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Krista J. Wiley

*University of Missouri-St. Louis*

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Reconsidering the Battered Woman Syndrome Defense for Women Who Kill

by

Krista J. Wiley

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Advisory Committee

John Brunero, Ph.D.,

Chairperson

Berit Brogaard, D.M.Sci, Ph.D.

Gualtiero Piccinini, Ph.D.

### ABSTRACT

This paper considers two possible alterations to the current use of Battered Woman Syndrome (BWS) as a defense for the criminal act of murder. First, I will argue that BWS is best used as an excuse defense for murder. In the United States, BWS has historically been used as a justification defense for victims of long-term domestic violence who kill their abusers. A justification defense attempts to show that the criminal defendant's action was warranted and justified while an excuse defense is meant to show that the criminal defendant is not fully responsible for her actions due to some mental disease or defect. I believe that BWS should be used as an excuse defense for murder because there is a significant amount of research linking BWS to Post Traumatic Stress Disorder (PTSD) and PTSD is currently accepted as an excuse defense for criminal action. Second, I will argue that one way to formulate BWS as an excuse defense is to name BWS in the DSM-VI as a sub-category of PTSD. I will also argue that the neural correlates of BWS are discoverable and the presentation of neural evidence will support BWS as a genuine psychological condition and excuse defense.

## I. Introduction

Lenore Walker first introduced Battered Woman Syndrome (BWS) in 1977 to explain why women remain in abusive relationships despite repeated abuse (Walker 2009: 41). Walker believes that long-term abuse falls into a pattern that is best understood as the repetition of a three-stage cycle of violence. In the first stage, the victim becomes aware of tension in the abuser. During this stage, the victim attempts to appease the abuser. The victim's effort to calm the abuser is often initially successful, but as tension builds she is unable to inhibit the abuser's hostility. In the second stage, tension continues to escalate and the battering incident occurs. The incident typically includes psychological and physical abuse. After the battering incident, tension is relieved. Walker believes that the release of tension naturally reinforces the abuser's use of violence. In the third stage, the abuser expresses remorse and apologizes profusely for the battering incident. The abuser himself may actually believe that he will never allow himself to become violent again. This stage provides positive reinforcement for the victim to remain in the relationship (Walker 2009: 91-94). As the cycle repeats, the amount of time spent in each stage of the cycle decreases and the severity of the battering incident increases. In the most severe cases, the victim continually perceives tension in the abuser and the dynamic between the abuser and the victim never returns to the third stage of the cycle (Walker 2009: 95).

Walker believes that women who suffer from BWS get caught in the cycle of abuse because they develop learned helplessness. The phrase 'learned helplessness' is controversial because battered women are actually not helpless at all. They are often able to successfully protect their lives and the lives of their children. However, Walker

believes that victims of domestic violence must give up their belief that they can escape abuse in order to defend themselves. Victims stop believing that their actions will have predictable outcomes (Walker 2009: 8-9). So, the victim does not believe that her attempt to leave the relationship will have the predictable outcome of ending the abuse. She may have to return to the relationship. If the victim does return to the relationship after attempting to leave, she will return to a situation that is far worse than the one that she left (Walker 2009: 9). Walker's notion of learned helplessness and how it arises as a result of the cycle of violence responds to those who claim that a battered woman can easily leave an abusive relationship if she is unhappy with how she has been treated.

Following its initial presentation, BWS was used as a justification defense for sufferers of long-term abuse who, in turn, murdered their abusers. Walker first introduced expert testimony on BWS in a Montana case involving Miriam Grieg. Grieg shot and killed her abusive husband during a battering incident. After shooting her husband six times, Grieg ran out of their apartment. When the police arrived she cautioned them to be careful when they entered because her husband was in there and he was angry (Walker 2009: 346). In addition to explaining the cycle of violence and development of learned helplessness, Walker testified that belief in the omnipotence of the abuser is common in the battered women she has interviewed (Walker 2009: 346). This is one way that expert testimony has been used to support a justification defense for women with BWS.

Before explaining more about this, it is important to discuss how a defense of this type operates in the legal systems of the United States. One purpose of developing a legal system is to maintain justice and fairness in a society. The legal system ensures that those who violate the law receive appropriate punishment. However, there are instances when a

member of society may be justified in her action of killing a fellow human. One such instance is when one kills another in self-defense. In the United States, self-defense has a specific definition. Definitions of self-defense vary depending on jurisdiction, but most include five main criteria, (1) the defendant must be in the presence of imminent danger, (2) the defendant must have acted the way that a reasonable person would act, (3) the defendant cannot have been the aggressor, (4) the defendant must have used necessary and non-excessive force, and (5) the defendant must not have had the opportunity to retreat safely (NIJ 1996). These five criteria were put into place to ensure that the defense is only used in cases of genuine self-defense.

I will argue that BWS should be allowed to operate as a defense to murder. However, I do not believe that BWS should be a justification defense. Instead, I will argue that BWS should be an excuse defense. In addition to justification defenses like self-defense, legal systems have historically recognized excuse defenses. Excuse defenses are meant to protect the mentally ill. The purpose of an excuse defense is not to show that the defendant's action was justified. Instead, it is to demonstrate that the defendant should not be penalized in the same way that a normal functioning human is penalized because she harmed another due to her inability to reasonably approach the situation.

Insanity and unconsciousness are two types of excuse defense. The insanity defense is probably the best excuse defense available to a battered woman who kills. Different jurisdictions in the United States use different insanity tests, but the main purpose of an insanity test is to determine whether or not a person on trial is mentally ill and should therefore be excused from their criminal action. About half of the states use the M'Naghten Test to assess a defendant's sanity (Burgess 2003: 69). According to the

M’Naghten Test, a person is only able to use the insanity defense if it can be shown that at the time of the offense she could not distinguish right from wrong (Burgess 2003: 69). The states that do not use the M’Naghten test use the insanity test developed by the American Law Institute (ALI). The ALI test, or ‘Control Test,’ has two components. It states that, ‘a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct *or* to conform his conduct to the requirements of law’ (Model Penal Code § 4.01 1962). So, a defendant may be excused if she exhibits just one of the two requirements included in the ALI test.

I believe that BWS can function as an excuse defense to murder because Walker has put forth significant research to support her theory that BWS is a subcategory of post-traumatic stress disorder (PTSD). PTSD has become one of the most frequently litigated mental diseases (Bottalico & Bruni 2012). However, the neuro-correlates of PTSD are currently undetermined. This makes legal assessment of the disorder complicated because behavioral evidence and the sufferers’ description of experiences is all we have to diagnose the condition. Through the use of neuro-technology, a neural basis for PTSD is slowly being discovered (Bottalico & Bruni 2012). I believe that neuroscientific progress will aid in the legal assessment of PTSD and BWS because neuroscience can offer physical evidence for these disorders in addition to the existing behavioral evidence. The addition of physical evidence will support BWS as an excuse defense.

In this paper I will put forth a two pronged argument. First, I will argue that BWS has been incorrectly used as a justification defense to murder. Instead, BWS should be considered an excuse defense to murder. Second, I will argue that one way to create a

BWS excuse defense is to name the syndrome in the DSM-VI as a sub-category of PTSD. The neuro-correlates of BWS are discoverable and should be used to support naming BWS in the next version of the DSM and to aid in the development of a successful excuse defense. I will also consider feminist objections to this view.

## II. BWS: Justification or Excuse Defense?

Justification and excuse defenses are similar because both defenses relieve the actor of liability. The defenses reduce liability because they preclude satisfaction of the basic elements of a crime (Greenawalt 1986: 87). In other words, the defenses show that the actor did not act in a way that meets the description of the crime in question. For example, in the United States first-degree murder is defined as ‘unlawful killing of a human being with malice aforethought... perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed’ (18 USC § 1111). A justification defense would preclude the satisfaction of the basic elements of first-degree murder because it would show that the action was reasonable and warranted, instead of malicious.

Self-defense is a possible reason for killing another person. If Bob is at the bar drinking with his buddies and a man attempts to stab him to death, Bob is justified if he pulls out his knife, fights back, and ultimately stabs his attacker to death. Bob killed a human being. However, the only reason that Bob carried out the action was because his life was initially threatened. So, self-defense is a justified reason to kill another human being.

Unlike a justification defense, an excuse defense would preclude the satisfaction of the basic elements of first-degree murder because the actor is not fully responsible for



the unlawful action. Insanity is a possible excuse defense. If Jim shoots and kills his neighbor because a low-flying helicopter triggers a PTSD response that he developed while fighting in Iraq, Jim could be legally excused from the crime. Jim's action of killing his neighbor was voluntary, but it is clear that Jim suffers from a mental illness that distorts his view of reality. For this reason, Jim is not fully responsible for his action.

Justification and excuse defenses are similar because they both preclude the basic elements of a crime, but there are several important differences between justification and excuse defenses. One difference is how the defenses relate to the rights of others in relation to the action. A justified actor may be aided by others but not prevented by others (Greenawalt 1986:89). So, if Bob attempts to successfully defeat his attacker, the violent bar patron, his friends would be justified if they came to his aid and attempted to restrain the attacker. However, they would not be justified if they took Bob's knife away, or prevented him from protecting himself against the attacker in some other way. Inversely, an excused actor may be prevented from acting by others but not aided by others (Greenawalt 1986:89). If Wendy finds out that Jim intends to kill his neighbor because he thinks that his neighbor is an enemy combatant, she would be justified if she took action to stop Jim's plan. Wendy would not be justified if she agreed to help Jim carry out his plan.

Another difference between justification and excuse defenses is how the defenses can be applied to fellow individuals in a society. Justification defenses can be applied to anyone in a specific situation (Greenawalt 1986:89). If Sarah had been attacked at the bar instead of Bob, Sarah would be justified if she acted in the same way that Bob did. It is acceptable for anyone to act in self-defense with the appropriate force. However, excuse

defenses are tailored to individual actors (Greenawalt 1986:89). If Wendy decided to kill her neighbor and later claimed that she did it because she believed that her neighbor was an enemy combatant working in connection with a low-flying helicopter, she would not be excused because (unlike Jim) she does not have the history of fighting in Iraq and developing PTSD, or similar suffering from similar delusions.

Greenawalt believes that we will undoubtedly encounter complications when trying to make clear distinctions between justification and excuse defenses (Greenawalt 1986: 87). For example, the DSM-V criteria for PTSD states that the traumatic event in question must be beyond the range of usual human experience and the traumatic event must generate distress in virtually anyone exposed to it. One might argue that these components of the PTSD diagnosis make PTSD a justification defense because it is a normal response to an abnormal situation. The development of PTSD does not just pertain to an individual; PTSD is a condition that may be developed by anyone who undergoes a traumatic event. The development of PTSD may be generalized, but the actions of someone who suffers from PTSD cannot be generalized. For this reason, PTSD is better used as an excuse defense. A basic understanding of differences between the two defenses is helpful as we attempt to move BWS out of the justification defense category and into the excuse defense realm.

Historically, BWS has been used to support the justification defense of self-defense in murder cases where the victim kills her abuser. BWS was successfully used as a justification defense in *Stewart v. State* (1988). Peggy Stewart was a victim of long-term abuse who shot and killed her husband while he was sleeping. She plead not guilty, claiming that she killed her husband in self-defense. Upon hearing expert testimony about

BWS, the jury found Stewart not guilty. However, the decision was appealed. The Supreme Court of Kansas ruled that BWS 'in and of itself does not operate as a defense to murder.' The Court did not believe that Stewart's situation met the five criteria for self-defense. She was not in the presence of imminent danger because she shot her husband while he was sleeping. It does not seem as though she acted reasonably. In this situation, Stewart was the aggressor. She also used excessive force because her husband was neither armed nor conscious. Finally, the Court believed that Stewart had the opportunity to retreat safely. The killing carried out by Stewart may have been morally justified because she committed the crime to escape abuse. However, the situation is different from a legal self-defense case because the abuse that she attempted to escape was future abuse, not imminent abuse. Other states followed the lead of the Supreme Court of Kansas.

Now, BWS cannot be used as a defense to murder in and of itself, but BWS is accepted as supporting evidence for self-defense in every jurisdiction of the United States (Savage 2006: 764). Expert testimony on BWS may be admitted into evidence in murder cases for three different purposes. First, it may be offered to support the defendant's credibility by assisting the jury in analyzing the defendant's claim of self-defense (Savage 2006: 764). The behavior of a battered woman may seem counterintuitive to lay people. Someone might assume that if a woman were abused she would leave her abuser to protect herself. However, it is clear that in most cases battered women are safer when living with the batterer than they would be if they attempted to escape. Signs that the relationship is ending often trigger a batterer's use of deadly violence (Walker 2009: 350). Second, it may be offered to prove that the defendant honestly believed that she

needed to defend herself against imminent or grave bodily injury (Savage 2006: 764). As the cycle of violence repeats itself, the severity of violence escalates (Walker 2009: 104). Expert testimony helps explain how victims are able to accurately anticipate deadly violence and subsequently feel the need to defend themselves. The last purpose for offering expert testimony is to show that the defendant's behavior was reasonable (Savage 2006: 764). The definition of 'reasonable' has been an area of disagreement among philosophers and legal scholars. What seems reasonable to one group of people may seem unreasonable to another due to social differences. For example, a person who has not been exposed to domestic violence may not understand the difficulty of breaking the cycle of violence. They may think that killing an abuser when there is no imminent threat to one's life is unreasonable because killing is a more severe crime than abuse. However, killing an abuser may seem reasonable to someone who understands BWS and the cycle of violence (Walker 2009: 348).

In order for a defense of self-defense to be successfully used the jury must be convinced that the victim meets all five criteria for self-defense. Expert testimony might help to persuade the jury into believing that the victim meets some of these criteria, but it is difficult to show that she meets all of the criteria. Reasonableness is perhaps the biggest hurdle for a BWS sufferer to overcome when attempting to use the defense of self-defense. The action is clearly unreasonable when background information about the abusive relationship is not considered. The scenario of Bob the justified killer is different from the situation of a victim of BWS who kills her abuser. It is difficult to convince a jury that the battered woman was not the aggressor if she killed the abuser while he was

in a vulnerable position. The actions of a woman who suffers from BWS do not fit cleanly into the criteria for the defense of self-defense.

For these reasons, I do not believe that a justification defense is the best approach to protecting victims of domestic violence who kill. One might argue that the best way to resolve this problem is to amend the defense of self-defense to fix problems surrounding reasonableness and include responses to prolonged abuse as a form of self-defense. As I will argue below, this approach would not acknowledge the role that the psychological condition of the victim plays in her decision to murder her abuser.

### III. Recognizing BWS as a Genuine Psychological Condition

Walker has spent most of her career collecting empirical support for BWS. Her most recent study began in 2003. The study consisted of administering a revised version of the Battered Woman Syndrome Questionnaire. The BWSQ #2 was developed to eliminate variables in the BWSQ #1 that did not accurately discriminate those with BWS. Standardized tests and other assessment instruments are included in the BWSQ #2 (Walker 2009: 51). One of the assessments in the BWSQ #2 determines whether or not women report symptoms included in the diagnostic criteria for PTSD. The BWSQ #2 was administered in the United States, Greece, Russia, and Spain. (Walker 2009: 52). Walker does not believe that every abused woman will develop BWS. She also does not believe that every abused woman will develop PTSD. However, each of the four cross-national groups of women that were studied scored above the required criteria for diagnosis of PTSD (Walker 2009: 57). The results and analysis of Walker's BSWQ #2 is the first empirical evidence to support the link between BWS and PTSD.

Similar to BWS, PTSD was not initially accepted as a genuine mental condition. Commentators disagree about the first time that PTSD was observed in trauma survivors. Some claim that the first modern descriptions of PTSD were offered during the period of the Russo-Japanese War (1904-1905) (Merskey & Piper 2007). In this war, high-explosive shells were used for the first time. Reports of those who survived the war describe a condition called ‘traumatic war neurosis.’ Traumatic war neurosis was characterized by confused states of mind, brief excitement and irritability, fearfulness, and general emotional instability (Botallico and Bruni 2012: 113). Traumatic war neurosis was later observed in veterans of the First and Second World Wars. Folk psychological terms like ‘shell shock’ and claims that a man had ‘lost his nerve’ were used to describe veterans who exhibited traumatic war neurosis (Botallico and Bruni 2007: 113).

Despite accounts of PTSD from as early as the turn of the 20<sup>th</sup> Century, PTSD did not become recognized as an independent disease until after the Vietnam War. Vietnam veterans lobbied the DSM task force to include PTSD as a disease in DSM-III (Burgess et al. 2010). The veterans were successful and PTSD was included in DSM-III. Upon its recognition as an independent disease, it became clear that PTSD was present in the general population. DSM-IV broadened the definition of PTSD to include more traumatic stressors. DSM-IV lists the core features of PTSD as (1) a traumatic event that involved actual or threatened death or serious injury, or threat to the physical integrity of self and others, resulting in a person’s responding with fear, feelings of helplessness, or horror; (2) the re-experiencing of the trauma in nightmares, intrusive thoughts (flashbacks), (3)

the numbing of responsiveness, or avoidance of thoughts or acts related to the trauma, (4) symptoms of dysphoria and hyperarousal (DSM-IV).<sup>1</sup>

The method for assessing PTSD in DSM-IV is behavioral. However, neuroscientists are successfully building tests to distinguish actual PTSD patients from non-patients using neuroimaging techniques. Neuroimaging uses three main techniques – functional Magnetic Resonance Imaging (fMRI), Positron Emission Tomography (PET), and Single Photon Emission Computed Tomography (SPECT) (Fancati, Vermetten, & Bremner 2007). All three techniques measure signals that are related to variations in regional Cerebral Blood Flow (rCBF). Basically, when a specific region of the brain is more active than a baseline, the region consumes more energy. More energy requires more blood. The correlation between rCBF and brain activity, or the firing of action potentials, is not perfect, but the correlation is strong enough to draw conclusions about brain activity (Logothetis 2008). The fMRI is widely available in hospitals because the scanner is the same machine used for conventional structural MRIs. Also, the fMRI does not require contact with radiation and it is non-invasive (Botallico and Bruni 2012: 113). For these reasons, the fMRI has become the leading neuroimaging technique in recent years.

The use of fMRIs has aided researchers in their attempts to find physical evidence to support behavioral evidence for PTSD. Recently, progress has been made toward

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<sup>1</sup> The DSM-5 is due for publication in May 2013. There have been several proposed changes for the diagnosis and criteria of PTSD. The symptoms of PTSD will remain the same for the most part. The diagnosis of PTSD may be moved from the category of anxiety disorders to a new class of ‘trauma and stressor-related disorders.’ The assessment measures for PTSD are also being revised (U.S. Department of Veteran’s Affairs 2012).

discovering physical evidence. Neuroscientists have found that in patients with PTSD the rCBF in the Medial Prefrontal Cortex (MPFC) is significantly lower relative to healthy patients (Liberzon & Sripada 2008). This finding is significant because the MPFC and amygdala systematically work together to regulate fear. The process used to regulate fear is top-down. The amygdala recognizes dangerous stimuli and the MPFC, specifically the Anterior Cingulate Cortex (ACC), stops the fear response when the threatening situation has passed, or is no longer frightening. In addition to differences in the way that the MPFC operates in PTSD patients and healthy patients, neuroscientists have found differences in the activity of the amygdala. The rCBF in the amygdala of PTSD patients is greater in PTSD patients relative to healthy patients (Shin 2004). The main conclusion that has been drawn from recent fMRI research is that PTSD symptoms are the result of loss of regulation of the amygdala-MPFC system (Bottalico and Bruni 2012: 114).

Unfortunately, this theory of PTSD may have some problems. Van Wingen and his colleagues have found that the heightened amygdala response that has been linked with PTSD is not specific to this disease. A similar result was produced in healthy subjects who underwent severe and repeated stress (Van Wingen et al. 2011). This finding shows that it is somewhat easy for the amygdala-MPFC system to be affected by exposure to stress. However, some have argued that this observation supports the hypothesis that PTSD patients experience continual stress due to their inability to regulate fear responses (Botallico and Bruni 2012: 114).

In addition to empirical support put forth by fMRI studies, a new neuroimaging technique has been used in the search for a physical explanation of PTSD. Georgopoulos and his colleagues developed a technique that measures Synchronous Neural Interactions



(SNI). They believe that SNI can successfully reveal biomarkers for several different pathologies. SNI attempts to track ‘synchronization patterns across the cortex, examining how different neuronal ensembles modulate their activity over time as well as relative to other ensembles’ (Botallico & Bruni 2012: 115, Georgopoulos et al. 2007). So, SNI examines the way that different neural networks work together.

Georgopoulos and his colleagues were able to use SNI and a sophisticated statistical procedure to create predictors that successfully classified PTSD patients and healthy controls with an accuracy of 97.3% and a specificity of 87.6% (Georgopoulos et al. 2010). They found that differences in synchronous activity between veterans who suffered from PTSD and healthy patients were localized in the right temporal cortex. Georgopoulos and his colleagues believe that flashbacks and continual re-experiencing of the traumatic memory associated with PTSD are connected to this marker. Georgopoulos claims that more work need to be done to develop a clear picture of what is going on in the brain of an individual who suffers from PTSD (Georgopoulos et al. 2010). Specifically, studies need to be conducted on other PTSD groups such as non-veteran adults and children.

I believe that battered women should be considered a PTSD group that is eligible to participate in SNI studies. Neuroscientific studies of this kind have not yet been conducted on those who meet Walker’s BWS criteria. If battered women exhibit the same SNI marker as veterans who suffer from PTSD, this data would support Walker’s theory that BWS is a sub-category of PTSD. With neuroscientific evidence, I believe that it would be easier to make the case that BWS should be named as a sub-category of PTSD in the next version of the DSM. Battered women would greatly benefit from the

recognition of BWS as a genuine psychological condition. Among other things, this recognition would aid in introducing BWS as an excuse defense.

There is empirical evidence to support the notion that introducing BWS as a subcategory of PTSD will successfully help victims of domestic violence to formulate an excuse defense. Cheryl Terrance and Kimberly Matheson conducted an experiment in which they attempted to determine whether or not the inclusion of PTSD expert testimony would make a woman who suffered from BWS more likely to successfully use the defense of self-defense. In order for a defense of self-defense to be successful, the jury has to believe that the victim acted reasonably. Terrance and Matheson aimed to figure out whether or not inclusion of PTSD evidence would make the victim appear more or less reasonable. First year undergraduate psychology majors (143 males and 173 females) volunteered to participate in the study in return for course credit. Juries consisted of 4 to 8 jurors and included at least one juror of the opposite sex. The experimental juries were shown one of three different videotaped cases. In one group of cases BWS expert testimony was put forth to support a defense of self-defense. In another group of cases BWS expert testimony framed within PTSD was presented to support a defense of self-defense. The last group of cases was the control group; no BWS expert testimony was presented (Terrance and Matheson 2003).

The juries' reaction to the videotaped cases showed that expert testimony that framed BWS within PTSD lead the jurors to feel more sympathetic toward the victim who had murdered her abuser. The jurors believed that the BWS/PTSD formulation of the defense represented a more valid psychological diagnosis than the jurors who were only given BWS evidence. Terrance and Matheson believe that an 'aura of scientific

objectivity' may have been afforded to the PTSD evidence due to its inclusion in the DSM-IV. Also, the jurors who were given the BWS/PTSD evidence were more likely to believe that the circumstances that the woman on trial experienced resulted in her becoming insane (Terrance and Matheson 2003). Therefore, the PTSD evidence increased the juries' awareness of the extent to which the battered woman developed an actual psychological disorder.

Although there was a difference in the way that the BWS/PTSD juries and the BWS juries viewed the battered woman on trial, the verdicts for both cases came back the same. The juries' verdicts were overwhelmingly guilty. The BWS and BWS/PTSD juries were not persuaded to view the actions of the battered woman as justified from the perspective of a 'reasonable person.' Terrance and Matheson conclude that PTSD evidence may be more useful to support an insanity plea (Terrance and Matheson 2003).

Examination of case law reveals that PTSD has had mixed results when used as a criminal defense (*State v. Heads* (1981); *People v. Wood* (1982); *State v. Gregory* (1979); *New Jersey v. Cocuzza* (1981)). However, courts often treat expert testimony on PTSD as scientifically reliable. PTSD is accepted in the United States appellate courts as a valid basis for the excuse defenses of insanity and unconsciousness. I believe that the insanity defense is the only excuse defense available to a battered woman who kills. Depending on the jurisdiction, the M'Naghten test or ALI test may be used.

I believe that if the M'Naghten test is used, one could argue that the BWS victim could not distinguish right from wrong when she killed her abusive intimate partner. The cycle of violence and learned helplessness support this argument by showing that a victim of long-term abuse loses the ability to accurately predict the outcome of her

actions. If the ALI test is used, it could be argued that the BWS victim could not conform her conduct to the requirements of the law. The cycle of violence and learned helplessness support this argument by showing that the victim genuinely believed that killing her partner was the only way to escape abuse. The possible legal consequences of the action did not prevent her from carrying out the action.

The unconsciousness defense is based upon the requirement that a criminal act must be involuntary. Basically, the law states that an individual who commits a crime while unconscious cannot be said to have voluntarily committed the act (Burgess 2003: 71). Currently accepted involuntary acts include 'reflexes, convulsions, movements during sleep, conduct under hypnosis, and a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual' (Model Penal Code § 2.01 1962). The actions of a battered woman who kills do not fit into any of the categories of currently accepted involuntary acts. I do not believe BWS will ever be included as an unconscious defense because the women in BWS cases are clearly conscious. Perhaps a BWS sufferer who killed her abuser while sleepwalking could successfully use an unconscious defense. However, in this hypothetical example, sleepwalking has become the disorder in question, not BWS.

The expert testimony available to those who suffer from BWS is better suited for an excuse defense. An excuse defense to murder for those with BWS would be supported by expert testimony on the connection between PTSD and BWS along with neuro-evidence indicating that long-term abuse physically alters the way that the brain of a BWS victim functions.

#### IV. Feminist Objections

Following the civil rights movement in the 1970's, women began to demand equality under the law in the United States. Early feminist legal approaches adopted an Aristotelian view of equality to argue for a gender-neutral legal system (Mackinnon 1991: 1286). Simply put, the Aristotelian notion of equality states that things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness (*Nicomachean Ethics* 1131a-b). So, early feminists argued that equality meant applying laws that were traditionally only applied to men to women as well. Inequality meant not applying laws in a uniform manner. Special legal protections for women were to be avoided. Pregnancy, insurance, women's schools, women's prisons, and other issues that brought to light important differences between the sexes were treated as rare exceptions that could be handled using some other rubric (Mackinnon 1991: 1287). Feminists who subscribe to this early approach to achieving legal equality will certainly take issue with the BWS project that I have outlined because it attempts to establish a female-specific mental disorder and accompanying female-specific legal defense.

Although early feminists may object to recognizing BWS as a female-specific mental condition and legal defense, I believe that there are other formulations of feminism that might support this project. Catherine Mackinnon is a contemporary feminist who has challenged the Aristotelian rationale used by early feminists. She claims that the major mistake of this approach is its failure to recognize the content of equality, or the way that the standard of equality is created. She writes,

Why should anyone have to be like white men to get what they have, given that white men do not have to be like anyone except each other to have it? Since men have defined women as different to the extent they are female, can women be

entitled to equal treatment only to the extent they are not women? (Mackinnon 1991: 1287).

Mackinnon believes that when the early feminist approach is closely considered, it becomes clear that it harms women more than it helps them because it requires them to conform to the characteristics of white men. Mackinnon believes that instead of creating equality, this practice robs women of their female identity. She also points out that it is absurd to use Aristotle's theory as a basis for equality as Aristotle lived in a slave society that did not afford any rights to women (Mackinnon 1991: 1287). Mackinnon argues that there are important differences between men and women and these differences can be acknowledged without hindering equality. Mackinnon's feminist theory represents one way that the view that I have put forth can work to promote equality while still recognizing differences between men and women.<sup>2</sup>

#### V. Conclusion

BWS has historically been used as a justification defense for sufferers of long-term abuse who subsequently murder their abusers. Currently, BWS is not allowed to serve as a defense to murder in and of itself. Instead, it is allowed to serve as supporting evidence for a justification defense. I believe that BWS is better suited to be used as an excuse defense. Walker has shown that those who suffer from BWS also exhibit the symptoms of PTSD and PTSD is commonly used as an excuse defense to murder. I believe that inclusion of BWS in the DSM and admission of neuro-evidence to show that the female

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<sup>2</sup> I am open to the possibility that men who are victims of long-term domestic violence may develop BWS. However, cases of domestic violence that involve male victimization are rarely reported. The lack of data on male victimization is a major obstacle when attempting to determine whether or not men and women respond to domestic violence in the same way.

victim's brain has been physically altered due to repeated abuse will aid in creating a successful excuse defense for BWS victims who kill their abusers.

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