WILL THE "REAL" BATTERED WOMAN PLEASE STAND UP? IN SEARCH OF A REALISTIC LEGAL DEFINITION OF BATTERED WOMAN SYNDROME

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INTRODUCTION

The average American's exposure to issues concerning battered women has increased dramatically over the past two decades. In spite of society's increased awareness of the predicament of battered

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Finally, I would like to dedicate this piece to my mother, Frances H. Simpson, who has empowered me to develop into the woman I am today. Thanks Mom!

1. Increased media attention to the problem has undoubtedly contributed to the education of the public regarding the prevalence of domestic violence in the United States. Cases which gained national prominence and enormous attention from the media include those involving Joel Steinberg, Hedda Nussbaum, and more recently, John and Lorena Bobbitt. See SAM ERLICH, LISA, HEDDA AND JOEL THE STEINBERG MURDER CASE (1989); Maria E. Odum, Irreconcilable Differences Revealed: Women's Groups Hail a Verdict that Makes Some Grown Men Wail, WASH. POST, Jan. 22, 1994, at A1 (explaining that "for experts on domestic violence, [the verdict] was a signal that spousal abuse will not be tolerated"). More recently the murder of Nicole Simpson brought domestic violence to the attention of the media. See Sarah Booth Conroy, Chronicles Wife Beating: An Age Old Story, WASH. POST, July 11, 1994, at B3 (noting that "[w]ith the Nicole Simpson tragedy screaming in our minds, some forget that family violence is nothing new"); Barbara Vobejda, Battered Women's Cry Relayed Up From Grass Roots, WASH. POST, July 6, 1994, at A1 (stating that Nicole Brown Simpson's murder "has elevated domestic violence to a new level on the national consciousness"). Recognition of the problem was also evident at the 1994 Oscar Awards, when Defending Their Lives, a documentary focusing on battered women in Massachusetts, won the award for Best Documentary. The film dealt with women who killed their batterers as well as women who were killed by their batterers. DEFENDING THEIR LIVES (Cambridge Doc. Films, Inc. 1994). Finally, the growth of state and local services addressing domestic violence, although clearly insufficient, demonstrates the increased recognition of it as a widespread social ill. See infra notes 196-97.
women, domestic battering remains epidemic.² At best, attempts to eradicate the problem are piecemeal; at worst, the community’s disregard of battered women borders on criminal.³ Recent statistics indicate that a minimum of two million women are “severely assaulted” by their male partners during an average twelve month period in the United States.⁴ These incidents are not isolated,⁵ and

2. “About 30 percent [sic] of the women murdered in 1990 were killed by husbands or boyfriends, according to the FBI.” Don Colburn, Domestic Violence: What Can Be Done?, A MA President Decrees ‘A Major Public Health Problem,” WASH. POST, June 28, 1994, (Health), at 10. “Every 15 seconds on average, the FBI estimates, a woman is beaten by her husband or boyfriend.” Id. While the number of shelters has grown from zero to approximately 1500 since the early 1970s, estimates of the prevalence of domestic violence far outstrip any such capacity. NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, STATISTICS PACKET 20 (3d ed. 1993) [hereinafter CLEARINGHOUSE] (citing Sarah Glaser, Violence Against Women, 3 C.O. RESEARCHER 171, 173 (Congressional Quarterly, Inc. 1993)). For example, in New York City alone, with a population of approximately 8 million, 59% of battered women and their children in search of shelter in the City’s programs are turned away due to lack of space. Id. at 175 (citing Olga Dwyer & Eileen Tully, Housing for Battered Women, N.Y. ST. OFF. FOR THE PREVENTION OF DOMESTIC VIOLENCE 9 (1989)). The National Clearinghouse for the Defense of Battered Women offers a 223-page 1993 Statistics Packet, 3d edition, for those interested in domestic violence in general, and the defense of battered women who kill their abusers, in particular. This resource is invaluable, offering a plethora of statistical data on battered women’s issues. The mailing address for the Clearinghouse is 125 So. 9th Street, Suite 302, Philadelphia, PA 19107; phone number: (215) 351-0010.

3. See Raucci v. Town of Rotterdam, 902 F.2d 1050, 1060-62 (2d Cir. 1990) (holding that where a “special relationship” existed between a victim and the police which caused the victim to detrimentally rely on the police to protect her, and its officers failed to do so, the municipality can be held liable). In response to both continued criticism of the police’s failure to take domestic violence complaints seriously and studies indicating that arrest is an effective deterrent, several police forces have instituted “mandatory arrest” policies. See Saul N. Weingart, Adding Insult to Injury: Domestic Violence and Public Policy 87 (1989) (unpublished dissertation, Harvard University) (indicating that “[a]s a result of the Minneapolis study [which found mandatory arrest to be effective at reducing domestic violence recidivism], mandatory arrest policies have been adopted in Oregon, Washington, and a number of smaller jurisdictions”); see also Miriam H. Ruttenberg, A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy, 2 AM. U. J. GENDER & L. 171 (1994). Bias against battered women in the courtroom is further evident in judges often deplorable handling of domestic violence cases. See Weingart, supra, at 94 (explaining that “[r]ecent studies of the judicial response to domestic violence continue to document the failure of the judiciary to take seriously family violence, even in the face of clear-cut statutory mandates”); see also ANGELA BROWNE, WHEN BATTERED WOMEN KILL 169-70 (1987) (describing one judge’s attitude that domestic violence is a problem to be solved within the family unit and his refusal to assist a battered woman seeking judicial intervention on her behalf; less than six months later, the woman was found after she had been shot, strangled, and stabbed to death by her husband); RICHARD J. GELLES & CLAIRE P. CORNELL, INTIMATE VIOLENCE IN FAMILIES 135 (2d ed. 1990) (noting “[o]nly a tiny fraction of incidents of marital violence reach a courtroom”). When batterers are prosecuted, the sentences are minimal, and are frequently suspended. Id. (citing courts’ actions as including “dismissing the charges, warning the abuser, requiring the abuser to enter counseling, fining the abuser, jail, or a suspended sentence”); CHARLES P. EWING, BATTERED WOMEN WHO KILL 16 (noting that “judges are notoriously reluctant to sentence convicted batterers to jail or prison”). Progress in the area of battered women shelters has been woefully inadequate. See infra note 196 (discussing that an unacceptable number of battered women seeking shelter are turned away due to lack of space).

4. “Researchers in the field agree that a more accurate national estimate would be a figure of 4 million women severely assaulted by male partners annually, and an estimate of 40% of adult couples having experienced at least one aggressive incident in their current relationship.”
studies indicate that domestic violence cuts across racial, economic, educational, and religious statuses. Social costs of domestic violence are enormous. Injuries sustained during domestic assaults account for an estimated nineteen to thirty percent of all injured women seeking emergency room treatment. The emotional and psychological costs are inestimable.

Historically, the existence of battered women spans several waves of social consciousness. The women's movement of the 1960s and 1970s brought to modern society's attention an often ignored and

CLEARINGHOUSE, supra note 2, at 91 (citing Hearings Before the Senate Committee on Judiciary on Legislation to Reduce the Growing Problem of Violent Crimes Against Women, 101st Cong., 2d Sess. 117 (Dec. 11, 1990) (testimony of Angela Browne)). "At least 2 million women a year are assaulted by their husbands or boyfriends and some experts say that because of underreporting the actual number of assaults may be twice as high." Colburn, supra note 2, at 10. Two years ago the American Medical Association reported that as many as 1 in 3 women in any given year (4 million per year) will be assaulted by a domestic partner. See Jill Smolowe, When Domestic Violence Hits Home, TIME, July 4, 1994, at 19, 20.

5. See CLEARINGHOUSE, supra note 2, at 113 (noting that "[a] battering incident is rarely an isolated occurrence; it usually recurs frequently. According to a 1982 survey of women in Texas, 19% of the women who were abused during the previous year and 25% of the women abused during their lifetime had been victimized at least once a week." (citing Raymond H.C. Teske & Mary L. Parker, Spouse Abuse in Texas: A Study of Women's Attitudes and Experiences, 7 RESPONSE TO VIOLENCE FAM. & SEXUAL ASSAULT 1 (1983)). In her study of battered women who kill, Angela Browne discovered "[t]he frequency with which abusive incidents occurred increased over time, with 40 percent [sic] in the homicide group reporting that violent incidents occurred more than once a week by the end of the relationship." BROWNE, supra note 3, at 68.

6. See Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2827 (1992) (recognizing that "[w]omen of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered"); BROWNE, supra note 3, at 3 (explaining that violence in families is not limited to the poor or working class; instead it is common among all income and education levels).

7. See Teri Randall, Abuse at Work Drains People, Money, and Medical Workplace Not Immune, 267 JAMA 1439, 1440 (1992) (stating that a Centers for Disease Control 1989 report estimates the cost of domestic violence at $45 billion, mostly attributable to medical costs, and a Bureau of National Affairs Inc. report estimates that domestic violence costs employers $3 to $5 billion annually, which includes "lost employee work hours, increased health costs, higher turnover rates, and lower productivity").

8. Colburn, supra note 2, at 10. See also BROWNE, supra note 3, at 6-9 (citing the statistics of studies discussing the prevalence of men seriously assaulting female partners and concluding, after extrapolating emergency room admissions of injurious assaults on women and applying the figures to the United States, that "between 1.5 and 2 million women seek medical treatment each year because of an assault by a male partner").

9. For an excellent source detailing the history of domestic violence, see ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT (1987). Pleck notes, [m]any people think that family violence was discovered in the 1960s ... yet there were two earlier periods of reform against family violence in American history. From 1640 to 1680, the Puritans of colonial Massachusetts enacted the first laws anywhere in the world against wife beating and 'unnatural severity' to children. A second reform epoch lasted from 1874 to about 1890, when societies for the prevention of cruelty to children ... were founded and smaller efforts on behalf of battered women ... were initiated.

Id. at 3-4.
usually misunderstood problem. Society’s growing awareness of the prevalence of domestic violence resulted in an increasing perception that women were victimized not only by their partners, but also by an uncaring judicial system.

Attorneys hired to defend battered women accused of killing their abusers began to seek admission of evidence about the violent situations within which these women felt compelled to remain. A growing number of battered women who previously either pleaded guilty or raised an insanity defense began to plead self-defense. One of the essential elements of self-defense is whether the defendant reasonably perceived herself to be in imminent or immediate danger. Depending on the jurisdiction, this test may be more subjective, allowing the jury to consider evidence about the surrounding circumstances and the defendant’s frame of mind, or more objective, adhering to a strict “reasonable man” standard.

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10. See Linda Gordon, Heroes of Their Own Lives: The Politics and History of Family Violence 1, 1 (1988) (noting that in the past twenty-five years family violence became a social problem within the United States). “Starting with a wave of concern about child abuse in the 1960s, the concern widened to include wife-beating, incest, . . . and marital rape, as the women’s liberation movement of the 1970s drew those crimes to public attention.” Id. It is not within the scope of this paper to specifically address issues concerning battered men in general, or those men who kill their partners in the context of self-defense. The fact that the overwhelming majority of those being battered are women, and those doing the battering are men, was a key consideration in arriving at this decision. See Colburn, supra note 2, at 10 (stating that according to the Department of Justice “an estimated 95 percent of assaults against spouses are committed by men against women”); Justice Department Examines Homicide in Families, WASH. POST July 11, 1994, at A9 (explaining that “[h]usbands kill their wives more often than wives slay their husbands . . .” and “[w]hen spouse murdered spouse, the husband was the assailant in almost two-thirds of the cases”).

11. See supra note 3 and accompanying text (discussing the judicial system’s often ineffective, frequently callous treatment of battered women).

12. As a practical matter . . . the legal defenses available to battered women who kill are generally quite limited. As a rule, there is no question that the woman killed her batterer . . . in most cases, there is little question the killing was intentional. The result is that most battered women who kill must either raise an insanity defense or plead self-defense.


13. See State v. Kelly, 478 A.2d 364, 374 (N.J. 1984) (explaining that the jury ultimately determines if the defendant did believe it was necessary to use deadly force to prevent an “imminent, grave attack”). The difference between imminent and immediate “stated simply, is between a requirement that the focus be on the circumstances, including past events, surrounding the defendant’s action [imminent] and a requirement that the focus be limited to the particular instant of the defendant’s action [immediate].” Holly Maguigan, Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals, 140 U. PA. L. REV. 379, 414 (1991).

14. See Maguigan, supra note 13, at 409 (explaining that the majority of jurisdictions instruct the jury to use a standard which includes the defendant’s subjective view). In her article, Maguigan notes that standards governing reasonableness can be further sub-divided into objective, subjective, a combination of subjective-objective, and a “reasonably prudent battered woman.” Id. at 409 nn.105-05.
In support of her self-defense plea, a defendant typically will attempt to offer expert testimony on the "Battered Woman Syndrome." Testimony on the Syndrome is relevant in homicide cases for at least two interconnected reasons: to assist the jury in evaluating the reasonableness of the woman's act, and to educate the judge and jury about the "myths and misconceptions" surrounding women who remain in battering relationships. The latter role of the testimony, while not addressing the specific legal elements of self-defense, impacts the woman's credibility. If the defendant lacks credibility in the jury's eyes, her chances of successfully proving self-defense diminish.

Literature is continuously developing on the concept of the Battered Woman Syndrome. Arguably, two of the quintessential volumes on battered women and the Syndrome are The Battered Woman and The Battered Woman Syndrome by Dr. Lenore Walker.

15. First, the expert describes the battered woman syndrome. Generally, the expert explains the three-stage cycle of violence posited by Walker: the 'tension building' stage, where the abuse is relatively minor; the 'acute battering' stage, where the woman is severely beaten; and the stage of 'loving contrition,' where the batterer temporarily stops abusing the woman, seeks forgiveness, and promises to reform. The expert then describes (1) how the physical and psychological abuse escalates as the cycle repeats itself; and (2) the psychological consequences for the battered woman: learned helplessness, depression, incapacitation, and false hope that the batterer will change. Finally, the expert usually explains how these consequences, combined with economic and social factors ... prevent battered women from leaving their batterers.

16. See EWING, supra note 3, at 51-52 (footnotes omitted).


19. Mary Ann Dutton, Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome, 21 HOESTRA L. REV. 1191, 1195 (1993) (arguing that a redefinition of the concept of the Battered Woman Syndrome is necessary for two major reasons: (1) testimony concerning the experiences of battered women refers to more than their psychological reactions to violence, and (2) battered women's diverse psychological realities are not limited to one particular 'profile'). See infra note 29 (discussing the trend of accepting this Syndrome).

20. LENORE WALKER, THE BATTERED WOMAN (1979) (discussing the theory of learned helplessness as it applies to battered women).
er. Developing what is commonly known as the Battered Woman Syndrome, Dr. Walker propounds the theory of "learned helplessness" and the cyclical nature of battering incidents to explain the actions of battered women. Walker's hypothesis originates in the research of Martin Seligman, which dealt with laboratory dogs repeatedly subjected to electric shocks. After discovering that they were unable to avoid being shocked regardless of what they did, these dogs exhibited behavior dubbed "learned helplessness." As a result, the dogs ceased all voluntary escape activity; even when researchers tried to teach the dogs to escape, the dogs remained entirely passive. Walker's analysis extends this theory to battered women in an effort to explain why they frequently do not leave their abusers, decline to prosecute them, or behave in a manner inconsistent with what society deems normal.

As the theory of Battered Woman Syndrome gained acceptance, Lenore Walker, The Battered Woman Syndrome (1984) (detailing the psychological issues of domestic violence, reviewing literature in the field, and applying the findings to law and clinical psychology).

22. See Faigman, supra note 12, at 622 (identifying Walker as "the preeminent researcher in this field" and stating that courts most often rely on her work in their decisions concerning admissibility of Battered Woman Syndrome testimony) (citing State v. Kelly, 478 A.2d 364, 371 (N.J. 1984) ("relying almost exclusively on Walker's theory and referring to her as a 'prominent writer' in the field"). In addition, the note asserts that "[l]aw review commentary similarly recognizes Walker's central role in bringing battered woman syndrome evidence to the courtroom." Id. at 622 n.10 (citing Buhrle v. State, 627 P.2d 1374, 1376 (Wyo. 1981)).

23. See Walker, supra note 21, at 2, 8-10, 33, 86-94, 100, 196-201 (considering learned helplessness as an explanatory theory of phenomenons including, but not limited to, why battered women do not leave and what factors contribute to their reaching this state).

24. See Walker, supra note 21, at 2, 84, 95-104 (discussing the "Walker Cycle Theory of Violence"); see also supra note 15 (describing the three stages of the cycle theory).

25. Walker, supra note 21, at 86 (citing Martin E. Seligman, Helplessness: On Depression, Development, and Death 21-25 (1975)) (explaining that Walker's hypothesis was aided by research done by Seligman and his colleagues demonstrating that, when dogs were repeatedly and non-contingently shocked, they were unable to escape from a painful situation, even when escape was quite possible and readily apparent). See Lyn Y. Abramson, Martin E. Seligman & John Teasdale, Learned Helplessness in Humans: Critique and Reformulation, 87 J. Of Abnormal Psychol. 49, 49-50 (1978) (reformulating earlier studies of learned helplessness by providing a human analogue to the original animal studies).

26. Walker, supra note 21, at 86 (explaining that "both depressed humans and helpless animals exhibited motivational deficits in the laboratory").

27. See Walker, Terrifying Love: Why Battered Women Kill and How Society Responds 49-50 (1989) (stating that it was only after the dogs were "repeatedly dragged to the cage exits" that their learned helplessness disappeared).

28. See generally Walker, supra note 21, at 33, 86, 89 (demonstrating that most literature, at least in the legal field, continues to cite learned helplessness as a seemingly integral component of the Battered Woman Syndrome).

29. For an analysis of the trend towards acceptance of Battered Woman Syndrome, see Cynthia L. Coffee, Note, A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome, 25 J. Fam. L. 373 (1986-87) (discussing those states unconditionally admitting the evidence, those conditionally admitting it, and those holding it inadmissible). Numerous courts cite learned helplessness and the cycle of violence theory as the scientific basis supporting their original acceptance of expert testimony on the subject. See State
defense lawyers introduced it as evidence to support the woman's self-defense plea. Courts, by admitting expert testimony on the Battered Woman Syndrome, implicitly—and often explicitly—accepted Walker's characterization of battered women as suffering from learned helplessness. Admission of the Battered Woman Syndrome as an appropriate topic of expert testimony is a fortunate outcome of the courts' acceptance of learned helplessness. However, several commentators recently began to focus on the negative aspects of such a characterization. In addition to problems inherent within the theory, much empirical work specifically does not support the portrayal of many battered women as victims of learned helplessness, further complicating a difficult evidentiary problem.

In light of these contradictory accounts, this article surveys current research on the behavior and reactions of battered women to their violent situations. The article begins by comparing and contrasting the theory of learned helplessness with an alternative theory of...
"battered woman as survivors." Section I compares an assessment of the statistical "fit" of each theory to the collected data. Principally drawing from Gondolf and Fisher's research on battered women as survivors, this article proposes a legal characterization of battered women which incorporates elements of both learned helplessness and survivor theories. Section II introduces the Supreme Court's standard for evaluating the admissibility of expert testimony on scientific evidence developed in Daubert v. Merrell Dow Pharmaceuticals, Inc. The article then applies the Daubert standard to Section I's proposed version of the Battered Woman Syndrome. Section III briefly examines the effects of analogous theoretical modifications on courts' acceptance or rejection of scientific theories as appropriate topics for expert testimony. Section IV briefly identifies and assesses the anticipated benefits of this proposed shift in the legal definition of the Battered Woman Syndrome. In conclusion, the article recommends a shift toward a modified survivor theory as an alternative theoretical basis for Battered Woman Syndrome.

SECTION I: LEARNED HELPLESSNESS VERSUS BATTERED WOMEN AS SURVIVORS: AN EMPIRICAL COMPARISON

Gondolf and Fisher, in Battered Women as Survivors: An Alternative to Treating Learned Helplessness, examine data from over 6,500 women who used Texas' shelter facilities within an eighteen month period.

35. Id. at 105-11 (describing the research methodology of Gondolf and Fisher).
36. Like insanity, the concept of the "Battered Woman Syndrome" is not used in the field of psychology per se; rather, it exists within the intersection of psychology and the law. Interview with Mary Ann Dutton, Ph.D., Clinical Psychologist, Research Professor of Emergency Violence, Professorial Lecturer at the National Law Center and Director of the Violence Initiative of George Washington University, in Washington, D.C. (Apr. 12, 1994) [hereinafter "Dutton Interview"]). While there is a field of study about battered women, domestic violence, and trauma, all of which, for example, pertain to the Syndrome, there is no single psychological entity labeled the Battered Woman Syndrome. Id.
37. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). See also infra note 93 (discussing the prior standard expressed in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).
38. Gondolf and Fisher's results are "based on data drawn from shelter intake and exit interviews . . . of 6,612 . . . women who entered the fifty Texas shelters during an eighteen-month period in 1984-1985." Gondolf & Fisher, supra note 34, at 105. For an in-depth discussion of Gondolf and Fisher's methodology, the sampling group, the preparation and administration of the interviews, formation of variables, and statistical analysis procedures, see id. at 105-11.
In the form of intake and exit interviews, this data tested their hypotheses about the help-seeking behaviors of battered women.39

Gondolf and Fisher's research40 indicates women in their study made an average of five out of eleven positive efforts to stop the abuse.41 This average does not include any efforts to secure medical treatment for injuries, or the shelter visit during which women completed the survey.42 The Gondolf and Fisher results confirm their hypothesis that battered women actively sought help to stop their abuse: "[t]he majority of the Texas women (71 [sic] percent) had previously left home before becoming shelter residents [and] [i]n 63 [sic] percent of the cases, the women had contacted the shelter or a lawyer; and over half (53 [sic] percent) had called the police at least once."43 These statistics do not conform with the stereotypical image of a passive woman who “learned” to be helpless.

During their analysis of the help-seeking behavior of battered women, Gondolf and Fisher refer the reader to Lee H. Bowker’s study of Milwaukee women who had “beaten wife-beating.”44 While

39. See GONDOLF & FISHER, supra note 34, at 105 (detailing how the women were asked 84 questions about three fundamental areas: their background, history of abuse and help-seeking activities).
40. Gondolf and Fisher's questionnaire asked the shelter women, "[i]n general, immediately after abusive incidents, what have you done?" See GONDOLF & FISHER, supra note 34, at 29. The questionnaire offered 13 different categories of what were viewed as both positive (all except for items 1 and 2) and negative responses (items 1 and 2): (1) attempted suicide [14% of the sample women reporting doing so], (2) covered up for the batterer [46%], (3) threatened or acted violent toward the batterer [35%], (4) left home [71%], (5) called a family member [47%], (6) called a friend [47%], (7) called a minister or other clergy [17%], (8) called a social service agency [19%], (9) called a shelter or lawyer [64%], (10) called the police [54%], (11) visited a social service agency [11%], (12) previously visited a shelter [14%], (13) took legal action [19%]. Id. at 30. In terms of further analysis, these were also divided into three subcategories: personal strategies (items 1-4 listed above), informal help sources (items 5-7), and formal help sources distinguishing between those sources "called" (items 8-10) and those "visited" (items 11-13). Id. at 29-30.
41. GONDOLF & FISHER, supra note 34, at 29.
42. GONDOLF & FISHER, supra note 34, at 29. Since 42% of the women sought professional treatment for their injuries, counting this as a positive help-seeking measure increases the average to six. Id. Including the current shelter contact during which the interview was conducted raised the average number to seven. Id. at 30. Also excluded were those strategies labeled personal (i.e., leaving home or threatening the batterer). Id.
43. GONDOLF & FISHER, supra note 34, at 30-31. In their measure of help-seeking, Gondolf and Fisher "deduce[d] from those measures alone that the shelter women have made assertive attempts to do something about their abuse." Id. at 30.
44. GONDOLF & FISHER, supra note 34, at 31 (referring to the informal and formal help sources from Bowker's sample). Bowker relied on a recruiting strategy which included such tactics as advertisements in major Milwaukee daily, local and student newspapers and newsletters, as well as radio broadcast public service announcements. LEE H. BOWKER, BEATING WIFE-BEATING 22 (1983). Bowker includes a sample of an advertisement, which reads in part: “Have you beaten wife-beating? Is this your success story? Experienced wife abuse at sometime in the past? Even if only once? Or 10-30 years ago? Eliminated the problem from relationship with husband or partner at least one year ago? Maintained relationship with that husband or partner?” Id. at 23.
Bowker’s study of a self-selected group of formerly battered women who “solved” their abuse problem did not hypothesize a survivor theory, Bowker’s findings nonetheless support those of Gondolf and Fisher.45

Bowker’s study indicates that the number of women who contacted other family members about the violence increased from nineteen percent during the first battering incident to forty-three percent during the last incident.46 The number of women who indicated they contacted friends rose from sixteen percent after the first incident to fifty-two percent after the last incident.47 In addition to identifying informal help-seeking strategies, Bowker also asked the women to rate the effectiveness of these tactics: contacting family members rated very successful in three percent of the cases, and fairly successful in seventy-seven percent;48 contacting friends, which

45. Bowker includes a small section on learned helplessness in his book. BOWKER, supra note 44, at 133. Bowker differentiates his sample (of women who had overcome battering) from Walker’s sample in The Battered Woman (who had not) by noting that they “hardly exemplified the learned-helplessness syndrome”; he notes that these women experienced learned helplessness early in their marital relationships. Id. By “triumphing over the battering the women also reduced or eliminated their feelings of helplessness.” Id. Instead of learned helplessness the women demonstrated “learned competence.” Id. Bowker postulates how his findings, in spite of illuminating numerous help-seeking strategies on the parts of those surveyed, in reality do not contradict Walker’s theory of a passive, subjugated victim. He notes “a high number of separations . . . occurred during the years when the women in the sample were gaining the necessary strength to demand an end to the battering.” Id. at 134. Bowker finds this consistent since “Walker believes that the first step in ending learned helplessness is to persuade the battered women (or the batterer) to leave the relationship.” Id. at 133-34. Bowker, however, never explains how these women managed to leave their relationships. To be consistent with Walker, they would likely have to be “led out” of the relationship—in much the way that dogs in Seligman’s experiments had to be “led out” of their captivity—before they would be able to unlearn learned helplessness. See supra notes 25-27 and accompanying text (discussing the Seligman laboratory studies with dogs). If these women left their batterers of their own free volition, then Bowker’s findings are not readily compatible with Walker’s. In addition, Bowker makes several statements throughout his book which appear to directly contradict the theory of learned helplessness. Namely, he states that the rapid increase in battered women’s contacts with women’s groups, during the interim between the first and the last battering incidents, “reflects the increase in the availability of women’s groups in recent years at least as much as changes in the help-seeking activities of the battered wives.” BOWKER, supra note 44, at 95-96. Bowker further concludes from the data that many battered women actively fight to remove violence from their lives. Id. at 104. “They did not abandon their personal efforts when they added informal and formal help-sources, but integrated these into an armada of forces individualized to be most effective in their own situations.” Id.

46. BOWKER, supra note 44, at 75 (noting also that this percentage does not include those who contacted in-laws). Mothers were the most commonly consulted, followed by sisters, brothers, and then fathers. Id.

47. BOWKER, supra note 44, at 75. Bowker also reported the following statistical increases in the percentage of women who used (what he defined as) informal help sources, comparing the number who used the source for the first battering incident to those who were using it by the last incident: contacting in-laws, from 12% to 16%; contacting neighbors, from 10% to 17%; contacting shelter services, from 10% to 29%. Id.

48. BOWKER, supra note 44, at 76. These results do not include the 6% who found this strategy neither successful nor unsuccessful; or the 14% who found it fairly unsuccessful. Id.
became the most commonly used strategy by the last incident, rated very successful in three percent of the cases and fairly successful in eighty-one percent.49

Bowker also examined strategies he deemed formal help-seeking: contact with police, social service agencies, lawyers and district attorneys, clergy, and women's groups (labeled by Bowker as "semi-formal").50 Formal help-seeking contact increased between the first battering incident and the last. Contact with police increased from nine percent to thirty-four percent;51 contact with social service agencies increased from seven percent to forty-three percent; contact with lawyers and district attorneys increased from six percent to forty-nine percent; contact with clergy increased from eight percent to fifteen percent; and contact with women's groups increased from one percent to thirty-six percent.52 Again, women rated the success or failure of these contacts.53

Bowker concluded from the data that battered women are not passive, but make efforts to end the abuse by exploring the various help-sources; he labeled the women's efforts as "extensive and

49. BOWKER, supra note 44, at 79-80. Seven percent judged it neither successful nor unsuccessful, nine percent as fairly unsuccessful, and one percent as very unsuccessful. Id. In objectively evaluating these self-reported success ratings, remember that these women escaped their violent situations. A successful escape was likely to be highly correlated with the outcome of the woman's help-seeking strategies.

50. Bowker defined formal help-sources as those which the community officially sanctioned. BOWKER, supra note 44, at 87. "They have a stable organizational structure, specified resources and services, and either legal or moral power to persuade individuals to take them seriously." Id. There are slight variations in Bowker's and Gondolf and Fisher's classification of sources as formal versus informal. See GONDOLF & FISHER, supra note 34, at 29-30 (classifying clergy as informal and contact with shelter services as formal, for example).

51. BOWKER, supra note 44, at 87. This figure was even higher for the worst battering incident, with 38% of those surveyed contacting the police. Id.

52. BOWKER, supra note 44, at 87-96. Bowker detailed the range of services provided by the formal help-seeking contacts. The police provided a wide-range of services from arresting the husband, moving the wife to safety or assisting her to seek medical treatment, to counseling the wife with legal advice or counseling the husband regarding his behavior. Id. at 88. Social service agencies focus on talking. Id. at 90. Lawyers and district attorneys handled divorces, assault charges, restraining orders and separations. Id. at 91. The clergy's focus was also on talking and problem solving. Id. at 94. The service provided by the women's groups was "modeling—other battered women counsel others on how to be 'victors instead of victims.'" Id. at 96.

53. The police were ranked by those who contacted them as "very successful in one percent of the incidents, fairly successful in 33 percent [sic], neither successful nor unsuccessful in 33 percent [sic], fairly unsuccessful in 30 percent [sic], and very unsuccessful in 3 percent [sic]." BOWKER, supra note 44, at 89. Contact with social service agencies was evaluated as "very successful in two percent of the cases, fairly successful in 57 percent [sic], neither successful nor unsuccessful in 22 percent [sic], fairly unsuccessful in 17 percent [sic], and very unsuccessful in 2 percent [sic]." Id. at 90. Contact with attorneys was judged very successful by 9%, fairly successful 50%, neither 21%, fairly unsuccessful 19% and less than 1% rated it as very unsuccessful. Id. at 91-92. Ratings for clergy were very successful in 2% of the cases, fairly successful in 53%, neither in 22%, fairly unsuccessful in 22%, and very unsuccessful in 2%. Id. at 94.
intensive." This finding convincingly supports Gondolf and Fisher's hypothesis that the survivor theory more accurately reflects what actually occurs in the experiences of most battered women than the learned helplessness theory. In addition to Gondolf and Fisher, other studies, including Pagelow, and Gelles and Straus, suggest that learned helplessness is "another 'woozle'—that is, a notion accepted as basic truth but based on common usage rather than empirical fact." What is particularly persuasive is that Walker herself in *The Battered Woman Syndrome* observed a concurrent increase in battered women's help-seeking activities as the violence intensified. These statistics conflict with Walker's advancement of learned helplessness as a primary symptom of battered women.

The majority of empirical evidence examining the help-seeking strategies of battered women conclusively supports the survivor theory as most consistent with their experiences. The evidence supporting help-seeking techniques by abused women makes learned helplessness less viable in explaining the behavior of battered women. Therefore, it is appropriate to examine the survivor theory to achieve the goal of developing a more robust theoretical basis for the Battered Woman Syndrome.

54. **BOWKER, supra note 44, at 104.** Bowker explained how the women combined different strategies of help-seeking including personal efforts and informal and formal help sources. *Id.*

55. **GONDOLF & FISHER, supra note 34, at 16.** This is not intended to imply that battered women do not feel helpless at any point in their relationships. *Id.* In fact, many women appear to feel powerless to change their circumstances at some point and yet at another point in time may actively try to escape their abusers. *Id.* Statistics indicate that a particularly violent episode, or a change in the nature of violence—from exclusively physical to sexual, or threats to harm, or actual harm, to children—often leads to a flurry of help-seeking in spite of previous feelings of futility. *Id.* at 16-18.

56. **See GONDOLF & FISHER, supra note 34, at 18 (explaining that studies by Pagelow indicate “quantitatively that the help-seeking efforts of battered women are substantial”).** *See also MILDRED D. PAGELOW, WOMAN-BATTERING: VICTIMS AND THEIR EXPERIENCES 138-39 (1981) (indicating in spite of low response rates on questions related to help-seeking, of the 155 women who responded, 99 sought help from psychiatrists or psychologists, 78 consulted clergy and 51 went to marriage counselors).*

57. **See RICHARD J. GELLES & MURRAY A. STRAUS, INTIMATE VIOLENCE: THE DEFINITIVE STUDY OF THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY 156 (1988) (finding “little evidence of battered women suffering from learned helplessness”).** "Overall, the greater the violence, the more active women are in seeking help." *Id.*

58. **GONDOLF & FISHER, supra note 34, at 28 (citing Walter R. Schrumm, Michael J. Martin, Stephan R. Bolman, and Anthony P. Jurich, Classifying Family Violence: Wither the Woozle, 3 J. Fam. Issues 319, 319 (1982) (suggesting "a 'woozle effect' may be operating in which frequent citations of relatively poor studies mislead us into thinking we know more about the causes of family violence than we really do"); see also GELLES & STRAUS, supra note 57, at 59-51 (discussing the various "woozles" present in the study of domestic violence).*

59. **See supra note 33 and accompanying text (indicating a steady increase in the number of women seeking help as the number of abusive incidents increased).**

60. **See supra notes 40, 47 and accompanying text (describing various help-seeking behaviors detected in battered women studies).**
Gondolf and Fisher, prior to their analysis of the data, hypothesized and contrasted elements of the survivor theory with elements of the learned helplessness theory. It is helpful to reproduce these two models in full here.

The elements of learned helplessness include:

1. Severe abuse fosters a sense of helplessness in the victim. Abuse as a child and the neglect of help sources intensify this helplessness. The battered woman is consequently severely victimized.
2. The victim experiences low self-esteem, self-blame, guilt, and depression. The only way to feel some sense of control over what is otherwise an unpredictable environment is to think that 'if I change my ways, things will get better.' But the abuse continues.
3. The victim eventually becomes psychologically paralyzed. She fails to seek help for herself and may even appear passive before the beatings. When she does contact a help source, she is very tentative about receiving help and is likely to return to the batterer despite advice or opportunity to leave.
4. This vulnerability and indecisiveness prolongs the violence and may contribute to its intensification. Some observers argue that this tendency may reflect an underlying masochism in the battered woman. The woman may feel that she deserves to be beaten and accepts it as a fulfillment of her expectations.61

In contrast, elements of the survivor theory include:

1. Severe abuse prompts innovative coping strategies from battered women and efforts to seek help. Previous abuse and neglect by help sources lead women to try other help sources and strategies to lessen the abuse. The battered woman, in this light, is a 'survivor.'
2. The survivor may experience anxiety or uncertainty over the prospects of leaving the batterer. The lack of options, knowhow, and finances raise fears about trying to escape the batterer. The battered woman may therefore attempt to change the batterer instead of attempting to leave.
3. The survivor actively seeks help from a variety of informal and formal help sources. There is most often inadequate or

61. GONDOLF & FISHER, supra note 34, at 12. Number five under Gondolf & Fisher's chart of learned helplessness recommends counseling to treat low self-esteem, depression, and masochism. Id. For comparison, see Walker's description of behaviors consistent with learned helplessness. WALKER, supra note 21, at 9-10, 33, 87-89, 100 (describing the concepts of learned helplessness and adapting the theory to women in a battering relationship).
piecemeal help-giving that leaves the woman little alternative but to return to the batterer. The help-seeking continues, however.

4. The failure of help sources to intervene in a comprehensive and decisive fashion allows abuse to continue and escalate. The inadequacy of help sources may be attributed to a kind of learned helplessness experienced in many community services. Service providers feel too overwhelmed and limited in their resources to be effective and therefore do not try as hard as they might.62

At first glance, these two theories appear diametrically opposed. One defines battered women as passive "victims,"63 the other perceives them as "active survivors."64 Although the learned helplessness model mentions the possibility of help-seeking activities by battered women, these acts are described as "tentative."65 In contrast, the survivor theory offers numerous and varied help-seeking behaviors as proof of its hypothesis that battered women do not submissively accept their abused status, but instead make quite determined attempts to escape or at least change their predicaments.66

Upon closer examination of both models, however, several elements convey essentially the same responses to violence. For example, elements one through three describe very similar activities on the battered woman's part; the difference occurs in how the acts are characterized.67 Specifically, element one of learned helplessness states that "[a]buse as a child and the neglect of help sources

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62. GONDOLF & FISHER, supra note 34, at 12. Number five under the survivor theory stresses the need for resources to enable battered women to escape. Id.

63. See WALKER, supra note 21, at 33 (finding that "the activity level of women after the first abusive incident shows a decrease"). She determines these results to be "consistent with the learned helplessness theory in that [the women] took this action without any belief that it would contingently stop the battering." Id. Walker interprets the women's behavior as "a basic coping mechanism much like Seligman's dogs, . . . who used passivity . . . to stay alive." Id. The dogs and battered women failed to "develop adequate escape skills." Id. To the outside world, the battered woman's focus on surviving the abuse, rather than escaping, appears to be an example of passive victimization.

64. GONDOLF & FISHER, supra note 34, at 17 (noting that the survivor hypothesis offers "[t]he alternative characterization of battered women . . . [as] active survivors rather than helpless victims").

65. GONDOLF & FISHER, supra note 34, at 12 (referencing number three on the learned helplessness portion of the comparison chart).

66. GONDOLF & FISHER, supra note 34, at 18. "We offer, therefore, a survivor hypothesis that contradicts the assumptions of learned helplessness: [b]attered women increase their helpseeking in the face of increased violence, rather than decrease helpseeking as learned helplessness." Id. at 17-18. The battered woman's "effort to survive transcends even fearsome danger, depression or guilt and economic constraints . . . [thus] [i]n this effort to survive, battered women are, in fact, heroically assertive and persistent." Id. at 18.

67. See supra notes 61-63 and accompanying text.
intensify" the battered woman's sense of helplessness; in contrast, element one of the survivor theory perceives "[p]revious abuse and neglect by help sources lead women to try other help sources and strategies to lessen the abuse." Also, both elements deal with previous abuse as possible factors in the woman's reaction to her situation, and both identify problems of "neglect by help sources."70

Element two seems strikingly similar in both models in that the women experience feelings alternately described as either "low self-esteem, self-blame, guilt and depression" or "anxiety or uncertainty."71 Low self-esteem is similar to anxiety in terms of its possible physical manifestation as an indecisive or unsure act by the battered woman; analogous arguments hold true for the other qualities and conditions described.72 Both theories expect the woman to try to change her partner's behavior instead of ending the relationship.73

Finally, element three further illustrates the similarity of the women's physical act of contacting help sources by the learned helplessness and survivor theory models. Regardless of the characterization in the help-seeking model as "tentative" by the proponents of learned helplessness, and the characterization as "active" by survivor theoreticians,74 the end result is the same—the woman stays with the batterer.75

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68. GONDOLF & FISHER, supra note 34, at 12 (referring to the "Comparison of Learned Helplessness and Survivor Hypothesis" table). "[S]udies have suggested that learned helplessness may be rooted in childhood exposure to violence." Id. at 14; see also supra notes 61-62 and accompanying text.

69. In their results, Gondolf and Fisher discovered the insertion of a "previous abuse" variable did not significantly affect the fit of the data to their survivor model. GONDOLF & FISHER, supra note 34, at 36. See also PAGELOW, supra note 56, at 172 (showing how correlations between abuse as a child and tolerance for violence as an adult are negative and instead those who were abused as children tended to end their marriages earlier).

70. See supra notes 61-62 and accompanying text. See also GONDOLF & FISHER, supra note 34, at 17 (explaining that "battered women remain in abusive situations not because they have been passive, but because they have tried to escape with no avail").

71. See supra notes 61-62 and accompanying text.

72. The contention that someone is experiencing self-blame, guilt and depression would reasonably lead to uncertainty on her part in terms of life-altering decisions such as deciding to leave a spouse. It appears to be a "which came first" scenario where it is unclear whether the uncertainty is due to the blame, guilt and depression, or the blame, guilt and depression are due to the uncertainty. See GONDOLF & FISHER, supra note 34, at 22.

73. GONDOLF & FISHER, supra note 34, at 12 (stating the learned helplessness theory focuses on the woman changing her behavior to stop her partner's abuse, and the survivor theory focuses on the woman trying to change the batterer's behavior; in both instances the woman stays with the batterer while trying to control her partner's behavior).

74. GONDOLF & FISHER, supra note 34, at 12 (stating that under element three of learned helplessness the victim is "psychologically paralyzed," thus if help is sought it is often tentative, but under element three of the survivor theory the woman actively seeks help).

75. See GONDOLF & FISHER, supra note 34, at 12 (explaining that the woman stays with the batterer under the learned helplessness theory because she is tentative about receiving help; and
At element four the theories sharply diverge. Learned helplessness focuses on the woman's inability to escape her situation, and her passive acceptance of abuse. The survivor theory focuses on the woman's substantial efforts, both informally and formally, to escape her abuse, and society's inability to assist her in doing so. Inaction, within the learned helplessness model, is perceived as a reasonable reaction by the battered woman since she has learned that efforts to escape her batterer are futile. This may often be the case where violence becomes neither more nor less severe, and the woman devotes her attention to surviving the abuse rather than escaping it.

In contrast, the survivor theory views the woman as a victim not only of her partner, but also of society's refusal to assist her in meaningful ways. While inaction would be reasonable in the face of such overwhelming odds against escape, the survivor theory points out that inaction is often not what occurs. The battered woman continues to seek escape routes while continually encountering an ineffective bureaucracy, insufficient help sources, and societal indifference. A woman previously exhibiting learned helplessness may become galvanized into action given a shift in the degree or nature of the violence, and make renewed efforts to seek help. Another woman may continue her help-seeking efforts throughout.

In light of the similarity of both theories, rather than risk exchanging one stereotypical image of battered women for another, which
may prove equally limiting in the future, the common elements are fused. Combining the similar ingredients of elements one through three, with the dissimilar components of the survivor theory's elements four and five, results in an adapted theory which better reflects reality. The goal of this combination is to gain a more flexible definition of the battered woman. An immediately apparent advantage to such a synthesis is the resulting theory's inherently broader application to victims of domestic violence. Thus, regardless of the particular stage of an individual battered woman's abuse at the time she is forced to defend her life, she will nevertheless have the alternative of presenting expert testimony on Battered Woman Syndrome.

The revised theory, which will be referred to as the survivor theory II, includes the following elements:

1. Severe abuse typically is met by informal help-seeking strategies on the part of the battered woman. Attempts are often made by the woman to change her behavior with the hope of stopping the abuse.

2. As her predicament worsens, the woman may experience a wide spectrum of feelings including low self-esteem, self-blame, guilt, depression, and anxiety. She is usually uncertain about how to remedy the situation. A lack of options and resources may lead her to feel as though she is incapable of escaping. At this stage, a woman may use personal strategies to try to change the batterer or continue to adapt her own behavior in an attempt to avoid the abuse.

3. The woman actively begins to seek help not only from informal help sources, but also from formal help sources. Despite her efforts, the general disinterest of society in her predicament coupled with inadequate resources routinely force her to return to her batterer. The battered woman's help-seeking behavior continues.

4. The failure of society to provide the woman with a viable alternative and society's lack of active intervention on her behalf allow the abuse to continue and often to escalate. As

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83. See supra note 29 and accompanying text (noting the difficulty of fitting battered women into one theory).
84. See supra notes 61-62, 67-75 and accompanying text (illustrating the similarities between the first three elements of the survivor theory and learned helplessness).
85. See supra notes 76-81 and accompanying text (contrasting the fourth elements of the two theories).
86. See GONDOLF & FISHER, supra note 34, at 12. See also supra note 80 and accompanying text.
part of a "social learning" process, the woman becomes acutely aware of certain verbal and non-verbal "cues" from her batterer which typically precede abuse. As such, the woman may respond to certain behavior by her partner in a way that is incomprehensible and unreasonable to others, at least until the basis for her response is thoroughly explained. Only after the battered woman's behavior is put into context does it become reasonable.

Armed with the survivor theory II, the next section examines potential evidentiary problems that might arise from a shift in the underlying theory of the Battered Woman Syndrome. Once a prediction has been made of the judicial system's response to an amended Battered Woman Syndrome, it will become clearer whether such a change should be advocated.

SECTION II: APPLICATION OF THE DAUBERT STANDARD TO THE SURVIVOR THEORY II VERSION OF THE BATTERED WOMAN SYNDROME

Today, expert testimony on Battered Woman Syndrome is admissible in the majority of jurisdictions. Historically, however, the fight to gain admission of Battered Woman Syndrome testimony in battered women's self-defense cases was not easy. Courts generally cited one or more of the following reasons for refusing admission: "(1) the syndrome [was] not sufficiently well established within the scientific community . . . to make it the subject of expert testimony; (2) such

87. Dr. Dutton explains that one of the essential theories to understanding the behavior of battered women is the concept of "social learning," which describes the basic way people learn and assimilate information. Dutton Interview, supra note 36. For example, if every time it becomes dark and cloudy during the daytime, it rains, then humans begin to anticipate and expect it to rain when it's dark and cloudy and will change their behavior accordingly (say, by bringing their umbrellas). Id. The same process occurs when batterers exhibit certain verbal and non-verbal "cues" prior to a battering incident. Id. Just as with non-violent relationships, the woman begins to develop an increased sensitivity to the batterer's cues indicating, for example, mood and level of dangerousness. Id. Except, instead of realizing her partner had a bad day because he walked in the door without speaking to anyone, the battered woman may anticipate a beating because he raised his voice, or his face was distorted into a certain expression, or any number of other signals an average person would not recognize as precursors to abuse. Id. The battered woman, however, because of her past exposure to his behavior, has learned to read his cues, anticipate violence, and perhaps take steps to avoid it. Dutton Interview, supra note 36.

88. See generally Coffee, supra note 29, at 396 (concluding the "trend in the admissibility of expert testimony on the battered woman syndrome appears to be in the direction of admissibility").

89. Dr. Walker's most recent volume on battered women, Terrifying Love, offers a window into her personal experiences and frequent frustrations in trying to gain admission for expert testimony on the Syndrome. See generally WALKER, supra note 27. As one of the pre-eminent scholars on Battered Woman Syndrome, if Walker encountered hostile judges and inflexible evidentiary standards, then undoubtedly other advocates have experienced similar, if not more formidable, evidentiary difficulties. See also infra note 90.
testimony . . . invade[d] the province of the jury; and (3) the probative value of such testimony [was] outweighed by its prejudicial impact on the jury.  

Neither arguments two nor three advanced by the courts should be affected by a change in the Battered Woman Syndrome's underlying theory. A shift to survivor theory II would have no effect on what is defined as the province of the jury. Further, the shift would have no impact on either the testimony's probative value or its prejudicial effects. Thus, the Battered Woman Syndrome based on survivor theory II, as compared to a version based exclusively on learned helplessness, should be no more difficult for courts to accept. Potential problems with argument one, however, require a more in-depth analysis in light of the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

The *Federal Rules of Evidence* allow expert testimony to be offered where the expertise of the witness will enhance the jury's ability to comprehend the evidence or decide a fact in issue. After passing the threshold requirement of enhancing comprehension, expert testimony on a subject was previously allowed when its methodology had achieved "general acceptance in the particular field to which it belong[ed]." Recently, however, the Supreme Court declined to affirm this "generally accepted" test and instead relied on the *Rules* to develop its own test for admissibility in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

90. *See Ewing, supra* note 3, at 54 (citing *State v. Thomas*, 423 N.E.2d 137, 139 (Ohio 1981) (excluding the proffered expert testimony on the Battered Woman Syndrome because it was not generally accepted by the scientific community and also because its prejudicial harm outweighed its probative value); *Fielder v. State*, 683 S.W.2d 565, 594 (Tex. App. 1985) (excluding expert testimony because of its prejudicial effect); *Buhrle v. State*, 627 P.2d 1374, 1378 (Wyo. 1981) (excluding the victim's expert testimony because of insufficient scientific acceptance); *State v. Griffiths*, 610 P.2d 522, 524 (Idaho 1980) (excluding testimony because it would invade the province of the jury).

91. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993) (clarifying the admissibility standard for expert testimony under the Federal Rules of Evidence); *see also infra* note 93 (presenting the standard that preceded *Daubert*).

92. *Fed. R. Evid.* 702 (specifying the standard for admissibility of expert testimony as whether the "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise").

93. Prior to *Daubert*, the *Frye* test was considered the majority rule for determining admissibility of expert testimony. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (rejecting testimony on systolic blood pressure deception test and establishing the *Frye* test—based on whether the scientific procedure "ha[s] gained general acceptance in the particular field in which it belongs"—to determine admissibility). *Frye* was rejected by the Court as the exclusive test of expert testimony admissibility in *Daubert*, 113 S. Ct. at 2794 (noting an "assertion that the Rules somehow assimilated *Frye* is unconvincing. . . . That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials.").
Pharmaceuticals, Inc. In Daubert, the Court announced a dual prong test of reliability and relevancy. As part of the Court's reliability prong, Daubert requires that the subject meet the definition of "scientific knowledge." The Court notes that "scientific' implies a grounding in the methods and procedures of science, and similarly, the word 'knowledge' connotes more than the subjective belief or unsupported speculation." The Court suggests this prong can be met by determining whether the theory can be, and has been, tested. The Court recognizes several factors which might be considered when making this determination: submission to peer review and publication, the rate of error, and the existence, and maintenance of operating standards. In addition, the Court recognizes the Frye test's general acceptance within the scientific community as another possible factor to be examined in determining admissibility.

After determining the reliability of expert testimony, the focus shifts to relevancy. Daubert informs us that the proper question to be asked is broader than simply whether the theory is generally accepted within its scientific community. The inquiry under

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94. Daubert, 113 S. Ct. at 2786; see infra note 95 for a discussion of the applicable Federal Rules of Evidence.
95. Id. at 2796-97. In asserting that the restrictions of reliability and relevancy applied, the Court refers to several Federal Rules of Evidence in its analysis: FED. R. EVID. 104(a) (dealing with the question of admissibility in general); 401 (noting relevance turns on whether the evidence tends to make the existence of a material fact in question more or less probable); 403 (permitting the exclusion of otherwise relevant evidence if its probative value is substantially outweighed by the risk of unfair prejudice); and 700 et. seq. (dealing specifically with expert testimony). Id.
96. Id. at 2795 (discussing the definitions of scientific and knowledge that indicate the connection to the necessity of reliability in this test).
97. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2795 (1993) (recognizing that scientific testimony does not need to be "known to a certainty; arguably, there are no certainties in science").
98. Id. at 2795 (explaining that "to qualify as 'scientific knowledge' an inference or assertion must be derived by the scientific method."). "Proposed testimony must be supported by appropriate validation—i.e., 'good grounds,' based on what is known." Id.
99. Id. at 2797 (stating that publication in a peer reviewed journal is relevant but not dispositive in assessing scientific validity).
100. Id. (explaining that these factors are considerations for the court, which are especially applicable to particular scientific techniques, and the Court uses spectrographic voice identification as an example of one such technique).
102. See Daubert, 113 S. Ct. at 2797.
103. See supra note 16 and accompanying text (discussing the ways in which Battered Woman Syndrome is relevant to a battered woman's self-defense plea).
104. Daubert, in contrast to the earlier majority Frye test by which the Syndrome was previously assessed, indicates that other factors, in addition to general acceptability, are to be examined when making admissibility determinations. See supra note 101 and accompanying text.
Daubert is flexible, focusing on principles and methodology rather than conclusions.\textsuperscript{105}

Applying the Supreme Court's framework set out in Daubert, the Battered Woman Syndrome, premised on survivor theory II, will be examined. Numerous surveys and published studies reveal help-seeking behavior by battered women.\textsuperscript{106} Empirical evidence supporting survivor theory II occurs in those studies specifically testing the "battered women as survivors" hypothesis,\textsuperscript{107} and also in those which ostensibly test for and find learned helplessness.\textsuperscript{108} As such, researchers testing for learned helplessness discovered recurrent and varied help-seeking behavior on the part of their subjects. The researchers were not looking for such behavior, which further bolsters the procedural credibility of the evidence.\textsuperscript{109} Thus, it is actually through the peer review and publication process explicitly sanctioned by the Court that learned helplessness was originally questioned and the survivor theory was offered as a more realistic model. Since the methodology and principles underlying studies on the Battered Woman Syndrome remain consistent, different researchers reaching different conclusions should not impact on its admissibility.

It is difficult to imagine the Court disqualified evidence on a topic merely because an underlying tenet's revision more accurately reflects statistical findings on the subject.\textsuperscript{110} Such a revision is exactly the practice that should be, and has been, encouraged by the Court. The survivor theory was effectively submitted to peer review and publication and fulfills that component of the Daubert guidelines.\textsuperscript{111}

\textsuperscript{105} Daubert, 113 S. Ct. at 2797 (clarifying that the inquiry is the "scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission").

\textsuperscript{106} See supra notes 40-60 and accompanying text.

\textsuperscript{107} See BOWKER, supra note 44, at 133-34 (indicating the Milwaukee study showed battered women can change an expectancy to fail through informal avenues such as families, friends and women's support groups); GELLES & STRAUS, supra note 57, at 156-59 (summarizing the results reached by a 1985 National Family Violence Survey indicating that of nearly 3,000 women victims the probability of the victim seeking informal sources of help increased as the level of violence increased); GONDOLF & FISHER, supra note 34, at 18 (referring to several empirical works which indicated that battered women could not be distinguished by symptoms of learned helplessness); PAGELOW, supra note 56, at 221 (noting that the development of shelters make it more feasible for a battered woman to leave her spouse).

\textsuperscript{108} See BOWKER, supra note 44, at 133 (describing how the Milwaukee survey results showed battered women who "exhibited learned competence instead of learned helplessness"); GELLES & STRAUS, supra note 57, at 159 (concluding that the results from studies do not support that battered women, in general, suffer from learned helplessness, but indicate that not all sources of help may be available, or those which are may not be effective).

\textsuperscript{109} See supra note 45 and accompanying text.

\textsuperscript{110} Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2797 (1993) (directing judges to "focus ... solely on principles and methodology, not on the conclusions they generate").

\textsuperscript{111} See supra notes 40-60 and accompanying text.
Two other factors mentioned by the Court include the known rates of error and the existence of standards controlling the technique's operation.\textsuperscript{112} In general, these factors appear less measurable with Syndrome testimony, due in part to its "soft" nature.\textsuperscript{113} Thus, key issues to address before proceeding are: how courts have traditionally dealt with expert testimony on behavioral sciences; whether they use the same test for both "hard"\textsuperscript{114} and soft sciences; and how reliability can be tested. Several cases provide an impression of how these issues have been handled under \textit{Frye}.

The Washington Supreme Court recently addressed these issues in \textit{State v. Riker}, a case examining the admissibility of Battered Woman Syndrome to explain the defendant's criminal activities occurring outside of a battering relationship.\textsuperscript{115} In its analysis, the court confirmed that the admission of scientific testimony involved two related inquiries: whether the theory passed the general acceptance standard in \textit{Frye}; and whether the expert testimony is properly admissible under Evidence Rule 702.\textsuperscript{116} Discussing the \textit{Frye} inquiry, the court again divides its analysis into two parts, one testing general acceptance in the relevant scientific community, and a second investigating whether the methods depended on by the theory produce reliable, generally accepted results.\textsuperscript{117} While the court held that the evidence insufficiently supported the use of Battered Woman Syndrome to explain actions taken outside of the battering relationship,\textsuperscript{118} it subjected this soft scientific testimony to the same test

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\item[112.] \textit{Daubert}, 113 S. Ct. at 2797.
\item[113.] "Soft" scientific evidence refers to nontraditional psychological evidence in the form of behavioral science testimony, or opinion testimony normally given in court by social workers, psychologists, and psychiatrists. "Soft" scientific evidence as related to syndromes is almost always offered in the form of expert testimony. As opinion, such evidence is usually subjective, and thus, not capable of being scientifically verified. Charles Bleil, \textit{Evidence of Syndromes: No Need for a "Better Mousetrap"}, 32 S. TEX. L. REV. 37, 40 (1990) (footnotes omitted).
\item[114.] "Hard" scientific evidence generally refers to the use of objective testing devices which provide quantifiable results. Bleil, \textit{supra} note 113, at 40.
\item[115.] \textit{State v. Riker}, 869 P.2d 43, 46 (Wash. 1994) (explaining the defendant’s theory as one in which her previous history of abuse "affected her ability to resist the alleged coercion" to engage in criminal activity).
\item[116.] Id. at 47; see also \textit{supra} note 92.
\item[117.] \textit{Riker}, 869 P.2d at 47 (indicating the theory does not have to be correct, only generally accepted).
\item[118.] Id. at 49-50 (finding the extension of the principles and the use of testimony on the Syndrome as described "has not yet achieved the general scientific acceptance necessary under \textit{Frye}").
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used for hard sciences. The court further appeared to equate reliability with general acceptance rather than treating it as a separate issue.

The Ohio Court of Appeals addressed analogous issues in State v. Martens as it examined the admissibility of Rape Trauma Syndrome. In addition to the usual criteria for evidence, the court explained that the theory underlying the expert opinion must be commonly accepted by the scientific community before the testimony would be admitted. Again, this court basically applied the Frye test even though it dealt with a soft science, and subsumed any question of reliability into its general acceptance test.

The Supreme Court of New Mexico arrived at a similar conclusion in State v. Alberico. The court, adopting Daubert, stated: "the focus should ... be on the validity and the soundness of the scientific method used to generate the evidence." As part of its analysis, the court relied on the DSM III-R as an indicator of a theory's "general acceptance in psychology [and] exposure to objective scientific scrutiny and empirical verification." The decision treats

119. State v. Riker, 869 P.2d 43, 49-50 (Wash. 1994) (finding the Battered Woman Syndrome insufficiently scientifically tested to explain behavior outside of the battering relationship). The Washington Court of Appeals also recently examined the use of expert testimony as related to general behavioral characteristics of sexually abused children. State v. Jones, 863 P.2d 85, 98 (Wash. Ct. App. 1993). In determining admissibility, the court recognized that "when personal experience is used as a basis for generalized statements regarding the behavior of [a class of victims], the testimony crosses over to scientific testimony regarding a profile or syndrome ... and therefore should be subject to the standard set forth in Frye." Id. at 97. The court observed that although some courts have allowed this kind of testimony without consideration of the scientific reliability, "where the concern is reliability of novel forms of evidence—it is appropriate to characterize all of the relevant disciplines as scientific [thus] acknowledging the scientific element of expert medical and behavioral science testimony." Id. at 97 n.8. The court also pointed out that, although Washington still adhered to the Frye test despite the difficulties presented when it is applied to general behavioral testimony, the Supreme Court's new Daubert test adopts a less rigid standard. Id. at 98 n.10.

120. State v. Riker, 869 P.2d 43, 50 (Wash. 1994) ("Without studies documenting the effect ... prior battering relationships will have on a person's functions ... the expert's opinion amounts to no more than an unsupported guess.").


122. Under case law of Ohio, permissible expert testimony must be relevant, beyond the understanding of the jury, and more probative than prejudicial. Id. (citing Ohio v. Thomas, 423 N.E.2d 137 (Ohio 1981)).


124. State v. Alberico, 861 P.2d 192, 203 (N.M. 1993) (rejecting the Frye test but concluding "[v]alidity is the measure for determining whether the testimony is grounded in or a function of established scientific methods" and explaining further that validity and reliability are scientifically interrelated).

125. Id. at 203-04.

126. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS III (rev. 1987) (referring to the main collection of published criteria commonly used in diagnosing various mental disorders within the medical field).

127. Alberico, 861 P.2d at 208. But see State v. Foret, 628 So. 2d 1116, 1125 (La. 1993) (noting that opinion testimony fails the Frye portion of the Daubert test because "psychodynamic theories
the admissibility of opinion testimony on psychological findings as part of the same inquiry of scientific evidence in general, indicating that for almost seventy-five years the admissibility of expert testimony has relied on the *Frye* test. The court in part relies on the DSM III-R's acceptance of the theory as an assurance of both its reliability and its adherence to scientific standards.

Historically, many states required psychological evidence to meet the standards set forth in *Frye*. The inherent difficulties in determining rates of error for soft sciences were not of sufficient magnitude to exclude the testimony. Regardless of whether an individual court uses the *Frye* test or the *Daubert* test, lack of data concerning the rate of error historically has not precluded admissibility of soft sciences and currently should not preclude admission of expert testimony on Battered Woman Syndrome. In addition, inquiries into standards governing "technique" are reflected in methodology considerations. The scientific standards governing empirical research in general also govern those examining Battered Woman Syndrome. Therefore, regardless of a dearth of informa-

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on the explanation of human behavior is, at best, a science that is difficult to impossible to test for accuracy. This untestability comes from its very nature as an opinion as to the causes of human behavior, and the fact that the methods for testing the results of psychoanalysis are rife with the potential for inaccuracy."). The court decided with this theory that a determination of whether the validity of a technique is sufficient for admissibility could not be conclusively answered. *Id.* In addition, as part of its analysis of the "known or potential rate of error," the court was reluctant to rely primarily on one of the few studies testing the accuracy of behaviors indicating child sexual abuse, which exhibited a "32% margin of error." *Id.* at 1125-26. *See generally* Coffee, *supra* note 29 (discussing the treatment of battered women in Louisiana and several other states).

129. *See*, e.g., Stokes v. State, 548 So. 2d 188, 195 (Fla. 1989) (explaining that after "consideration of the approaches to this problem, we believe that the test espoused in *Frye* properly addresses the issue of admissibility of posthypnotic testimony"); Hill v. State, 507 So. 2d 554, 555 (Ala. Crim. App. 1987) (adhering to the *Frye* general acceptance principle for scientific and medical expert testimony); Commonwealth v. Nazarovitch, 436 A.2d 170, 172 (Pa. 1981) (reaffirming that scientific evidence must meet the standards established in *Frye*, "which is generally accepted by many jurisdictions, including our own"); State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980) (concluding that "[u]nder the *Frye* rule, the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate").
130. *See supra* notes 115-28 (demonstrating that these courts relied on the *Frye* general acceptance test rather than a strict reliability standard).
131. *See supra* notes 115-28 (illustrating that even in those instances where soft sciences were excluded, the ratio of error was not cited as a separate reason for exclusion).
132. The court in *Alberico* addresses the issue of standards in its discussion of how the psychological process works. State v. Alberico, 861 P.2d 192, 209 (N.M. 1993). Specifically, psychological diagnosis is no different from other methods or techniques; the psychologist compares symptoms with known reactions and attempts to correlate the victim's symptoms with the categorized known causes of behavioral patterns. *Id.*
133. *See BOWKER*, *supra* note 44, at 19-59, 35-38 (describing the standards for research used to conduct the Milwaukee study); *GELLES & STRAUS*, *supra* note 57, at 207-12 (discussing the methodologies of each survey and the strengths and weaknesses of the chosen techniques).
tion about rates of error or standards controlling the scientific technique, a valid empirical methodology should create a presumption in favor of the amended Syndrome's admissibility.

Finally, the remaining factor to examine is the Frye "general acceptance" test. Again, while the survivor theory II may not be present by name in the majority of the literature discussing the Battered Woman Syndrome, it is repeatedly present statistically.\(^3\) Evidence confirms the presence of battered women who exhibit both learned helplessness and survivor behavior depending on their individual circumstances, at what stage they are in their relationships, and other factors, such as prior experience with abuse.\(^4\) Daubert specifically notes no consensus is needed among conclusions, merely agreement about the procedure one must follow to reach that conclusion.\(^5\) Since the Frye general acceptance test compels a more stringent inquiry than Daubert,\(^6\) the Syndrome premised on survivor theory II should not receive a negative finding in any of the jurisdictions currently allowing the Battered Woman Syndrome premised exclusively on learned helplessness. A similar evaluation by the courts is likely since both theories employ the exact same methodology, but merely reach different conclusions based on that procedure.

Except for difficulties encountered in attempting to measure criteria more appropriate to hard sciences,\(^7\) the Battered Woman Syndrome, with survivor theory II as one of its scientific bases, satisfies the Daubert "suggested requirements" and thus should be admitted as an appropriate topic for expert testimony.

**SECTION III: DETERMINING THE FEDERAL STANDARD FOR EVIDENTIARY REVIEW OF "AMENDED" SCIENTIFIC THEORIES UNDER DAUBERT**

The current judicial system's wary treatment of novel scientific theories is neither new nor always misplaced. In today's courtroom,
the frequency of conflicts between experts contributes to the courts’ suspicions that a crafty lawyer can always find an expert to express a specific point of view.\textsuperscript{139} The plethora of so-called “junk sciences” being thrown at judges is likely to result in some novel, yet scientifically credible, theories being held inadmissible.\textsuperscript{140} As presented in Section II, survivor theory II was perceived as more closely resembling an amendment\textsuperscript{141} to the existing theory of Battered Woman Syndrome, rather than a thoroughly novel type of expert evidence. In an attempt to ascertain how lower federal courts are using \textit{Daubert} as the appropriate test for admissibility of either amended or novel expert testimony, an electronic search of federal court cases was conducted, and its results examined.\textsuperscript{142} The first step was to analyze these cases for examples of “amended” scientific theories. The electronic search did not reveal any cases expressly discussing amended theories. The closest statement by a court regarding an amended theory dealt with how it would treat new techniques of DNA profiling.

In an opinion considering admissibility of DNA profiling, in general, and the FBI’s specific procedures applying that profiling, in particular, the Eighth Circuit in \textit{United States v. Martinez} authorized future judges to take judicial notice of “DNA fingerprinting,” which demonstrated proper application of a reliable methodology.\textsuperscript{143} Of

\begin{itemize}
\item \textsuperscript{139} See Paul C. Gianelli, “\textit{Junk Science}”: The Criminal Cases, 84 J. CRIM. L. & CRIMINOLOGY 105, 106 (1993) (discussing Fifth Circuit Judge Higginbotham’s criticisms of expert testimony as being two-fold with the first criticism being that “experts whose opinions are available to the highest bidder have no place testifying in a court of law”).
\item \textsuperscript{140} As well as some scientifically “incredible” theories being disallowed.
\item \textsuperscript{141} The term “amended” here narrowly refers only to those scientific theories previously accepted by the judicial system as valid topics for expert testimony, but which have subsequently experienced a change in their underlying theories or procedures. Amended theories are to be distinguished from novel scientific theories which presumably are screened by the court for the first time in a particular jurisdiction to determine their acceptability as legitimate topics of expert testimony.
\item \textsuperscript{142} The author conducted a Westlaw search on April 5, 1994, to locate any federal court’s mention of “\textit{Daubert v. Merrell Dow}” after May, 1993 (the case was decided on June 28, 1993). The search resulted in 75 cases which were electronically submitted to Westlaw (excluding decisions of courts which may not be included on Westlaw), including 39 circuit court cases and 36 lower court decisions. With the exception of the Eleventh Circuit, the other circuit courts based decisions on \textit{Daubert}. For the circuit cases which examined the lower courts’ admission or exclusion of expert scientific testimony under a test other than \textit{Daubert}, the overwhelming majority of these decisions were affirmed (19 out of 33 published opinions). Only a handful were reversed and/or remanded (6). The reason for conducting a federal case law search is primarily due to the conformity of standards gained by the \textit{Federal Rules of Evidence}. Since most states follow a similar or identical standard to the \textit{Federal Rules}, the use of federal cases exclusively should eliminate any problems arising from slight differences in those remaining states whose rules of evidence do not mirror federal standards.
\item \textsuperscript{143} \textit{United States v. Martinez}, 3 F.3d 1191, 1197 (8th Cir. 1993) (stating that such notice, absent a “preliminary showing that the expert properly performed a reliable methodology,” did “not mean that expert testimony concerning DNA profiling is automatically admissible under \textit{Daubert}”).
\end{itemize}
particular significance for this paper is the court’s caveat that for any
new techniques of DNA profiling to be admitted, an in limine hearing
applying the Daubert standard would be necessary. Consequently,
while a new procedure did not necessarily preclude admission of
expert testimony on DNA profiling, the mere fact that a court
admitted earlier testimony based on a different technique did not
guarantee admission of that testimony if it was based on a new
technique.

Thus, at least in the Eighth Circuit, a change in a scientific
procedure’s underlying technique would likely be independently
subject to the Daubert test prior to the admission of expert testimony
on that topic, despite previous acceptance of the procedure. In light
of state courts’ treatment of psychological evidence, a change in
the underlying theory of a scientific procedure would be subject to
the same independent testing, no more difficult nor easy, than that
for new scientific theories or techniques. While Martinez provides
insight into how one circuit would likely treat the problem of a
change in the Battered Woman Syndrome’s theoretical underpin-
nings, the dearth of cases treating amended theories from the other
circuits leaves the issue solidly in uncharted waters, offering no
additional support of the Eighth Circuit’s brief dicta.

Since only one case out of the seventy-five examined remotely
addressed the issue of how amended scientific theories are treated, a
decision was made to re-canvass the cases to determine how courts
treat the admissibility of novel scientific theories. The hope was to
submit the paradigm shift toward survivor theory II to a worst case
scenario. Thus, the theory would not be tested as an amended
theory, which had gained prior acceptance by the courts, but tested
strictly as a novel theory.

In general, the Supreme Court favors the jury hearing the evidence,
novel or not, as long as the scientific methodologies or procedures

144. Id.
145. See supra notes 115-23 and accompanying text (discussing the applicability of the Frye
test to both hard and soft sciences).
146. The rationale for this treatment is, if a court decides a shift to survivor theory II
fundamentally changes Battered Woman Syndrome, then it would be subjected to entirely
independent evidentiary scrutiny (even though previous literature on the Syndrome would
undoubtedly be used to prove the cycle of violence theory, battered women’s behavior and
reactions, methodology and procedure, etc.). This is in contrast to review of the Syndrome as
an amended theory. Presumably, since most courts have previously accepted the Syndrome, the
threshold for its amended admission would be lower, and the court would limit consideration
to the survivor II element, rather than re-examine the entire body of knowledge on the Battered
Woman Syndrome. To subject the theory to the tougher of these two standards, that reserved
for novel theories, should provide a “worst case” decision on admissibility.
being considered sufficiently fulfill the Daubert criteria. The Daubert Court, specifically addressing respondent's fears of a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions," further notes that "[v]igorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Where these safeguards do not work, the judge can use judicial authority to direct a verdict or grant summary judgment.

To determine Daubert's application to novel scientific theories, the seventy-five cases previously located were re-examined. Similar to the first search for cases dealing with amended scientific theories, this survey uncovered sparse precedent. In those cases in which novel scientific testimony was deemed of insufficient validity, there was little or no scientific foundation for the testimony. The results discussed below include those sciences which, while not necessarily labeled novel by the courts, nevertheless fit the definition of a novel theory.

For example, one case involved a physician who claimed to be able to determine whether a cataract was radiation-induced by mere visual inspection. While not presented per se as a novel science, the court apparently determined this testimony described an unacceptable novel science when it found that none of the sources cited by the physician stated that radiation-induced cataracts were visually detectible.

A second example involved an expert who testified that ibuprofen caused the plaintiff's renal failure. When pressed for the basis of
her opinion, the expert subsequently admitted a lack of scientific support.\textsuperscript{156} Again, while not labeled novel, the fact that the expert herself identified her opinion as "curb side" with no scientific support,\textsuperscript{157} would likely make her theory that ibuprofen leads to renal failure, at best, a novel one.

A third case, which warrants a closer look, involved plaintiff's experts who used unrecognized methodologies to support their theory that use of Primatene Tablets and Primatene Mist\textsuperscript{158} during pregnancy resulted in birth defects.\textsuperscript{159} In doing so, the experts relied on \textit{in vivo} and \textit{in vitro} studies involving animals.\textsuperscript{160} The court observed that while over 2,000 agents have been shown to cause birth malformations in animals, only twenty-five to thirty of those agents have been shown to have a corresponding effect on humans.\textsuperscript{161} In spite of this fact, plaintiff's experts extrapolated on \textit{in vitro} and \textit{in vivo} animal studies to prove causation.\textsuperscript{162} In combination with numerous other deficiencies, including lack of peer review of the experts' conclusions,\textsuperscript{163} a high rate of erroneous results,\textsuperscript{164} and non-compliance with generally accepted methodology in the relevant scientific field,\textsuperscript{165} the court held the testimony inadmissible.\textsuperscript{166} The use of \textit{in vivo} and \textit{in vitro} animal studies, absent corroborating human studies, to determine causality for human birth defects was deemed an unacceptable novel theory.\textsuperscript{167}

\textsuperscript{156} Id. (quoting the doctor as testifying that "[i]f... you were asking [for] an analytical, scientific opinion, then, I would have to research it, and I have neither the time nor the inclination to do that").

\textsuperscript{157} Id.

\textsuperscript{158} Over-the-counter asthma treatments.

\textsuperscript{159} Wade-Greaux v. Whitehall Lab., Inc., 1994 WL 80840, 80880 (D.V.I. 1994) (concluding the anecdotal and animal-based data relied on by plaintiff's experts did not meet the criteria required by the relevant scientific disciplines).

\textsuperscript{160} Id. (describing the evidence gathered from studies using chick embryos and rabbits).

\textsuperscript{161} Id. (noting also that, while animal studies may provide useful information, data from them cannot be generalized to humans).

\textsuperscript{162} See infra note 167 (explaining the problems with extrapolation between human and animal studies).

\textsuperscript{163} Wade-Greaux v. Whitehall Lab., Inc., 1994 WL 80840, 80878 (D.V.I. 1994) (finding "there is no evidence that any of the methodologies advanced by plaintiff's experts has been subjected to peer-review among the community of scientists").

\textsuperscript{164} Id. (concluding that plaintiff's experts' methodologies were likely to have "an extraordinarily high rate of error").

\textsuperscript{165} Id. at 80876 (averring that "each of plaintiff's expert witnesses used a methodology not recognized by the relevant scientific community, and not subject to scientific verification").

\textsuperscript{166} Id. (holding "[t]herefore, each of their opinions was not helpful and must be excluded").

\textsuperscript{167} Perhaps to label this a novel theory is unfair since research has been done which indicates application of test results for animals to humans is inappropriate. Specifically, the court indicates scientists have determined extrapolation between animal and human studies invalid due to the "principle of species specificity [which] has been tested and demonstrates that different species can react differently to the same agent." Wade-Greaux v. Whitehall Lab., Inc.,
In contrast, one case which admitted expert testimony on a novel theory concerned the effect of a DPT vaccination shot on a child's existing heart condition.\textsuperscript{68} Citing the expert's reliance on a prominent textbook in the field, as well as two articles describing children who suffered similar reactions to the vaccination, the court held a sufficient scientific basis was presented to sustain admission of testimony on the theory.\textsuperscript{69}

All of the above cases were surveyed with an eye toward constructing guidelines for obtaining admission of amended scientific evidence in federal courts. Unfortunately, the first survey offered little insight into how the courts would treat the concept of an amended scientific theory.\textsuperscript{70} The second survey, however, revealed several decisions applying the \textit{Daubert} standard to novel scientific theories.\textsuperscript{71} Thus, given the absence of illustrative cases on amended theories, guidance is sought from those cases dealing with novel sciences, and some direction is offered.\textsuperscript{72}

First, a minimum requirement is a "modicum" of scientific support for the expert's theory and its methodology. While it is not clear how many pieces of peer-reviewed literature are sufficient to constitute a modicum of scientific support, a theory lacking in scientific support altogether is inadmissible.\textsuperscript{73} Problems arise with cases which fall somewhere between the imaginary lines of "no scientific foundation" and "sufficient foundation." Unfortunately, it is virtually impossible

\textsuperscript{68} Leary v. Secretary of Dep't of Health & Human Servs., 1994 WL 43395, 43404 (Ct. Cl. 1994) (allowing testimony on the vaccination's aggravation of an existing condition of myocarditis, in spite of the expert's uncertainty over the "exact mechanism by which such aggravation actually took place... [due in part to] the exceedingly rare nature of this type of event... [and the lack of a] large body of scientific knowledge... regarding the administration of DPT vaccinations and any resulting cardiac damage").

\textsuperscript{69} Id. at 43405 (identifying "the necessary scientific underpinnings to enable me to find, by a preponderance, that... [plaintiff's] underlying myocarditis was significantly aggravated by the... DPT vaccination").

\textsuperscript{70} See supra notes 142-44 and accompanying text (discussing the courts' lack of treatment of amended scientific theories).

\textsuperscript{71} See discussion supra notes 150-69 and accompanying text.

\textsuperscript{72} See supra notes 153-69 and accompanying text (suggesting that accepted methodology, peer review, and portrayal of scientific evidence as non-static, all increase the likelihood that novel and amended theories will be accepted in court).

\textsuperscript{73} See cases cited supra notes 155-69 and accompanying text.
to predict what an individual judge will decide when determining whether the evidence meets the sufficient foundation criteria.

Nonetheless, while it remains unclear where the minimum threshold lies, this should not preclude seeking admission of a novel scientific theory. For example, use of an accepted methodology within the scientific field in question greatly increases the probability the testimony will be admitted.\(^{174}\) Subjecting a theory to peer review increases the odds that the minimum requirement is met.\(^{175}\) Where peer review occurs, the state cases discussed earlier indicate that a lack of information about error rates or general scientific acceptance would be unlikely to preclude admission.\(^{176}\) Similarly, if the scientific theory is weak on methodology, then it is imperative that other factors be met, such as peer review, or general acceptance within the relevant scientific field. In borderline cases, the court should allow the testimony, relying on opposing counsel's vigorous cross-examination and presentation of contrary evidence to attack the evidence's weak points.\(^{177}\)

Second, similar to the court's treatment of a novel, or previously unadmitted scientific theory, an amended scientific theory would probably be subject to \textit{Daubert} as well. An amended theory, in contrast to a novel one, would likely have a significantly easier task of meeting the standard. This is especially true, as in the present case, if only one of its underlying tenets changed. For example, an amended theory may more accurately explain the statistical findings of the scientific community, perhaps even lowering the procedure's error rate. The amended theory may also garner favorable peer review, where previously there was only unfavorable commentary. In these situations, the amendment itself may provide the necessary support to meet the \textit{Daubert} standard—support which the previous, unamended theory lacked.\(^{178}\)

Finally, cases specifically acknowledge that scientific theories are constantly amended as new information is discovered.\(^{179}\) Scientific

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\(^{175}\) \textit{See} Leary v. Secretary of Dep't of Health & Human Servs., 1994 WL 43395, 43405 (Cl. Ct. 1994) (holding two articles and one textbook to constitute sufficient peer-review and publication, as well as general acceptance in the field).

\(^{176}\) \textit{See supra} notes 115-28 and accompanying text (examining different courts' application of "general acceptance" within the relevant scientific community).


\(^{178}\) This scenario would not be unlikely if the amendment made the theory better fit the available data, while all other factors remained constant.

\(^{179}\) \textit{See} Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2795 (1993) (indicating that scientific theories are "subject to further testing and refinement") (quoting Brief for American Association for the Advancement of Science and the National Academy of Sciences
knowledge is recognized in *Hodges v. Secretary of the Dep't of Health & Human Servs.*, as constantly being changed, refined and amended as new tests and data accumulate.\(^{180}\) One circuit court emphasized that "by requiring . . . the inquiry be focused solely on the methodology and principles underlying the proffered scientific expert testimony, the *Daubert* court has instructed the courts that they are not to be concerned with the reliability of the conclusions generated by valid methods, principles, and reasoning."\(^{181}\) Thus, if valid scientific methods are employed then it follows that the conclusions are scientifically valid\(^{182}\) and once the testimony meets this criteria, the court should admit it.

Given the liberal spirit of the rules echoed by *Daubert* and subsequent federal cases, it is unlikely that a court would refuse to recognize the Battered Woman Syndrome based on survivor theory II as an appropriate topic for expert testimony.

**SECTION IV: AN ANALYSIS OF THE BENEFITS ACCRUED FROM THE INCORPORATION OF SURVIVOR THEORY II INTO THE BATTERED WOMAN SYNDROME**

One benefit of a shift from learned helplessness to the survivor theory II model is the resulting positive characterization of battered women as survivors, rather than the negative image of battered women as passive victims.\(^{183}\) Closely related is the expectation that battered women who do not conform to the stereotypical pattern\(^{184}\) would be able to fit the adapted model's more flexible and realistic criteria. Finally, evidence of the woman's help-seeking behavior serves the dual purpose of bolstering her credibility before the jury,\(^{185}\) while concurrently eliminating contradictory messages inherent within the theory of learned helplessness.

Several other benefits arise from modifying the traditional Battered Women Syndrome to incorporate the survivor theory II model. First, from a societal point of view, the characterization of battered women

\(^{180}\) 9 F.3d 958, 966 (Cl. Ct. 1993).
\(^{181}\) United States v. Bonds, 12 F.3d 540, 556 (7th Cir. 1993).
\(^{182}\) Id.
\(^{183}\) See Schneider, supra note 17, at 234 (noting how continued reliance on learned helplessness perpetuates erroneous stereotypes of women as victims, while denying the complex reality of battered women's responses).
\(^{184}\) For example, "[t]he victim may not be thought of as the 'typical' battered woman if she has a history of prostitution, . . . or if she has been observed to behave angrily, is known to abuse her children, is trained in the use of a weapon, or is physically larger than her abusive partner." Dutton, supra note 19, at 1195 n.17.
\(^{185}\) See infra note 186 and accompanying text.
as subservient victims, rather than determined survivors, has serious repercussions in terms of promoting or challenging stereotypes. Second, and equally important, these characterizations impose perilous boundaries on what society perceives as the standard pattern of the battered woman, within which defendants must fit their own life experiences. Especially among those who view the Battered Woman Syndrome defense as an excuse or justification, it is practically impossible to convince them that a woman suffers from learned helplessness—and thus deserves what they perceive as leniency—when she is unable to fit the mold. For example, if she uses drugs, actively fights back, participates in arguments with her husband, or fails to conform to the battered woman stereotype because of a different ethnic origin, she undoubtedly will have

186. Some courts seem to treat battered woman syndrome as a standard to which all battered women must conform rather than as evidence that illuminates the defendant's behavior and perceptions. As a result, a defendant may be considered a battered woman only if she never left her husband, never sought assistance, and never fought back. Unless she fits this rigidly-defined and narrowly-applied definition, she is prevented from benefiting from Battered Woman Syndrome testimony.

Phyllis L. Crocker, The Meaning of Equality for Battered Women Who Kill Men in Self-Defense, 8 HARV. L.J. 121, 144 (1985). Schneider, supra note 17, at 234 (stating "[t]he notion of battered woman syndrome contains the seeds of old stereotypes of women in new form—the victimized and the passive battered woman, too paralyzed to act because of her own incapacity").

187. See Dutton, supra note 19, at 1196 (noting there is no single standard of behavior or pattern exhibited by battered women).

188. "[A]ppellate cases on the issue suggest that expert testimony is not being admitted where it is most needed—where the woman's experiences and the circumstances of the homicide are indeed most 'different.'" Schneider, supra note 17, at 216.

189. [T]he danger of the battered woman syndrome approach is that it revives concepts of excuse. . . . [I]t focuses on the woman's defects. . . . It implies that she is limited because of her weakness and her problems. . . . The opinion in State v. Kelly seems to suggest that admission of expert testimony is primarily important because the battered woman 'suffers' from the syndrome and could not be expected to leave her home, not because it is relevant to the reasonableness of her act. The court is willing to extend its 'protection' and admit the testimony because the battered woman is perceived as weak.

Schneider, supra note 17, at 234 (emphasis in original) (citing State v. Kelly, 478 A.2d 364, 372-73 (N.J. 1984)).

190. See Schneider, supra note 17, at 234-35 (conveying the ramifications of rigid adherence to stereotypes, and how this severely curtails many women's options to explain their behavior).

One unfortunate consequence of a rigid classification of the battered woman is that "women who depart from this stereotype, because of their own life situations or because the facts of their cases do not fit this perspective, are not likely to be able to take advantage of judicial solicitude." Id.

191. See Crocker, supra note 186, at 145 (explaining the tension between stereotypical and real behavior that binds battered women). "If the defendant has tried to resist [her batterer] in the past, the court accepts this as evidence that rebuts her status as a battered woman." Id.

In addition, studies indicate that fighting back is a common reaction of these women. Gelles & Straus, supra note 57, at 148 (noting that "[n]early one in four victims (24 percent) hit their attacker back"). See supra note 184 (describing examples of atypical battered women).

192. See supra note 180 and accompanying text; Schneider, supra note 17, at 234-35 n.144 & 146 (describing the problems in a battered woman self-defense case involving a black woman who did not conform to the battered woman syndrome stereotype; also hypothesizing different
problems convincing the judge and jury that she deserves expert testimony on Battered Woman Syndrome. These problems may arise from the testimony itself being held inadmissible, or from the jury's assessment that, since she does not fit the mold, the theory does not apply to her.

Finally, it is vital that battered women be defined as survivors—women whose efforts to either terminate or escape their abuse often escalated the violence from their batterers, and was usually met by general disinterest from society. Such an insight helps illustrate how the battered woman's actions are indeed those of a reasonable person. Battered women do search for alternatives to their situations, and even when none are forthcoming, their help-seeking continues. Battered women's shelters, lauded as the saviors of countless abused women, are incredibly underfunded and alarmingly limited in the number of women they are able to assist. Other resources for battered women are insufficient.

results where economic classes are varied—i.e., between "upper class" and "lower class" battered women) (quoting Letter from Barbara Hart, Attorney, to Elizabeth M. Schneider, (Nov. 30, 1984) (on file with the author)).

193. See BROWNE, supra note 3, at 115 (explaining that "[t]he point of, or even the discussion of, separation is one of the most dangerous times for partners in a violent relationship"). "For many battered women, leaving their mates and living in constant fear of reprisal or death seems more intolerable than remaining, despite their fears of further harm." Id. "The women's fears of retaliation were supported by their past experiences with the men's violence, as well as by threats of further violence if they attempted to leave." Id. at 114. See generally CLEARINGHOUSE, supra note 2, at 181-87 (detailing the numerous statistical studies indicating that a woman is in the most danger when attempting to escape her batterer's control).

194. Learned helplessness, on the other hand, tends to depict battered women as unreasonable. "Although the term is purely descriptive, its psychological content and the language and import of the term carry a different message. Regardless of its more complex meaning, the term 'battered woman syndrome' has been heard to communicate an implicit but powerful view that battered women are all the same, that they are suffering from a psychological disability and that this disability prevents them from acting 'normally.'" Schneider, supra note 17, at 225-26.

195. See SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 33 (1982) (noting "[t]he influence of the women's liberation movement on the battered women's movement is illustrated concretely in hundreds of shelters and women's crisis centers in the United States"). But cf, Richard A. Berk, Phyllis J. Newton & Sarah F. Berk, What a Difference a Day Makes: An Empirical Study of the Impact of Shelters for Battered Women, 48 J. MARRIAGE & FAM. 481, 481 (1986) ("predict[ing] that shelters will have beneficial effects only for battery victims who are already taking control of their lives. For other women, a shelter stay may in the short run encourage retaliation.... [the study reveals] that our hypotheses are by and large supported.").

196. See GELLES & STRAUS, supra note 57, at 112-13 (noting that even though the number of shelters increased in ten years from four to more than one thousand, this number is unable to accommodate more than a million battered women). "Thus for all practical purposes there is not enough space for 80 to 90 percent [sic] of the severely and repeatedly battered women in America." Id. at 176. "Despite the rapid increase in numbers over the last few years the number of institutions, such as houses or shelters, available for the women to flee to safety are still limited." DOMESTIC VIOLENCE BEHIND THE CURTAIN 119 (Alison Landes, Carol D. Foster & Mark A. Siegel eds., 1991); SCHECHTER, supra note 195, at 243-44 (explaining the "dilemmas every shelter faces, both of meeting the immediate needs of shelter residents and of offering assistance to the countless women who must be turned away because there is no space available"). See
In light of the scarcity of economic assistance, tightness of the job market, lack of affordable child care and housing, and general shortage of other resources, it is not surprising that a battered woman will return to her batterer rather than risk becoming homeless or hazarding further injury. By survivor theory standards, her actions take on the more favorable appearance of reasonableness. Theories of social learning emphasize that people learn to respond to certain situations given what has proven successful, or more importantly unsuccessful, in the past. If attempts to escape result in more severe abuse for the woman, then it becomes reasonable for her to stay.

Thus, adoption of the survivor theory II as an underpinning of the Battered Woman Syndrome offers several benefits, including an increased ability to explain the woman's actions as reasonable, a better statistical fit to the underlying data, and a more realistic portrayal of the battered woman who tries to escape her abuse but is constantly forced to return to her batterer.

 generally CLEARINGHOUSE, supra note 2, at 174-75 (offering tragic statistics on the number of battered women that are denied shelter).

197. See WALKER, supra note 21, at 141 (showing that women often received inadequate response from the criminal justice system in that “[b]ureaucratic delays, inadequate responses, and lack of knowledge and training prevented the institution from being responsive in life threatening situations”).

198. See Schneider, supra note 17, at 221 (noting the common social and economic problems facing battered women). "If women had equal status with men in social, political, economic, educational, and family areas, then [women] would be less likely to live with spouse abuse." WALKER, supra note 21, at 118.

199. See SCHECHTER, supra note 195, at 238 (explaining the preconditions which must exist to end violence, including, "shelter, adequate jobs, income, free health care, affordable housing and child care").

200. See supra note 193 (discussing the separation violence faced by many battered women, and how the threat of further violence acts as a significant deterrent to women leaving abusive partners).

201. Schneider argues that “[d]efense lawyers and experts should emphasize the common aspects of the battered women's experience, both her helplessness and her behavioral adjustments that allow her to survive, her desperate coping, her unique insight and ability to know and anticipate the degree of violence she faces, and her painful understanding of the paucity of alternatives available to women in this culture." Schneider, supra note 17, at 240. Schneider further posits that “[t]his fuller description of battered women's experiences is both more accurate and better explains to judges and juries why a battered woman doesn't leave the house and why she kills to save her own life." Id. It is important to realize that the survivor theory does not completely exclude the fact that battered women often feel helpless. See supra note 62 and accompanying text. In fact, element two of the Gondolf and Fisher model notes anxiety and uncertainty on the woman's part, as well as the lack of viable alternatives, all of which contribute to the woman remaining with the batterer. GONDOLF & FISHER, supra note 34, at 12. It is entirely understandable for the woman to feel helpless when faced with such a scenario.

202. See supra note 87 (discussing the concept of social learning especially as applied to how battered women are “trained” to react based on past abuse experiences).
CONCLUSION

On behalf of the estimated two million battered women in the United States alone,203 this article stresses the need for inclusion of survivor theory II, with its recognition of the help-seeking activities of battered women,204 into the underlying theoretical premises of Battered Woman Syndrome. The implications for policy-making, for battered women's self-defense claims, as well as the data's strong empirical support of the survivor theory II modifications, all persuasively argue for its incorporation into the expert testimony arsenal of Battered Woman Syndrome. Advocates must actively counter the perception that only "good" abused women are described by the Syndrome. It is unquestionably a disservice to battered women for the legal profession to continue offering an incomplete and skewed perception of battered women's behavior.

While there may be potential risks to such a paradigmatic shift, such as the fear the court will rule the testimony inadmissible, the perceived benefits far outweigh such considerations. Without the valuable insight into battered women's daily circumstances, provided by the survivor theory II, more innocent women will be punished for acting in reasonable self-defense.205 Allowing only battered women who fit a largely unrealistic model to benefit from the explanatory power of the Battered Woman Syndrome places an intolerable burden on the rights of women everywhere.

It is imperative that the legal profession take the first steps to eradicate the vestiges of sexism inherent in learned helplessness. Adoption of the survivor theory II and its consistent statistical findings will enable the law to eliminate the inherent contradiction and stereotypical backlash of learned helplessness as currently applied in Battered Woman Syndrome. Anything less borders on criminal.

203. See supra note 4 and accompanying text (utilizing the weight of statistical data to emphasize the immediate need for national attention).
204. See supra notes 40-60 and accompanying text (outlining the types of help-seeking battered women attempt and how the survivor theory II model more accurately explains the behavior).
205. In fact, most battered women do not meet the stereotype reflected in Battered Woman Syndrome in some way or another. Dutton Interview, supra note 36. The notion of a common, singular profile may be misleading. Id. For example, the jury may look at a particular defendant and say she doesn't fit the stereotype because "she looks angry" or "she fought back," and may therefore conclude that these theories don't apply to her. Id. Simply because the defendant does not fit the stereotype of a battered woman does not mean that she did not reasonably perceive herself to be in danger at that moment. Id. To deny her the use of Battered Woman Syndrome testimony to help explain the reasonableness of her actions is equivalent to institutionally maintaining the stereotype. Id.