

# Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense

## INTRODUCTION

The trials of battered women who kill their batterers are the stuff of made-for-TV-movies.<sup>1</sup> Evidence of the physical, psychological, and sexual abuse heaped upon these women makes for sensationalist media coverage and exploitation. Add expert testimony from psychologists, psychiatrists, social workers, and lay counselors of battered women, and the plot is irresistible. In these trials, the courtroom may be transformed into a circus, with the experts as ringmasters.

The increasing claims of self-defense for these women<sup>2</sup> raises many questions: Whether there is such a thing as a "battered woman syndrome defense"; whether proponents of the battered woman syndrome use the courtroom to promote a particular subclass of self-defense for women who have been ignored by the legal system far too long; and whether there is a proper role for expert testimony on the battered woman syndrome in self-defense cases?

This Comment argues that expert testimony on the battered woman syndrome should not be used in the trials of battered women who kill their abusers and claim self-defense. First, to permit expert testimony on the syndrome in these cases is dangerous for the judicial system and society for several reasons. These include that it: (1) fosters inappropriate pleading and careless legal work by defense attorneys; (2) invites the use of violence to end violence within the family; (3) reinforces a societal view of women as victims; and (4) encourages juries to decide difficult cases based on sympathy rather than legal requirements. Second, self-defense claims, as currently defined in statutes and interpreted by case law, are adequate to protect the battered woman who defends herself during a violent attack. Finally, manslaughter is appropriate in cases in which the woman attacks her batterer while he is incapacitated or unaware.

This Comment traces the evolution of the battered woman syndrome, discusses evidentiary issues in admitting expert testimony, argues that the

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1. See, e.g., *The Burning Bed* (NBC television broadcast, Oct. 8, 1984). Commenting on the sensationalist exposure of battered women in the media, Professor Elizabeth Schneider, Professor of Law, Brooklyn Law School, lamented "[c]rudely speaking, the notion of 'battered spouses' has become a sexy issue." Margolick, *The Trials of Battered Wives Who Kill*, Chi. Daily L. Bull., Feb. 3, 1984, at 3, col. 2, 11, col. 5.

2. See *infra* notes 42-68 and accompanying text.

testimony should be excluded in self-defense cases, and suggests the appropriateness of manslaughter for cases where the battered woman kills her abuser outside of an abusive incident.

## I. THE EVOLUTION OF BATTERED WOMAN SYNDROME TESTIMONY

The problems of using battered woman syndrome testimony are pervasive. It has been noted that “ ‘the issue of a battered woman syndrome is now being raised in a number of cases where it is wholly inappropriate.’ ”<sup>3</sup> It is possible that battered women claim self-defense more often because expert testimony is available to help establish the legal requirements of self-defense where they otherwise would not exist. One also questions the theoretical consistency of using such generalized expert testimony in both self-defense and insanity cases.<sup>4</sup> The development of the battered woman syndrome nonetheless represents a significant step toward understanding the problem of woman abuse.

### A. *The Societal Problem Of Woman Abuse*

An accumulation of cultural forces has encouraged the subjugation of women in our society.<sup>5</sup> Psychology traditionally identified the “healthy” woman as passive, subservient, and masochistic,<sup>6</sup> while religion taught women to serve their husbands as masters.<sup>7</sup> The media, through pervasive stereotyping in advertising, television programming, and movies,<sup>8</sup> perpetuated subservient role models for women. In similar fashion, legal doctrines such as spousal immunity, which denied women legal rights and protection, enforced a patriarchal system which condoned violence against wives.<sup>9</sup>

As an outgrowth of the feminist movement of the 1960's and 1970's, public attention finally focused on the plight of battered women.<sup>10</sup> According to one observer, the extent of woman abuse in America was not realized by the government or public until 1974, when the first shelter for battered women

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3. Margolick, *supra* note 1, at 11, col. 5.

4. See, e.g., *State v. Duell*, 332 S.E.2d 246 (W. Va. 1985). Ms. Duell entered a bar, sat next to her husband, ordered a drink, shot her husband at point blank range, ordered another drink, and waited for the police. A psychologist testified that as a battered woman, Ms. Duell was not likely to be in touch with reality, aware of the consequences of her act, or able to discern right from wrong when she killed her husband.

5. See Note, *Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?*, 2 LAW & HUM. BEHAV. 133, 142-51 (1978).

6. *Id.* at 142-44.

7. *Id.* at 144-45.

8. *Id.* at 145-46.

9. *Id.* at 146.

10. See Bochnak, *Introduction to WOMEN'S SELF-DEFENSE CASES* at xv (E. Bochnak ed. 1981) [hereinafter *WOMEN'S SELF-DEFENSE CASES*].

opened.<sup>11</sup> For too many years and too many reasons, assaults on women by male family members were systematically ignored by the police, the courts, social service agencies, and the medical and mental health professions. Psychological research indicates that as late as 1971, the use of violence against women in society was acceptable.<sup>12</sup>

The severity and pervasiveness of woman abuse is of uncertain dimension. The incidence of battering in marital or colhabiting relationships is difficult to estimate, in part because of the privacy of the relationships, and in part because of the problems in defining "violence."<sup>13</sup> Owing to both the unresponsiveness of legal and societal channels and to the severity of the abuse by males against female companions, women have asserted themselves within the abusive situation in a violent manner.

### B. Battered Women Batter Back

One reason public attention recently has focused on the plight of battered women is the increased publicity generated both by the phenomenon of battering and by trials<sup>14</sup> of women who take matters into their own, often

11. L. HARTIG, IDENTIFICATION OF PERSONALITY CHARACTERISTICS AND SELF-CONCEPT FACTORS OF BATTERED WIVES 1 (1982). The first program for battered women was opened in 1974. S. MORGAN, CONJUGAL TERRORISM 1 (1982).

12. This acceptance is indicated by the following study of bystander reactions to violence. A group of unknowing male subjects saw four scenarios of violence. The researchers sought to discover when bystanders would be willing to intervene in a fight. "The subjects intervened when the violence was male-upon-male, female-upon-female, and female-upon-male. Contrary to the researchers' expectations, none of the male subjects intervened to help a woman being 'injured' by a man." Note, *supra* note 5, at 148 (citing G. Borofsky, G. Stallak, & L. Messe, *Sex Differences in Bystander Reactions to Physical Assault*, J. EXPERIMENTAL SOC. PSYCHOLOGY 313 (1971)). One reason posited for the unresponsiveness of males in situations of male-upon-female violence is the assumption that the man was the woman's husband, and she somehow deserved the violence. Note, *supra* note 5, at 148.

13. As one commentator notes: "abuse is an inexact term, but when it is defined to include physical violence ranging from an occasional slap to severe beating, the experts believe that more than one-half of all American couples engage in it. . . . By conservative estimates, there are 4.7 million badly battered women in the United States." Eisenberg, *Changes in the Law Affecting Battered Women: Past, Present, and Future*, 3 AM. J. TRIAL ADVOC. 45, 45-46 (1979). *But see* L. BOWKER, BEATING WIFE BEATING 6 (1983):

[M]arital violence occurred for sixteen percent of the couples interviewed, and had occurred in the past for twenty-eight percent of the couples. Husbands were only slightly more likely to use violence against wives . . . but were more likely to have seriously beaten up their spouses or to have used a knife or gun on them.

14. One cannot, however, totally fault the media for covering these trials. Statistics indicate that from 1969 to 1982, the female rate of murder and non-negligent homicide displayed virtually no change. AMERICAN VIOLENCE AND PUBLIC POLICY 27 (L. Curtis ed. 1985). Indeed, statistics show that female arrests for murder and non-negligent manslaughter were 2.4 per 100,000 women in 1969, and 2.3 per 100,000 women in 1981. *Id.* at 237 (Table 14). If arrests by law enforcement agencies remain constant, then the number of trials of women who kill, in general, is the result of prosecutorial discretion in charging and the lack or breakdown of plea bargaining. Whether prosecutors systematically discriminate against women offenders by

armed,<sup>15</sup> hands. Examining recent statistics about women who kill presents an interesting picture, one far removed from that created by like statistics of male offenders. The fact is that men commit far more homicides than women. In the United States, women commit approximately twenty percent of all homicides.<sup>16</sup> When only murder and non-negligent manslaughter are compared, women commit just 12.5 percent of these crimes.<sup>17</sup> Given that women are far less likely to kill than men are, the next step is to ask who women are likely to kill. Sources indicate that husbands are the "likely" target.<sup>18</sup> In 1977, women killing their husbands accounted for 4.8 percent of all murders according to FBI statistics.<sup>19</sup> In 1985, however, husbands were the victims in only three percent of all murders and non-negligent manslaughters committed.<sup>20</sup> The next question to be answered in husband-boyfriend homicides is what percentage of these killings involved battering and, presumably, the battered woman syndrome. In her informal study of female homicide cases in Los Angeles, Dr. Nancy Kaser-Boyd<sup>21</sup> found that one-third of these cases involved wives who had killed their husbands, and that these killings were predominantly battered woman syndrome cases.<sup>22</sup>

As demonstrated, the number of wives killing husbands is low. Yet the law never has sympathized with abused wives who fought back. This attitude was well articulated by the eighteenth century jurist, Sir William Blackstone, who theorized that a husband killing his wife was comparable to killing a stranger; but a wife killing her husband was comparable to killing the king and committing treason.<sup>23</sup> Vestiges of this anachronism remain, keenly ev-

charging them with the most serious offense available, by refusing to plea bargain, or by more favorably charging and plea bargaining with men who kill women, is beyond the scope of this Comment. So, too, is the possible reluctance of defense counsel to plea bargain cases which they believe can result in acquittal for the battered woman defendant.

15. See, e.g., *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977). "In our society women suffer from a conspicuous access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons." *Id.* at 239, 559 P.2d at 558.

16. *USA Today*, January 27, 1986, at 11A, col. 1.

17. UNITED STATES DEPARTMENT OF JUSTICE, FBI, UNIFORM CRIME REPORTS CRIME IN THE UNITED STATES 11 (1986) [hereinafter UNIFORM CRIME REPORTS]. These figures are based on law enforcement agency reporting, however, not judicial decisions.

18. Note, *Does Wife Abuse Justify Homicide?*, 24 WAYNE L. REV. 1705, 1706 (1978).

19. Lewin, *Battered Women and the Doctrine of Self-Defense: a Reevaluation of the Meaning of Deadly Force*, 8 STUDENT LAW. May, 1980 at 10, 11.

20. UNIFORM CRIME REPORTS, *supra* note 17, at 11. Boyfriends comprised 1.4% of all victims of murder and non-negligent manslaughter.

21. Dr. Kaser-Boyd is a clinical psychologist specializing in battered women.

22. *USA Today*, January 27, 1986, at 11A, col. 1. However, to put these killings in perspective, Dr. Kaser-Boyd emphasizes that "less than one percent of battered women end up killing their husbands. The woman is much more likely to be killed in a battering incident." *Id.* According to FBI statistics for 1985, 30% of all female murder victims were killed by husbands and boyfriends, while only 6% of men victims were slain by wives and girlfriends. UNIFORM CRIME REPORTS, *supra* note 17, at 11.

23. See Margolick, *supra* note 1, at 3, col. 5.

ident in the disparity of media coverage of battered women who kill their male abusers and batterers who kill their female companions. The "news-worthiness" of the trials of battered women who kill as opposed to the killings of battered women is rather like the old adage that when a dog bites a man, that is not news; but when a man bites a dog, that is news.

Having discovered how often women kill and who they kill, the question remains as to why they kill. When women kill they are seven times more likely to kill in self-defense than men are.<sup>24</sup> For this reason, in the case of a battered woman, "self-defense"<sup>25</sup> has taken on a subtle pseudo-legal meaning. LaFave and Scott<sup>26</sup> explain self-defense as the ability to take reasonable steps to protect oneself from an attacker when one has no chance to resort to the law for protection.<sup>27</sup> Self-defense is traditionally premised on a single encounter, and many battered women suffer numerous violent episodes before availing themselves of self-defense. In addition, the cases where self-defense is claimed illustrate the disparity of circumstances under which a battered woman will claim self-defense. Battered women who kill their abusive mates during a violent episode claim self-defense at trial. This plea is echoed by battered women who kill in anticipation of a violent episode, after a battering incident is over, or while their abusers are incapable of harming them. These latter situations involve particularly muddled questions of law and morality for attorneys, judges, juries, and society. One observer identifies the difficulty of analyzing the cases of battered women who resort to murder as the struggle to decide "whether murder is justifiable when a woman is denied due process or adequate protection by the law."<sup>28</sup> Claiming self-defense in these non-confrontational settings may not have been possible without the development of the battered woman syndrome, and the subsequent use of expert testimony on that syndrome at trial.

### C. *The Development of the Battered Woman Syndrome*

With increased awareness of the abuse of women in society, researchers began to study the effect of battering relationships on women, and from this research, the battered woman syndrome evolved. The battered woman syndrome describes the complex set of emotional characteristics and behavioral patterns of a woman who is in an abusive relationship with a man. Dr. Lenore Walker, a feminist psychologist at the Colorado Women's College

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24. USA Today, January 27, 1986, at 11A, col. 1; see also Lewin, *supra* note 19, at 11.

25. See *infra* notes 100-09 and accompanying text for a discussion of the law of self-defense.

26. W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 454 (2d ed. 1986).

27. *Id.*

28. Maynard-West, Book Review, 6 *WOMEN'S RTS. L. REP.* (Rutgers Univ.) 310, 311 (Spring 1980).

in Denver, is the foremost authority on the battered woman syndrome.<sup>29</sup> Her pioneering study of violence against women, *The Battered Woman*, defined the battered woman and identified the essential elements of the battered woman syndrome:

A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. [In] order to be classified as a battered woman, the couple must go through the battering cycle at least twice.<sup>30</sup>

At the core of the battered woman syndrome lie the theories of "learned helplessness"<sup>31</sup> and the "cycle of violence."<sup>32</sup> *Learned helplessness* is a psychosocial theory for lack of response, or passive behavior in the face of the ability to act. Experiments on rats and dogs, with humans administering continuous negative stimuli such as electrical shocks, proved that physical abuse created a sense of powerlessness in these animals. The dogs, for instance, soon learned that they could not control being given a shock, and became "compliant, passive and submissive," ceasing voluntary movement.<sup>33</sup> In adapting this psychosocial theory to battered women, Dr. Walker claims that a woman responds with learned helplessness when she can control a given outcome but does not believe that she can. Battered women operate from a belief that they are helpless and this belief becomes reality. Because these women allow what they perceive to become beyond their control, they become submissive and passive. Battered women, therefore, do not attempt to escape the battering relationship.<sup>34</sup>

The learned helplessness theory thus explains why the battered woman who kills has not left the situation prior to the killing. This theory, coupled with her possible failed attempts to call the police, go to a shelter for battered women, or convince her husband or lover to stop beating her, implies that killing her abuser was a perceived last resort. The woman learned that she was powerless to stop the repeated batterings, and therefore, turned to a relatively calm time to end the abuse herself.

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29. Dr. Walker is the author of two books on the subject of battered women, as well as numerous articles. She has testified in more than sixty cases in over twenty state and federal courts for both defendants and the prosecution. Frank, *Driven to Kill: "Battered Women" Strike Back*, 70 A.B.A. J., Dec. 1984, at 25, 26. She has also testified before several congressional committees and the U.S. Commission on Civil Rights. L. WALKER, *THE BATTERED WOMAN SYNDROME I* (1984).

30. L. WALKER, *THE BATTERED WOMAN* xv (1979).

31. *Id.* at 16, 42-54, 187; see also L. WALKER, *supra* note 29, at 86-94.

32. L. WALKER, *supra* note 30, at 55-70, 187. See also L. WALKER, *supra* note 29, at 95-104.

33. L. WALKER, *supra* note 30, at 46.

34. *Id.* at 47.

The *cycle theory of violence* identifies three components of a battering relationship varying in intensity and time: (1) the tension building phase; (2) the explosion or acute battering incident; and (3) the calm, loving respite.<sup>35</sup> In the initial phase, smaller emotional and physical batterings and verbal harassments escalate.<sup>36</sup> In the second phase, the batterer loses control of his emotions and a severe, perhaps lethal, battering occurs.<sup>37</sup> In the final phase, the batterer is remorseful and loving, and the time is marked by a respite from aggression.<sup>38</sup>

The third phase, also known as the "honeymoon" phase, offers an additional reason why the battered woman remains with the batterer. She does not perceive the battering incidents as a pattern of behavior. The battered woman, instead views them as relatively unpredictable outbursts, or due to some fault of her own. A battered woman believes that the third phase accurately reflects the relationship. Dr. Walker has suggested that these women chose to believe that the loving and contrite man in phase three is who the abuser really is.<sup>39</sup>

While the battered woman syndrome explains the behavior of women in battering relationships, it is not, by itself, considered a legal defense.<sup>40</sup> If the syndrome was a defense by itself, a battered woman could kill her abuser at any time during the relationship without legal condemnation.<sup>41</sup> The current problem is that even though the syndrome is not itself a legal defense, the coupling of expert testimony on the syndrome and self-defense pleas in both confrontational and non-confrontational settings, may have the same result for society as if the syndrome *was* a legal defense. To prevent this, expert testimony on the battered woman syndrome must be excluded in the trials of battered women who kill their abusers outside a violent episode.

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35. *Id.* at 55.

36. *Id.* at 56-59.

37. *Id.* at 59-65.

38. *Id.* at 65-70.

39. *Id.* at 68.

40. It is a popular, though misguided, notion that there presently is a separate battered woman syndrome defense. *See, e.g.,* Moran v. Ohio, 469 U.S. 948, 949-50 (1984) (Brennan, J., dissenting). In *State v. Walker*, 40 Wash. App. 658, 664, 700 P.2d 1168, 1173 (1985), a Washington state court of appeals emphasized that point:

Mrs. Walker's ultimate defense rested solely on the bare assertion that she feared for her life because of abuse she allegedly sustained in the past. Mrs. Walker attempts to establish the concept that one who is a victim of family abuse is justified in inflicting deadly force on an abuser. . . . We do not read *State v. Allery* [101 Wash.2d 591, 682 P.2d 312 (1984)] which recognized the existence of a 'battered woman syndrome,' as establishing that this syndrome is a defense in and of itself.

41. One commentator suggests this reminder for those people in the legal community who would posit such a "defense": "[a]lthough unstated, the real plea in abused wife homicide cases seems to be 'I couldn't take it anymore.' That has never been a legal defense." Note, *supra* note 18, at 1726.

## II. EVIDENTIARY ISSUES IN ADMITTING EXPERT TESTIMONY ON THE BATTERED WOMAN SYNDROME

The United States Supreme Court has not squarely faced the issue of admissibility of expert testimony on the battered woman syndrome, nor directly decided the validity of a judicially created subcategory of self-defense for battered women. The closest the Court has come to addressing these issues are cursory comments by Justice Brennan in his dissent to the denial of certiorari in *Moran v. Ohio*.<sup>42</sup> In that case, Ms. Moran claimed self-defense in the shooting death of her sleeping husband. She attempted to establish the elements of self-defense using the battered woman syndrome. Justice Brennan's dissent first noted that since situations like Ms. Moran's fit traditional self-defense claims imperfectly, the battered woman syndrome has emerged as a defacto self-defense theory.<sup>43</sup> Justice Brennan also pointed out that few appellate courts have addressed directly a battered woman self-defense theory because such claims only raise the issue of whether traditional self-defense elements were established.<sup>44</sup> Apart from these concerns, appellate courts have been reluctant to overturn trial court rulings on the admissibility of evidence unless an egregious error was committed.<sup>45</sup> For the foregoing reasons, the focus on the admissibility of expert testimony at trial is vitally important to a battered woman defendant.

### A. Current Status—Split of Authority on Admissibility

Jurisdictions are split as to the admissibility of expert testimony on the battered woman syndrome. Jurisdictions admitting the testimony<sup>46</sup> include Florida,<sup>47</sup> New Jersey,<sup>48</sup> Washington,<sup>49</sup> Georgia,<sup>50</sup> Kansas,<sup>51</sup> and the District

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42. 469 U.S. 948 (1984). Certiorari was denied on the issue of whether, under the 14th amendment's Due Process clause, the state could allocate the burden of proof by a preponderance of the evidence to the defendant claiming self-defense.

43. *Id.* at 950. Justice Brennan also emphasized the difficulty faced by battered women defendants who bear the burden of proof. "Given some of the problems of fitting Petitioner's battered woman theory within traditional self-defense doctrine, the jury may well have faced a close question as to whether the elements of self-defense were proven." *Id.* at 956 n.7.

44. *Id.* at 950 n.2.

45. *See, e.g., Fennell v. Goolsby*, 630 F. Supp 451 (E.D. Pa. 1985). The United States District Court for the Eastern District of Pennsylvania denied Ms. Fennell's writ of habeas corpus, based on her claim that the trial court had denied her sixth amendment right to present evidence and compel witnesses. The trial court excluded certain expert testimony on the battered woman syndrome. The district court ruled that while the trial court erred in excluding the evidence, the error was harmless. *Id.* at 461.

46. Provided that the trial judge makes a ruling based on a state or federal rule of evidence or court derived test.

47. *Hawthorne v. State*, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982).

48. *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984).

49. *State v. Allery*, 101 Wash. 2d 591, 682 P.2d 312 (1984).

50. *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981).

51. *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985).



of Columbia.<sup>52</sup> Jurisdictions holding the testimony inadmissible include Ohio,<sup>53</sup> Idaho<sup>54</sup> and Wyoming.<sup>55</sup>

The seminal case for admitting the expert testimony is *Ibn-Tamas v. United States* ("*Ibn-Tamas P*").<sup>56</sup> In *Ibn-Tamas I* the trial court held that the proffered testimony of Dr. Lenore Walker was inadmissible. The trial court noted that the testimony would exceed the instances of prior violent behavior that jurors were entitled to hear and would invade the jury's responsibility to weigh the facts and judge the credibility of the defendant and the witnesses. The trial court also objected to Dr. Walker's assumption that the deceased was a batterer because that issue was not being tried.<sup>57</sup>

In remanding the case, the United States Court of Appeals for the District of Columbia stressed that only the trial court's second objection went to the question of admissibility.<sup>58</sup> The court of appeals outlined a three-pronged test of admissibility based on *Dyas v. United States*:<sup>59</sup>

- (1) The subject matter 'must be so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman';
- (2) 'The witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for the truth'; and
- (3) expert testimony is inadmissible if 'the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert'.<sup>60</sup>

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52. *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979).

53. *State v. Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

54. *State v. Griffiths*, 101 Idaho 163, 610 P.2d 522 (1980). In this case expert testimony by a psychiatrist on the defendant's fear, not her status as a battered woman, was excluded. This case is similar to others precluding expert testimony on the battered woman syndrome because syndrome testimony most often goes to establish the reasonableness of the defendant's fear. In addition, Ms. Griffiths was also a battered woman.

55. *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981).

56. 407 A.2d 626. Ms. Ibn-Tamas suffered repeated abuse at the hands of her husband. Dr. Ibn-Tamas kept loaded firearms in their house and his adjoining office. After an argument over breakfast, Dr. Ibn-Tamas struck his pregnant wife over the head with a magazine and his fists, dragged her upstairs, ordered her to leave the house by 10 a.m., and continued to beat her with a hairbrush when she protested leaving. Dr. Ibn-Tamas then threatened his wife with a .38 caliber gun. There were conflicting reports as to what happened later in the morning. After going to his office, Dr. Ibn-Tamas returned to the bedroom upstairs. He allegedly pushed Ms. Ibn-Tamas toward the dresser on which the gun lay. She fired a warning shot at the door and her husband retreated down the stairs. Ms. Ibn-Tamas then stated that as she reached the stairs her husband jumped out from behind a wall. She fired two shots. Dr. Ibn-Tamas backed down the stairs and into an examination room adjoining the house. When his wife reached the first floor, she saw what she thought was her husband crouching with a gun in his hand in the examination room. She then fired the fatal blow. At her trial expert testimony on the battered woman syndrome was excluded, and Ms. Ibn-Tamas was found guilty of second-degree murder while armed.

57. *Ibn-Tamas*, 407 A.2d at 631.

58. *Id.* at 632.

59. 376 A.2d 827 (D.C. 1977).

60. *Ibn-Tamas*, 407 A.2d at 632-33 (citations omitted).

The appellate court disagreed with the trial court's opinion that Dr. Walker's testimony was not beyond the ken of layman. The appellate court held Dr. Walker's testimony "would have supplied an interpretation of the facts which differed from the ordinary lay perception . . . advocated by the government."<sup>61</sup> The expert testimony would serve the dual purposes of enhancing the defendant's credibility and supporting Ms. Ibn-Tamas' testimony that her husband's actions had provoked a state of fear which led her to believe she was in imminent danger.<sup>62</sup> The case was remanded in order for the trial court to rule on the admissibility of the evidence based on the second and third prongs of the *Dyas* test. On remand, the trial court found that, among other deficiencies, "defendant failed to establish a general acceptance by the expert's colleagues of the methodology used in the expert's study of 'battered women.'"<sup>63</sup> In a second appeal, the appellate court held that the "trial judge was *not compelled as a matter of law*, to admit the evidence."<sup>64</sup>

In *State v. Thomas*,<sup>65</sup> the Ohio Supreme Court rejected the battered woman syndrome testimony outright. The court stated that:

Expert testimony on the "battered wife syndrome" . . . to support defendant's claim of self-defense is inadmissible herein because (1) it is irrelevant and immaterial to the issue of whether the defendant acted in self-defense at the time of the shooting; (2) the subject of the expert testimony is within the understanding of the jury; (3) the "battered wife syndrome" is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise; and (4) its prejudicial impact outweighs its probative value.<sup>66</sup>

The *Thomas* court implicitly rejected the testimony because it failed to pass the first and third prongs of the *Dyas* test.<sup>67</sup> In a footnote, the court also offered several additional reasons why exclusion of the testimony was proper. These included that: (1) there was no proper proffer of expert testimony; (2) defendant's expert had no personal contact with her; (3) the expert was not asked a hypothetical question; (4) the defendant had not been determined to be a battered woman; (5) the jury instructions were

61. *Id.* at 634-35.

62. *Id.* at 634.

63. *Ibn-Tamas v. United States*, 455 A.2d 893, 894 (D.C. 1983).

64. *Id.* at 894 (emphasis added).

65. 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

66. *Id.* at 521, 423 N.E.2d at 140.

67. The Ohio Supreme Court's second conclusion, that the subject matter is within the understanding of the jury, fails the first prong of the *Dyas* test that the subject matter be beyond the ken of the average layman. The third conclusion, that the syndrome is not sufficiently developed as a science to warrant the label "expert testimony" fails *Dyas*' third prong, which is that the state of the art must be sufficiently established to allow a reasonable opinion by an expert. *Id.*

adequate to cover the situation; and (6) there was no prejudice to the defendant.<sup>68</sup>

Although jurisdictions differ on the ultimate issue of admissibility, they agree on criteria for admitting the expert testimony. The two areas of contention for courts are whether the expert testimony is beyond the ken of the average juror and whether the state of the art is sufficiently developed to permit testimony by experts. Because there is disagreement over these issues, the following discussion attempts to illustrate why expert testimony on the battered woman syndrome should be excluded.

### B. *Why the Testimony Should Be Inadmissible*

As previously discussed, the decision to admit expert testimony on the battered woman syndrome usually rests upon a finding that the subject matter is beyond the ken of the jury, and that the state of the art is sufficiently established to permit expert testimony.<sup>69</sup> Expert testimony about the battered woman syndrome cannot pass muster on either evidentiary issue. The testimony, therefore, should *not* be admissible in the trials of battered women who kill their batterers and claim self-defense.

The most compelling reason for excluding the expert testimony is that the subject matter is *not* beyond the ken of the average juror. It is hypothesized that the trials of battered women who kill evoke emotions and possible prejudices in jurors about the role of women in society, the sanctity of the marital relationship, the sanctity of human life, and the relative values of male and female lives, as well as a possible prejudice against the defendant for her status as a battered woman.<sup>70</sup> Commentators urge that prospective jurors need to be educated.<sup>71</sup> One writer cautions that in the murder trial of a battered woman, one must consider both the impact of the battered woman defendant on the jurors, and the way in which the ultimate punishment is related to jurors' psychological needs.<sup>72</sup>

Proponents of the expert testimony argue that jurors often come to trial with notions of the woman defendant as blameworthy in some way. This

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68. *Id.* at 519 n.1, 423 N.E.2d at 139 n.1. This ruling is correct. When a judge rules that expert testimony is inadmissible, this does not exclude the introduction of *other* evidence of prior abuse, such as eyewitness accounts, police reports, and medical records, to establish that the deceased abused the defendant. Exclusion of the expert testimony only means that opinions as to the defendant's state of mind or perception of danger is based on this other testimony. There is no prejudice to the defendant in allowing her to raise the inference that she was a battered woman.

69. The first and third prongs of the *Dyas* test, *see supra* note 67 and accompanying text.

70. *See generally* Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L. J. 121 (1985); Note, *The Expert as Educator: A Proposed Approach to the Use of Battered Woman Syndrome Expert Testimony*, 35 VAND. L. REV. 741 (1982).

71. Note, *supra* note 70, at 744, 766.

72. Maynard-West, *supra* note 28, at 311.

phenomenon is similar to "blaming the victim," a phenomenon social scientist William Ryan documented in a study of victims of racial discrimination, and subsequently extended to several areas of violence against women, particularly rape.<sup>73</sup> Juror attitudes reflect the societal belief that somehow the victim provoked the discrimination or assault.<sup>74</sup> In cases involving a battered woman defendant, jurors may feel that she provoked, deserved, or enjoyed the repeated attacks.<sup>75</sup> These assumptions are detrimental to the battered woman's theory of self-defense, particularly if she is viewed as having provoked the attack which results in her attacker's death.<sup>76</sup> The battered woman would then have no legal right in some jurisdictions to defend herself with deadly force.<sup>77</sup>

If these prejudicial views are held by jurors, the battered woman defendant cannot receive a fair trial without that testimony. Expert testimony supposedly ensures that jurors decide the issue of self-defense on relevant evidence, not prejudice. The battered woman's testimony, standing alone, is not sufficient to accomplish this.

One criticism of this approach is that sympathetic judges and commentators blindly *assume* jurors hold these "misconceptions" about battered women, and that only expert testimony can change these views.<sup>78</sup> Supporters of the expert testimony do not discuss the very real possibility that jurors have similar conclusions about the problems of battered women as those suggested by the experts, or that juries can be swayed by other evidence of

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73. L. WALKER, *supra* note 30, at 14-15 (citing W. RYAN, *BLAMING THE VICTIM* (1971)).

74. In rape cases, "blaming the victim" is also called "victim precipitation," which originally developed in the study of homicide victims by Marvin E. Wolfgang. He found that 26% of the victims he studied had been the first to display a weapon or show aggression. M. WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* 254 (1958). Menachem Amir, a student of Wolfgang's, adapted the victim precipitation theory to sexual assault cases, and included under the rubric "precipitation" such actions as flirting, wearing suggestive buttons, and having a previous relationship with the attacker. M. AMIR, *PATTERNS IN FORCIBLE RAPE* (1971). In addition, victim precipitation has some basis in Freudian psychology, which identified a common masochistic desire to be raped in women. See generally S. KATZ & M. MAZUR, *UNDERSTANDING THE RAPE VICTIM* 137-151 (1979); *FORCIBLE RAPE* 18-22 (D. Chappell, R. Geis & G. Geis eds. 1977).

75. It may well be that prosecutors perpetuate these questionable theories at trial, and that the *true* need for education is in educating and sensitizing these *prosecutors* to the seriousness of woman battering. See, e.g., *State v. Anaya*, 438 A.2d 892, 894 (Me. 1981); *People v. Powell*, 83 A.D.2d 719, 720, 442 N.Y.S.2d 645, 647 (1981).

76. Dr. Walker has noted that battered women occasionally *do* provoke an acute battering incident. This provocation may occur when the couple has been in a battering relationship for a long time. Because the woman realizes a major outburst is inevitable soon, she acts to minimize her anger, anxiety, and terror, and brings about the attack. L. WALKER, *supra* note 30, at 60. The majority of acute battering episodes, however, result from the internal state of the batterer or an event outside the relationship, rather than the woman's behavior.

77. Only one who is not an aggressor generally can use reasonable force to repel an attack. See generally W. LAFAVE & A. SCOTT, *supra* note 26, at 454. An aggressor, however, may defend himself if he withdraws (and notifies his potential victim of that fact) or if the potential victim responds with deadly force to a non-deadly attack. *Id.* at 459-60.

78. Note, *supra* note 70, at 744, 766.

the battering relationship, such as eyewitness accounts or medical records.

Researchers have conducted numerous post-trial interviews with jurors in battered woman self-defense cases. In one case, two members of the jury, the foreman and another male juror, had knowledge about battered women, but this fact did not surface during voir dire. The foreman watched his mother remain in an abusive relationship with his father, and he personally understood how a woman could stay with an abusive mate.<sup>79</sup> The foreman and his wife, a nurse who treated battered women, often discussed the phenomenon of battering and why women do not leave their abusers.<sup>80</sup> The researchers concluded that these jurors' exposure to the phenomenon of battering allowed them to sympathize with the defendant, and "to *reject the tendency to 'blame the victim'* so often applied to women."<sup>81</sup>

The fact that these jurors' personal knowledge and experience went undetected during voir dire highlights a basic flaw in the proponents' reasoning for the "expert as educator." Commentators observe that because the presumptions held by jurors are extremely controversial and difficult to resolve, the importance of *asking* them what they believe is obvious.<sup>82</sup> Questioning jurors during voir dire about their personal knowledge of battering relationships, and possible assumptions about the people involved in such relationships, allows defense counsel to exclude prospective jurors who hold biased views. In addition, use of this line of questioning, by defense counsel or the court, educates and sensitizes acceptable jurors to the probable testimony of the battered woman, family, friends, and neighbors to follow at trial.<sup>83</sup>

This alternative causes one to wonder how judges have come to rule that the subject matter *was* beyond the ken of the average laymen when they do not often question prospective jurors. Judges, unfortunately, have too frequently relied upon the writings of Dr. Lenore Walker. As late as 1984, in *State v. Kelly*<sup>84</sup> the New Jersey Supreme Court majority cited her work as authority for concluding that jurors hold prejudiced views and that the expert's testimony is needed to provide an alternative to jurors supposed bias against the defendant.<sup>85</sup>

Dr. Walker, however, never addressed juror beliefs, nor established that jurors hold biased views of battered women, in her research. Instead she based her findings on her own intuition. Dr. Walker interviewed women who had been in abusive relationships and drew conclusions about the women

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79. WOMEN'S SELF-DEFENSE CASES, *supra* note 10, at 160.

80. *Id.*

81. *Id.* at 165 (emphasis added).

82. Acker & Toch, *Battered Women, Straw Men, and Expert Testimony: A Comment on State v. Kelly*, 21 CRIM. L. BULL. 125, 142 (1985).

83. *Id.*

84. 97 N.J. 178, 478 A.2d 364 (1984).

85. *Id.* at 192, 478 A.2d at 370.

and the relationships. She then compared these conclusions to those she projected on the public. (The latter conclusions were exactly opposite her own.). Dr. Walker titled the first chapter of *The Battered Woman* "Myths and Reality," labelling her conclusions "reality" and those she hypothesized the general public held, "myths". Critics have insightfully stated that:

This estimate of public opinion is one that requires documentation, . . .

. . . Walker's roster [of myths] is in actuality a *literary device* designed to contrast her own inferences to a set of contrasting assumptions which she rejects. . . . [Walker], however, neither has expertise nor claims expertise in public opinion assessment, which is the only basis for her to assert that the 'myth' with which she disagrees, and which the court [in *State v. Kelly*] . . . assumes to be prevalent, are widely endorsed.<sup>86</sup>

The phenomenon of battering, consequently, is not necessarily beyond the ken of the average juror. Judges have made only cursory inquiries in this regard, relying instead on Dr. Walker's writings. Not only may the phenomenon of the battered woman syndrome be within the understanding of the jury, the specific expert testimony, as it relates to the defendant's fear of imminent danger, can be understood by jurors.<sup>87</sup> Experts testify that the harmful psychological effect of abuse leads to a reasonable fear of imminent danger. Opponents of the expert testimony argue that a history of abuse results in familiarity with the abuser and increases expectations of future abuse. The link between repeated past abuse and future abuse does not require expert testimony on so-called victimization syndromes. Most jurors understand that previous violent encounters alter present perceptions. The link between past and future violence is not too complex or foreign for most people to comprehend.<sup>88</sup>

In addition to disagreement concerning the first prong of the *Dyas* test, whether the subject matter is beyond the juror's ken, there is disagreement as to whether the state of the art or science is sufficiently developed to permit testimony by an expert. A second reason for rejecting expert testimony on the battered woman syndrome, therefore, is the veracity of the conclusions made by Dr. Walker and others based on questionable methodology. The concurring opinion in *Ibn-Tamas II* provides an excellent argument for rejecting Dr. Walker's testimony, her own misgivings. The concurrence referred to the following comments by Dr. Walker. "I think this research has raised more questions for me than it has answered. As a trained researcher, I felt uneasy about stating some of my conclusions in this book. They seemed

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86. Acker & Toch, *supra* note 82, at 138-39 (emphasis added).

87. A reasonable fear of imminent danger of death or grievous bodily harm is a requirement of self-defense. See *infra* notes 103-06 and accompanying text.

88. Acker & Toch, *supra* note 82.

too tentative to write down in the positive manner which I have used."<sup>89</sup> In rejecting battered woman syndrome expert testimony, the Wyoming Supreme Court, in *Buhrle*,<sup>90</sup> also relied on this passage.

A more damning observation by Dr. Walker is that "the women were not randomly selected, and they cannot be considered a legitimate data base from which to make specific generalizations."<sup>91</sup> Yet when Dr. Walker takes the stand for the defense, she attempts to persuade the jury that her generalizations relating to learned helplessness and the cycle theory of violence should be accepted by the jury, and applied to the specific defendant. The psychological community, while accepting interviewing as a appropriate way to obtain data, discards conclusions that are not based on a random sample. Because Dr. Walker's methodology did not include random selection, her conclusions should not be accepted.

Finally, the veracity of Dr. Walker's theories *as they apply to battered women who kill* is unclear. It is questionable whether there is any significant difference between a woman in a battering relationship and one who has terminated that relationship by killing her batterer.<sup>92</sup> Learned helplessness, for example, supposedly accounts for the inability of a particular defendant to leave her abuser. This theory of powerlessness does not account for the actions taken by battered women to control specific instances of acute battering and to extend the honeymoon phase.<sup>93</sup> In the animal studies, the passivity and inactivity, or loss of will to escape when they could, was complete. In battered women, the analogy is not so convincing.<sup>94</sup> In addition

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89. *Ibn-Tamas*, 455 A.2d at 894 (citing L. WALKER, *supra* note 30, at xv-xvi). The correct methodology and the veracity of the researchers' conclusions are particularly important in battered woman syndrome testimony. Often the expert has not personally treated or even interviewed the battered woman defendant. *See, e.g., Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137. Yet the expert attempts to attribute the *characteristics* of woman suffering from the syndrome to a particular defendant. This attempt to pigeonhole women defendants only serves to further stereotype battered women as weak and helpless.

90. 627 P.2d at 1377.

91. L. WALKER, *supra* note 30, at xiii.

92. Dr. Walker hypothesizes that women who escape battering relationships would show fewer signs of learned helplessness than women currently in battering relationships. L. WALKER, *supra* note 29, at 87. Dr. Walker compares battered women in and out of relationships and finds that those who leave had reached a level of anger and disgust which enabled them to leave the relationship. Accompanying the increase in anger, hostility, and disgust was a decrease in fear and depression associated with learned helplessness. *Id.* at 89. If anger is a motivating factor in leaving a relationship, then it seems logical that anger also would be a motivating factor in terminating the relationship in a more violent fashion.

93. *See, e.g., L. WALKER, supra* note 29, at 79. "Battered women often manipulate the environment in order to minimize the opportunity for the batterer to be angry . . . . It may be this sense of internal control that is the hope which allows the battered woman to believe she will be able to change the batterer or the environment in such a way that things will get better." *Id.*

94. In the experiment with dogs, the loss of escape skills in the caged animals was so complete that researchers had to drag them through the opened cage door several times before

to manipulating the phases of battering, battered women often hold jobs and run households. When expert testimony about learned helplessness is introduced at trial, the jury is asked to ignore the ways a woman is competent and efficient, due to her highly developed survival skills, and to focus instead on the totality of the learned helplessness. This stereotyping can actually hurt battered women defendants who are, for example, professionals, or women who have left the batterer in the past, or taken other positive steps to end the battering—women who are an exception to the battered woman profile.<sup>95</sup>

In addition, while Dr. Walker attributes the battered woman's inability to leave a batterer to learned helplessness, another authority, Lee Bowker, concludes that several systematic factors determine whether a battered woman will leave the relationship.<sup>96</sup> Ms. Bowker's book, *Beating Wife-Beating*, explores the ways that battered women remedied their abusive relationships. Battered women took several steps to relieve themselves of the problem. These steps included: (1) contacting the police, (2) going to a battered woman's shelter, (3) obtaining counseling, (4) leaving the relationship permanently and obtaining a divorce, (5) convincing the batterer to stop his violent behavior, by herself or with the help of others; and (6) fighting the abuser.<sup>97</sup>

As previously noted, expert testimony on the battered woman syndrome should be inadmissible because it fails both the first and third prongs of the *Dyas* test. The first prong, that the subject matter of the expert testimony is beyond the comprehension of the average juror, is an uncertain tenet. Juror attitudes are presumed under a misplaced reliance on Dr. Walker's writings and testimony, not explored through a thorough voir dire. The third prong, a sufficiently developed state of the art, fails because the veracity of Dr. Walker's hypotheses, based on faulty methodology, belies the devel-

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the dogs realized an avenue of escape was available. The learned helplessness ascribed to battered women is better defined as a loss of escape skills and a distorted perception of what is in or out of their power to control. Because battered women are unable to predict which actions taken will lead to success (which is defined as the cessation of violence), they lose the will to escape. Even Dr. Walker acknowledges that battered women may *develop coping and survival skills at the expense of escape skills*. L. WALKER, *supra* note 29, at 33, 86. In addition, early childhood experiences account for learned helplessness in adult women. Learned helplessness, in fact, may develop in the battered woman either in her childhood or during the abusive relationship. The probability is equal. *Id.* at 92. A very significant question for a jury and for society is whether the development of survival skills at the expense of escape skills is to be legally condoned through successful battered woman self-defense pleas.

95. Crocker, *supra* note 70, at 136, 147-48.

96. L. BOWKER, *supra* note 13, at 5.

97. *Id.* at 9. A further question for juries and society is whether, as alternatives become more publicized and as the judicial system becomes more responsive, the battered woman who does not avail herself of these alternatives is not allowed to use psychological theories that imperfectly excuse her behavior at a trial where she claims self-defense in the killing of her batterer.



opment of the state of the art. Finally, while expert testimony is designed to clarify issues for jurors and aid them in their deliberations, expert testimony on the battered woman syndrome often diverts juror attention from legitimate issues and confuses them with stereotypes that specific battered women defendants may not fit.

### III. THE DELETERIOUS EFFECT OF EXPERT TESTIMONY ON THE BATTERED WOMAN SYNDROME ON THE LAW OF SELF-DEFENSE

Expert testimony on the battered woman syndrome dilutes the law of self-defense in several ways. First, the testimony attempts to establish the elements of self-defense in certain cases where they do not exist. The attempts, if successful, turn self-defense, considered a justification, into an excuse. Second, the testimony depicts the battered woman as weak and helpless, thus encouraging jurors to adopt an accident theory of self-defense. As a result, jurors acquit a battered woman defendant *only if* they believe the killing was accidental. Third, allowing expert testimony to establish the elements of self-defense encourages both carelessness and inappropriate pleading by defense counsel, as well as the development of other victimization-syndrome defenses. Finally, the inherent inconsistency of permitting expert testimony describing a battered woman's unhealthy mental state to establish the reasonableness of her act of self-preservation undermines the social goal of self-defense. The effect of finding reason in what is unreasonable is to cloak retaliation in self-defense.

#### A. *The Law of Self-Defense*<sup>98</sup>

Self-defense allows a person to use force to protect herself from a threatened harm.<sup>99</sup> To claim self-defense, an actor cannot be the initial aggressor.<sup>100</sup>

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98. Feminists who examine only the historical evolution of self-defense find that plea and its application to particular cases permeated with a male perspective. They then claim that a woman's self-defense plea does not fit into that traditional model. Women, particularly battered women, therefore are denied the chance to successfully claim self-defense because their cases do not fit the classic confrontation model. See generally Crocker, *supra* note 70.

But this cursory inquiry does not delve far enough into the law of self-defense. It ignores an important social goal. The social goal of self-defense is the preservation of human life (a gender neutral goal). The law of self-defense preserves life in two ways. First, self-defense allows the threatened person to protect himself or herself against an aggressor with deadly or non-deadly force. Second, and equally important, is the limit put on the use of deadly force by the principles of proportionality and necessity. See *infra* notes 117-20 and accompanying text. One must only resort to killing the aggressor if it is a necessary act, or the last resort. To erode the proportionality and necessity components of self-defense is to broaden the range of circumstances under which a life can legally be taken without criminal sanctions. To acquiesce to battered women, and allow them to kill their abusers to end the abuse, is to encourage similar action by others.

99. This defense, defense of the home, and the prevention of serious felony offenses were "defensive force" claims which developed at common law. P. LOW, J. JEFFRIES & R. BONNIE, *CRIMINAL LAW: CASES AND MATERIALS* 551-52 (1982).

100. W. LAFAVE & A. SCOTT, *supra* note 26, at 454.

In addition, the actor must *reasonably* believe both that the threat of bodily injury is immediate (or imminent)<sup>101</sup> and that force is necessary to avoid the threat.<sup>102</sup> The use of deadly force to protect oneself creates special problems for society because the harm inflicted is the taking of a life.

The law of self-defense using deadly force, allows a battered woman to use deadly force "to protect herself from what she reasonably believes to be an imminent, deadly attack."<sup>103</sup> Self-defense does not require that an actual deadly attack occur. A person acting under color of self-defense need only reasonably believe that she is in danger of death or grave bodily harm.<sup>104</sup> In addition, contrary to the common interpretation of self-defense, deadly force is not inevitably unjustified against an unarmed aggressor.<sup>105</sup> The use of a deadly weapon against an unarmed attack, however, *does* create an unspoken presumption that the person using the weapon intended to inflict death on the victim.<sup>106</sup> This presumption, or permissive inference, is the factor that is most difficult to overcome in cases with female defendants, not only battered women, because women may resort to weapons against an unarmed attack more readily than male defendants.<sup>107</sup>

While the use of a deadly weapon is more easily understood by jurors in a confrontation between the battered woman and her abuser, the use of a weapon occurs in non-confrontational circumstances for many battered women. Self-defense is the common plea of battered women who kill their abusers during a violent episode, in anticipation of a violent episode, after a violent episode, and while the abuser is asleep or otherwise incapacitated.

101. These two concepts may not be interchangeable. In Kansas, for example, self-defense case law has not interpreted the statutory requirement of imminent danger to be immediate. A jury instruction substituting immediate for imminent was held clearly erroneous by the Kansas Supreme Court in *State v. Hundley*, 236 Kan. 461, 467, 693 P.2d 475, 480 (1985).

102. W. LAFAVE & A. SCOTT, *supra* note 26, at 454.

103. WOMEN'S SELF-DEFENSE CASES, *supra* note 10, at 43.

104. *See, e.g.*, MODEL PENAL CODE § 3.04(2)(b). She is also justified in using deadly force to prevent rape and kidnapping.

105. Such subjective characteristics as size and sex, as well as the particularly violent nature of the attack or attacker, and the presence of several aggressors are considered relevant in self-defense cases. W. LAFAVE & A. SCOTT, *supra* note 26, at 456-57. As long ago as 1954, in a case involving a woman defendant who previously had been beaten by the deceased, an Oklahoma criminal court of appeals recognized that differences in physical strength, age, and size could justify the use of a deadly weapon:

There may be such a difference in the size of the parties involved or disparity in their ages or physical condition which would give the person assaulted by fists reasonable grounds to apprehend danger of great bodily harm and thus be legally justified in repelling the assault by the use of a deadly weapon. It is conceivable that a man might be so brutal in striking a woman with his fists as to cause death.

*Easterling v. State*, 267 P.2d 185, 188 (Okla. Crim. App. 1954).

106. W. LAFAVE & A. SCOTT, *supra* note 26, at 613-15.

107. *See supra* note 15.

Proponents attempt to introduce expert testimony in all of these cases.<sup>108</sup> Where the killing occurs during a violent episode, self-defense is an appropriate plea which needs little adjustments by expert testimony at trial. But expert testimony is vital when the defendant kills her batterer outside a violent episode. The two areas of self-defense requiring expert opinion are the reasonableness of the degree of force used and the reasonableness of the battered woman's perception of imminent danger. In the non-confrontational killings by battered women, expert testimony attempts to create these elements of self-defense where they do not exist. The result is the destruction of self-defense as a justification and the substitution of an excuse for the justification.

### B. *Creating An Excuse From A Justification*

Most jurisdictions treat the defense of self-defense as a "pure justification,"<sup>109</sup> although modern interpretation may include self-defense under the doctrine of excuse.<sup>110</sup> The distinction between justification and excuse is often unclear, because the result of a jury finding justification or excuse can be the same—lack of criminal responsibility. The importance of distinguishing the two concepts lies in how society perceives the unpunished act. Justification defenses, such as self-defense, focus on the *act* rather than the actor, while excuse emphasizes the *actor*, not the act.<sup>111</sup>

Under justification, the law continues to recognize the harm caused by the act as wrong, but offers an exception to applying the criminal law. A successful justification defense requires acquittal because, by definition, no crime has occurred. Self-defense, according to some scholars, is the primary example of a justification. If committed in self-defense, an intentional killing is not a crime.<sup>112</sup>

The reason that the killing is not a crime is that the act avoids an even greater harm or furthers a more important interest of society.<sup>113</sup> In self-defense cases, the balancing of harms is that "[s]ociety's interest in the right

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108. Indeed, expert testimony can be offered at trials in which the battered woman pleads insanity or some form of diminished capacity. *See, e.g.,* State v. Duell 332 S.E.2d 246 (W. Va. 1985). An assistant professor of psychology testified that Ms. Duell, who had gone to a tavern, ordered a drink, and shot her husband as he sat next to her, was not likely to be in touch with reality and was unaware of the consequences of her actions.

109. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 235-36 (1982).

110. Crocker, *supra* note 72, at 130 (citing R. PERKINS & R. BOYCE, CRIMINAL LAW 1123-26 (1982)).

111. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 274-75 (1975).

112. P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 99, at 523.

113. Robinson, *supra* note 109, at 213.

of bodily integrity, when combined with the physical harm threatened, outweighs the harm inflicted to deter such an aggressor."<sup>114</sup>

The balancing of harms in a justification case may be analyzed by dividing the act into several elements. Professor Paul Robinson analyzes the act under the following scheme: "*triggering conditions* permit a *necessary* and *proportional response*."<sup>115</sup> Once triggered, the justifiable conduct must satisfy the two components of proportionality and necessity.<sup>116</sup> The conduct is proportional if it causes a harm that is reasonable or not excessive in light of the harm avoided. The act is necessary if it protects or furthers a societal interest.

When a battered woman kills her abuser outside a violent episode, both necessity and proportionality are arguably absent. Expert testimony must create these two components to justify the killing in self-defense. This dangerous sleight of hand occurs when experts use the defendant's past experiences and psychological state to produce the reasonableness of both deadly force and the defendant's fear of imminent danger. If proportionality means that the battered woman could not have effectively protected herself with less force, then experts must show that the use of deadly force was the defendant's perceived last resort. Experts show this perception through the learned helplessness phenomenon. Because the defendant believes she is powerless to stop the abuse in any other way, using deadly force is the only way to end the abuse. The battered woman may have tried alternatives and failed. The battered woman may fear that anything less than deadly force would so enrage the batterer that he would kill her at that instant.

Experts attempt to establish the necessity of deadly force by showing the reasonableness of the battered woman's fear of imminent danger. They emphasize the severity and unpredictability of the batterings. The imminence requirement represents what Professor Robinson calls the temporal element of necessity.<sup>117</sup> In the case of a battered woman who kills her abuser when he is of no present apparent threat, expert testimony to prove the reasonableness of her fear of imminent danger destroys the temporal element of necessity in self-defense.<sup>118</sup> As one opponent of the expert testimony explains:

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114. *Id.* at 214.

115. *Id.* at 216. (emphasis in original)

116. *Id.* at 217.

117. *Id.*, at 217 n.68.

118. Underlying the attempts by experts on the battered woman syndrome to establish the reasonableness of the woman's perception of imminent danger is the debate over the imminence requirement itself. Imminence requires that the danger, if not immediate, is about to happen. The issue is how long one must wait before responding with deadly force to a threat of future harm. Under Professor Robinson's scheme for analyzing justificatory acts, the threat of future harm would be the triggering condition. The question still remains as to whether the threat of death tomorrow, with no action by the aggressor, justifies the use of deadly force today. Case law or statutes which require imminence apparently require the person threatened to wait to act with deadly force.

the battered wife syndrome defense violates the existing criminal law by seeking to avoid the requirement of imminent present danger of death or great bodily harm and substituting *certainty of future harm* plus inadequacies of legitimate alternatives rationale, thereby bestowing upon the abused wife the unique right to destroy her tormentor at her own discretion.<sup>119</sup>

Admitting expert testimony in the trials of battered women who kill in a non-confrontational setting means that self-defense no longer satisfies the strict requirements of justification.

Another major problem with battered woman syndrome expert testimony in self-defense cases is that it blurs the justification-excuse distinction. This testimony emphasizes the defendant and her psychological characteristics. As stated earlier, an excuse emphasizes the actor, not the act.<sup>120</sup> Under the doctrine of excuse, the illegal act goes unpunished "because some *characteristic of the actor* vitiates society's desire to punish him."<sup>121</sup> Learned helplessness is one such characteristic. Because battered women suffer from learned helplessness, which impedes their escape from the relationship, some would argue that it seems unfair or unethical for society to "blame" battered women through criminal conviction for their act of self-preservation.<sup>122</sup>

Herein lies the problem. While defendants would claim, under the doctrine of excuse, that it would be unfair or unethical for society to "blame" them by convicting and punishing them for their act,<sup>123</sup> the defendants are pleading self-defense, a justification. The danger lies in the public, and other battered women, mistaking the acquittal by self-defense as an acceptance of homicide as justified, appropriate conduct for battered women who want to escape battering relationships.<sup>124</sup> Acquittal by excuse still means that the *act* itself is condemned by society. Blurring the distinction between excuse and justification seems to imply a "social utility"<sup>125</sup> theory of self-defense for

119. Rittenmeyer, *Of Battered Wives, Self-Defense and Double Standards of Justice*, 9 J. CRIM. JUST. 389, 390 (1981) (emphasis added).

120. Robinson, *supra* note 111, at 275.

121. *Id.* (emphasis added).

122. As two researchers have commented:

The question is whether . . . some trappings of excuse may not be suggested to the jury through the testimony of an expert about the battered woman's syndrome and its pertinence to the accused "battered woman's" claim of self-defense. . . . The explicit assumptions underlying the battered woman's syndrome may in fact suggest that the homicidal conduct . . . is consequently to be excused because of impediments to the person's freedom to choose to act other than she did.

Acker & Toch, *supra* note 82, at 153.

123. P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 99, at 523.

124. The feminist theory of self-defense *assumes* that a battered woman's act of self-preservation, regardless of when it occurs in the cycle of violence, is justifiable, not simply excusable. Crocker, *supra* note 70, at 130.

125. A "social utility" theory of justifiable homicide is attributed to Professor Herbert Wechsler and Professor Jerome Michael:

For the most part it is possible to achieve and protect the conditions of worth-

battered women, permitting the killing of the abuser not because it was necessary at that point in time, but because it appears "just" in the long run.<sup>126</sup> Jurors who acquit the battered woman who kills in a non-confrontational setting by self-defense create a complete defense where an incomplete one has been presented.<sup>127</sup>

### C. *The Encouragement Of An Accident Theory of Self-Defense*

Further dilution of the law of self-defense occurs because expert testimony focuses on the battered woman's *plight* rather than her *right*. One can view self-defense defined in statutes as creating a "right" to defend oneself. The effect of battered woman syndrome testimony is to emphasize the defendant's weakness and helplessness, overshadowing the battered woman's *right* to defend herself, and encouraging jurors to adopt an "accident" theory of self-defense.

In a community analysis survey by the National Jury Project, people who would acquit a battered woman defendant on self-defense were divided into two groups: the accident theory group and the strict self-defense group. The accident theory group tended to perceive the battered woman, rather than the deceased, as the victim. The study stated that:

This group saw Rachel Olsen as a helpless frightened victim. They believed her fear was reasonable because of the history of abuse. They emphasized the fact that she *had no active intent to defend or protect herself* but was acting out of terror . . . .

[They] were more comfortable thinking of Mrs. Olsen as trying to "get away."<sup>128</sup>

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while living by other means than homicide. But precisely as homicide is sometimes a necessary means to the preservation of life, it is sometimes a necessary means to the prevention of physical and psychic injuries that usually prove to be permanent and seriously impair the human capacities of those who suffer them. What has been said about the justifiability of homicide in the first case applies with equal force to homicide in the second. . . . There remains, of course, the difficult problem of determining what physical and psychic injuries so gravely impair the capacity to function that the value of life itself is seriously impaired.

Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 740 (1937) (citations omitted). Feminists appear to argue that battered women suffer the type of severe physical and psychic injuries that the authors above speak of.

126. Acker & Toch, *supra* note 82, at 149.

127. Justification defenses are complete defenses while excuses may not be. Two opponents of battered woman syndrome testimony stated that it "threatens to expand the bounds of lawful justification, and . . . invites the jury to consider the battered woman's conduct as lawfully excused." *Id.* at 143. Another opponent, writing after several celebrated cases in the late 1970's concluded that the trials "reveal that both traditional defenses [insanity and self-defense] have been stretched beyond their common law and statutory definitions to allow acquittals or conviction on a lesser charge." Note, *supra* note 18, at 1720.

128. WOMEN'S SELF-DEFENSE CASES, *supra* note 10, at 118 (emphasis added).

Expert testimony premised on the woman-as-victim reinforces the jurors' belief that the battered woman did not intend to kill her batterer, and promotes an accident theory of self-defense. The result is that, if jurors believe a woman intends to use a weapon, she intends to kill her batterer. This self-defense plea cannot be successful because it was not accidental. Consider, for example, the following comments of jurors:

[One juror] understood the defense argument [to be] that Mrs. Olsen acted in self-defense, but was unable to distinguish the issue of intent. He assumed that Mrs. Olsen had intended to kill her husband and that self-defense was an excuse rather than a legal justification.<sup>129</sup>

... Blair [another juror] could not see how one could use a deadly weapon [in this case a steak knife] without intending to inflict death. He never viewed the use of a deadly weapon in the context of the *right* to defend oneself against a life threatening attack.<sup>130</sup>

If some jurors believe that self-defense must be accidental in order for the defendant to be acquitted then jurors often debate the wrong question. For these jurors, a battered woman defendant's case does not turn on whether she had the *right* to use deadly force, but whether the defendant accidentally used a deadly weapon.<sup>131</sup>

Not only does expert testimony divert the jurors' attention from the proper inquiry of whether the defendant had a right to defend herself, it further undermines self-defense by motivating jurors to blame the deceased batterer for his death. By emphasizing the repeated physical beatings and psychological dominance, the jury is encouraged to sympathize with the defendant.<sup>132</sup> Blaming the deceased batterer is critical in achieving an acquittal for a battered woman defendant.<sup>133</sup>

In the end, expert testimony confuses the jury as to who the real victim is when a batterer is killed. While the defendant may have been the victim during the battering relationship, the deceased is surely the victim of her escape through homicide. Expert testimony circumvents the jurors' responsibility to try a self-defense case. The testimony is cumulative, confusing,

129. *Id.* at 136.

130. *Id.* at 168 (emphasis added).

131. *Id.*

132. Acker and Toch note that "[a]t a murder trial where self-defense is at issue, jurors are asked to define either the defendant or the deceased as an innocent victim within a tragic situation." Acker & Toch, *supra* note 82, at 149.

133. As one study suggests:

[T]he ability to accept the law rests too frequently on the juror's ability to *blame the attacker*, who is now dead, rather than the victim.

...

... It is a rare juror who is able to distinguish between his or her personal interpretation of the facts and the interpretation which the law requires.

WOMEN'S SELF-DEFENSE CASES, *supra* note 10, at 162, 169 (emphasis added).

and prejudicial. Even if the testimony would be admissible under the *Dyas* test, it should be rejected because of its confusing and prejudicial impact.

#### *D. Overreliance of the Expert Testimony to Establish Self-Defense*

Two additional ways in which expert testimony weakens self-defense law are the overreliance on the testimony by defense counsel and the stimulation of similar self-defense victimization exceptions. First, this testimony is used in repugnant cases. The explosion of battered woman self-defense cases and the success of the use of expert testimony encourages shoddy work by attorneys. Rather than thoroughly examining the ramifications of the plea and expert testimony, defense lawyers have jumped on the bandwagon. Defense lawyers often delegate their own work to experts on the battered woman syndrome. This behavior can lead to conviction for a woman who has a legitimate self-defense plea, but does not quite fit the stereotyped battered woman.<sup>134</sup>

Second, the theory of victimization as a legitimate reason for retaliation cloaked in self-defense is not limited to battered women. By acquitting battered women who are properly guilty of manslaughter, juries set a dangerous precedent. Soon, abused children,<sup>135</sup> the elderly abused in nursing homes or at the hands of relatives, or any other victim of repeated assaults or other crimes, may be able to claim self-defense based upon a victimization-syndrome.

#### *E. The Inherent Inconsistency of Establishing Reasonableness By Describing the Unhealthy Mental State of Battered Women*

One final objection to the use of expert testimony in conjunction with self-defense is the inherent inconsistency of describing the battered woman's unhealthy mental state to show the *reasonableness* of her belief of imminent danger, and, consequently, the reasonableness of her act of self-defense. Expert testimony by psychiatrists and psychologists traditionally was intro-

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134. One case study concluded that:

[O]verreliance on the theory of battering undercut the development of a strong self-defense theory. The defense believed that [the defendant's] state of mind could best be explained . . . through general expert testimony on battering. [This] [r]eliance . . . also diverted [the defense team] from assessing [the defendant's] strengths and weaknesses as a witness.

. . . .  
 . . . The jury's attention was diverted from the specific facts of the incident . . . which provided a far more reasonable basis for [her] perception of imminent bodily harm [than the expert's theory].

*Id.* at 202-203.

135. *See. e.g., Jahnke v. State*, 682 P.2d 991 (Wyo. 1984).



duced at trial when the defendant pleaded insanity.<sup>136</sup> The testimony involved whether the defendant, at the time of the criminal act, so suffered from a diseased mind or defect of reason that he did not comprehend the nature and consequences of his act.<sup>137</sup>

But in the case of battered woman syndrome expert testimony, these experts testify not that the woman is unreasonably mentally ill, but rather that the woman acted as a reasonable battered woman would. For instance, these experts testify as to the psychological effects of prior beatings, such as learned helplessness and clinical depression.<sup>138</sup> Testimony proceeds in this fashion because the claim of self-defense requires proof of reasonableness, or rationality, behind the homicidal act.

This testimony is inconsistent, however, with the true mental state of battered women. In her comprehensive study of 403 cases of battered women, Dr. Walker predicted battered women would be at high risk for depressive disorders. The results of psychological testing bore out this prediction.<sup>139</sup> Another study compared the personality characteristics of battered wives to non-battered wives, and found that battered wives tend to be "generally more maladjusted, with higher scores on psychosis, personality disorder, and neurosis factors."<sup>140</sup> Battered wives were psychologically more unhealthy, and possessed personality characteristics which indicated they were overexcitable, unstable women.<sup>141</sup> In fact, overexcitable battered women can become hypersensitive to clues of violence to follow, and as a result beat the batterer to the attack.

A short example illustrates this point. If a batterer customarily calls home from work to make sure his target is home on days when he is going to beat her, and the woman shoots him as he enters the door after calling from work, she might have what one psychiatrist describes as "signal anxiety"—a "fear triggered by danger signs from an attacker . . ."<sup>142</sup> If this woman claimed self-defense, experts would try to show how this anticipatory act was "reasonable." The danger is that what mental health experts define as a "reasonable" survival skill developed by the battered woman is not "reasonable" in the legal sense.

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136. The psychiatrist would testify as to the unreasonableness of the defendant's actions. In an insanity plea, the defendant is not acquitted and released, but is subject to civil commitment to an institution. W. LAFAYE & A. SCOTT, *supra* note 26, at 304.

137. *Id.* The Model Penal Code suggests that the defendant is not responsible for his conduct if at that time he lacked the capacity to understand the criminality of his conduct or conform his acts to legal requirements, due to some mental defect or disease.

138. See *supra* notes 31-34 and accompanying text; *infra* notes 141-44 and accompanying text.

139. L. WALKER, *supra* note 29, at 82.

140. L. HARTIG, *supra* note 11, at 41.

141. *Id.* at 50, 53-54.

142. WOMEN'S SELF-DEFENSE CASES, *supra* note 10, at 188.

Applying a broader interpretation of reasonableness to battered women self-defense cases presents two questions. (1) Does the defendant have the mental ability to make a reasonable decision to use deadly force? (2) If so, should the law protect this specific group of defendants? Those who propose a battered woman self-defense theory emphasize the debilitating effect of abuse on the battered woman's mental state. But this debilitating effect indicates the possibility of diminished ability to make a rational decision. This possibility should not be ignored in the judgment of whether the killing is a justified act committed by a mentally competent woman.<sup>143</sup> Because women suffering from learned helplessness are unable to discern what actions will change the reality of their situation, it seems that some form of diminished capacity is the proper plea. The rationality and reasonableness of the homicidal act are arguably absent. Testimony on the battered woman syndrome, furthermore, has been offered in insanity trials.<sup>144</sup> The combination of expert testimony on the battered woman syndrome and self-defense pleas in a non-confrontational setting, therefore, cannot and should not be reconciled.

#### IV. MANSLAUGHTER AS THE PROPER CRIME

When a battered woman kills her batterer during a violent attack, self-defense is a responsible plea. But if a battered woman kills in a circumstance in which her batterer did not attack her, the strict elements of this justification defense are not met. Because the crime of manslaughter "constitutes a sort of catch-all category which includes homicides which are not bad enough to be murder but which are too bad to be no crime whatever,"<sup>145</sup> manslaughter represents a compromise for those who fear increased homicides as an escape for battered women, and those who believe battered women have suffered enough and should not be punished further. This section illustrates several ways in which manslaughter is the appropriate result when a battered woman kills outside of a violent episode.<sup>146</sup>

Voluntary or intentional manslaughter is defined as a "homicide resulting from an intent to kill or to do grievous bodily harm which would be murder but for . . . extenuating circumstances."<sup>147</sup> The defendant's status as a battered woman could be considered an extenuating circumstance, particularly

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143. Rittenmeyer, *supra* note 119.

144. See *supra* notes 4, 110 and accompanying text.

145. W. LAFAVE & W. SCOTT, *supra* note 26, at 652.

146. The customary view of manslaughter is that while the defendant possesses an intent to kill the victim, the surrounding circumstances reasonably produced the defendant's temporary loss of self-control. *Id.* at 653-54. Options reducing a homicide to manslaughter for the defendant who kills her batterer outside of an acute battering incident include provocation, diminished capacity, imperfect self-defense, and irresistible impulse.

147. Note, *supra* note 5, at 135 (citing R. MORELAND, LAW OF HOMICIDE 63 (1952)).

if it can be argued that battered women suffer from some psychological or emotional state which inhibits their capacity to form the intent or similar mens rea requirement necessary to sustain a murder charge.<sup>148</sup>

This strategy could be shaped in several ways for the battered woman defendant, all designed to conform with the requirements of manslaughter. First, the typical circumstances of manslaughter are that the deceased provoked the defendant who acted before a cooling off period had expired.<sup>149</sup> The battered woman defendant would try to prove that the history of abuse, culminating with the last acute battering incident, provoked her. In such a situation, the defendant's loss of self-control must be reasonable.<sup>150</sup> In such a scenario, expert testimony would be admitted in court to establish that the battered woman killed the deceased within the cooling off period. Since research indicates that battered women live in a state of anxiety and almost constant apprehension, the battered woman defendant probably would have an exaggerated cooling off period.<sup>151</sup>

A second reason why manslaughter is appropriate is that it permits the battered woman to incorporate in her defense the true emotions of fear and anger,<sup>152</sup> emotions which experts deny in the hypothesis of learned helplessness.<sup>153</sup> The battered woman's homicidal act may be triggered by anger over past abuse, in fear and anticipation of future abuse, or a combination of both.<sup>154</sup>

Because the anger over past abuse and fear of future harm can arise out of the same provocation the following two scenarios are possible. The provocation element of manslaughter is met if the woman kills in response to

148. At common law, murder required "malice aforethought," interpreted as involving both intent and premeditation. W. LAFAVE & A. SCOTT, *supra* note 26, at 605. Jurisdictions today recognize four categories of murder: (1) murder committed during a felony; (2) "depraved heart" murder; (3) intentional murder; and (4) murder intending to do grave bodily injury. *Id.*

149. *Id.* (citing W. LAFAVE & A. SCOTT, *HANDBOOK OF CRIMINAL LAW* 573, 579 (1972)).

150. As LaFave and Scott have argued:

[To] reduce murder to manslaughter, the battered wife must be able to show that she was so over-come by passion that she was unable to cool down in the interval of time between the provocation and the homicide. Further, she must show that, under similar circumstances, a reasonable person would have been similarly provoked, and that, consequently, her arousal and her deed are, if not justifiable, then understandable.

*Id.*

151. *Id.* at 157. It has been suggested that "[w]here cumulative terror is aroused repeatedly and intensely, perhaps a cooling off period becomes elongated. . . . When the beatings recur unpredictably and frequently, there may not be enough time for cumulative terror to subside."

*Id.*

152. The battered woman may repress or deny her true emotions.

153. See *supra* notes 31-34 and accompanying text.

154. "Modern psychology tells us that the sudden anger element of manslaughter . . . and the fear-of-impending-harm element of self defense . . . may well coexist and often do. Indeed, they may be triggered by the same set of circumstances." Note, *supra* note 5, at 140 (quoting interview with a clinical psychologist and professor of psychology).

past abuse, while the provocation element of imperfect self-defense<sup>155</sup> is met if she kills in anticipation or apprehension of a future harm. On the other hand, it is not logical to argue that the battered woman's fear and anger are justified by her immediate circumstances as required by self-defense, unless she kills during a violent attack.<sup>156</sup> Manslaughter, therefore, more correctly reflects the reality of the battered woman who kills the batterer when she is not in imminent danger.<sup>157</sup>

The final manner in which a battered woman can reduce a murder charge to manslaughter is to plead a form of diminished capacity. This plea is available in certain jurisdictions as an extenuating or mitigating circumstance that would reduce murder to manslaughter. The defendant would argue that her psychological state from years of abuse prevents her from forming the intent or alternative mental element required for murder. This option was recognized by an expert's sworn statement to a Missouri court of appeals that diminished mental capacity is an attribute of the battered woman syndrome, and that the battered woman defendant would be incapable psychologically of fully and completely considering her actions.<sup>158</sup>

Expert testimony previously has been directed to the reasonableness of a defendant's fear of imminent danger in both confrontational and non-confrontational settings. In a non-confrontational self-defense claim, the courts should, where this testimony is admissible, permit it only to establish elements

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155. Some jurisdictions establish or acknowledge imperfect self-defense "as a subspecies of manslaughter. [It] is similar to 'provocation' as a rationale for reducing murder to manslaughter." *Id.* at 139.

156. Long ago the Pennsylvania Supreme Court held:

The dividing line between self-defense and this character of manslaughter [imperfect self-defense] seems to be the existence, as the moving force, of a reasonably founded belief of imminent peril to life, or great bodily harm, as distinguished from the influence of an uncontrollable fear or terror, conceivable as existing, but *not* reasonably justified by the immediate circumstances. . . . If the act is committed under the influence of an uncontrollable fear of death or great bodily harm, caused by the circumstances, but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense, the killing is manslaughter.

*Commonwealth v. Colandro*, 231 Pa. 343, 345, 80 A. 571, 574 (1911).

157. One past objection to the battered woman syndrome as a self-defense theory is that self-defense includes retaliatory acts when the defendant is acquitted for a killing when the batterer is of no immediate threat. Manslaughter, by a finding of imperfect self-defense, alleviates this objection particularly for those who equate a battered woman syndrome self-defense with "open season on men." Note, *supra* note 18, at 1725-26. An "irresistible impulse" argument also alleviates the objection. Though not as exculpatory as insanity, "irresistible impulse" in some jurisdictions operates on the requirement of some mental disease or defect. "[T]hough possibly knowing the nature and consequences of the act and its wrongfulness . . . an impulse which the defendant was powerless to resist overcame reason and restraint." *Id.* at 1723 (citing 21 AM. JUR. 2D *Criminal Law* § 36 (1965)). To reduce a murder charge to manslaughter under this argument, the battered woman defendant shows that years of severe abuse created a frame of mind such that an impulse to kill her batterer to end her torment overwhelmed her.

158. *State v. Martin*, 666 S.W.2d 895, 900 (Mo. Ct. App. 1984).

of manslaughter in a murder case.<sup>159</sup> Manslaughter is the appropriate crime for the homicides committed by battered women outside of an acute battering incident. As stated earlier, there is an inherent inconsistency in admitting expert psychological or psychiatric testimony describing the depressed, helpless state of the battered woman, who is unable to perceive the reality of her situation, to prove the legal reasonableness of her act. If a diminished mental capacity is part of the battered woman syndrome, or if battered women are incapable of effectively understanding the outcome of their actions, then manslaughter due to imperfect self-defense or diminished capacity is the proper result. If anxiety and apprehension permeate the battered woman's psyche, manslaughter by provocation or irresistible impulse is the appropriate defense.

### CONCLUSION

The split of authority on the admissibility of expert testimony on the battered woman syndrome illustrates the concern that an unfortunate segment of the population not be punished twice: during the abusive relationship and for ending the abuse.

Yet in attempting to protect these women, courts may have unwittingly hurt society and other women defendants. First, by allowing juries to continue stereotyping women as weak and vulnerable, and by licensing the use of deadly force by a specialized group, any "battered woman syndrome defense" ironically contradicts both the social equality sought by women and the basic aim of the criminal law.<sup>160</sup> Second, the use of battered woman syndrome expert testimony with self-defense leads to the misapplication of the law of self-defense and a corrosion of justification defenses in general. The combination is deadly. It allows retaliatory acts under the guise of self-defense.<sup>161</sup>

In a civilized society, we should not accept spouse abuse or child abuse. But in a civilized society we also should not legitimize the battered woman's act of killing her batterer *as an escape* from the battering relationship. The judicial system does have a role in ameliorating the reprehensible position

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159. Proving some element of reasonableness is what the expert testimony attempts to do. By itself, the attempt to establish reasonableness is not a legal aberration; rather, it is the *coupling* of the self-defense claim with the expert's attempt to establish reasonableness that is unacceptable. This coupling is an attempt by sympathetic attorneys, experts, and feminists to make the understandable—manslaughter—legally justifiable as a successful self-defense plea in the case of battered women defendants.

160. Rittenmeyer, *supra* note 119, at 390; see also Crocker, *supra* note 70.

161. "In the recent acquittals of abused wives, judges and juries, swayed by sympathetic defendants, broadly interpreted self-defense. . . . [T]he acquittals reveal a disturbing expansion of justifiable homicide and may indicate a trend toward sanctioning retaliation for a particular class of defendants." Note, *supra* note 18, at 1716; see also Acker & Toch, *supra* note 82, at 149.

of battered women in our society. However, courts should not assume the role of liberator for these unfortunate women by allowing expert testimony to distort the requirements of self-defense.<sup>162</sup> Instead, courts should stem the tide of expert testimony on the battered woman syndrome to establish the legal elements of self-defense. Admitting such testimony in conjunction with self-defense is detrimental to the law, women, and society. “‘I couldn’t take it anymore’ has never been a legal defense.”<sup>163</sup>

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162. If the requirements of imminence, necessity and proportionality are to be abandoned for battered women defendants, then legislatures, not courts, should address the situation by drafting statutory definitions of self-defense that encompass the plight of the battered woman.

163. Note, *supra* note 18, at 1726.