

**Women Who Kill: Providing and Justifying Alternative Legal Pathways to  
the Use of Battered Women Syndrome as Self-Defense**

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## **(1) INTRODUCTION**

According to a 2019 Domestic Violence Network report, at least one in three women and one in seven men in the U.S. experience domestic violence in their lifetime (State of Domestic Violence Report 4). 50% of all homeless women and children are fleeing abusers (Domestic Violence Statistics). In Indiana, 40.4% of all adult women and 26.8% of men experience intimate partner physical violence, intimate partner sexual violence, and/or intimate partner stalking in their lifetime. That number could easily be higher given victims who do not report the abuse. Sometimes, victims of intimate partner violence (IPV) respond aggressively to the abuse. In Louisiana, one in five women serving life killed their abusive partners. Candice Malone, who was a college student juggling work and school, called the police after her boyfriend cut her, but she was told a restraining order would cost her \$100, money she did not have (Moore). When the abuse escalated, she killed her abuser and was sentenced to life in prison (Moore). Malone's case demonstrates that women still face obstacles in escaping abusive situations and receiving the help and understanding that they need in the court system.

Malone's situation is not unique. Many legal scholars and court functionaries believe that battered women who can prove their abuse in court should be granted reduced culpability. For this paper, the term "battered" refers to defendants who have been severely abused and who retaliated at a time when their abusers were not attacking them, for example, when their partners were sleeping. If abuse victims defended themselves during a physical confrontation instigated by their abusers, that constitutes self-defense, but other battered women cases fall in a "grey" area or a middle ground where they neither fulfill all the requirements for self-defense, but the abuse was severe enough I argue to warrant reduced culpability. This paper focuses on these less straightforward cases. I intend to argue that in these cases, battered women (or other victims of

severe abuse) should be at least partially excused if not considered fully responsible, but not by using Battered Women Syndrome (BWS) to support claims of self-defense or duress. For reference, duress excuses defendants due to coercion or unlawful threats in criminal action (Duress). Excuse means that the jury or judge determining the case recognizes that the defendant is guilty of committing the crime, but that due to certain mitigating factors, they should either not be punished or their punishment should be reduced instead. I argue that the courts should implement and use a doctrine of partial excuse for battered women, or implement and use a new plea of guilty but only partially responsible based on mitigating factors due to the presence of brain injuries, mental illnesses, and their inability to get help.

The legal world has grappled with cases like Malone's for forty years. Francine Hugh's case in 1977 was one of the first concerning "battered women" or abused women who killed their husbands. In Hugh's case, her husband abused her for thirteen years (Sorrentino and Musselman). Then one day, after her husband humiliated, raped, and beat her, Hugh set the bed on fire while her husband was sleeping. The defense used Lenore Walker's research on battered women, specifically battered women syndrome (BWS), to successfully argue temporary insanity and find Hugh not guilty.

Many believed that Lenore Walker's research on Battered Woman Syndrome (BWS) would provide a firm psychological foundation for arguing in court that such women should either be excused or were justified in acting in self-defense. They would therefore not receive the punishment due to reduced culpability. Unfortunately, using the syndrome to support legal claims in the years since has proved controversial. Since Hugh's case, experts have argued for using BWS as a foundation for self-defense as justification, or duress as an excuse. Justification means that the court believes the defendant took the right action in the circumstances. For

instance, people are right to defend their own lives when attacked, especially with a weapon. Excuse means that the court does not condone the defendant's action, but recognizes mitigating factors that reduce culpability, such as coercion. Despite legal scholars' attempts to use the syndrome to support legal claims, BWS failed to provide a consistent and effective basis for forming claims of reduced culpability because the experimental evidence establishing the theory is flawed and because the syndrome still does not help defendants satisfy self-defense and duress claims. Unfortunately, in place of BWS, the courts have not utilized other psychological research to draw on more effective legal solutions.

The failure to assist victims could be because battered women pose a dilemma for the court system. The American court system values principles called rule of law, equal justice, and accountability (Strategic Plan for the Federal Judiciary). Rule of law refers to predictability in the court system, coherence when the punishment matches the crime, and continuity when defendants face the same punishments for the same crimes regardless of when or where the crime was committed. The system, in upholding the equal justice, values fairness and impartiality. Finally, for the sake of accountability, the courts value "stringent standards of conduct" and "self-enforcement of legal and ethical rules (Strategic Plan for the Federal Judiciary). The U.S. justice system must hold defendants accountable and assign responsibility, sometimes despite other factors. Perhaps the defendant was abused as a child or felt pressured by peers to commit crimes. These factors contributed to the defendant's inclinations, but the court system still must hold people responsible to avoid excusing actions for just any mitigating factor. What is more, the system values fairness and impartiality. These values, when applied to battered women may justify two contradictory outcomes. Abuse affects people differently, but the court system generally assumes a person's moral agency unless explicitly proven otherwise, even in

cases of abuse. For most women, the abuse does not drive them to murder their husbands. Only a few abuse victims kill their abusers outside confrontation. If most women did consistently respond to abuse by killing or assaulting their husbands, then the justice system might feel that some sort of excuse or justification would be more applicable. Excuse refers to an explanation that serves as grounds for an exemption from culpability (Excuse). Justification refers to explanations that show an act was right or reasonable. Experts have posed different solutions based on these concepts such as using self-defense as an excuse or using BWS to justify pleas of duress. Despite these proposals, because of the discrepancy in response to abuse, the court system struggles in applying the value of fairness to battered women who kill. The judges or juries may have trouble determining when one would expect a defendant's actions to be reasonable or not without having experienced the defendants' abuse or been inside the defendant's head.

Battered women represent instances where the legal outcomes do not always match one's intuitions of the moral responsibility of these women. Both Judy Norman and Candice Malone feared for their lives. They endured horrific, severe abuse. Yet they both were sentenced and sent to prison, Candice for the rest of her life. The legal system's practices go against a sympathy that some people have for women experiencing horrific abuse. Proposed legal solutions have failed because; 1) BWS, the usual psychological basis for legal claims, does not explain why some women escalate to killing their husbands and why others are able to avoid killing their partners; 2) the vague wording of pre-existing doctrines leaves cases up to the discretion of juries whether or not to extend them to battered women, and finally; 3) current doctrines are usually implemented strictly and require cases meet all of the requirements. In this paper, I will argue that the courts do not need and should not rely on Battered Woman Syndrome because the theory

contains flaws, does not explain why some abuse victims escalate and others do not, and is ultimately ineffective in achieving as a basis for achieving the desired outcomes.

After arguing against BWS, I will build a psychological profile establishing that abuse victims have certain mental illnesses such as PTSD and a high likelihood for traumatic brain injuries (TBIs). I will argue that the effects of TBIs, specifically increases in aggression and less resistance to impulses, explain why some women escalate to violence and others do not, especially in cases of severe abuse. As such, TBIs are crucial to understanding why battered women should be excused. TBIs provide tangible evidence of reduced capacity in resisting violent impulses. TBIs, which reduce resistance to impulses, and mental illnesses, which predispose victims towards negative attitudes and perceptions, create a deadly combination. Battered women will not all present the same mental illnesses and symptoms of those conditions, but if battered women can present evidence of abuse, an expert can investigate and testify to the presence of TBIs and symptoms of mental illnesses. An argument based on psychology may not produce the certainty that juries and judges may want for a verdict of innocence, but the current research on abuse and the predominant effects of psychological conditions can establish enough of a connection to warrant a reduction in culpability.

Based on the psychological effects of abuse and more importantly, the presence of TBIs, abuse victims who kill their abusers should be partially excused and therefore see a reduction in their punishment. They are more predisposed towards feelings of hopelessness and desperation. As such they are more likely to believe that the extreme option of killing their abuser is the only way to end the abuse and perhaps survive. The TBIs explain why they are less resistant towards their aggressive impulses. Essentially, Stephen Morse argues that, in addition to guilty, not guilty, or guilty by reason of insanity, the courts should add a verdict of guilty but not fully

responsible. The variation and complexities of abuse cases prevent full excuse, but a verdict of partial excuse would mean a decrease in punishment from other murderers that recognizes the impacts of abuse on the situation. This solution best fits these cases and might help other defendants apart from battered women who are suffering from severe mitigating factors.



## **(2) BATTERED WOMAN SYNDROME**

This section discusses the history of BWS and presents the argument for the theory and its application to legal doctrines against which I intend to argue. Before BWS domestic violence was considered a private affair. The abuse was not condoned, but the court system did little to protect victims of abuse. Attitudes changed concerning domestic violence due in part to the feminist movement. Beginning largely in the 70s, more people began turning to the law to aid in settling cases of domestic violence. With a change in attitudes, the issue of battered women who attack and even kill their abusive partners during lulls in the abuse came to the more people's attention in the 60s and 70s as these cases became more publicized that dealt with these circumstances.

Before 1979, the issue of whether or not women could simply leave prevented courts from assigning less or no culpability to these defendants. In 1979 DrLenore Walker set out to help women facing the law by seeking to explain why women do not feel like they can leave and thus escalate to violence instead. She conducted a study on a sample of women who had been abused. From the study, she concluded that battered women shared certain characteristics that indicated the existence of a syndrome that impacted decision-making.

### *(2.1) What is Battered Woman Syndrome?*

Walker identified two key elements of BWS: learned helplessness and the cycle of violence to explain why women did not feel like they can leave their abusive relationships. She described a battered woman as a legal adult who "is or has been in an intimate relationship with a man who repeatedly subjects or subjected her to forceful physical and/or psychological abuse" (Wiley 4). Walker based her theory on evidence of learned helplessness in animals and a study involving four hundred abused women (4). From this study, she concluded that battered women

experience a cycle of violence in their relationships: “a tension-building phase, an acute battering phase, and a reconciliation phase” (4). The cycle of violence and learned helplessness explain why a woman feels like she cannot leave. With learned helplessness, a woman does not believe she can seek help. In addition to learned helplessness, the reconciliation phase too causes women to stay in their relationships with the hope that their partners will change and become better. Because of BWS, a battered woman experiences a reduced capacity to reason and to appreciate her options. Walker believed this reduced capacity explains why some women feel driven to assault and kill their husbands.

Legal defenses use BWS to give battered women an opportunity to plead self-defense. Even if the exact specifics may vary from state to state, Wiley outlines five standard requirements for self-defense: (1) the defendant must be in the presence of imminent danger; (2) the defendant must have acted the way that a *reasonable* person would act; (3) the defendant cannot have been the aggressor; (4) the defendant must have used necessary and non-excessive force; and (5) the defendant must not have had the opportunity to retreat safely (NIJ 1996). Typically, a person must both believe that they are in danger and act as someone would “reasonably” in response to the circumstances, and not excessively. Legislatures designed self-defense requirements for conflicts between two men who are more equal in physical stature, factors that are not applicable in cases of domestic abuse (Wiley 1). As self-defense currently stands, legal defenses of victims who kill their abusers during a break between bouts of abuse run into two problems: imminency and the inability to retreat. A sleeping partner, for example, does not pose an immediate threat to an abuse victim’s life at that moment. Additionally, killing someone is excessive and extremely difficult to prove as necessary outside of a violent conflict. She might be discredited by her failure to leave instead. Alafaire Burke states: “A battered

woman's failure to leave during a non-confrontational moment can be fatal to a claim of self-defense" (21). Due to these problems, battered women's defense teams have struggled to convince jurors that they should be found not guilty on the basis of self-defense standards.

Walker's solution aims at fixing the gaps between self-defense requirements and these women's situations. In line with requirement (1), with the syndrome, Walker argues that a woman would have perceived that the threat to her life as imminent at all times given the abusive nature of the relationship. Concerning (5), on top of the syndrome, she may have tried to leave the relationship unsuccessfully in the past and would therefore either face harsher abuse should she try again or accept that she simply cannot escape based on previous attempts or her abuser's manipulation. In the view of BWS, due to their altered state of mind, Walker argues that the women would meet the remaining two of the five requirements for self-defense. They would reasonably believe they had no other options and their abusers pose an imminent threat to their lives even when docile.

### *(2.2) Effectiveness of applying BWS to Legal Claims in Court*

Pleas relying on BWS as evidence for self-defense enjoyed some success initially but have since been more controversial. In *People v Humphrey*, the jury found the defendant guilty of voluntary manslaughter, but the California Supreme Court reversed the verdict because the court did not include evidence regarding BWS (Holliday et al. 3). Mrs. Ibn-Tamas, another classic case of a battered woman, was not so fortunate. She was found guilty of killing her abusive husband in a lull between beatings when she believed him to be grabbing a gun (Strucke and Hajjar). In the State of Illinois, districts are split on the use of BWS to support legal claims. Dingwall argued in a motion that her abuser forced her to commit three robberies and thus that she acted under duress (Musick 63-64). The district court denied her motion believing that her

motion did not satisfy duress's requirements of imminence and no legal alternative (64). The Seventh Circuit disagreed with the district court and reversed its judgment arguing that the presence of an immediate physical threat is not a requirement for establishing duress (64). The court additionally decided that expert evidence on battered should be permitted to support duress claims (64). The Seventh Circuit agreed as did the District of Columbia, Sixth, and Ninth Circuits. The Fifth and Tenth Circuits disagreed and believed BWS should not be used to support claims of duress (64). Thus the circuit courts are split on the issue. In 1996, at the height of battered women's popularity, the Department of Justice found that 63% of women who had killed their abusers had their convictions upheld (The Validity and Use of Evidence). In *People v Seely*, the court agreed to admit expert testimony that a plaintiff was a battered woman. Up until that point, BWS testimony could be given, but the expert could not testify on the application of the syndrome to the defendant in expert testimony. Now, up to 70% of states have found BWS expert testimony relevant to supporting self-defense, and 70% of states agree that the testimony is relevant to the defendant's state of mind (The Validity and Use of Evidence). Further, the admission of BWS requires that different conditions be met in different states. In eighteen states, a self-defense claim must be raised to admit evidence of BWS testimony. In fourteen states, the courts require evidence that BWS is accepted in the scientific community to be submitted. In ten states, the woman must first show that she has been abused (Rivers-Schutte 35). Even when evidence is admitted, BWS fails to consistently convince juries not to hold abuse victims accountable.

### **(3) CRITICISMS OF BATTERED WOMAN SYNDROME**

This section covers the criticisms of battered woman syndrome both including its credibility as a syndrome and its extension to legal doctrines. Criticisms of BWS may explain why it has not seen more uniform acceptance as a basis for legal claims. The criticisms are important for understanding why BWS is not effective, so that other approaches can bypass prevent, or mitigate these same problems. The courts themselves are split on the use of BWS to support legal claims likely because of problems with its scientific validity and its application to battered women cases. Alafaire Burke, professor at Hofstra School of Law, argues that the theory itself has little “empirical support,” depicts women as “cognitively impaired and irrational, and ultimately fails to explain why a battered woman might escalate to killing her husband (Burke 6). For example, the cycle of violence explains why a woman might stay for a few rotations of the cycle, but it does not explain why a woman would stay for years (14). Walker instead relies on learned helplessness to explain why women stay (14). Learned helplessness “instills a negative belief about the efficacy of her actions” that decreases her motivation to escape for fear of the abuse escalating (14). After multiple attempts, the abuse victim loses motivation because she does not feel that the abuse will end if she continues trying to leave. If anything, the abuse will only escalate. Victims may experience learned helplessness after failing to use other methods to prevent or lessen abuse, such as fighting back or manipulating their moods. Learned helplessness arguably renders battered women incapable of rationalizing their escape options because they are discouraged (14). Walker believes that learned helplessness, brought on and exacerbated by the cyclical nature of the violence, causes women to resort to drastic measures to protect themselves, including killing their partners. As a result, battered women have reduced culpability when considering their actions.

If the flaws in the experiment design discredit BWS, then the condition loses credibility as a basis for any legal claim. Even if BWS is more credible as a psychological condition, the condition does not explain what could psychologically lead to escalation in some but not in most battered women. If most battered women do have the ability to resist violent impulses, then the court should not use BWS to form the basis for legal claims of self-defense and duress.

### *(3.1) Experimental Flaws*

The experiment establishing BWS contained flaws in the experiment design that discredit Walker's conclusions. Walker did not carry out the experiment using important techniques to establish the certainty of her conclusions. She only interviewed women who had escaped abuse and did not compare this group with a control group of women who had not experienced abuse (Burke 32). A control group would establish a correlation between abuse and the characteristics Walker observed. A correlation would build a stronger case that abuse led to her observations. In addition, of her subjects, only a few of them had killed their abusers. In studying the ones who killed their abusers together with other battered women, Walker failed to explain why these characteristics would lead some women to react violently as opposed to the others who did not (32). Holliday and her associates confirmed Burke's criticisms of the experiment by stating: "Several scholars have pointed out methodological limitations regarding research on BWS, including the 'lack of control groups, problems with interviewing methods and data analysis, and absence of data supporting some of [Walker's] conclusions.' Although numerous studies have been conducted regarding the experiences of women and domestic violence, the validity and reliability of BWS as a clinical diagnosis (as opposed to a legal construct) remains controversial" (6). After all, at the time of the experiment Walker was no doubt an advocate for battered

women. Her experiment could easily have been influenced by a “confirmatory bias” in the kinds of questions and the wording of what she was asking her subjects.

Walker’s questions used in the experiment further raise concerns of confirmatory bias. Faigman reports that Walker did use leading questions to suggest a particular answer to her subjects (Burke 33). interpret the subject responses which “opens the door to experimenter expectancies” (33). Based on this response, the experimenters either could not or did not attempt to quantify the responses or set some sort of standard for interpreting the responses (33). Quantifying human experience is difficult, but often people conducting surveys use numerical scales when evaluating human responses in their questions to standardize the responses. Without attempting to measure the responses using some sort of standard, the experimenters likely drew the conclusions that they expected or wanted to see. The shortcomings of the experiment design is a problem in the fourteen states that require general acceptance of the theory as evidence for the syndrome.

Setting the experiment design problems aside, others doubt whether battered women actually have learned helplessness. Lee Bowker argues that women in abusive relationships have seven coping strategies and do actively seek help, “including talking, extracting promises, nonviolent threatening, hiding, passive defense, avoidance, and counter-violence” (Strucke and Hajjar). They do utilize their networks by reaching out to family, friends, and neighbors as well as police and social service institutions (Strucke and Hajjar). In one study, 61% of people contacted the police following extreme incidents of violence (Haag 1274). Alafaire Burke reports in one study concluded that battered women, as a whole, are resourceful and not always submissive (64). Bowker concludes that women’s behaviors stem from their circumstances: their partner’s need to dominate and lack of support from institutions, rather than helplessness

(Strucke and Hajjar). Ellen Fischer establishes thirteen strategies women use to escape their situation. Murray Straus, Richard Gelles, and Ellen Dobash all conclude that women “increasingly seek out help” the more the abuse escalates (Strucke and Hajjar). Even if women do become passive, Walker does not explain how battered women break out of learned helplessness when they finally attack and kill their husbands. Also, learned helplessness fails to adequately explain why women would see the threat to their lives as imminent in a way that properly meets self-defense standards (Burke 41). Finally, if women’s helplessness ends when she takes action, then she can assess exit options (44). The syndrome does not explain why some women choose violence and others do not (44). Given these considerations, arguably Walker is using the evidence to justify the conclusion she wants to find rather than drawing the conclusion from the evidence.

In addition to the problems with learned helplessness, Faigman argues that Walker’s research does not adequately establish a cycle of violence. The cycle of violence constitutes the three phases: “tension-building,” “acute battering,” and “reconciliation.” Walker did not specify the phases enough to measure their duration or how intense the phase was and therefore connect stages of the cycle to battered women’s reduced culpable states. She did not specify a time frame for the cycle of violence in her conclusions (Burke 33). The cycle could occur in minutes or years. She just said the three phases exist (33). She provided no way of measuring this cycle and whether it has even occurred in the first place. She did not explore whether the cycles stay the same or if they change or “mutate” during the relationship (33-34). Perhaps over time the abuse lessens or phases get shorter or longer. Further complicating the issue, not all of Walker’s patients showed all three stages in the cycle. According to her data, thirty-five percent were not preceded by a period of “tension building” and forty-two percent were not followed by a phase



of “loving contrition” (Burke 34). Moreover, Walker does not provide data revealing how many of her subjects went through all three cycles. The number of women experiencing all three stages could be low or high. As a result, experts cannot establish how long someone has been in a phase, how many times the cycle has completed rotations, nor what proportion of women are skipping certain stages, which ones, and how often. Due to the lack of specificity and proof in establishing her claims, the cycle of violence says little if anything about how battered women are affected by abuse and therefore whether they have reduced culpability.

The cycle of violence does not establish a connection between the abuse and battered women’s escalation to violence. Walker claims that battered women, therefore, live in “cumulative terror,” but less than half of her subjects said that they “unequivocally” ever feared “their abusers would or could kill them” (Burke 34). This fact indicates that the majority of the subjects did not live in fear of death. More than half of the abuse victims in this survey fell very short of experiencing “cumulative terror” due to the abuse. As such, Burke argues that Walker’s research fails to establish a strong causal connection between the cycle of violence and women constantly fearing for their lives, including during the intervals between abuse. Without evidence, her cycle of violence fails to show why women escalate and thus why they cannot resist any impulse they might have toward murder. A claim of self-defense and duress would require stronger causal connections that explain how abuse can lead someone to kill the abusive partner.

Even if battered women experienced learned helplessness or went through cycles of violence in their relationships, Walker’s conclusions did not establish why some women are driven to kill while most are not. Without this explanation, the courts are understandably hesitant to say they were acting in self-defense. Most women do not feel that killing their partners is the

only way to preserve their lives. The syndrome does not explain why the minority of abused women do escalate to killing and others do not. Some women with the syndrome can resist their impulse to kill assuming the presence of such an urge. Without understanding what distinguishes the minority of abuse victims from the majority, the syndrome does little to explain how the escalation to murder is justified or excused.

Perhaps Walker's conclusions are correct to some extent, but the court system functions differently than the rest of society. Flaws in the concepts and the experiment design will hinder courts from effectively using BWS as a basis for legal claims. Given that the defense and the prosecution oppose each other in trial, the prosecution only needs to list all the flaws with BWS and/or how battered women do not act according to the syndrome to effectively prevent claims of self-defense. If BWS is undermined in court because of the criticisms listed in this paper, juries and judges will at least hesitate if not reject using the research for legal decisions. The psychological evidence used needs to be widely accepted by experts and relevant in meeting the requirements of the doctrines for legal defenses to see more success.

### *(3.2) BWS Failure in Supporting Legal Claims*

Even if the science and logic behind the syndrome were sound, BWS is not useful in establishing self-defense claims. A syndrome explains why someone would not have the ability to view their situation objectively, but self-defense requires objectivity. Perception of danger to her life is not enough. Her partner has to actually pose a threat to her life. Definitions vary slightly but, generally, someone considers something objectively when they only rely on facts, or external and verifiable information rather than feelings and subjective perceptions. In having a syndrome, battered women cannot easily disregard their feelings and subjective interpretations of the situation. This inability hinders self-defense claims because self-defense relies on an

objective consideration of the circumstances and whether someone was facing an imminent threat to her life. Burke claims that the court does not consider what a “paranoid schizophrenic” would consider reasonable self-defense if a schizophrenic believed someone posed a threat to them and killed him or her (40). Self-defense has objective standards to protect a specific group of defendants who are defending themselves during deadly assaults, not defendants who only believed their lives were in danger at that specific moment.

Self-defense is classified as justification. Justification means that the court believes the defendant took the “objectively preferable” action or what the court finds as an acceptable course of action given the circumstances (Kinports 165). For instance, no one would expect someone to just stand there while another person lunges at him or her with a knife. If the offender dies or is critically wounded, the courts would consider the defendant justified as taking the preferable course of action in preserving the defendant’s life. Therefore, the defendant should not be held responsible. The need for a syndrome implies that battered women do not take the objectively preferable course of action when they attack their partners outside bouts of abuse, unlike the usual obvious cases of self-defense. She is seemingly not acting like a “reasonable person” which therefore precludes her from qualifying for justification doctrines which encompass self-defense. BWS emphasizes a reduced capacity for reasoning. This reduced capacity means that a woman with the syndrome likely failed in properly assessing alternative options and determining non-excessive force for the situation given the objective self-defense requirements. Therefore battered women are excluded from self-defense claims because they cannot properly determine them in the first place. Kinports responds to this objection of excluding women from self-defense because of problems in their reasoning by arguing that self-defense already requires an element of subjectivity. Self-defense requires an interpretation of the defendant’s circumstances and thus

has an element of subjectivity already (164-165). Unfortunately, this claim does not work for the application of BWS to self-defense because syndromes emphasize people's mental states, not their circumstances. The syndrome is typically applied to women who are killed in between bouts of abuse when the circumstances do not warrant self-defense.

Gendered language hurts women in court because BWS evidence may cause juries to believe that the women who have the syndrome are docile and weak, and they may expect them to act demure or submissive. Valerie Day ran into this problem when she fought back against her abusive boyfriend who had tried to kill her multiple times (Goodmark 54). The prosecution argued that she was not abused because she did not exhibit characteristics associated with battered women including acting "docile," "submissive," "dependent," and "selfless" (54). Therefore she did not suffer from BWS and did not act in self-defense.

### *(3.3) BWS Supports Gendered Stereotypes*

Most abused women do not fit the "submissive" and "docile" stereotype that BWS implies. Of the women Susan Miller studied who were arrested for domestic assaults, Miller found that 95 percent of the women had used violence in reaction to a partner's violence (Goodmark 64). These statistics go against the view that women feel helpless. They are not generally passive or demure. Women in abusive relationships are thirteen times more likely to react with violence towards their partners than women who are not in abusive relationships (Saxenam and Messina 2). They are seven times more likely to respond violently when experiencing psychological abuse and intimidation from their partners (Saxenam and Messina 2). Suddenly, these women have to act a certain way during their relationship and even in court to persuade the jury they have this syndrome. Usage of the syndrome promotes negative stereotypes and undermines women should they not conform. The syndrome implies that those

who have it and are compromised do not fight back. Fighting back or using other means to stop the abuse hinders their claims of BWS.

The gendered language undermines men and even children who may act in response to abuse because they do not fall under the category of ‘woman’ to qualify for the defense (Holliday et al. 6). Critics of the language of the syndrome suggest “battering syndrome,” “battered partner syndrome,” or “battered person syndrome,” despite Walker’s research focus on women (6). Though some have moved away from the terminology, the syndrome is based on gender stereotypes and studies associated with women in abusive situations, not men or children. So it remains inaccessible to other types of abuse victims. Research and discussion regarding abuse focus on women because they are disproportionately affected by domestic violence, but men and children can be abused too. BWS seems too focused on women to acknowledge and help other categories of abuse victims who have committed similar violent crimes.

#### *(3.4) Potential Overextension of Mitigating Factors with Weak Psychological Support*

The popularity of BWS and its initial success may have opened the door to the use of other mitigating factors as excuses to reduce culpability: the most famous being the infamous Twinkie defense. Two years after Francine’s case in 1977, Dan White, a San Francisco politician, was put on trial for murder. His defense’s psychiatrist argued that White’s consumption of Twinkies and other sugary foods lead to a diminished capacity for reason (Twinkie Defense). As result, his defense successfully argued that his actions did not fulfill the requirements for intent in first-degree murder (Twinkie Defense). He was instead convicted of involuntary manslaughter (Twinkie Defense). Courts responded by lessening the intent requirements in first-degree murder to avoid someone from using sugary foods to get out of more serious charges (Twinkie Defense). Critics of the Twinkie defense became concerned that

defendants would be able to use anything to argue they had diminished capacity. Others used cough syrup. Dr. Louis Chen, who killed his partner and his son, claimed that the cough syrup induced psychosis in 2011 (Handelman). In 2011, James McVay, who had stabbed a woman to death, said he should be excused because the night before, he had mixed alcohol with cough syrup that caused hallucinations (Handelman). Both Chen and McVay failed to establish their claims, but the syndrome allowed others to argue that they had partially compromised mental states due to factors outside their control. Understandably, the court cannot just accept any reason for reduced culpability. The reasons need a firmer grounding in psychology and a good, credible understanding of how the compromised mental state drove someone to murder a human being.

Naturally, these explanations have not shared in BWS's success, but the introduction of Twinkie defense undermines the logic used in BWS that uses mental states to shift blame away from the defendants. Syndromes seem to support the logic that if defendants cannot control their circumstances, and as a result, feel compelled to commit a violent crime, then they should not be held accountable. In the court system, proving a lack of autonomy is difficult, especially given that others with underlying problems who eat Twinkies or drink cough syrup rarely if ever escalate to violence. The syndrome solution takes away from other solutions that could allow more flexibility in response to abuse.

### *(3.5) BWS in Connection with Duress*

More recently, legal defenses have used BWS to support legal claims of duress. Duress “refers to a situation where one person makes unlawful threats or otherwise engages in coercive behavior that causes another person to commit acts that they would otherwise not commit,” as established by *McCorde v. Goode* and *William v Williams* (Duress). BWS makes more sense in

the context of duress given that BWS focuses on the victim's subject interpretation of circumstances. Despite duress being a better fit, in *United States v Lopez (2019)*, the district court did not allow expert testimony stating that the defendant had a reasonable "fear" that her partner would harm her and her loved ones and "whether she had a reasonable opportunity to escape" with regards to her felony gun charges (Holliday et al. 4). Though the court did give the jury instructions on the duress defense and allowed the defendant to discuss her experiences of domestic violence, the court still found Lopez guilty but the U.S. Court of Appeals for the Ninth Circuit retracted the conviction and "remanded the case for a new trial, holding that 'expert testimony on BWS is not categorically excludable and may be relevant to a defense of duress'" (5). In *Lopez-Correa v. United States (2020)* the defendant pled guilty to "aiding and abetting" her partner in producing child pornography, but at the sentencing hearing, she claimed and provided evidence that her partner, the co-defendant, had taken her hostage and "physically and sexually abused her" and that due to his behavior, she felt compelled to assist him to protect herself (5). Later she appealed her guilty plea by claiming her counsel failed to adequately assist her when her counsel had her plead guilty to a crime she did not commit instead of pleading not guilty by "duress, coercion, and BWS defenses" (5). The U.S. District Court for the District of Puerto Rico vacated her conviction and found that had she been able to present evidence of BWS and a duress defense, "more likely than not, no reasonable juror would find her guilty beyond a reasonable doubt" (5). So the defense has had some success, especially when applied in combination with duress, but BWS extension to duress is controversial.

Some courts have accepted BWS as supporting duress but many have not. Typically evidence is admissible. Of the nineteen federal courts admitting expert testimony, two-thirds have allowed it in a duress case ( *The Validity of and Use of Evidence* 4). 76% have found

expert testimony to be admissible to prove the defendant is a battered woman or suffers from the syndrome (5). The admissibility of such expert evidence has not led to courts consistently reversing decisions or getting women off the hook in the first place. While defendants primarily utilize self-defense, courts and states are “split on whether a history of abuse might also be relevant when establishing a defense of duress” (Women Who Kill in Response to Domestic Violence 5). New Jersey is the only state in the report that considers a history of abuse in establishing duress claims (5). The report says that some support using BWS to establish duress and others do not (76). Unlike duress, expert testimony is universally admissible for self-defense in “all courts and jurisdictions” (Wharton). The courts seem more open to connecting BWS with self-defense claims than duress. BWS to support duress does not work either.



#### **(4) APPLYING DURESS AND SELF-DEFENSE WITHOUT BWS**

This section argues that even in the absence of BWS, battered women cannot fulfill standards of duress nor can the courts apply self-defense as an excuse.

##### *(4.1) Duress without BWS*

Even if one uses a firmer psychological basis for establishing duress, the courts seem reluctant to expand duress regardless to battered women despite many legal experts recommending it. In 2006, Joshua Dressler most notably advocates for the court system to extend duress to battered women, yet this solution does not seem to be commonly accepted. Alafaire Burke explains that the reluctance to extend duress to battered women comes from a desire to view women as rational actors during abuse (110). An excuse defense undermines this notion that women are acting rationally whereas self-defense condones battered women's extreme responses. Many want to justify battered women's actions as self-defense, but the parameters of the court system do not make this legal claim feasible.

I disagree with the desire to avoid excusing women in an effort to recognize them as completely rational or acting as people who are not experiencing abuse would. I address this issue later, but setting this criticism aside, duress has other problems that hinder the doctrine from being effective for abuse victims. The U.S. doctrine for duress requires unlawful threats and/or coercion (Duress). Scholars may argue the stress of the abuse coerced defendants into killing their partners, but the abuser did not use the abuse to explicitly force the defendant to kill him. Proving that the presence of abuse alone coerced an abuse victim into killing their abuser is difficult. Duress might be more compelling if abuse victims can provide tangible evidence of threats made against their lives. In the absence of such evidence, abuse likely puts pressure on its

victims to respond, but it induces multiple responses including various means of escaping or using only defensive force during physical assaults. The requirements of duress are vague enough to potentially allow an extension to battered women, but proving coercion in the absence of a person forcing an ultimatum is too much of a stretch. Even if it is possible, the vagueness of the doctrine leaves its application toward battered women up to juries and judges entirely.

Leaving outcomes to the discretion of juries will not change anything for battered women cases. Instead, vague wording will lead to cases that fall in a “grey” category. In these instances, according to research, juries will likely rule based on their biases. Lee Curley, James Munro, and Itiel Dror wrote that juries can develop biases from several factors “1) pre-trial beliefs and attitudes; 2) cognitive biases; and, 3) biased interpretations of evidence by expert witnesses” (Curley et al. 2006). Having multiple jurors to balance out the biases does not work either. Their biases would “need to be spread out across the jury” (206-207). For example, say a juror believes that women make false claims against men to either get back at them or protect themselves. Then to counter that bias, the jury would need someone who believes that women would never lie about something like abuse, but detecting these biases during jury selection is unreasonable. Furthermore, those picking jurors could not adequately balance out all of the biases even if they could detect them. Consequently vague wording in duress might help in limited cases, but it would likely still fail to help abuse victims facing incarceration as a whole.

Duress does specify a need for loss of control or coercion. In response to duress, Coughlin argues that a prosecutor just has to prove that the woman acted independently of her husband to prove that she is not affected by him, and therefore not experiencing the loss of control required for duress. Her response might make sense in some abusive situations, but admittedly, Coughlin is oversimplifying abusive relationships. In Malone’s case, her boyfriend

was cutting her. She was a student and therefore financially unstable. Norman's husband forced her into prostitution, assaulted, and demeaned her. He even made her eat cat and dog food and would force her to sleep on concrete among other forms of humiliation (Dressler 3) Dressler reports that the day Judy Norman killed her abuser, her husband had kicked the "defendant in the side of the head while she was driving and told her he would 'cut her breast off and shove it up her rear end'" (4). Given this level of abuse, no wonder women feel driven to extremes. Coughlin dismisses the psychological impact of abuse on women too quickly to preserve battered women's rationality, but she has a point. If a victim of abuse has time to regain composure and consider alternatives, duress becomes more difficult to prove. Again, only a minority of women kill their abusers. Most women do manage to escape. Objectively, when her abuser does not pose an active threat, a woman can rationally choose between either attempting escape, staying and enduring the abuse, or attacking her husband.

#### *(4.2) Extending Self-Defense to Excuse*

Alternatively, Kit Kinports argued that self-defense should be used as an excuse instead of just a justification. Standard self-defense, she argues, allows for factoring in the circumstances, which she believes, therefore allows for a certain level of subjectivity (164). People act in self-defense if based on their perception of circumstances, they reasonably believe their lives are in danger. In the case of battered women, domestic abuse survivors do struggle to leave and find the resources to become stable apart from the batterer as discussed previously. Due to threats on their lives and other extreme abuse, battered women may believe their partner will kill them if they do not take action. They may reasonably believe that potentially due to prior failed attempts to escape, they cannot leave while their abuser is alive. Thus the only way to escape is to kill them. They would risk their lives more trying to defend themselves during a

confrontation, a case of justification for self-defense. So, they act out when the abuser is not acting violently toward them. If self-defense accounts for the subjective interpretation of circumstances, then regardless of whether the abusers actually posed a threat or not, all that would matter is the victims' perspective and whether their action was reasonable based on their perceptions of danger. The abusers' threats to their lives would feel real.

This solution has not seen the same consideration as duress, which could be due to the criticisms. Experts are concerned with lowering the standards of self-defense, a pre-existing doctrine. A typical case of self-defense is pretty straightforward and meant for special circumstances, namely cases regarding people defending their lives during violent confrontations. Cases of battered women who kill during lulls in the abuse do not fall within the typical self-defense standards. Experts are concerned that in lowering the standards, the court would allow other types of defendants who should not be excused through self-defense to utilize the doctrine (Burke 62-63. For example, a self-defense excuse would allow defendants with schizophrenia to claim that because of the defendant's delusions, they reasonably believed that their victim posed a threat to their lives or a "schizophrenia" self-defense (Burke 62). In broader terms, self-defense as an excuse would allow defendants to claim that they had a certain deterministic factor that led them to believe their lives were in danger, and given that this factor hindered their perceptions, they acted reasonably. Self-defense becomes based entirely on perceptions rather than meant for the specific cases when defendants' lives are clearly threatened and cannot simply walk away.

Even if the perception of circumstances for battered women is considered, the perspective that death is imminent is still too subjective. Battered women may feel that if they do not act, their abusers will kill them, but no one knows whether that would happen in one hour or one

week. The California Supreme Court argues that the jury should determine imminence from the defendant's perspective, but this consideration is still vague (Kinports 165). It requires juries, who are comprised of people with pre-existing biases regarding mental illnesses and culpability, to make judgments on whether defendants acted reasonably and without ever having been in those situations. Given the nature of these judgment calls, the juries themselves may be hesitant to extend self-defense to people who act outside of confrontations. As a result, allowing self-defense to be considered as an excuse does not seem effective as a solution.

Overall, society has shifted away from using BWS because of the flaws in research and its' poor fit as self-defense and duress. Burke argues that BWS as part of duress fares worse in court than when it used to support claims of self-defense (53). The courts have not largely considered lowering self-defense standards to accommodate excuses either, likely because of the criticisms. Furthermore, neither duress nor self-defense as an excuse, ultimately explain why some abuse victims escalate when most do not, and therefore why this explanation warrants reduced culpability. This missing piece of information prevents favorable outcomes because clearly most abuse victims are resisting temptation to escalate to murder if they even consider violence as a response in the first place. The defense in these cases would be asking the jury to excuse the killing of one's partner, a tough request given these missing pieces in understanding. Juries may believe that the defendants who are victims of abuse found themselves in horrible situations, but they may not be convinced that these defendants should be excused as a result of them.

Since the popularization of BWS, neuroscience and psychology advancements arguably provide a better foundation for excuse solutions. One expert, Gleason, interviewed a small sample of battered women and found that they predominantly demonstrated symptoms of

psychosexual dysfunction, depression, PTSD, generalized anxiety disorder, and obsessive-compulsive disorder (McMahon 29). Gleason concludes that the BWS symptoms that Walker observed actually result from a combination of mental illnesses observed in other people (29). The consideration of multiple mental illnesses when forming a basis for legal claims might provide a broader perspective. A broader perspective that accounts for multiple conditions that can arise during abuse allows more variety in responses to abuse than BWS. Instead of just allowing BWS to fade, the justice system should promote and enact stronger alternative legal doctrines based on updated advancements in research. Even if BWS had fewer problems, given advances in neuroscience and psychology, the legal system does not need use syndrome as the basis for legal claims in court.

## **(5) WHY EXCUSE**

In light of what has not worked, the rest of the paper argues for why women should still be at least partially excused and how to best achieve this outcome. The first part of this section of this paper explores the various mitigating factors including mental illnesses and stressful, deterministic circumstances that when considered altogether, create a compelling case for legal claims involving reduced culpability. Given these mitigating factors, the court should utilize solutions that account for reduced culpability.

### *(5.1) Battered Women Psychology*

#### *(5.1.1) Prevalence of Mental Conditions in Abuse Victims*

While people want to acknowledge abuse victims as fully rational, especially in cases of extreme abuse, the legal solutions for battered women should rest on a nuanced understanding of abuse victims' psychology. Abuse victims suffer from a wide range of conditions including bipolar disorder, dependency disorder, depression, and most notably PTSD. Salcioglu reported that in a meta-analysis of domestic violence cases, in 141 studies from 81 countries, "a synthesis of studies reported that 31– 84% of samples selected from clinical settings, shelters, hospitals, and community agencies suffer from posttraumatic stress disorder (PTSD)" (117). In 11 studies regarding BW, the average prevalence of PTSD among the samples was 63.8%, (117). The presence of PTSD indicates that abuse victims do experience and are responding to traumatic circumstances. In addition to PTSD, in severe cases, victims of abuse are at high risk for traumatic brain injuries (TBIs). Women are most likely to kill in cases of severe abuse (58). A holistic approach that accounts for the various mental illnesses in abuse victims can provide a

better psychological foundation in arguing why some escalate and others do not, and why abuse victims who escalate to violence should be excused.

The women who react violently and kill others usually have some sort of mental disorder. Santos-Hermosa and his colleagues looked at a sample of 577 victims and 542 perpetrators to study differences in gender among criminals. They reported “Of the 13 female perpetrators with mental disorders, seven exhibited mood disorders, two exhibited personality disorders, and one psychotic disorder, with the specific disorder unknown in three cases” (Santos-Hermosa et al. 7). In one large European study, of 132 women who attempted murder or manslaughter and were psychiatrically evaluated after their homicide, “72% of the women were diagnosed with a personality disorder and 61% had previously been under the care of mental health services,” (Flynn et al. 368). Williams reported that, in one study, of 113 incarcerated women in the US, 42% had a history of TBIs, “and those who had committed violent offences had suffered an average of two TBIs” (Williams et al. 8). One would be remiss to ignore the impact of mental illnesses on women in shaping their perceptions and arguably driving some of them to murder out of desperation. When their mental illnesses are treated and when removed from domestic abuse, battered women do not pose a threat to society.

*(5.1.2) PTSD effects on subjects and use as support for legal claims*

PTSD in particular correlates with other illnesses. 37 of the articles reported that abuse victims were 2-3 times at risk for major depressive disorder and 1.5- to 2-fold increased risk of depressive symptoms and postpartum depression relative to women not exposed to domestic violence (Salcioglu 115). “Finally, a meta-analysis of 42 studies found that, compared with women without mental disorders, the odds of domestic violence among women with PTSD was 7.34 whereas it was 4.08 among women with anxiety disorders and 2.77 among women with



depressive disorders” (115). PTSD factors with other mental illnesses in affecting women’s decision-making. Women may be able to still rationalize their options, a key distinction from insanity, but one cannot ignore the impacts of mental illnesses on their perceptions and emotions.

The severity of abuse correlates with the rate and severity of PTSD. Proponents of BWS have argued that due to the connection between abuse and PTSD, BWS should be categorized as a subsection of PTSD, and the DSM-IV reflects this option (Kippert). In a few studies conducted, prevalence rates of PTSD among battered women have ranged from 33%-58% (O’Keefe 73). Multiple studies have shown that the severity of domestic violence correlates with the severity of PTSD symptoms present (73). O’Keefe discussed one study that focused only on battered women charged with “homicide/assault of the abusers,” and those women have more severe PTSD symptoms than the sample of all battered women (73). Multiple sources affirm that repeated victimization and living with the batterer increases the risk for more severe or chronic PTSD (73). O’Keefe reports that victims who are abused as adults who experienced childhood abuse have a greater likelihood of developing PTSD and more severe PTSD symptoms. O’Keefe conducted her studies regarding the connection between PTSD and battered women and found that “a high percentage of incarcerated battered women experienced severe spousal abuse” and still at the time of the study, experienced symptoms (80). She moreover found that incarcerated battered women who killed/seriously attacked their partners “reported more frequent and severe violence than the comparison group” which meant they experienced more severe physical and sexual abuse and were more likely to fear for their lives (81). This study confirms that women’s use of lethal force is likely in response to severe abuse. The correlation demonstrates that women typically respond to aggressors differently. Severe abuse does not automatically lead to a violent response from the victim, only a higher likelihood that it would.

Women can treat their PTSD and recover from the abuse with the right social support. O'Keefe and her colleagues reference previous research in noting that over time battered women recover from their traumatic experience and return to a "healthier psychological condition" after they leave and they no longer experience abuse or the threat of abuse (82). This research indicates that rehabilitation would be effective for women recovering from domestic violence once they are free. They cannot recover psychologically from abuse while they are still in their toxic relationships.

Similarly to BWS, PTSD by itself does not see widespread acceptance in court as a condition that reduces culpability. Courts recognize testimony regarding PTSD as reliable and scientifically valid for establishing claims of insanity and self-defense (Berger et al. 509). In practice, the courts have questioned the evidence regarding the presence of PTSD in individual defendants and its admissibility as relevant or compelling in cases (Berger 509). PTSD has seen limited success as a partial defense or mitigating circumstances. In 2012, Berger and their associates found that of 42 cases that had been appealed regarding a reversal of a conviction based on evidence of PTSD, only 11 had convictions reversed and remanded or, the defendants' sentences vacated. In 2 of those 42 cases, the appellate courts reversed the denial of PTSD experts (511). In other words, of the cases appealed, only 30% successfully appealed using PTSD as the basis for a reversal in the decision. The weakness of PTSD could be that PTSD does not explain a potential escalation to violence. Overall, the legal system accepts the validity of mental illnesses, but it seems hesitant to accept how those illnesses may impact decision-making to the point of committing a crime. This hesitancy makes sense. Abuse victims may have mental illnesses, but the court system does not seem convinced that battered women warrant excuses based solely on the presence of mental illnesses alone, at least not without risking a potentially

slippery slope or discriminating against other defendants. The Department of Justice stated that 64% of inmates had some sort of mental illness (Taylor). Given the prevalence of mental illness, the court cannot make special exceptions for one group of defendants simply because of the presence of mental conditions. The system would need a stronger basis for excuse. Otherwise, they would risk discriminating against other inmates.

*(5.1.3) Depression as Another Potential Mitigating Factor in Culpability*

In addition to PTSD, psychological research has established that major depression affects the brain. In one study, researchers studied seventeen women with major depression and seventeen women as control subjects. They found that women with depression in the short term had on average 13% larger amygdala volume and a 12% reduction in hippocampal volumes (C. Lange and E. Irle 1059). Qais AbuHasan and his associates state that the amygdala helps regulate “anxiety, aggression, fear conditioning, emotional memory, and social cognition. Electrical stimulation of the amygdala evokes fear and anxiety responses in humans,” (AbuHasan et al.) Depression at least correlates with a reduction in the part of the brain that regulates emotion. An earlier study looked at thirty patients diagnosed,” with depression and compared them with 30 healthy control subjects (Frodl et al. 709). The researchers controlled for age, gender, and education by selecting pairs of individuals that had those factors in common, one with depression and one without (Frodl et al. 709). They found that the patients with depression had “significantly increased amygdala volumes in both hemispheres” than their matching control subjects (709). This research means that in the short term, the person is still processing emotional stimuli but focused on negative emotions. Dr. Michael Amiel says that depression causes a cortisol influx that enlarges the amygdala (Amiel). Damage to this part of the brain throws emotions “off balance” causing uncontrollable mood fluctuations which then result in the

subjects experiencing both positive and negative emotions intensely. An enlarged amygdala further causes sleep issues which then worsen the brain's reactions to stimuli and develop a negative mood and mindset worsening depression (Amiel). Essentially, an enlarged amygdala causes a negative feedback loop that worsens pre-existing conditions and increases the intensity of people's emotions and negative mindsets. In battered women, these effects mean that they view their situation more negatively and with less hope. At least in the short term, they will be far more likely to believe that they cannot escape and that the only way to end the abuse will be to kill their partners, whether or not this is true.

The effects of depression in connection to violence is admittedly weaker than other conditions long-term. Later on, in chronic depression or when someone has major depression disorder, the amygdala goes back to normal size and or is often smaller than normal. Nolan and his associates found that across multiple studies conducted, on average, the hippocampus showed "an approximate 8% volume difference bilaterally and the amygdala showing an approximate 7% difference on the right and 5% difference on the left," (4). Though this statement is not backed up by research yet, perhaps the amygdala has been damaged due to the chronicity of the depression that ultimately changed the processes so that it does not process emotions like this part of the brain did before the subjects' depression. Even if by some chance, the amygdala returns to normal or returns to a state that does not cause increased hopelessness and depression, PTSD, TBIs, and the presence of symptoms from other mental conditions still provide a strong case for reduced culpability.

#### *(5.1.4) Traumatic Brain Injuries*

Traumatic Brain Injuries (TBIs) better aid in explaining why some women escalate and why others do not than PTSD and depression. Additionally, TBIs connect the abuse directly to

reduced culpability in women. Dressler, in describing what happened to Judy Norman, reported that her abuser had kicked her in the head the day she murdered her husband. She likely sustained one or multiple TBIs. Research shows a correlation between violence and TBIs in men, specifically damage to the prefrontal cortex in the frontal lobe. The prefrontal cortex regulates thoughts, actions and emotions through extensive connections with other brain regions (Arnsten). Mild or traumatic brain injuries or a brain tumor cause damage to the frontal lobes (Stevens 205).

TBIs negatively impact decision-making. Stevens states “Research indicates that murderers generally have lower glucose metabolism in the prefrontal cortex which in turn indicates that prefrontal deficits in antisocial individuals could potentially predispose them to higher impulsivity and inhibited self-control,” (205). The dysfunction impacts the person’s ability to control their impulses and consider the consequences before taking action (205). Williams confirms Stevens’ conclusion affirming that TBIs commonly cause issues in emotion regulation which manifest as impulsiveness and “poor social judgment (Williams et al. 1). Williams explains “Injury to frontal systems can lead to increased risk of impulsive aggression, poor decision making, and lack of control of social behavior,” (3). Stevens indicates that abnormalities in the frontal lobe correlate to cases of psychopathy in individuals (205). He said that since “the frontal lobes contain the brain’s primary serotonergic projections,” the presence of “abnormalities in serotonin metabolism may lead to impulsive aggression” which brain injuries can cause (205). Research proves that TBIs lead to aggressive behavior. That evidence manifests in football players, who are at increased risk of TBIs. They are four times more likely to get arrested for domestic violence than the general population (Diamond). Diamond reports that domestic violence arrests account for roughly half of the arrests among NFL players versus around 20% of the general population (Diamond). In addition to NFL players, Williams reported

that Vietnam veterans with injuries to the frontal cortex “were rated as more aggressive and violent compared with non-injured controls and patients with lesions in other brain areas,” (3). Those inclinations may differ in how they manifest in women, but given the effects of TBIs in men and the correlation to violence, one would expect an increased propensity for violence in women experiencing abuse as well.

Given the nature of abuse, women in abusive relationships are most at risk of getting TBIs. Often men would hit women in the head instead of the face or other visible areas to hide the abuse from others. The effects of these injuries are not always obvious, even to the victims themselves (DeWard). Some brain injuries are misdiagnosed or undiagnosed (DeWard). Some of the effects of TBIs include increased impulsivity, more tension, and anxiety, depression, decreased frustration tolerance, and issues with self-control (DeWard). One study reported that “of the 89 patients who suffered a traumatic brain injury, 30 of them (33.7%) met the aforementioned criteria for the presence of significant aggressive behavior during the first 6 months after the traumatic episode” (Tateno et al. 158). Naturally in a population of abuse victims, that statistic translates to one-third of abuse victims escalating to violence in response. It may depend on which areas of the brain are affected by the injury. Halina Haag and her associates reported that repeated head trauma causes “brain tissue degeneration resulting in fatigue, depression and mood changes, memory loss, confusion, aggression, impaired judgment, and difficulty in everyday tasks” (1270). Besides these effects, TBIs contribute to causing dependency and substance abuse (DeWard). TBIs serve as an explanation for why women, especially women experiencing more severe abuse, would escalate to killing their partners. More severe abuse no doubt correlates with a significant chance of TBIs. The effects stack and women may experience more of the negative effects the more injuries they experience. The injuries

further explain why more people who experienced abuse as children may have an increased likelihood of becoming abusers.

Because of TBIs' correlation to violence, they help explain why women are more likely to kill or respond to violence with violence in more severe cases of abuse. Battered women are far more likely to sustain TBIs in more severe cases than in less severe ones. One study found that 92% of battered women reported receiving blows to the head, 40% of those women lost consciousness because of the hits, and 77% reported concussion symptoms (Haag 1273). In another study, all the domestic violence survivors reported receiving injuries to the head, face, and neck and showed some symptoms of TBIs (Haag 1274). In another study, 35% of BW experienced a head injury during a violent incident (1273). The effects of injuries stack too. 50% of people in that sample sustained multiple brain injuries (1273). As of right now, research has connected TBIs to domestic violence victims, particularly women, but papers discussing solutions for battered women who kill do not consider the impact of TBIs on decision-making. Christa Hillstrom, writing for the New York Times, claims that domestic violence victims are likely at a greater risk for TBIs than football players. TBIs in combination with mental illnesses easily compromise women's agency and show how the violence itself drove women to extreme actions.

TBIs can be identified and treated within the system. Identification can factor into criminal justice outcomes. The United Kingdom has worked to recognize TBIs as a potential factor in the escalation of violence in their justice system. Williams argues that any "neuror rehabilitation could offset the risk of violent crime (9). Additionally, he argues for more linkage between "emergency departments, community mental health services, general practitioners, and school systems" particularly in lower socioeconomic areas (9). The court

system can require routine screening for TBIs upon a person's entry and thus ideally provide treatment (9). Stevens reports that where there is evidence of brain trauma, brain scans have been used as a mitigating factor in sentencing (203). The UK already screens for mental disabilities in young people and takes TBIs into account for reducing sentencing (9). Finally, William recommends providing access to brain injury link-workers for incarcerated people to identify TBIs and support people with those injuries. Williams notes that in the UK, Parliamentary bodies recognize the "need to take account of TBI in the criminal justice system" (9). Other countries recognize the connection between TBIs and violence. TBIs can be treated and mitigated as a causal factor, especially in women who rarely escalate to violence outside of domestic disputes. Admittedly, TBIs first need to be identified in women when they do enter the criminal justice system. The court system in the US does not necessarily search for TBIs in psychiatric evaluations. The court system would benefit greatly from tracking TBIs and the connection to violence during abuse, and then focusing on mitigating the effects of TBIs within defendants.

Unfortunately, the correlation between TBIs and domestic violence is often overlooked as Haag and her associates reported finding only 22 empirical studies with limited data on the sample size and diversity studying the relationship between the two (1282-1283). Admittedly, the data may be hard to track given that domestic violence largely happens behind closed doors. Abused women do not always go to the hospital to get treated after sustaining traumatic injuries. Hillstrom reports that in 2020, "the Government Accountability Office released a report warning that the lack of data-gathering on traumatic brain injuries in abused women makes it impossible to confront the crisis in a meaningful way" (Hillstrom). Therefore little data has been gathered regarding the prevalence of TBIs in battered women at all, much less in the women who kill in response to abuse. Though data on women domestic violence survivors is lacking, given the



available information, women do experience damage to the prefrontal cortex during bouts of abuse that impacts the regulation of emotions and impulsivity. Emotions factor heavily into decision-making. The damage then causes increased aggression. Though more research needs to be done to definitively establish the correlation, the causal connection between TBIs and women who escalate to violence to escape their abusers seems highly probable based on current research on the connection between TBIs and violence in men.

While mental illness is a known factor in domestic violence, TBIs and the psychological impacts of the abuse provide a better understanding of why women in abusive situations act as they do. TBIs especially explain why women, in cases of extreme abuse, escalate to violence to the point of sometimes killing their abuser. The TBIs and other mental illnesses that result from abuse explain why abuse victims consider killing their partners in the first place, feel more desperation to carry out this option, and why they may have a reduced capacity to assess alternative options. The TBIs would lower a victim's inhibitions against resorting to violence, and the mental illnesses would heighten negative emotions and hopelessness. TBIs paint a more accurate psychological profile of general victims of abuse that explains how they might respond differently than other abuse victims and why.

Standard mental illnesses are more advantageous than BWS. They better allow for non-homogenous responses than syndromes because symptoms tend to materialize differently. For example, most mental illnesses allow for spectrums while syndromes require the presence of key characteristics and stronger correlations between the presence of certain factors and the symptoms. Women may have different combinations of mental illnesses and different severities in symptoms depending on the type and severity of abuse inflicted on them that would better

allow for non-homogeneity in response to abuse. What matters is that an expert can diagnose the mental illness and explain why the symptoms present reduce culpability.

For alternative solutions to BWS to work, experts need a complete understanding of battered women that explains why only a minority of domestic violence victims escalate to violence and most do not. BWS focuses primarily on explaining why women do not leave, not why they escalate. Other legal solutions focus on justifying the escalation when women do resort to violence, not explaining why women who escalate should be distinguished from *most* other battered women who do not escalate. A complete psychological understanding of BW and abuse's varying impacts on domestic violence victims fills that gap in understanding. Women are far more likely to escalate to violence in more severe instances of abuse. Severe cases of abuse certainly mean higher probabilities for TBIs and more severe TBIs. Furthermore, both the abusive circumstances and the TBIs would contribute to the development of mental illnesses. Mental illnesses would easily warp battered women's perceptions and push them towards more drastic options than abuse victims with less severe mental illnesses. TBIs cause impulsion and aggression that would factor in heavily in a person's decision to carry out more extreme action in response to her circumstances. Both internal factors, psychological and damage to the brain, and external factors, the abuse would factor heavily in battered women's decision-making and exert pressure on them to carry out more extreme actions either out of desperation, fear, and/or anger. Psychological conditions and TBIs better allow for a variance in response than syndromes. The psychological profile outlined gives a general understanding of the extent that mental illnesses and TBIs impact domestic violence victims.

The broader understanding allows for escalation in some and not in others depending on the extent of the psychological effects and presence of TBIs. Even though people with mental

health conditions share symptoms, mental illnesses can manifest differently. Some symptoms may be present more in some people than others. TBIs can impact people differently depending on where the brain was damaged and how that manifests itself, whether the injury leads to aggression and/or impulsivity or just other kinds of cognition issues. Other solutions fail to encapsulate a complete understanding of why, psychologically speaking, a minority of women escalate and a majority do not. As a result, if the court system tries to excuse domestic violence victims, courts have to consider the bigger picture and somehow justify why these women in particular should be excused when other women manage to avoid going to such extreme lengths.

### *(5.2) Additional Considerations in Arguing for a Reduction in Punishment*

#### *(5.2.1) Consideration of Circumstances*

Given the psychological effects of abuse and her situation, full punishment for battered women goes against the court's values of fairness and accountability. In punishing battered women who do not fit self-defense, the court is limiting them to the following three options: 1) keep attempting escape, 2) take the abuse, or 3) defend themselves while receiving life-threatening abuse. Staying with an abuser is dangerous. About four thousand women die each year from domestic violence (Ganley). Fighting back during abuse is also dangerous because at least in a heterosexual relationship, the man would have a physical advantage. He might be able to overpower her and decide to kill her. Even someone does not die after the abuse victim defends herself, this choice causes the abuser to further escalate the his violence towards her in the future. The National Institute of Justice and the Office of Justice Program, a section of the US Department of Justice, reported that almost 60% of women who fought back believed that fighting back made their abuser more violent (Practical Implications of Current Domestic Violence Research). Of course, the abuser may have other advantages besides physical strength

for shutting down victims when they try to defend themselves. If not 1 or 2, then that leaves escape.

Women's lives are most at risk when they do attempt to leave. According to Burke. "The risks of a battered woman being seriously injured or killed by her batterer are at their highest within the first two years of her separation from the batterer," (65). Of the total number of domestic violence victims, 75% of the victims were killed as they tried to leave their relationship or after they had left (Ganley). Furthermore, women often make seven attempts *on average* before they successfully leave (Ganley). Each time they attempt, they risk an escalation in abuse and more danger to their lives. Many women rightfully believe that the abuse will escalate should they attempt to leave and that they will fail to escape due to a lack of resources and support. In 2016, of 43,697 requests, 12,197 (28%) went unfulfilled (Domestic Violence and Homelessness Statistics). Of those requests that went unfulfilled, 7,728 (63%) were for emergency housing. The reasons could easily be any combination of relational and societal factors. Even in the absence of mental illness, women cannot just leave. The circumstances may not explain why only a minority of women escalate to killing their partners in response, but the danger of leaving certainly serves as yet another reason why battered women should be excused because this factor hinders battered women's ability to treat their injuries and mental illnesses. Furthermore, the feeling of being unable to leave places stress on battered women which would exacerbate whatever mental conditions they would have which would then make them more likely to commit murder.

Women at least do struggle to leave and find the resources they need. The reasons women do not feel as if they can leave can be categorized as either relational and/or societal reasons. Societal reasons include a lack of support from governing institutions. For example, she may fear

losing her children to him in divorce proceedings or legal disputes (Why Do Victims Stay?). Her partner may control the finances as well (Why Do Victims Stay?). Law enforcement may not respond because they consider the abuse a “domestic” matter (Why Do Victims Stay?). Police may be hesitant to arrest, and prosecutors hesitant to prosecute. Judges rarely impose the maximum sentence, instead favoring probations or fines. Women cannot simply resort to restraining orders because abusers break those orders. Shelters may be full or unavailable. No financial support means nowhere to go and no means to support oneself. Failure to leave further serves as a contributing factor that explains how women get driven to the point of violence.

Relational reasons include the pressures that the partners and family members have exerted on battered women that pressure them to stay in the relationship. For example, parents of battered women may not support her leaving her family. She may come from a more religious background where her family would not approve of her leaving and therefore not support her. She might not know how to get help and find support. Perhaps, the relationship still has good moments that give her false hope. His manipulation may extend to convincing her that no one will help her and escape would be futile. The abuser may have successfully isolated her from her friends and family thus depriving her of a support system she can use when escaping.

Unlike other types of defendants, abuse victims are responding to unusually extreme circumstances and under pressure. If defendants who are abuse victims have attempted to escape before acting out violently, then punishing them implies a legal obligation on abuse victims to keep attempting escape or stay in the situation. This obligation is unfair and does not take into account all the effects of abuse and the difficulties in leaving. In cases where the abuse victims cannot prove they tried to escape, but they can demonstrate that their partner severely abused them, then in those cases, those defendants should still be excused. They may have been afraid of

experiencing more abuse or getting hunted down and killed if they tried to leave. Legal defenses may not be able to prove with certainty that the defendants specifically had this fear of experiencing more severe abuse, but such fears align with what we know about abuse.

Full punishment ignores the abuser's role in the situation that led to the defendant killing them. Arguably, the abusers are partially an indirect cause for their own death at the hands of their victims. The psychological impacts and pressure to remain in the relationship are huge driving forces behind women's decisions when assessing their options. The abusers directly cause intense stress and fear that results in horrible mental states. They should be considered partially responsible for their own deaths. The victims may be the ones that ultimately carry out the action, but abusers place the victims in a toxic situation. Intentions aside, they are the driving forces behind abuse victims' ultimate resort to violence. If the court believes that a defendant was responding to abuse, perhaps it should acknowledge this fact in its judgment by placing at least partial blame on the abuser. An excuse would allow shifting part or all of the blame to the abuser for creating the circumstances that drove someone to take such drastic action. In ignoring the abuser's actions, the court sends the message that no matter how victims of abuse respond, they will face repercussions either at the hands of the abuser or the court system.

From a solely utilitarian point of view, abuse victims can recover and no longer pose a public safety threat. Victims of abuse tend to recover once they escape their abusers and receive treatment. Salcioglu and his associates reported that studies found that "trauma-focused psychological interventions designed to overcome fear, reduce helplessness responses, and restore a sense of control over one's life would be effective in improving PTSD symptoms in survivors of domestic violence" (123). They said the evidence demonstrates treatment focused on restoring a sense of control in victims "by blocking cognitive and behavioral avoidance of

trauma cues and reminders” successfully reduce PTSD and depression symptoms. Flasch, Murray, and Crowe report that in a previous study, they interviewed hundreds of survivors and found that overall, despite the negative long-term impacts, the survivors reported “successes, strengths, and resources they developed in the aftermath” of their relationships (3375). They then go on and generally live “positive, fulfilling lives,” (3375). Flasch and her associates moreover found in their research that survivors of abuse take advantage of different strategies and resources. In one small sample of 18 women, they recovered “by making connections with others, drawing upon spiritual beliefs, engaging in bodywork and physical activity, using decision-making skills, and other self-care strategies” (3379-3380). Naturally, these strategies will vary from person to person. Flasch and her associates identified and categorized processes that abuse survivors use to overcome the effects of abuse as either intrapersonal or interpersonal processes. Intrapersonal processes included regaining one’s identity, forgiveness towards themselves and their abusers, examination, and education of the past situation, and embracing newfound freedom and power in life (3385). Interpersonal processes included building support networks and using their experiences to help others in similar situations (3385). Women typically do not re-enter another abusive relationship and get driven to kill multiple partners. Their ability to recover indicates that battered women are responding to their circumstances and would not act out violently outside their relationship. Battered women do not pose a threat to public safety like other defendants do.

Fear of inadvertently condoning murder in more complicated cases hinders pleas of innocence. Even though leaving is dangerous and women face an immense amount of pressure and stress, killing between bouts of abuse is an extreme response. In battered women cases, the court system is understandably hesitant to condone violence as a response to wrongdoing. From

the perspective of the justice system, people do not automatically forfeit their right to life because of the wrongs they commit. The court system has to uphold an inherent value of life. Given this inherent value, perhaps women are objectively obliged to keep attempting escape. Otherwise, condoning their actions violates this inherent value. Thus, even if one feels as though women are justified in using violence against their abusers, the court system's adversarial nature sets high standards. Judges and juries cannot get inside defendants' heads to properly determine if they could actually, reasonably escape or not. As a result, solutions are limited to abuse victims' perceptions of the threat to their lives. These complications make arguing for verdicts of innocence more difficult and complicated. A focus on reducing punishment instead of plea of innocence lowers the need for high correlation or proof of direct causation between the presence of the conditions and the defendant's actions.

#### *(5.2.2) Advantages of Excuse*

A doctrine of excuse best allows considerations for a complete and complex psychological understanding of the factors behind what drives some abuse victims to extreme lengths without potentially condoning murder. An excuse doctrine does not need to be concerned with "reasonableness" or whether or not abuse victims acted rationally given their situation. It avoids objectivity which inevitably causes the jury to consider how other women in abusive situations respond and whether one particular response is too extreme. As a result, excuses do not ask the jury to condone a potentially extreme response to abuse. Subjectivity allows the court system to focus only on the individual's circumstances and mental states.

Abuse victims should be excused. Abuse damages its victims psychologically, especially in extreme circumstances. The effects of abuse could easily warp abuse victims' perceptions of the viability of alternative options. Abuse victims can still use moral reasoning and have an idea



of the consequences, but in extreme cases, how battered women view their situations and their beliefs about their circumstances affect their impulses. Conditions such as depression and PTSD can create negative feedback loops where sufferers will fixate on the negatives. This fixation leads to feelings of hopelessness and desperation which may push sufferers to take more drastic action. In a way, the circumstances may be coercive. Battered women can still resist and choose not to kill their partners, but in cases of extreme abuse, the court system would be unreasonable to expect them to completely resist their impulses. Abuse victims, unlike others suffering from their conditions, are not able to recover from TBIs and other mental conditions they may have endured because of the abuse. Their circumstances exacerbate bad psychological conditions and make leaving much more difficult. An excuse solution allows for the court system to account for extreme cases of abuse where all or most of these complicating factors would become relevant. An excuse still shifts part or all of the blame to the abusers without asking the jury to justify killing outside of confrontation or to consider what “reasonableness” would mean in circumstances they have potentially never experienced themselves. Through means of excuse, the court system utilizes a holistic perspective on what drives victims of extreme abuse to kill without getting worried about objectivity and reasonableness. In doing so, the court system would be situated better to avoid punishing abuse victims and to focus on helping abuse victims recover and reintegrate into society.

## (6) OBJECTIONS: Overextension and Special Treatment

Likely one of the biggest obstacles to effectively excusing abuse victims is fear of a slippery slope. While neuroscience can inform the court's understanding of what leads a person to commit a crime, it also raises complications in assigning culpability in a way that does not compromise the court's recognition of moral agency. Critics of what they call an "abuse excuse" are worried that excusing battered women or others will feed into deterministic notions that if one can identify the cause of their actions, they should not be held accountable. Alan Dershowitz argues that an "abuse excuse is symptomatic of a general abdication of responsibility that is 'dangerous to the very tenets of democracy, which presuppose personal accountability'" (Kinports 188). Critics are concerned that excusing one group of defendants based on deterministic factors will lead to too much excusing. Too much excusing would compromise the court system's integrity. Many conditions or factors may influence a defendant's decision-making that is out of their control, but the court cannot just excuse everyone for the most remote influence on decision-making. In failing to recognize moral agency, the court does a disservice to victims and society who have been wronged by defendants' actions. Too much excuse diminishes recognition of the defendants as fully rational beings.

### *(6.1) Overextension*

In relation to slippery slope concerns, abuse victims are not the only defendants that suffer from TBIs. Geert Phillip Stevens, who works at the University of Pretoria in South Africa discusses a case study in his article regarding Michael. Michael suddenly developed sexual urges, including urges regarding minors (202). He sexually molested his 12-year-old daughter, performed poorly during treatment, and made sexual advances toward others trying to help him overcome his urges (202). When he started complaining of headaches, he saw a neurologist who

discovered he had a tumor in his brain (202). His urges disappeared after getting the tumor removed (202). When his tumor returned, his urges started and then stopped once the tumor was removed again (202-203). Michael is not alone. Katzin and his team conducted a study and reported that of 269 inmates, roughly 75% of them reported a traumatic brain injury (TBI) (4). Only an estimated 60 offenders reported no TBI. (4). Stevens reports that brain dysfunction in criminal populations can be as high as 94% in homicide offenders, 61% in “habitually aggressive adult offenders, and 49%-78% in repeat sex offenders in South Africa (205). TBIs are more common in the prison population than in the regular population likely because of the connection between TBIs and symptoms of impulsivity and aggression. Maybe the court can decide that depending on the kind of TBI and treatment options for mitigation, that simply the presence of TBIs can be used to excuse or partially excuse a defendant. More strides would need to be made in establishing the deterministic implications of TBIs in domestic violence survivors before they can be considered when excusing someone. For instance, some TBIs may affect people differently depending on the severity and lasting effects.

Overextension may be more unlikely depending on how the court system approaches legal doctrines because abuse victims are very different from other kinds of defendants. Abuse victims rarely respond with violence and only in cases of extreme abuse, and they generally have multiple, diagnosable conditions including ones that result from damage to the brain. Judy Norman’s husband forced her to commit humiliating acts in addition to horrific threats and extreme physical abuse (Norman v North Carolina). Assuming Candice Malone spoke truthfully, her boyfriend cut her with scissors, choked her, and had her head slammed into a wall (State v Malone). These cases are extreme. The level of physical violence indicates that rates of TBIs are likely very high in these cases and abuse victims are going to experience more mental illnesses

and more severe symptoms. Additionally, they will struggle in getting help and utilizing resources. These factors make battered cases unique and thus make overextension unlikely.

To prevent overextension, critics are concerned about implementing a special doctrine that unfairly favors a certain group of defendants. Critics are concerned that even if special treatment seems justified for certain abuse victims, any doctrine exclusively favoring them may set a precedent that would allow the courts to implement other doctrines favoring other groups of defendants who deserve punishment. For example, hypothetically, the court system decided to create a special doctrine to favor defendants who grew up with Nazi parents or were taught extreme beliefs, whether or not their actions tied back to their upbringing. Even if other special treatment doctrines do not arise, the court system could wrong defendants by favoring one group of defendants over others.

#### *(6.2) Special Treatment*

With regards to concerns regarding special treatment, the court already utilizes forms of excuse: duress, insanity, and to a much more limited extent, diminished capacity. The system recognizes the impact of unusually severe deterministic factors. Recognition of these factors does not hinder their ability to uphold values. Cases where abuse victims kill their partners, typically, are extreme and involve deterministic factors. Abuse victims have a stronger case for excuse than just anyone with TBIs because of their situation. The abuse both causes and aggravates the effects of TBIs. Especially in instances when they escalate to violence, abuse victims very likely experience more severe head injuries and potentially multiple of them than other kinds of defendants. They cannot simply seek help or focus on coping with the effects of TBIs because of their abusers. In fact, 38% of women do not contact the police or get medical attention after severe incidents of abuse (Haag 1274). Therefore, in posing a solution, the

criminal justice system needs to account for both internal and external factors in decision-making. People with TBIs and/or other mental illnesses can still seek out help and treat their symptoms. Partners in violent relationships are focusing on surviving the abuse, not on identifying and treating their conditions. The abuse places external stress that both causes and exacerbates the effects of mental illnesses and TBIs and prevents victims from getting the help they need. These cases, though relatively uncommon, heavily involve deterministic influences on decision-making.

The court system can distinguish defendants who are victims of current abuse from defendants who experienced abuse that occurred in the past. Abuse that occurred in the past does not warrant an excuse. At some point, victims of past abuse can seek out help if they feel they need it to cope with their conditions. They can certainly use their own reasoning and coping mechanisms to overcome or lessen negative emotions and other effects of mental conditions once they escape abuse. Once a battered woman escapes, she does not need to go back and kill her partner. As such, any legal solutions applied to battered women or others experiencing the effects of abuse can be distinguished from those whose abuse occurred in the past.

Ability to recovery from the effects of abuse and not reoffend suggest that the inability to escape either because of their perceptions and/or actually having tried is important. When people finally escape abuse, those circumstances no longer place stress on the survivor that both causes and exacerbates mental illnesses and the effects of TBIs. Their perceptions are no longer warped in a way that drives them to the extreme of killing someone. Unlike people currently experiencing abuse, survivors have more of an ability to recognize any remaining problems they are experiencing as a result of past abuse. As discussed previously, victims of abuse can and do recover. Additionally, they have more freedom to get the help they need. As such, they have

more power to lessen or cope with any lasting effects of abuse because their abuse occurred in the past. So even though many people who were abused become abusers or commit crimes, any excuse applied to battered women would not extend to them simply because women are responding to their current circumstances and do not have the same ability to identify problems and get help in the event they need it. This point further goes to show the importance of escape in abuse, and why the courts might have difficulty justifying killing an abuser. If a victim can escape, they are less justified in killing their abusers. The court might be considered unreasonable if they expected victims to stay in their situations, but many find justifying the killing outside clear self-defense exceedingly difficult if not impossible for defendants to successfully argue if escape is remotely possible.

The overall argument of this thesis can apply to anyone currently receiving abuse, but the case for excusing women specifically experiencing abuse is stronger because, as a demographic, they are not typically violent. They disproportionately escalate to violence in response to something and as such, they do not pose as much of a threat to public safety. They do not comprise the majority of the prison population. They only make up 5-15% of the total number of homicides in the world (Santos-Hermosa et al. 1). Studies indicate that women do not commit acts of violence and assault toward people that are not close to them (Saxenam and Messina 2). Swatt and He reported that, of women homicide defendants in Chicago, more often experienced some physical injury before the homicide and were more likely to use a knife to kill their victims than men, suggesting a defensive reaction as a result of previous abuse” (Flynn et al. 368). A good portion of women ends up in prison for committing crimes in response to abuse. Jurik and Winn found that in 80% of the cases concerning women who committed murder, arguments usually preceded the incident and acted as the precipitating incident (Eckhard and Pridemore 56).

For comparison, arguments only preceded 63% of murders committed by men (Eckhard and Pridemore 56). This information supports that battered women as a defendant type may benefit significantly in more integration of mitigating factors into the consideration for legal claims without posing a threat to the public.

### *(6.3) Gender Stereotypes*

Some critics believe that applying excuses to battered women feeds into the old derogatory stereotype that they are crazy. They think that if the court system excuses abuse victims on the grounds of impaired cognitive reasoning, then the impairment means something is wrong with the victims, not the situation they found themselves in. People need to shift their views of excuse solutions away from “mental illnesses make women crazy”. Coughlin vocalizes this concern. Coughlin argues that excuses that focus on women especially diminish women’s capacity for reason in the eyes of the law. Instead, it reinforces traditional hierarchies where courts find men responsible for actions that they would not assign women responsibility for because of their lack of reason for their male counterparts (58). Her criticisms reflect a desire to maintain women as perfectly rational perpetrators because otherwise, she fears the court system could favor such defendants simply because of their gender and role within her relationship with a man.

Her argument does create a compelling case for not limiting solutions to female defendants. Doing so might unintentionally undermine them as rational actors simply because of their gender. Beyond this consideration, she is wrong to reject the idea of excusing battered women or other kinds of cases involving abuse victims. Excuse in the court system does not automatically mean that someone is “crazy,” or lesser as a human being. Battered women’s actions might be rational but her mental conditions mean that, due to her emotions and stress, her

path there is not. Instead, excuse doctrines acknowledge reduced capacity for reason without implying that the actions the defendant committed were the right ones to pursue. Legal scholars should pursue doctrines of excuse concerning battered women and doing so will not hurt the defendants in the long run.

One cannot ignore the pressure and the psychological effects of abuse on decision-making. In the years since Coughlin wrote her article, additional evidence has come out regarding the impacts of abuse psychologically. The psychological impacts that abuse has on its victims better explains why some women might feel compelled to take more drastic measures than others and create a compelling case for seeking reduced culpability regardless of whether the action she took is rational or irrational. The stress of the situation both causes and exacerbates symptoms associated with mental illnesses. Given the traumatic situation, one would be remiss to ignore the impact of mental illnesses and the effects of TBIs as stressors that would impact decision-making. So while a woman might rationally opt to keep attempting escape, the psychological effects of abuse may push her towards more drastic but seemingly rational options. From a utilitarian perspective, women have not gotten their desired results without some sort of argument regarding their mental states.

For legal solutions to work, critics need to shift their mindsets away from the belief that mental illnesses make women “crazy.” They should instead view mental conditions as the result of a transformative effect of abuse that impacts women’s perceptions. Women are not crazy and can reason through their options. Many of them utilize other coping strategies or means of escape. Those who kill specifically usually experience more extreme abuse. Extreme abuse can be connected to mental illnesses, TBIs, and feelings of hopelessness and desperation. The court system should not ignore the impacts of these conditions and expect abuse victims to act as



people without these conditions would in the relationship. TBIs already predispose people with them towards aggression. The other factors would easily cause women to perceive murder as their only means of escaping the situation. The factors may not establish enough absolute causation to warrant innocence, but it should be enough to warrant a reduction in punishment. The courts should focus on excusing abuse victims based on the presence of extreme abuse, TBIs, and mental illnesses.

#### *(6.4) Concluding Thoughts*

Based on the psychological profile and the justification behind factoring psychological evidence into legal decisions, excuse is a better option for solutions. Even if one feels as though women are justified in killing their abusers outside of confrontation, such a response is extreme. Justification sets the bar too high in cases when women take action outside of confrontation. Justification requires the jury to condone killing which is a difficult standard to meet, even in cases of abuse. Additionally, psychological states become far less relevant in determining justification defenses. The focus is on whether the defendant made the objectively preferable choice, not on explaining why her impaired judgment led her to make the less preferable decision. Excuses, on the other hand, do not require potentially condoning someone's decision. They better allow defenses to use mental states and circumstances to explain why defendants made the choice that they did and why, to that defendant, the decisions seemed to be the best option, not that the choice was right.

Helping battered women get excused in court will likely not end domestic violence, but it would aid abuse victims who find themselves in seemingly impossible situations. The stress of the circumstances combined with the psychological effects of battering put battered women in a uniquely vulnerable position different from those who are not in abusive situations. Especially in

cases of severe abuse, the psychological profile, given the impacts of abuse based on advancements in psychology, better contextualize women's mental states and provides a better understanding of how battered women can feel driven to kill their abusers.

### **(7) PATH FORWARD: Applying Mitigating Factors Effectively**

In light of mens rea requirements for culpability, this section discusses what would best achieve reduced culpability assuming battered women should be held less accountable than other types of homicide defendants. Mens rea focuses on defendants' mental state to determine intent and whether the defendant was aware of the possible wrongful result of their action when considering culpability (American Law Institute). Duress and self-defense are still weak fits for battered women even with a different psychological basis. Established doctrines might work in some cases, but the courts have not adopted accepted extensions of duress or self-defense to battered women cases. A different psychological foundation will not better extend duress and self-defense to battered women because psychology does not get around Burke's concerns of using perceptions to establish self-defense claims nor will it help battered women more clearly fit the requirements of duress.

Furthermore, psychology as a discipline fails to support causal claims with absolute certainty, only strong correlations. Mental illnesses manifest themselves differently. People's responses and ability to handle symptoms vary as well. With regards to TBIs, the brain is complex. The damage to areas of the brain during abuse might manifest different effects in victims and varying degrees of intensity of side effects. Despite the limitations of psychological research, given what is known, abuse victims, especially those that escalate to violence, likely present more side effects of psychological conditions, and more intense symptoms. Stephen Morse's proposal for a new doctrine of partial excuse might be the best path forward in allowing courts to account for the nuances that arise in battered women cases without using psychological conditions to overextend other doctrines. It lowers the bar where psychological evidence proving

significant correlations with plausible causal explanations would be enough to reduce punishment in abuse victims and recognize mitigating factors.

*(7.1) Mens Rea*

In general, the tighter the relationship between the mental states of the defendant and the criminal harm they cause, the higher the level of criminal culpability is assigned to the defendant. TBIs and psychological conditions can potentially ground arguments for reduced culpability for battered women by connecting mental states that arise during abuse to the crime. The U.S. Model Penal Code sorts mental states into four categories in the mens rea doctrine: 1) Purpose: the defendant “had an underlying conscious object to act;” 2) Knowledge: the defendant knew the conduct would lead to a certain result; 3) Recklessness: the defendant disregarded significant and unjustified risk involved with their conduct; or 4) Negligence: the defendant did not know the risks involved but should have (American Law Institute). The implementation of mens rea underlies the different degrees and subtypes of crimes such as murder and rape. A defendant is more culpable for murder if that person pulls the trigger intending to kill another than for the same act but in an instance where the person does not acknowledge the danger that someone could die or get seriously injured. Both scenarios have the same result, but the law treats those situations differently. Another example is the case of simple rape versus aggravated rape. In the first case, the rapist might be aware of, but recklessly disregard the risk that the person does not consent to intercourse (American Law Institute). In the second case, the rapist must act with the purpose of securing submission to nonconsensual sex,” (American Law Institute). The doctrine punishes aggravated rape more even though both cases result in sexually assault.

Even with TBIs, many abuse victims will still fulfill the mens rea requirements 1 and 2 of purpose and knowledge which makes a verdict of innocence more difficult. With regards to 3 and 4, battered women are aware that what they are taking a life which is considered illegal and potentially face prison. Barring unusually severe traumatic brain injuries, when asked about their conduct, they would be able to explain their actions and why they did what they did. This fact indicates the ability to reason. Their injuries are typically not so extensive that they have no rationale behind their conduct or no understanding of the situation. They are aware of the potential results and implications of resorting to violence as a response.

Although they can form mens rea, battered women ought to be partially excused by recognizing reduced culpability based on mitigating factors. Justification solutions are much harder bars to reach. Battered women may be intuitively justified and should not be punished. Unfortunately, the court system holds to a different set of standards and cannot condone killing simply because the murder victim abused a person. As for justification, the fact that most women do not kill their husbands undermines this type of solution. Justification may require more homogeneity in responses. Excuses are easier to argue in cases that are not self-defense. Nevertheless, people are hesitant to use a form of an excuse because of negative stereotypes and difficulty defining responsibility given the influence and pressure of circumstances and negative emotions in decision-making. The legal system understandably does not want to undermine the recognition of people as rational actors.

Battered women cannot argue insanity. Generally, battered women's moral knowledge is not compromised. Sifferd argues: "Symptoms of a mental disorder can undermine a person's capacity to be law-abiding at the time of a crime by causing a lack of moral knowledge; and the presence of a mental disorder signals to the court that the defendant is not culpable for this

ignorance” (1). Even if a battered woman suffers from a diagnosable mental illness, this does not necessarily mean lack in understanding of the moral nature of her actions. Mental illnesses come in all shapes and sizes. A mental disorder or illness alone, as established in the DSM-IV which is a compilation of psychological conditions, does not automatically cause a deficiency in judgment that warrants reduced culpability in the legal system. Most people still retain a capacity to make decisions and render moral judgment. Despite their conditions, the court does not serve its purpose of retribution and deterrence if people can blame their wrongdoing on just any mental illness they happen to have or on external pressure unrelated to their understanding of a harmful act.

#### *(7.2) Diminished Capacity*

Battered women do not have just one mitigating factor but multiple: TBIs, other mental illnesses, circumstances that cause and exacerbate the effects of these mental conditions. The presence of one might constitute enough to reduce punishment, but the presence of all three factors should provide a strong case. The abuse out of the defendant’s control exacerbated and caused mental conditions that predispose them towards negative feelings and perceptions. These perceptions combine with TBIs predisposing defendants towards aggressive behavior create a logical explanation for how the abuse led the defendants to act as others without those factors would not. If established, all three mitigating factors work together and are interrelated enough to establish a strong enough connection between the effects of the abuse on perceptions and the crime without having been in the abuse victim’s head. Those that do resort to killing their partners do not kill again and typically recover from the relationship afterward which indicates they are temporarily diminished in their perceptions which hinders their ability to act in accordance with the law.

At least one court did believe that certain factors may diminish some defendants' culpability despite mens rea. In the past, a court system in California utilized a diminished capacity excuse. Diminished capacity is a lesser version of the insanity defense that, according to Legal Information Institute at Cornell, is "based on the belief that certain people, because of mental impairment or disease, are simply incapable of reaching the mental state required to commit a particular crime, (Diminished Capacity). Unlike insanity which renders a verdict of "not guilty," diminished capacity only lessens the punishment. The United States Sentencing Commission Guidelines Manual allows for a plea of diminished capacity when the defense can prove that a "significantly reduced mental capacity contributed substantially to the commission of the offense" (USSG §5K2.13, p.s. Diminished Capacity). Despite this allowance, only a few jurisdictions allow diminished capacity excuses. The support is understandably mixed given all the various factors in decision-making. The excuse especially faced scrutiny because Dan White's attorneys used it in arguing for the "Twinkie defense" (Diminished Capacity). Legal experts may want to allow some form of diminished capacity for mental illness, but outside clear cases of insanity, the criminal justice system seems hesitant of overextend excusing to defendants who should not be excused because it will interfere with the court's duty in assigning responsibility for the sake of people wronged. Other states did not follow suit with California and adopt this diminished capacity doctrine likely because of how broad it was. A doctrine of partial excuse might be able to avoid this problem by narrowing the scope of mitigating factors. The DSM might be a good place to start for determining which mental illnesses and conditions might diminish culpability.

### *(7.3) Applying Stephen Morse's Partial Excuse to Battered Women*

The diminished capacity excuse aligns with Morse's proposed doctrine of partial excuse. Currently the court system has the following pleas: guilty, not guilty, not guilty by reason of insanity. Partial excuse is Morse's proposal for a fourth plea of guilty but not fully responsible. It means the defendant is responsible but recognizes the presence of other mitigating factors, such as mental illnesses. As a result, the punishment is reduced based on the impact of the mitigating factors. The insanity defense by itself requires a clear case of cognitive impairment, and that the impairment contributed significantly to the person committing wrongdoing. A partial excuse would allow fairer treatment for cases that only fit some but not all the requirements for doctrines of self-defense, insanity, or duress.

Morse uses Bruce North's case as an example to illustrate why the justice system needs a version of partial excuse. North killed a man named John Ellis (Morse 292). Ellis was visiting to discuss his business partnership with North and his father Dan. North yelled that Ellis was lying about something likely related to the business and shot him (292). Two hours later he confessed, but he was "rambling, incoherent statements that indicated fear of the business partners and coherent, appropriate statements concerning the shooting," (292). One month after the killing, North showed clear signs of delusions and other symptoms of schizophrenia (292). Morse reasons that North could no longer hide his schizophrenia symptoms because his condition had gotten so bad (292). During his trial, he had to be heavily medicated or he would become psychotic (292). Morse discusses how he showed signs of deterioration before the killing. The insanity defense might have been difficult to prove because no one likely knew exactly how competent he was when he shot his victim. The insanity defense itself is extremely difficult to prove because, according to Teneille Brown, a professor of law at the University of Utah, "it's really hard to get inside the defendant at the time of the crime and figure out what they knew"



(Madsen). The defense only argues insanity in about one percent of cases, and of the times the case is argued, seventy-five percent of the insanity pleas are rejected (Lettieri). A partial excuse would lower the bar and include more people who might not be fully culpable for their crimes. At the same time, a new, more malleable doctrine would not compromise pre-existing doctrines.

Morse argues that current doctrines are too absolute. What makes their cases and solutions such as duress so difficult is that legal doctrines present “all-or-nothing bright line tests” concerning insanity and duress (295). In reality, criminal defendants deal with a wide range of factors that could affect their rationality and control capacities (296). Very often, a doctrine includes a specific requirement to narrow the scope, this specification includes some relevant cases but excludes others that might qualify. Morse argues that anything less than an absolute case is left up to the courts as a matter of “discretion.” Discretion leads to inconsistent rulings, based on potentially the biases of juries and the skill of the attorneys (296). Morse claims that “virtually all criminal punishment should be proportionate to the desert, as virtually all criminal law theoreticians believe, blanket exclusion of doctrinal mitigating claims and treatment of mitigations solely as a matter of sentencing discretion are not fair” (296). If punishment is meant to match what the defendant deserves, then mitigating circumstances should be considered. Thus the courts need a doctrine of partial excuse to assist not only battered women but also others struggling with mental illnesses and/or circumstances that exert pressure on the defendant.

Some might respond that homicide already accounts for mitigating factors with varying degrees of murder when considering culpability, but degrees in sentencing are not enough. First, the deliberations that distinguish first and second degrees of murder boil down to the question of premeditation. First-degree statutes can vary a little in wording, but overall, first-degree requires

premeditation with an “intent” to kill. Second-degree still typically recognizes intent but not that the murder was premeditated. Morse argues that “No time is too short for deliberations to be found or there is no genuine requirement that defendants must coolly weigh or consider the consequences of homicide,” (297). Morse seems to think that the way to determine premeditation is considering the time allowed for deliberation, but people can make decisions quickly or over a long period of time. Consequently, whether to find someone guilty of first-degree versus second-degree is left entirely up to the jury. It does not account for other factors that reduce culpability, such as mental illnesses or TBIs. The differences in degrees would not help battered women either. Many battered women cases do involve intent to kill and potentially premeditation. The difference in degrees would not account for the impacts of abuse in the decision-making process.

One might argue that a doctrine of partial excuse is unnecessary because mitigating factors can be considered at sentencing. Morse responds that a guilty verdict already in place would sway the courts against the defendants and cause more doubt of mitigating factors (297). A version of partial excuse would allow juries to consider mitigating factors alongside determinations of guilt or innocence during trial. Considering mitigating factors during trial would give the defendants two opportunities to present evidence of reduced culpability, the trial and sentencing. Multiple opportunities better allows fair treatment. If the courts find no basis for the claims, then they can reject the evidence two times. If a case has any possibility of reduced culpability, then the defense has two opportunities to prove it.

A doctrine of partial excuse should extend to battered women given the psychological effects of battering and dangerous circumstances. Though battered women fulfill mens rea requirements for moral capacity, the impact of TBIs and other mental health problems, such as PTSD, act as deterministic factors that affect the defendant’s emotions and decision-making.

They are not justified because of the imminence requirement in self-defense and the mens rea requirement excludes them from insanity, but battered women do have diagnosable TBIs and other conditions that arguably reduce culpability. They are excellent candidates for partial excuse or a diminished capacity doctrine given the psychological impacts of abuse. Experts testifying in court should be able to identify the presence of TBIs using brain scans. They could additionally diagnose other mental illnesses such as PTSD, dependency disorder, and depression which would impact decision-making. All of these factors and abuse victims' inability to get treatment create a compelling case for reduced culpability.

For a doctrine of partial excuse to work, the doctrine would need to be more specific as to which cases the excuse can be applied. If the doctrine is too broad, defendants will use anything as a mitigating factor, like Dan White when his defense argued his Twinkie consumption was a contributing, mitigating factor. The Twinkie defense undermined a broad version of the doctrine in California, but Dan White did not suffer from a TBI, a diagnosable injury that at least contributes to changes in behavior. Nor did he not have any other diagnosable, well-accepted conditions. Abuse victims and others who have TBIs and/or other debilitating mental conditions would be strong candidates. Perhaps the court system can require that defendants show symptoms of diagnosable, commonly accepted conditions and how these conditions would have interfered in decision-making. Perhaps the courts could use the DSM as one measure for what conditions are commonly accepted. The doctrine could moreover account for extreme, stressful circumstances such as abuse. Either way, the courts should narrow the scope of partial excuse to exclude ridiculous claims involving cough syrup and twinkies to mitigate concerns regarding overextension. Regardless of how the court decides to narrow the scope of partial excuse, battered women should fall within the limits. A new doctrine that is not specific to battered

women but can account for “grey area” cases would avoid compromising pre-existing doctrines by extending them too far.

## **(8) CONCLUSION**

The courts are split on using BWS as the basis for legal claims. In part, this may be because the study of BWS has been subject to experimental flaws. Further, even if we assume the syndrome is real, it does little to explain why only a small minority of abused women kill their abusers during lulls in abuse. The legal doctrines of duress and self-defense, for which legal defenses use BWS as support, do not quite fit battered women cases. Duress generally and self-defense require a person feel that they are in imminent danger. The vague language in these legal doctrines leaves these cases largely up to jury discretion. The courts usually require that cases fulfill all the requirements to utilize the doctrines. Given the adversarial nature of the court system, battered women face too many significant legal obstacles trying to use BWS to argue that pre-existing legal doctrines ought to provide them with an excuse or justification. As a result, BWS is largely ineffective when used in courts.

Advancements in psychology and neuroscience provide a firmer, more grounded basis for reduced culpability than BWS. Legal experts can better argue for reduced culpability based on the presence of PTSD, depression, TBIs, or a combination of mental conditions that impact decision-making. Additionally, the presence of potentially multiple conditions in abuse victims with various symptoms allows for a range of responses and coping mechanisms. Aggression and impulsivity as a side effect of TBIs especially explain why women in severe cases of abuse are more likely to escalate in response than other victims. Many abuse victims cannot leave or at least struggle to escape. They then must cope with the effects of the conditions while living with abusive partners whose actions cause and exacerbate these mental conditions. Given these facts, their perceptions of their situation are likely warped to an extent. The effects of these conditions exert pressure toward more drastic action.

Rather than trying to manipulate vague wording to extend pre-existing doctrines to battered cases, the symptoms suffered by battered women might fit better with Morse's legal doctrine of partial excuse. Because the Twinkie defense undermined a similar doctrine of diminished capacity, partial excuse would benefit from restricting the doctrine to cases involving mental illnesses or conditions, especially cases involving multiple and/or severe conditions. The cases that meet some but not all of the requirements for self-defense and duress would be good candidates for partial excuse. This kind of doctrine might better assist battered women and others suffering from mental illnesses that do not meet legal insanity requirements but are suffering from significant cognitive impacts from being abused without the courts having to condone one's questionable decision to kill someone. To avoid overextension, the court can set standards for which conditions likely interfere with rationality and for how to account for the presence of conditions when they are properly diagnosed in defendants. Some overextension concerns may still apply in setting these standards, but at least a new middle-ground doctrine would avoid compromising pre-existing legal doctrines while recognizing mitigating factors. More importantly, partial excuse can ultimately help abuse victims facing criminal charges.

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