimate partner.[52] In reaching this diagnosis, it is clinically insignificant whether or not a woman is currently involved in an intimate relationship with her batterer.[53] Thus, even though seventy-six percent of the women involved in Dr. Walker's study were no longer involved in battering relationships at the time of testing, they were all clinically diagnosed as "battered women."[54]

B. The Effects of Violence on Battered Women

Dr. Walker's research reveals several components of the BWS. First, her study confirms that battering relationships are composed of cycles of violence.[55] Second, because battered women are unable to control their batterers' abuse, they become "helpless" in an otherwise escapable situation.[56] Third, due to the repeated abuse they suffer, battered women behave like trauma victims.[57] As a result, they are hypervigilant to their surroundings.[58]

Dr. Walker's pioneering research led to the discovery of the "Walker Cycle Theory of Violence."[59] This theory describes three distinct phases to a battering relationship. In phase one, the tension building phase, the batterer indulges in psychological torture of the woman.[60] This torture is followed by phase two, an "acute battering incident," in which the inevitable tension that has built up results in

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52. *Id.* at 203.

53. *Id.* at 15 (stating that "[a]ll 403 women reported on a battering relationship, as that was the criteria for inclusion in the sample, while only 203 had a nonbattering relationship to report"); *see also* Letter from Lenore Walker, Walker & Associates, to Ann-Marie Montgomery, *Seattle University Law Review* (Mar. 9, 1995) (on file with the *Seattle University Law Review*) [hereinafter Letter from Lenore Walker (Mar. 9, 1995)].

54. SYNDROME, *supra* note 50, at 97; *see also* Letter from Lenore Walker (Mar. 9, 1995), *supra* note 53. Dr. Walker found that battered women suffer the same type of psychological torture that both prisoners of war and hostage victims experience. In her study, this psychological abuse included threats such as death of family, death of self, and other vague threats. SYNDROME, *supra* note 50, at 27.

55. SYNDROME, *supra* note 50, at 95.

56. *See id.* at 86-87.

57. Walker, *supra* note 5, at 326.

58. *Id.* at 328.

59. For an extensive discussion of this theory, see SYNDROME, *supra* note 50, at 2.

60. *Id.* at 95. In this phase, the batterer expresses hostility toward the woman by calling her names and/or engaging in some physical abuse. In order to control the batterer's anger, the woman tries to placate him in hopes that he will not become further aggravated. Many times a battered woman succeeds in reducing the batterer's hostility "which reinforces her unrealistic belief that she can control" him. *Id.* However, soon the woman realizes that she cannot control the batterer's "angry response pattern," and she therefore begins to withdraw. *Id.*

an uncontrollable discharge of violence.[61] In phase three, the batterer expresses "loving contrition" by apologizing profusely and showing kindness and remorse.[62] It is this third phase that is the most troublesome because the batterer's behavior provides the woman with positive reinforcement for staying in the relationship.[63]

This positive reinforcement leads battered women to experience a sense of learned helplessness.[64] The theory of learned helplessness explains the counter-intuitive nature of the battered woman's responses to the incessant abuse she suffers.[65] It is difficult for an individual who has never suffered from a battering relationship to understand why a victim of repeated abuse would choose to stay in the relationship, refuse to call the police, or refuse to seek psychological help.[66] However, the violence in these relationships is random and unpredictable; hence, women begin to doubt their own natural responses to danger.[67]

When a woman realizes that her behavior bears no relationship to the violence she receives, she develops "survival or coping skills that keep [her] alive with minimal injuries."[68] For example, many battered women become passive after an abusive incident.[69] These coping skills are developed at the expense of escaping skills, which may

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61. *Id.* at 182. In phase two, women are subjected to life threatening violence. This violence includes broken eardrums, severe cuts or burns, broken bones, permanent head injuries, black eyes, lost teeth, and concussions. *Id.*

62. *Id.* at 96.

63. *Id.*

64. *Id.* The theory of learned helplessness was developed by Martin Seligman. Seligman studied the effects of intermittent and non-contingent shocks on dogs. These dogs developed perceptual distortions because the pain they received could not be accurately determined. Thus, the dogs refused to escape their situations even when no fence restrained them. *Id.* at 86-87.

65. In the words of Dr. Walker, "The theory of learned helplessness attempts to demonstrate how a seemingly normal functioning woman loses the ability to predict that what she does will have an impact upon her safety." Walker, *supra* note 5, at 330.

66. Monique M. Gousie, Comment, *From Self-Defense To Coercion:* McMaugh v. State *Use Of Battered Woman's Syndrome To Defend Wife's Involvement In Third-Party Murder*, 28 NEW. ENG. L. REV. 453, 474 (1993) ("Absent the expert testimony, the jury would and did have difficulty understanding why [the defendant] 'would get in a car with a drunk, violent, and heavily armed man . . . [and] did not either resist him, or refuse to go—and why she sat passively, waiting for events to unfold.'").

67. Walker, *supra* note 5, at 330; *see also* SYNDROME, *supra* note 50, at 86.

68. SYNDROME, *supra* note 50, at 33.

69. *Id.* at 33, 87. Another coping mechanism used by battered women is minimizing the violence that they experience. *Id.* at 24. "Battered women may omit descriptions of their batterer's violent acts because they fear . . . that talking about the violence in too much detail will upset the precarious situation and cause [them] further harm." *Id.*

include anger and active behavior, skills that would enable the battered woman to leave the relationship.[70]

The synergistic effects of the cycles of violence and learned helplessness are profound.[71] A symptom of these effects is hypervigilance, a symptom that all battered women share.[72] Battered women are hypervigilant to cues of *potential* danger and are acutely aware of their surroundings.[73] To a battered woman, otherwise insignificant behaviors such as an eye twitch, a particular tone of voice, or a certain movement are all things that may signal an impending attack by a male.[74] Contrary to societal belief,[75] this hypervigilance continues whether or not a battered woman stays in the particular violent relationship.[76] Analyzing a battered woman's hypervigilance, Dr. Walker states:

> [W]omen are hypervigilant to cues of impending danger and accurately perceive the seriousness of the situation before another person who had not been repeatedly abused might recognize the danger. They may make a preemptive strike before the abuser has actually inflicted much physical damage, anticipating his next moves from what they know from previous experience. Or, they might wait until the man has stopped for awhile, knowing that he will begin his assault again.[77]

Illustrating a battered woman's hypervigilant behavior, Dr. Walker analogizes a battered woman to an animal who has been in a forest fire and then jumps when a match is lit.[78] Both the animal's and the battered woman's reactions are instinctual. That is why a battered woman may exhibit hypervigilant behavior in response to threats made by persons *other than her batterer*.[79] Accordingly,

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70. *See id.* at 33, 87.

71. Walker, *supra* note 5, at 328.

72. *Id.*

73. These women are particularly aware of little things that signal an impending attack. *Id.*; *see also infra* note 108 and accompanying text.

74. Walker, *supra* note 5, at 328.

75. *Id.* at 333.

76. Letter from Lenore Walker (Mar. 9, 1995), *supra* note 53. Ms. Walker states that the hypervigilant reaction takes the longest to heal. *See* Walker, *supra* note 5. Additionally, when battered women are placed in a dangerous situation, they can experience flashbacks of a previously abusive incident. This is particularly problematic because these flashbacks increase the battered woman's perception of danger. *Id.* at 327-28. In fact, sometimes it is impossible for battered women to separate the flashback from the current situation. *Id.* at 328.

77. Walker, *supra* note 5, at 324.

78. Letter from Lenore Walker (Mar. 9, 1995), *supra* note 53.

79. Letter from Lenore Walker, Walker & Associates, to Ann-Marie Montgomery, *Seattle University Law Review* (Mar. 24, 1995) (on file with the *Seattle University Law Review*)

battered women may perceive behavior by males (other than their batterers) as threatening, while a non-battered woman would not perceive the same behavior as threatening in any way.[80]

III. WASHINGTON ALLOWS EXPERT TESTIMONY OF THE BATTERED WOMAN SYNDROME IN CASES WHERE A BATTERED WOMAN'S STATE OF MIND IS AT ISSUE

The BWS is not a separate legal defense.[81] Rather, BWS testimony aids jurors in understanding the syndrome's psychological effects on women who suffer from it.[82] As Dr. Walker explains:

> [T]estimony about the psychological knowledge concerning the dynamics of an abusive relationship and its psychological impact on the woman's state of mind [is needed] to help meet the legal standard of self-defense or *duress* which might not be otherwise met if the history of abuse was not known. The psychologist is asked to evaluate first if the woman was a battered woman; second, if the abuse caused the development of Battered Woman Syndrome (which is a sub-category of the Post Traumatic Stress Disorder . . .), and third, if so, how that impacted on the woman's state of mind at the time of the action for which she is charged.[83]

The Washington Supreme Court has repeatedly admitted BWS testimony in cases where a battered woman's state of mind was at issue, making it clear that BWS testimony is admissible under both *Frye* and ER 702.[84]

[hereinafter Letter from Lenore Walker (Mar. 24, 1995)].

80. Letter from Lenore Walker (Mar. 9, 1995), *supra* note 53.

81. Susan D. Appel, Note, *Beyond Self-Defense: The Use of Battered Woman Syndrome In Duress Defenses*, U. ILL. L. REV. 955, 958 (1994).

82. State v. Allery, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984).

83. Walker, *supra* note 5, at 323 (emphasis added).

84. *See, e.g.*, *Allery*, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984); State v. Ciskie, 110 Wash. 2d at 263, 265, 751 P.2d 1165, 1166 (1988). These holdings are in accord with decisions of other jurisdictions. For example, BWS evidence was admitted in the following self-defense cases: *Ex parte* Hill, 507 So. 2d 558 (Ala. 1987); People v. Aris, 264 Cal. Rptr. 167 (1989); People v. Hare, 782 P.2d 831 (Colo. 1989), *aff'd*, 800 P.2d 1317 (1990); Hawthorne v. State, 470 So. 2d 770 (Fla. Dist. Ct. App. 1985); Motes v. State, 384 S.E.2d 463 (Ga. 1989); People v. Minnis, 455 N.E.2d 209 (Ill. 1983); State v. Nunn, 356 N.W.2d 601 (Iowa Ct. App. 1984); State v. Stewart, 763 P.2d 572 (Kan. 1988) (sleeping husband case); Commonwealth v. Craig, 783 S.W.2d 387 (Ky. 1990); State v. Burton, 464 So. 2d 421 (La. Ct. App.), *writ denied*, 468 So. 2d 570 (1985); State v. Anaya, 438 A.2d 892 (Me. 1981); Commonwealth v. Moore, 514 N.E.2d 1342 (Mass. App. Ct. 1987); State v. Hennum, 441 N.W.2d 793 (Mich. 1989) (sleeping husband case), *rev'd*, 441 N.W.2d 793 (1989); May v. State, 460 So. 2d 778, (Miss. 1984); State v. Williams, 787 S.W.2d 308 (Mo. Ct. App. 1990); State v. Jackson, 435 N.W.2d 893 (Neb. 1989); State v. Briand, 547 A.2d 235 (N.H. 1985); State v. Kelly, 478 A.2d 364 (N.J. 1984); State v. Gallegos, 719 P.2d 1268 (N.M. 1986); People v. Torres, 488 N.Y.S.2d 358 (N.Y. Sup. Ct. 1985);

A. *In Washington, Battered Woman Syndrome Testimony Passes the* Frye *Analysis*

Recall that when a jurisdiction has accepted a scientific theory under *Frye*, the theory is no longer novel and need not undergo the *Frye* analysis again.[85] In *State v. Allery*,[86] where a murder defendant claimed she acted in self-defense, the Washington Supreme Court held that the BWS was sufficiently recognized in the scientific community to be admitted via expert testimony under the first prong of *Frye*.[87] The *Allery* court's holding was clear: "Where the psychologist is qualified to testify about the battered woman syndrome, and the defendant establishes her identity as a battered woman, expert testimony on the battered woman syndrome is admissible."[88]

Four years later, in *State v. Ciskie*,[89] the Washington Supreme Court appropriately reaffirmed, without additional analysis, that the BWS is an accepted psychological theory in the scientific community.[90] *Ciskie* did not involve a battered woman claiming self-defense. Rather, the State introduced expert testimony of the BWS to explain why a rape victim would not call the police.[91] Although *Ciskie* involved a different factual context than *Allery*, the Washington Supreme Court ruled that the testimony had already been found admissible under *Frye*.[92] Therefore, the *Ciskie* court did not entertain a *Frye* analysis,[93] and no Washington case challenged the BWS under the *Frye* standard until *State v. Riker*.[94]

State v. Clark, 377 S.E.2d 54 (N.C. 1989); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983) (sleeping husband case); State v. Koss, 551 N.E.2d 970 (Ohio 1990); Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989); State v. Hill, 339 S.E.2d 121 (S.C. 1986); State v. Furlough, 797 S.W.2d 631 (Tenn. Crim. App. 1990); Fielder v. State, 756 S.W.2d 309 (Tex. 1988); Blair v. Blair, 575 A.2d 191 (Vt. 1990); State v. Dozier, 255 S.E.2d 552 (Va. 1979); State v. Lambert, 312 S.E.2d 31 (W. Va. 1984); State v. Felton, 329 N.W.2d 161 (Wis. 1983).

For criticism of BWS testimony in self-defense cases, see David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986).

85. State v. Cauthron, 120 Wash. 2d 879, 888 n.3, 846 P.2d 502, 506 n.3 (1993).

86. 101 Wash. 2d 591, 682 P.2d 312 (1984).

87. *Id.* at 597, 682 P.2d at 316.

88. *Id.*

89. 110 Wash. 2d 263, 751 P.2d 1165 (1988).

90. *Id.* at 271, 751 P.2d at 1170.

91. *Id.* at 271-72, 751 P.2d at 1169-70.

92. *Id.* at 271-72, 751 P.2d at 1170.

93. *Id.* at 271-72, 751 P.2d at 1169-70.

94. 123 Wash. 2d 351, 869 P.2d 43 (1994).

B. *In Washington, Battered Woman Syndrome Testimony is Properly Admissible Under ER 702*

In both *Allery* and *Ciskie*, the Washington Supreme Court admitted BWS testimony because, when offered through an expert, it was helpful to the trier of fact.[95] Significantly, BWS testimony is not admissible for purposes of general credibility.[96] Nor is it admissible to endorse what the defendant did.[97] Rather, it is admitted to help jurors understand why the battered defendant failed to act in what would seem a more "normal" way.[98] BWS testimony is relevant and, thus, helpful to the trier of fact for several reasons: (1) it bolsters the defendant's credibility,[99] (2) it explains her perception of danger,[100] and (3) it explains why her fear of danger is reasonable.[101]

First, BWS evidence is relevant because it bolsters the defendant's credibility. Because the effects of the BWS are outside the knowledge of the average juror,[102] expert testimony is needed to dispel dangerous misconceptions about battered women and to assist jurors in understanding a battered woman's behaviors and responses. For example, it is difficult to understand (1) why a battered woman remains in a relationship that is psychologically and physically dangerous,[103] and (2) why a battered woman does not seek help or call the police.[104] Jurors cannot fairly or accurately assess the defendant's behavior without an educated understanding of the counter-intuitive nature of the BWS.[105] Without the aid of expert testimony, a jury may think that a battered woman's failure to leave the relationship signals exaggeration of the violent nature of the incidents.[106]

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95. *See Allery*, 101 Wash. 2d at 597, 682 P.2d at 316; *Ciskie*, 110 Wash. 2d at 279, 751 P.2d at 1173. While recognizing that BWS testimony is helpful to explain a battered woman's perception of fear, courts may refuse to admit this evidence if the battered woman's mental state is not at issue. *See, e.g.*, State v. Hanson, 58 Wash. App. 504, 508, 793 P.2d 1001, 1003 (upholding the trial court's refusal to admit BWS testimony where the defendant claimed that she *accidentally* shot her battering husband), *rev. denied*, 115 Wash. 2d 1033 (1990).

96. *Hanson*, 58 Wash. App. at 507, 793 P.2d at 1002 (concluding that BWS evidence cannot be introduced solely "to enhance the general credibility of the defendant").

97. *Id.* at 509, 793 P.2d at 1003.

98. *Id.*

99. This applies to those defendants whose state of mind and perceptions are at issue. *See infra* note 107.

100. *Riker*, 123 Wash. 2d at 371, 869 P.2d at 54 (Utter, J., dissenting) (citing cases).

101. *Allery*, 101 Wash. 2d at 597, 682 P.2d at 316.

102. *Ciskie*, 110 Wash. 2d at 274, 751 P.2d at 1171.

103. Appellant's Opening Brief at 10-11, *Riker* (No. 58970-4).

104. *Allery*, 101 Wash. 2d at 597, 682 P.2d at 316.

105. *Id.* at 594, 682 P.2d at 314.

106. Appellant's Opening Brief at 11, *Riker* (No. 58970-4).

Thus, many jurors may not believe the defendant's testimony regarding past abuse or her version of the particular events that are critical to her defense.[107]

Second, BWS evidence is relevant to explain the battered woman's *perception* of danger. Without expert testimony providing a basic framework for evaluating the defendant's behavior, lay jurors cannot understand the gravity of a battered woman's perceptions of danger. For example, they will not understand how seemingly innocuous behavior may actually be a life-threatening signal to the battered woman.[108]

BWS evidence is particularly important in self-defense cases[109] because the defendant's perception of "imminent danger" is a purely subjective element.[110] Jurors must evaluate the evidence "from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees,"[111] and they must consider the facts and circumstances that were known to her before the crime,[112] which include evidence of battering. To accurately assess the degree of force a battered woman uses, jurors must put themselves in the defendant's shoes. "In no other way could the jury safely say what a reasonably prudent [person] similarly situated would have done."[113]

Third, BWS testimony is relevant to explain the *reasonableness* of the defendant's fear. For example, although the defendant's perception

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107. A juror's lack of understanding is a constant fear that battered women face. *See* SYNDROME, *supra* note 50, at 23. According to Dr. Walker,

> [M]ost battered women do not think anyone will believe the actual level of violence experienced. Indeed, in legal cases attorneys often suggest highlighting only a few battering incidents for fear the jury might not believe that so much violence could occur without beginning to question the personality of the woman.

Id.

108. Battered women can perceive an imminent attack from innocuous behaviors such as eye twitches, mannerisms, certain movements, and voice inflections. *See* Walker, *supra* note 5, at 325.

109. In Washington, a homicide is justified as self-defense if it occurs "[i]n the lawful defense of the slayer, . . . when there is reasonable ground to apprehend a design on the part of the person slain . . . to do some great personal injury to the slayer . . ., and there is imminent danger of such design being accomplished." WASH. REV. CODE § 9A.16.050(1) (1994).

The self-defense statute appears objective on its face. However, courts interpret this statute as having both objective and subjective characteristics. State v. Janes, 121 Wash. 2d 220, 238, 850 P.2d 495, 504 (1993) (explaining the self-defense standard in the context of the battered child syndrome).

110. *See Allery*, 101 Wash. 2d at 597, 682 P.2d at 316.

111. *Id.*

112. *Id.* at 594-95, 682 P.2d at 314.

113. *Id.* at 594, 682 P. 2d at 314 (quoting State v. Wanrow, 88 Wash. 2d 221, 235-36, 559 P.2d 548, 556 (1977)).

of "imminent danger" in self-defense cases is a purely subjective element, the jury must still employ the reasonable battered woman's perspective, which is an objective standard.[114] As Dr. Walker explains,

> [I]t is . . . difficult for a battered woman's perceptions to be understood as reasonable without expert testimony to explain the typical way any woman and in particular, this battered woman would have perceived the same situation.
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> . . . .
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> . . . [P]sychology can help the court by offering the research data known about the dynamics of battering relationships and the reasonableness of battered women's perception of imminent danger in general as a way to compare the particular battered woman's level of fear.[115]

These reasons illustrate how expert testimony of the BWS is helpful to a jury in cases where a battered woman's state of mind is at issue. Anyone who has not been a battered woman would not know, without the aid of an expert, what is or is not a potentially life threatening situation to a battered woman. Similarly, without expert testimony, jurors cannot possibly know what is or is not a *reasonable* response from a battered woman facing such a situation. With these concepts in mind, one must conclude that *State v. Riker* is a tragic decision.

IV. *STATE V. RIKER*

Washington precedent illustrates that BWS evidence is admissible under *Frye* and ER 702 when a battered woman's state of mind is at issue. It follows, then, that BWS evidence should be admitted in cases where a battered woman defendant claims duress. Specifically, in cases of duress, jurors are required to assess whether or not the defendant was in fear of immediate injury and whether or not her fear was reasonable.[116] In a very controversial case, *State v. Riker*,[117] the Washington Supreme Court recently addressed the admissibility of BWS testimony in the duress context.

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114. State v. Wanrow, 88 Wash. 2d 221, 240, 559 P.2d 548, 558-59 (1977); *see also Janes*, 121 Wash. 2d at 238, 850 P.2d at 504.

115. Walker, *supra* note 5, at 323, 325; *see also Wanrow*, 88 Wash. 2d at 240, 559 P.2d at 558-59.

116. *See infra* note 140; *see also* State v. Turner, 42 Wash. App. 242, 245-46, 711 P.2d 353, 354-55 (1985).

117. 123 Wash. 2d 351, 869 P.2d 43 (1994).

A. The Facts

The defendant, Deborah Riker, was physically and psychologically abused at a very early age.[118] For nine years, she was physically and sexually assaulted by her first stepfather.[119] Her second stepfather sexually abused Deborah when she received good grades or did something right.[120] This abuse did not end with her childhood. At age fifteen, Deborah married, and her husband sexually abused her throughout the marriage.[121] She then left the marriage, only to enter into a series of subsequent abusive relationships. First, she lived with a man who choked and hit her in order to control her behavior.[122] Her next boyfriend beat her at least fifty times, and her wounds were severe: As a result of this boyfriend's beatings, Deborah suffered a fractured skull and two broken wrists.[123] This relationship lasted three-and-a-half years.[124] Deborah then entered at least two more violent and psychologically torturous relationships before the summer of 1987 when she met Rupert Burke.[125]

When Deborah met Burke, he was dating her sister, Suzanna.[126] Burke was a paid informant working with police officers who were investigating Deborah.[127] Burke, who was posing as a marijuana grower looking for weapons, was described by Deborah as a "Mafia type."[128] He used cocaine and was frequently violent with Suzanna.[129] Deborah was aware that Burke physically abused her sister.[130]

On June 16, 1987, Burke demanded that Suzanna get cocaine from Deborah.[131] When Suzanna failed to reach Deborah, Burke threw Suzanna against the wall and threatened, "You are going to keep trying to get a hold of somebody, if you know what's good for you. You have two kids to think about."[132] Two undercover police officers

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118. Appellant's Opening Brief at 10-11, *Riker* (No. 58970-4).
119. *Id.* at 10-11.
120. *Id.* at 11.
121. *Id.*
122. *Id.*
123. *Id.* at 12.
124. *Id.*
125. *Id.* at 12-13.
126. *Id.* at 7.
127. *Id.* at 4-5.
128. *Id.* at 7.
129. *Id.*
130. *Riker*, 123 Wash. 2d at 356, 869 P.2d at 46.
131. Appellant's Opening Brief at 7, *Riker* (No. 58970-4).
132. Respondent's Brief at 23, *Riker* (No. 58970-4).

witnessed this threat.[133] Suzanna tried again and finally reached Deborah. On this day, Deborah first sold cocaine to Rupert Burke.[134]

Burke demanded cocaine from Deborah on two other occasions. When she refused, he threatened that she and her sister would "know the consequences."[135] Because Deborah believed that this threat was life-endangering,[136] she arranged an $18,000 cocaine buy upon Burke's demand.[137] Although Deborah arranged the drug sale, she decided not to participate in the deal. Burke actually bought the cocaine from a third party.[138] Nonetheless, Deborah Riker was charged with delivery and possession of cocaine.[139]

B. The Trial Court Decision

At trial, Deborah asserted a defense of duress.[140] Deborah sought to introduce expert testimony on the BWS to explain two elements of duress: (1) that Burke's threats put Deborah in fear of "immediate grievous bodily injury," and (2) that Deborah's fear of Burke was reasonable.[141]

In an offer of proof to the court, BWS expert Karil Klingbeil stated she would testify that the BWS is a widely accepted theory and that Deborah was a battered woman.[142] Ms. Klingbeil offered that,

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133. *Id.*

134. Appellant's Opening Brief at 7, *Riker* (No. 58970-4).

135. Appellant's Reply Brief at 3, *Riker* (No. 58970-4).

136. *Id.* at 4.

137. Appellant's Opening Brief at 5, *Riker* (No. 58970-4).

138. *Id.* at 6; *Riker*, 123 Wash. 2d at 355, 869 P.2d at 45.

139. Appellant's Opening Brief at 3, *Riker* (No. 58970-4).

140. *Riker*, 123 Wash. 2d at 353, 869 P.2d at 45. Washington's duress statute states:

(1) In any prosecution for a crime, it is a defense that:

(a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or another would be liable to *immediate* death or *immediate* grievous bodily injury; *and*

(b) That such apprehension was reasonable upon the part of the actor; and

(c) That the actor would not have participated in the crime except for the duress involved.

WASH. REV. CODE § 9A.16.060(1) (1994) (emphasis added).

141. Appellant's Opening Brief at 18, *Riker* (No. 58970-4).

142. Respondent's Brief at 5-6, *Riker* (No. 58970-4). Karil Klingbeil is the founder of the sexual assault unit at Harborview Medical Center and testified as an expert in the first case in which Washington State accepted testimony on the BWS. *See* State v. Allery, 101 Wash. 2d 591, 595, 682 P.2d 312, 315 (1984). In *Riker*, both the State and the defense stipulated to Ms. Klingbeil's qualifications as an expert. 123 Wash. 2d at 364, 869 P.2d at 50. In arriving at her conclusion, Ms. Klingbeil relied on the following information: (1) standard psycho-social interviews with Deborah and her sister, (2) administration of the MMPI and other behavioral

due to Deborah's prior abuse, Deborah could not separate her fear and experience with Mr. Burke from the other frightening experiences in her life.[143]

The State objected to this testimony, claiming that it was a novel extension of the BWS to a context where the defendant was not currently in an intimate relationship with her batterer.[144] The State based its objection on the fact that there were no current studies explaining a battered woman's perception of fear *outside* the intimate relationship context.[145] The State also argued that Ms. Klingbeil's conclusion that Deborah was a battered woman was inadmissible testimony because it was not based on accepted scientific principles and methodology.[146] The trial court agreed and excluded Ms. Klingbeil's testimony. Deborah was convicted of delivery and possession of cocaine and sentenced to four years in prison.[147]

C. *The Washington Supreme Court Majority's Analysis*

Deborah appealed her conviction and the Washington Supreme Court granted direct review.[148] In a 7-2 decision, the court affirmed the trial court's ruling, holding that expert testimony regarding the BWS is inadmissible in duress cases where the defendant was not involved in an intimate relationship with the individual who put her under duress.[149] In reaching its decision, the court examined the admissibility of expert testimony under *Frye* and ER 702 and then discussed the policy of admitting BWS evidence in duress cases.[150]

The majority determined that the first part of the *Frye* analysis was not at issue because the BWS is a generally accepted theory in the

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characteristics of battered women, (3) administration of the cycle theory of violence, and (4) knowledge of the fact that Deborah was recently involved in yet another violent battering relationship. Telephone Interview with Karil Klingbeil, founder of the Harborview Medical Center Sexual Assault Unit (Mar. 6, 1994).

143. Telephone Interview with Karil Klingbeil, founder of the Harborview Medical Center Sexual Assault Unit (Mar. 6, 1994); *Riker*, 123 Wash. 2d at 372-73, 869 P.2d at 54-55 (Utter, J., dissenting).

144. Respondent's Brief at 54-58, *Riker* (No. 58970-4). Specifically, the State claimed it was a novel extension of BWS in this context because Burke and Deborah were not involved in an intimate relationship and Burke never actually hit her. *Id.*

145. *Id.* at 55-58.

146. *Id.*

147. *Riker*, 123 Wash. 2d at 358, 869 P.2d at 47.

148. *Id.*

149. *Id.* at 363, 869 P.2d at 50.

150. *Id.* at 360, 869 P.2d at 48.

scientific community.[151] However, it then determined that the expert testimony in this case failed the second part of the *Frye* analysis,[152] under which expert testimony must be based on accepted scientific methods. The *Riker* court determined that the use of expert testimony on the BWS to explain Deborah's fear of Burke was novel because Deborah and Burke were not involved in an intimate relationship.[153] Because the court could not identify any scientific studies involving application of the BWS in a non-intimate, non-battering context, the court concluded that the extension of the syndrome to this context had not yet achieved the necessary "general scientific acceptance."[154] Under this analysis, the court determined that Ms. Klingbeil's opinion amounted to no more than an "unsupported guess."[155]

The court went on to examine Ms. Klingbeil's testimony under ER 702,[156] which requires that the witness qualify as an expert and that the testimony be helpful to the trier of fact. Because Ms. Klingbeil's qualifications were not at issue,[157] the court focused its analysis on whether or not the testimony would be helpful to the trier of fact.[158] The majority found that the trial court correctly excluded the expert's testimony because the testimony was not relevant and, thus, would not assist the trier of fact.[159] The court pointed to the relationship between Deborah and Burke, indicating that because they were only brief acquaintances who engaged in limited contacts, BWS testimony was not probative.[160] This conclusion rested, in part, on

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151. *Id.* (citing State v. Janes, 121 Wash. 2d 220, 234-36, 850 P.2d 495, 502-03 (1993); State v. Ciskie, 110 Wash. 2d 263, 271, 751 P.2d 1165, 1170 (1988); State v. Allery, 101 Wash. 2d 591, 596-98, 682 P.2d 312, 315-16 (1984)).

152. *Id.* at 362, 869 P.2d at 49. For a discussion of the *Frye* test, see *supra* part I.A.

153. *Riker*, 123 Wash. 2d at 363, 869 P.2d at 50.

154. *Id.*

155. *Id.* at 364, 869 P.2d at 50.

156. *Id.* For a discussion of ER 702, see *supra* part I.B.

157. *Riker*, 123 Wash. 2d at 359-60, 869 P.2d at 47-48 ("The first part of this inquiry was never at issue since the parties stipulated at trial that Dr. Klingbeil is an expert on the battered woman syndrome.").

158. *Id.* at 364, 869 P.2d at 50.

159. *Id.* at 364-65, 869 P.2d at 50.

160. *Id.* at 365, 869 P.2d at 50. The court also relied on a test used by a Nebraska court. *Id.* at 364, 869 P.2d at 50 (citing State v. Reynolds, 457 N.W.2d 405, 419 (Neb. 1990)). The Nebraska test for relevancy depends on a case-by-case analysis. Under that test, the court's conclusion that evidence is relevant or not relevant depends on (1) "the court's evaluation of the state of knowledge presently existing about the subject of the proposed testimony," and (2) "the court's appraisal of the facts of the case." *Id.* at 364, 869 P.2d at 50. This Nebraska test has not been used in any other Washington case. *See infra* notes 225-226 and accompanying text.

the supposed absence of specific studies regarding the effects of battering outside the intimate battering relationship.[161]

After concluding that testimony on the BWS was inadmissible under both the *Frye* standard and ER 702, the court examined policy reasons for refusing to admit BWS evidence in cases of duress. The majority was concerned that if it extended BWS testimony to cases of duress, "the evidentiary doors [would] be thrown open to every conceivable emotional trauma."[162] According to the majority, the duress defense is viewed with skepticism. In so stating, the court relied on the language of the duress statute, which requires that the defendant apprehend "immediate harm" as opposed to only "imminent harm," as is required for self-defense.[163] In the majority's opinion, allowing BWS evidence in cases of duress would have a more socially harmful outcome than allowing the same testimony in cases of self-defense where the defendant and the victim were in an intimate, battering relationship.[164] Thus, in light of its *Frye* analysis, its ER 702 analysis, and its policy considerations, the majority held that BWS testimony is inadmissible in cases of duress where the defendant was not in a current intimate relationship with her batterer.[165]

D. The Dissent's Analysis

Two justices disagreed with the majority decision in *Riker*.[166] Writing for the dissent, Justice Robert Utter explained that the trial court should not have undertaken a *Frye* analysis because the BWS, as a general theory, is already scientifically accepted and recognized.[167] Thus, whether or not an intimate relationship existed between Deborah and Burke was "without legal consequence."[168]

Justice Utter recognized that BWS testimony is intended to explain how "severe abuse operates to alter the victim's state of mind in general, and the perception of danger in particular."[169] According to the dissent, BWS testimony is helpful to the trier of fact because, in appropriate cases, jurors are required to evaluate the reasonableness of

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161. *Riker*, 123 Wash. 2d at 365, 869 P.2d at 50.

162. *Id.* at 366 n.5, 869 P.2d at 51 n.5.

163. *Id.* at 365, 869 P.2d at 51.

164. See id. at 365-66, 869 P.2d at 51.

165. *Id.*

166. Justices Robert F. Utter and Charles Johnson were the only dissenters. *Id.* at 370, 869 P.2d at 53.

167. *Id.* at 372, 869 P.2d at 54 (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) and State v. Allery, 101 Wash. 2d 591, 594-98, 682 P.2d 312, 314-16 (1984)).

168. *Id.* at 371, 869 P.2d at 54.

169. *Id.*

the defendant's apprehension of harm.[170] Because Deborah offered BWS testimony to help the jury understand her *perception* of Burke's threats,[171] the dissent reasoned that the testimony was relevant to show why Deborah feared immediate harm and why Deborah's perception of the threat was reasonable.[172] The testimony was therefore helpful to the trier of fact under ER 702.[173]

V. ANALYSIS OF *STATE V. RIKER*

A. Riker *Was A Result-Oriented Decision*

The court's decision in *Riker* was result-oriented and partial to the State. Several indicators throughout the opinion evidence the court's result-oriented approach. For example, the court relayed the State's version of the facts, expressed its fear of extending BWS testimony too far, misinterpreted research on the BWS, and showed lack of confidence in jurors. All of these factors lead to a compromised outcome.

Beginning with the facts of the case, the court relayed the State's version of events.[174] Although the court "briefly" outlined Deborah's testimony regarding both her dealings with Burke as well as her history of abuse, it is clear from the court's language that the majority did not believe her. For example, the court used the word "claimed" when describing events to which Deborah testified.[175] When describing Deborah's fear of Burke, the court pointed out that Deborah feared his threats in spite of the facts that Deborah never saw bruises on her sister, Burke never hit Deborah, and Burke never made his threats more specific.[176] The court's discussion of the facts sounds more like a judicial assessment of the defendant's credibility than an impartial description of events. The court's discussion of the duress defense was no less skewed.

Pointing to society's traditional skepticism of duress, the court communicated its apprehension in admitting BWS testimony in this drug-related case.[177] The court stated loudly and clearly that it was "reluctan[t] to allow even the abnormal stresses of life to provide a basis for the [duress] defense."[178] The court supported this assertion

170. *Id.*
171. *Id.* at 371-72, 869 P.2d at 54.
172. *Id.* at 374-75, 869 P.2d at 56.
173. *Id.* at 375, 869 P.2d at 56.
174. *Id.* at 354-55, 869 P.2d at 45-46.
175. *Id.* at 354, 356-57, 869 P.2d at 45-46.
176. *Id.* at 356, 869 P.2d at 46.
177. *See id.* at 365, 869 P.2d at 50-51.
178. *Id.* at 365, 869 P.2d at 51.

by contrasting the self-defense and duress statutory language, and by accepting, without discussion, one commentator's opinion that the duress defense is an excuse rather than a justification.[179] However, the court failed to examine the similarities between self-defense and duress and ignored an opinion shared by several scholars that duress, like self-defense, is a justification, not an excuse.[180]

Moreover, the majority misinterpreted BWS research. For example, the court asserted, without support, that allowing BWS testimony in Deborah Riker's case would be tantamount to throwing open the evidentiary doors to every conceivable emotional trauma.[181] The court's opinion was based on its belief that there was no foundation establishing that Deborah could distinguish her fear "from that of every other citizen who has a troubled past."[182] What is profoundly apparent in this statement is the court's ignorance of the BWS. Deborah is not every other citizen who has a troubled past; she is a battered woman who was forced to sell cocaine to a man who threatened her life if she failed to comply with his demands.

Even more disturbing is the court's lack of confidence in jurors deciding a duress case. The court speculated that "the jury's finding of duress would rest upon sympathy for the defendant, rather than an evaluation of her present danger."[183] The court doubted the existence of competent jurors who would evaluate Deborah's fears as required by law under the duress statute. The court stated, without support, that jurors would simply ignore their duty under the law,[184] but the court did not address the obvious disparity in its own logic: that jurors in self-defense cases are somehow more competent to evaluate BWS evidence than jurors in duress cases.

Clearly, the Washington Supreme Court has reservations in admitting BWS testimony in a drug case where the defendant claims duress. Although these reservations reflect important policy considerations, the *Riker* court allowed them to inhibit its legal reasoning. In short, the court's desire to reach a particular result compromised its ability to correctly analyze the admissibility requirements under both *Frye* and ER 702.

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179. *Id.* at 366 n.4, 869 P.2d at 51 n.4.

180. Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 257-58 (1995) (explaining that scholars including Wayne LaFave, Austin Scott, Glanville Williams, and Jeremy Benthan agree that duress is a justification).

181. *Riker*, 123 Wash. 2d. at 366 n.5, 869 P.2d at 51 n.5.

182. *Id.*

183. *Id.*

184. *Id.*

B. *The* Riker *Court Misapplied* Frye

The *Riker* court correctly found that the first part of the *Frye* analysis was not at issue because the BWS is a generally accepted theory in the scientific community.[185] However, the court incorrectly determined that Ms. Klingbeil's testimony failed the second prong of *Frye*. This conclusion was erroneous because the *Frye* standard does not apply to novel "contexts," only novel "theories." Moreover, even if *Frye* did apply, the court erred further by inquiring into Ms. Klingbeil's conclusion that Deborah Riker was a battered woman who could not separate her fear of Burke from other battering experiences. Finally, the basis for the court's misapplication of *Frye*, the lack of specific studies on point, is unsound.

1. *Frye* Does Not Apply to Novel Contexts, Only Novel Theories

Washington case law states that the *Frye* standard applies only to novel *theories*, not novel *contexts*.[186] Although the *Riker* court was troubled that admitting Ms. Klingbeil's testimony in a non-intimate, non-battering context would be an extension of the BWS, this reservation should not affect the admissibility of this testimony.[187] Once a theory has garnered general acceptance, experts can testify to novel applications of the theory without undergoing a *Frye* analysis each time. Two Washington decisions illustrate this principle: *State v. Lord*[188] and *State v. Noltie*.[189]

In *State v. Lord*, the Washington Supreme Court held that epi-illumination microscopy passed the *Frye* analysis.[190] In *Lord*, an

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185. *See supra* note 84 and accompanying text. Although the court conducted an analysis under *Frye*, it did not have to do so. The *Frye* standard is only used in admitting *novel* scientific evidence. State v. Janes, 121 Wash. 2d 220, 232, 850 P.2d 495, 501 (1993) (analyzing the battered child syndrome for the first time in Washington under the *Frye* standard); State v. Cauthron, 120 Wash. 2d 879, 899, 846 P.2d 502, 512 (1993) (applying the *Frye* standard to evidence regarding the restricted fragment length polymorphism method of DNA typing). As noted above, although the BWS was at one time a novel theory, currently it is not a novel scientific concept. The Washington Supreme Court officially held this "novel" evidence was admissible in 1984. State v. Allery, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984).

186. *See, e.g.*, State v. Noltie, 116 Wash. 2d 831, 809 P.2d 190 (1991); State v. Lord, 117 Wash. 2d 829, 822 P.2d 117 (1991).

187. *See Lord*, 117 Wash. 2d at 850-51, 822 P.2d at 190-91.

188. 117 Wash. 2d 829, 822 P.2d 177 (1991).

189. 116 Wash. 2d 831, 809 P.2d 190 (1991).

190. 117 Wash. 2d at 854, 822 P.2d at 193. An epi-illumination microscope "utilizes a microscope with illumination coming down from the side of the sample and reflected off the sample, rather than passing light upward through the sample as regular microscopes do." *Id.* at 852, 822 P.2d at 191-92.

expert used an epi-illumination microscope to examine paint and metal chips that linked the defendant to a murder.[191] Analyzing the *Frye* question, the court could not point to any research, scientific or legal, involving the epi-illumination microscope in this particular context.[192] Nonetheless, the court looked to the scientific acceptance of the microscope in general and determined that using an epi-illumination microscope to examine paint and metal chips was valid.[193] Under *Frye*, it was of no legal consequence that the microscope was used in a new context because the microscope had already been found scientifically valid.[194]

In *State v. Noltie*, the Washington Supreme Court affirmed a court of appeals ruling, holding that expert testimony regarding scientifically accepted colposcopy evidence was admissible in the novel context of a child abuse case.[195] In *Noltie*, the State's expert used a colposcopy examination to determine whether or not a child had been sexually abused.[196] Although using this technique was novel in the child abuse context, the court held that the expert's testimony regarding her use of a colposcope was admissible.[197] The testimony was admitted because colposcopy is a generally accepted technique for discovering cancer and, thus, the requirements of *Frye* were met.[198] For purposes of the *Frye* standard, it was of no legal significance that this technique was applied in a "novel" set of circumstances.[199] Thus, the *Noltie* decision illustrates that once a theory or procedure is found to be generally accepted in the scientific community, in any context, the *Frye* inquiry is complete.

Under both *Lord* and *Noltie*, the *Riker* majority should have admitted Ms. Klingbeil's testimony regardless of the fact that Deborah's situation presented the court with a novel context. The BWS is a generally accepted scientific theory. BWS evidence has been admitted in the context of battering within intimate relationships and, thus, it need not undergo a *Frye* analysis when it is applied in the new

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191. *Id.* at 849-50, 822 P.2d at 190.

192. *Id.* at 852, 822 P.2d at 191-92.

193. *Id.*

194. *See id.*

195. 116 Wash. 2d at 850-51, 809 P.2d at 201-02 (affirming State v. Noltie, 57 Wash. App. 21, 786 P.2d 332 (1990)). The court of appeals recognized that the colposcopy was a known technique for discovering cancer and its use in child abuse cases was "relatively recent." 57 Wash. App. at 29, 786 P.2d at 336.

196. *Noltie*, 116 Wash. 2d at 850, 809 P.2d at 201.

197. 57 Wash. App. at 30-31, 786 P.2d at 336.

198. *Id.* at 29-30, 786 P.2d at 336.

199. *See id.*

context in which the defendant is not currently in an intimate battering relationship.

The court's obvious divergence from precedent in this case leads to absurd results. The majority's analysis would require lower courts to entertain a *Frye* analysis in every case where expert testimony is at issue because all cases present differing factual contexts. This cannot be what the Washington Supreme Court intended. If the court had desired this result, it would have engaged in a *Frye* analysis in *State v. Ciskie*,[200] where the BWS was applied in a new factual context.[201] The *Ciskie* court, however, stated that a previous decision, *State v. Allery*,[202] had already recognized the BWS as an accepted scientific theory.[203] Thus, it was not necessary to engage in a *Frye* analysis more than once on the same scientific theory because the theory was no longer novel. Under the *Riker* analysis, however, trial judges must now undertake a *Frye* analysis every time a defendant raises the issue of expert testimony. This is, to say the least, absurd.

2. The Majority Invaded the Jury's Province by Examining the Expert's Conclusion

Even if the *Frye* analysis was applicable in *Riker*, the court erroneously examined Ms. Klingbeil's conclusion, thereby flatly ignoring its own precedent. In a *Frye* analysis, courts are prohibited from examining an expert's conclusion.[204] Under *Frye*, the court is concerned only with the existence of a phenomenon and the procedures that experts rely on in reaching their conclusions. In fact, the Washington Supreme Court has ruled that once a theory gains the appropriate scientific recognition, the weight to be given the expert's conclusion is left to the jury.[205]

Ms. Klingbeil is a well-established expert diagnostician of battered women.[206] She evaluated Deborah using scientifically accepted techniques and was quite confident that Deborah was a battered woman. Despite the fact that this testimony is legally sufficient to pass

200. 110 Wash. 2d 263, 751 P.2d 1165 (1988).

201. *Id.* at 265, 751 P.2d at 1166 (allowing the State to introduce BWS evidence to explain a rape victim's failure to report the incident).

202. 101 Wash. 2d 591, 682 P.2d 312 (1984).

203. *Ciskie*, 110 Wash. 2d at 271, 751 P.2d at 1170.

204. *Cauthron*, 120 Wash. 2d at 898-99, 846 P.2d at 511; *see also Lord*, 117 Wash. 2d at 854-55, 822 P.2d at 193.

205. *See Lord*, 117 Wash. 2d at 854, 822 P.2d at 192-93.

206. *Allery*, 101 Wash. 2d at 595-96, 682 P.2d at 315.

Frye, the court examined the conclusion, stating it amounted "to no more than an unsupported guess."[207]

Even if the majority did not believe that Deborah was a battered woman or that Ms. Klingbeil could properly evaluate Deborah under these circumstances, the fact that a scientific procedure might yield false results does not render the expert's conclusion inadmissible.[208] Any problems associated with testing procedures go to their weight, not their admissibility.[209] In fact, if an expert couches her testimony in terms of "could have" or "possible," if she is relying on valid scientific techniques, her testimony must be admitted.[210] The court should have admitted this testimony because any doubts regarding Deborah Riker's status as a battered woman could be explored on cross-examination, or argued to the jury.[211] Thus, the court's examination of Ms. Klingbeil's conclusion is an unprecedented invasion of the jury's province.

Not only is the court's inquiry entirely inappropriate under *Frye*, this attack on the expert's conclusion was based on the apparent lack of studies documenting the effects of prior battering on a person's behaviors and reactions outside an intimate relationship. As extensively noted in Part II, the very studies the court cites document the battered woman's ability to perceive danger and accurately assess this danger.[212]

3. The Court Misinterpreted the Research on the Battered Woman Syndrome

In reaching its decision, the court cited exclusively to Dr. Walker's research and determined that her studies did not document the effects that prior battering relationships would have on a woman's

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207. *Riker*, 123 Wash. 2d at 364, 869 P.2d at 50.

208. State v. Russell, 125 Wash. 2d 24, 51, 882 P.2d 747, 766-67 (1994) (quoting and affirming the trial court decision).

209. *Id.*

210. *Lord*, 117 Wash. 2d at 853, 822 P.2d at 192. In *Lord*, the defendant argued that an expert's conclusion that trace evidence "could have" shared a common source was unreliable and therefore inadmissible under *Frye*. *Id.* The court firmly rejected this argument because the methods and techniques used in reaching this conclusion were generally accepted; therefore, the proper weight to be given to her conclusion was left to the jury. *Id.*

211. *Id.*

212. Letter from Lenore Walker (Mar. 24, 1995), *supra* note 79. Dr. Walker opines that "[i]t would be expected that someone with BWS would be more hypervigilant—more likely to accurately perceive danger at an earlier point—with less obvious cues—than someone who hadn't been abused or developed BWS." *Id.* *See also* Walker, *supra* note 5, at 333 (explaining that "most battered women are more sensitive than the non-battered woman in perceiving the imminent danger to which they respond").

behaviors outside these relationships.[213] In *Riker*, the court was troubled by the fact that Dr. Walker's research was limited to situations involving either a husband or boyfriend who battered either a wife or girlfriend.[214] Because Deborah and Burke did not fit the traditional scenario in Dr. Walker's research, the court held that BWS testimony was not "scientifically accepted"[215] in this context. However, the court ignored that Dr. Walker's research examined the *effects* of battering, regardless of whether the woman was currently in a battering relationship.[216] The court misinterpreted Ms. Walker's research on the BWS.

First, the court's assertion that there were no studies involving the BWS in a context where the battered woman and the male figure were not intimately involved is directly controverted by the original research on the issue.[217] As stated earlier, only twenty-four percent of the 435 women in Dr. Walker's study were involved in an intimate, battering relationship at the time of the study. The remaining seventy-six percent of these women were previously exposed to battering relationships but were not in a battering relationship at the time of the study.[218] However, this fact did not alter their status as battered women:[219] The BWS assumes only the existence of an intimate relationship *at some point in the battered woman's life.*

Further, Dr. Walker's research supports the conclusion that a battered woman manifests effects of the BWS even when she is out of the battering relationship.[220] Dr. Walker determined that battered women are acutely aware of their surroundings and exhibit instinctual behavior in response to any cues of danger, not just those from her batterer.[221] Thus, the dissent correctly pointed out that the nature of Deborah's relationship with Burke was immaterial because the only issue was the effect of Deborah's prior abuse on her current perceptions.[222]

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213. *Riker*, 123 Wash. 2d at 364, 869 P.2d at 49-50.

214. *Id.* at 363, 869 P.2d at 50.

215. *Id.*

216. *See supra* text accompanying notes 65-80.

217. *See supra* text accompanying notes 50-80.

218. SYNDROME, *supra* note 50, at 1.

219. Letter from Lenore Walker (Mar. 24, 1995), *supra* note 79.

220. *Id.*; *see also supra* text accompanying notes 50-80.

221. Letter from Lenore Walker (Mar. 24, 1995), *supra* note 79; *see supra* note 108 and accompanying text.

222. *Riker*, 123 Wash. 2d at 372, 869 P.2d at 54.

The court's misinterpretations, however, did not end with Dr. Walker's research. With its desired outcome firmly in mind, the court went on to misapply ER 702.

C. *The* Riker *Court Misapplied ER 702*

The *Riker* majority declined to entertain the traditional analysis used in BWS cases[223] to determine whether or not Ms. Klingbeil's testimony was helpful to the trier of fact. Instead, the court fashioned a new rule to determine if BWS evidence passes ER 702.[224] The court's desire to disallow BWS evidence in the *Riker* case was firm indeed. Had the court engaged in the correct analysis under ER 702, as Washington law requires, the testimony would have been admitted.

1. The *Riker* Court Created a New Standard

Although the Washington Supreme Court has repeatedly held that relevant evidence under part two of ER 702 need only be helpful in assisting the jury to understand the evidence,[225] the *Riker* majority did not follow its own mandate. Instead, the court, without citing any authority, fashioned a new, more stringent analysis derived from a Nebraska jurisdiction.[226] Relying on the test set forth in *State v. Reynolds*,[227] the court intimated that in Washington, relevance will now depend on (1) "the court's evaluation of the state of knowledge presently existing about the subject of the proposed testimony," and (2) "the court's appraisal of the facts of the case."[228] The court then determined, under this new standard, that "there was an inadequate foundation for establishing the probative value of the [BWS] outside of a battering relationship," and, therefore, the testimony was inadmissible.[229]

This new standard evidences the court's desire to make it difficult for certain battered women defendants to support their defenses. Until *Riker*, no Washington court had deviated from the traditional inquiry under ER 702, which requires only that the testimony be *helpful* to the

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223. *See, e.g.*, State v. Hanson, 58 Wash. App. 504, 793 P.2d 1001 (1990); State v. Ciskie, 110 Wash. 2d 263, 751 P.2d 1165 (1988); State v. Allery, 101 Wash. 2d 591, 682 P.2d 312 (1984).

224. *Riker*, 123 Wash. 2d at 364, 869 P.2d at 50.

225. *See Allery*, 101 Wash. 2d at 591, 682 P.2d at 312; *Ciskie*, 110 Wash. 2d at 272, 751 P.2d at 1170; State v. Janes, 121 Wash. 2d 220, 220, 850 P.2d 495, 495 (1993).

226. *Riker*, 123 Wash. 2d at 364, 869 P.2d at 50.

227. 457 N.W.2d 405, 419 (Neb. 1990).

228. *Riker*, 123 Wash. 2d at 364, 869 P.2d at 50.

229. *Id.*

trier of fact.[230] Undoubtedly, battered woman defendants will have a difficult time introducing expert testimony under prong one of this new test.

Indeed, the supreme court created several problems by adopting this test. First, this new standard leaves trial judges with no precedent to guide their decisions to admit or exclude evidence. Similarly, appellate courts have no precedent to apply in determining whether trial judges have abused their discretion. This will undoubtedly lead to unpredictable decisions. Second, allowing trial courts to determine the relevance of expert testimony based on an "appraisal of the facts of the case" allows courts unfettered discretion. In short, this standard gives judges an open invitation to exclude testimony merely because they disbelieve the defendant or find the facts of her case dubious.

The supreme court has now created uncertainty regarding the proper analysis courts are to undertake when determining the admissibility of expert testimony under ER 702. This uncertainty creates unanswered questions. Under *Riker*, do courts forego the traditional ER 702 analysis altogether? Is this new standard applicable only in duress cases or only to battered women defendants like Deborah? What is clear from this unprecedented legal leap to an obscure rule from another jurisdiction is that the Washington Supreme Court simply wanted to avoid its own rule. Had the court applied the traditional, proper analysis under ER 702, Ms. Klingbeil's testimony would have been admitted.

2. Had the *Riker* Court Applied the Correct 702 Analysis, Battered Woman Syndrome Testimony Would Be Admissible in Duress Cases

Traditionally, the two-step analysis under ER 702 requires only that (1) the witness qualify as an expert, and (2) the testimony be helpful to the trier of fact.[231] In determining whether or not testimony is helpful, courts examine the reasons why the defendant offered the testimony and the relevance of the testimony in light of those reasons.[232] In *Riker*, the parties stipulated to Ms. Klingbeil's qualifications as an expert, so the first prong was not at issue.[233] Under the second prong, Ms. Klingbeil's testimony should have been admitted

230. *See supra* notes 225-226 and accompanying text.
231. State v. Cauthron, 120 Wash. 2d 879, 890, 846 P.2d 502, 507 (1993).
232. *Riker*, 123 Wash. 2d at 364-65, 869 P.2d at 50.
233. *Id.* at 364, 869 P.2d at 50.

because this testimony would have aided the jury in determining issues of fact in Deborah Riker's case.

Washington courts allow defendants to introduce BWS testimony to support a self-defense claim,[234] yet the *Riker* court refused to extend this privilege to a duress case.[235] In comparing self-defense and duress, it is clear that BWS testimony in duress cases is helpful to the trier of fact because (1) self-defense and duress are similar defenses, and (2) self-defense and duress are based on similar rationales.

a. Self-Defense and Duress are Similar Defenses

1. Similar Characteristics

In Washington, both duress and self-defense are statutorily defined.[236] The similarities between these defenses are evident when the statutes are compared. The Washington duress statute requires proof of four basic elements: (1) that the defendant was compelled to commit a crime under threat, (2) that this threat created a subjective fear of *immediate* death or grievous bodily injury, (3) that such fear was reasonable, and (4) that the actor would not have committed the crime but for the duress involved.[237] A defendant claiming self-defense must prove similar elements. Under Washington's self-defense statute, homicide is justified when, "[i]n the lawful defense of the slayer, . . . there is reasonable ground to apprehend a design on the part of the person slain . . . to do some great personal injury to the slayer . . . and there is *imminent* danger of such design being accomplished."[238]

The duress and self-defense statutes have similar characteristics. Both defenses require the defendant to have a subjective fear of bodily

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234. *See, e.g.*, State v. Allery, 101 Wash. 2d 591, 682 P.2d 312 (1984).

235. 123 Wash. 2d 351, 869 P.2d 43 (1994). Courts and legislatures in several other jurisdictions have admitted BWS testimony where the defendant claims a duress defense. *See, e.g.*, CAL. EVID. CODE § 1107 (West 1995) (providing that BWS evidence is admissible in *any* criminal case); United States v. Johnson, 956 F.2d 894 (1992) (determining that BWS evidence is relevant to sentencing where the defendant claims duress, thus refusing to disturb the trial court's decision to admit expert testimony regarding the BWS); People v. Romero, 13 Cal. Rptr. 2d 332 (Cal. App. 1992) (holding that if BWS testimony is relevant in self-defense cases, it is *a fortiori* relevant to support a defense of duress), *rev'd on other grounds*, 883 P.2d 388 (Cal. 1994); McMaugh v. State, 612 A.2d 725 (R.I. 1992) (holding BWS testimony admissible in duress cases). The *McMaugh* court actually held that the BWS is an affirmative defense.

236. *See* WASH. REV. CODE § 9A.16.050 (1995) (self-defense); WASH. REV. CODE § 9A.16.060 (1995) (duress).

237. *See* WASH. REV. CODE § 9A.16.060 (1995) (emphasis added). Jurors are also required to consider whether or not the defendant had the ability to avoid the harm. State v. Turner, 42 Wash. App. 242, 246, 711 P.2d 353, 355 (1985).

238. WASH. REV. CODE § 9A.16.050(1) (1995) (emphasis added).

harm,[239] and they both require that this fear be objectively reasonable.[240] Similarly, the standards for interpreting these defenses are the same. Under the subjective components of both self-defense and duress, jurors evaluate the defendant's actions based on an assessment of all the circumstances.[241] In addition, with both defenses, the issue of whether the defendant perceived fear under either of these components is strictly for the jury to decide.[242]

Although there are differences between duress and self-defense, these differences are minimal. The primary distinctions are as follows: (1) the fear of injury in duress must be "immediate," while the fear of injury in self-defense must be "imminent";[243] and (2) the defendant acting under duress directs her conduct toward a third party, while the defendant acting in self-defense directs her conduct toward the person putting her in fear.[244] In addition, although a defendant may claim self-defense to a charge of murder, the duress statute precludes a defendant from claiming the defense in a charge of manslaughter or murder.[245] Lastly, unlike self-defense, the duress defense is unavailable to one who recklessly places herself in a situation in which it is probable she will be subject to duress.[246]

These dissimilarities, however, are not controlling in the context of admitting BWS testimony. Under both defenses, a juror must assess whether the defendant honestly believed she was in "immediate" or "imminent" danger, and whether the defendant's fear of danger was reasonable.[247] Thus, under both defenses, a defendant's credibility and state of mind will be placed directly before the jury.[248] Furthermore, under both defenses, the jury must apply the same standards in

239. WASH. REV. CODE §§ 9A.16.050, .060 (1995); *see also* State v. Janes, 121 Wash. 2d 220, 238, 850 P.2d 495, 504 (1993) (explaining the self-defense standard in the context of the battered child syndrome).

240. WASH. REV. CODE §§ 9A.16.050, .060 (1995); *see also Janes*, 121 Wash. 2d at 238, 850 P.2d at 504 (discussing the objective portion of the self-defense statute).

241. *Turner*, 42 Wash. App. at 246-47, 711 P.2d at 355 (duress); *Janes*, 121 Wash. 2d at 238, 850 P.2d at 504 (self-defense).

242. *Turner*, 42 Wash. App. at 245, 711 P.2d at 355 (duress); *Janes*, 121 Wash. 2d at 238, 850 P.2d at 504 (self-defense).

243. *See supra* text accompanying notes 239-240.

244. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 235 (1982).

245. WASH. REV. CODE § 9A.16.060(c)(2) (1995).

246. *Id.* § 9A.16.060.

247. *Id.* §§ 9A.16.050, 060.

248. *See* Boland, *supra* note 48, at 613-14.

evaluating the defendant's actions.[249] Thus, duress and self-defense are almost identical in many important respects.

2. Similar Rationales

The *Riker* majority incorrectly opined that, as a matter of public policy, the duress defense should be limited.[250] This opinion misstates the current debate on the issue. Not only do scholars debate the rationales of both duress and self-defense,[251] but the majority's position fails to consider that the principles of deterrence and rehabilitation in the context of battered women are identical for both self-defense and duress.

Generally, there are two theories that explain the rationales behind self-defense and duress: justification and excuse.[252] "Justified conduct is correct behavior which is encouraged or at least tolerated."[253] Under this theory, although the defendant has the mental state that the crime requires and the defendant commits the act, she is justified because she avoided a harm of greater magnitude.[254] In contrast, a defendant is excused, even though her deed may be wrong, "because conditions suggest that the actor is not responsible for [her] deed."[255] Society deems this conduct undesirable, but it is inappropriate to sanction the actor because she is not blameworthy. Rather, the situation itself is to blame.[256]

Several scholars disagree on the underlying rationale for duress. The two most notable authorities in favor of classifying duress as a justification are Wayne LaFave and Austin Scott.[257] In arguing that duress is justified conduct, these scholars state the following rationale

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249. *See supra* text accompanying note 241.

250. 123 Wash. 2d at 366-67, 869 P.2d at 51.

251. *Compare* Robinson, *supra* note 244, at 226 (viewing duress as an excuse) *with* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 433 (2d ed. 1986) (viewing duress as a justification).

252. *See infra* text accompanying notes 253-267.

253. Robinson, *supra* note 244, at 229. Here, the focus is on the act done, not the actor.

254. LAFAVE & SCOTT, *supra* note 251, at 433.

255. Robinson, *supra* note 244, at 221 (stating that "excuses admit that the deed may be wrong, but excuse the actor because conditions suggest that the actor is not responsible for his deed").

256. *Id.* at 229. The appropriate focus here is on the actor (acts are justified, actors are excused).

257. Finkelstein, *supra* note 180, at 257. Additionally, Glanville Williams and Jeremy Bentham support this approach, while the criminal codes of four states specifically treat the duress defense as a justification. *Id. But see* Robinson, *supra* note 244, at 222. Paul Robinson classifies duress as an excuse because the actor is unable to control her conduct due to the conditions imposed upon her. *Id.*

for the defense of duress: "For reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person."[258] This is particularly important in cases where battered women claim duress and choose to commit the crime because the greater evil they may face is death.[259]

Although the rationales of excuse and justification manifest some differences, these distinctions are unimportant because both rationales serve the same purpose. In either situation, the defendant is not culpable. Conduct that is justified is not deterrable conduct because there is nothing to condemn or punish.[260] Similarly, an actor who is excused or justified in her conduct is not necessarily going to be rehabilitated because punishing a blameless person weakens the rehabilitation function.[261]

In *Riker*, the majority classified duress as an excuse, stating that society wishes to place limitations on the duress defense.[262] The court did so even though this classification is contrary to the opinions of these scholars and even though two Washington cases have stated that duress can be classified as either an excuse or justification.[263]

In holding that duress and self-defense do not serve the same policies, the court also ignored the principles of punishment. It is of no legal consequence whether one views the duress defense as an excuse or justification because under either position the defendant is

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258. LAFAVE & SCOTT, *supra* note 251, at 433.

259. *See* Clifford D. May, *Editorial: Science v. Advocacy: Battered Women's Advocate Raises Eyebrows Over Role in Simpson Case*, ROCKY MTN NEWS, Feb. 5, 1995, at 84A, *available in* Westlaw, 1995 WL 3169599. Lenore Walker states:

> If you took a group of battered women and a group of non-battered women, the group of battered women would be at higher risk to be killed by their partners. But that risk would be very low. Conservatively, 2.5 million women in America are battered every year. Between 1,200 and 4,000 of them are killed, a small percentage. And even though we know there is a risk, what you can't do is go backwards and say which woman will be killed or which partner will be the one to kill.

Id. See also State v. Hulltz, 838 P.2d 1257, 1261 n.3 (Alaska Ct. App. 1992) (stating that "[i]n 1990, fifty percent of female murder victims in Alaska were killed by their husbands or boyfriends," quoting COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT, ANNUAL REPORT TO GOVERNOR HICKEL AND THE ALASKA LEGISLATURE 2 (March 1992)); Walker, *supra* note 5, at 332 (stating that "it is not unusual for the abuse to escalate to homicidal proportions after the separation and during the divorcing period").

260. Robinson, *supra* note 244, at 245.

261. *Id.* at 247. This author believes excuses do serve the goals of special deterrence and rehabilitation.

262. *Riker*, 123 Wash. 2d at 365 n.4, 869 P.2d at 51 n.4 (citing Robinson, *supra* note 244, at 226, who describes duress as an excuse).

263. *Id.* The two Washington cases referred to are State v. Davis, 27 Wash. App. 498, 508, 618 P.2d 1034, 1039 (1980) and State v. Bromley, 72 Wash. 2d 150, 432 P.2d 568 (1967).

not punished.[264] In other words, under either position, the defendant cannot be rehabilitated or deterred.[265] If we cannot deter someone who, while acting in self-defense saves her life and takes that of another, how can an individual who commits a crime while under threat be deterred from "perceiving immediate harm"? If, while holding a gun to B's head, A tells B that he will kill her if she does not sell him a pound of cocaine, is B going to try to locate cocaine? The point is that B is in fear for her life because A has threatened her. The only issue is whether or not the threat is immediate. Neither society, nor the legislature, nor the Washington Supreme Court can deter one from being in fear and committing a crime when one is threatened with her life.

c. *Where Battered Woman Syndrome Testimony is Admitted in Self-Defense Cases, it Should Be Admitted in Duress Cases*

Applying the foregoing principles and discussion to the *Riker* case, BWS testimony would have been helpful to the trier of fact in assessing Deborah's defense of duress. As in a self-defense case, expert testimony was crucial because Deborah's state of mind was at issue. In evaluating her duress defense, jurors were asked to address two questions: (1) Was Deborah Riker honestly in fear of immediate harm?; and (2) Was this fear reasonable? Unfortunately, without any BWS testimony, there was nothing to distinguish Deborah's perceptions from those of any other person.

Without BWS evidence presented through an expert, jurors could not assess the subjective and objective components of duress. The subjective component could not be accurately evaluated because there was not enough information to determine whether Deborah honestly perceived Burke's threats as putting her in immediate harm. Only if an expert testified would jurors know that battered women are hypervigilant to any cues of danger and that these women accurately perceive these cues faster than do lay persons.[266] This testimony

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264. Robinson, *supra* note 244, at 245.

265. *Id.* at 247.

266. *See supra* text accompanying note 77. In People v. Aris, the court, in paraphrasing Dr. Walker's testimony, stated that "[a] woman who has been battered and then is threatened with more abuse is more likely to perceive the danger involved faster that [sic] one who has not been abused. The battered woman accurately senses when an abusive episode is not yet over." 264 Cal. Rptr. 167, 177 (Ct. App. 1989). Describing a battered woman's hypervigilance to *any* cues of danger, Walker further testified that battered women perceive danger very honestly and much faster than someone who has not been battered. *Id.*

would support Deborah's theory that she perceived an immediate threat.

Similarly, the objective component could not be properly evaluated within the standards jurors are required to apply. How can a juror, knowing nothing of the BWS, determine what the reasonable battered woman would have done in Deborah's situation? Indeed, without expert testimony, threats such as, "You will know the consequences!" seem vague and innocuous. But the issue is not what we as lay persons deem reasonable. The issue is what a battered woman, knowing all she knows and seeing all she sees, would have done.[267] Thus, there are no persuasive reasons why BWS testimony should not be admitted in cases of duress when such evidence is admitted in self-defense cases.

The exclusion of BWS evidence in *Riker* was unfairly prejudicial. The widely held misconceptions regarding the BWS are well noted. They exist whether the defendant claims self-defense or duress. Without education regarding the psychological symptoms battered women manifest and the impact of violence on these women's lives, the jury may not have believed Deborah's testimony.

VI. CONCLUSION

The highest court in Washington State, in *State v. Riker*, propounded a rule that is both counter-intuitive in theory and contrary to the policy behind the admissibility of expert testimony. The court determined, in effect, that certain battered women do not deserve the benefit of legal precedent. The court implicitly stated that because some testimony and some syndromes have the potential to be abused, the courts must, however arbitrarily, prevent the floodgates from being "thrown open to every conceivable emotional trauma."[268] Yet battered women defendants like Deborah are harmed in the process.

Although society must be on guard for unwarranted application of a syndrome in order to escape criminal culpability, in a case like Deborah Riker's, there is no danger of this happening. Allowing jurors to hear expert testimony on the BWS does not mean they will automatically acquit the defendant. The admission of this evidence may have had no consequence on Deborah's verdict. Nevertheless, the jury has a defined role in American jurisprudence and this role must not be invaded. It is the jury's province to decide whether BWS evidence should form the basis for an acquittal.

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267. *See supra* text accompanying note 111-115 and notes 239-249.

268. *Riker*, 123 Wash. 2d at 366 n.5, 869 P.2d at 51 n.5.

The *Riker* court limited application of the BWS to a narrow set of circumstances by adopting a rigid rule of law from Nebraska, without any authority for doing so. Unless this new rule is limited to the *Riker* case, this new application of ER 702 will pose significant hurdles for other types of expert testimony.

If the court does not wish to admit BWS evidence when a defendant asserts a duress defense, as was clearly the case in *Riker*, then at the very least, the court must reach its conclusion by using the proper expert testimony analysis and adhering to its own precedent. Unfortunately, the *Riker* court did neither of these things. The *Frye* standard was not properly analyzed and prior Washington precedent was either flatly ignored or directly controverted.