PARRICIDE, PTSD, AND PRO-CARCERAL MORALITY:

WHILE COURTS STILL REJECT BATTERED CHILD SYNDROME TESTIMONY

AND PROPOSED STEPS TOWARDS CHANGE

by

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Introduction

After defending a murderer-millionaire and a bomber-soccer mom, *How to Get Away with Murder*'s fictional law firm takes a very different type of client—a teenage boy named Ryan who, after witnessing years of violence against his mother at the hands of his police officer father, shoots him and is charged with murder.[1] The defenders wants to argue self-defense, clearing the hurdles of evidence exclusion and a biased juror to do so.[2] The episode's climax comes during Ryan's mother's testimony, where the cross-examiner gets her to admit that she did not have a gun aimed at her head when Ryan killed his father because Ryan was already holding his father's weapon—completely crumbling the existence of an imminent threat.[3]

Despite the show's frequently outlandish depiction of the criminal process, this moment feels eerily accurate. The episode has already shown how Ryan and his mother have been altered by the abuse and the killing.[4] Ryan, just a teen, has memorized his father's drinking patterns and the responses of his father's cop coworkers: "calling them was only gonna make him come down harder on her later."[5] His mother agrees, describing how her husband would threaten to kill her, taunting that he would get away with it because of his job; she testifies that her son's actions were the only way she could survive.[6] Yet all of this—the family's constant feelings of anxiety, fear, and helplessness—are obscured completely by the fact that the abuser was not armed, and therefore could not have been a reasonably imminent threat.[7]

The commentary on the case throughout the episode feels realistic, too. There's a law intern who feels so strongly that Ryan should be acquitted, she risks her career to contact the jury about nullification.[8] Meanwhile, another intern cannot understand her sympathy, repeatedly referring to Ryan just as "the guy who shot his dad in the back" and "psycho boy."[9] The police department rallies behind their colleague, blasting the media with the narrative that the upstanding officer loved his wife and the law.[10] Yet in the end, the firm wins not because of a verdict, but because after hearing about the abuse, the jury of public opinion rallies behind Ryan, causing the prosecutor to drop the case against him.[11]

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[1] *How to Get Away with Murder: We're Not Friends* (ABC television broadcast Oct. 23, 2014).
[2] *Id.*
[3] *Id.* at 00:26:07-00:26:32.
[4] *Id.*
[5] *How to Get Away with Murder*, *supra* note 1, at 00:06:27.
[6] *Id.* at 00:25:30, 00:25:41-00:25:57.
[7] *Id.* at 00:26:07-00:26:32.
[8] *Id.*
[9] *Id.* at 00:09:51, 00:29:00.
[10] *Id.* at 00:07:36, 00:21:52-00:22:19.
[11] *Id.* at 00:32:00-00:32:30.

Broadly speaking, this episode exemplifies both the courts' and the public's fraught attitude towards abused children who fight back. Despite growing sociopolitical recognition of the problem of domestic violence in general, and child abuse specifically, parricides—children who kill their parents—still face enormous stigma. Such stigma shapes their experience in the criminal courtroom in profound ways that compromise the right to present an adequate defense and lead to lengthy incarcerations of society's most vulnerable youth.

This paper deals with one such courtroom phenomena: the treatment of expert testimony on Battered Child Syndrome (BCS) to support self-defense claims of parricides. BCS, a group of physiological and psychological symptoms describing common side effects of child abuse, is frequently used in prosecutions for child abuse, as well as family court matters.[12] Additionally, testimony on BCS's companion syndrome, Battered Women's Syndrome[13] (BWS), is readily accepted in criminal cases where a battered woman kills her abuser and seeks to make a self-defense claim.[14] Yet strangely, BCS has not enjoyed such widespread acceptance when battered parricides seek to admit testimony in support of their self-defense claims; currently, only four state high courts have explicitly found BCS testimony as admissible in these circumstances.[15] Even more strangely, most courts and commentators seem to consider the matter settled, with little cases or scholarship advocating for BCS testimony past the early 2000s.[16] This paper seeks to understand why.

Part I explores the past, examining the respective histories of self-defense law, BWS, and BCS, and identifying how these histories have contributed to the exclusion of BCS testimony in self-defense cases. It posits a few key phenomena—namely, the medical history of BCS, the pro-carceral strategies of the early battered women's movement, and the cultural perceptions of childhood, parenting, and protective violence—that might have been

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[12] Kristi Baldwin, *Battered Child Syndrome as a Sword and a Shield*, 29 AM. J. CRIM. L. 59, 61 (2001) (explaining that "the offensive view" of battered child syndrome finds "wide acceptance while the defensive view finds sharp resistance").

[13] As will be discussed later in the paper, many domestic violence advocates have criticized the term "Battered Women Syndrome," advocating that "the effects of battering" is more accurate phrasing. While their criticisms are quite persuasive, the courts have not adopted their language usage. Therefore, this paper utilizes "Battered Women Syndrome" to remain consistent with courts' own evidentiary terms.

[14] Lauren E. Goldman, *Nonconfrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuse*, 45 CASE W. RES. L. REV. 185, 188-89 (1994) ("abused women have had surprising success in many jurisdictions admitting expert testimony concerning battered woman syndrome to support their claims of self-defense despite the nonconfrontational nature of the killings"). However, many courts continue to misunderstand or misuse battered women's syndrome testimony, even in 2022. *See, e.g.,* Lalchan v. U.S., 282 A.3d 555 (D.C. Ct. App. 2022). *Cf.* Hope Toffel, *Crazy Women, Unharmed Men, and Evil Children: Confronting the Myths About Battered People Who Kill their Abusers and The Argument for Extending Battering Syndrome Self-Defenses to all Victims of Domestic Violence*, 70 SOUTH. CAL. L. REV. 337 (1996) (explaining that many courts rely on gender stereotypes in using battered women's syndrome).

[15] *See* State v. Janes, 850 P.2d 495 (Wash. 1993); State v. Nemeth, 694 N.E.2d 1332 (Ohio 1998); State v. Smullen, 844 A.2d 429 (Md. 2004); State v. MacLennan, 702 N.W.2d 219 (2005).

[16] *But see* Kip Nelson, *The Misuse of Abuse: Restricting Evidence of Battered Child Syndrome*, 75 L. & CONTEMP. PROBS. 187 (2012); Claire Houston, *What Ever Happened to the "Child Maltreatment Revolution"?*, 19 GEO. J. GENDER & L. 1 (2017).

influential on the treatment of BCS testimony, arguing that the cultural perceptions of self-defense and childhood best explains the differential treatment of BCS.

Part II describes the present, reviewing cases that have both accepted and rejected BCS testimony in self-defense cases. It first identifies two key sticking points that have led courts and scholars to reject BCS in self-defense cases: the nonconfrontational nature of most parricide and the relative novelty of the psychological branch of the theory. Next, it explains how courts have come to accept the theory using consistency-based and need-based justifications—noting, however, that these have overcome neither the cultural perceptions of self-defense nor the moral distaste for seemingly non-confrontational parricides.

Finally, Part III looks towards the future, explaining why BCS testimony in self-defense cases must be made admissible both for the sake of evidentiary clarity and to work towards the goals of both the abolition and domestic violence movements. It argues that admitting BCS can protect society's most vulnerable children from incarceration and serve abolitionist goals of disrupting moral narratives around criminality, while also serving domestic violence advocates' goals of shedding light on the systems of abuse. Using the analysis from Parts I and II, Part III provides concrete steps that an emerging political coalition of abolitionists and domestic violence advocates, current defense attorneys, and other branches of government can take to achieve widespread acceptance of BCS testimony in self-defense cases. However, it also notes that mere admission of BCS testimony is not alone sufficient, arguing for the importance of deconstructing cultural notions of self-defense and parricide as the true route to just outcomes for abused children-defendants.

Part I.
The Past: A History of Self Defense, Battered Women's Syndrome, and Battered Child Syndrome

In order to understand the differential treatment of BCS—both why it is handled differently from BWS and why it is handled differently in non-prosecution contexts—we must begin with understanding the legal and cultural histories of self-defense law, BWS, and BCS.

A. Self Defense Law

Self-defense is an affirmative defense that, when proven, justifies the commission of an otherwise criminal act. Although the specific elements of a self-defense claim vary from state-to-state, a successful self-defense

argument generally requires the defendant to prove that they had an honest, reasonable belief that severe unlawful force was near—not just eventual—and so using force in response was necessary to prevent harm.[17] In brief, this breaks down to seven elements: 1) the defendant's subjective fear; 2) that the fear was objective or reasonable; 3) that the victim's use of force was unlawful; 4) that the defendant was in imminent or immediate danger;; 5) that self-defense was necessary; 6) that the protective force was proportional to the unlawful force; and 7) that there was not duty to nor possibility of retreat.

As these elements suggest, self-defense law envisions a particular user of protective force acting in a particular circumstance. As one scholar puts it, under "the traditional self-defense standard…the defendant must show evidence that a reasonable *adult male* would have believed he faced an *immediate*, and not merely *imminent*, threat of violence."[18] The self-defense standard envisions violence committed by a stranger, like encountering a violent mugger on the street or a burglar in one's home.[19] These circumstances are spontaneous, obviously demanding violence, and assume a level of physical strength to overcome the perpetrator, which typically only men, rather than women or children, would possess.[20]

Given this cultural backdrop, it is no surprise that certain elements prove tricky when battered persons kill their abusers and raise a self-defense claim.[21] First, given their long history with an abuser, abused defendants often act in response to subtle, individualized cues that indicate threats; thus, their fear might not look genuine or reasonable to an outsider.[22] Second, many abused defendants fight back in circumstances that appear non-confrontational, presenting difficulties in showing the immediacy or imminence of the threat, or the necessity and/or proportionality of their actions.[23] More challenges arise where abuse is unreported, sparking skepticism about whether it occurred at all.[24] Finally, many abused defendants have remained in their violent relationships for many

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[17] *Accord* Goldman, *supra* note 14, at 187-88.
[18] Robert Hegadorn, *Clemency: Doing Justice to Incarcerated Battered Children*, 55 J. M. B. 70, 73 (1999) (emphasis added).
[19] John Nelson Scobey, *Self-Defense Parricide: Expert Psychiatric Testimony on the Battered Child Syndrome*, 13 HAMLINE J. PUB. L. & POL'Y 181 (1992).
[20] *See* Catherine S. Ryan, *Battered Children Who Kill: Developing an Appropriate Legal Response*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 301, 308 (1996) ("traditional self-defense theories presuppose that two adult males are involved in the conflict").
[21] Scobey, *supra* note 19, at 181 ("What about the sexually abused teenaged girl who shoots her father in the back after an argument? What about the terrorized and battered son who ambushes and kills his unsuspecting father? In such cases, traditional views of self-defense, with their built-in requirements, typically preclude defendants from successfully raising the argument").
[22] *Id.* at 182 ("courts must approach child abuse parricide cases subjectively and recognize the child's heightened sense of fear, and that it is based on their ability to predict their abuser's behavior [so that] the reasonableness of the defendant's actions can be judged fairly"); Joëlle Anne Moreno, *Killing Daddy: Developing a Self-Defense Strategy for the Abused Child*, 137 U. PA. L. REV. 1281, 1286 (1989) ("battered children and women perceive, more acutely than strangers, the imminence and degree of danger at the hand of their abusers").
[23] Scobey, *supra* note 19, at 182 ("child abuse victims learn how to tell when their parents are going to hurt them, and […] are afraid even in the absence of a confrontation"). Nevertheless, many courts have implied that nonconfrontational killings can never satisfy the imminence or immediacy elements of self-defense. *See, e.g.,* Jahnke v. State, 682 P.2d 991, 997 (Wy. 1984); Whipple v. State, 523 N.E.2d 1363, 1367 (Ind. 1998).
[24] Nelson, *supra* note 16, at 201.

years, sparking the question "why didn't you leave?", undermining the necessity or duty to retreat elements.[25] The problems merely compound the issues that self-defense defendants face when working to meet an intentionally narrow standard.[26]

However, at least some of the unique problems facing abused defendants may be overcome by presenting expert testimony on the effects of battering. Two such "syndromes" describing these effects—BWS and BCS—are described below.

B. Battered Women's Syndrome (BWS)

Coined by psychologist and battered women's advocate Lenore Walker, BWS is a term that refers to the common psychological experiences of women who experience domestic abuse.[27] Writing in response to theories which posited that women were predisposed to remain in violent relationships due to a masochistic or provocateur pathology, Walker argued that a battered woman's psyche was *shaped* by abuse, thus entrapping them in violent relationships.[28] She identified a cycle of violence comprising three stages: tension building, an acute battering incident, and loving contrition.[29] Repeated endurances of this cycle result in psychological effects, most notably learned helplessness and general feelings of anxiety, depression, and/or fear.[30]

Learned helplessness refers to a feeling of powerlessness, in which abused individuals come to doubt their ability to achieve their goals or change their situation.[31] The theory was first documented by Martin Seligman, who studied the response of dogs to adverse situations; he found that when dogs repeatedly attempted to escape their chambers but were met with electric shocks, they eventually stopped trying to escape.[32] He posited that repeated thwarting leads to a depressive feeling of a lack of control.[33] Walker extended this theory to the experiences of battered women, arguing that the abuser's repeated attacks on their victims' self-autonomy—through physical or sexual assaults, controlling behavior, or demeaning insults—coupled with failed past attempts to leave the abuser (or threats that leaving would fail) caused abused women to feel powerless to end the relationship.[34] Thus, for Walker,

[25] *See, e.g.,* Nemeth, 694 N.E.2d at 1337 (describing the prosecution's argument that the defendant could not meet the standard of self-defense, because he "could have left the house again" or "gone to his father or grandparents" to report the abuse by his mother).
[26] Ryan, *supra* note 20, at 301 ("traditionally, self-defense arguments have been narrowly limited in their scope and application").
[27] Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, *in* DOMESTIC VIOLENCE LAW 38, 43 (Nancy K. Lemon ed., 5th ed. 2008).
[28] *Id.*
[29] *Id.* at 45.
[30] Houston, *supra* note 27, at 44.
[31] *Id.*
[32] Martin E.P. Seligman, *Learned Helplessness*, 23 ANNUAL REV. MED. 407 (1972).
[33] *Id.*
[34] Houston, *supra* note 27.

the phenomena of learned helplessness, together with the cyclical nature of violence, explained why battered women do not leave abusive situations.[35]

When Walker first published her theory, it was widely embraced by the battered women's movement.[36] The movement had long struggled to explain why abused women stayed with their abusers.[37] Early misconceptions blamed domestic abuse on the female pathology, arguing that some women provoked abuse or enjoyed abuse; other sociologists blamed the problem on familial dysfunction; and still others took a systemic view, blaming domestic violence on patriarchy—especially within the institution of marriage—and poverty.[38] This third view, while true in many respects, fails insofar as it absolves the abuser of responsibility for the abuse. Meanwhile, the first two theories both absolve the abuser *and* blame the victim for the violence—theory that feminist battered women's advocates (rightly) found intolerable. Walker's theory of BWS and learned helplessness, then, offered an appealing alternative by providing a non-accusatory explanation for the victim's failure to leave, while also blaming the abuser for causing such a psychological response. As a result, the early battered women's movement embraced Walker's theory as well as her ultimate conclusion that only separation could stop abuse, leading to many of the mandatory criminalization policies in effect today.[39]

However, many feminist domestic violence advocates and scholars now criticize BWS as pathologizing and overly unifying. While BWS was proposed as a means to combat victim pathologies, the fact that it is termed a "syndrome" falsely communicates some type of psychological diagnosis—inherently otherizing to battered women, given this country's continued stigma around mental health.[40] Additionally, though BWS is properly understood as a catch-all term for common effects of battering, too often it is used to say that *all* women who survive abuse experience *all* the listed symptoms.[41] As such, BWS runs the risk of oversimplifying the individualized experience of abuse, which has particularly glaring consequences when "bad" or "abnormal" victims seek services and are not believed.[42] Finally, some advocates also criticize the fundamental inference of Walker's initial finding—the analogy

[35] *Id.*
[36] *See id.* at 43 (explaining that domestic violence advocates were searching for a non-victim blaming answer to the reason why women stayed in abusive relationships).
[37] *Id.* (describing the question "why doesn't she leave" and the domestic violence advocate's "bugaboo").
[38] Houston, *supra* note 27, at 39-43.
[39] *Id.* at 46-47.
[40] Toffel, *supra* note 14, at 369-70 ("instead of focusing on the reasonableness of a battered woman's actions, BWS has instead become synonymous with psychological trauma or disorder" thus making battered women's self-defense claims "fearfully close to an insanity or impaired mental state defense").
[41] *Id.*at 370 ("the legal system […] has created the fiction that only women who suffer distinct psychological symptoms of post-traumatic stress disorder, as outlined in the Diagnostic and Statistical Manual of Mental Disorders, have BWS").
[42] Toffel, *supra* note 14, at 370-372 (describing the differential outcomes with Black, poor, or lesbian women attempt to raise a self-defense claim using BWS).

of human women to the dogs in Seligman's early learned helplessness study—as both morally demeaning and methodologically flawed.[43] As a result of these criticisms, many scholars and advocates have proposed alternatives to BWS, including the coercive control model and the survivor hypothesis.[44]

Despite efforts of these skeptical advocates, however, BWS remains reified by the United States legal system, utilized in criminal law, custody disputes, and clemency petitions. In particular, expert testimony on BWS is commonly admitted as part of self-defense claims in cases where a victim kills her abuser. While BWS testimony in self-defense cases has flaws, when properly used, it can also be hugely helpful in multiple ways. First, because many battered women are triggered to kill by seemingly minor, non-dangerous circumstances—for instance, a "look" from their abuser—BWS testimony can help explain why the victim-defendant[45] was subjectively afraid that harm was imminent, and why this fear might have been reasonable given the couple's history and the abuser's typical "tells." Second, when the victim-defendant kills in a nonconfrontational setting, like when the abuser is incapacitated, BWS and learned helplessness can explain why this force was necessary from the victim's perspective; it can also combat the jury's likely question, "why didn't she leave instead of kill him?". BWS testimony can also inform the jury of other structural obstacles to leaving their abusers, like the risk of separation assault.[46] Third, BWS testimony can explain that for a domestic abuse victim, imminence feels prolonged due to the constant state of anxiety. Finally, testimony that a victim-defendant exhibits traits that are common amongst battered women can bolster the credibility of her abuse claims. These are just some of the varied ways that courts have found BWS testimony helpful and proper in self-defense cases.

BWS testimony has gained universal admissibility in self-defense cases, yet other broader "battered persons" syndromes remain barred—including Battered Child Syndrome.

C. Battered Child Syndrome (BCS)

Like BWS, BCS is a catchall term for the common effects that prolonged abuse has on a child. Unlike BWS, however, BCS originated as a physiological term, not a psychological one. The syndrome was first noted in the 1950s by pediatrician C. Henry Kempe, whose study posited common signs that a someone might be abusing a

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[43] *See* Houston, *supra* note 27, at 46.
[44] *See, e.g.,* Toffel, *supra* note 14, at 373-74; Houston, *supra* note 27, at 47.
[45] This paper employs the term "victim-defendant" whenever it discusses a victim of domestic abuse who is facing legal repercussions for killing their abuser, in order to avoid pathologizing them as an immoral criminal while also avoiding confusion between them and the victim of their killing.
[46] Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis, in* DOMESTIC VIOLENCE LAW 13, 20-21 (Nancy K. Lemon ed., 5th ed. 2008) (describing the prevalence of separation assault, particularly homicides, even in abusive relationships that were not previously physically violent).

child.[47] Dr. Kempe and further scholars also noted specific injuries common in battered children, "including severe bruises, multiple fractures, and lesions in different stages of healing."[48] While portions of Dr. Kempe's theory—like the parental characteristics—seem to imply parental blame, BCS only posits *whether* abuse occurred, not *who* the abuser is.[49] Nevertheless, the physical components of BCS are frequently admitted in child abuse and neglect prosecutions, including to infer intent of the accused merely from the diagnosis that physical abuse occurred.[50]

Since its original medical origin, BCS has expanded to include common psychological experiences of children that have suffered abuse.[51] These psychological symptoms are extremely similar to BWS, including the repeated and cyclical nature of abuse; the resulting learned helplessness, leaving children feeling powerless to change their situations; and general feelings of anxiety or depression.[52] BCS theorists also emphasize the phenomena of "hypervigilance," or the child's state of constant increased alertness to their surroundings in order to defend more quickly against dangers.[53] Finally, like BWS, BCS is also recognized as a relative of Post-Traumatic Stress Disorder (PTSD).[54]

Despite the relative novelty of BCS's non-physical components, various scholars have posited that the psychological effects of battering are actually more acute in abused children than abused women.[55] While adult battered women have potentially had life experiences outside of the abuse—such as a healthy childhood, prior non-abusive romantic relationships, or more educational experiences about the danger of domestic abuse and services available to victims—children likely have no such exposure, so may feel that the abuse is normal and thus inescapable.[56] Furthermore, children are extremely dependent on their parents for food; shelter; access to transportation, education, healthcare, and communication sources; and an early social safety net.[57] Many parents (both abusive and non-abusive) also frequently monitor their children's activities, including where they go, whom they contact, and how they use the internet. As such, most children are unaware of services that could help them

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[47] Baldwin, *supra* note 12, at 61-62.
[48] Nelson, *supra* note 16, at 189
[49] Baldwin, *supra* note 12, at 65 ("while the syndrome does prove that the child was intentionally injured, it cannot prove who committed the prior injuries"). *See also* Nelson, *supra* note 16, at 194-95 (criticizing prosecutors for using the medical battered child syndrome "as a convenient description of child abuse as well as the child abuser," which is outside the scope of Kempe's theory).
[50] Baldwin, *supra* note 12; Nelson, *supra* note 16.
[51] Baldwin, *supra* note 12, at 63-64.
[52] *Id.*
[53] *Id.*
[54] *See* Nelson, *supra* note 16, at 200 (describing testimony in the Menendez trial, where a psychiatrist explained BCS through the analogy to PTSD).
[55] *E.g.,* Moreno, *supra* note 22, at 1282; Scobey, *supra* note 19, at 186.
[56] Janes, 850 P.2d at 503 ("unlike the battered adult, a child has no outside context with which to compare the abusive reality").
[57] Such control, aside from being common sense, is also legally enforced. *See* Houston, *supra* note 16, at 5 ("the law continues to structure the parent-child relationship as hierarchical" by giving parents constitutional rights to "care, custody, and control," including "the right to corporally punish their children.")

escape the abuse or are unable to safely access them, thus amplifying feelings of helplessness.[58] Finally, the sheer youthfulness and psychological immaturity of abused children make them especially susceptible to harm from adversities. All these factors likely combine to make the psychological effects of helplessness, anxiety, depression, and hypervigilance even more acute in battered children than in adults.

Yet despite the well-documented psychological devastation of battering on children, few courts are willing to accept such BCS testimony when an abused child seeks to raise a self-defense claim. A few distinctions between BWS and BCS might be responsible for such different treatment, though ultimately only one is persuasive. First, BCS originally developed as a physiological medical symptom, so its psychological components are newer; given that expert testimony is typically evaluated under "general acceptance" or multi-factor "reliability" tests, their relative novelty might weigh against their admission in court.[59] At least one scholar has expressed concern that these psychological outgrowths of Dr. Kempe's original medical theory were developed solely to aid in litigation,[60] which is often a touchstone of unreliability.[61] However, the selective acceptance of BCS in child abuse prosecutions but not self-defense—a trend that has been ongoing since the 1990s—suggests that courts *do* find the evidence reliable and have for some time now.[62] Thus, novelty and reliability cannot fully account for courts' failure to admit BCS testimony in self-defense cases.

Another justification may be the political choices made by the early battered women's movement. Alongside advocating for broad acceptance and usage of BWS, the early movement developed strong pro-prosecution alliances in an effort to get law enforcement and the general public to take domestic violence as a serious criminal matter.[63] As a result, police and prosecutor offices instituted pro-criminalization policies like mandatory arrests and no-drop policies—which are arguably unparalleled by the criminalization of child abuse and maltreatment.[64] Perhaps the widespread acceptance of BWS in self-defense cases can be understand through the lens of political concessions, where the criminal legal system accepted such exculpatory evidence as a compromise for the battered women's movement generally pro-criminal attitude. However, this argument is lacking. First, it ignores

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[58] Scobey, *supra* note 19, at 188-89.
[59] Nelson, *supra* note 16, at 203-207 (arguing that BCS fails these reliability tests because of its departure from Dr. Kempe's original theory and its inability to pass the *Daubert* tests).
[60] *Id.* at 194 (arguing that courts have "morphed Kempe's BCS" exclusively for use in criminal cases).
[61] Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, (1999) (explaining that when evaluating non-scientific evidence, courts should consider whether experts typically use such criteria outside of the context of litigation).
[62] *See, e.g.,* Janes, 850 P.2d at 236 (finding in 1993 that BCS was sufficiently reliable to be admitted).
[63] *See generally* Houston, *supra* note 16.
[64] *Id.*

the increasingly police-like child welfare system, which represents at least some comparable alliances between children's rights advocates and the criminal legal system.[65] Second, it fails to explain courts' early hesitancy to admit BWS evidence, as well as its continued misuse by judges and juries.[66] Finally, it also neglects how deeply American's pro-carceral conviction runs—the way the United States has structured its sense of morality around criminalization, so that the only way to prevent and condemn dangerous or illegal actions is through incarceration.[67] Both BWS and BCS inherently conflict with American's sense of incarceration-oriented morality, because testimony on either syndrome in self-defense may, inherently, result in someone who has killed another avoiding incarceration. Even political bargains and alignments cannot overcome such affronts to America's basic foundation of morality. Thus, the bargaining justification cannot account for the differential treatment between BCS and BWS.

Finally, and most convincingly, our cultural perceptions of child-parent relationships, coupled with the "typical self-defense claim," make parricide more morally reprehensible than an adult woman killing her abusive partner. While an abused woman is also not the "typical self-defender," the fear of parricide is uniquely embedded in Western culture, whether through biblical stories, Greek tragedies, or Shakespearean plays.[68] The fear of a treacherous son killing his father and thus disrupting traditional family and social order is palpable throughout literature and history.[69] Yet at the same time, children are often depicted as perfectly innocent and angelic, incapable of such gruesome violence.[70] These two phenomena—the paranoia of parricide and the romanticizing over-simplification of children—combines to make children who kill their parents, even abusive ones, morally intolerable.[71] Of course, women face similar expectations of submissiveness; however, unlike children, they have the political organizing power to change some of these conceptions—and the acceptance of BWS may be a result of

[65] Collier Meyerson, *For Women of Color, the Child-Welfare System Functions Like the Criminal Justice System*, THE NATION (May 24, 2018), https://www.thenation.com/article/archive/for-women-of-color-the-child-welfare-system-functions-like-the-criminal-justice-system/.
[66] *See, e.g.,* Lalchan v. U.S., 282 A.3d 555 (D.C. Ct. App. 2022).
[67] *See* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) (explaining that criminalization imposes a false morality, because while all individuals commit some kind of moral wrong or even a crime—for instance, speeding—during their lives, not all individuals are punished).
[68] Hegadorn, *supra* note 18, at 70 ("the crime of murdering one's own parents is viewed with special horror in western societies"). *Accord* Ryan, *supra* note 20, at 304-06 (describing the harsh penalties for parricide in earliest legal and religious codes, as well as the moral statement against parricide in *Oedipus Rex*); Reginald M. Parker, *When No One Hears their Cries: Battered Child Syndrome as a Defense State v. Janes*, 19 THURGOOD MARSHALL L. REV. 431, 432 (1994) (describing Shakespeare's works confronting parricide).
[69] *Id.*
[70] *See* Ryan, *supra* note 20, at 308 (noting that a child defendant "comes before the court in the enigmatic form of a violent murderer hidden beneath a façade of youth and innocence").
[71] *Id* at 301 ("one seldom associates childhood with violence, much less murder, but the frightening reality is that children in American society are increasingly both the victim and the perpetrators of violent crime"). *See also,* Goldman, *supra* note 14, at 185-86 ("the specter of an abused child killing his parent evokes a morass of feelings" but "initially there is horror […] and an urge to punish the child who has violated both societal norms and the most sacred prohibition in the criminal law"); Nelson, *supra* note 16, at 201 (accusing parricides of "act[ing] out of personal vengeance rather than self protection" and then fabricating an "abuse excuse").

such changes.[72] Thus, the cultural perception surrounding parricide seems to be more salient than cultural perceptions surrounding gender, making courts less amenable to BCS testimony.

With these hypotheses in mind, the remainder of this paper explores why courts are so hesitant to admit expert testimony on the psychological effects of child abuse and how some courts have overcome these concerns to admit BCS testimony.

Part II.

The Present: The Current State of BCS Testimony in Self-Defense Parricide Cases

At time of this writing, only four state highest courts[73] along with one state appellate court[74] have explicitly recognized that BCS may be admissible in parricide cases, when a child victim-defendant seeks to make a self-defense claim. A handful of other lower courts have accepted some testimony on the psychological effects of battering under the guise of generic PTSD, or have accepted such testimony at the *sentencing* stage, rather than as a defense.[75] The remainder have either explicitly rejected BCS testimony in self-defense cases or have not addressed it at the highest level. This section summarizes the law on both sides of the issue, starting with the leading case and common scholarly arguments against admitting BCS testimony in parricides' self-defense cases.

(a) "The Norm": *Jahnke v. State* and the Exclusion of BCS Testimony

While few state high courts have accepted BCS, none have rejected it more emphatically or famously than Wyoming in *Jahnke v. State*.[76] *Janhke* involved a homicide trial against sixteen-year-old Richard John, who confessed to shooting and killing his father, Richard Chester.[77] Prior to the trial, Richard John had (unsuccessfully) moved for a transfer to juvenile court; at that hearing, he presented evidence that he had "suffered from mental and physical abuse at the hands of his father over a long period of his life," including on the night in question.[78] Before

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[72] *See generally* Houston, *supra* note 16 (articulating a rosy, optimistic view of the feminist movement).
[73] Janes, 850 P.2d; Nemeth, 694 N.E.2d; Smullen, A.2d; MacLennan, 702 N.W.2d.
[74] Appeal in Maricopa County, Juvenile action No. JV-506561, 893 P.2d 60 (Ct. App. Az. Div. 1. 1994). The appellate case will not be discussed further in this paper, due to its limited binding effect within the state and its subsequent lack of widespread discussion by scholars.
[75] *See* State v. Hines, 696 A.2d 780 (N.J. App. Div. 1997) (accepting PTSD testimony); Perryman v. State, 990 P.2d 900 (Ct. Crim. App. Ok. 1999) (accepting PTSD testimony as encompassing battered child syndrome testimony), People v. Cruickshank, 105 A.D.2d 325 (N.Y. App. Div. 1985) (barring the admission of BCS testimony but requiring the victim-defendant be deemed a "youthful offender" as a result of the abuse). *See also* Moreno, *supra* note 22, at 1295-1299 (describing two other cases involving attempt or manslaughter of an abusive parent, where the victim-defendant was allowed to present BCS at either trial or sentencing).
[76] Jahnke, 682 P.2d.
[77] *Id.* at 993.
[78] *Id.* at 994.

going out for dinner with Richard John's mother, Richard Chester had been involved in a "violent altercation" with his son, which culminated in an ominous warning that Richard John should not be at home when he returned.[79] Thus, while his parents were gone, Richard John and his sister prepared numerous weapons throughout the home before setting up post in the garage to wait for Richard Chester's return.[80] When his father arrived home, Richard John shot his father six times, killing him.[81] He was convicted of voluntary manslaughter,[82] though the governor of Wyoming ultimately commuted his sentence after public outcry surrounding his abuse.[83]

In deeming BCS inadmissible in Richard John's case, the court largely focused on the nonconfrontational nature of the killing. While acknowledging that "there is no reason to distinguish a child who is a victim of abuse" from battered women, the court ultimately characterized Richard John's defense as an argument that "one who is a victim of family abuse is justified in killing the abuser" even in nonconfrontational circumstances, a "patent" departure from traditional self-defense law.[84] The court resoundingly rejected the argument that BCS evidence may be admissible to help the jury assess the honest or reasonable belief of imminent danger through the defendant's eyes:

> "it is clear that if such evidence has any role at all it is assisting the jury to evaluate the reasonableness of the defendant's fear *in a case involving the recognized circumstances of self-defense which include a confrontation or conflict with the deceased not of the defendant's instigation.*"[85]

Furthermore, the *Jahnke* court refused to consider any other potential purposes for the BCS evidence, like elucidating Richard John's failure to leave the house in response to his father's threats. Rather, the nonconfrontational nature of the killing settled the matter for the *Jahnke* court.

The concern over nonconfrontational killings by parricides is the most prominent justification for excluding BCS testimony in self-defense cases. One scholar—expressing near hysterical concern that BCS would soon be universally accepted—claimed that "empirical research has shown that the defendants who use BCS as a defense usually use unreasonable force, kill while the victim is in a relaxed position, and act out of personal vengeance rather than self-protection," permitting immature and immoral justifications for atrocious actions.[86] Even more

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[79] *Id.* at 995.
[80] *Id.*
[81] *Id,* at 995-96.
[82] *Id.* at 993-94.
[83] Scobey, *supra* note 19, at 196.
[84] Jahnke, 682 P.2d at 996.
[85] *Id.* at 997 (emphasis added).
[86] Nelson, *supra* note 16, at 201.

measured scholars express concern that "using the battered child syndrome to establish the elements of self-defense in nonconfrontational killings in effects creates a wholly subjective standard of self-defense doctrine," thus advocating that evidence be limited to a partial excuse rather than a complete justification.[87] Other courts seem similarly preoccupied with allowing BCS to justify nonconfrontational killings, even in cases where egregious abuse is shown.[88] Thus, it seems that courts who reject BCS in self-defense cases are unwilling to loosen their cultural notions of a "real" self-defense claim, as well as their own bias that abused parricides are intolerable deviants who deserve incarceration, as posited above.

The *Jahnke* court also briefly mentioned another reason for excluding BCS testimony toward Richard John's defense. First, the trial judge claimed there hadn't been "any evidence of any court's acceptance of the science of the battered child, what can be predicted from the battered child"; while leaving open that BCS may be sufficiently reliable, the *Jahnke* court ultimately concluded that they could not see how the defense's offer of proof met the criteria for admitting expert testimony.[89] Scholars are similarly concerned with the reliability of BCS testimony, particularly its stark departure from Dr. Kempe's original theory that focused on physiological symptoms of abuse.[90] In keeping with the concern that BCS allows morally depraved children an unjust respite from criminal penalties, one scholar argued that "replacing Kempe's BCS with a new version […] takes the focus away from the battered child and onto the battering parent," thus usurping the criminal process.[91]

Nevertheless, despite the concern of most courts and many scholars with the admission of BCS testimony, some courts have changed the tide and admitted the testimony to aid in self-defense claims.

(b) "The Exceptions": Cases Admitting BCS Testimony

Courts may potentially use BCS testimony at two stages in the criminal process: the trial stage as part of a self-defense argument, or at the sentencing stage as part of an argument for leniency. While the former has enjoyed little acceptance by courts, the latter has been better received—though often under the term PTSD, not battered child syndrome.[92] These cases, while encouraging, represent only a small sliver of the potential impact that BCS

[87] Goldman, *supra* note 14, at 186. *See also* Baldwin, *supra* note 12, at 82 (arguing that BCS testimony should be admitted "to mitigate, but not to absolve, a child's guilt").
[88] *E.g.,* State v. Crabtree, 805 P.2d 1, 2-3, 40 ("declin[ing] to adopt a battered child syndrome defense" based on facts that the deceased was a regularly abusive drug addict, but who had not physically abused the victim-defendant in some time prior to his death).
[89] Jahnke, 682 P.2d at 1004, 1007-08.
[90] Nelson, *supra* note 16, at 204 ("a lawyer's extension of BCS, as opposed to Kempe's version, does not lend itself to sufficient testability, rate of error, standards of maintenance, peer review, or general acceptance. A proper analysis of these Daubert factors shows that the current use of BCS does not pass the Supreme Court's standard").
[91] *Id.* at 202.
[92] *See, e.g., Cruickshank*, 105 A.D.2d at 334 (N.Y. case permitting a parricide youthful offender status because her "conduct and symptoms [were] classic characteristics of a sexually abused child). *See also* Moreno, *supra* note 22, at 1295-96 (describing the N.Y. case of Cheryl Pierson,

testimony can have on the sentencing of abused parricides. The highest courts in Washington, Ohio, Maryland, and Minnesota, however, have explicitly ruled that expert testimony on BCS is admissible at trial to aid a parricide's self-defense claim whenever there is a proper foundational showing that it is relevant. This section briefly describes the facts of these cases before turning to common reasoning that persuaded each court to admit the BCS testimony, namely consistency with preexisting evidentiary rulings and the importance of the testimony to mounting a defense against the prosecution's case theory.

In *State v. Janes*, 17-year-old Andrew killed his mother's boyfriend Walter Jaloveckas after ten years of sporadic but severe physical and emotional abuse during Walter's "outbursts."[93] Andrew's mother Gale and brother Sean were also victims of Walter's anger management issues and abusive tendencies.[94] Indeed, the night before Walter's death, the family home was rife with conflict—Walter yelled at Gale, and then went into Andrew's room and spoke in a tone he typically reserved for threats.[95] When Andrew awoke the next morning, Gale informed him that Walter was still angry, prompting Andrew to hide a loaded shotgun and steal Walter's pistol and bulletproof vest.[96] After spending the day intoxicated and ranting to his friends about wanting to kill Walter—which had happened on various previous occasions—he left a cassette tape for his mother claiming he was done suffering abuse and that he was sorry; shot Walter multiple times in the head; shot at police officers when they arrived on the scene; and, after surrendering, confessed to the killing while being transported to jail.[97] In turn, Andrew was charged with first degree premeditated murder.[98]

Similar to *Janes*, in *State v. Nemeth*, Brian Nemeth killed his abusive mother, Suzanne, soon after an incident of acute battering.[99] Suzanne was an alcoholic who drank excessively multiple times a week, resulting in physical and psychological abuse to her 16-year-old son during these drunken states.[100] While the abuse had been ongoing for several years, it escalated severely in the year prior to her death, causing Brian to develop physical symptoms of anxiety as well as sleeplessness, as he would protect himself by locking himself in his room and

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who after hiring a classmate to killed her abusive father, was allowed to present expert testimony on PTSD at her manslaughter trial and sentencing stage). *Cf.* Scobey, *supra* note 19, at 196 (describing the *Jahnke* case, which garnered so much national sympathy that the Wyoming governor commuted their sentences despite the court's refusal to accepted BCS testimony).

[93] *Janes*, 850 P.2d at 496.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 496-98.

[98] *Id.* at 498.

[99] *Nemeth*, 694 N.E.2d at 1332.

[100] *Id.* at 1333.

standing against the door until his mother fell asleep.[101] On the night of Suzanne's birthday, Brian knew she would drink in excess and was frightened to go home.[102] He attempted to stay at a friend's house but was thwarted.[103] First, his friend's mother sent him home; there, a physical altercation ensued, causing him to run back to his friend's home.[104] His friend's mother then permitted him to stay, but only if he informed his mother where he was, causing his mother to come pick him up and force him home.[105] Once home, he immediately ran to his room, where he barricaded his door shut and listened to his mother pound on the door and scream insults at him for several hours.[106] When she finally retreated, Brian, in a kind of haze, picked up the compound bow and arrows in his room and shot Suzanne five times.[107] She eventually died from her injuries, upon which Brian was charged with aggravated murder.[108]

Next, in *State v. Smullen,* 17-year-old Bruno fatally stabbed his adoptive father and attacked his father's daughter and granddaughters after being grounded.[109] Bruno, a regular churchgoer, was grounded after his father Warren learned Bruno skipped church to spend time with his friend Shawn Williams, who Warren believed to be a drug dealer.[110] In addition to limiting Bruno's telephone privileges, Warren told Bruno that the only way he would be leaving the house was "in a box."[111] According to Bruno, the grounding came on the heels of many verbal arguments and corporal punishments, namely "punch[ing] him in the chest with a piece of wood."[112] After being grounded, Bruno decided he would kill his father later that week.[113] While Warren was out, he obtained a butcher knife and latex gloves from the kitchen.[114] Upon his return, while Warren was on the couch reading the newspaper, Bruno came behind him and stabbed him multiple times in the head and chest.[115] He then turned on three young relatives, chasing them around the house with the knife and cutting them multiple times.[116] When police arrived, Bruno eventually confessed and was charged with premeditated first degree murder.[117]

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[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Nemeth*, 694 N.E.2d at 1333.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 1334.
[108] *Id.*
[109] *Smullen*, 844 A.2d at 429.
[110] *Id.* at 432.
[111] *Smullen*, 844 A.2d.
[112] *Id.* at 434.
[113] *Id.* at 433.
[114] *Id.*
[115] *Id.*
[116] *Smullen*, 844 A.2d.
[117] *Id.* at 434-35.

Finally, in *State v. MacLennan*, 17-year-old Jason shot and killed his father, Kenneth, after many years of severe emotional abuse.[118] Jason's mother, who died from cancer five years prior to the killing, was physically and sexually abused by Kenneth; furthermore, Kenneth frequently neglected his wife and son during her illness, leaving 12-year-old Jason to care for her.[119] After his mother passed, Jason's father continually left him alone in the house while he worked or pursuing a new romantic relationship.[120] Kenneth also had a terrible temper, which he frequently took out on his son; as such, Jason was afraid of his father, avoided being alone with him, and was "uncharacteristically docile and hypersensitive" when his father was around.[121] On the day of Kenneth's death, a volatile argument ensued concerning an empty beer bottle that Kenneth had found.[122] After the argument, Kenneth left for dinner; upon his return, Jason immediately shot and killed his father.[123] Jason was charged with first-degree premeditated murder.[124]

Though these four cases have quite a few factual differences—from the evidence attesting to the abuse, the type of alleged abuse, and the circumstances of the killing—each court arrived at the same conclusion: that, when proper foundation is shown, expert testimony on BCS should be admitted supporting a self-defense claim. Furthermore, each court pointed to similar reasoning in reaching this conclusion. Primarily, all four courts focused on what I term consistency-based justifications—that is, reasons that admitting expert testimony on BCS in self-defense cases are consistent with other evidentiary rules and statutes. As a secondary reasoning, the courts also employ need-based arguments that focus on the necessity of the testimony for the defendant's case, particularly when prosecutors have relied upon or exacerbated preexisting misconceptions about abused children.

In making consistency-based arguments, all four courts are careful to apply well-established expert admissibility tests to the proffered testimony, typically either the *Frye* "general acceptance" test[125] or the Evidence Rule 702 codification of the *Daubert* standard, which asks a judge to determine whether the proffered testimony is a) sufficiently reliable, and b) helpful to the jury.[126] In applying the particular test, each court found the similarity to other readily accepted syndromes highly relevant. Interestingly, many of the courts are especially persuaded by the

[118] *MacLennan*, 702 N.W.2d at 222.
[119] *Id.* at 226.
[120] *Id.* at 223, 226.
[121] *Id.* at 226.
[122] *Id.* at 224.
[123] *MacLennan*, 702 N.W.2d at 224-25.
[124] *Id.* at 225.
[125] Frye v. U.S., 293 F. 1013 (D.C. App. 1923) (mandating a "general acceptance test" that, while rejected by federal courts, still applies in many states).
[126] Many states model their evidentiary codes off of the Federal Rules of Evidence, in this case Fed. R. Evid. 702, which codified Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

analogy of BCS to PTSD. For the *Janes* court, BCS is simply "abuse-induced PTSD,"[127] while the *Nemeth* court notes that BCS is "most often discussed as a form of PTSD,"[128] which both states had already deemed an appropriate subject for expert testimony. The *Nemeth* court also cited other jurisdictions that have admitted BCS in self-defense cases, including a New Jersey Appellate decision[129] that admitted testimony on PTSD that stemmed from childhood abuse; and the *Smullen* court, while largely focusing on the similarity of BCS to BWS, noted that both syndromes were simply subsets of PTSD.[130] These cases show that for some admitting courts, battered persons syndromes and PTSD essentially collapse into one diagnosis, where the longstanding acceptance of PTSD and the fact that PTSD "is one of the few kinds of psychiatric disorders that is considered a normal response to an abnormal situation" made BCS generally accepted, scientifically reliable, and relevant and helpful to the jury.[131]

Accepting courts also focus on the similarity between BCS and BWS. "Application of this syndrome to a self-defense argument in parricide cases would seem […] a lateral extension of the battered spouse syndrome," because "at least three of the elements found in the battered spouse syndrome" are also relevant to BCS:

> repeated physical abuse, the 'learned helplessness' that, in some circumstances, may account for the failure of the victim to strike back during confrontation or take steps to avoid the problem, and a heightened vigilance and sensitivity to signs of impending violence that would not likely be apparent to anyone else.[132]

As the *Janes* court put it, "given the close relationship between the battered woman and battered child syndromes, the same reasons that justify the admission of the former apply with equal force to the latter."[133] The *Janes* court also noted that because children are even more vulnerable to the effects of abuse than adult women, making BCS arguably more relevant and important than in the case of battered women.[134] Thus, the similarity to—and, in some instances, magnification of—both PTSD and BWS supported consistency-based arguments for the admissibility of BCS.

Although consistency-based justifications are at the heart of each court's decision to admit expert testimony on BCS, a few courts were also persuaded by need-based arguments—namely, the need of the defendant to combat

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[127] Janes, 850 P.2d at 501.
[128] Nemeth, 694 N.E.2d at 1339.
[129] *Id.* at 1340 (explaining that "several states have allowed the defendant to present expert testimony of a 'battered child' or 'battered person' syndrome where a child has killed or attempted to kill an abusive family member," citing *Hines*, 696 A.2d at 787).
[130] *See* Smullen, 844 A.2d at 442.
[131] Janes, 850 P.2d at 501 (quoting Paul A. Mones, *When a Child Kills: Abused Children Who Kill Their Parents* 63 (1991)).
[132] Smullen, 844 A.2d at 446-47.
[133] Janes, 850 P.2d at 502. *See also* MacLennan, 702 N.W.2d at 234 ("there is no reason why our reasoning an analysis in [admitting BWS] should not apply with equal force to battered child syndrome").
[134] Janes, 850 P.2d at 502-503. *Cf.* Moreno, *supra* note 22, at 1282.

misconceptions about abuse, particularly when they were relied upon by the prosecutor. This is particularly evident in *Nemeth*, where "the existence and prevalence of such misconceptions are evidence in the transcript of [the] trial" as the prosecution "repeatedly stressed that Brian could have left the house again" and implied "that he must have created the allegations of abuse after the fact because, otherwise, more people would have known about it."[135] Thus, the *Nemeth* court explained that expert testimony of BCS were necessary in at least three ways: first, "to refute the seemingly logical conclusion that serious abuse could not be taking place if no one outside the home was aware of it"; second, "to dispel the misconception that a nonconfrontational killing cannot satisfy the elements of self-defense"; and third, "to counter prosecutorial attacks on the defendant's credibility based on the nonreporting of abusive incidents."[136] The other three courts similarly noted that expert testimony on BCS might be necessary to dispel the jurors' ignorance or misconceptions about abuse, so that they may adequately access a defendant's self-defense claim.[137]

While these four cases—as well as their reasonings—are positive developments in the area of criminal defense and domestic violence law alike, it is important to know one common downfall of most[138] of the cases: an extremely high foundational showing of abuse before BCS testimony can be admitted. In *MacLennan*, even facts showing that Jason was afraid of and physically abused, as well as neglected, by his father was insufficient to demand BCS testimony.[139] And in *Smullen*, even Bruno's allegations that his father threatened him with corporal punishment and death were insufficient to raise any possible self-defense claim, thus precluding the admission of BCS testimony.[140] Similarly, while Andrew Janes was permitted to present BCS testimony, along with numerous witnesses attesting to the abuse within his home, the court could not say whether the evidence was sufficient for a self-defense instruction.[141] Most of the courts rejected the self-defense argument or instruction largely because of the seemingly non-confrontational nature of the killing, revealing the grip that cultural ideas of self-defense and parricide continue to hold a tight grip on legal doctrine. Thus, even in courts that deem BCS admissible testimony, there is still much work to be done to ensure that it is being used properly.

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[135] Nemeth, 694 N.E.2d at 1337.
[136] Nemeth, 694 N.E.2d at 1337.
[137] *E.g.,* Janes, 850 P.2d at 503, 505.
[138] *Contra* Nemeth, 694 N.E.2d at 1341 (holding that "the proffered expert testimony on battered child syndrome was both relevant and reliable and that the trial court in this case erred in granting the motion prohibiting the testimony," thus remaining the case for a new trial with the inclusion of the testimony).
[139] MacLennan, 702 N.W.2d at 235.
[140] Smullen, 844 A.2d at 452-53.
[141] Janes, 850 P.2d at 506.

Part III.

The Future: Why BCS Should be Admitted and How We Can Get There

As the above courts' consistency-based justifications show, BCS should be universally admitted at least for the sake of evidentiary coherency. Barring expert testimony on BCS while readily admitting BWS and general PTSD creates arbitrary and artificial distinctions based only on the expert's chosen terminology and the victim-defendant's age and gender. As one scholar explains, while the specific dynamics of an abusive relationship may look different depending on the victim's age and gender, the abuse will almost certainly lead to an indelible psychological mark on the victim, no matter who they are; as such, evidence of those psychological effects should be admitted for all victim-defendants raising self-defense claims.[142] Finally, another scholar notes that the current status of BCS acceptance—where states vary greatly from each other, often leaving the matter within the trial court's discretion—leads to inconsistencies such that the success of an abused child-defendant's self-defense depends merely on the luck of being charged in a sympathetic jurisdiction or assigned a sympathetic judge.[143] Such unpredictable, arbitrary outcomes are an affront to justice's demand for consistent, predictable, and logical evidentiary rules. Thus, evidentiary consistency demands BCS be more widely accepted. In addition, testimony on BCS should be admissible in self-defense cases for parricides for normative reasons, which this paper will explore by relating them to the two social movements: the anti-incarceration or abolitionist movement, and the domestic violence advocacy movement.

(a) An Abolitionist and Anti-Domestic Violence Coalition

Abolitionists and other anti-carceral activists argue that American's reliance on incarceration is immoral and racist, and thus should be dramatically scaled back or abolished in its entirety. These advocates both encourage systemic policies and individual litigation strategies that impede incarceration, with a particular attentiveness to the rights of the most vulnerable criminal defendants; abolitionists specifically also encourage a reimagining of aspects of American culture and morality that feed into the carceral system.[144]

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[142] Toffel, *supra* note 14, at 350-51.
[143] Nelson, *supra* note 16, at 201 ("defendants who find a friendly judicial ear and are able to use such a broad definition of BCS thus have a significant advantage").
[144] *E.g.*, Melissa Stein, *Towards the Abolitionist Imagination*, POL'Y RSCH. ASSOC.'S (Sept. 1, 2021), https://www.prainc.com/abolitionist-imagination/.

The current bar on BCS testimony should concern anti-carceral or abolition advocates for various reasons. First, parricides usually confess to the killings quite soon after police arrive, thus leaving affirmative defenses as the only viable litigation strategy. Admission of BCS, then, may often implicate the child-defendant's constitutional right to mount an effective defense—a right that ought to concern any activist with concerns about the just operation of the criminal legal system. Second, abused parricides are amongst society's most vulnerable due to their age and the extreme violence to which they have been subjected. In general, many scholars have noted the detriment of incarceration on children, noting that those incarcerated as children are more likely to experience mental health problems and offend again;[145] one can imagine that children already vulnerable from years of scarring abuse are more likely to experience these negative effects, making it particularly imperative to prevent their incarceration.[146] Third, abolitionists in particular are preoccupied with reimagining American morality, deconstructing the notions that those who commit crimes are "bad" and "worthy" of punishment by incarceration. Thus, the pathologizing aura around parricides should alarm any abolitionist. Advocating for the admission of BCS testimony in self-defense claims is thus a project that is not only concerned with legal change but is invested in the deconstruction of moral stigma around abused parricides.

Domestic violence advocates should also be invested in this moral and legal project because it advances understanding of domestic violence—which will not only help child abuse victims, but domestic abuse victims more broadly. The benefit to advocates against child abuse are clear; admitting BCS testimony in self-defense cases will combat the misconceptions about child abuse which are often relied upon by prosecution, thus protecting survivors from unjust criminalization and educating the courtroom and the public about child abuse. However, even domestic violence advocates not focused on child welfare should advocate for the broader admission of BCS testimony in self-defense cases. Although BWS testimony is admissible across the United States, it is often misused.[147] Part of this misuse comes from the fact that "an image of the stereotypical battered women has emerged [which] conforms to many of the pernicious stereotypes that have traditionally plagued women, such as that of the typically passive,

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[145] *Juvenile Detention Explained*, THE ANNIE E. CASEY FOUND. (Nov. 13, 2020, updated Mar. 26, 2021), https://www.aecf.org/blog/what-is-juvenile-detention (noting that even brief pretrial juvenile detention increases a likelihood of felony recidivism, decreases the likelihood of graduating high school, and exacerbates existing mental and physical health problems).

[146] *See* Goldman, *supra* note 14, at 246-47 (noting that "most battered child defendants are amenable to treatment are able to adjust well to become productive, law-abiding members of society" when provided with non-carceral treatments).

[147] Toffel, *supra* note 14, at 340 (explaining that BWS is often mistakenly characterized as a pathologizing psychological disorder). *Accord* Lalchan, 282 A.3d (striking down a trial court ruling that erroneously excluded BWS testimony because it was a psychological diminished capacity defense).

mentally unstable, helpless victim."[148] Furthermore, "lesbian, poor, and minority women" are rarely able to fit this stereotype, which is centered around the experiences of "middle- to upper-class, white, heterosexual women."[149] The admission of gender- and age-neutral battering syndromes in self-defense cases—which would include BCS but also general battered spouse syndrome for abused men—would combat the gender stereotypes embedded in court applications of BWS, because the court "will need to ask why battered women, men, and children all respond in similar ways to their abusers."[150] Therefore, domestic violence advocates should support the admission of non-gendered battering syndromes like BCS in order to promote non-stereotyped applications of the syndromes in all cases.

Thus, these two groups—anti-carceral and domestic violence advocates—should work as a coalition to increase the admissibility of BCS in self-defense cases. Such a coalition would be highly politically effective, as both have unique experiences and strategies of political organizing. Additionally, because of the early domination of carceral feminism in the battered women's movement, these groups have historically been in tension; a coalition-building effort between them would thus not only be effective, but recognized as surprising, lending significance to the issue of BCS testimony. The aftermath of the *Jahnke* case suggests that, despite cultural pathologizing, the American public is much more sympathetic to the plight of abused parricides than the court.[151] Thus, a coalition of anti-carceral and domestic violence advocates should pursue out-of-court campaigns to raise awareness of and public sympathy towards the current nature of BCS testimony in self-defense cases; instruct defense attorneys on best strategies to advocate for abused parricide clients; encourage legislatures to enact changes to self-defense statutes that open the door to BCS testimony; and pressure governors to employ executive clemency measures to keep even convicted abused parricides out of jail.

(b) Action Steps for System Participants

Though defense attorneys are largely bound by court precedents, there are still steps they may take to encourage the acceptance of BCS testimony in self-defense cases. First, especially in jurisdictions whose high courts have not yet ruled on BCS in the self-defense context or who are following extremely old precedents, attorneys should not shy away from making arguments that incorporate BCS, if only to create an appealable issue and invite

[148] Toffel, *supra* note 14, at 370.
[149] *Id.*
[150] *Id.* at 374.
[151] Scobey, *supra* note 19, at 196 ("Richard's courage and eloquence moved people deeply" especially because "this happened in an upper-middle-class family, to intelligent children").

high courts to (re)consider the matter. Second, to increase the chance of acceptance at both trial and appellate levels, attorneys should appeal to the consistency-based rationales for BCS testimony in their arguments, as these seem to resonate with courts. Attorneys might even present the evidence as testimony on "abuse-induced PTSD" instead. Finally, even if the trial court rejects BCS testimony pursuant to a self-defense claim, defense attorneys should still seek post-conviction relief—like sentencing mitigation under laws like New York's Domestic Violence Survivors Justice Act[152] or by executive clemency—for their abused parricide clients. Even though such strategies may not directly bear on the admissibility of BCS testimony, resentencing or pardoning abused parricides convey a strong moral message about their humanity and lack of culpability, thus working to dismantle the predominate cultural method that children who killed their parents are inherently monsters.

Actors outside of the judiciary branch should also take responsive steps to encourage the use of BCS in self-defense cases and, even when not used for acquittals, protect children victim-defendants from enduring harsh sentences. Many legislatures have preexisting statutes that permit the admission of testimony on the effects of battering in self-defense cases, which have had an enormous influence in courts admitting testimony on BWS.[153] However, these statutes often suffer from two infirmities. First, many are explicitly gendered (referencing only "battered *women*'s syndrome") or make an implicit reference to age (specifying "battered *spouse* syndrome"), which many courts have interpreted as precluding or not covering BCS testimony.[154] Therefore, legislatures should utilize neutral language, like "battered persons syndrome" or "testimony related to the psychological effects of abuse" when drafting these statutes. Second, even if the statute is broad or open-ended in whom it covers, many courts are still hesitant to admit BCS testimony because few other courts have done so, or because they felt it outside the scope of the legislature's primary intent.[155] Thus, legislatures should also contain explicit cues within the statutes that testimony on BCS is within the scope of permissible evidence. Finally, legislatures should avoid statutes that enact procedural barriers beyond mere relevance and reliability for admitting BCS testimony.[156] For instance, a model statute might read: "the courts should admit evidence of the psychological effects of abuse whenever relevant to a

[152] CRIM. PROC. § 440.47(1) (2019) (permitting abused parricides convicted of manslaughter to see resentencing if their history of domestic abuse contributed to the crime).
[153] *See* Toffel, *supra* note 14, at 341-43 (describing the variety of state laws admitting some form of battering syndrome self-defense testimony).
[154] *See* Toffel, *supra* note 14, at 341-43. *But see generally,* Smullen, 844 A.2d (admitting BCS despite an age-specific statute).
[155] *See generally* Parker, *supra* note 68 (describing a Texas statute admitting general battered persons testimony, which was expected to open the door to BCS acceptance; however, only one, seemingly unpublished case appears to have utilized the statute).
[156] *Cf.* Toffel, *supra* note 14, at 339 (criticizing states that admit battered person syndrome testimony, but "require them to meet a higher standard of admissibility before allowing the syndrome evidence into court").

defendant's self-defense claim, including, but not limited to, battered spouses and battered children." Such a rule would make courts more comfortable in admitting BCS testimony in self-defense cases.

Legislatures should also amend their statutory elements of the self-defense claim to require "imminent" danger rather than "immediate" danger, which is more flexible and allows self-defense even outside of the traditional circumstances. Because most parricides—as well as many other victims of abuse—kill in non-confrontational settings, it is difficult for courts to conceptualize their fear of harm as "immediate." However, the *Janes* court seemed to find the imminence requirement enough to be satisfied by a non-confrontational killing in the circumstances of abuse.[157] Thus, abolishing the "immediacy" standard in favor of the "imminence" standard may open the door for self-defense arguments, and thus battered persons syndrome testimony, for both abused parricides and other victims alike.

Even when the courts and legislatures fail to admit BCS testimony, resulting in a failed self-defense claim and conviction of an abused parricide, the executive branch should offer clemency in the form of a pardon or extreme sentence reduction.[158] As one scholar notes, this was a common practice in the early period of BWS testimony, where governors would commute sentences of abused women who killed their spouses but were not permitted to raise self-defense claims that included BWS testimony—even in glaringly non-confrontational circumstances.[159] There is precedent for a Governor similarly intervening in cases involving abused parricides.[160] In addition to ensuring just outcomes for abused children, routine executive clemencies for parricides will also have the positive effect of changing public perception of abused children who kill their parents, thus inviting and incentivizing the legislature and courts to admit BCS testimony more liberally.

Conclusion

In sum, this paper has discussed the past, present, and future admissibility of BCS testimony in self-defense cases concerning abused parricides. It has explained why BCS has received differential and less favorable treatment in these contexts, describing the lasting impact of our stereotypes of self-defense and cultural aversion to parricides, particularly nonconfrontational ones. Ultimately, though, it has encouraged us to embrace a more accepting

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[157] *See* Parker, *supra* note 68, at 441 (explaining that while "many states view the term 'imminent' as meaning about to transpire, the *Janes* court "defined and important distinction between the words imminent and immediate" where imminence is more permissive).
[158] Hegadorn, *supra* note 18, at 70.
[159] *Id.* at 78 (describing a commutation when an abused woman hired a hitman to kill her spouse).
[160] Scobey, *supra* note 19, at 196 (describing the commuting of the Jahnke siblings' sentences).

approach to BCS testimony: one that promotes evidentiary consistency alongside the normative goals of the movements against mass incarceration and domestic violence. It has argued that a coalition between the abolitionist and domestic violence movements can foster this acceptance, noting the particular ways that activists, defenders, legislatures, and executives can lead to the admittance of BCS testimony and fairer outcomes for abused parricide defendants.

It is key, though, that we ought not to stop there. As the four studied cases—*Smullen, Janes, MacLennan,* and *Nemeth*—reveal, mere acceptance of BCS in court does not on its own guarantee better outcomes for abused parricide defendants. If advocates for these vulnerable children do not also work to dismantle the cultural chokehold of dominant moral disgust for non-confrontational parricides, judges will merely continue barring, limiting, or misapplying BCS testimony, regardless of the official evidentiary rules. Advocates must not merely see the end goal as acceptance of BCS testimony; rather, the acceptance of the testimony—as well as the journey to get there—is properly viewed as yet another tool to combat the misunderstandings about domestic violence that plague our society today.