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SO MUCH ACTIVITY, SO LITTLE CHANGE: A REPLY TO THE CRITICS OF BATTERED WOMEN'S SELF-DEFENSE

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Prior to 1970, the term “domestic violence” referred to ghetto riots and urban terrorism, not the abuse of women by their intimate partners.¹ Today, of course, domestic violence is a household word. After all, it has now been ten years since the revelation of football star O.J. Simpson’s history of battering purportedly sounded ““a wake-up call for all of America””;² ten years since Congress enacted legislation hailed as ““a milestone . . . truly a turning point in the national effort to break the cycle”” of violence;³ and twenty years since Farrah Fawcett’s portrayal of Francine Hughes in the movie *The Burning Bed* supposedly “left an indelible mark upon society’s collective consciousness.”⁴ Despite these and numerous other “milestones” and “wake-up calls,” domestic violence continues to be a seemingly intractable problem in this country. Substantial numbers of women are still beaten by their husbands and boyfriends every day, and many of them die as a result.⁵ A much smaller number of women strike back and kill their abusers, but it is these cases – and

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1. See Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1290 n.42 (2000).

2. Fred Brown, *New Domestic Violence Laws Take Effect: State Makes It Easier to Keep Abusers at Bay*, DENV. POST, July 2, 1994, at B1 (quoting U.S. Representative Patricia Schroeder).

3. George Lardner, *The Law Stops at the State Line: Ignorance, Confusion Paralyze the Cops*, WASH. POST, June 2, 1996, at C3 (quoting Attorney General Janet Reno’s description of the Violence Against Women Act).

4. Jay B. Rosman, *Domestic Violence: Recent Amendments to the Florida Statutes*, 20 NOVA L. REV. 117, 125-26 (1995). Francine Hughes, a battered woman who killed her sleeping husband in 1977, was ultimately acquitted on grounds of temporary insanity. See FAITH McNULTY, *THE BURNING BED* (1980); *THE BURNING BED* (Anchor Bay Entertainment 1984) (starring Farrah Fawcett).

5. I use gendered terms here because statistics show that the overwhelming majority of domestic batteries involve men assaulting women. See, e.g., CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP’T OF JUSTICE, *INTIMATE PARTNER VIOLENCE 2* (2000) (finding that 85% of reported incidents were perpetrated by men). For statistics on the overall incidence of domestic violence and intimate-partner killings, see *infra* notes 29-39 and accompanying text.

the self-defense issues they raise – that seem to receive a disproportionate share of the attention.⁶

The most troublesome self-defense questions arise, of course, in cases involving non-confrontational killings – where the woman struck back before or after a beating, or, most controversially, when her abuser was asleep. Although statistically most killings do not fall into this category,⁷ they raise the most difficult questions and have generated the most interest. Can a woman who kills under these circumstances legitimately argue that she acted in self-defense – that, pursuant to the prevailing definition of the defense, she honestly and reasonably believed she was in imminent danger of death or serious bodily harm?⁸ A number of critics contend that she cannot, and it is my purpose here to evaluate the various arguments they have advanced.

I. INTRODUCTION

In some respects, much has changed in the intervening years since the term “domestic violence” entered the public consciousness. Beginning in 1976, state legislatures began to enact domestic violence reform statutes that made available at least temporary orders of protection on an ex parte basis and authorized longer-term protective orders with far-reaching remedies.⁹ Within four years, such legislation had been passed in forty-five states and the District of Columbia, and it now exists in all fifty states.¹⁰ In 1994, after four years of intensive lobbying by women’s groups, Congress passed the Violence Against Women Act, the first comprehensive federal response to the problem of domestic violence.¹¹ Among other things, this federal legislation authorized

6. A recent Lexis search using the terms “battered women” and “self-defense” yielded 772 law journal articles, but only 198 court opinions during the past ten years. When the search was narrowed to “battered women w/10 self-defense and date > 1992,” 373 journal articles and only 62 court opinions were retrieved.

7. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 396-401 (1991) (noting that her findings – that three-fourths of the 223 killings she studied occurred under confrontational circumstances – confirmed similar results in other studies); V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1253 (2001) (reaching similar findings in a survey of seventy cases where battered women charged with homicide raised self-defense claims and imminence was at issue).

8. See 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 5.7 (1986).

9. See CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* 498 (2001). In addition to prohibiting the abuser from committing further acts of violence, an order of protection may bar him from having any contact with the victim whatsoever and may also grant her other remedies – including possession of the residence or other property, custody, child support, or other economic relief. See generally Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 910-1030 (1993).

10. See DALTON & SCHNEIDER, *supra* note 9, at 498.

11. Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994).

the expenditure of almost a third of a billion dollars for battered women's shelters over a five-year period, required states to recognize and enforce protective orders entered in other states, and made it a federal crime to cross state lines in order to violate an order of protection.¹²

In the realm of criminal law, state legislatures have taken a variety of steps in an effort to alter the law's traditional *laissez faire* attitude toward domestic violence.¹³ Although the police historically were not allowed to make warrantless arrests for misdemeanors like assault unless the crime was committed in their presence, nearly every state has now expanded police arrest powers to change that rule for domestic violence cases.¹⁴ Faced with police reluctance to exercise those powers, in 1977 Oregon became the first state to enact a mandatory arrest law, requiring the police to arrest where they had probable cause to believe a domestic battery had occurred.¹⁵ Today, twenty-one other states and the District of Columbia have enacted similar legislation.¹⁶ In addition, some states have increased the penalties for domestic battery,¹⁷ and some have even created specialized domestic violence courts to handle these cases.¹⁸

Nevertheless, battered women continue to confront hurdles as they attempt to avail themselves of the fruits of these reform efforts. There still is not enough shelter space to meet the needs of domestic violence victims. A survey in New York City several years ago found that the city's shelters could accommodate only one-quarter of requests.¹⁹ Further, some experts estimate

12. *Id.* at 1926-34. The act's most controversial provision, however, which created a federal civil damages action against anyone who committed a crime of violence motivated by gender, was struck down by the Supreme Court. See *United States v. Morrison*, 529 U.S. 598 (2000). The Court reasoned that the Commerce Clause did not give Congress power to reach intrastate, non-economic activity even if it had an "aggregate effect on interstate commerce," and that the legislation could not be justified under Congress' power to enforce the Fourteenth Amendment because it was aimed at private individuals. *Id.* at 617, 626.

13. See, e.g., ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 164-67 (1987) (describing the law's historic reluctance to intervene in such "private" matters, as evidenced by the "rule of thumb," which permitted a man to beat his wife so long as he used a stick no bigger than his thumb).

14. See Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1184 (2002).

15. See OR. REV. STAT. § 133.055(2)(a) (2001).

16. See Friedman & McCormack, *supra* note 14, at 1184-85 (citing statutes). An additional seven states have enacted legislation providing that arrests are preferred in domestic violence cases. See *id.* For discussion of the impact of mandatory arrest laws, see *infra* note 27.

17. See Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1578 n.302 (1998).

18. See Tsai, *supra* note 1.

19. See The "Failure to Protect" Working Group, *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 859 (2000) (citing 1997-98 figures). An oft-cited Senate Report found in 1992 that there are three times as many animal

that as many as half of all women and children who are homeless today are fleeing from violent homes.²⁰

The civil protective order process has proven to be far from a panacea, as it has become apparent that seeking an order of protection can be a risky proposition for a battered woman. It can be risky in a physical sense: “[b]attering is about domination,”²¹ and batterers often react violently when they feel they are losing control – when women try to leave or otherwise assert their independence, for example, by filing for an order of protection.²² The protective order process can also be risky for mothers because state authorities are increasingly bringing abuse and neglect proceedings as well as criminal failure-to-protect charges against them, not only when children are themselves victims of abuse but also when they are exposed to abuse by witnessing beatings received by their mothers.²³ Moreover, it is now more common for a batterer to respond to a woman’s request for a protective order by likewise seeking an order against her, and judges are often tempted to grant such mutual orders of protection.²⁴ Finally, enforcement issues continue to be the

shelters as shelters for battered women in this country. See STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., 2D SESS., *VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA* 26 (Comm. Print 1992). See also Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1020-21 (1995) (describing the reasons why African-American women are hesitant to turn to shelters).

20. See Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071, 1076 (1995).

21. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 53 (1991).

22. See Tsai, *supra* note 1, at 1292 (citing studies finding that 50% to 60% of protective orders are violated within two years, and a third study which reported that “17% of victims killed in domestic incidents had obtained orders of protection”); Jill Smolowe, *When Violence Hits Home*, TIME, July 4, 1994, at 18 (quoting forensic psychiatrist Park Dietz’s statement, “[a] restraining order is a way of getting killed faster”). For further discussion of the dangers of leaving an abusive relationship, see *infra* notes 141-42 and accompanying text.

23. See Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL’Y 157, 193 (2003) (concluding that an order of protection can be “a license to entrap” rather than “a ticket to freedom”); The “Failure to Protect” Working Group, *supra* note 19, at 849; Jeanne A. Fugate, Note, *Who’s Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272 (2001).

24. See Mahoney, *supra* note 21, at 75-76 (noting that mutual orders are “routinely” granted in some jurisdictions); Philip Trompeter, *Gender Bias Task Force: Comments on Family Law Issues*, 58 WASH. & LEE L. REV. 1089, 1090 (2001) (finding that “[m]ore than half of the family law attorneys [surveyed by the Virginia Gender Bias Task Force] report that courts issue mutual protective orders where allegations do not warrant their issuance”); Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1054 n.119 (1992) (citing findings from three state gender bias studies).

“Achilles’ heel” of the protective order system.²⁵ Although studies suggest that at least half of protective orders are violated at least once, and many are violated repeatedly,²⁶ the police are still much more likely to arrest in a case involving stranger assault, and they are reluctant to arrest unless the abuser committed some independent crime.²⁷ Judges are similarly loathe to

25. PETER FINN & SARAH COLSON, U.S. DEP’T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 49 (1990). See also Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 220-46 (1993) (describing the enforcement problems reported in a nationwide survey of domestic violence organizations).

26. See Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 214, 240 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (finding that 60% of orders were violated within one year following their issuance); Andrew R. Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don’t Work*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra*, at 192, 199-200 (reporting that almost half of all orders were violated within two years). According to one of these studies, more than one-quarter of women were subjected to severe violence in the year after they obtained an order of protection, more than one-fifth received death threats, and more than half experienced psychological abuse. See Harrell & Smith, *supra*, at 223-25. See also *supra* note 22 and accompanying text.

27. See Eve S. Buzawa, Thomas L. Austin & Carl G. Buzawa, *The Role of Arrest in Domestic Versus Stranger Assault: Is There a Difference?*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 26, at 150, 161 (finding that “incidents involving strangers result in an arrest 33% of the time, compared with 28% for acquaintances and 18% for domestic”). See also Ammons, *supra* note 19, at 1022-29 (describing the greater hurdles African-American women face in trying to obtain police protection). Note that the overwhelming majority of states make the violation of protective orders a crime, although it can lead to felony charges in only six states. See Klein & Orloff, *supra* note 9, at 1096-97.

Police reluctance to arrest is evident even in states with mandatory arrest laws. In those jurisdictions, the police may refuse to arrest despite the mandatory arrest requirement on the grounds that they lack probable cause, see Barbara J. Hart, *Arrest: What’s the Big Deal*, 3 WM. & MARY J. WOMEN & L. 207, 210 (1997), or they may delay so long in responding that the batterer is no longer on the scene when they arrive. See Buzawa, Austin & Buzawa, *supra*, at 156 (citing National Criminal Victimization Survey finding that “police respond within 5 minutes in 36% of cases in which the offender is a stranger and in only 24% of cases in which the offender is an intimate”). Moreover, mandatory arrest laws have had the effect of increasing the number of women arrested, as the practice of dual arrests has become more common. See Hart, *supra*, at 210. At least fourteen state legislatures have responded to this last trend by amending their mandatory arrest statutes to authorize arrest of only the primary aggressor. See Cecelia M. Espenosa, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQ. L. REV. 163, 185 n.113 (1999) (citing statutes). While some believe that such amendments have been effective, see Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533, 565, others report that the police continue to arrest women, especially women of color. See Espenosa, *supra*, at 185-86.

It is important to note that some studies question whether arrests are even effective in deterring domestic abuse. See Jannell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter*

incarcerate, and “few batterers ever see the inside of a jail cell, even when convicted of a serious offense”; instead, probation is the most common sanction for such violations.²⁸

Most importantly, the incidence of domestic violence is still unacceptably high. In 1992, the Surgeon General reported that domestic violence was the “single largest cause of injury to women in the United States.”²⁹ More recent statistics show that more than one-fifth of all women report having been physically assaulted by their partner at some point in their lives.³⁰ At least one million women experience such assaults each year,³¹ and some put the figure much higher.³² Moreover, while the number of women killed by their partners has declined in recent years,³³ that figure has not decreased as dramatically as the overall murder rate.³⁴

While it used to be conventional wisdom that women committed half of all spouse killings,³⁵ recent years have witnessed a change in that figure. Now,

Domestic Violence?, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 26, at 43, 48-49 (reporting that arrests reduced domestic violence only in certain cities, only for employed batterers, and only in the short run).

28. Hanna, *supra* note 17, at 1523.

29. S. REP. NO. 101-545, at 36-37 (1990) (quoting Susan MacManus & Nikki Van Hightower, *Limits on State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 PUB. ADMIN. REV. 269, 269 (1989)).

30. See PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 26 (2000) (22.1% of women surveyed in the 1995-96 National Violence Against Women Survey).

31. See *id.* (reporting an annual total of 4.5 million physical assaults affecting 1.3 million women, for an annual victimization rate of 44.2 assaults per 1,000 women over the age of seventeen).

32. See S. REP. NO. 101-545, at 30 (1990) (estimating that three to four million women are battered each year).

33. In 1971, for example, at least 1,077 women were murdered by their husbands, see FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1971: UNIFORM CRIME REPORTS 9, 114 (1972) [hereinafter 1971 UNIFORM CRIME REPORTS], whereas at least 1034 women were killed by their husbands or boyfriends in 2001. See FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2001: UNIFORM CRIME REPORTS 24 (2002) [hereinafter 2001 UNIFORM CRIME REPORTS]. I use the term “at least” here because the relationship among the parties is unreported for some homicides.

34. The total number of murders decreased by 35.3% between 1991 and 2001, while the number of women killed by their partners decreased by only 22.3%. Compare FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1991: UNIFORM CRIME REPORTS 13, 19 (1992) (24,703 total murder victims, 1,330 of whom were women killed by their partners), with 2001 UNIFORM CRIME REPORTS, *supra* note 33, at 19, 24 (15,980 total murder victims, 1,034 of whom were women killed by their partners).

35. See, e.g., 1971 UNIFORM CRIME REPORTS, *supra* note 33, at 9 (reporting that 52% of the spouse killings that year were perpetrated by husbands); Marvin E. Wolfgang, *A Sociological Analysis of Homicide*, in STUDIES IN HOMICIDE 15, 23 (Marvin E. Wolfgang ed., 1967) (finding that 53 of the 100 spouse killings reported in Philadelphia between 1948 and 1952 were committed by men).

approximately three-quarters of intimate-partner killings involve male perpetrators and female victims.³⁶ What has remained constant, however, is that approximately one-third of all female murder victims each year are killed by their partners.³⁷ By comparison, only a small percentage of male victims are killed by their wives or girlfriends.³⁸ Nevertheless, it is that small minority of homicides – killings that often take place in the context of an abusive relationship³⁹ – that have attracted so much attention.

Although the number of battered women who kill has remained small, the domestic violence reform movement has not ignored the self-defense issues arising in those cases. Initially, battered women encountered evidentiary hurdles when they tried to introduce expert psychological testimony describing the so-called “battered woman syndrome”⁴⁰ in support of their self-defense claims. Now, such testimony is routinely admitted in every state,⁴¹ often as a result of judicial decision, but sometimes by virtue of legislation.⁴² Likewise,

36. The 1,034 women murdered by their husbands or boyfriends in 2001 represented 77.8% of intimate-partner killings. See 2001 UNIFORM CRIME REPORTS, *supra* note 33, at 24.

37. Compare 1971 UNIFORM CRIME REPORTS, *supra* note 33, at 9, 114 (reporting that 31.2% of female murder victims were killed by their husbands), with 2001 UNIFORM CRIME REPORTS, *supra* note 33, at 27 (reporting that 32.2% of female murder victims were killed by their husbands or boyfriends).

38. In 2001, only 2.8% of male murder victims were killed by their wives or girlfriends; in 1971, 7.8% of male victims were killed by their wives. See 2001 UNIFORM CRIME REPORTS, *supra* note 33, at 22-27; 1971 UNIFORM CRIME REPORTS, *supra* note 33, at 9, 114. See also LAWRENCE A. GREENFIELD ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS FACTBOOK: VIOLENCE BY INTIMATES 5 (1998) (reporting similar percentages for the period 1976-96). These murder figures are consistent with the general findings that “violence against women is predominantly intimate partner violence,” whereas “men are predominantly victimized by strangers.” TJADEN & THOENNES, *supra* note 30, at 46.

39. See Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 520 (1996) (citing studies concluding that “at least forty-five percent and perhaps as many as ninety-seven percent [of women imprisoned for killing a partner] were abused by the person they killed”). See also Maguigan, *supra* note 7, at 397 n.67 (reporting that “[m]ost female homicide defendants had been battered by the men whom they killed”); Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 STAN. L. REV. 1435, 1454 n.123 (1998).

40. The term originated with psychologist Lenore Walker. See generally LENORE WALKER, *THE BATTERED WOMAN* xv (1979). For a description of the battered woman syndrome, see *infra* notes 75-80 and accompanying text.

41. See Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, in U.S. DEP'T OF JUSTICE, *THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT 3* (1996).

42. See *id.* at 15 (citing twelve such state statutes). Cf. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 558 (2001) (observing that courts have been more receptive than legislatures to battered women's self-defense claims and that “most of the favorable legislation simply ratified previous court decisions”).

some state legislatures have amended their self-defense laws to make clear that prior acts of domestic violence on the part of the decedent are admissible.⁴³ In addition, a number of courts now require that trial judges give jury instructions explaining how such testimony is relevant to the defendant's self-defense claim.⁴⁴

Some courts have gone even further, taking the position that the objective element of self-defense – which asks whether the defendant's belief in the need for defensive force was reasonable – must be evaluated by considering how a "reasonable battered woman," or a reasonable person with the defendant's history of abuse, would have perceived the situation.⁴⁵ In *Bechtel v. State*, the Oklahoma Court of Criminal Appeals went further still, adopting a special jury instruction for battered women's self-defense cases that struck the pattern jury instruction's reference to "a reasonable person" and instead advised the jury to consider whether "a person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that she was in imminent danger of death or great bodily harm."⁴⁶

43. See, e.g., GA. CODE ANN. § 16-3-21(d)(1) (2003); KY. REV. STAT. ANN. § 503.050(3) (Banks-Baldwin 1999); NEV. REV. STAT. § 48.061 (1997). See also LA. CODE EVID. ANN. art. 404A(2) (West 1995) (creating an exception to the usual rule – which bars evidence of a victim's "dangerous character" absent "a hostile demonstration or an overt act on the part of the victim" – for self-defense cases involving "a history of assaultive behavior" between parties who "lived in a familial or intimate relationship").

44. See, e.g., *Smith v. State*, 486 S.E.2d 819, 823 (Ga. 1997) (requiring modification of pattern self-defense instruction "in all battered person syndrome cases" to make clear that "evidence that the defendant suffers from battered person syndrome . . . relates to the issue of the reasonableness of the defendant's belief that the use of force was immediately necessary, even though no use of force against the defendant may have been, in fact, imminent"); *Boykins v. State*, 995 P.2d 474, 479 (Nev. 2000) (requiring instruction informing the jury that evidence of battered woman syndrome may be considered "when determining the defendant's state of mind at the time of the killing and whether she acted in self-defense," and in evaluating "the reasonableness of her belief that she was about to suffer imminent death or great bodily harm").

45. See *Smith*, 486 S.E.2d at 822-23; *State v. Stewart*, 763 P.2d 572, 579 (Kan. 1988); *State v. Edwards*, 60 S.W.3d 602, 615 (Mo. Ct. App. 2001) ("an otherwise reasonable person who is suffering from battered spouse syndrome"); *Boykins*, 995 P.2d at 476; *State v. Gartland*, 694 A.2d 564, 575 (N.J. 1997); *People v. Seeley*, 720 N.Y.S.2d 315, 321 (N.Y. Sup. Ct. 2000); *State v. Thomas*, 673 N.E.2d 1339, 1345 (Ohio 1997). But cf. *People v. Humphrey*, 921 P.2d 1, 9 (Cal. 1996), described *infra* at notes 60-61 and accompanying text.

46. *Bechtel v. State*, 840 P.2d 1, 11 (Okla. Crim. App. 1992). The text of the jury instruction the court adopted for cases involving battered women is as follows (with the language omitted from the pattern jury instruction in brackets):

A person is justified in using deadly force in self-defense if that person [reasonably] believed that use of deadly force was necessary to protect herself from imminent danger of death or great bodily harm. Self-defense is a defense although the danger to life or personal security may not have been real, if a [reasonable] person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that she was in imminent danger of death or great bodily harm.

Finally, a few states have amended their substantive self-defense rules in other ways in an effort to make the law more responsive to battered women defendants. In *Weiland v. State*, for example, the Florida Supreme Court overturned one of its prior decisions and modified the castle exception to its retreat rule so that a defendant is no longer required to retreat before using deadly force at home against a cohabitant.⁴⁷ The court reached that decision in part because of its belief that “[i]mposing a duty to retreat from the home may adversely impact victims of domestic violence” and “[a] jury instruction on the duty to retreat may reinforce common myths about domestic violence.”⁴⁸ While the Florida change applies to all criminal cases, the Kentucky legislature has amended its self-defense statute for domestic violence cases only, adopting a definition of “imminence” that makes clear that “in the context of domestic violence and abuse . . . , belief that danger is imminent can be inferred from a past pattern of repeated serious abuse.”⁴⁹

As explained below,⁵⁰ these are far from radical changes to well-accepted self-defense doctrine. Nevertheless, much has been written, both on these reforms specifically and more generally on the topic of battered women’s self-defense. The notion that battered women who kill under non-confrontational

Id. Cf. *Valdez v. State*, 900 P.2d 363, 378 (Okla. Crim. App. 1995) (explaining that the approach adopted in *Bechtel* applies only in cases involving battered women and that “[i]n all other self-defense cases, [the pattern jury instruction] is to be administered in its original form”).

The concurring opinion in *Bechtel* called the majority’s approach somewhat “puzzling” because the modified instruction “include[d] the reasonableness requirement” in the last clause despite the court’s purported intent to “strick[e] the words “reasonably” and “reasonable” from [the] instruction.” See *Bechtel*, 840 P.2d at 15-16 (Parks, J., concurring in the result) (quoting the majority opinion). But cf. *State v. Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983) (similarly holding that a “defendant’s conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under the like circumstances,” but instead requiring the jury “to place itself as best it can in the shoes of the accused, and then decide whether or not the particular circumstances surrounding the accused at the time he used force were sufficient to create in his mind a sincere and reasonable belief that the use of force was necessary to protect himself”).

47. *Weiland v. State*, 732 So. 2d 1044, 1050-57 (Fla. 1999). The majority of jurisdictions in this country do not require a defender to retreat before resorting to self-defense. In the minority of states (like Florida) that do impose a retreat requirement, almost all have adopted a “castle doctrine” exception for the home, although they disagree as to whether that castle exception applies when one is attacked at home by a co-occupant. See 1 LAFAVE & SCOTT, *supra* note 8, § 5.7(f).

48. *Weiland*, 732 So. 2d at 1052, 1054. See also *State v. Gartland*, 694 A.2d 564, 570-71 (N.J. 1997) (agreeing that the cohabitant exception to the castle doctrine “disadvantage[s] women” and is “inherently unfair” to battered women, and therefore “commend[ing] to the Legislature consideration of the application of the retreat doctrine in the case of a spouse battered in her own home”).

49. KY. REV. STAT. ANN. § 503.010(3) (Banks-Baldwin 1999).

50. See *infra* notes 54-59 and accompanying text (discussing the admissibility of the abuser’s prior violence) & 60-74 (analyzing the reasonable battered woman standard).

circumstances might have a legitimate self-defense claim has been subject to criticism on a variety of fronts. It is my purpose here to evaluate these criticisms.

In so doing, I have catalogued the objections into five categories. Part II addresses the claim that battered women cannot hope to satisfy the objective "reasonableness" requirement of the self-defense standard. Part III then describes various criticisms leveled at the battered woman syndrome theory, and Part IV considers the imminence requirement as applied in this context. Part V discusses the contention that battered women are really advancing an excuse rather than a justification for their act, and Part VI analyzes the argument that these self-defense claims raise the specter of determinism and create an "abuse excuse." After examining these various objections, I conclude that, while recent advances in psychological research have shed light on the effects of battering and on the best way of presenting that information in support of a battered woman's self-defense claim, most of these critiques are misguided and, as I have argued elsewhere,⁵¹ even non-confrontational killings by battered women can fit within traditional self-defense doctrine.

II. THE REASONABLENESS INQUIRY

Critics of battered women's self-defense claims often focus on the objective component of the self-defense standard, arguing that even if a battered woman who killed under non-confrontational circumstances honestly believed that defensive force was necessary,⁵² her belief could not have been reasonable.⁵³ But, under conventional self-defense doctrine, the objective element of the defense asks whether a reasonable person *in the defendant's circumstances* would have believed she was in imminent danger of death or serious bodily harm.⁵⁴ For example, the criminal law has traditionally permitted defendants to introduce evidence of the decedent's violent history or

51. See Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393 (1988).

52. In some jurisdictions, an honest, unreasonable belief in the need to use defensive force gives rise to a claim of "imperfect" self-defense, resulting in a manslaughter conviction. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 231-32 (3d ed. 2001).

53. See, e.g., Stephen J. Morse, *The "New Syndrome Excuse Syndrome,"* CRIM. JUST. ETHICS, Winter/Spring 1995, at 3, 12.

54. See, e.g., *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986) (denying that "an objective standard [of self-defense] means that the background and other relevant characteristics of a particular actor must be ignored," and instead observing that "a determination of reasonableness must be based on the 'circumstances' facing a defendant or his 'situation,'" including "any relevant knowledge the defendant had about [the victim]" and "any prior experiences he had which could provide a reasonable basis for a belief . . . that the use of deadly force was necessary under the circumstances"). See generally DRESSLER, *supra* note 52, at 238.

reputation to support their claim that they both honestly – and reasonably – believed the decedent posed a threat to them.⁵⁵

Thus, even the so-called “objective” standard of self-defense is not completely objective, but at least partially particularistic – and rightly so, because otherwise defendants are held to an unrealistic standard. As Susan Estrich has observed, “a purely objective standard is unduly harsh because it ignores the characteristics which inevitably and justifiably shape the defender’s perspective, thus holding him (or her) to a standard he simply cannot meet.”⁵⁶

A battered woman’s history and pattern of battering are among the circumstances relevant in evaluating what a reasonable person in her situation would have believed.⁵⁷ As one court explained, self-defense law “requires the jury to place itself figuratively in the defendant’s shoes and to determine the reasonableness of the defendant’s belief from the facts and circumstances as the defendant perceived them,” and “[i]n order to determine what constituted ‘defendant’s shoes,’ the jury must know whether or not a defendant is a battered person.”⁵⁸ In fact, this evidence is no different from the evidence of the decedent’s violent actions or propensities that has long been admitted in support of self-defense claims.⁵⁹

Similarly, the so-called “reasonable battered woman” standard adopted by some courts is just a short-hand description for the conventional “reasonable person under the circumstances” standard that courts apply in all self-defense cases. Thus, it makes no sense for the California Supreme Court to take the position it articulates in *People v. Humphrey*, where it disclaims any intent to “replace the reasonable ‘person’ standard with a reasonable ‘battered woman’ standard” – reasoning that “the ultimate question is whether a reasonable *person*, not a reasonable battered woman, would believe in the need to kill to prevent imminent harm” – but then goes on to hold that “the jury, in determining objective reasonableness, must view the situation from the *defendant’s perspective*” and “must consider all of the relevant circumstances

55. See, e.g., *Smith v. United States*, 161 U.S. 85, 88 (1896).

56. Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1434 (1990). See also Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 449-50 (1981) (concluding that “[t]he result of taking into account the social reality of the accused is a more realistic assessment of his or her culpability”).

57. See, e.g., Morse, *supra* note 53, at 11; Robert F. Schopp, Barbara J. Sturgis & Megan Sullivan, *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 90.

58. *People v. Seeley*, 720 N.Y.S.2d 315, 321 (N.Y. Sup. Ct. 2000).

59. See Parrish, *supra* note 41, at iv (noting that “[a]ny defendant claiming self-defense would want to bring in information about the deceased’s history of violence against her or him,” and therefore “[t]his type of ‘social context’ information is *not* unique to battered women’s self-defense claims”).

in which defendant found herself.”⁶⁰ The court acknowledges, as it must, that the defendant’s history of abuse is one of “the relevant circumstances” to be considered, and it does not deny that her experience as a battered woman must have colored her “perspective.”⁶¹ Thus, the objective standard it adopts seems not much different from the one it purports to reject.

Nevertheless, Stephen Morse has countered, characteristics like the defendant’s relative size and strength compared to that of the decedent, or the decedent’s prior history of violence, are “normal, non-culpable” characteristics that are properly considered in assessing a self-defense claim, whereas he suggests that the effects of battering “do not meet the test of normality and innocence for modifying the objective standard for justification.”⁶² If by “normality and innocence,” Morse is referring to the point he makes later that “not all victims of repeated battering are syndrome sufferers,”⁶³ the standard for self-defense has always required only that the defendant’s belief in the need for defensive force be a “reasonable” one – not necessarily the correct one or one that everyone else in her situation would have endorsed.⁶⁴ Just as some battered women do not strike back against their abusive partners, some individuals who are threatened by stronger aggressors submit to the assault, walk away, or otherwise manage to defuse the situation, and some who face an ambiguous situation do not mistakenly assume the other person poses a threat. Those who do exercise defensive force in these circumstances do not forfeit their self-defense claim simply because “not all” persons in their situation would have done so.

On the other hand, by “normality and innocence,” Morse may be referring to his argument that adopting “a reasonable battered victim syndrome sufferer” approach “makes a mockery of objective standards,” resulting in the “relativization of ethical standards” and “threaten[ing] to make right whatever the agent honestly believes is right.”⁶⁵ It is obviously true, as George Fletcher has warned, that “[i]f the reasonable person were defined to be just like the defendant in every respect, he would arguably do exactly what the defendant did under the circumstances.”⁶⁶ Thus, “if the reasonable person has all of the defender’s characteristics, the standard loses any normative component and

60. *People v. Humphrey*, 921 P.2d 1, 7-9 (Cal. 1996).

61. *See id.* at 9 (noting that the defendant’s history of abuse “was relevant to reasonableness,” as was “expert testimony about its effects” on her) (emphasis removed).

62. Morse, *supra* note 53, at 11. This discussion obviously shades into the criticisms of battered woman syndrome theory discussed in the next section, but is included here because it directly implicates the objective inquiry made in self-defense cases.

63. *Id.* For further discussion of this line of argument, *see infra* notes 190-95 and accompanying text.

64. *See* 1 LAFAYE & SCOTT, *supra* note 8, § 5.7(c).

65. Morse, *supra* note 53, at 13.

66. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 513 (1978).

becomes entirely subjective.”⁶⁷ But, that is an inherent difficulty self-defense law confronts whenever it tries to determine which of the defendant’s characteristics are properly considered in making an objective inquiry: the perennial problem of “striking the balance between the defender’s subjective perceptions and those of the hypothetical reasonable person.”⁶⁸

Moreover, it is interesting to note, as Victoria Nourse has pointed out, that prior to 1960 the criminal law did not pay much attention to the precise definition of “the reasonable person.”⁶⁹ Nevertheless, the purported neutrality of that unquestioned “reasonable person” standard masked the gender and race bias underlying it.⁷⁰ Its assumption of a male model of behavior was implicit rather than express, therefore now “mak[ing] all other normative claimants appear illegitimate, as if they were political arguments asking for special favors.”⁷¹ Battered women, however, seek no “special favors.” Even before commentators pointed out the biases hidden in the reasonable person standard, the objective element of self-defense was never purely objective; as noted above, it always included some of the defendant’s subjective characteristics. The only question then, as now, is the value judgment where we draw the line.⁷²

Although the precise placement of that line may be open to debate, it should be beyond dispute that the effects of battering are relevant considerations. As a Justice Department report commissioned by Congress recently concluded, “[a]n extensive and continually expanding research literature” – drawn from “the interdisciplinary fields of domestic violence and traumatic stress [and] reflect[ing] work in psychology, psychiatry, sociology, nursing, criminal justice, and other disciplines” – “supports the assertion that domestic violence is associated with a wide range of traumatic psychological

67. Estrich, *supra* note 56, at 1435.

68. *Id.* at 1434.

69. See Nourse, *supra* note 7, at 1296.

70. See, e.g., Donovan & Wildman, *supra* note 56, at 448 (observing that “[n]ot coincidentally, the allegedly universal, classless, and sexless nature of the reasonable man was a device which promoted the myth of the objective, value-free nature of the criminal law”).

71. Nourse, *supra* note 7, at 1299.

72. Some observers have commented on the ambiguity in self-defense law’s notion of “reasonableness” – whether it is a descriptive term (akin to “common” or “typical”) or a normative concept. See, e.g., Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 495-96 (1996); Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 503 (1996). This is an important observation, but it does not resolve the questions at issue here. Whether descriptive or normative, the reasonableness inquiry ought to carry the same connotations in all cases, and my point here is that battered women are asking only that their self-defense claims be assessed according to the same reasonableness standards generally applied in other cases.

reactions.”⁷³ In fact, it was the recognition of this very fact that led courts to overcome their initial reluctance and admit expert testimony describing the battered woman syndrome in support of battered women’s self-defense claims.⁷⁴ While this much may be conceded, battered woman syndrome theory has come under increasing attack from almost all sides. It is to those criticisms that the next section turns.

III. BASHING THE BATTERED WOMAN SYNDROME

Psychologist Lenore Walker, one of the early pioneers in the field of domestic violence, coined the term “battered woman syndrome” to describe the effects of intimate-partner abuse.⁷⁵ In her 1979 book, *The Battered Woman*, Walker observed that women who find themselves in abusive relationships tend to share certain characteristics, including low self-esteem, passivity, and traditional attitudes about male-female roles.⁷⁶ Walker also found that many battering relationships are characterized by a cyclical pattern – the so-called “cycle of violence,” consisting of a tension-building stage, an acute battering incident, and then a stage of loving contrition.⁷⁷ The book also explained Walker’s theory of “learned helplessness”: once battered women learn that they cannot control or prevent the beatings, they come to feel that the violence is unavoidable and that there is no escape from the relationship.⁷⁸ Walker used these findings to try to dispel the myth that battered women remain in abusive relationships because they are masochists.⁷⁹ Instead, she pointed out that women stay for a number of reasons, which included not only their feelings of helplessness and the reinforcement they received during the third stage of the cycle, but also other factors – namely, fear, lack of resources, concern for children, love for their partner, shame, and lack of external support resulting from the batterer’s efforts to isolate them from others.⁸⁰

The “battered woman syndrome” has now become a popular punching bag, with the Justice Department report concluding that the term “does not reflect the breadth of empirical knowledge now available concerning battering and its

73. Mary Ann Dutton, *Validity of “Battered Woman Syndrome” in Criminal Cases Involving Women*, in U.S. DEP’T OF JUSTICE, *THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT*, *supra* note 41, at 10, 4-5.

74. *See supra* notes 40-42 and accompanying text.

75. WALKER, *supra* note 40, at xv.

76. *See id.* at 31-35.

77. *See id.* at 55-70 (finding that 65% of battered women reported a tension-building stage and 58% a contrition phase).

78. *See id.* at 45-54.

79. *See id.* at 20.

80. *See* WALKER, *supra* note 40, at 49-50, 64-69, 127-49.

effects” and thus “is no longer useful or appropriate.”⁸¹ Criticisms of the battered woman syndrome fall primarily into four categories: that the theory implies pathology or mental disorder rather than reasonableness; that it creates a new “battered woman syndrome” defense; that it suggests a model for all battering relationships that does not fit some women; and that the learned helplessness portion of the theory is inconsistent with a woman’s use of self-defense.⁸² Each of these objections will be described in turn.

First, critics of the theory argue that the term “syndrome” tends to “pathologize” battered women⁸³ and thus, by definition, negates the

81. *Overview and Highlights of the Report, in U.S. DEP’T OF JUSTICE, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT, supra note 41, at vii* (noting that this was “[a] significant conclusion of all three reports” included in the Justice Department report). *See also* Dutton, *supra* note 73, at 17 (characterizing the term “battered woman syndrome” as “imprecise” and “misleading,” and observing that it “does not adequately reflect the breadth or nature of knowledge concerning battering and its effects”); Mary Ann Dutton, *Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Women, in U.S. DEP’T OF JUSTICE, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT, supra note 41, at 5* (finding a “consensus” in a focus group composed of judges, defense attorneys, prosecutors, expert witnesses, and advocates that the term “battered woman syndrome” is “too ambiguous and too narrow” and therefore “not adequate to portray the necessary information to assist the factfinder” in a criminal trial involving a battered woman).

82. In addition to the four criticisms discussed here, some commentators have raised methodological objections to Walker’s study. *See, e.g.,* David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 75-79, 104-07 (1997); David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 636-43 (1986). Others have responded to these objections, noting the ethical considerations that make “true social science experiments” in this context impractical, *see* Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome by and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 797 (1996); the “virtual impossibility of conducting a controlled experiment,” Mosteller, *supra* note 72, at 481; the widespread use of surveys in other scientific research, *see* Schopp, Sturgis & Sullivan, *supra* note 57, at 55; and the fact that prior to Walker’s work, social scientists without her “ideological commitment” had “failed even to perceive violence against women as a problem worthy of study” and even “avowedly neutral scholars in this area turned out to have a political agenda of their own.” Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45, 92 (1998).

83. Faigman & Wright, *supra* note 82, at 69. *See also* Rebecca D. Cornia, *Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes About Women*, 8 UCLA WOMEN’S L.J. 99, 102 (1997); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 52 (1994) (describing the battered woman syndrome as “a mental disorder, whose characteristic symptoms cause [women] passively to submit themselves to marriages in which they are so brutally handled by dominant men that they lose their capacity to make rational choices”); Dutton, *supra* note 81, at 6 (reporting concerns expressed by the focus group that “the term ‘battered woman syndrome’ signals disorder, pathology, or a clinical condition”); Patricia Kazan,

reasonableness of their perceptions.⁸⁴ Just as “the reasonable psychotic”⁸⁵ or “the reasonable paranoid schizophrenic”⁸⁶ is an oxymoron, the argument goes, so the “reasonable syndrome sufferer”⁸⁷ cannot be deemed to have acted reasonably and thus cannot possibly hope to satisfy the objective component of the self-defense standard. This criticism is not entirely fair because the “battered woman syndrome” construct is not necessarily meant to connote some sort of mental disease or defect, but is simply “a convenient way of describing a set of characteristics that are common to many (but not all) battered women.”⁸⁸ Nevertheless, the use of the term “syndrome” has clinical connotations and is therefore prone to generate confusion.

Reasonableness, Gender Differences, and Self-Defense Law, 24 MANITOBA L.J. 549, 557 (1997) (noting that the battered woman syndrome makes women seem “deviant and pathological,” and “has often been read by the courts as evidence of mental incapacitation or insanity”); Margulies, *supra* note 82, at 96 (arguing that “the term ‘battered woman’ both pathologizes and homogenizes women’s experiences, leaving no room for agency”); *Overview and Highlights of the Report*, *supra* note 81, at vii (noting that “the word ‘syndrome’ may be misleading, by carrying connotations of pathology or disease, or . . . may create a false impression that the battered woman ‘suffers from’ a mental defect”).

84. For examples of court opinions describing the battered woman syndrome in medical terms that emphasize the woman’s incapacity and lack of reasonableness, see, e.g., *Ex parte Haney*, 603 So. 2d 412, 413 (Ala. 1992) (describing the defense expert as testifying that defendant “was suffering from a psychological defect, which he characterized as ‘spouse abuse syndrome’”); *State v. Riker*, 869 P.2d 43, 56 (Wash. 1994) (Utter, J., dissenting) (noting that “battered woman syndrome describes a psychological condition produced when a person is repeatedly subjected to severe abuse,” and that “severe abuse distorts perceptions of harm and its immediacy in ways that are not readily understandable”); *State v. Riley*, 500 S.E.2d 524, 533 n.11 (W. Va. 1997) (per curiam) (commenting that the defendant “relied upon the battered woman’s syndrome and other evidence of mental incapacity and upon self-defense as a defense at trial”) (emphasis added); *Trusky v. State*, 7 P.3d 5, 10 (Wyo. 2000) (observing, in analyzing whether the prosecution was entitled to notes taken by defense expert who examined the defendant for battered woman syndrome, that the defendant – whose defense at trial was self-defense – “asserted an affirmative defense on the basis of diminished capacity and battered woman syndrome” and therefore “may not argue a deficient mental condition and, at the same time, claim protection by privilege”).

85. Kazan, *supra* note 83, at 563.

86. Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 242 (2002). See also Morse, *supra* note 53, at 13.

87. Morse, *supra* note 53, at 12.

88. Parrish, *supra* note 41, at 2. See also Kazan, *supra* note 83, at 557 (observing that the battered woman syndrome was “originally intended to function in a purely descriptive capacity . . . making it possible for the courts to see past common myths and misconceptions about the battering relationship”); Regina A. Schuller & Patricia A. Hastings, *Trials of Battered Women Who Kill: The Impact of Alternative Forms of Expert Testimony*, 20 LAW & HUM. BEHAV. 167, 168 (1996) (observing that battered woman syndrome is “merely a descriptive term”); Lenore E.A. Walker, *Psychology and Law*, 20 PEPP. L. REV. 1170, 1177 (1993) (noting

Second, critics have argued that the battered woman syndrome creates a new “battered woman syndrome defense” – a “special excuse for women.”⁸⁹ But, the “syndrome” itself does not give rise to a defense.⁹⁰ Rather, the history of violence and the effects of that violence are used in determining whether the defendant has a standard self-defense claim because she acted under circumstances where she honestly and reasonably believed she was in imminent danger of death or serious bodily harm. Nevertheless, some courts

that the battered woman syndrome, like post-traumatic stress disorder, is “not a mental illness, but rather a way to clinically describe the impact of abuse on the woman’s state of mind”).

Some courts have recognized as much, noting that the “battered woman syndrome” is not a mental disease. *See, e.g.,* *People v. Humphrey*, 921 P.2d 1, 7 n.3 (Cal. 1996) (using the term “battered women’s syndrome,” but observing that “‘the preferred term among many experts today is “expert testimony on battering and its effects” or “expert testimony on battered women’s experiences,’” in part because “‘the phrase “battered women’s syndrome” . . . has pathological connotations which suggest that battered women suffer from some sort of sickness [and] expert testimony on domestic violence refers to more than women’s psychological reactions to violence’”) (quoting amicus brief); *People v. Seeley*, 720 N.Y.S.2d 315, 318 (N.Y. Sup. Ct. 2000) (noting that “Battered Woman Syndrome is not a mental defect or disease,” but rather “is identified by a series of common characteristics that appear in persons who have been abused for an extended period of time by the dominant figure in their lives”); *Bechtel v. State*, 840 P.2d 1, 7 (Okla. Crim. App. 1992) (concluding that “the syndrome is a mixture of both psychological and physiological symptoms but is not a mental disease in the context of insanity”).

89. Coughlin, *supra* note 83, at 27-28. *See also* Morse, *supra* note 53, at 3 (describing the “battered victim” defense as a “new affirmative defense[]”).

90. *See, e.g.,* *Dutton*, *supra* note 73, at 17 (observing that “[t]here is no ‘battered woman defense,’ *per se*”). A number of courts seem to have had no trouble recognizing this fact. *See, e.g.,* *Smith v. State*, 486 S.E.2d 819, 822 (Ga. 1997) (observing that “the battered person syndrome is not a separate defense, but . . . evidence of battered person syndrome is relevant in a proper case as a component of justifiable homicide by self-defense”); *Banks v. State*, 608 A.2d 1249, 1253 (Md. Ct. Spec. App. 1992) (holding that state statute providing for admissibility of battered spouse syndrome evidence “does not, as appellant, the State, and the trial judge all seem to believe, create a new defense to murder”; “[r]ather, evidence of the Battered Spouse Syndrome is offered in support of the state of mind element of perfect or imperfect self-defense”); *Boykins v. State*, 995 P.2d 474, 478 (Nev. 2000) (noting that “battered woman syndrome is not a complete defense” but is “relevant to the reasonableness of an individual’s belief that death or great bodily harm is imminent”); *Seeley*, 720 N.Y.S.2d at 320 (commenting that “Battered Woman Syndrome is not a defense to a criminal act,” but instead is “evidence . . . generally recognized as admissible in cases involving self-defense”); *State v. Koss*, 551 N.E.2d 970, 974 (Ohio 1990) (warning that “admission of expert testimony regarding the battered woman syndrome does not establish a new defense or justification,” but “assist[s] the trier of fact [in] determin[ing] whether the defendant acted out of an honest belief that she was in imminent danger of death or great bodily harm and that the use of such force was her only means of escape”); *State v. Hill*, 339 S.E.2d 121, 122 (S.C. 1986) (admonishing that “this Court is not recognizing the battered woman’s syndrome as a separate defense” but is only addressing “the relevance of this testimony to a claim of self-defense”); *Witt v. State*, 892 P.2d 132, 143 (Wyo. 1995) (noting that state statute permitting the use of battered woman syndrome testimony “does not create a separate defense; it permits the introduction of expert testimony on the battered woman syndrome when the affirmative defense of self-defense is raised”).

and commentators persist in using the misleading terms “battered woman’s defense” and “battered woman syndrome defense,” even when they are talking about standard self-defense claims.⁹¹

Third, critics point out that Walker’s theory creates a one-size-fits-all model that in fact does not accurately describe all abusive relationships.⁹² The battered women who actively take steps in an effort to stem the abuse – sometimes even fighting back – can hardly be viewed as “passive” or “helpless.” Not only does this model tend to create a profile or stereotype that each battered woman must meet in order to raise a successful self-defense claim,⁹³ it also disproportionately disadvantages certain groups of women – including women of color⁹⁴ and women who are financially independent⁹⁵ –

91. See Parrish, *supra* note 41, at iii (noting that “the perception that there is a separate defense called the ‘battered women’s defense,’ or the ‘battered woman syndrome defense,’ persists” among many judges and lawyers). See also *supra* note 89 and accompanying text.

92. See, e.g., Dutton, *supra* note 73, at 17 (arguing that “[t]he knowledge pertaining to battering and its effects does not rest on a singular construct, as the term ‘battered women syndrome’ implies”); Margulies, *supra* note 82, at 71 (observing that the battered woman syndrome “homogenize[s] women’s experiences” and does not fit those who “consistently reply in kind”); Raeder, *supra* note 82, at 790 (noting that admissibility of battered woman syndrome evidence “depends upon shoehorning women into a syndrome in which they often do not fit”).

93. See, e.g., Faigman & Wright, *supra* note 82, at 111 (noting that courts may refuse to admit expert testimony when a defendant “fails to ‘fit’ the ‘typical’ model of a battered woman who kills”); Maguigan, *supra* note 7, at 444-45 (arguing that a “reasonable battered woman” standard creates “a new stereotype” and “invites courts to prevent the fair trials of women who are not ‘good’ battered women”); Martha Shaffer, *The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After R. v. Lavallee*, 47 U. TORONTO L.J. 1, 19 (1997) (concluding that the Canadian experience with battered woman syndrome testimony “raise[s] the possibility that a stereotype of the ‘authentic’ battered woman is operating, making it difficult for women who do not fit the mold to make use of self-defence”).

Boykins v. State, 995 P.2d 474 (Nev. 2000), provides a helpful illustration of the dangers resulting from the creation of such a model. The dissenting opinion in that case pointed out:

The jury apparently favored the testimony of the State’s expert . . . that Boykins did not fit the typical profile of a battered woman. For example, Boykins successfully managed a brothel with dozens of employees, she was financially independent, and earned approximately \$65,000 annually for her work at the brothel. Moreover, Boykins had previously exhibited aggressive and dominant personality characteristics.

Id. at 481 (Young, J., dissenting).

94. See, e.g., Ammons, *supra* note 19, at 1071 (observing that an African-American woman “must compete with racial and cultural stereotypes that indicate that she is anything but ‘helpless’”); Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1250 (2001) (criticizing battered woman syndrome theory because it is “based upon the white, middle class woman” and fails to “consider or accommodate other sources of oppression,” for example, the hesitancy of African-American women to call the police and the “silenc[ing] of Asian-American women] from reporting their abuse by the community pressures and family values of their ethnicity”); Margulies, *supra* note 82, at 71 (pointing out that learned helplessness “conflicts with popular images of African-American women”). See generally Pamela J. Smith, Comment, *We Are Not Sisters: African-American Women and the Freedom to Associate and*

whom juries are less likely to regard as “helpless.” Moreover, it is a model that contributes to gender stereotypes by favoring helplessness and passivity, thereby rewarding women who act in conformance with traditional gender roles.⁹⁶ It is thus, according to Anne Coughlin, a “profoundly anti-feminist,” indeed “misogynist,” defense.⁹⁷

Finally, critics make the related point that the theory of “learned helplessness” cannot account for a battered woman’s use of defensive force. Christine Littleton has commented on “[t]he tension . . . between [the] image of battered women as passive and the actual action of those relatively few battered women who kill their batterers.”⁹⁸ As George Fletcher succinctly noted, “[i]t is hardly a sign of helplessness to acquire a gun and . . . kill one’s psychological captor.”⁹⁹

Disassociate, 66 TUL. L. REV. 1467, 1482 (1992) (observing that historically it was only white women who were put on a pedestal and “expected to be submissive”).

95. See Ammons, *supra* note 19, at 1078 n.259 (observing that “jurors have to be educated about how a black woman can be economically independent and yet emotionally dependent or ‘trapped’ in a relationship”). See generally S. REP. NO. 101-545, at 37 (1990) (concluding that domestic violence is not confined to a particular socio-economic group).

96. See, e.g., Cornia, *supra* note 83, at 101, 122 (describing the battered woman syndrome as an “immense disservice” because it “sacrifice[s] an emerging image of woman as equal to man” and “reinforces incapacity and inferiority in the women who invoke it”); Coughlin, *supra* note 83, at 50-51 (arguing that the defense “excuses [a battered woman] from criminal liability if she can prove that she was a passive, obedient wife whose choices were determined, not by her own exercise of will, but by the superior will of her husband,” and thus “requires women to embrace precisely the same insulting stereotypes the defense was supposed to explode”); Faigman & Wright, *supra* note 82, at 69-70 (commenting that the battered woman syndrome reflects “archaic stereotypes” and “demeans women”); Margulies, *supra* note 82, at 64-65 (concluding that the battered woman syndrome “subtly harms all women by reinforcing images of helplessness and lack of agency,” thereby suggesting that the “images that have historically limited opportunities for women . . . reflect an inevitable and natural reality rather than a social construction”); Morse, *supra* note 53, at 13 (observing that the battered woman syndrome may “reinforce[] negative stereotypes of women as helpless victims of their emotions who cannot be expected to behave rationally”).

97. Coughlin, *supra* note 83, at 87, 70. Professor Coughlin analogizes the “battered woman syndrome defense” to the now-discredited marital coercion doctrine, pursuant to which a woman who committed a crime in her husband’s presence was presumed to have been coerced to do so. See *id.* at 31. Coughlin contends that “the marital coercion doctrine reappeared, with its patriarchal understandings about women’s incapacity for responsible conduct virtually intact, . . . in the form of the battered woman syndrome defense.” *Id.* at 48-49.

98. Christine A. Littleton, *Women’s Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 29, 30 (also posing the question, “If these women are so passive, dependent and helpless, where do they get the strength and courage to live, day after day, with the abuse, humiliation and violence . . . [a]nd, in those rare instances, where do they get the desperation to kill?”).

99. GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS’ RIGHTS IN CRIMINAL TRIALS 138 (1995). See also Coughlin, *supra* note 83, at 81 (arguing that “the learned helplessness diagnosis . . . is inconsistent with the homicidal act” because “[i]f the woman is

Despite the force of some of these criticisms – particularly the last two – it is important to note that psychological research into the effects of abuse has advanced since the publication of Walker’s book in 1979. Walker herself, as well as others, have observed that a history of abuse triggers in some battered women a form of post-traumatic stress disorder (“PTSD”),¹⁰⁰ an anxiety disorder that, according to the American Psychiatric Association, results from “exposure to an extreme traumatic stressor” that involves experiencing or witnessing a threat of death or serious injury to oneself or others.¹⁰¹ Common signs of PTSD are found in some battered women: reliving the traumatic event in flashbacks or dreams; avoidance (or “flight”) behavior, such as an inability to recall the traumatic event, a “restricted range of affect,” or efforts to avoid situations that trigger memories of the event; and arousal (or “fight”) symptoms, such as hypervigilance, irritability, or sleep disorders.¹⁰²

Although PTSD can develop in “almost anyone” exposed to such a stressor,¹⁰³ some critics respond that PTSD, like the battered woman syndrome, is a mental disorder that, by definition, signifies the absence of reasonableness and therefore cannot possibly support a self-defense claim.¹⁰⁴ Even if it is “a normal response to an abnormally stressful situation,” several commentators have written, it remains a “psychological disorder[] because the individual suffers a recognizable pattern of impaired psychological process.”¹⁰⁵ The “normalcy” of the syndrome may help to “explain[] the situational source of

psychologically paralyzed, . . . then it seems much more likely that she will continue to endure the ongoing violence, rather than resort to such an extreme form of self-help”); Estrich, *supra* note 56, at 1433 (noting that women who kill “are, by definition, hardly . . . ‘helpless’ creatures”); Kazan, *supra* note 83, at 567, 568 (arguing that learned helplessness “undermines [the battered woman’s] claim” and makes it “difficult to imagine how [she] might be able to summon the will to act in her own defense”).

100. Walker, *supra* note 88, at 1177, 1185. See Dutton, *supra* note 73, at 19 (noting that PTSD can be found in somewhere between 31% and 84% of battered women). See also WYO. STAT. ANN. § 6-1-203(a) (Michie 2003) (defining battered woman syndrome as a “subset” of PTSD); *People v. Seeley*, 720 N.Y.S.2d 315, 318 (N.Y. Sup. Ct. 2000) (describing battered woman syndrome as “a subcategory or subset of posttraumatic stress syndrome”).

101. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994).

102. *See id.* at 426-28.

103. *Id.* at 426.

104. See Schopp, Sturgis & Sullivan, *supra* note 57, at 95-96. Cf. Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1198-99 (1993) (observing that “defining battered woman syndrome as PTSD frames the issue before the finder of fact as solely a ‘clinical’ phenomena,” requiring the battered woman “to meet a specific set of criteria,” and therefore risking “the unintended result . . . that the expert witness constructs for the finder of fact an image of pathology”).

105. Schopp, Sturgis & Sullivan, *supra* note 57, at 95.

the disorder,” they continue, but it “does not render the syndrome less a disorder.”¹⁰⁶

By way of comparison, however, the criminal law does not blindly embrace medical diagnoses of mental disease when it comes to the insanity defense. In that context, the law has always taken the position that the medical and legal definitions of mental disease are not necessarily identical because the two communities have distinct goals and purposes.¹⁰⁷ Similarly here, the fact that a defendant has a diagnosable mental condition according to the medical profession should not automatically foreclose a self-defense claim or a finding of reasonableness. The fundamental question for the criminal justice system should be whether in the particular case the symptoms of that condition distorted or supported the reasonableness of the defendant’s fear. With respect to PTSD, some symptoms – for example, hypervigilance – may well suggest the reasonableness of a defendant’s fear because they make her more alert to signals of danger.¹⁰⁸ Other symptoms – for example, lack of affect or difficulty remembering the abuse – are neutral and not directly relevant to the reasonableness of her beliefs at the time she used defensive force.¹⁰⁹ And still others, for example, a flashback that “magnifie[d] the fear and cause[d] the woman to perceive each successive battering incident as more dangerous than if it were the first one to occur” – if that perception was unreasonable – will undermine a self-defense claim by suggesting that her belief in the need to use defensive force was not reasonable.¹¹⁰ Thus, the fact that PTSD – or even the much-maligned battered woman syndrome¹¹¹ – may have psychological sequelae does not mean that battered women’s self-defense claims are tantamount to a “reasonable psychotic”¹¹² or “reasonable paranoid schizophrenic”¹¹³ standard of self-defense.

In addition to evidence of PTSD, other experts have found that the so-called “active survivor theory” better captures the experience of battered

106. *Id.* at 96 (acknowledging that they would reach a different conclusion if the term “normal” in this context signified “free of functional impairment” – as opposed to “statistically normal” or “understandable” – but concluding that would be “incompatible with the contention that the battered woman syndrome occurs at all, because the syndrome has been defined as a pattern of psychological impairment which typically occurs in battered women”).

107. See, e.g., 1 LAFAVE & SCOTT, *supra* note 8, § 4.3(c)(2).

108. See *supra* note 102 and accompanying text.

109. See *id.*

110. Lenore Walker, *The Battered Woman Syndrome Is a Psychological Consequence of Abuse*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 133, 138-44 (Richard J. Gelles & D.R. Loseke eds., 1993).

111. *But cf.* Ammons, *supra* note 19, at 1080 (commenting that “it seems premature and cavalier to jettison a trauma theory which is akin to other valid explanations of how humans respond to violence, just because it might not apply to all battered women”).

112. Kazan, *supra* note 83, at 563.

113. Burke, *supra* note 86, at 242.

women.¹¹⁴ This theory, associated with Edward Gondolf and Ellen Fisher, observes that, rather than being helpless, battered women “respond to abuse with helpseeking efforts that are largely unmet,” and they “remain in abusive situations not because they have been passive but because they have tried to escape with no avail.”¹¹⁵ Moreover, women tend to step up their helpseeking efforts as the violence escalates, “attempting, in a very logical fashion, to assure themselves and their children protection and therefore survival.”¹¹⁶ Gondolf and Fisher also explain that “[t]he so-called symptoms of learned helplessness may in fact be part of the adjustment to active helpseeking,” attributable to “quite natural and healthy responses”: learned helplessness may, for example, reflect “a temporary manifestation of traumatic shock, . . . an effort by battered women to save the relationship,” or “an expression of separation anxiety that understandably accompanies leaving the batterer.”¹¹⁷

The active survivor theory thus “focuses on abusers and on societal inaction, not on the incapacities of survivors, . . . stress[ing] the power and control exerted by the abuser, the enforcement of that power by both legal and cultural norms, and the material, rather than psychological, deficits that make exiting abusive relationships difficult.”¹¹⁸ In addition to emphasizing the reasonableness of the battered woman’s actions, this model avoids falling into the trap of focusing exclusively on the woman and her psychological traits, thereby diverting attention from the role that the abuser, society, and other external constraints play in preventing her from protecting herself and leaving the relationship.¹¹⁹ Moreover, the active survivor theory is “inclusive” and

114. See EDWARD W. GONDOLF & ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* 11-25 (1988). See also Dutton, *supra* note 73, at 15-16 (citing studies reporting that “many battered women engage in active efforts to resist, avoid, escape, and stop the violence against them,” including fighting back physically and verbally and calling the police); Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 146 SMU L. REV. 2117, 2135-36 (1993) (concluding that battered women tend to increase their helpseeking efforts over time, rather than becoming passive and decreasing such efforts); Littleton, *supra* note 98, at 41-42 (observing that learned helplessness theory is “markedly inconsistent with Walker’s own description of a ‘common behavior’ among the battered women she studied” – that they actively engage in efforts “‘to control other people and events in the environment to keep the batterer from losing his temper’” and also “‘develop survival or coping skills that keep them alive with minimal injuries’”) (quoting WALKER, *supra* note 40, at 34; LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 33 (1984)); Mahoney, *supra* note 21, at 61-62 (noting that many battered women seek help or try to leave the abusive relationship, and concluding that it is “the helping professions, rather than battered women, that [are] afflicted with ‘helplessness’”).

115. GONDOLF & FISHER, *supra* note 114, at 11, 17.

116. *Id.* at 18.

117. *Id.* at 21-22 (emphasis removed).

118. Margulies, *supra* note 82, at 113.

119. See Chiu, *supra* note 94, at 1251-52 (noting that the “lopsided focus on . . . the behavior of the woman distracts and undermines the need to further explore and understand the

“open[] to a diverse spectrum of stories,” “instead of relying . . . on an expert’s monolithic construct of a woman’s subjective mental state.”¹²⁰ In this respect, the active survivor theory is consistent with the finding of researchers generally that not all battered women respond in the same way to a history of abuse.¹²¹

As a result of these developments in our understanding of abusive relationships, many researchers, expert witnesses, and judges now talk in terms of “battering and its effects” rather than “the battered woman syndrome.”¹²² This terminology is intended to minimize the confusion generated by the term “battered woman syndrome” by avoiding any suggestion that the woman suffers from a “syndrome” or mental impairment or that some sort of profile or model exists that all battered women must match.¹²³

Nevertheless, some critics persist in arguing that even testimony describing the active survivor theory or the “effects” of battering creates a “special excuse[] for women” – one that is “not available to all” defendants but instead

blameworthy and egregious conduct of the man,” thereby representing a “contemporary version[] of the historical blaming of women for domestic violence”); Dutton, *supra* note 104, at 1201 (concluding that “expert testimony concerning battered women’s experiences” provides the “overall social context that is essential for explaining battered women’s responses to violence”); Susan Stefan, *The Cloak of Benevolence*, in MARY BECKER, CYNTHIA GRANT BOWMAN & MORRISON TORREY, *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 322, 324 (2d ed. 2001) (pointing out that “[b]y labeling a reaction to . . . battering . . . as a medical condition to be treated, it is more likely to be removed from the political sphere – seen as an individual’s medical condition and not a focal point for political action”).

120. Margulies, *supra* note 82, at 111.

121. See Dutton, *supra* note 104, at 1196; *Overview and Highlights of the Report*, *supra* note 81, at vii-viii. Note that even Lenore Walker found that the three-stage cycle of violence did not describe all battering relationships. See *supra* note 77.

122. See, e.g., *People v. Humphrey*, 921 P.2d 1, 7 n.3 (Cal. 1996) (observing that “the preferred term among many experts today is “expert testimony on battering and its effects” or “expert testimony on battered women’s experiences””) (quoting amicus brief); Dutton, *supra* note 73, at 22; Dutton, *supra* note 81, at 6.

123. It is not evident, however, that any such change in the tenor of expert testimony will have much impact on the outcome of battered women’s trials. See Schuller & Hastings, *supra* note 88, at 181-84 (concluding based on simulated trial experiment that the gender of the juror made a difference, but that the type of expert testimony did not have much effect on the verdict). See generally CHARLES P. EWING, *BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION* 41-43 (1987) (reporting results of various studies, most of which found that approximately two-thirds or three-fourths of battered women are convicted or plead guilty); Parrish, *supra* note 41, at 7 (concluding based on survey of state court opinions that “the defense’s use of or the court’s awareness of expert testimony on battering and its effects in no way equates to an acquittal”); Shaffer, *supra* note 93, at 17-19 (reporting, based on five-year survey of thirty-five Canadian cases in which the battered woman syndrome was raised as a part of a defense or as a mitigating factor in sentencing, that the Canadian experience belies the argument that “women charged with killing their batterers are securing acquittals in great numbers”).

is “designed . . . to provide new excuses for women defendants only.”¹²⁴ And, the argument continues, “special excuses for women, in whatever form, reinforce incommensurable gender differences, in which the qualities characterized as male inevitably are privileged over those characterized as female.”¹²⁵

For a battered woman facing murder charges, however, often the major hurdle is convincing the judge “to apply the generally applicable standards of self-defense jurisprudence” to her case – a hurdle that frequently proves difficult because judges are simply unable “to see battered women’s use of deadly force as reasonable under established definitions.”¹²⁶ Battered women do not seek “special” treatment; they simply ask to be judged by the same rules that have traditionally been applied to male defendants. Their request to have the finder of fact consider the effects of battering may look like a request for special treatment, but that is only because we are so accustomed to making the same sort of inquiries in cases involving male defendants that they have now become invisible to us. As Victoria Nourse has pointed out, “group generalizations are unavoidable in the criminal law.”¹²⁷ For example, she notes, “[w]hen juries generalize that men naturally lose control when their wives cheat . . . , they are making group generalizations.”¹²⁸ To be sure, men do not rely on a “male rejection syndrome” in those cases; they do not “call

124. Coughlin, *supra* note 83, at 91, 26.

125. *Id.* at 91, 90 (concluding, however, that the active survivor theory is “less misogynist than . . . learned helplessness”).

126. Maguigan, *supra* note 7, at 432-37 (attributing the high reversal rate she found in surveying 270 appellate court opinions issued in 223 battered women’s homicide cases – a rate of 40%, compared to the national average of 8.5% – to this factor). *See also* Parrish, *supra* note 41, at 7 (finding a reversal rate of 32% in survey of 152 state court decisions involving battered women).

For recent cases illustrating Maguigan’s theory, *see* *People v. Garcia*, 28 P.3d 340, 347-49 (Colo. 2001) (reversing defendant’s conviction in part because the trial judge refused to instruct the jury that defendant had no duty to retreat and that deadly force can be used to prevent sexual assault); *Weiland v. State*, 732 So. 2d 1044, 1057-58 (Fla. 1999) (concluding that the trial court erred by excluding testimony of three eyewitnesses who “would have provided the only direct testimony to support Weiland’s claims of prior abuse,” thus allowing the prosecutor to “discredit Weiland’s claims of abuse by arguing that no one had ever witnessed any injuries on Weiland or seen evidence of her husband’s abuse of her”); *State v. Rodrigue*, 734 So. 2d 608, 612 (La. 1999) (finding that the trial court erred in refusing to apply state statute allowing testimony of batterer’s prior violence because the parties were not involved in “a current intimate relationship,” even though “[t]he statute . . . contain[ed] no such requirement” and “certainly did not contemplate that the battered party would not have the benefit of the provision when the batterer, as frequently happens, confronts and assaults the former mate shortly after the break-up of the intimate relationship”).

127. Nourse, *supra* note 39, at 1443.

128. *Id.* at 1443-44 (also explaining that “any time the law imposes a reasonable person standard, it requires that juries make assumptions about human behavior – assumptions that put the defendant in a group of analogously situated persons”).

expert witnesses to explain that a reasonable person would lose self-control when his wife cheats or leaves.”¹²⁹ But, that is only because they need not do so, for “the reasonableness of such arguments is assumed.”¹³⁰ The reason such conduct is presumed reasonable with no need for explanation, whereas the conduct of a battered woman is presumed to be unreasonable, and any request for explanation is dismissed as special pleading, is because the criminal law “is, from top to bottom, preoccupied with male concerns and male perspectives, . . . a system of rules conceived and enforced by men, for men, and against men.”¹³¹

To the extent the argument is that even the erroneous misperception that battered women are seeking special treatment reinforces gender stereotypes, this critique is reminiscent of the familiar equal treatment/different treatment debate that has raged in feminist jurisprudence.¹³² Advocates of equal treatment contend that treating female defendants differently from male defendants reinforces gender stereotypes.¹³³ Difference feminists point out in response that the quest for formal equality presumes the absence of gender differences and that, in a male-dominated society which invariably “privileges” those “qualities characterized as male,” settling for formal equality tends to disadvantage women.¹³⁴ The controversy here is yet another manifestation of what Margaret Radin has called “the transition problem of the double bind” – “a series of two-pronged dilemmas in which both prongs are, or can be, losers for the oppressed.”¹³⁵ Given the Catch-22 nature of this dilemma, there is, of course, no perfect solution. To me, however, it seems preferable to take into account the effects of battering in assessing a battered woman’s self-defense

129. *Id.* at 1451.

130. *Id.* For further discussion of these provocation issues, see *infra* notes 174, 192-94, and accompanying text.

131. Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2151, 2154 (1995).

132. See generally Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL’Y 1 (1994).

133. See, e.g., Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 351-52 (1984-1985) (arguing that “the ‘equal treatment’ approach to pregnancy . . . is the one best able to reduce structural barriers to full workforce participation of women, produce just results for individuals, and support a more egalitarian social structure”).

134. See, e.g., Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1181 (1986) (characterizing the equal treatment approach as “fundamentally flawed” because “[t]he search for sameness is built around male norms” and therefore only helps women who “are just like men, or are willing to ascribe to male values and standards”).

135. Margaret Ann Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1699, 1701, 1704 (1990) (noting that the double bind is a “pervasive” problem for women because “[f]or a group subject to structures of domination, all roads thought to be progressive can pack a backlash”).

claim, not only because doing so will permit a more accurate and more complete – and therefore fairer – assessment of her situation, but also because otherwise we disadvantage her compared to male defendants for whom the criminal justice system has historically, though perhaps unconsciously, been willing to make such accommodations.

IV. THE IMMINENCE REQUIREMENT

Focusing on self-defense's imminence requirement, some critics argue that a battered woman who kills under non-confrontational circumstances might reasonably fear future abuse,¹³⁶ but she cannot honestly and reasonably believe she is in imminent danger of harm at the time she acts.¹³⁷ There are four responses to this objection.

First, research shows that battered women tend to become hypersensitive to their abuser's behavior and to the signs that predict a beating.¹³⁸ Many battered women who kill say that something in the abuser's behavior changed or signaled to them that this time he really was serious about carrying out his threats to kill.¹³⁹ That experience may enable battered women to recognize the

136. *But cf.* Danielle R. Dubin, Note, *A Woman's Cry for Help: Why the United States Should Apply Germany's Model of Self-Defense for the Battered Woman*, 2 ILSA J. INT'L & COMP. L. 235, 241 (1995) (contending that it is "legally impossible to conclusively establish" that a sleeping batterer will resume the abuse when he awakes).

137. *See, e.g.*, Estrich, *supra* note 56, at 1433 (commenting that the imminence requirement "does not allow [a battered woman] to respond eight hours later, or when [the abuser] is asleep"); Kym C. Miller, *Abused Women Abused by the Law: The Plight of Battered Women in California and a Proposal for Revising the California Self-Defense Law*, 3 S. CAL. REV. L. & WOMEN'S STUD. 303, 316 (1994) (arguing that, given the imminence requirement, "a jury can only find that the woman acted in self-defense by disregarding the mandate of . . . self-defense law"); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 375 (1993) (concluding that the refusal even to instruct the jury on self-defense in a case where a battered woman shot her sleeping husband was consistent with "settled [self-defense] law" because "the threat of death or great bodily harm was not imminent when [she] shot her husband, not, at least, by any reasonable interpretation of the word imminent"); Dubin, *supra* note 136, at 240 (arguing that the courts' interpretation of the imminence requirement "effectively excludes" self-defense in non-confrontational cases). *See also infra* note 147 and accompanying text.

138. *See, e.g.*, Dutton, *supra* note 73, at 8 (observing that "intimate partners generally learn to read the subtle nuances of each other's behavior more clearly than can others"); Fischer, Vidmar & Ellis, *supra* note 114, at 2119-20 (reporting that, just as "[t]hrough daily interaction and shared history every couple develops idiosyncratic modes of communication, . . . [a] gesture that seems innocent to an observer is instantly transformed into a threatening symbol to the victim of abuse"); Morse, *supra* note 53, at 11-12 (noting that hypervigilance would be helpful to show the reasonableness of a defendant's perception of danger); Schopp, Sturgis & Sullivan, *supra* note 57, at 72 (observing that "the best indicators of future violence are past violent behavior by the same person in similar circumstances"). *See also supra* note 102 and accompanying text (reporting that hypervigilance is one of the effects of PTSD).

139. *See, e.g.*, BROWNE, *supra* note 13, at 129-30.

imminence of an attack at a time when others without their prior experience would not.

Second, given her history, a battered woman may reasonably come to believe that the only time she can realistically protect herself is when her abuser is, for example, asleep. She may have learned that trying to defend herself during a beating is futile and merely escalates the violence.¹⁴⁰ She may have tried numerous other ways of protecting herself and escaping the relationship, only to find that the criminal justice system and social service agencies were unable or unwilling to help her and that her husband would find her, bring her back, and punish her with even more severe abuse for attempting to leave him.¹⁴¹ In fact, research shows that battered women are often attacked and even killed when they try to leave the relationship and the batterer fears that he is losing control.¹⁴²

140. See, e.g., Dutton, *supra* note 73, at 16. Moreover, a woman who tries to protect herself by hiding a weapon to use when the batterer resumes his attack may be deemed to have acted with premeditation and thus convicted of first-degree murder.

141. See, e.g., FLETCHER, *supra* note 99, at 145 (concluding that “Judy Norman could not escape without fear of being caught and beaten, as she had been beaten in the past”); Schopp, Sturgis & Sullivan, *supra* note 57, at 104 (observing that battered women who unsuccessfully tried to seek help “can cogently argue that effective legal alternatives were not available,” and others “might demonstrate the necessity of defensive force through expert testimony regarding the lack of effective legal protection in their jurisdiction”). For a general discussion of the inadequacy of current legal remedies and the “helplessness” of social agencies in addressing the needs of battered women, see *supra* notes 19-34 and accompanying text.

142.

At least half of women who leave their abusers are followed and harassed or further attacked by them. In one study of interspousal homicide, more than half of the men who killed their spouses did so when the partners were separated; in contrast, less than ten percent of women who killed were separated at the time Men who kill their wives described their feeling of loss of control over the woman as a primary factor “[T]he decision by a battered woman to leave is often met with escalated violence by the batterer.”

Mahoney, *supra* note 21, at 64-65 (quoting Barbara Hart, *Beyond the “Duty to Warn”: A Therapist’s “Duty to Protect” Battered Women and Children*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 234, 240 (Kersti Yllo & Michele Bograd eds., 1988) (alteration in original)). See also Dutton, *supra* note 73, at 14 (noting that the phenomenon of “separation abuse – retaliation for a woman’s efforts to separate from the abuser or to end the relationship” – is “validated . . . by homicide statistics”); Fischer, Vidmar & Ellis, *supra* note 114, at 2138 (reporting that “[t]he most dangerous time for a battered woman is when she separates from her partner”); Miller, *supra* note 137, at 308 (reporting that three-fourths of battered women are beaten after they are separated or divorced) (citing CALIFORNIA ATTORNEY GENERAL’S OFFICE, CRIME PREVENTION CENTER, DOMESTIC VIOLENCE HANDBOOK: A VICTIM’S GUIDE 3 (1988)).

Third, even though “inevitable future harm” may not be the same as “imminent harm,”¹⁴³ imminence is in some sense a proxy for necessity.¹⁴⁴ The battered woman who kills her sleeping husband arguably satisfies that notion of imminence, just like the hostage who is being slowly poisoned over a period of time, or who has been told to expect to die later in the week, and who suddenly has a window of opportunity to attack her kidnapper and save her life.¹⁴⁵

Finally, it is important to note that standard self-defense doctrine requires only a reasonable belief in the imminence of the threat, and not actual imminence. As the Oklahoma Court of Criminal Appeals observed, “the issue is not whether the danger was in fact imminent, but whether, given the

143. *State v. Norman*, 378 S.E.2d 8, 14 (N.C. 1989) (holding that “a defendant’s subjective belief of what might be ‘inevitable’ at some indefinite point in the future does not equate to what she believes to be ‘imminent’”).

144. See FLETCHER, *supra* note 66, §10.5; PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(c)(1)-(2) (1984); Burke, *supra* note 86, at 278 (observing that “[a]s a factor acting independent of necessity, the imminency of the threat has no exculpatory value to a claim of self-defense”); Rosen, *supra* note 137, at 380 (noting that “the concept of imminence has no significance independent of the notion of necessity”); Lawrence P. Tiffany & Carl A. Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DENV. L. J. 839, 846-47 (1975) (pointing out that the “temporal ‘imminence’ of the threat may be . . . evidence of a lack of alternatives, but the absence of temporal ‘imminence’ is not proof of the existence of alternatives”). See also Nourse, *supra* note 7, at 1259 n.117 (citing cases that “explicitly equate imminence and alternatives”). Cf. *Queen v. Petel*, [1994] 1 S.C.R. 3, 13-14 (Can.) (noting that Canadian self-defense law considers imminence “only one of the factors which the jury should weigh in determining whether the accused had a reasonable apprehension of danger and a reasonable belief that she could not extricate herself otherwise than by killing the attacker”).

In fact, Professor Rosen has pointed out that historically, “imminence of impending harm was not a specific requirement” of either of the two forerunners of our contemporary self-defense defense, and he therefore concludes that imminence does not have “an unquestioned historical lineage as a fundamental requirement for a finding of self-defense.” Rosen, *supra* note 137, at 382, 387. Rosen therefore advocates that the imminence requirement be relaxed such that if a defendant satisfies the burden of production by presenting substantial evidence that defensive force was necessary to defend against a non-imminent threat, the jury would be instructed to consider only whether self-defense was necessary, with imminence being one relevant factor but not an absolute prerequisite. See *id.* at 405-06.

145. See *Bechtel v. State*, 840 P.2d 1, 12 (Okla. Crim. App. 1992) (analogizing the battered woman’s situation to “the classic hostage situation”); *Robinson v. State*, 417 S.E.2d 88, 91 (S.C. 1992) (concluding that “[w]here torture appears interminable and escape impossible, the belief that only the death of the batterer can provide relief may be reasonable in the mind of a person of ordinary firmness”); ROBINSON, *supra* note 144, § 131(c)(1) (posing a similar hypothetical and concluding that “[i]f a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier – as early as is required to defend himself effectively”).

circumstances as she perceived them, the defendant's belief was reasonable that the danger was imminent."¹⁴⁶

Nevertheless, some critics counter, the imminence requirement cannot be satisfied in non-confrontational cases because the woman always had the option of leaving before the abuser woke up.¹⁴⁷ In addition to the difficulties that a battered woman faces in leaving the relationship or otherwise protecting herself from the abuse,¹⁴⁸ other commentators have pointed out that "a rule that demands the defendant 'avoid the confrontation'" by leaving the relationship is "a 'pre-retreat' rule [that] . . . has never been part of standard self-defense law."¹⁴⁹ Just as "[t]he man who goes for the fiftieth time to the violent gangbar is not deprived of his self-defense claim because he 'should have left'

146. *Bechtel*, 840 P.2d at 12. See also *Smith v. State*, 486 S.E.2d 819, 823 (Ga. 1997); *Springer v. Commonwealth*, 998 S.W.2d 439, 453-54 (Ky. 1999).

147. See, e.g., ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE* 28-29 n.12 (1994) (arguing that "[n]owhere in the civilized world do self-defense laws justify the killing or maiming of a sleeping spouse by a woman who has the option of either leaving or calling the police"); FLETCHER, *supra* note 99, at 134-35 (observing that a woman who kills a sleeping batterer has "a problem justifying the killing as the fear of imminent attack" and the "further problem . . . that she [has] to explain why she did not seize a less extreme means of avoiding [his] brutality – namely, running away"). Cf. *Weiland v. State*, 732 So. 2d 1044, 1048 (Fla. 1999) (noting that the prosecutor in that case – which involved a killing "during a violent argument," not under non-confrontational circumstances – "stressed as 'critical' that the killing could not be considered justifiable homicide unless Weiland had exhausted every reasonable means to escape the danger, including fleeing her home").

These failure-to-exhaust-all-options arguments are reminiscent of those made in some sexual assault cases, where women are asked why they did not scream, fight back, or use some other means to escape a violent man. See, e.g., *People v. Warren*, 446 N.E.2d 591, 593-94 (Ill. App. Ct. 1983) (holding that "it was incumbent upon [the woman] to resist," and noting that a 5'2", 105-pound woman attacked in the middle of an isolated woods by a 6'3", 185-pound man did not scream, try to flee, or "tell [him] to leave her alone or put her down"); *State v. Rusk*, 424 A.2d 720, 733-34 (Md. 1981) (Cole, J., dissenting) (arguing that women "must follow the natural instinct of every proud female to resist, by more than words, the violation of her person by a stranger or an unwelcomed friend," and asking there why the victim "did not seek a means of escape," "did not even 'try the door' to determine if it was locked," and "fail[ed] to flee, summon help, scream, or make physical resistance"); *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1164 (Pa. 1994) (observing that the woman there "took no physical action to discourage [the man]," and "never attempted to go to the door or unlock it") (quoting trial transcript). In that context, feminist critics of the rape laws have pointed out that such arguments reflect the law's historic devaluation of women's testimony and its insistence on holding women to the "traditional male notion of a fight." SUSAN ESTRICH, *REAL RAPE* 62 (1987). See also *People v. Barnes*, 721 P.2d 110, 117-18, 118-19 (Cal. 1986) (pointing out that "[t]he requirement that a woman resist her attacker appears to have been grounded in the basic distrust with which courts and commentators traditionally viewed a woman's testimony regarding sexual assault," and citing studies showing that "while some women respond to sexual assault with active resistance, others [may] 'freeze,'" smile, or appear calm).

148. See *supra* notes 80, 114-19, 140-42, and accompanying text.

149. Nourse, *supra* note 7, at 1284.

before the violence erupted,” the law should likewise recognize that “[t]here is no general duty to avoid violence before the confrontation” when battered women raise a claim of self-defense.¹⁵⁰

Once again, the battered woman is simply asking the courts to faithfully apply the standard self-defense doctrine to her case, something that the courts are seemingly reluctant to do.¹⁵¹ In her survey of twenty years of self-defense cases in which imminence factored as a major issue, Victoria Nourse found that most of the cases involving battered women, like most of the rest of her sample, involved killings during a confrontation – not killings while the batterer was asleep or otherwise following “a significant time lag.”¹⁵² Thus, the imminence standard tended to “operate as a proxy for any number of *other* self-defense factors.”¹⁵³ The real hurdle battered women faced was that their “cases are in general not seen as ‘real fights,’” so that “even when the cases are confrontational – when the gun is pointed at her – they still are not seen as confrontational.”¹⁵⁴ These findings led Nourse to conclude that the imminence requirement is “far from as settled or coherent as it is assumed to be.”¹⁵⁵

Nourse contends, however, that focusing on the necessity for self-defense instead of imminence, as suggested above, does not “resolve the potential for conflict in the law of imminence,” but “simply transform[s] the question of the meaning of imminence into the meaning of necessity.”¹⁵⁶ But, as Nourse and others have aptly noted, standard criminal doctrine does not invariably require a strict finding of necessity in order to justify a self-defense acquittal. The law

150. *Id.* See also Dutton, *supra* note 104, at 1226-27 (noting that the “common perception [that a battered woman should leave the relationship] is contrary to a fundamental legal premise” because “[t]he law has always been clear . . . that a person has no obligation to rearrange her . . . entire life, or even inconvenience [her]self, in order to avoid a situation in which the need to act in self-defense might arise”) (quoting CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW* 146 (1989)); Rosen, *supra* note 137, at 396-97 (noting that even if a battered woman “could have escaped safely from her house and fled to Alaska, where she could change her identity and live happily, and safely, ever after,” the law has never “required completely innocent people to behave in this fashion” and has never demanded “[r]enunciation of personal and family identity”). Cf. Maguigan, *supra* note 7, at 419 (noticing the “tendency to blur the definition of the retreat rule with the question of whether the woman could have escaped the relationship”).

151. See Nourse, *supra* note 7.

152. *Id.* at 1253.

153. *Id.* at 1236 (specifying “strength of threat, retreat, proportionality, and aggression” as the issues for which imminence operated as a proxy).

154. *Id.* at 1286. This finding corroborates the similar conclusion Holly Maguigan reached based on her survey of 270 appellate court opinions issued in 223 battered women’s homicide cases. See *supra* note 126 and accompanying text.

155. Nourse, *supra* note 7, at 1237.

156. *Id.* at 1271. See also *id.* at 1276-77 (noting that self-defense law’s view as to what conduct is “necessary” has shifted over time).

of self-defense “depart[s] from the rule of ‘objective necessity’”¹⁵⁷ when it allows a defendant to kill in self-defense if facing a threat of only serious bodily harm¹⁵⁸ and when it refuses to require defenders to first fire a warning shot.¹⁵⁹ Additionally, and most notable for our purposes, the law of self-defense in most jurisdictions deviates from a strict necessity requirement when it allows the use of deadly force despite the availability of a clear path of retreat.¹⁶⁰ The law thereby evidences a willingness to defer to “manly instincts” without even flinching,¹⁶¹ while insisting that battered women satisfy a special “pre-retreat” requirement unenforced elsewhere in self-defense law.¹⁶²

V. JUSTIFICATION OR EXCUSE?

Critics of battered women’s self-defense claims also argue that women claiming self-defense in non-confrontational cases are really advancing an excuse for their conduct, rather than a justification,¹⁶³ and therefore, presumably by definition, are not entitled to the justification of self-defense. Under well-established principles of criminal law, however, even self-defense is not invariably a justification. For example, the defense is available when a defendant kills a perfectly innocent person who the defendant reasonably, but

157. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 333 (1996).

158. See, e.g., *id.* at 329; Nourse, *supra* note 7, at 1270.

159. See Nourse, *supra* note 7, at 1270. See also Rosen, *supra* note 137, at 396 (noting that “[t]he possibility always exists that a person attacking another with a gun will change his mind, or miss, or have a heart attack before pulling the trigger,” and thus concluding that “the law *never* requires the necessity to be absolute before allowing self-defense”).

160. See Nourse, *supra* note 7, at 1270; Rosen, *supra* note 137, at 388-90.

161. Estrich, *supra* note 56, at 1434. See also *State v. Abbott*, 174 A.2d 881, 884 (N.J. 1961) (concluding that a retreat requirement would “demand what smacks of cowardice” because “the manly thing to do is to hold one’s ground”); 1 LAFAVE & SCOTT, *supra* note 8, § 5.7(f) (noting that the majority approach is based on “a policy against making one act a cowardly and humiliating role”).

162. See Kahan & Nussbaum, *supra* note 157, at 373, 333 (accusing self-defense law of “appear[ing] to shift opportunistically” because “to say that the law cannot be adjusted to privilege deadly force” used by “a woman who kills rather than endure the degradation of continued abuse . . . because the law never ranks the defendant’s honor and dignity over a wrongful aggressor’s life betrays either extreme confusion or hypocrisy”).

163. See, e.g., Burke, *supra* note 86, at 242-43; Coughlin, *supra* note 83, at 28 (referring to the “battered woman syndrome defense” as a “special excuse for women”); Margulies, *supra* note 82, at 63 (arguing that the battered woman syndrome “sounds largely in the key of excuse, not justification”); Morse, *supra* note 53, at 12-13; Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 43-44 (1986) (maintaining that “successful use of the battered person’s defense theory . . . is inherently inconsistent with the concept of justification,” and therefore advocating that self-defense be thought of as an excuse).

mistakenly believed was about to launch an attack. In those circumstances, the defense operates more as an excuse than a justification.¹⁶⁴ Moreover, as explained above, standard self-defense doctrine departs from a strict requirement of necessity in certain instances, thereby also deviating from our usual notions of justification.¹⁶⁵

The ambiguous nature of self-defense – a defense widely thought of as a justification – confirms that the criminal law does not clearly distinguish between justifications and excuses.¹⁶⁶ One commentator has thus written that the whole issue is “much ado about little.”¹⁶⁷ On the other hand, Stephen Morse has staked out the contrary position, describing this as “one of the most important issues modern criminal law thought has addressed,” in large part because “the law is a teacher that sets moral and social standards” and “the distinction encourages doing right and deters doing wrong.”¹⁶⁸ He may well have a point, but one wonders why those same concerns are not raised when male defendants who did “wrong,” but made a reasonable mistake about the need to use defensive force, are acquitted on grounds of self-defense.

From the perspective of the individual defendant, presumably most people would be indifferent between a not guilty verdict based on a justification and one based on an excuse. As Glanville Williams observed, “the distinction does not concern the person who is charged with the offence in question and who sets up the defence.”¹⁶⁹ Anne Coughlin rejects that assumption, however, arguing that battered women are in fact “harmed by the finding of irresponsibility that their successful excuse defenses incur” because “the dubious moral status occupied by the excused actor – that creature who is more like a ‘dog’ or a ‘rock’ than a human being” – reinforces gender stereotypes and thus “has profound implications for the construction of gender.”¹⁷⁰ Interestingly, Coughlin’s description of defendants who raise a successful duress defense has very a different tone. Quoting Michael Moore’s comment that the threats which give rise to a duress defense “interfere with one’s normal

164. See, e.g., FLETCHER, *supra* note 66, at 767; Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 283-84 (1975); Glanville Williams, *The Theory of Excuses*, 1982 CRIM. L. REV. 732, 739.

165. See *supra* notes 157-60 and accompanying text.

166. See, e.g., George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 954 (1985); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1897 (1984) (observing that there is no “systematic” difference between the two); Robinson, *supra* note 164, at 276 (noting that “[t]he early common law distinction between justification and excuse exists today only in theory”).

167. Rosen, *supra* note 137, at 407-08 (noting that “[n]either jurors nor putative defendants are aware of the subtle differences between a justification and excuse, and . . . few judges could explain the difference”).

168. Morse, *supra* note 53, at 7.

169. Williams, *supra* note 164, at 732.

170. Coughlin, *supra* note 83, at 23-24.

ability or opportunity to do what is morally or legally required,”¹⁷¹ Coughlin observes that the defendant who acts under duress is excused because “the alternatives open to him were so agonizing that we accept his claim that he was carrying out a course of conduct that he did not choose – and would not have chosen – for himself.”¹⁷² Thus, in Coughlin’s view, “[t]he model of the responsible actor is heavily inscribed on the duress defense” even though, as she notes, duress is generally considered an excuse rather than a justification.¹⁷³ Why don’t those defendants suffer from the same “dubious moral status” as the battered woman Coughlin characterizes as “less than a full human being”?¹⁷⁴ Why do we simply “withhold blame” from defendants excused by duress rather than “harm[] [them] by [a] finding of irresponsibility”?¹⁷⁵ While Coughlin is certainly right to criticize the gender stereotypes that underlay the now-discarded doctrine of marital coercion,¹⁷⁶ one wonders whether it is those same stereotypes – and the devaluation of women, their experiences, and their stories that they reflect – that lead her to describe a battered woman’s self-defense claim so differently from that of the defendant who acted under duress.

VI. THE ABUSE EXCUSE

A related objection argues that battered women’s self-defense claims fall prey to “the determinist reductio”¹⁷⁷ or – in somewhat more colorful terms – that they are illustrative of the “abuse excuse” crisis sweeping through criminal law.¹⁷⁸ According to Stephen Morse, the fact that a defendant may be able to pinpoint a cause for her use of violence – i.e., the history of abuse in the case of battered women – cannot give rise to a defense because “[p]resumably all phenomena of the universe are caused by the necessary and sufficient conditions that produce them.”¹⁷⁹ Allowing “determinism or universal causation [to] underwrite[] responsibility,” Morse continues, “threatens to undermine notions of personal responsibility that are vital to human dignity

171. Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1129 (1985) (quoted in Coughlin, *supra* note 83, at 15 n.65).

172. Coughlin, *supra* note 83, at 16.

173. *Id.* at 29-30 n.143.

174. *Id.* at 4. Cf. Nourse, *supra* note 39, at 1454 (making a similar point with respect to provocation, noting that “[f]ew scholars . . . have urged that we eliminate the provocation defense because it diminishes men’s moral agency”).

175. Coughlin, *supra* note 83, at 30, 23 (observing that duress is characterized as an excuse because “the community prefers that actors not offend, even under the pressure of serious threats, but will withhold blame where the threats are sufficiently grievous”).

176. *See supra* note 97.

177. Morse, *supra* note 53, at 8.

178. DERSHOWITZ, *supra* note 147, at 3 (defining the “abuse excuse” as “the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation”).

179. Morse, *supra* note 53, at 8.

and the fair operation of the criminal justice system.”¹⁸⁰ In a similar vein, Alan Dershowitz argues that “the abuse excuse is a symptom of a general abdication of responsibility” that “is dangerous to the very tenets of democracy, which presuppose personal accountability for choices and actions.”¹⁸¹ And, according to Dershowitz, “[i]t all began with the so-called battered woman syndrome.”¹⁸²

These critiques are valid, at least to a point. As Michael Moore noted almost twenty years ago, the ability to identify a causal factor that explains one’s crime cannot itself afford an excuse because “the causal theory of excuse leads to the absurd conclusion that no one is responsible for anything.”¹⁸³ The real question is whether the particular causative factor indicates blamelessness – a question that cannot be answered without making a subjective value judgment as to which causal factors ought to constitute excuses.¹⁸⁴ Once again, then, the problem with this critique is that the law governing criminal defenses has always been comfortable accepting determinist arguments in certain contexts – that, in the words of Victoria Nourse, “almost all excuses become abuse excuses.”¹⁸⁵ Thus, the law takes it for granted that reasonable people will use deadly force when confronted by an “uplifted knife,”¹⁸⁶ that the man who finds his wife in bed with someone else will lose control and react with violence,¹⁸⁷ and that no “manly” individual will retreat from home in order to escape an attacker.¹⁸⁸ Why are those defendants not asked to take “personal responsibility” for their actions? Or, as Nourse puts it, “why not

180. *Id.* at 8, 9.

181. DERSHOWITZ, *supra* note 147, at 4.

182. *Id.* at 45. See also FLETCHER, *supra* note 99, at 140 (arguing that “we are witnessing the beginning of a transformation of the battered women’s syndrome into a general defense of abuse as a justification for retaliation”); Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 854-55 (1995) (arguing that “an abusive partner, and similar predisposing conditions do not by themselves negate responsibility,” and “we must condemn and seek to deter criminal acts when the perpetrators could have done otherwise – even if their motives evoke sympathy”).

183. Moore, *supra* note 171, at 1092.

184. See Kahan & Nussbaum, *supra* note 157, at 274 (maintaining that the so-called “abuse excuse” is a sign not of “lawlessness,” but of the law’s “responsiveness . . . to changes in . . . social norms”); Morse, *supra* note 53, at 9 (acknowledging that “free will is often just a hand-waving placeholder for the conclusion that the defendant ought to be excused”).

185. Nourse, *supra* note 39, at 1446, 1447 (explaining that most of criminal law’s well-accepted defenses – such as self-defense, duress, insanity, and provocation – are based on the “behavioristic causal explanation” that the defendant’s “practical ability to choose, and thus to exercise self-control, has been impaired”).

186. See *Brown v. United States*, 256 U.S. 335, 343 (1921) (“Detached reflection cannot be demanded in the presence of an uplifted knife.”).

187. See *supra* notes 128-30 and accompanying text.

188. See *supra* notes 160-61 and accompanying text.

demand that those who act under duress or provocation also exercise self-control?"¹⁸⁹

Likewise, although Professor Dershowitz is certainly correct in pointing out that "the vast majority of people who have experienced abuse . . . do not commit violent crimes,"¹⁹⁰ the same can be said of defenses long accepted by the criminal law. Many people faced with an "uplifted knife" will not respond with defensive force,¹⁹¹ most people who find their partner in bed with another will not react violently,¹⁹² and some who are subjected to threats will not succumb and commit a crime.¹⁹³ Nevertheless, the fact that many people are able to avoid violent or otherwise criminal behavior in these circumstances has not led to widespread outcry for the abolition of the defenses of duress, provocation, or self-defense.¹⁹⁴ Nor has the fact that, to a large extent, these defenses, premised as they are on a male model of behavior, tend to be of greatest benefit to a subset of society – namely, men – who are more likely to

189. Nourse, *supra* note 39, at 1447. Cf. Chiu, *supra* note 94, at 1239 (describing how various aspects of the law are inconsistent as to whether they view battered women as "purely agents, purely victims, or a combination of both").

190. DERSHOWITZ, *supra* note 147, at 5-6.

191. See *State v. Gartland*, 694 A.2d 564, 570 (N.J. 1997) (commenting that "[t]he male pronouns in the Code reflect a history of self-defense that is derived from a male model"); Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 153 (1978) (noting that "[s]tandards of justifiable homicide have been based on male models and expectations"; "[f]amiliar images of self-defense are a soldier, a man protecting his home, family, or the chastity of his wife, or a man fighting off an assailant").

192. See Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 735-36 (1995) (describing provocation as a "male-oriented doctrine" because it primarily benefits male defendants by "mitigating the predominantly male reaction of retaliating for affronts and other 'injustices'"); Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1692, 1697 (1986) (noting that historically only men were deemed reasonably provoked by witnessing an act of spousal adultery, and that even our contemporary gender-neutral standard is "a shallow concession to equality" given that "women rarely react to their husband's infidelity with deadly violence").

193. See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 446-47 (2d ed. 1960) (characterizing as "debatable" the assumption that people "will always choose to live even though they must kill unoffending persons to preserve themselves").

194. Note, however, that in 1997, the Maryland legislature amended its definition of manslaughter so as to provide that "[t]he discovery of one's spouse engaged in sexual intercourse with another does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter even though the killing was provoked by that discovery." MD. CODE ANN., CRIM. § 2-207(b) (2002). The law was passed in response to several Maryland cases where a husband successfully avoided a murder conviction by claiming that he was provoked to kill his wife because he discovered or suspected that she was having an affair. See Kimberly Wilmot-Weidman, *After a Three-Year Fight, Murder Is Finally Murder in Maryland*, CHI. TRIB., Nov. 23, 1997, § CN (Womanews), at 1.

act in ways that require that they avail themselves of the defenses. To return to Victoria Nourse once again, “law has always exercised judgment; it simply has lost the ability to see that this is what it is doing.”¹⁹⁵

VII. CONCLUSION

“Allowing victims of abuse to invoke an abuse excuse, while doing nothing to prevent the underlying abuse, is little more than symbolism on the cheap,” Alan Dershowitz charges.¹⁹⁶ In somewhat less provocative terms, Anne Coughlin urges that we “change our experiences, perhaps even eliminate domestic violence,” by “persuad[ing] the community to change its assumptions about gender relationships.”¹⁹⁷ It is certainly important to remind ourselves to keep our eyes on the ball – not to allow the relatively small number of cases where battered women kill their abusers under non-confrontational circumstances to divert our attention from the plight of the much larger number of women victimized by domestic violence. But I know of no one who advocates “doing nothing” about these larger issues and simply focusing on self-defense as the solution to the problem of domestic violence.

The difficulty in the short run with the suggestion that we focus our energy on putting an end to domestic violence is that cases involving non-confrontational killings do arise, and they make their way to court. From the individual defendant’s perspective, as Catharine MacKinnon noted in another context, “[a] prison term is a big price to pay for principle” and “arousing the sexism of the jury may appear her only chance of acquittal.”¹⁹⁸ From a broader societal perspective, the criminal justice system is charged with the immediate task of assessing culpability and must therefore attempt to adjudicate the merits of a battered woman’s self-defense claim in a principled manner.

In the longer term, the difficulty with the proposal that we simply end domestic violence is that it is much easier said than done. As our experience with thirty years of reform efforts has demonstrated, the gender bias that leads individual men to feel free to beat their partners – and that leads society to treat that violence more cavalierly than it treats stranger assaults – is so well

195. Nourse, *supra* note 39, at 1461.

196. DERSHOWITZ, *supra* note 147, at 39.

197. Coughlin, *supra* note 83, at 65. *See also* People v. Aris, 264 Cal. Rptr. 167, 174 (Ct. App. 1989) (noting, in rejecting battered woman’s self-defense claim, that while “alternative means of resolving [a] battered woman’s problem, . . . such as restraining orders, shelters, and criminal prosecution of the batterer, . . . have proved tragically inadequate in some cases, the solution is to improve those means, not to lessen our standards of protection against the unjustified and unexcused taking of life”), *overruled on other grounds by* People v. Humphrey, 921 P.2d 1, 10 (Cal. 1996); Faigman & Wright, *supra* note 82, at 70 (suggesting that “the proper solution is to devote the necessary resources to the eradication of domestic violence”).

198. Catharine A. MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703, 721 (1982) (discussing insanity defenses raised by battered women).

entrenched that it has proven very resistant to change. In the meantime, and certainly while we continue our efforts to end violence against women, we should also recognize the gender bias so firmly embedded in our criminal laws and strive to give battered women's self-defense claims the same consideration we have traditionally afforded to defenses raised by male defendants.

