1988

Defending Battered Women's Self-Defense Claims

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TEN years have passed since Francine Hughes poured a can of gasoline around the bed where her husband was sleeping, stood outside the doorway, and threw a lighted match into the room. In so doing, she not only killed the man who had subjected her to brutal physical and psychological abuse for more than thirteen years, but also vividly brought the plight of battered women to the public eye.[1] Violence inflicted on women by their husbands and boyfriends[2] continues to be a widespread problem; estimates of the number of battered women in this country range from two to forty million.[3] Although a number of these women escape from the vio-

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I would like to thank Mary Becker, Don Dripps, Wayne LaFave, Steve Ross, and Steve Schulhofer for their valuable comments on earlier drafts of this Article, and Linda Sue Freisler for her research assistance.

[1] *See* A. JONES, WOMEN WHO KILL 281-83 (1980); F. MCNULTY, THE BURNING BED 186 (1980).

[2] This Article uses the terms "husband" and "spouse" interchangeably to refer to both abusive husbands and boyfriends.

The Article focuses only on the problems confronting battered women because women comprise the overwhelming number of victims of spousal abuse. *See* Thurman v. City of Torrington, 595 F. Supp. 1521, 1528 n.1 (D. Conn. 1984) (women are victims in 29 out of 30 cases); People v. Cameron, 53 Cal. App. 3d 786, 796, 126 Cal. Rptr. 44, 50 (1975) (women are 15 times more likely to be victims of spousal assaults); Howard, *Husband-Wife Homicide: An Essay from a Family Law Perspective*, 49 LAW & CONTEMP. PROBS. 63, 70 n.40 (1986) (94 to 98% of victims are women). Moreover, the effects that sustained abuse has on women, *see infra* Part I, have not been found in the few male victims of spousal abuse; such abuse is "qualitatively different from that experienced by women." Howard, *supra*, at 70-71 n.40; *see also* Berk, Berk, Loseke & Rauma, *Mutual Combat and Other Family Violence Myths*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 197, 204, 210 (D. Finkelhor & R. Gelles eds. 1983); Gayford, *Battered Wives*, in VIOLENCE AND THE FAMILY 19, 19 (J. Martin ed. 1978) (number of battered husbands is very small because men are physically stronger and have less difficulty leaving home); Case/Comment, *Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?*, 2 LAW & HUM. BEHAV. 133, 133 n.1 (1978).

[3] *See* Comment, *The Battered Woman's Syndrome Defense*, 34 U. KAN. L. REV. 337,

lent relationship, many endure the abuse, and some ultimately die as a result of their injuries. Still others, like Francine Hughes, strike back.

Hughes was acquitted after presenting a case of temporary insanity,[4] although some of her supporters would have preferred that her attorney raise a claim of self-defense.[5] More recently, battered women charged with killing their husbands have maintained that they killed in self-defense even though many of these homicides occurred either before or after a beating or even while the husband slept.[6] Consequently, these cases appear quite different from our traditional notions of self-defense. Because a jury verdict simply convicts or acquits without further explication and because the number of appellate court opinions is limited by the double jeopardy clause's bar on prosecutorial appeals,[7] no precise statistics are

337 (1985); *see also* A. JONES, *supra* note 1, at 283 (between one-fourth and one-half of all women married to or living with a man will be subjected to violence); Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 624-25 (1980) (putting the figure at one-third to one-half of all women); Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 273 (1985) (in any given year, between one-fifth and one-tenth of all women intimately involved with a man will experience abuse).

The precise number of battered women is unknown because wife abuse is one of the most underreported crimes in the country, and law enforcement records are sketchy. Often no record of a domestic disturbance is made unless there has been an arrest. Furthermore, the FBI's Uniform Crime Reports do not specify the relationship between the victim and the offender, except in homicide cases. *See* ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 82-84 (1984) [hereinafter TASK FORCE ON FAMILY VIOLENCE]; U.S. COMMISSION ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 1 (1982); Howard, *supra* note 2, at 69 n.38; Waits, *supra*, at 272-73 n.15, 275 & n.28; Comment, *supra*, at 337. The problem is compounded because researchers apply differing definitions to key concepts such as family violence and spouse abuse. *See, e.g., id.* at 337-38 n.7, 365. For a more extensive discussion of the appropriate definition of "battered woman," see *infra* Part III(B).

[4] *See* A. JONES, *supra* note 1, at 289; F. MCNULTY, *supra* note 1, at 268. In Michigan, mental illness is defined as "a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MICH. COMP. LAWS ANN. § 330.1400a (1980). A defendant who, like Hughes, is acquitted by reason of temporary insanity may go free, whereas one who is found "guilty but mentally ill" may serve the same prison sentence as a sane defendant convicted on similar charges. *Compare* MICH COMP. LAWS ANN. § 330.2050 *with* MICH. COMP. LAWS ANN. § 768.36 (1982).

[5] *See* A. JONES, *supra* note 1, at 285, 288-89; F. MCNULTY, *supra* note 1, at 213.

[6] *See infra* notes 58-62 and accompanying text. This Article does not discuss the cases where battered women kill their husbands during a beating. Self-defense claims raised in that context correspond more closely to classic cases of self-defense and thus are more easily resolved in favor of battered women.

[7] *See, e.g.*, United States v. Scott, 437 U.S. 82, 91 (1978).

available to measure the success of self-defense claims raised in such circumstances. The evidence suggests, however, that the cases are hopelessly in conflict.[8]

The commentators likewise have split on the proper disposition of self-defense claims in this context. Some argue that acquittal on grounds of self-defense is appropriate.[9] Others deny the validity of the defense, concluding that a battered woman who elects to kill at a time when her husband is *not* abusing her cannot be acting in self-defense.[10] These commentators claim that the traditional elements of self-defense are absent in such cases because the battered woman could not have honestly and reasonably believed that she was in imminent danger of death or serious bodily harm at the time she killed her husband.[11] The literature also fails to reach any consensus even in defining the precise nature of the defense at issue — whether it is the standard self-defense claim equally applicable in other contexts,[12] an extension of the traditional self-defense claim

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[8] *See generally* C. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 41-43 (1987); A. JONES, *supra* note 1, at 292-95, 316; WOMEN'S SELF-DEFENSE CASES: THEORY AND PRACTICE 289-300 (E. Bochnak ed. 1981) (case chart indicating charges filed, disposition, and sentence imposed in a number of cases) [hereinafter WOMEN'S SELF-DEFENSE CASES]; Note, *The Battered Wife's Dilemma: To Kill or to Be Killed*, 32 HASTINGS L.J. 895, 918 n.145 (1981) [hereinafter Note, *Battered Wife's Dilemma*]; Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615, 626-27 (1982) [hereinafter Note, *Imperfect Self-Defense*].

[9] *See, e.g.*, A. JONES, *supra* note 1, at 299-300; WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 42-48; Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 153 (1985); Schneider, *supra* note 3; Schneider & Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 153-59 (1978); Note, *Battered Wife's Dilemma*, *supra* note 8, at 920-31; Comment, *supra* note 3, at 350-53; Case/Comment, *supra* note 2, at 157-63.

[10] *See, e.g.*, C. EWING, *supra* note 8, at 46-49, 77; Acker & Toch, *Battered Women, Straw Men, and Expert Testimony: A Comment on* State v. Kelly, 21 CRIM. L. BULL. 125, 143 (1985); Rittenmeyer, *Of Battered Wives, Self-Defense and Double Standards of Justice*, 9 J. CRIM. JUST. 389 (1981); Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U.L. REV. 11, 32 (1986); Note, *Imperfect Self-Defense*, *supra* note 8, at 626; Comment, *The Defense of Battered Women Who Kill*, 135 U. PA. L. REV. 427, 436-39 (1987) [hereinafter Comment, *Women Who Kill*]; Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 631 (1986) [hereinafter Note, *Empirical Dissent*]; Comment, *The Battered Spouse Syndrome as a Defense to a Homicide Charge Under the Pennsylvania Crimes Code*, 26 VILL. L. REV. 105, 131-33 (1980-1981) [hereinafter Comment, *Crimes Code*]; Note, *Does Wife Abuse Justify Homicide?*, 24 WAYNE L. REV. 1705, 1720-22 (1978) [hereinafter Note, *Wife Abuse*].

[11] *See infra* note 55 and accompanying text.

[12] *See, e.g.*, Hawthorne v. State, 408 So. 2d 801, 806-07 (Fla. Dist. Ct. App.) (per curiam), *review denied*, 415 So. 2d 1361 (Fla. 1982); State v. Hodges, 239 Kan. 63, 72-

available only to battered women,[13] or a battered woman defense rather than a self-defense claim at all.[14]

This Article contends that many battered women who kill their abusive spouses can legitimately raise the standard self-defense claim. No substantial extension of self-defense doctrine is required to justify the acquittal of battered women on self-defense grounds. Furthermore, no special "battered woman defense" is necessary or even desirable in such cases.

Part I of the Article summarizes the results of psychological research studying abused women and battering relationships. It further explains the concept of the "battered woman syndrome" which describes the effects of sustained physical and psychological abuse by one's husband. Part II discusses the requirements of a successful self-defense claim and concludes that many battered women who kill their abusive husbands can prove each of the necessary elements. Finally, Part III critically evaluates the various objections to recognition of self-defense claims raised by battered women and also discusses several alternative defenses that have been proposed for such cases.

I

THE BATTERED WOMAN SYNDROME

Before examining the prerequisites for acquittal on self-defense grounds, it is important to understand the nature of a battering relationship and the impact such a relationship has on the woman. The "battered woman syndrome" describes identifiable psychological characteristics exhibited by women whose husbands have physically and psychologically abused them over an extended period of time.[15] Specifically, the syndrome explains the psychological effects

73, 716 P.2d 563, 569-70 (1986); State v. Leidholm, 334 N.W.2d 811, 819-20 (N.D. 1983); State v. Hill, 287 S.C. 398, 400, 339 S.E.2d 121, 122 (1986); State v. Walker, 40 Wash. App. 658, 664-65, 700 P.2d 1168, 1173 (1985); WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 42; Schneider, *supra* note 3; Comment, *supra* note 3, at 352-53; Note, *Empirical Dissent*, *supra* note 10, at 626.

[13] *See, e.g.*, C. EWING, *supra* note 8, at 77-78, 97; Rittenmeyer, *supra* note 10, at 391-93; Comment, *Crimes Code*, *supra* note 10, at 133-34.

[14] *See, e.g.*, Meeks v. Bergen, 749 F.2d 322, 327-28 (6th Cir. 1984); Acker & Toch, *supra* note 10, at 125; Vaughn & Moore, *The Battered Spouse Defense in Kentucky*, 10 N. KY. L. REV. 399, 399, 419 (1983); Comment, *Women Who Kill*, *supra* note 10, at 429 n.12; Note, *Wife Abuse*, *supra* note 10, at 1731.

[15] *See, e.g.*, Fennell v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985); Hawthorne v. State, 470 So. 2d 770, 774 n.1 (Fla. Dist. Ct. App. 1985) (Ervin, C.J., concurring in part & dissenting in part); State v. Kelly, 97 N.J. 178, 207, 478 A.2d 364, 371 (1984); People

of such abuse on battered women.

Psychologist Lenore Walker, who pioneered the study of battered women, found that battering relationships tend to occur in cyclical form, with the cycle divided into three phases.[16] During the first phase, the tension-building stage, the husband subjects his wife to minor physical and verbal abuse while she attempts to be as placating and passive as possible in order to avert more violent behavior. The mounting tension characterizing the first phase makes more serious brutality inevitable. This violence — the acute battering incident — occurs during the second phase of the cycle. The acute battering incident may be triggered by some external event in the husband's life or may be provoked by the woman, who is no longer able to tolerate the tension and wishes to accelerate the onset of the third phase. During this third part of the cycle, the husband is extremely contrite and seeks the woman's forgiveness for his abusive behavior; he claims to love her and promises not to subject her to further violence.[17] As the battering relationship progresses, the frequency and severity of the abuse escalates.[18]

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v. Torres, 128 Misc. 2d 129, 132, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985); State v. Hill, 287 S.C. 398, 400, 339 S.E.2d 121, 122 (1986).

The author of this Article acted as cocounsel for the American Psychological Association, which appeared as amicus curiae in *Hawthorne* and *Kelly*, arguing in favor of admitting expert testimony describing the battered woman syndrome in cases where battered women are charged with killing their husbands.

[16] *See* L. WALKER, THE BATTERED WOMAN 55-70 (1979); *see also, e.g.*, Fennell v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985); State v. Anaya, 438 A.2d 892, 893 (Me. 1981) (describing testimony of defendant's expert); State v. Kelly, 97 N.J. 178, 193-94, 478 A.2d 364, 371 (1984); People v. Torres, 128 Misc. 2d 129, 132-33, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985); State v. Moore, 72 Or. App. 454, 462, 695 P.2d 985, 989 (Newman, J., concurring), *review denied*, 299 Or. 154, 700 P.2d 251 (1985); State v. Leaphart, 673 S.W.2d 870, 872 (Tenn. Crim. App. 1983) (describing testimony of defendant's expert); Fielder v. State, 683 S.W.2d 565, 587 (Tex. Crim. App. 1985); State v. Allery, 101 Wash. 2d 591, 596, 682 P.2d 312, 315 (1984) (describing testimony of defendant's expert); State v. Kelly, 33 Wash. App. 541, 543, 655 P.2d 1202, 1203 (1982), *rev'd*, 102 Wash. 2d 188, 685 P.2d 564 (1984) (describing testimony of defendant's expert); Frieze, *Perceptions of Battered Wives*, in NEW APPROACHES TO SOCIAL PROBLEMS 79, 103-04 (1979); Gayford, *supra* note 2, at 35; Hilberman, *Overview: The "Wife-Beater's Wife" Reconsidered*, 137 AM. J. PSYCHIATRY 1336, 1339 (1980); Howard, *supra* note 2, at 76-77; Waits, *supra* note 3, at 292-95.

[17] Walker has found, however, that this third phase of the cycle is not present in some battering relationships and, in others, tends to disappear over time. *See* Walker, *The Battered Woman Syndrome Study*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH, *supra* note 2, at 31, 44.

[18] *See* L. WALKER, THE BATTERED WOMAN SYNDROME 26, 148, 150 (1984); *see also* C. EWING, *supra* note 8, at 18; J. FLEMING, STOPPING WIFE ABUSE 94 (1979); R. LANGLEY & R. LEVY, WIFE BEATING: THE SILENT CRISIS 200 (1977); M. PAGELOW, WOMAN-BATTERING: VICTIMS AND THEIR EXPERIENCES 45 (1981); Kuhl, *Commu-*

A woman who finds herself involved in such a relationship falls into a depression-like state of "learned helplessness."[19] She learns that her husband's violence is unpredictable and that no correlation exists between her conduct and his abusive behavior. The violence is unavoidable; she can do nothing to pacify her husband and prevent the beating.[20] The battered woman's inability to control the situation leads to feelings of fatalism. She perceives her husband as omnipotent and believes there is no way for her to escape or improve her life.[21]

In addition to this feeling of helplessness, battered women share a number of other characteristics. Although they come from all socioeconomic groups and educational backgrounds,[22] battered women tend to adhere to traditional views about proper male/female

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nity Responses to Battered Women, 7 VICTIMOLOGY 49, 53 (1982); Note, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135, 138 (1977).

[19] L. WALKER, *supra* note 16, at 45-54; *see also* Fennell v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985); State v. Hodges, 239 Kan. 63, 66, 716 P.2d 563, 566 (1986) (describing testimony of defendant's expert); State v. Kelly, 97 N.J. 178, 205, 478 A.2d 364, 377 (1984); People v. Torres, 128 Misc. 2d 129, 132, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985) (describing testimony of defendant's expert); State v. Kelly, 102 Wash. 2d 188, 190, 685 P.2d 564, 567 (1984) (describing testimony of defendant's expert); C. EWING, *supra* note 8, at 66-68; J. FLEMING, *supra* note 18, at 93-95; A. JONES, *supra* note 1, at 296-97; L. WALKER, *supra* note 18, at 86-94; Frieze, *supra* note 16, at 103; Hilberman, *supra* note 16, at 1343; Steinmetz, *Wife Beating: A Critique and Reformulation of Existing Theory*, 6 BULL. AM. ACAD. PSYCHIATRY & L. 322, 330 (1978).

Walker's concept of "learned helplessness" is adapted from experiments conducted by Martin Seligman. *See* L. WALKER, *supra* note 18, at 86. Seligman found that when laboratory animals were subjected to painful stimuli over which they had no control, they passively accepted their situation and became unable to escape — even when escape was possible. *See* M. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH (1975).

[20] *See, e.g.*, People v. Torres, 128 Misc. 2d 129, 132, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985) (describing testimony of defendant's expert); State v. Kelly, 102 Wash. 2d 188, 190, 685 P.2d 564, 567 (1984) (describing testimony of defendant's expert); A. JONES, *supra* note 1, at 296; L. WALKER, *supra* note 16, at 48. For examples of the types of events that trigger a husband's violence, see *infra* note 105.

[21] *See, e.g.*, Fennell v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985); State v. Hodges, 239 Kan. 63, 66, 716 P.2d 563, 566 (1986) (describing testimony of defendant's expert); State v. Kelly, 97 N.J. 178, 194-95, 478 A.2d 364, 372 (1984); People v. Torres, 128 Misc. 2d 129, 133, 488 N.Y.S.2d 358, 362 (Sup. Ct. 1985) (describing testimony of defendant's expert); E. PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR 39 (1977); L. WALKER, *supra* note 16, at 49-50, 75; Gayford, *supra* note 2, at 22, 34; Hilberman & Munson, *Sixty Battered Women*, 2 VICTIMOLOGY 460, 465 (1977-1978); Steinmetz, *supra* note 19, at 326.

[22] *See, e.g.*, D. MARTIN, BATTERED WIVES 19 (1976); M. PAGELOW, *supra* note 18, at 82-87; TASK FORCE ON FAMILY VIOLENCE, *supra* note 3, at 11; L. WALKER, *supra* note 18, at 156; Schneider, *supra* note 3, at 625 n.6; Waits, *supra* note 3, at 276-77.

roles.[23] They have low self-esteem[24] and blame themselves for the beatings they receive.[25] They also tend to be passive and often have an overriding desire to please.[26] As a result of the abuse, they live in a state of constant "[a]gitation and anxiety bordering on panic" as they await the next assault.[27] They feel "paralyzing terror," characterized by "chronic apprehension of imminent doom, of

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[23] *See, e.g.*, State v. Kelly, 97 N.J. 178, 195, 478 A.2d 364, 372 (1984); People v. Torres, 128 Misc. 2d 129, 132, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985); J. FLEMING, *supra* note 18, at 82-83; A. JONES, *supra* note 1, at 296; R. LANGLEY & R. LEVY, *supra* note 18, at 112, 114; D. MARTIN, *supra* note 22, at 79-83; L. WALKER, *supra* note 16, at 33-35; *see also* Hilberman & Munson, *supra* note 21, at 467.

Traditionally, a husband's abuse of his wife has been condoned. At common law, a husband was permitted to whip his wife, providing he used a switch no bigger than his thumb (thus explaining the origin of the term "rule of thumb"). *See* State v. Rhodes, 61 N.C. (Phil. Law) 445, 450 (1868). As late as 1868, a North Carolina court affirmed the acquittal of a man who had beaten his wife with a switch about the size of one of his fingers but smaller than his thumb. *See id.* at 445. Vestiges of the common law rule remain today. Recent public opinion polls reveal that 20 to 25% of American adults approve of physical violence between spouses "on 'appropriate' occasions." D. MARTIN, *supra* note 22, at 19-20; *see also* A. JONES, *supra* note 1, at 308 (In 1978, an Indiana prosecutor decided to file manslaughter rather than murder charges against a man who had beaten and kicked his ex-wife to death in the presence of a witness and raped her as she lay dying. The prosecutor explained: "He didn't mean to kill her. He just meant to give her a good thumping.").

[24] *See, e.g.*, Smith v. State, 247 Ga. 612, 614, 277 S.E.2d 678, 680 (1981) (describing testimony of defendant's expert); State v. Kelly, 97 N.J. 178, 195, 478 A.2d 364, 372 (1984); People v. Emick, 103 A.D.2d 643, 654, 481 N.Y.S.2d 552, 559 (1984) (describing testimony of defendant's expert); People v. Torres, 128 Misc. 2d 129, 132, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985) (describing testimony of defendant's expert); Fielder v. State, 683 S.W.2d 565, 585 (Tex. Crim. App. 1985) (describing testimony of defendant's expert); State v. Kelly, 102 Wash. 2d 188, 190, 685 P.2d 564, 567 (1984) (describing testimony of defendant's expert); J. FLEMING, *supra* note 18, at 84-86; R. LANGLEY & R. LEVY, *supra* note 18, at 114; D. MARTIN, *supra* note 22, at 81-82; M. PAGELOW, *supra* note 18, at 159; L. WALKER, *supra* note 16, at 32-33; Goodstein & Page, *Battered Wife Syndrome: Overview of Dynamics and Treatment*, 138 AM. J. PSYCHIATRY 1036, 1041, 1042 (1981); Hilberman & Munson, *supra* note 21, at 462; Roy, *A Current Survey of 150 Cases*, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 25, 41 (M. Roy ed. 1977).

[25] *See, e.g.*, Fennell v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985); State v. Kelly, 97 N.J. 178, 195, 478 A.2d 364, 372 (1984); Fielder v. State, 683 S.W.2d 565, 587 (Tex. Crim. App. 1985); J. FLEMING, *supra* note 18, at 81-82; R. LANGLEY & R. LEVY, *supra* note 18, at 116-18; D. MARTIN, *supra* note 22, at 81-83; L. WALKER, *supra* note 16, at 31, 33, 56; Frieze, *supra* note 16, at 100-02; Gayford, *supra* note 2, at 22; Goodstein & Page, *supra* note 24, at 1042, 1043; Hilberman & Munson, *supra* note 21, at 465; Steinmetz, *supra* note 19, at 326, 329.

[26] *See, e.g.*, Hilberman & Munson, *supra* note 21, at 465; Steinmetz, *supra* note 19, at 330; Comment, *supra* note 3, at 343; Comment, *Crimes Code*, *supra* note 10, at 111.

[27] Hilberman & Munson, *supra* note 21, at 464; *see also* State v. Kelly, 97 N.J. 178, 196, 478 A.2d 364, 372-73 (1984) (describing testimony of defendant's expert); Fielder v. State, 683 S.W.2d 565, 587 (Tex. Crim. App. 1985).

something terrible always about to happen."[28]

Although early researchers believed that battered women were masochists,[29] more recent findings reject the notion that a battered woman stays with her husband because she enjoys the abuse.[30] Rather, a number of other factors explain her unwillingness to leave the relationship and escape her husband's violence. First, because of her feelings of helplessness, the battered woman begins to believe that she is unable to escape from her husband.[31] This belief may be fueled by her prior experiences; she may have attempted to leave her husband, only to have him chase after her and force her to return.[32] She may be afraid to leave or seek help because her husband has threatened to harm or kill her, the children, or any relatives or

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[28] Hilberman & Munson, *supra* note 21, at 464; *see also, e.g.*, Fennell v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985); Smith v. State, 247 Ga. 612, 614, 277 S.E.2d 678, 680 (1981) (describing testimony of defendant's expert); State v. Hodges, 239 Kan. 63, 66, 716 P.2d 563, 566 (1986) (describing testimony of defendant's expert); State v. Hundley, 236 Kan. 461, 467, 693 P.2d 475, 479 (1985); State v. Gallegos, 104 N.M. 247, 250, 719 P.2d 1268, 1271 (Ct. App. 1986) (describing the battering relationship as a "hopeless vacuum of 'cumulative terror' ") (quoting Note, *Battered Wife's Dilemma*, *supra* note 8, at 928); People v. Emick, 103 A.D.2d 643, 654, 481 N.Y.S.2d 552, 559 (1984) (describing testimony of defendant's expert); People v. Torres, 128 Misc. 2d 129, 132, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985) (describing testimony of defendant's expert); Fielder v. State, 683 S.W.2d 565, 587 (Tex. Crim. App. 1985); State v. Felton, 110 Wis. 2d 485, 492, 329 N.W.2d 161, 164 (1983) (The defendant testified that "she was scared and shaking. . . . '[I]t was like a powder keg, like something's gonna blow.' "); D. MARTIN, *supra* note 22, at 76; E. PIZZEY, *supra* note 21, at 41; Goodstein & Page, *supra* note 24, at 1043; Steinmetz, *supra* note 19, at 328.

[29] *See, e.g.*, 1 H. DEUTSCH, PSYCHOLOGY OF WOMEN 276 (1944); L. WALKER, *supra* note 16, at 20; Shainess, *Psychological Aspects of Wifebattering*, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 111, 115-16 (M. Roy ed. 1977); Snell, Rosenwald & Robey, *The Wifebeater's Wife: A Study of Family Interaction*, 11 ARCHIVES GEN. PSYCHIATRY 107, 110-11 (1964); *see also* People v. Powell, 102 Misc. 2d 775, 783, 424 N.Y.S.2d 626, 632 (1980), *aff'd*, 83 A.D.2d 719, 442 N.Y.S.2d 645 (1981) (while cross-examining defendant, prosecutor asked her if she enjoyed being beaten).

[30] *See, e.g.*, State v. Hodges, 239 Kan. 63, 69, 716 P.2d 563, 567 (1986); State v. Kelly, 97 N.J. 178, 196, 478 A.2d 364, 373 (1984); C. EWING, *supra* note 8, at 88-89; R. LANGLEY & R. LEVY, *supra* note 18, at 125; M. PAGELOW, *supra* note 18, at 55-56; L. WALKER, *supra* note 18, at 75-76; Gayford, *supra* note 2, at 20-21; Goodstein & Page, *supra* note 24, at 1043; Hilberman, *supra* note 16, at 1339, 1343; Steinmetz, *supra* note 19, at 332.

[31] *See, e.g.*, State v. Hundley, 236 Kan. 461, 467, 693 P.2d 475, 479 (1985); State v. Kelly, 97 N.J. 178, 194-95, 478 A.2d 364, 372 (1984); People v. Torres, 128 Misc. 2d 129, 133, 488 N.Y.S.2d 358, 362 (Sup. Ct. 1985) (describing testimony of defendant's expert); L. WALKER, *supra* note 16, at 49-50; Frieze, *supra* note 16, at 102-03; Goodstein & Page, *supra* note 24, at 1042; Hilberman & Munson, *supra* note 21, at 465.

[32] *See, e.g.*, A. JONES, *supra* note 1, at 298-99; R. LANGLEY & R. LEVY, *supra* note 18, at 121; D. MARTIN, *supra* note 22, at 77-79; J. TOTMAN, THE MURDERESS: A PSYCHOSOCIAL STUDY OF CRIMINAL HOMICIDE 52-53 (1978); Hilberman & Munson,

friends who help her if she does try to escape.[33]

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supra note 21, at 466; Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1 (1982).

> Many of these women had tried to leave and were badly beaten for it. Some actually had gotten away but their husbands traced and followed them, even to another state. . . . Some . . . had been separated or divorced for up to two years . . . and yet still experienced life-threatening harrassment and abuse.

Id. at 12.

For examples of such cases, see United States v. Iron Shield, 697 F.2d 845, 847 (8th Cir. 1983) (defendant dropped divorce proceedings when husband threatened her and her children); Terry v. State, 467 So. 2d 761, 762 (Fla. Dist. Ct. App.), *review denied*, 476 So. 2d 675 (Fla. 1985) ("When [defendant] moved to her mother's house, Mercer pursued her and threatened to shoot her. When she moved into her own apartment, he broke in several times, beating her when he got in."); State v. Hodges, 239 Kan. 63, 67-68, 716 P.2d 563, 566-67 (1986) ("Although defendant left [her husband] many times, he would find her and she would return home with him. The defendant related one incident where, after Harvey found her, he took her to a wooded location where he beat her, broke her jaw, and said she was either going to live with him or she wasn't going to live. . . . The defendant left him again in 1974, but he found her and eventually she stopped trying to run from him."); Kress v. State, 176 Tenn. 478, 481, 144 S.W.2d 735, 736 (1940) (Once when defendant left her husband, he followed her and told her that he could not "get along without her and she was either going to come back to Knoxville with him or he was going to blow her brains out."); Vaughn & Moore, *supra* note 14, at 403-04 (In one case, a battered woman moved out of state, but her husband followed her, beat her, and then held her captive for several weeks before permitting her to go outside alone. On another occasion, she moved to another county and did not even tell her family where she was, but her husband found her and "told her she was coming home to stay.").

[33] *See, e.g.*, Fennell v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985); Smith v. State, 247 Ga. 612, 614, 277 S.E.2d 678, 680 (1981) (describing testimony of defendant's expert); State v. Hundley, 236 Kan. 461, 66, 693 P.2d 475, 479 (1985); State v. Kelly, 97 N.J. 178, 195-96, 478 A.2d 364, 372 (1984); People v. Torres, 128 Misc. 2d 129, 133, 488 N.Y.S.2d 358, 362 (Sup. Ct. 1985) (describing testimony of defendant's expert); Fielder v. State, 683 S.W.2d 565, 585 (Tex. Crim. App. 1985) (describing testimony of defendant's expert); R. LANGLEY & R. LEVY, *supra* note 18, at 121-22; D. MARTIN, *supra* note 22, at 76-79; M. PAGELOW, *supra* note 18, at 72; E. PIZZEY, *supra* note 21, at 39 ("Very few people understand this kind of fear. It is the fear of knowing that someone is searching for you and will beat you when he finds you. In the mind of someone who has been badly beaten, this fear blots out all reason."); L. WALKER, *supra* note 18, at 42 ("Women commonly reported phrases such as 'If I can't have you, no one will'; 'If you leave, I'll find you wherever you go'; 'Just do that and you'll see how mean I can really be.' Threats of bodily mutilation such as cutting up her face, sewing up her vagina, breaking her kneecaps, and knocking her unconscious also served to terrify women . . . ."); Frieze, *supra* note 16, at 98; Gayford, *supra* note 2, at 22; Goodstein & Page, *supra* note 24, at 1042, 1043; Hilberman & Munson, *supra* note 21, at 462, 466.

For examples of such cases, see Ibn-Tamas v. United States, 407 A.2d 626, 629 (D.C. 1979) (Defendant's husband "threaten[ed] her with a fractured skull should she attempt to leave or seek a divorce."); State v. Hodges, 239 Kan. 63, 68, 716 P.2d 563, 567 (1986) (Just as defendant was about to file a police report, her husband "walked in and said, 'You tell the police that and you will never tell anybody anything again.' "); State v. Necaise, 466 So. 2d 660, 662 n.1 (La. Ct. App. 1985) ("[H]e dared me [to call the police]. He said if he saw a police car, he could kill me in front of them."); State v.

Moreover, an abusive husband is typically jealous and extremely possessive. He attempts to isolate his wife by preventing her from developing friendships with others and sometimes even from leaving the house.[34] As a result of this isolation, the battered woman often has no one to turn to for support if she does decide to leave her husband. Even if there were someone to rely on, the battered woman may be reluctant to reveal that she is abused, either because

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Gallegos, 104 N.M. 247, 251, 719 P.2d 1268, 1272 (Ct. App. 1986) (defendant's husband threatened to shoot her if she ever left him); People v. Emick, 103 A.D.2d 643, 653, 481 N.Y.S.2d 552, 558 (1984) (Defendant's husband "told her on numerous occasions that he would find her and kill her if she ever left him.").

[34] [Battering husbands] are cool or rude to family and friends, gradually cutting their wives off from social contacts. Some keep the car keys; some permanently sabotage their wives' cars. Others make sure their wives never have enough cash to go out. Some won't let their wives use the telephone; James Hughes used to rip the wires out of the wall if he thought Francine had used the phone. . . . Some lock their wives in; others follow them when they leave the house. Some make their wives literal prisoners. During a five-month marriage, Gary Bartosh . . . never let his wife, Eileen, out of his sight except for some monitored trips to the bathroom.

A. JONES, *supra* note 1, at 298; *see also, e.g.*, State v. Hodges, 239 Kan. 63, 66, 716 P.2d 563, 566 (1986) (describing testimony of defendant's expert); J. FLEMING, *supra* note 18, at 84, 87-88; K. HOFELLER, SOCIAL, PSYCHOLOGICAL AND SITUATIONAL FACTORS IN WIFE ABUSE 98 (1982) (Almost half of the battered women studied indicated that their husbands did not permit them to have friends or to invite friends to the home.); Goodstein & Page, *supra* note 24, at 1040; Hilberman & Munson, *supra* note 21, at 461-62 ("Leaving the house for any reason invariably resulted in accusations of infidelity which culminated in assault. . . . Many husbands refused to allow their wives to work. When the women did work, efforts were made to ensure that both spouses worked at the same place so that activities and friends could be monitored."); Kuhl, *supra* note 18, at 52 (30% of the women studied had been physically imprisoned by their husbands — for example, tied to furniture, locked in closets, or physically confined to the house); Steinmetz, *supra* note 19, at 329 ("In other instances, the husband enforces the isolation by insulting the wife's friends and physically preventing their entry into the house, by insisting that the wife work where he does, or by refusing to allow her to work at all. Cases have been reported in which the monitoring of the wives has included escorting them to and from the ladies' room when away from home, thereby preventing escape."); Walker, Thyfault & Browne, *supra* note 32, at 11.

For examples of such cases, see United States v. Cebian, 774 F.2d 446, 447 (11th Cir. 1985) (per curiam) (at various times, defendant's husband had handcuffed her to a bed and locked her in a closet for 24 hours); Fennell v. Goolsby, 630 F. Supp. 451, 457 (E.D. Pa. 1985) (often defendant's husband would not permit her to leave the house); People v. Minnis, 118 Ill. App. 3d 345, 352, 455 N.E.2d 209, 214 (1983) (defendant's husband tied her to bedroom door when he left the house); People v. Emick, 103 A.D.2d 643, 649, 481 N.Y.S.2d 552, 556-57 (1984) (defendant's husband glued the door to their trailer shut so that he could determine whether anyone had entered during his absence); State v. Lambert, 312 S.E.2d 31, 33 (W. Va. 1984) ("[A]s a general rule, [defendant's] husband prevented her from leaving the house alone and forced her to accompany him to his place of employment when he was working in order to keep an eye on her."); D. MARTIN, *supra* note 22, at 84 ("My husband doesn't think I need to leave the house.").

she feels guilty, believing that she is the one to blame for the abuse, or because she fears she will be stigmatized as a battered woman.[35] She may think that no one will believe her stories of abuse. In fact, she may have already looked to friends or family for help, only to be advised that she should return to her husband and try to be a "better wife."[36]

The battered woman's previous attempts to seek aid from the police, likewise, may have proved futile. Historically, the police have been reluctant to intervene in domestic disputes and have refused to arrest violent husbands.[37] Similarly, prosecutors have discouraged

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[35] *See, e.g.*, State v. Kelly, 97 N.J. 178, 195, 478 A.2d 364, 372 (1984); Fielder v. State, 683 S.W.2d 565, 585 (Tex. Crim. App. 1985) (describing testimony of defendant's expert); J. FLEMING, *supra* note 18, at 92; R. LANGLEY & R. LEVY, *supra* note 18, at 118; D. MARTIN, *supra* note 22, at 5, 81-83; Goodstein & Page, *supra* note 24, at 1042; Steinmetz, *supra* note 19, at 328-29.

[36] *See, e.g.*, State v. Kelly, 97 N.J. 178, 195, 478 A.2d 364, 372 (1984); People v. Emick, 103 A.D.2d 643, 654-55, 481 N.Y.S.2d 552, 559 (1984) (describing testimony of defendant's expert); D. MARTIN, *supra* note 22, at 2-3; L. WALKER, *supra* note 16, at 23; Kuhl, *supra* note 18, at 55-56.

For examples of such cases, see State v. Felton, 110 Wis. 2d 485, 490, 329 N.W.2d 161, 163 (1983) (defendant "received counseling from a clergyman and was told that she should be a better wife"); J. TOTMAN, *supra* note 32, at 44, 46 (One battered woman reported, "I went to the Army chaplain one time. He told me to try to work it out. He said a divorce would be bad for my husband's career."); L. WALKER, *supra* note 16, at 175-77; Steinmetz, *supra* note 19, at 329, 330-31 ("A young college student returns home to her parents several times after brutal beatings by her husband. Each time, in spite of suggestions to the contrary by friends and teachers, her parents' insistence that 'her place was with her husband' forced her to return.").

[37] *See, e.g.*, State v. Kelly, 97 N.J. 178, 192, 478 A.2d 364, 370 (1984); A. JONES, *supra* note 1, at 303-05; TASK FORCE ON FAMILY VIOLENCE, *supra* note 3, at 11-12, 16-26; UNDER THE RULE OF THUMB, *supra* note 3, at 21-22; Crocker, *supra* note 9, at 129-30 n.36 (only 10% of police departments serving populations greater than 100,000 encourage arrests in domestic violence cases); Howard, *supra* note 2, at 69-70 (in vast majority of cases of spousal homicide, the police had previously been called to the home); Note, *supra* note 18, at 143-49.

For examples of such cases, see Bartalone v. County of Berrien, 643 F. Supp. 574, 575 (W.D. Mich. 1986) (alleging that police violated battered woman's constitutional rights by failing to respond to her report of abuse by husband); Thurman v. City of Torrington, 595 F. Supp. 1521, 1524 (D. Conn. 1984) (alleging that police violated battered woman's constitutional rights by ignoring her repeated attempts to file complaints against her husband and to seek police protection from him); State v. Gallegos, 104 N.M. 247, 251, 719 P.2d 1268, 1272 (Ct. App. 1986) (defendant's neighbors called the police once, but they failed to take action because they had not witnessed the brutality); Bruno v. Codd, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901, *appeal denied*, 48 N.Y.2d 656, 396 N.E.2d 488, 421 N.Y.S.2d 1032 (1979) (class action suit alleging that police, as well as employees of family court clerk's office and city's probation department, attempted to discourage battered women from pursuing legal remedies to protect themselves from abusive husbands); Nearing v. Weaver, 295 Or. 702, 704, 670 P.2d 137, 138-39 (1983) (alleging that police violated state statute by failing to arrest plaintiff's abusive husband after he refused to comply with protective order); Kress v. State, 176

battered women from pursuing criminal complaints against their husbands, and judges have been extremely lenient in sentencing abusive husbands.[38] The unresponsiveness of law enforcement officials thus tends to reinforce the battered woman's belief that attempts to escape from her husband or otherwise seek outside help will be unsuccessful.[39]

Walker's description of the three-phase cycle of violence also

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Tenn. 478, 482, 144 S.W.2d 735, 736 (1940) (on the day of the killing, police refused to arrest defendant's husband until she went to court and swore out a warrant; because it was Sunday evening, however, she would have had to wait until the next morning); Dvoskin, *Legal Alternatives for Battered Women Who Kill Their Abusers*, 6 BULL. AM. ACAD. PSYCHIATRY & L. 335, 347 (1978) (When one battered woman called the police after being beaten by her husband, who was a professional football player, "the police ended up sitting around talking football with him.").

Although some jurisdictions have made efforts to reform police practices in domestic disturbance cases, *see, e.g.*, A. JONES, *supra* note 1, at 303; Note, *Battered Wife's Dilemma*, *supra* note 8, at 909-10; Comment, *supra* note 3, at 363-65, the traditional attitudes of the police are deeply ingrained and extremely difficult to change. *See, e.g.*, Woods, *Litigation on Behalf of Battered Women*, 7 WOMEN'S RTS. L. REP. 39, 44-45 (1981).

[38] *See, e.g.*, A. JONES, *supra* note 1, at 312; TASK FORCE ON FAMILY VIOLENCE, *supra* note 3, at 27-43; UNDER THE RULE OF THUMB, *supra* note 3, at 33-34, 59-60; Note, *Battered Wife's Dilemma*, *supra* note 8, at 910-11; Case/Comment, *supra* note 2, at 149-51; Note, *supra* note 18, at 149-52.

Prosecutors often explain their failure to pursue criminal charges against abusive husbands on the ground that battered women frequently change their minds and ultimately refuse to cooperate in the prosecution. *See, e.g.*, UNDER THE RULE OF THUMB, *supra* note 3, at 27-29. Although fear of further violence may understandably make a battered woman reluctant to press charges against her husband, *see* TASK FORCE ON FAMILY VIOLENCE, *supra* note 3, at 28, it is not clear that battered women tend to be more uncooperative than other victims who know their assailants, *see* A. JONES, *supra* note 1, at 312, and the prosecutors' attitude may become "a self-fulfilling prophecy." UNDER THE RULE OF THUMB, *supra* note 3, at 33. Battered women would be much more likely to press charges against their husbands if prosecutors did not discourage them from doing so. *See* TASK FORCE ON FAMILY VIOLENCE, *supra* note 3, at 13-14, 27-30.

Other civil and nonlegal remedies theoretically available to battered women likewise have proven ineffective. *See, e.g.*, C. EWING, *supra* note 8, at 95; A. JONES, *supra* note 1, at 305-06; UNDER THE RULE OF THUMB, *supra* note 3, at 20, 59-60, 77, 81-82; Eisenberg & Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RTS. L. REP. 138, 141 (1977) (one Michigan judge estimates that at least one woman per week comes to court claiming that her estranged husband has violated an injunction restraining him from physically abusing her); Waits, *supra* note 3, at 270 n.11; Note, *Battered Wife's Dilemma*, *supra* note 8, at 911-17; Note, *supra* note 18, at 152-59.

For examples of such cases, see People v. Powell, 102 Misc. 2d 775, 777, 424 N.Y.S.2d 626, 628 (1980), *aff'd*, 83 A.D.2d 719, 442 N.Y.S.2d 645 (1981) (defendant's husband repeatedly violated protective orders); State v. Allery, 101 Wash. 2d 591, 593, 682 P.2d 312, 313 (1984) (defendant's husband violated restraining orders by entering her home).

[39] *See, e.g.*, R. LANGLEY & R. LEVY, *supra* note 18, at 153-62; D. MARTIN, *supra* note 22, at 76; J. TOTMAN, *supra* note 32, at 45; L. WALKER, *supra* note 16, at 64-65, 206-07; Eisenberg & Micklow, *supra* note 38, at 159; Gelles, *Abused Wives: Why Do*

helps explain why a battered woman does not leave an abusive relationship: she may believe her husband's promises to reform and thus yield to his pleas for forgiveness.[40] On a more practical level, the battered woman may lack the financial resources and job skills to support herself and her children;[41] she may be concerned about her children's well-being or fear that she will lose custody if she leaves without them;[42] and she may simply have no place to go.[43]

They Stay?, 38 J. MARRIAGE & FAM. 659, 666 (1976); Goodstein & Page, *supra* note 24, at 1041.

[40] *See, e.g.*, Smith v. State, 247 Ga. 612, 614, 277 S.E. 2d 678, 680 (1981) (describing testimony of defendant's expert); State v. Kelly, 97 N.J. 178, 194, 478 A.2d 364, 371-72 (1984); People v. Emick, 103 A.D.2d 643, 654, 481 N.Y.S.2d 552, 559 (1984) (describing testimony of defendant's expert); People v. Torres, 128 Misc. 2d 129, 132, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985); Fielder v. State, 683 S.W.2d 565, 585 (Tex. Crim. App. 1985) (describing testimony of defendant's expert); R. LANGLEY & R. LEVY, *supra* note 18, at 114; D. MARTIN, *supra* note 22, at 73, 83; M. PAGELOW, *supra* note 18, at 74; L. WALKER, *supra* note 18, at 96; L. WALKER, *supra* note 16, at 66-69; Gayford, *supra* note 2, at 25; Goodstein & Page, *supra* note 24, at 1042; Hilberman, *supra* note 16, at 1339; Roy, *supra* note 25, at 32.

For examples of such cases, see State v. Thomas, 13 Ohio App. 3d 211, —, 468 N.E.2d 763, 764 (1983); State v. Felton, 110 Wis. 2d 485, 490, 329 N.W.2d 161, 163 (1983); J. TOTMAN, *supra* note 32, at 43 ("You keep thinking things will get better. You look for signs that he's happier or you're getting along better. And sometimes things are better for a little while. Mostly you're just kidding yourself, but you want it to work."); Steinmetz, *supra* note 19, at 329 ("You put up with six days of beating because there is one good day to have someone to share things with.").

[41] *See, e.g.*, Fennell v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985); State v. Hundley, 236 Kan. 461, 467, 693 P.2d 475, 479 (1985); State v. Kelly, 97 N.J. 178, 195, 478 A.2d 364, 372 (1984); C. EWING, *supra* note 8, at 13; J. FLEMING, *supra* note 32, at 83-84 ("[T]he husband invariably controls the family finances — usually with an iron hand. It is the rare victim who has more than a few dollars she can call her own."); R. LANGLEY & R. LEVY, *supra* note 18, at 118-20; D. MARTIN, *supra* note 22, at 83-84, 119-20; L. WALKER, *supra* note 16, at 127-44; Frieze, *supra* note 16, at 98; Goodstein & Page, *supra* note 24, at 1042; Hilberman & Munson, *supra* note 21, at 462; Roy, *supra* note 24, at 31.

For examples of such cases, see State v. Kelly, 102 Wash. 2d 188, 190, 685 P.2d 564, 567 (1984) (describing testimony of defendant's expert); State v. Felton, 110 Wis. 2d 485, 490, 329 N.W.2d 161, 163 (1983).

[42] *See, e.g.*, Fennell v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985); J. FLEMING, *supra* note 18, at 86; A. JONES, *supra* note 1, at 297; R. LANGLEY & R. LEVY, *supra* note 18, at 116; D. MARTIN, *supra* note 22, at 5, 73, 79-80, 85; M. PAGELOW, *supra* note 18, at 72; L. WALKER, *supra* note 16, at 149; Frieze, *supra* note 16, at 98; Gayford, *supra* note 2, at 25; Roy, *supra* note 24, at 31; Case/Comment, *supra* note 2, at 151-52.

For examples of such cases, see State v. Hodges, 239 Kan. 63, 67, 716 P.2d 563, 566-67 (1986); State v. Felton, 110 Wis. 2d 485, 490, 329 N.W.2d 161, 163 (1983) (One of the reasons defendant failed to go through with divorce proceedings was that her husband "persuaded her that the children would have fewer disciplinary and school problems if he were around to take care of them.").

[43] *See, e.g.*, State v. Kelly, 97 N.J. 178, 195, 478 A.2d 364, 372 (1984); People v. Torres, 128 Misc. 2d 129, 133, 488 N.Y.S.2d 358, 362 (Sup. Ct. 1985) (describing testimony of defendant's expert); A. JONES, *supra* note 1, at 297; R. LANGLEY & R. LEVY,

Finally, a battered woman may be unwilling to leave her husband because she is emotionally dependent on him[44] or because she still loves him.[45]

As the severity of the violence increases, battered women are more likely to seek help or attempt to leave the relationship.[46] Unfortunately, some women find that they cannot escape their husband's violence. Even separation and divorce may not end the husband's assaults.[47] Indeed, some women eventually return to their husbands because of threats or for one of the other reasons set

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supra note 18, at 120; D. MARTIN, *supra* note 22, at 119; M. PAGELOW, *supra* note 18, at 72; Gayford, *supra* note 2, at 24; Roy, *supra* note 24, at 31-32.

For an example of such a case, see People v. Emick, 103 A.D.2d 643, 653, 481 N.Y.S.2d 552, 558 (1984).

[44] *See, e.g.*, State v. Hundley, 236 Kan. 461, 467, 693 P.2d 475, 479 (1985); People v. Torres, 128 Misc. 2d 129, 132, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985) (describing testimony of defendant's expert); State v. Felton, 110 Wis. 2d 485, 495, 329 N.W.2d 161, 165 (1983) (describing testimony of defendant's expert); C. EWING, *supra* note 8, at 19-20; Steinmetz, *supra* note 19, at 328, 329-30.

For examples of such cases, see State v. Heidmous, 75 N.C. App. 488, 490, 331 S.E.2d 200, 201 (1985); State v. Kelly, 102 Wash. 2d 188, 190, 685 P.2d 564, 567 (1984) (describing testimony of defendant's expert).

[45] *See, e.g.*, Fielder v. State, 683 S.W.2d 565, 585 (Tex. Crim. App. 1985) (describing testimony of defendant's expert); A. JONES, *supra* note 1, at 297; R. LANGLEY & R. LEVY, *supra* note 18, at 114; D. MARTIN, *supra* note 22, at 73; J. TOTMAN, *supra* note 32, at 43.

For examples of such cases, see Smith v. State, 247 Ga. 612, 614, 277 S.E.2d 678, 680 (1981); State v. Hill, 287 S.C. 398, 398-99, 339 S.E.2d 121, 121 (1986).

[46] *See* L. WALKER, *supra* note 18, at 150 (although only 14% of the women studied sought help after the first battering incident, that figure rose to 50% after the last reported beating); *see also* A. JONES, *supra* note 1, at 297 (citing Western Michigan University study finding that almost one-half of the battered women surveyed had filed for divorce; most had called the police for assistance; more than two-thirds had received counseling; and two-thirds had relied on family and friends for emotional support or emergency shelter); Gelles, *supra* note 39, at 661 (of 41 battered women studied, 9 were divorced or separated, 21 had called the police or sought counseling, and 11 had sought no outside intervention); Kuhl, *supra* note 18, at 51 (of the 420 battered women surveyed, 34% had called the police); *cf.* Eisenberg & Micklow, *supra* note 38, at 143 (noting that 80% of the 20 battered women studied were divorced or divorcing, but admitting that the subjects of the study had all been referred by attorneys or other professionals and that the figure might not be as high for battered women who had not initiated contact with third parties).

These findings are consistent with Seligman's initial research on learned helplessness. *See supra* note 19. He found that, even after the experimenter physically dragged the animals from confinement, some managed to escape but others did not. *See* Seligman, Maier & Geer, *Alleviation of Learned Helplessness in the Dog*, 73 J. ABNORMAL PSYCHOLOGY 256, 260-61 (1968).

[47] *See, e.g.*, Ripley v. State, 590 P.2d 48, 49-50 (Alaska 1979); State v. Hundley, 236 Kan. 461, 462, 467, 693 P.2d 475, 476, 479 (1985); F. MCNULTY, *supra* note 1, at 102 (describing facts in the Hughes case); Gayford, *supra* note 2, at 35; Jones, *When Battered Women Fight Back*, BARRISTER, Fall 1982, at 12, 15 (citing University of Florida

forth above.[48]

This description of the battered woman syndrome and the effects of abuse have not been universally accepted. Some judges and commentators have criticized Walker's explanation of the cycle of violence and battered woman syndrome, arguing that her research is biased, that her study failed to use a control group, that her sample was insufficient to obtain reliable results, and that her interviewers colored the data provided by the sample of battered women.[49]

These criticisms do not invalidate Walker's theory, however, and the critics themselves do not offer any alternative theory that plausibly explains why battered women remain in abusive relationships. A substantial number of courts and commentators have adopted Walker's theories, and independent studies conducted by other researchers have reached similar conclusions.[50]

More specifically, although Walker's study of four hundred battered women did not include a control group, published norms on psychological scales and information provided by the subjects regarding their nonviolent relationships provided some means of comparison.[51] Efforts were also made to ensure that the sample of battered women studied was representative in terms of geography, race, age, and national origin. Interviewers were carefully selected and trained to minimize distortions in the data provided by the subjects.[52]

Of course, any such methodological criticisms can be presented at trial to assist the jury in determining the proper weight to be given to the defendant's expert testimony concerning the battered woman syndrome.[53] Even if the jury has some doubt about the validity of

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finding that more than 56% of the men studied who had killed their wives were separated on the day of the homicide); Walker, Thyfault & Browne, *supra* note 32, at 10.

[48] *See, e.g.*, Gayford, *supra* note 2, at 25; *see also* cases cited *supra* note 32.

[49] *See, e.g.*, Ibn-Tamas v. United States, 455 A.2d 893, 894-95 (D.C. 1983) (Gallagher, J., concurring); Ibn-Tamas v. United States, 407 A.2d 626, 655 (D.C. 1979) (Nebeker, J., dissenting); Buhrle v. State, 627 P.2d 1374, 1377 (Wyo. 1981); Note, *Empirical Dissent*, *supra* note 10, at 636-43.

[50] *See supra* notes 15-48.

[51] *See* L. WALKER, *supra* note 18, at 203-04.

[52] *See id.* at 215-24; *see also* Hawthorne v. State, 470 So. 2d 770, 777-78 (Fla. Dist. Ct. App. 1985) (Ervin, C.J., concurring in part & dissenting in part) (noting that Walker's findings are consistent with another expert's research and concluding that her sample was sufficiently representative).

[53] *See, e.g.*, Hawthorne v. State, 470 So. 2d 770, 787 (Fla. Dist. Ct. App. 1985) (Ervin, C.J., concurring in part & dissenting in part); MCCORMICK ON EVIDENCE 609-10 (E. Cleary 3d ed. 1984); Comment, *Self-Defense: Battered Woman Syndrome on Trial*, 20 CAL. W.L. REV. 485, 504-06 (1984).

the expert testimony, however, those doubts should not distract the jury from its primary obligation in ruling on the defendant's self-defense claim — to determine whether she honestly and reasonably believed that she was in imminent danger of death or serious bodily harm at the time she killed her husband.

II

THE ELEMENTS OF SELF-DEFENSE

The fact that a woman is involved in a battering relationship from which she feels unable to escape does not, of course, give her the right to kill her abusive husband.[54] Rather, self-defense justifies killing only in limited circumstances: the defendant must have reasonably believed that her adversary posed an imminent threat of unlawful bodily harm and that the use of defensive force was necessary to avoid that danger; she must have used no more than a reasonable amount of force; and she must not have been the aggressor in the conflict.[55] If the defendant used deadly force against her adversary — that is, force that was intended to cause death or serious bodily injury or that the defendant knew created a substantial risk of death or serious bodily injury[56] — she acted in justifiable self-defense only if she honestly and reasonably believed that her adversary was about to kill her or inflict serious bodily harm.[57]

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[54] Although the nature of the battering relationship and its effect on the battered woman may not by themselves explain why she killed her husband at the time she did, *see, e.g.*, C. EWING, *supra* note 8, at 55-56; Note, *Empirical Dissent*, *supra* note 10, at 647, they nonetheless are very relevant in evaluating the woman's self-defense claim. *See infra* notes 84-87 and accompanying text.

[55] *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 454 (2d ed. 1986). In most jurisdictions, once the defendant has produced some evidence supporting a claim of self-defense, the prosecution has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. *See* Annotation, *Homicide: Modern Status of Rules as to Burden and Question of Proof to Show Self-Defense*, 43 A.L.R.3D 221, 239 (1972); *id.* at 11-15 (Supp. 1987). For examples of the application of this principle in cases involving battered women who killed their husbands, see People v. White, 90 Ill. App. 3d 1067, 1070, 414 N.E.2d 196, 199 (1980); State v. Jacoby, 260 N.W.2d 828, 835 (Iowa 1977); State v. Edwards, 420 So. 2d 663, 681 (La. 1982); People v. Stallworth, 364 Mich. 528, 535, 111 N.W.2d 742, 746 (1961); State v. Kelly, 97 N.J. 178, 200, 478 A.2d 364, 374-75 (1984); Commonwealth v. Helm, 485 Pa. 315, 320-21, 402 A.2d 500, 503 (1979); State v. Walker, 40 Wash. App. 658, 660-61, 700 P.2d 1168, 1171 (1985). In a minority of jurisdictions, however, the defendant has the burden of proving that she acted in self-defense, an approach that was upheld in the face of a due process challenge in Martin v. Ohio, 107 S. Ct. 1098 (1987). For an example of the application of this principle in a case involving a battered woman who killed her husband, see State v. Thomas, 13 Ohio App. 3d 211, 212, 468 N.E.2d 763, 764 (1983).

[56] *See* W. LAFAVE & A. SCOTT, *supra* note 55, at 455.

[57] *See id.* at 456.

The battered woman who kills her husband often does so in a non-confrontational setting.[58] Instead of striking back while her husband abuses her, she waits until he has finished attacking her,[59] until he threatens her with further abuse,[60] or even until he is asleep.[61] In such circumstances, juries convict many battered women of murder or manslaughter despite claims of self-defense.[62] Because these cases do not resemble the classic case of self-defense, this lack of success is not surprising. Nevertheless, in many of these cases, the battered woman can satisfy all the necessary elements of a self-defense claim.

A. Honest and Reasonable Belief

The most fundamental element of a self-defense claim requires that, at the time of the killing, the defendant honestly and reasonably feared unlawful bodily harm at the hands of her assailant. A minority of jurisdictions follow the Model Penal Code's subjective approach, which requires only an honest belief that the assailant intended unlawful harm.[63] The standard applied in the majority of

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[58] *See, e.g.*, C. EWING, *supra* note 8, at 28 (summarizing cases described in A. JONES, *supra* note 1); *id.* at 34 (two-thirds of 87 cases reviewed involved killings in non-confrontational settings); Crocker, *supra* note 9, at 139-40.

[59] For examples of such cases, see Meeks v. Bergen, 749 F.2d 322, 324 (6th Cir. 1984); Ibn-Tamas v. United States, 407 A.2d 626, 630 (D.C. 1979); State v. Nunn, 356 N.W.2d 601, 603-04 (Iowa Ct. App. 1984); State v. Kelly, 97 N.J. 178, 189-90, 478 A.2d 364, 369 (1984); State v. Leaphart, 673 S.W.2d 870, 873 (Tenn. Crim. App. 1983); State v. Crigler, 23 Wash. App. 716, 718, 598 P.2d 739, 740 (1979).

[60] For examples of such cases, see Langley v. State, 373 So. 2d 1267, 1268-71 (Ala. Crim. App. 1979); Ripley v. State, 590 P.2d 48, 49-50 (Alaska 1979); People v. Lucas, 160 Cal. App. 2d 305, 307, 324 P.2d 933, 934 (1958); People v. White, 90 Ill. App. 3d 1067, 1068, 414 N.E.2d 196, 198 (1980); Fultz v. State, 439 N.E.2d 659, 662 (Ind. Ct. App. 1982); State v. Jacoby, 260 N.W.2d 828, 831-32 (Iowa 1977); State v. Seelke, 221 Kan. 672, 673, 561 P.2d 869, 871 (1977); State v. Lynch, 436 So. 2d 567, 568 (La. 1983); State v. Gallegos, 104 N.M. 247, 251, 719 P.2d 1268, 1272 (Ct. App. 1986); People v. Torres, 128 Misc. 2d 129, 131-32, 488 N.Y.S.2d 358, 360-61 (Sup. Ct. 1985); State v. Allery, 101 Wash. 2d 591, 593, 682 P.2d 312, 313-14 (1984).

[61] For examples of such cases, see State v. Guido, 40 N.J. 191, 195-96, 191 A.2d 45, 48 (1963); People v. Emick, 103 A.D.2d 643, 644, 481 N.Y.S.2d 552, 553 (1984); State v. Leidholm, 334 N.W.2d 811, 814 (N.D. 1983); State v. Felton, 110 Wis. 2d 485, 487, 329 N.W.2d 161, 162 (1983).

[62] *See, e.g.*, A. BROWNE, WHEN BATTERED WOMEN KILL 12, 163 (1987) (of the 42 cases studied, only 10 resulted in acquittal or dismissed charges; 20 of the women received prison sentences); C. EWING, *supra* note 8, at 41-43; WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 289-300; Schneider & Jordan, *supra* note 9, at 149-50 n.3; Walker, Thyfault & Browne, *supra* note 32, at 14. Despite these failures, self-defense claims by battered women are increasing. *See, e.g.*, C. EWING, *supra* note 8, at 46.

[63] MODEL PENAL CODE § 3.04(1) (Official Draft 1962); *see* W. LAFAVE & A. SCOTT, *supra* note 55, at 457-58. For examples of cases involving battered women who killed

jurisdictions, however, includes both a subjective and an objective component, mandating that the defendant's fear be both honest and reasonable.[64]

Where self-defense is defined to include an objective component, courts typically instruct the jury to analyze whether a reasonable person would have felt the need to use self-defense under the same circumstances.[65] The jurisdictions that purport to apply an entirely subjective standard of self-defense use a similar instruction: in order to acquit on grounds of self-defense, the trier of fact must find that a reasonable person in the same situation, seeing what the defendant saw and knowing what she knew, would have resorted to self-defense.[66] This latter standard is not purely subjective; rather, it also incorporates the objective notion of "reasonableness." Thus, the two approaches do not constitute diametrically opposed standards. Instead, they represent different points on a continuum, with the only arguable difference lying in the extent to which they import

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their husbands where the court purported to apply a subjective standard, see State v. Hodges, 239 Kan. 63, 72, 716 P.2d 563, 569 (1986); State v. Leidholm, 334 N.W.2d 811, 817-18 (N.D. 1983); State v. Thomas, 66 Ohio St. 2d 518, 520 n.2, 423 N.E.2d 137, 139 n.2 (1981); Fielder v. State, 683 S.W.2d 565, 592 (Tex. Crim. App. 1985); State v. Allery, 101 Wash. 2d 591, 594, 682 P.2d 312, 314 (1984).

[64] *See* W. LAFAVE & A. SCOTT, *supra* note 55, at 457. For examples of the application of this standard in cases involving battered women who killed their husbands, see Langley v. State, 373 So. 2d 1267, 1271 (Ala. Crim. App. 1979); Nygren v. State, 616 P.2d 20, 22 (Alaska 1980); People v. Reed, 695 P.2d 806, 807 (Colo. Ct. App. 1984), *cert. denied*, 701 P.2d 603 (Colo. 1985); People v. Dillon, 24 Ill. 2d 122, 125, 180 N.E.2d 503, 504 (1962); State v. Nunn, 356 N.W.2d 601, 604 (Iowa Ct. App. 1984); State v. Lynch, 436 So. 2d 567, 569 (La. 1983); May v. State, 460 So. 2d 778, 784 (Miss. 1984); State v. Martin, 666 S.W.2d 895, 899 (Mo. Ct. App. 1984); State v. Kelly, 97 N.J. 178, 197, 478 A.2d 364, 373 (1984); State v. Gallegos, 104 N.M. 247, 249, 719 P.2d 1268, 1270 (Ct. App. 1986); People v. Emick, 103 A.D.2d 643, 658, 481 N.Y.S.2d 552, 561 (1984); Easterling v. State, 267 P.2d 185, 187 (Okla. Crim. App. 1954); Commonwealth v. Helm, 402 A.2d 500, 504 (Pa. 1979).

In some jurisdictions where self-defense includes both an objective and a subjective component, a defendant whose fear was honest, but unreasonable, will be convicted of murder. In other jurisdictions, however, these facts support a claim of "imperfect self-defense," resulting in a conviction of voluntary manslaughter. *See* W. LAFAVE & A. SCOTT, *supra* note 55, at 463; Note, *Imperfect Self-Defense*, *supra* note 8, at 635-36. For examples of the application of the doctrine of imperfect self-defense in cases involving battered women who killed their husbands, see People v. Davis, 33 Ill. App. 3d 105, 108-10, 337 N.E.2d 256, 259-60 (1975) (convicted of manslaughter); May v. State, 460 So. 2d 778, 783-85 (Miss. 1984) (convicted of manslaughter).

[65] *See, e.g.*, Addington v. United States, 165 U.S. 184, 186-87 (1897); Nygren v. State, 616 P.2d 20, 22 n.6 (Alaska 1980); Sacrini v. United States, 38 App. D.C. 371, 378 (1912); State v. Griffiths, 101 Idaho 163, 176-77, 610 P.2d 522, 536 (1980) (Bistline, J., dissenting), *cert. denied*, 454 U.S. 1057 (1981); State v. Kelly, 97 N.J. 178, 204, 478 A.2d 364, 377 (1984).

[66] For examples, see cases cited *supra* note 63.

the defendant's particular characteristics into the definition of the "reasonable person."[67]

Conceptualizing the "reasonable person" is no easy feat. As Dean William Prosser noted in defining the term for purposes of tort law:

> The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons, since the law can have no favorites. At the same time, it must make proper allowance for the risk apparent to the actor, for [her] capacity to meet it, and for the circumstances under which [s]he must act.[68]

It is perhaps easier to begin by thinking about what the term "reasonable person" does *not* mean. First, the reasonable person does not represent an ethical ideal; rather, the reasonable person has "those human shortcomings and weaknesses which the community will tolerate on the occasion."[69] Therefore, acquittal on grounds of self-defense does not require a finding that the morally ideal person would have used defensive force.

Arguably, the ideal person would not kill under any circumstances. In any event, the ideal person would not kill her assailant

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[67] *See, e.g.*, W. PROSSER & W. KEETON, THE LAW OF TORTS 175 (5th ed. 1984) (In determining what a reasonable person would have done "under the same or similar circumstances," courts have made "allowance not only for the external facts, but sometimes for certain characteristics of the actor [her]self, and have applied, in some respects, a more or less subjective standard. Depending on the context, therefore, the reasonable person standard may, in fact, combine in varying measure both objective and subjective ingredients.") (footnote omitted); Schneider & Jordan, *supra* note 9, at 155 n.53; Note, *Empirical Dissent*, *supra* note 10, at 643.

[68] W. PROSSER & W. KEETON, *supra* note 67, at 173-74 (footnotes omitted). Prosser's definition is equally relevant to the concept of the reasonable person applied in criminal cases. In fact, because tort law's reasonable person standard is used to determine whether the defendant should compensate innocent persons for damages she proximately caused, whereas the standard is used by the criminal law to determine whether the defendant should be punished for her conduct, any difference between the two calls for accepting a wider range of conduct as reasonable in criminal cases.

[69] *Id.* at 174; *see also id.* at 175 n.10 (the reasonable person is "not necessarily a supercautious individual devoid of human frailties" (quoting Whitman v. W.T. Grant Co., 16 Utah 2d 81, 83, 395 P.2d 918, 920 (1964))); 3 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS 389 (2d ed. 1986).

> [T]his reasonably prudent person is not infallible or perfect. In foresight, caution, courage, judgment, self-control, altruism, and the like [s]he represents, and does not excel, the general average of the community. [Sh]e is capable of making mistakes and errors of judgment, of being selfish, of being afraid — but only to the extent that any such shortcoming embodies the normal standard of community behavior.

Id.

if she knew that she could slip safely out the back door of her home and thereby avoid the need to resort to defensive force. The ideal person would not kill to prevent an intruder from robbing her home, nor would she make a mistake and kill someone who was attacking her with what appeared to be a knife but was, in fact, a ballpoint pen.

Nevertheless, in each of these instances, defendants in the majority of jurisdictions can raise a successful self-defense claim. Only a minority of jurisdictions require one to retreat before using defensive force, and virtually none compels retreat from one's own home.[70] Most jurisdictions permit the use of deadly force to prevent an intruder from burglarizing, robbing, or burning down one's home.[71] Finally, a self-defense claim is not defeated by proof that the defendant's reasonable belief in the need to use defensive force was mistaken and that, in fact, the assailant posed no danger.[72] As Justice Holmes explained, "[d]etached reflection cannot be demanded in the presence of an uplifted knife."[73]

Likewise, the "reasonable person" is not a statistical concept: acquittal on grounds of self-defense does not require a finding that most people would have thought it necessary to use defensive force under similar circumstances. For example, no empirical evidence suggests that most people would kill in the three situations described above where courts recognize self-defense claims even though the ideal person would not have used deadly force.

Rather than representing an ethical ideal or a statistic, the concept of the reasonable person is a measure of culpability. The reasonable person is "a personification of a community ideal of reasonable behavior, determined by the jury's social judgment."[74] She "possess[es] and exercis[es] those qualities of attention, knowledge, intelligence and judgment" that society believes are "required

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[70] *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 55, at 460-61. For a more extensive discussion of the retreat rule, see *infra* Part II(F).

[71] *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 55, at 467.

[72] *See, e.g.*, *id.* at 457. For a discussion of this principle in cases involving battered women who killed their husbands, see, *e.g.*, State v. Griffiths, 101 Idaho 163, 166, 610 P.2d 522, 525 (1980), *cert. denied*, 454 U.S. 1057 (1981); State v. Hundley, 236 Kan. 461, 468, 693 P.2d 475, 479 (1985); State v. Necaise, 466 So. 2d 660, 666 n.4 (La. Ct. App. 1985); May v. State, 460 So. 2d 778, 784 (Miss. 1984); State v. Kelly, 97 N.J. 178, 198, 478 A.2d 364, 373 (1984); State v. Gallegos, 104 N.M. 247, 250, 719 P.2d 1268, 1271 (Ct. App. 1986); State v. Leidholm, 334 N.W.2d 811, 815 & n.3 (N.D. 1983).

Some commentators argue that self-defense claims in such cases are really claims of excuse rather than of justification. *See infra* notes 299-302 and accompanying text.

[73] Brown v. United States, 256 U.S. 335, 343 (1921).

[74] W. PROSSER & W. KEETON, *supra* note 67, at 175 (footnote omitted).

of its members for the protection of their own interests and the interests of others."[75] Thus, a person fails to live up to the reasonable person standard if she is culpable for having acted as she did — that is, if her conduct does not conform to that which we can fairly demand from each other.[76] If, however, her conduct was morally permissible, though not optimal, and was the best that could be expected under the circumstances, then it satisfies the reasonable person standard.[77]

In applying this reasonable person standard, the trier of fact may not simply construct a hypothetical reasonable person and imagine how that individual would have acted if put into the defendant's shoes at the time of the killing. Rather, as Prosser observed, "[t]he conduct of the reasonable person will vary with the situation with which [s]he is confronted. The jury must therefore be instructed to take the circumstances into account . . . ."[78] Thus, the reasonableness of the defendant's perceptions and actions and the culpability of her conduct can be determined only by analyzing the defendant's characteristics and the circumstances she faced. Otherwise, the trier of fact cannot determine what a reasonably prudent person would have done under those circumstances.[79]

The difficulty arises in determining which of the defendant's characteristics and which of the circumstances she confronted ought to be included in the reasonable person standard. The defendant's culpability cannot be determined fairly without some consideration of her personal characteristics. However, defining the "reasonable person" to include all of her particular attributes, experiences, and weaknesses will likely lead the trier of fact to conclude that this "reasonable person," who is virtually identical to the defendant, would have acted just as the defendant did.[80] In that event, defining self-defense to require an honest and reasonable apprehension of danger is no different from requiring only an honest belief.

Nevertheless, even those jurisdictions that adhere to the least ex-

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[75] Schwab, *The Quest for the Reasonable Man*, 45 TEX. B.J. 178, 178 (1982).

[76] *See* Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1292-93, 1305-07 (1974).

[77] *See* Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1905-07, 1909-11 (1984).

[78] W. PROSSER & W. KEETON, *supra* note 67, at 175.

[79] *See* Fletcher, *supra* note 76, at 1308-09; Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 658-60 (1981).

[80] *See* Fletcher, *supra* note 76, at 1292; Kelman, *supra* note 79, at 636; Note, *Imperfect Self-Defense*, *supra* note 8, at 619-20.

pansive view of the reasonable person standard define the reasonable person to include some of the particular defendant's traits and circumstances. For example, in evaluating a defendant's self-defense claim, the trier of fact will consider evidence that the defendant and her assailant differed in age, size, weight, or strength or that the defendant suffered from some physical handicap or injury.[81] This type of disparity in physical condition has a significant impact on one's ability to defend herself against a physically superior adversary. Thus, it is relevant in determining whether the defendant reasonably feared her assailant. If the "reasonable person's" physical characteristics do not match the defendant's, the jury cannot determine whether the defendant's fear of her adversary was reasonable.

Similarly, courts have traditionally admitted evidence concerning an assailant's prior acts or threats of violence and violent reputation in the community to support the reasonableness of the defendant's apprehension.[82] One is "justified in acting more quickly and taking

[81] *See* Smith v. United States, 161 U.S. 85, 88 (1896); 40 AM. JUR. 2D *Homicide* § 159, at 447 (1968) ("the relative size and strength of the accused and deceased are proper considerations in determining whether there was reasonable apprehension of danger and whether the slayer used more force than was necessary to defend [her]self against the threatened danger"); 40 C.J.S. *Homicide* § 131, at 1019-20 (1944). For a discussion of this principle in cases involving battered women who killed their husbands, see, *e.g.*, State v. Thomas, 66 Ohio St. 2d 518, 520 n.2, 423 N.E.2d 137, 139 n.2 (1981), *aff'd*, 474 U.S. 140 (1985); Easterling v. State, 267 P.2d 185, 188 (Okla. Crim. App. 1954); Kress v. State, 176 Tenn. 478, 487-88, 144 S.W.2d 735, 738 (1940).

[82] *See* Smith v. United States, 161 U.S. 85, 88 (1896); 40 AM. JUR. 2D *Homicide* § 302, at 570-71 (1968) (defendant may introduce evidence concerning "the turbulent and dangerous character of the deceased . . . to show that the circumstances were such as would have naturally caused a [person] of ordinary prudence to believe that [s]he was, at the time of the killing, in imminent danger of losing [her] life or of suffering great bodily harm"); Annotation, *Admissibility of Evidence as to Other's Character or Reputation for Turbulence on Question of Self-Defense by One Charged With Assault or Homicide*, 1 A.L.R.3D 571, 575 (1965).

For a discussion of this principle in cases involving battered women who killed their husbands, see, *e.g.*, Meeks v. Bergen, 749 F.2d 322, 328 (6th Cir. 1984) (applying Michigan law); People v. Moore, 43 Cal. 2d 517, 527-28, 275 P.2d 485, 492-93 (1954); People v. Bush, 84 Cal. App. 3d 294, 302-03, 148 Cal. Rptr. 430, 435-37 (1978); Ibn-Tamas v. United States, 407 A.2d 626, 639 (D.C. 1979); Hawthorne v. State, 377 So. 2d 780, 787 (Fla. Dist. Ct. App. 1979); Fultz v. State, 439 N.E.2d 659, 662 (Ind. Ct. App. 1982); State v. Jacoby, 260 N.W.2d 828, 838-39 (Iowa 1977); State v. Osbey, 238 Kan. 280, 285, 710 P.2d 676, 680 (1985); State v. Seelke, 221 Kan. 672, 682-83, 561 P.2d 869, 876 (1977); State v. Edwards, 420 So. 2d 663, 669-71 (La. 1982); People v. Giacalone, 242 Mich. 16, 21-22, 217 N.W. 758, 760 (1928); State v. Kelly, 97 N.J. 178, 205, 478 A.2d 364, 377 (1984); State v. Gallegos, 104 N.M. 247, 250, 719 P.2d 1268, 1271 (Ct. App. 1986); People v. Torres, 128 Misc. 2d 129, 131, 488 N.Y.S.2d 358, 360 (Sup. Ct. 1985); Fielder v. State, 683 S.W.2d 565, 584 (Tex. Crim. App. 1985); State v. Allery, 101

harsher measures" if she knows her adversary has acted violently in the past.[83] Accordingly, in determining whether the defendant acted as a reasonable person, the reasonable person with whom the defendant is compared must possess the same knowledge that the defendant had regarding the assailant's violent acts and reputation.

Given that courts consider at least some of the particular defendant's attributes and circumstances in defining the "reasonable person," they should likewise permit an instruction that directs the jury to measure the defendant's actions against those of the "reasonable battered woman." The jury, therefore, should be instructed to acquit the defendant if it finds that the reasonable battered woman would have feared her husband under the circumstances that confronted the defendant.

If the jury is not instructed to determine how a reasonable battered woman would have reacted under the circumstances, it cannot possibly evaluate whether or not the defendant's actions were reasonable. Most women are substantially smaller and weaker than most men,[84] and few women have training in self-defense techniques or experience engaging in hand-to-hand combat. Moreover, unlike men, women are socialized to be passive and not to fight.[85]

Wash. 2d 591, 595, 682 P.2d 312, 315 (1984); State v. Dozier, 163 W. Va. 192, 197, 255 S.E.2d 552, 555 (1979); Buhrle v. State, 627 P.2d 1374, 1380-81 (Wyo. 1981).

The courts often require that the defendant produce some evidence supporting her allegation that she acted in self-defense before this type of evidence may be admitted. *See, e.g.*, Annotation, *supra*. For a discussion of this principle in cases involving battered women who killed their husbands, see, *e.g.*, Langley v. State, 373 So. 2d 1267, 1271 (Ala. Crim. App. 1979); Mullis v. State, 248 Ga. 338, 339-40, 282 S.E.2d 334, 337-38 (1981); Fultz v. State, 439 N.E.2d at 662; State v. Jacoby, 260 N.W.2d at 837; State v. Edwards, 420 So. 2d at 669.

[83] People v. Bush, 84 Cal. App. 3d 294, 302-03, 148 Cal. Rptr. 430, 435 (1978).

[84] *See, e.g.*, People v. Cameron, 53 Cal. App. 3d 786, 791, 126 Cal. Rptr. 44, 47 (1975); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 108 (107th ed. 1987) (average height and weight for men in this country range from 5'7.4" to 5'9.7" and from 163 to 178 pounds; average height and weight for women range from 5'2.2" to 5'4.3" and from 134 to 150 pounds); L. WALKER, *supra* note 18, at 157, 159. For examples of cases involving battered women who killed their husbands where the court made note of the disparity in size or strength, see Borders v. State, 433 So. 2d 1325, 1326 (Fla. Dist. Ct. App. 1983); State v. Hundley, 236 Kan. 461, 468, 693 P.2d 475, 480 (1985); State v. Seelke, 221 Kan. 672, 672-73, 561 P.2d 869, 870 (1977); State v. Lynch, 436 So. 2d 567, 568 (La. 1983); Kress v. State, 176 Tenn. 478, 481, 144 S.W.2d 735, 738 (1940); State v. Hoyt, 21 Wis. 2d 284, 287, 128 N.W.2d 645, 646 (1964) (per curiam).

[85] *See, e.g.*, State v. Wanrow, 88 Wash. 2d 221, 239, 559 P.2d 548, 558 (1977); A. Jones, *supra* note 1, at 299-300; D. MARTIN, *supra* note 22, at 61-63; L. WALKER, *supra* note 16, at 78; Eisenberg & Micklow, *supra* note 38, at 142; Hoffman-Bustamante, *The Nature of Female Criminality*, 8 ISSUES IN CRIMINOLOGY, Fall 1973, at 117, 123; Schneider, *supra* note 3, at 627-28; *id.* at 647 & n.131 (citing jury instructions to that

As a result, they are typically very anxious when confronted with a situation requiring them to use physical violence to defend themselves.[86] Thus, the reasonable woman's reaction to circumstances necessitating the use of defensive force differs significantly from the reaction of the reasonable man.

In addition, the reasonable battered woman is different from the reasonable woman. The battered woman not only knows her husband's reputation for violence but also has repeatedly been the victim of his assaults. As a result, she is all too familiar with the severity of his attacks and understands the seriousness of his threats. Moreover, her reactions to the abuse — in particular, her feelings of being trapped in the relationship and of having no way to protect herself other than with defensive force — cannot be measured by the reactions of the average woman who has not experienced such abuse. Although the reasonable woman might refuse to endure such beatings and attempt to escape from the relationship, the effects of sustained abuse lead the reasonable battered woman to react differently.[87] Self-defense theories advocating consideration of the defendant's size and strength and the assailant's prior acts of violence, therefore, have even greater force when a battered woman raises a claim of self-defense. The trier of fact cannot fairly evaluate the defendant's claim without measuring her conduct against that of the reasonable battered woman.

Although some courts agree with this conclusion,[88] several critics

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effect given in several cases); Schneider & Jordan, *supra* note 9, at 157; Case/Comment, *supra* note 2, at 142-46.

[86] *See, e.g.*, Schneider, *supra* note 3, at 628.

[87] *See supra* notes 30-48 and accompanying text.

[88] *See, e.g.*, Terry v. State, 467 So. 2d 761, 763-64 (Fla. Dist. Ct. App.), *review denied*, 476 So. 2d 675 (Fla. 1985); Hawthorne v. State, 408 So. 2d 801, 807 (Fla. Dist. Ct. App.) (per curiam), *review denied*, 415 So. 2d 1361 (Fla. 1982); State v. Hodges, 239 Kan. 63, 72, 716 P.2d 563, 569 (1986); State v. Hundley, 236 Kan. 461, 467, 693 P.2d 475, 479 (1985); State v. Kelly, 97 N.J. 178, 207, 478 A.2d 364, 378 (1984); State v. Gallegos, 104 N.M. 247, 250, 719 P.2d 1268, 1271 (Ct. App. 1986); People v. Emick, 103 A.D.2d 643, 658, 481 N.Y.S.2d 552, 561 (1984); State v. Leidholm, 334 N.W.2d 811, 818-20 (N.D. 1983); Fielder v. State, 683 S.W.2d 565, 587-88 (Tex. Crim. App. 1985); State v. Allery, 101 Wash. 2d 591, 595, 682 P.2d 312, 315 (1984); Rittenmeyer, *supra* note 10, at 389 (describing jury instructions given in prosecution of Cynthia Hutto in South Carolina). *Compare* State v. Felton, 110 Wis. 2d 485, 509-10, 329 N.W.2d 161, 172 (1983) *and* State v. Hoyt, 21 Wis. 2d 284, 291, 128 N.W.2d 645, 649 (1964) (per curiam), where the court required that the defendant's conduct be measured against that of the reasonable battered woman in determining whether she was subjected to reasonable provocation and thus guilty of manslaughter rather than murder. For a more extensive discussion of this form of manslaughter, see *infra* notes 306-12 and accompanying text.

object to the use of a "reasonable battered woman" standard. Some characterize this standard as inherently oxymoronic: by definition, a woman who suffers from the battered woman syndrome does not act reasonably.[89] This argument misconceives the nature of the battered woman syndrome, perhaps due, at least in part, to the unfortunate use of the term "syndrome," which connotes some form of mental disability. In fact, the battered woman syndrome is not a form of mental disease.[90] Although some battered women may be depressed or suffer from some form of mental disease or emotional disturbance,[91] the battered woman syndrome itself is not classified as a psychiatric diagnostic category. Rather, the syndrome is "best understood as being descriptive of an identifiable group of symptoms that characterize the behavior and state of mind of abused women rather than being disease-like in character."[92] The syndrome describes the emotions and reactions that any woman who has experienced spousal abuse for an extended period of time is likely to exhibit.[93] Thus, a battered woman's "psychological state

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[89] *See, e.g.*, State v. Edwards, 420 So. 2d 663, 678 (La. 1982); State v. Necaise, 466 So. 2d 660, 664-65 (La. Ct. App. 1985); State v. Martin, 666 S.W.2d 895, 900 (Mo. Ct. App. 1984) (describing testimony of defendant's expert); C. EWING, *supra* note 8, at 56-57; Rittenmeyer, *supra* note 10, at 392; Rosen, *supra* note 10, at 15-16 n.20; Comment, *Women Who Kill*, *supra* note 10, at 440-42.

[90] *See, e.g.*, Ripley v. State, 590 P.2d 48, 53 n.8 (Alaska 1979) (describing testimony of defendant's expert); Hawthorne v. State, 408 So. 2d 801, 806-07 (Fla. Dist. Ct. App.) (per curiam), *review denied*, 415 So. 2d 1361 (Fla. 1982); State v. Hodges, 239 Kan. 63, 72, 716 P.2d 563, 569-70 (1986); People v. Emick, 103 A.D.2d 643, 655, 481 N.Y.S.2d 552, 559 (1984) (describing testimony of defendant's expert); State v. Kelly, 102 Wash. 2d 188, 198, 685 P.2d 564, 571 (1984); A. BROWNE, *supra* note 62, at 176; C. EWING, *supra* note 8, at 45-46; L. WALKER, *supra* note 18, at 75-76, 124; L. WALKER, *supra* note 16, at 20-21; Dvoskin, *supra* note 37, at 344; Gayford, *supra* note 2, at 32 (according to many psychiatrists, the battered woman syndrome is not a psychiatric disorder); Rosen, *supra* note 10, at 43 n.176; Note, *Battered Wife's Dilemma*, *supra* note 8, at 918; *cf.* Goodstein & Page, *supra* note 24, at 1042 (the battered woman syndrome "is not a diagnosis unto itself but, rather, cuts across a wide spectrum of underlying diagnostic categories and personalities"); Waits, *supra* note 3, at 283-84 (noting that battered women feel helpless and may have other psychological problems because they are battered; "[t]hey are not battered because they have problems"). *But see* Comment, *Women Who Kill*, *supra* note 10, at 440-42 (arguing that battered woman syndrome is a form of mental disease).

[91] *See* C. EWING, *supra* note 8, at 11-12; L. WALKER, *supra* note 18, at 82, 123; Gayford, *supra* note 2, at 25-26 (21 of 100 battered women studied had been treated for depression); Hilberman & Munson, *supra* note 21, at 464. *But cf.* L. WALKER, *supra* note 18, at 100 (battered women who had left their abusive husbands exhibited more signs of depression than those still involved in the relationship).

[92] People v. Torres, 128 Misc. 2d 129, 133, 488 N.Y.S.2d 358, 362 (Sup. Ct. 1985) (describing testimony of defendant's expert witness).

[93] *See* Ripley v. State, 590 P.2d 48, 53 n.8 (Alaska 1979) (describing testimony of

— while not 'normal' in the statistical sense — is not necessarily inconsistent with reasonable behavior."[94]

Some commentators argue that evaluating a battered woman's self-defense claim in light of the actions and perceptions of the reasonable battered woman distorts the inquiry by changing the objective standard into a wholly subjective one.[95] As noted above,[96] defining the reasonable person to include all of the particular defendant's characteristics, experiences, and weaknesses effectively creates a subjective standard because the jury will probably conclude that a "reasonable person," virtually identical to the defendant, would have acted exactly as the defendant did. Defining the reasonable person to include the characteristics of the reasonable battered woman should be avoided, the argument continues, "lest the rule of law be destroyed by self-serving individual[s] and factual idiosyncracies."[97]

This argument, however, ignores the fact that the current concept of the reasonable person is not strictly an objective one. The standard already includes the particular defendant's physical attributes and knowledge of the assailant's violent character.[98] Incorporating the defendant's status as a battered woman is not substantively different: the courts will not need to measure the defendant's conduct against that of the reasonable intoxicated person,[99] the reasonable hotheaded person,[100] or the reasonable coward[101] if the defendant in a particular case possesses any of those traits. Indeed, it may not be appropriate to evaluate the self-defense claim raised by a defendant who was intoxicated at the time of the crime by asking how the

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defendant's expert); State v. Felton, 110 Wis. 2d 485, 495, 329 N.W.2d 161, 165 (1983) (describing testimony of defendant's expert); Steinmetz, *supra* note 19, at 326.

[94] C. EWING, *supra* note 8, at 59.

[95] *See, e.g.*, Rittenmeyer, *supra* note 10, at 392-93; Rosen, *supra* note 10, at 41-42 n.170; Note, *Imperfect Self-Defense*, *supra* note 8, at 618-20; *cf.* Recent Development, 54 WASH. L. REV. 221, 228 (1978) (arguing that most courts evaluating self-defense claims are unwilling to take into account the defendant's psychological or learning disabilities).

[96] *See supra* note 80 and accompanying text.

[97] Rittenmeyer, *supra* note 10, at 393. For general criticism of the subjective test as too ambiguous and difficult to apply, see, *e.g.*, Fletcher, *supra* note 76, at 1305-06; Greenawalt, *supra* note 77, at 1918.

[98] *See supra* notes 81-83 and accompanying text.

[99] *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 55, at 457; Nygren v. State, 616 P.2d 20, 22 (Alaska 1980).

[100] *See, e.g.*, Kelman, *supra* note 79, at 637.

[101] *See, e.g.*, Teal v. State, 22 Ga. 75, 84 (1857); Fletcher, *supra* note 76, at 1291, 1293. *But see* State v. Thomas, 13 Ohio App. 3d 211, 213, 468 N.E.2d 763, 765 (1983) (timid, easily frightened person is not held to same standard as braver person).

reasonable intoxicated person would have acted under the circumstances.

The reasonable battered woman standard is different. Unlike traits such as hotheadedness, drunkenness, or cowardice, the traits characteristic of a battered woman are not attributes that the woman can reasonably be expected to control,[102] that evidence some sort of moral failure for which she can fairly be blamed,[103] or that the criminal law is designed to alter.[104] The battered woman typically has done nothing to bring on her husband's abuse. Therefore, she cannot justly be blamed for her status as a battered woman.[105]

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[102] *See* Fletcher, *supra* note 76, at 1291-93. One commentator has argued, however, that the traits characteristic of battered women should not be incorporated into the definition of the reasonable person because one's status as a battered woman is "acquire[d] more intentionally" than the other characteristics of the particular defendant that are included. Note, *Imperfect Self-Defense*, *supra* note 8, at 620. If this objection is based on the notion that some women intentionally seek out abusive relationships, the research rejecting the traditional characterizations of battered women as masochists provides a sufficient response. *See supra* notes 29-30 and accompanying text. Moreover, a woman's involvement in a battering relationship is accidental. *See* L. WALKER, *supra* note 18, at 76; *see also* State v. Heisler, 116 Wis. 2d 657, 662 n.6, 344 N.W.2d 190, 193 n.6 (Ct. App. 1983) (observing that a battered woman does not "choose her circumstances in the same sense that [one chooses] to become intoxicated"); *infra* notes 219-20 and accompanying text (noting that battered women usually do not become involved in successive abusive relationships).

On the other hand, if the argument is that once a woman has accidentally become involved in an abusive relationship, her status as a battered woman is a condition that she can somehow control or change, the commentator misunderstands the nature of the battered woman syndrome. After enduring a period of abuse over which she has no control, the battered woman reasonably comes to believe that she can do nothing to improve her life. *See supra* notes 19-21 and accompanying text.

[103] *See* Greenawalt, *supra* note 77, at 1916-18.

[104] *See* Kelman, *supra* note 79, at 637. In addition, Kelman raised an argument in a different context that could conceivably be applied to cases involving battered women. He observed that even though the criminal law is not attempting to deter impotence, the attribute of being impotent should not be incorporated into the definition of the reasonable person if, as a group, impotent men tend to be hypersensitive and therefore more prone to violence in situations that one would normally expect to confront. *See id.* This argument, however, cannot legitimately be extended to reject the use of the reasonable battered woman standard in appropriate cases. Most battered women are not more likely than the average person to act violently in normal day-to-day situations. Rather, their violent acts are usually limited to protecting themselves from abusive husbands. *See infra* notes 217-18 and accompanying text. When they act in self-defense, their use of force is justifiable and ought not be deterred. *See also infra* Part III(A).

[105] *See, e.g.*, State v. Hodges, 239 Kan. 63, 69, 716 P.2d 563, 567 (1986); C. EWING, *supra* note 8, at 88-89; J. FLEMING, *supra* note 18, at 81; A. JONES, *supra* note 1, at 296; D. MARTIN, *supra* note 22, at 49; M. PAGELOW, *supra* note 18, at 65-66; L. WALKER, *supra* note 16, at 29; WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 48; Eisenberg & Micklow, *supra* note 38, at 144 & n.61; Howard, *supra* note 2, at 76; Steinmetz, *supra* note 19, at 324; Walker, *supra* note 17, at 37.

For specific examples of events that provoke an abusive husband's violence, see Peo-

Accordingly, measuring a defendant's conduct against a reasonable battered woman standard would not defeat any of the goals of the criminal system. In fact, such an approach would serve the ends of justice by helping the jury properly determine what a reasonably prudent person would have done under the circumstances that confronted the defendant.[106]

Similarly, some commentators argue that evaluating the defendant's conduct according to that of the reasonable battered woman dramatically alters the nature of self-defense from a claim of justification to one of excuse.[107] A defendant's act is justified and should be encouraged if it was socially desirable; similar behavior under identical circumstances would likewise be justified.[108] On the other hand, the law excuses the defendant's act, even though it was wrong, if the defendant lacks culpability — that is, if the defendant acted as the result of some internal or external pressure and thus cannot properly be blamed for her conduct.[109] Self-defense is typically classified as a justification.[110]

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ple v. Bush, 84 Cal. App. 3d 294, 299, 148 Cal. Rptr. 430, 433-34 (1978) (defendant had previously been beaten when she accidentally burned the dinner, when she gave her husband a telephone message from someone whose name he did not recognize, and when she asked him to prepare his own food because she was ill); J. FLEMING, *supra* note 18, at 81 ("[W]hile he may beat her one night for putting the kids to bed too late, he may well turn around and beat her the next for putting them to bed too early."); A. JONES, *supra* note 1, at 296 ("A husband may beat his wife for overcooking an egg, or for undercooking it, for turning on the TV or for turning it off, for talking or for keeping still. Many battered women report that they are attacked while they sleep."); D. MARTIN, *supra* note 22, at 49 ("[S]he prepared a casserole instead of fresh meat for dinner; she wore her hair in a pony tail; she mentioned that she didn't like the pattern on the wallpaper."); WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 48; Hilberman & Munson, *supra* note 21, at 462 ("Violence erupted in any situation in which the husband did not immediately get his way. A commonly described pattern was for the husband to come home late after having been out with another woman and goad his wife into an argument which ended in violence."); *see also infra* text accompanying note 180.

[106] *See supra* text accompanying note 79.

[107] *See, e.g.*, Rosen, *supra* note 10, at 42-45; Comment, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253, 1271-74 (1986-1987).

[108] *See, e.g.*, Fletcher, *supra* note 76, at 1304-05; Rosen, *supra* note 10, at 18-21; Note, *Imperfect Self-Defense*, *supra* note 8, at 630-31. The necessity defense is an example of a defense typically categorized as a justification. *See, e.g.*, Fletcher, *supra* note 76, at 1282-88.

[109] *See, e.g.*, Fletcher, *supra* note 76, at 1276, 1303-04; Rosen, *supra* note 10, at 21-25; Note, *Imperfect Self-Defense*, *supra* note 8, at 630-31. Examples of defenses typically classified as excuses are insanity and duress. *See, e.g., id.* at 633.

[110] *See, e.g.*, Rosen, *supra* note 10, at 25; Note, *Imperfect Self-Defense*, *supra* note 8, at 632. For a discussion of the appropriateness of this characterization, see *infra* notes 297-304 and accompanying text.

Critics claim that by instructing the jury to consider the psychological traits characteristic of battered women, the inquiry shifts from justification to excuse because it can no longer be said that anyone who acted as the defendant did behaved appropriately.[111] Rather, the jury is being asked to acquit the defendant because she

> suffered from an identifiable psychological syndrome that caused her to assess the dangerousness of the situation in a different manner than an average, ordinary person . . . . [A]cquittal is dependent upon proving that [she] had . . . a disability that caused a mistaken, but reasonable, belief in the existence of circumstances that would justify self-defense.[112]

In addition to mislabelling the battered woman syndrome as a mental illness,[113] this argument misconstrues the nature of self-defense claims. Self-defense is a justification even though it encompasses cases where the defendant made a reasonable mistake concerning the nature of the danger confronting her.[114] Thus, the fact that a battered woman may have acted under a mistaken, but reasonable, apprehension of the danger posed by her abusive husband — that she did not do "the right thing" in some ideal sense — is not fatal to her claim of self-defense.[115] Moreover, the battered woman who maintains that she killed in self-defense is not arguing that she acted differently from the "average, ordinary person." Instead, her self-defense claim is the same as that made by other defendants: she acted just as the "average, ordinary person" in her circumstances would have acted. Hence, the battered woman who reasonably feels that she cannot escape her husband's violence except by using defensive force in a nonconfrontational setting may well have done "the right thing" by acting in self-defense.

Finally, some commentators maintain that measuring the defendant's conduct according to that expected of the reasonable battered

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[111] *See* Rosen, *supra* note 10, at 42.

[112] *Id.* at 43.

[113] *See supra* notes 90-93 and accompanying text.

[114] *See supra* note 72 and accompanying text.

[115] Although the battered woman who makes an honest and reasonable mistake about the nature of the danger facing her is nevertheless entitled to acquittal on self-defense grounds, the term "reasonable belief" is not meant to suggest that the defendant's apprehension is always, or even usually, misplaced. In many cases, the threat facing the battered woman is a real one, and the only way she can protect herself is to use defensive force in a nonconfrontational situation. *See, e.g.*, A. BROWNE, *supra* note 62, at 167 (referring to the battered woman's perception of helplessness as "simply good reality testing"). Thus, references to "reasonable belief" in this Article include cases where the danger is real, as well as those where the woman's fear is reasonable, but mistaken.

woman discriminates against male defendants, thereby violating the equal protection clause.[116] The standard is not gender-neutral, these commentators argue, because it includes the defendant's gender-related attributes.[117] However, the standard does not discriminate on the basis of gender simply because the victims of spousal abuse tend to be women.[118] Rather, the law must treat a battered woman's claim of self-defense like any self-defense claim: acquittal is appropriate if a reasonable person in her circumstances would have perceived and responded to the danger as she did. Thus, the battered woman does not receive favorable treatment merely because the reasonable person in her circumstances is a battered woman, any more so than does the defendant with a broken arm[119] or the blind defendant, whose conduct is measured against that of a reasonable person with those attributes.[120] In fact, any other approach impermissibly discriminates *against* the battered woman.

B. Imminence

Even though a battered woman's self-defense claim is evaluated according to the perceptions and behavior of a reasonable battered woman, the defendant may still be convicted if she was not in imminent danger at the time she killed her husband.[121] She may not use defensive force to retaliate for previous assaults or to protect against

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116 *See, e.g.*, Buda & Butler, *The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence*, 23 J. FAM. L. 359, 378-80 (1984-1985); Rittenmeyer, *supra* note 10, at 393-95; Rosen, *supra* note 10, at 33 n.126; Note, *Wife Abuse*, *supra* note 10, at 1731.

117 *See* Rosen, *supra* note 10, at 39 n.163; *see also* Crocker, *supra* note 9, at 151.

118 *See supra* note 2.

119 *See, e.g.*, Cook v. State, 194 Miss. 467, 473, 12 So. 2d 137, 139 (1943) (taking into consideration that defendant could use only one hand in defending himself).

120 *See* Meadows v. United States, 82 F.2d 881, 883, 885 (D.C. Cir. 1936) (taking into consideration that defendant had a wound in his leg and lung trouble); Bacom v. State, 317 So. 2d 148, 149 (Fla. Dist. Ct. App. 1975) (taking into account that defendant was partially disabled by arthritis); Commonwealth v. Pimental, 5 Mass. App. Ct. 463, 469, 363 N.E.2d 1343, 1349 (1977) (taking into account that defendant was "nauseated, fatigued and in a debilitated condition"); State v. Dunning, 8 Wash. App. 340, 341-42, 506 P.2d 321, 322 (1973) (taking into consideration that defendant was substantially smaller and recently had undergone a series of abdominal operations and thus feared blow to stomach).

121 *See* W. LAFAVE & A. SCOTT, *supra* note 55, at 458. Some jurisdictions use analogous approaches but are somewhat more flexible, requiring, for example, that the danger confronting the defendant be "immediate." *See, e.g.*, State v. Hundley, 236 Kan. 461, 466-68, 693 P.2d 475, 478-79 (1985). Some require that the use of defensive force be "immediately necessary" to protect the defendant "on the present occasion," State v. Kelly, 97 N.J. 178, 197, 478 A.2d 364, 373 (1984). The latter is the Model Penal Code standard. *See* MODEL PENAL CODE § 3.04(1) (Official Draft 1962).

anticipated assaults that are not imminent.[122] Therefore, the battered woman who kills her abusive husband after he has completed a beating,[123] after he has threatened to beat her again at some future time,[124] or after he has fallen asleep[125] may have difficulty persuading the jury and the court that she honestly and reasonably thought she was in imminent danger at the time of the killing.

A danger is "imminent" if it is "threatening to occur immediately; near at hand; [or] impending."[126] Moreover, the defendant's husband must have had the "present ability" to carry out his threats at the time of his death.[127] When a battered woman kills in a nonconfrontational setting, her husband's actions at that particular moment may not seem especially threatening in retrospect to an observer unfamiliar with the man's prior abusive behavior. Nevertheless, the jury's inquiry as to whether the battered woman honestly and reasonably feared imminent danger at the time she killed cannot end at the instant when the killing occurred. Rather, the jury must also consider the history of abuse in determining whether the woman reasonably feared an imminent threat. Significantly, the law requires only that the defendant's fear of imminent danger be honest and reasonable; her fear need not be accurate as well.[128] If the reasonableness of her belief is measured according to the perceptions of a reasonable person in her circumstances — a battered woman who has repeatedly been the victim of her husband's prior threats and violence — the jury might well find the imminence requirement satisfied even though the woman killed in a nonconfrontational setting.

For example, the battered woman's familiarity with her husband's violence may enable her to recognize the subtle signs that usually precede a severe beating.[129] Her husband's prior threats

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[122] *See, e.g.*, Acker & Toch, *supra* note 10, at 145; Comment, *The Battered Wife Syndrome: A Potential Defense to a Homicide Charge*, 6 PEPPERDINE L. REV. 213, 222 (1978).

[123] *See, e.g.*, cases cited *supra* note 59; *see also* C. EWING, *supra* note 8, at 48-49; Note, *Wife Abuse*, *supra* note 10, at 1721.

[124] *See, e.g.*, cases cited *supra* note 60; *see also* C. EWING, *supra* note 8, at 48-49.

[125] *See, e.g.*, cases cited *supra* note 61; *see also* C. EWING, *supra* note 8, at 47-48.

[126] State v. Huett, 340 Mo. 934, 950, 104 S.W.2d 252, 262 (1937) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY).

[127] *E.g.*, People v. Williams, 56 Ill. App. 2d 159, 166, 205 N.E.2d 749, 753 (1965); State v. Thomas, 66 Ohio St. 2d 518, 520 n.2, 423 N.E.2d 137, 139 n.2 (1981), *aff'd*, 474 U.S. 140 (1985); *see also* Rittenmeyer, *supra* note 10, at 391, 395 n.1 (citing state statutes to the same effect).

[128] *See supra* notes 72-73 and accompanying text.

[129] *See, e.g.*, State v. Hodges, 239 Kan. 63, 66, 716 P.2d 563, 566 (1986) (describing

and acts of violence are also important because the law permits swifter defensive action when the adversary is known to be violent.[130] Moreover, even if the woman kills her husband when he is only threatening her, rather than actually beating her, she knows from past experience that he is not merely making idle comments but is fully capable of carrying out his threats. Thus, the battered woman may reasonably fear imminent danger from her husband when others unfamiliar with the history of abuse would not.

Furthermore, many battered women who kill their husbands report that the situation confronting them at the time of the killing seemed different from the prior outbreaks of violence — the threat appeared more life-threatening than at any previous time.[131] The woman should be permitted to explain her reasons for that perception, and the jury can then evaluate its reasonableness.

A battered woman may reasonably fear imminent danger even when she kills a sleeping man. The rationale underlying the imminence requirement is to ensure that the defendant's use of defensive force was necessary. Where a threatened assault was not imminent, the attack might never have occurred, or the defendant might have been able to resort to other means to prevent it.[132] In the case of a battered woman, however, future violence is almost certain to oc-

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testimony of defendant's expert); State v. Gallegos, 104 N.M. 247, 250, 719 P.2d 1268, 1271 (Ct. App. 1986); L. WALKER, *supra* note 18, at 102; L. WALKER, *supra* note 16, at 88; WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 43, 44-45; Schneider, *supra* note 3, at 634; Steinmetz, *supra* note 19, at 324; Walker, Thyfault & Browne, *supra* note 32, at 4.

For examples of such cases, see United States v. Iron Shield, 697 F.2d 845, 846 (8th Cir. 1983); State v. Griffiths, 101 Idaho 163, 165, 610 P.2d 522, 524 (1980), *cert. denied*, 454 U.S. 1057 (1987); State v. Hundley, 236 Kan. 461, 468, 693 P.2d 475, 480 (1985); State v. Gallegos, 104 N.M. 247, 252, 719 P.2d 1268, 1273 (Ct. App. 1986); People v. Torres, 128 Misc. 2d 129, 131, 488 N.Y.S.2d 358, 360 (Sup. Ct. 1985); State v. Allery, 101 Wash. 2d 591, 595, 682 P.2d 312, 315 (1984); State v. Kelly, 33 Wash. App. 541, 543, 655 P.2d 1202, 1203 (1982), *rev'd*, 102 Wash. 2d 188, 685 P.2d 564 (1984).

[130] *See supra* notes 82-83 and accompanying text.

[131] *See, e.g.*, A. BROWNE, *supra* note 62, at 129-30; L. WALKER, *supra* note 18, at 40; WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 45 n.5; Jones, *supra* note 47, at 49.

For examples of such cases, see Smith v. State, 247 Ga. 612, 613, 277 S.E.2d 678, 679 (1981); People v. Davis, 33 Ill. App. 3d 105, 108, 337 N.E.2d 256, 259 (1975); People v. Torres, 128 Misc. 2d 129, 132, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985); State v. Felton, 110 Wis. 2d 485, 492, 329 N.W.2d 161, 164 (1983); J. TOTMAN, *supra* note 32, at 46 ("He had beaten me lots of times. That wasn't different. But this time, it seemed worse. I thought he was going to kill me. It seemed like him or me."); *id.* at 47.

[132] *See, e.g.*, State v. Kelly, 97 N.J. 178, 220 n.23, 478 A.2d 364, 385 n.23 (1984); W. LAFAVE & A. SCOTT, *supra* note 55, at 458; Rittenmeyer, *supra* note 10, at 391; Tiffany & Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DEN. L.J. 839, 846 (1975).

cur. The chances that her husband will suddenly decide to end his abusive treatment are negligible; in fact, the cycle of violence will probably continue at an escalated rate.[133] As one commentator aptly noted, "it makes little sense for the law to excuse the wife's killing if it occurs while she is being beaten, but to find her guilty of murder if she kills during a temporary respite between beatings."[134]

In addition, the battered woman may reasonably believe that any other efforts to avoid her husband's violence are futile. For a variety of reasons, she may reasonably feel that she cannot escape from her husband and that she cannot rely on the police for meaningful help.[135] Moreover, any attempt to defend herself while her husband is beating her is likely to be useless because of the substantial disparity in their size and strength[136] and because efforts to resist typically further infuriate the attacker.[137] Thus, the battered woman may come to believe that her only options are killing herself, letting her husband kill her, or killing him[138] — and, in addition, that her only opportunity to kill him is in a nonconfrontational setting.

Under these circumstances, the threat presented by her husband may reasonably appear imminent to the battered woman even though he has already finished beating her, has only threatened to attack her at some time in the future, or has even fallen asleep.[139]

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[133] *See supra* notes 16-18 and accompanying text. Although there is some disagreement, many psychologists are pessimistic about the success of treatment designed to control a batterer's violent behavior; the only solution may be termination of the marriage. *See* C. EWING, *supra* note 8, at 95; L. WALKER, *supra* note 18, at 8; L. WALKER, *supra* note 16, at 28-29, 245-48. Indeed, few abusive husbands will accept help. *See* Gayford, *supra* note 2, at 37; Hilberman & Munson, *supra* note 21, at 460; Snell, Rosenwald & Robey, *supra* note 29, at 108. *But see* R. LANGLEY & R. LEVY, *supra* note 18, at 201-02; Acker & Toch, *supra* note 10, at 154-55 & n.74; Waits, *supra* note 3, at 279, 291.

[134] Note, *Battered Wife's Dilemma*, *supra* note 8, at 929.

[135] *See supra* notes 29-48 and accompanying text.

[136] *See supra* note 84 and accompanying text.

[137] *See, e.g.*, R. LANGLEY & R. LEVY, *supra* note 18, at 122, 123; M. PAGELOW, *supra* note 18, at 67; L. WALKER, *supra* note 16, at 62, 98; Eisenberg & Micklow, *supra* note 38, at 145; Gayford, *supra* note 2, at 25; Schneider, *supra* note 3, at 632; Steinmetz, *supra* note 19, at 324.

[138] *See, e.g.*, Fennell v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985); State v. Anaya, 438 A.2d 892, 894 (Me. 1981) (describing testimony of defendant's expert).

[139] For example, a jury acquitted Deborah Davis, a battered woman who killed her sleeping husband after learning that "he was planning to build a coffin, wrap her in adhesive tape like a mummy and keep her alive but imprisoned beneath their bed." San Francisco Chronicle, July 3, 1980, at 5. He had threatened to keep her there forever, and she had discovered several parts of the apparatus he intended to use. *See* WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 45.

Another jury acquitted Cynthia Hutto, an abused woman who killed her sleeping

As the New Jersey Supreme Court noted:

> The [imminence] rule's presumed effect on an actor who reasonably fears that her life will soon be endangered by an imminent threat is to cause her to leave the danger zone, especially if, because of the circumstances, she knows she will be defenseless when that threat becomes imminent. The rule, in effect, tends to protect the life of both the potential aggressor and victim. If, however, the actor is unable to remove herself from the zone of danger (a psychological phenomenon common to battered women, according to the literature), the effect of the rule may be to prevent her from exercising the right of self-defense *at the only time it would be effective.*[140]

If the battered woman kills her husband at the one opportunity she reasonably believes she has to defend herself, her use of force at that time is necessary. If she reasonably believes that she has no alternative but to act in self-defense and the prospect of future violence is virtually certain, the threat she faces is, in a very real sense, imminent even though her husband is not attacking her at that precise moment. In such cases, the rationale underlying the imminence requirement is fully satisfied, even though the battered woman kills in a nonconfrontational setting.

C. Overt Act

In a minority of jurisdictions, a self-defense claim will succeed only if the victim committed some overt act at the time of the killing that reasonably put the defendant in fear of imminent danger.[141]

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husband after he gave her a loaded gun and told her "the only way they could resolve the situation was for one of them to kill the other." He also said that he was going to sleep and that "she should be gone when he awoke." *Id.* at 46. Because Hutto had nowhere to go, she knew that a beating was inevitable.

[140] 97 N.J. 178, 220 n.23, 478 A.2d 364, 385 n.23 (1984) (emphasis added); *see also* S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 733 (4th ed. 1983):

> In an English motion picture, a cuckolded husband imprisons and chains his wife's latest lover in an abandoned cellar with the announced intention of killing him after the passage of sufficient time for the stir over his disappearance to quiet down, probably several months. Must the intended victim wait until the final moment when the husband is about to commit the fatal act, or may he kill the husband in self-defense at any time during the period of imprisonment that he can succeed in laying hands on him?

Id; *see also* Tiffany & Anderson, *supra* note 132, at 846 ("the existence *vel non* of reasonable alternatives ought to be relevant to determining whether the threatened harm is imminent . . .").

[141] For a discussion of this doctrine in cases involving battered women who killed their husbands, see, *e.g.*, Langley v. State, 373 So. 2d 1267, 1271 (Ala. Crim. App. 1979); People v. Lucas, 160 Cal. App. 2d 305, 310, 324 P.2d 933, 936 (1958); People v.

A court that strictly interprets this requirement may instruct the jury to analyze only the specific instant when the killing occurred in evaluating a self-defense claim.[142] Indeed, even an explicit threat may not satisfy the overt act requirement[143] unless the assailant engaged in some attempt to carry out the threat. As a result, this requirement can be fatal to the self-defense claim of a battered woman who kills her husband in a nonconfrontational setting.

Such an inflexible interpretation of the overt act doctrine is unwarranted. Like the imminence requirement, proof of an overt act ensures that the threat facing the defendant was a real one. The assailant's overt act at the time of the killing indicates that a reasonable person would have feared that the assailant posed a danger of imminent harm.[144] However, where a battered woman presents evidence of a sustained history of abuse, thereby indicating the virtual certainty of future violence, the pattern of beatings should be sufficient to establish that the danger was real. By abusing her over the years, therefore, the defendant's husband has committed the "overt acts" necessary to put her in reasonable fear for her life.

Even if prior beatings are not deemed "overt acts," a battered woman can still reasonably perceive a threat of imminent danger sufficient to satisfy the overt act requirement in nonconfrontational settings. For example, given the history of abuse, a battered woman can reasonably fear danger when her husband has only threatened her verbally or has made a menacing gesture that would not appear aggressive to an unknowing bystander. Thus, in interpreting the overt act requirement, some courts have properly recognized that a verbal threat may be sufficient to lead a reasonable person to fear

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Dillon, 24 Ill. 2d 122, 125-26, 180 N.E.2d 503, 504-05 (1962); Fultz v. State, 439 N.E.2d 659, 662 (Ind. Ct. App. 1982); State v. Burton, 464 So. 2d 421, 426-29 (La. Ct. App.), *writ denied*, 468 So. 2d 570 (La. 1985); State v. Martin, 666 S.W.2d 895, 899-900 (Mo. Ct. App. 1984); State v. Leaphart, 673 S.W.2d 870, 873 (Tenn. Crim. App. 1983); State v. Walker, 40 Wash. App. 658, 662, 700 P.2d 1168, 1172 (1985).

[142] *See, e.g.*, People v. Dillon, 24 Ill. 2d 122, 125-26, 180 N.E.2d 503, 504 (1962) ("The question is . . . whether the evidence shows that, at this particular instant, her husband had made an unprovoked assault upon her which put her in reasonable fear of imminent death or great bodily harm which could be avoided only by stabbing him."); People v. White, 90 Ill. App. 3d 1067, 1072, 414 N.E.2d 196, 200 (1980) ("[T]he issue of self-defense should be determined by the trier of fact upon the evidence of what transpired during the 'particular instant' in which the death was caused.").

[143] *See, e.g.*, People v. Lucas, 160 Cal. App. 2d 305, 310, 324 P.2d 933, 936 (1958); Fultz v. State, 439 N.E.2d 659, 662 (Ind. Ct. App. 1982) (overt act requirement not satisfied by husband's threatening and pointing finger at defendant).

[144] *See, e.g.*, State v. Edwards, 420 So. 2d 663, 669 (La. 1982).

imminent danger.[145] As the Michigan Supreme Court observed, the battered woman who kills her husband following a threat may reasonably believe that her husband has not "abandoned his declared purpose to kill her."[146]

Furthermore, a jury searching for an overt act must look beyond the immediate instant when the killing occurred; it must consider the battered woman's prior experience with her husband. Otherwise, the jury cannot accurately determine whether a reasonable person in the defendant's circumstances would have feared imminent danger based on her husband's conduct at the time of the killing.[147] In fact, any other approach would be inconsistent with the rationale for permitting a victim to resort to defensive force more quickly when her adversary is known to be violent.[148] Thus, just as the battered woman who kills in a nonconfrontational setting can prove that the threat she feared was an imminent one, she can also demonstrate that her husband engaged in the requisite overt acts.

D. Reasonable Force

A defendant's self-defense claim will succeed only if the degree of force used was reasonably related to the degree of harm threatened.[149] As a result, proof that a battered woman used more force than necessary to protect herself undermines her claim of self-defense.

Battered women charged with killing their husbands have almost invariably used "deadly force" — that is, force that was intended to cause death or serious bodily harm or that the defendant knew cre-

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[145] *See, e.g.*, State v. Edwards, 420 So. 2d 663, 670 (La. 1982) (overt act requirement satisfied where husband threatened the defendant and had the same look on his face as he had had on a previous occasion when he had tried to "cut [her] throat"); State v. Martin, 666 S.W.2d 895, 900 (Mo. Ct. App. 1984); State v. Thomas, 66 Ohio St. 2d 518, 520 n.2, 423 N.E.2d 137, 139 n.2 (1981); State v. Leaphart, 673 S.W.2d 870, 873 (Tenn. Crim. App. 1983); State v. Walker, 40 Wash. App. 658, 663, 700 P.2d 1168, 1172 (1985).

[146] People v. Giacalone, 242 Mich. 16, 22, 217 N.W. 758, 760 (1928) (reversing battered woman's conviction on the ground that she was erroneously barred from introducing evidence concerning her husband's prior threats and assaults because he had not committed any "overt act" at time of the killing).

[147] *See, e.g.*, State v. Wanrow, 88 Wash. 2d 221, 233-36, 559 P.2d 548, 555-56 (1977), and State v. Crigler, 23 Wash. App. 716, 718-19, 598 P.2d 739, 740-41 (1979) (finding error where the trial judge's instruction to the jury regarding the overt act requirement limited the jury's consideration to only those acts or circumstances at the time of or immediately before the killing).

[148] *See supra* notes 82-83 and accompanying text.

[149] *See generally* W. LAFAVE & A. SCOTT, *supra* note 55, at 455.

ated a substantial risk of death or serious bodily harm.[150] Deadly force is not justified unless the defendant reasonably believed that her adversary was about to kill her or inflict serious bodily harm.[151] Therefore, as a general rule, a deadly weapon may not be used in self-defense when the assailant is unarmed.[152] Because a battered woman's husband is often unarmed at the time she kills him,[153] this doctrine at times has defeated battered women's self-defense claims.[154]

Notwithstanding this principle, current law permits the jury to find that a battered woman used a reasonable amount of force even when she confronted her unarmed husband with a deadly weapon. Most jurisdictions recognize that, at least in some circumstances, an assailant's fists can be deadly weapons, thus permitting the victim of the attack to use deadly force to defend herself. As one appellate court noted, "[i]t is a firmly established rule that the aggressor need not have a weapon to justify one's use of deadly force in self-defense, and that a physical beating may qualify as such conduct that could cause great bodily harm."[155]

This approach is especially appropriate where the parties' size, strength, or physical condition differ substantially, as is usually true in confrontations between a man and a woman.[156] As the Oklahoma Criminal Court of Appeals observed:

> [I]t cannot be said to be true in all cases where fists are used in making an attack upon another that the person attacked would not be legally justified in the use of a deadly weapon. . . . There may be such a difference in the size of the parties involved or disparity in their ages or physical condition which would give the person assaulted by fists reasonable grounds to apprehend danger of great bodily harm and thus legally justified in repelling the assault by the use of a deadly weapon. It is conceivable that a man might be so brutal in striking a woman with his fists as to

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150 *See id.*

151 *See id.* at 456.

152 *See id.*

153 *See, e.g.*, Mullis v. State, 248 Ga. 338, 339-40, 282 S.E.2d 334, 337-38 (1981); People v. Davis, 33 Ill. App. 3d 105, 110, 337 N.E.2d 256, 260 (1975); *see also* C. EWING, *supra* note 8, at 49; Note, *Imperfect Self-Defense*, *supra* note 8, at 623; Note, *Wife Abuse*, *supra* note 10, at 1720-21.

154 *See* WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 43.

155 People v. Reeves, 47 Ill. App. 3d 406, 411, 362 N.E.2d 9, 13 (1977) (citations omitted); *see also, e.g.*, Meadows v. United States, 82 F.2d 881, 884-85 (D.C. Cir. 1936); Gabler v. State, 177 Ga. App. 3, 7, 338 S.E.2d 469, 472 (1985); State v. Kelly, 97 N.J. 178, 204-05, 478 A.2d 364, 377 (1984); State v. Painter, 27 Wash. App. 708, 713, 620 P.2d 1001, 1004 (1980).

156 *See supra* note 84 and accompanying text.

cause her death.[157]

Thus, the factfinder must consider the relative size and strength of the parties to determine not only whether the defendant reasonably feared her assailant but also whether she used a reasonable amount of force.

A woman is often at a further disadvantage in defending herself against a man because she is unfamiliar with hand-to-hand combat.[158] She is likely to have had little experience with self-defense or fist fighting and, therefore, typically cannot defend herself effectively without a weapon. As a result, a battered woman may reasonably believe that she cannot protect herself from her unarmed husband unless she uses a weapon.

Moreover, a battered woman's prior experiences with her husband's violence may provide tangible evidence that he is able to cause her serious bodily injury sufficient to permit her to respond with deadly force. He may have a collection of deadly weapons that he has used or threatened to use against her in the past.[159] Even if her husband has never armed himself before attacking her, the battered woman may be well aware of the serious injuries that he can inflict without a weapon.[160] By hitting, punching, and kicking her, he may have broken her bones or teeth, choked her until she was unconscious, produced internal bleeding, fractured her ribs, caused a miscarriage, or inflicted other injuries that required hospitaliza-

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[157] Easterling v. State, 267 P.2d 185, 188 (Okla. Crim. App. 1954) (citation omitted); *see* 40 AM. JUR. 2D *Homicide* § 159, at 447 (1968); 40 C.J.S. *Homicide* § 131, at 1019-20 (1944); *see also, e.g.*, Cook v. State, 194 Miss. 467, 473, 12 So. 2d 137, 138 (1943); Kress v. State, 176 Tenn. 478, 488, 144 S.W.2d 735, 738 (1940); State v. Painter, 27 Wash. App. 708, 713, 620 P.2d 1001, 1004 (1980); Schneider, *supra* note 3, at 633 (noting that "the ordinary injury suffered by a man in a fist fight with another man is different from the ordinary injury suffered by a woman being abused by a man").

[158] *See supra* note 85 and accompanying text.

[159] *See, e.g.*, L. WALKER, *supra* note 18, at 42. For examples of such cases, see Ripley v. State, 590 P.2d 48, 50 (Alaska 1979); People v. Welborn, 242 Cal. App. 2d 668, 671, 51 Cal. Rptr. 644, 646 (1966); Ibn-Tamas v. United States, 407 A.2d 626, 630 & n.8 (D.C. 1979); Terry v. State, 467 So. 2d 761, 763 (Fla. Dist. Ct. App.), *review denied*, 476 So. 2d 675 (Fla. 1985); Strong v. State, 251 Ga. 540, 541, 307 S.E.2d 912, 913 (1983); People v. Reeves, 47 Ill. App. 3d 406, 411, 362 N.E.2d 9, 11 (1977); State v. Osbey, 238 Kan. 280, 281-82, 710 P.2d 676, 677-78 (1985); State v. Necaise, 466 So. 2d 660, 662-63 (La. Ct. App. 1985); State v. Guido, 40 N.J. 191, 195, 191 A.2d 45, 47-48 (1963); State v. Gallegos, 104 N.M. 247, 250-51, 719 P.2d 1268, 1271-72 (Ct. App. 1986); People v. Torres, 128 Misc. 2d 129, 131, 488 N.Y.S.2d 358, 360 (Sup. Ct. 1985); State v. Moore, 72 Or. App. 454, 457, 695 P.2d 985, 986, *review denied*, 299 Or. 154, 700 P.2d 251 (1985); Commonwealth v. Helm, 485 Pa. 315, 320, 402 A.2d 500, 503 (1979); State v. Hill, 287 S.C. 398, 399, 339 S.E.2d 121, 121 (1986); Kress v. State, 176 Tenn. 478, 480, 144 S.W.2d 735, 736 (1940).

[160] *See, e.g.*, People v. Reeves, 47 Ill. App. 3d 406, 412, 362 N.E.2d 9, 14 (1977).

tion, sutures, or even surgery.[161]

In one case, for example, a defendant's abusive husband had previously broken her ankle; twisted her hand so that she needed a cast and then surgery; kicked her elbow and dislocated it; struck her face with so much force that her eyes and mouth were swollen and she could not see or eat; struck her breast, requiring surgery to remove a knot; and thrown her across a chair, causing four fractured ribs.[162] In another case, the defendant's husband had on prior occasions broken her jaw; kicked her down the stairs; pushed her down on icy pavement, causing a cut in her knee that required sixty-three stitches; and "pushed her into the kitchen and tried to drown her in the kitchen sink by running water up her nose."[163] While not all of

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[161] *See, e.g.*, L. WALKER, *supra* note 18, at 26; Gayford, *supra* note 2, at 23 (injuries suffered by battered women surveyed included fractured ribs, noses, jaws, teeth, and other bone fractures; dislocated jaws and shoulders; retinal damage; and miscarriages); Hilberman & Munson, *supra* note 21, at 462 (injuries included multiple bruises, black eyes, fractured ribs, subdural hematomas, detached retinas, abortions and premature birth, and "[s]trangling and choking until consciousness was impaired"). In fact, one commentator notes that most women who are killed by their husbands are not stabbed or shot but rather are beaten or kicked to death. *See* A. JONES, *supra* note 1, at 300.

[162] *See* People v. White, 90 Ill. App. 3d 1067, 1069-70, 414 N.E.2d 196, 198 (1980).

[163] State v. Hodges, 239 Kan. 63, 65, 716 P.2d 563, 565 (1986); *see id.* at 67-68, 716 P.2d at 566-67. For other examples of injuries inflicted on battered women, see United States v. Cebian, 774 F.2d 446, 447 (11th Cir. 1985) (per curiam) (prior injuries included ruptured spleen, fractured jaw, fingers, and ribs, and two broken noses); Meeks v. Bergen, 749 F.2d 322, 324 (6th Cir. 1984) (prior assault had rendered defendant unconscious); United States v. Iron Shield, 697 F.2d 845, 847 (8th Cir. 1983) (defendant's husband had previously "knocked her to the ground and kicked her repeatedly in the groin," causing her boots to fill with blood and resulting in a four-day hospital stay; other injuries included lost teeth and black eyes); People v. Bush, 84 Cal. App. 3d 294, 300, 148 Cal. Rptr. 430, 434 (1978) (while defendant was pregnant, husband "struck her in the stomach with his fist with sufficient force to cause her to experience abdominal cramping and to vomit blood"); People v. Cameron, 53 Cal. App. 3d 786, 788, 126 Cal. Rptr. 44, 45 (1975) (woman's nose was broken, her ear "was cut requiring considerable surgical intervention," and her face and body "bore marks of trauma"); Ibn-Tamas v. United States, 407 A.2d 626, 629 (D.C. 1979) (defendant's husband had "pulled [defendant] from her chair onto a cement porch and caused her to lose consciousness by putting his knee to her neck"); Borders v. State, 433 So. 2d 1325, 1326 (Fla. Dist. Ct. App. 1983) (although husband usually beat defendant only with his fists, some of his assaults were so violent that others intervened because they feared that defendant would be killed); State v. Griffiths, 101 Idaho 163, 165, 610 P.2d 522, 524 (1980), *cert. denied*, 454 U.S. 1057 (1981) (on previous occasion, husband had choked defendant "to near insensibility"); People v. Reeves, 47 Ill. App. 3d 406, 408, 362 N.E.2d 9, 11 (1977) (prior beatings had been so severe that hospitalization was required); State v. Hundley, 236 Kan. 461, 461-2, 463, 693 P.2d 475, 475-76, 477 (1985) (defendant's husband had knocked out several of defendant's teeth; broken her nose at least five times; repeatedly broken her ribs; hidden her insulin or diluted it with water, sending her into diabetic comas; and beaten her so that her face "bled profusely and required stitches"); State v. Seelke, 221 Kan. 672, 673, 561 P.2d 869, 871 (1977) (defendant's husband had strangled

these injuries are immediately life-threatening, the law considers them severe enough to constitute serious bodily harm[164] that may,

her until she passed out); State v. Lynch, 436 So. 2d 567, 568 (La. 1983) (defendant's husband had beaten her with a bat so that she was unable to walk for several weeks and had knocked out one of her teeth); State v. Anaya, 438 A.2d 892, 893 (Me. 1981) (defendant required medical treatment for a concussion and for face and head injuries); State v. Gallegos, 104 N.M. 247, 250-51, 719 P.2d 1268, 1271-72 (Ct. App. 1986) (when defendant was pregnant, her husband "picked her up and threw her against a wall, causing the premature birth of the child"; prior beatings had left scars near her eye and on her nose and forehead); People v. Emick, 103 A.D.2d 643, 651-52, 481 N.Y.S.2d 552, 557 (1984) (defendant's husband had beaten her head against a tree; stabbed her in the foot with a pencil, requiring a trip to the hospital to remove part of the pencil; beaten her with a piece of wood, repeatedly striking her head and breaking one of her toes; placed an electric immersion coil in her vagina to prevent her from having intercourse with other men; and hit her in the head with sufficient force to cause her to black out); People v. Powell, 102 Misc. 2d 775, 777, 424 N.Y.S.2d 626, 628 (1980), *aff'd*, 83 A.D.2d 719, 442 N.Y.S.2d 645 (1981) (defendant had been confined in several hospitals as a result of her husband's beatings); State v. Thomas, 13 Ohio App. 3d 211, 212, 468 N.E.2d 763, 764 (1983) (defendant had been hospitalized three times after beatings); Easterling v. State, 267 P.2d 185, 187 (Okla. Crim. App. 1954) (defendant had been beaten so badly that she could not see); State v. Leaphart, 673 S.W.2d 870, 872 (Tenn. Crim. App. 1983) (defendant's husband had broken her arm, forcibly injected her with drugs, and blackened her eyes); State v. Felton, 110 Wis. 2d 485, 489-90, 329 N.W.2d 161, 163 (1983) (defendant's husband had beaten her during each of her six pregnancies, causing a miscarriage on one occasion; he had also choked her while she was asleep, struck her with his fist with sufficient force to break her upper denture, and broken several of her ribs).

[164] *See, e.g.*, People v. Burroughs, 35 Cal. 3d 824, 831, 201 Cal. Rptr. 319, 323, 678 P.2d 894, 898 (1984) (defining serious bodily injury for purposes of setting penalties for various batteries as "[a] serious impairment of physical condition, including, but not limited to the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement" (quoting CAL. PENAL CODE § 243(e)(5) (West Supp. 1987)) and also noting that "great" bodily injury, essentially equivalent to "serious" bodily injury, has been defined for purposes of enhancing felony punishments as "significant or substantial physical injury," which includes a broken jaw or hand (quoting CAL. PENAL CODE § 12022.7 (West 1982)); People v. Reed, 695 P.2d 806, 808 (Colo. Ct. App. 1984), *cert. denied*, 701 P.2d 603 (Colo. 1985) (defining serious bodily harm for purposes of self-defense to include injuries that involve substantial "risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of body"); Gabler v. State, 177 Ga. App. 3, 7, 338 S.E.2d 469, 472 (1985) (upholding defendant's conviction for aggravated assault, which requires finding that defendant used force that was likely to or did result in serious bodily harm, where defendant used only fists, but victim could not breathe and was hospitalized under intensive care); State v. Napoleon, 2 Haw. App. 369, 371, 633 P.2d 547, 549 (1981) (upholding defendant's conviction for third degree assault, which requires finding that defendant used deadly force, where defendant used a baseball bat with sufficient force to break victim's arm); Barbee v. State, 267 Ind. 299, 301, 369 N.E.2d 1072, 1073 (1977) (upholding conviction of aggravated assault and battery, which requires finding of great bodily harm, where victim was knocked unconscious, hospitalized for X-rays and then released, and suffered headaches for several months thereafter; also noting that great bodily harm "need not consist of permanent or disabling injury" but includes any

therefore, be repelled by deadly force.

Based on her prior experience with her husband's brutality and the disparity in size, strength, and familiarity with self-defense techniques, a battered woman may reasonably conclude that her husband can kill her or cause serious bodily harm without using a weapon and that her only means of defense is to arm herself.[165] Accordingly, her self-defense claim cannot be defeated on the grounds that at the time she killed, she had a gun and her husband did not,[166] or that she did not appear to suffer any injuries immediately prior to his death.[167]

> Where great bodily violence is being inflicted, or threatened, upon a person, by one much stronger and heavier, with such determined energy that the person assaulted may reasonably apprehend death or great bodily injury, [s]he is justified in using a deadly weapon upon [her] assailant. It makes no difference whether the bodily violence is being, or about to be, inflicted with a club, or a rock, or with the fists of an overpowering adversary of superior strength and size.[168]

"serious and violent injury which could reasonably result in the loss of health, life, or limb"); State v. Currie, 400 N.W.2d 361, 365 (Minn. App. 1987) (upholding defendant's conviction for first-degree assault, which requires a finding that defendant caused great bodily harm, where defendant whipped children with an extension cord until their backs were bleeding, leaving scars that were still evident two years later); State v. Kelly, 97 N.J. 178, 219, 478 A.2d 364, 384 (1984) (noting that jury could infer that husband's prior abuse of defendant created risk of death or serious bodily harm, where he had choked, bitten, and used his fists on her and had threatened to kill her); State v. Painter, 27 Wash. App. 708, 711-14, 620 P.2d 1001, 1003-04 (1980) (disapproving of jury instruction defining great bodily harm for purposes of self-defense as "an injury of a more serious nature than an ordinary striking with the hands or fists" because, depending on the size and strength of the parties, that amount of violence can inflict serious injury).

[165] *See, e.g.*, State v. Lynch, 436 So. 2d 567, 569 (La. 1983); Commonwealth v. Helm, 485 Pa. 315, 326, 402 A.2d 500, 506 (1979); R. LANGLEY & R. LEVY, *supra* note 18, at 196.

[166] In addition, it is important to realize that although the battered woman may be armed, she may be too unfamiliar with the weapon's operation to be able to solely rely on it to fend off her husband's violence. *See* State v. Lynch, 436 So. 2d 567, 569 (La. 1983).

[167] Moreover, the defendant's husband may have threatened additional abuse so that her actual injuries do not necessarily reflect the amount of force threatened. *See* People v. Reeves, 47 Ill. App. 3d 406, 411, 362 N.E.2d 9, 13 (1977). Indeed, the bruises inflicted on battered women often cannot be easily seen. *See id.* at 410, 362 N.E.2d at 13 (most of the defendant's bruises would not be visible unless she shaved her head); D. MARTIN, *supra* note 22, at 49 (husbands often direct their attacks to the parts of the woman's head where bruises or bumps will be covered by hair); Gayford, *supra* note 2, at 23. *But see* State v. Necaise, 466 So. 2d 660, 669 (La. Ct. App. 1985) (finding it relevant that defendant had no bruises).

[168] Kress v. State, 176 Tenn. 478, 488, 144 S.W.2d 735, 738 (1940) (quoting Bitner v. State, 130 Tenn. 144, 157-58, 169 S.W. 565, 568 (1914)).

Thus, if a battered woman reasonably perceives that her husband can inflict serious bodily injury with his bare hands, she is entitled to use deadly force to protect herself.

E. The Initial Aggressor Rule

The initial aggressor in a conflict is typically prohibited from resorting to self-defense against her adversary unless she first withdraws from the confrontation.[169] This initial aggressor rule is designed to ensure that self-defense is used only to protect against a threat of unlawful force. Therefore, if her adversary is lawfully trying to defend himself, the initial aggressor may not respond with defensive force.[170]

This rule has at times defeated a battered woman's self-defense claim on the theory that the woman provoked her husband's violence.[171] The trier of fact may find it incomprehensible that a man would so severely and arbitrarily abuse his wife and may conclude, therefore, that the woman somehow brought about the abuse by provoking her husband.[172] This conclusion is unwarranted; in fact, the husband typically beats his wife without any rational justification.[173]

Even if the defendant manages to disabuse the jury of that myth, the initial aggressor rule may make a self-defense claim seem implausible if a battered woman kills her husband in a nonconfrontational situation. In such cases, the battered woman appears to be

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[169] *See* W. LAFAVE & A. SCOTT, *supra* note 55, at 459.

[170] *See id.* An exception to the initial aggressor rule is recognized in situations where the initial aggressor uses only nondeadly force, but the other party to the conflict responds with deadly force. Under those circumstances, the latter party is using unlawful force, and the initial aggressor may act to defend herself. *See id.*

[171] *See, e.g.*, United States v. Iron Shield, 697 F.2d 845, 848 (8th Cir. 1983); People v. Moore, 43 Cal. 2d 517, 524, 275 P.2d 485, 490 (1954); State v. Edwards, 420 So. 2d 663, 682 (La. 1982) (Sexton, J., dissenting); State v. Martin, 666 S.W.2d 895, 899 (Mo. Ct. App. 1984); State v. Walker, 40 Wash. App. 658, 663-64, 700 P.2d 1168, 1172-73 (1985).

[172] *See, e.g.*, State v. Hodges, 239 Kan. 63, 69, 716 P.2d 563, 567 (1986); State v. Kelly, 97 N.J. 178, 192, 478 A.2d 364, 370 (1984); D. MARTIN, *supra* note 22, at 6; L. WALKER, *supra* note 16, at 29; WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 48; Acker & Toch, *supra* note 10, at 154 n.72 (noting that the description of the battered woman syndrome does not account for the husband's perspectives or indicate the defendant's possible contributions to the degenerating relationship).

Even if this belief were correct as an empirical matter, it would not justify labelling the woman as the aggressor unless she brought on the abuse by threatening her husband with physical harm or otherwise acting in an aggressive manner. *See infra* notes 178-79 and accompanying text.

[173] *See supra* note 105 and accompanying text.

the initial aggressor at the time of the killing. As explained in Part II(B), however, a battered woman may kill in a nonconfrontational setting because she reasonably believes it is the only opportunity she realistically has to protect herself from her husband's repeated attacks.[174] Under those circumstances, she is not the initial aggressor; she is simply using her one chance to defend herself.

Because of the battered woman's familiarity with her husband's violence, she may testify that she knew her husband would beat her because of something she had done or failed to do.[175] For example, some women may fight back even though they know resistance will incite their husbands to greater brutality.[176] Nevertheless, a woman should not lose her self-defense claim simply because she knows her husband will react violently when she tries to defend herself during a beating, or cooks a meal or wears clothes that her husband does not like.

Although a battered woman's familiarity with her husband's violence may lead her to predict that certain actions on her part will enrage him, that knowledge alone does not make her the initial aggressor.[177] One acts as the initial aggressor only when she commits "an affirmative *unlawful* act reasonably calculated to produce an affray foreboding injurious or fatal consequences."[178] Therefore, so

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[174] *See* People v. Moore, 43 Cal. 2d 517, 529, 275 P.2d 485, 493 (1954); *see also supra* notes 135-140 and accompanying text.

[175] *See, e.g.*, L. WALKER, *supra* note 18, at 171; *see also supra* note 129 and accompanying text.

[176] *See* Waits, *supra* note 3, at 296-97; *see also supra* note 137 and accompanying text.

[177] *See, e.g.*, King v. United States, 177 A.2d 912, 913 (D.C. 1962), and Sawyer v. State, 161 Ga. App. 479, 479-83, 288 S.E.2d 108, 109-11 (1982) (defendants did not lose their right to use self-defense by continuing to associate with violent acquaintances).

[178] United States v. Peterson, 483 F.2d 1222, 1233 (D.C. Cir.), *cert. denied*, 414 U.S. 1007 (1973) (emphasis added); *see also* State v. Theroff, 25 Wash. App. 590, 595-96, 608 P.2d 1254, 1257, *aff'd*, 95 Wash. 2d 385, 622 P.2d 1240 (1980); 40 AM. JUR. 2D *Homicide* § 302, at 435 (1968).

> [B]efore an act will cause a forfeiture of the fundamental right of self-defense, it must be an act such as is wilfully and knowingly calculated to lead to conflict. Acts that merely afford an opportunity for conflict, or that do not proximately contribute to the conflict, will not have this effect. An inconsiderate, yet not unlawful act, or a mere preparation to commit a wrongful act, where there is no accompanying demonstration which indicates the wrongful purpose, will not be deemed a forfeiture of the right of self-defense.

Id. (footnotes omitted).

For specific examples, see *Peterson*, 483 F.2d at 1234 (observing that defendant is not the initial aggressor just because she "arms [her]self in order to proceed upon [her] normal activities, *even if [s]he realizes that danger may await [her]*") (quoting Rowe v. United States, 370 F.2d 240, 241 (D.C. Cir. 1966)) (emphasis added); People v. Townes, 391 Mich. 578, 592, 218 N.W.2d 136, 142 (1974) (one who merely created a threat to

long as she did not act in an aggressive or threatening manner,[179] the initial aggressor rule does not apply because her husband's violence does not represent the lawful use of defensive force.

It may be, however, that the battered woman not only knew that certain behavior would bring on her husband's violence but also acted purposely to incite him. In some cases, a battered woman may actually provoke an assault because she knows severe violence is inevitable, and she prefers to accelerate the beating so as to progress to the stage where her husband will be loving and contrite.[180] Even in these cases, however, the battered woman's behavior should not necessarily defeat her self-defense claim. If she has not engaged in any unlawful act, she cannot be deemed the initial aggressor. Indeed, even if her conduct was aggressive and unlawful — if, for example, she intentionally provoked a beating by threatening her husband with a weapon — it would distort the purposes of the initial aggressor rule to consider her the aggressor when her sole purpose was to expedite an impending assault by her husband.

Even when the battered woman was not the aggressor in the conflict resulting in the death of her husband, some commentators argue that permitting the woman to broaden the time frame at trial so that the jury can consider the history of her relationship with her husband also opens the door to evidence of prior violent incidents when she *was* the aggressor.[181] Certainly, the battered woman's

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property by refusing to leave defendant's store was not the initial aggressor); Luck v. State, 588 S.W.2d 371, 375 (Tex. Crim. App. 1979), *cert. denied*, 446 U.S. 944 (1980) (refusing to characterize defendant as the initial aggressor in confrontation with angry husband merely because defendant had engaged in illicit relationship with the man's wife). *But see* Barger v. State, 235 Md. 556, 202 A.2d 344 (1964) (reaching opposite conclusion from *Luck*).

[179] Aggressive or threatening words, in addition to acts, may be sufficient to invoke the initial aggressor rule. *See* R. PERKINS & R. BOYCE, CRIMINAL LAW 1132 (3d ed. 1982) (Although the intentional use of words "so vile that they are calculated to result in combat, and do so result" makes one the initial aggressor in a conflict, the privilege to use self-defense is not lost if one uses "words neither intended nor likely to result in physical violence . . ., even if they unexpectedly have this consequence."). *But see* United States v. Peterson, 483 F.2d 1222, 1230 (D.C. Cir.), *cert. denied*, 414 U.S. 1007 (1973) ("mere words" do not constitute aggression).

[180] *See, e.g.*, State v. Kelly, 97 N.J. 178, 193, 478 A.2d 364, 371 (1984); L. WALKER, *supra* note 18, at 102; L. WALKER, *supra* note 16, at 60; Frieze, *supra* note 16, at 103; Hilberman, *supra* note 16, at 1339; Waits, *supra* note 3, at 296; *see also supra* note 17 and accompanying text (describing third phase of cycle of violence). If, however, the battered woman provokes a beating because she wishes to respond with deadly force and thus kill her husband, the initial aggressor rule will defeat her self-defense claim. *See, e.g.*, R. PERKINS & R. BOYCE, *supra* note 179, at 1131, 1132 n.14.

[181] *See, e.g.*, Rosen, *supra* note 10, at 39 n.161; Note, *Imperfect Self-Defense*, *supra* note 8, at 625-26 & n.49. For examples of such cases, see People v. Moore, 43 Cal. 2d

prior acts of provocation or violence may help the jury determine which party was the aggressor in the final conflict. If one of the parties acted aggressively or violently on prior occasions, that person is more likely to have been the aggressor at the time in question.[182] Otherwise, however, the battered woman's prior aggressive acts are not relevant in deciding whether she lost the right to defend herself by virtue of the initial aggressor rule. She is not barred from defending herself forever simply because she provoked her husband's violence at some time in the past.[183]

F. The Retreat Doctrine

In some jurisdictions, a defendant must retreat from her assailant before using deadly force in self-defense. Although at first glance the retreat rule might appear to create another obstacle to a battered woman's self-defense claim, the current law governing retreat should not defeat her defense in most cases.

The majority of jurisdictions do not even follow the retreat rule. In those jurisdictions, one may "stand her ground" and use deadly force in self-defense even if she could retreat from her assailant with complete safety.[184] This no-retreat approach ensures that the victim of an attack is not forced to yield her rights or act in a cowardly manner.[185]

A significant minority of jurisdictions, however, do adhere to the

517, 534, 275 P.2d 485, 496 (1954) (Schauer, J., dissenting); State v. Kelly, 102 Wash. 2d 188, 204-06, 685 P.2d 564, 574-75 (1984) (Dore, J., dissenting).

[182] *See, e.g.*, Meeks v. Bergen, 749 F.2d 322, 328 (6th Cir. 1984); State v. Jacoby, 260 N.W.2d 828, 837 (Iowa 1977); State v. Edwards, 420 So. 2d 663, 670-71 (La. 1982).

[183] *See* People v. Reeves, 47 Ill. App. 3d 406, 411, 362 N.E.2d 9, 13 (1977) (although battered woman had previously threatened to kill her husband, court concludes that she had abandoned that intent at time of the killing and was acting in self-defense); State v. Brent, 347 So. 2d 1112, 1116 (La. 1977) (the relevant time for determining which of the parties to a conflict was the initial aggressor is at the beginning of the particular confrontation in question).

This argument does not undermine the battered woman's efforts to present evidence of her husband's prior assaults in order to prove that he was the aggressor in the final conflict and that she honestly and reasonably feared that he would harm her. The same type of evidence concerning the woman's prior violence is equally admissible for the same purposes, but it may not be used to demonstrate that, by provoking her husband at some point in the past, the battered woman forfeited her right of self-defense for all time.

[184] *See* W. LAFAVE & A. SCOTT, *supra* note 55, at 460-61. For a discussion of this approach in a case involving a battered woman who killed her husband, see May v. State, 460 So. 2d 778, 784 (Miss. 1984).

[185] *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 55, at 460; Note, *Limits on the Use of Defensive Force to Prevent Intramarital Assaults*, 10 RUT.-CAM. L.J. 643, 653 n.60 (1979); Note, *Empirical Dissent*, *supra* note 10, at 623 n.14.

retreat rule, reasoning that the use of defensive force is unnecessary if the potential victim can retreat safely.[186] Nevertheless, these jurisdictions typically create an exception in cases where the defendant was attacked in her home.[187] This "castle doctrine" absolves one of the duty to retreat on the theory that, once at home, she has retreated as far as possible, for there is no safer place for her to go.[188] Because the vast majority of battering incidents occur in the home,[189] the battered woman need not retreat before using deadly force against her husband when he has threatened her in her home.

A few of the jurisdictions that apply the retreat rule have created an exception to this castle doctrine when both parties to a conflict are occupants of the same house.[190] This approach is based on the notion that both have an equal right to the home, and, therefore, neither can eject the other.[191] Significantly, however, the majority of states that follow the retreat doctrine do not require the victim to retreat from her home even if she is attacked by a co-occupant.[192]

Consequently, only a few jurisdictions might require a battered woman to retreat from her husband if he attacks her at their home. Even in these cases, however, the woman need not retreat unless she

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[186] *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 55, at 461 n.57; Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 580 (1903). At least 20 states have adopted a retreat requirement. *See* 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW 660-61 & nn.64, 66 & 68 (1986).

[187] *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 55, at 461. For a discussion of this principle in cases involving battered women who killed their husbands, see, *e.g.*, Langley v. State, 373 So. 2d 1267, 1271 (Ala. Crim. App. 1979); State v. Jacoby, 260 N.W.2d 828, 835 (Iowa 1977); People v. Emick, 103 A.D.2d 643, 661, 481 N.Y.S.2d 552, 563 (1984); State v. Leidholm, 334 N.W.2d 811, 820-21 (N.D. 1983); Commonwealth v. Helm, 485 Pa. 315, 324, 402 A.2d 500, 505 (1979); State v. Allery, 101 Wash. 2d 591, 598, 682 P.2d 312, 316 (1984).

[188] *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 55, at 461 n.62; Beale, *Homicide in Self-Defense*, 3 COLUM. L. REV. 526, 540-41 (1903).

[189] *See, e.g.*, People v. Cameron, 53 Cal. App. 3d 786, 792, 126 Cal. Rptr. 44, 47 (1975); L. WALKER, *supra* note 18, at 150; WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 46; Dvoskin, *supra* note 37, at 350; Goodstein & Page, *supra* note 24, at 1037; Rosen, *supra* note 10, at 29 n.106; Roy, *supra* note 24, at 48.

[190] For a discussion of this exception in a case involving a battered woman who killed her husband, see, *e.g.*, State v. Leidholm, 334 N.W.2d 811, 820-21 (N.D. 1983).

[191] *See, e.g.*, State v. Pontery, 19 N.J. 457, 475, 117 A.2d 473, 482 (1955); Commonwealth v. Johnson, 213 Pa. 432, 434, 62 A. 1064, 1064-65 (1906).

[192] *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 55, at 461 n.62. For a discussion of this doctrine in cases involving battered women who killed their husbands, see, *e.g.*, Langley v. State, 373 So. 2d 1267, 1271 (Ala. Crim. App. 1979); State v. Jacoby, 260 N.W.2d 828, 835 (Iowa 1977); People v. Stallworth, 364 Mich. 528, 535, 111 N.W.2d 742, 746 (1961); People v. Emick, 103 A.D.2d 643, 661, 481 N.Y.S.2d 552, 563 (1984); Commonwealth v. Helm, 485 Pa. 315, 324, 402 A.2d 500, 505 (1979).

knows she can do so with complete safety.[193] She must realize that she has an avenue of escape. Moreover, she need not retreat if doing so would create the risk of injury — even "less than serious bodily injury."[194] In many cases, retreat will prove impossible under this standard. The battered woman's ability to escape may be impeded by her husband's greater size and strength,[195] by his attempts to block her exit from the home,[196] by her fear that he will follow her and will inflict even greater injury to punish her for leaving him,[197] by her memory of prior occasions when she was unable to secure help from family, friends, or the police,[198] or by her concern for leaving her children with their violent father.[199] Therefore, the battered woman frequently cannot leave home when attacked by her husband.

In addition to these barriers, psychological impediments may also hinder her ability to retreat safely. Because the jury must decide whether the battered woman honestly and reasonably believed that she could retreat from her husband with complete safety,[200] it must consider the perceptions of a reasonable person in the defendant's circumstances. Thus, the jury must decide whether a woman who had been repeatedly abused by her husband would have reasonably

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[193] *See, e.g.*, State v. Napoleon, 2 Haw. App. 369, 371, 633 P.2d 547, 549 (1981); State v. Abbott, 36 N.J. 63, 72, 174 A.2d 881, 885 (1961); W. LAFAVE & A. SCOTT, *supra* note 55, at 461; Rosen, *supra* note 10, at 29 n.106. For examples of the application of this principle in cases involving battered women who killed their husbands, see State v. Leidholm, 334 N.W.2d 811, 820 (N.D. 1983); Commonwealth v. Helm, 485 Pa. 315, 324, 402 A.2d 500, 505 (1979); Fielder v. State, 683 S.W.2d 565, 592 (Tex. Crim. App. 1985).

[194] State v. Abbott, 36 N.J. 63, 72, 174 A.2d 881, 885 (1961).

[195] *See supra* note 84 and accompanying text.

[196] *See, e.g.*, Smith v. State, 247 Ga. 612, 613, 277 S.E.2d 678, 679 (1981); People v. Minnis, 118 Ill. App. 3d 345, 352, 455 N.E.2d 209, 214 (1983); People v. Stallworth, 364 Mich. 528, 531, 111 N.W.2d 742, 744 (1961); Commonwealth v. Helm, 485 Pa. 315, 325, 402 A.2d 500, 505 (1979); State v. Kelly, 33 Wash. App. 541, 542, 655 P.2d 1202, 1202 (1982), *rev'd*, 102 Wash. 2d 188, 685 P.2d 564 (1984); *cf.* State v. Edwards, 420 So. 2d 663, 668, 670 (La. 1982) (defendant backed into a door while attempting to retreat and her husband was almost upon her).

[197] *See, e.g.*, WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 47; *see also supra* notes 32-33 and accompanying text.

[198] *See, e.g.*, WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 47; *see also supra* notes 36-39 and accompanying text.

[199] *See* People v. Cameron, 53 Cal. App. 3d 786, 792, 126 Cal. Rptr. 44, 48 (1975); Schneider, *supra* note 3, at 633; Note, *supra* note 185, at 657. In addition, a battered woman's ability to retreat may be hindered by other factors, such as the weather, the time of day, and the type of clothes she was wearing at the time. *See, e.g.*, WOMEN'S SELF-DEFENSE CASES, *supra* note 8, at 47 n.7.

[200] *See, e.g.*, State v. Leidholm, 334 N.W.2d 811, 820 (N.D. 1983); Fielder v. State, 683 S.W.2d 565, 592 (Tex. Crim. App. 1985).

believed that she could not withdraw safely from the abusive situation.[201] Her belief that she is helpless and that her husband is omnipotent may well lead her to conclude that any attempt to escape will be futile.[202]

Some courts and commentators assert that if the battered woman presents evidence of the history of the abusive relationship to convince the jury that she reasonably feared her husband, the jury will inevitably find many prior opportunities for retreat.[203] This argument is irrelevant, however, to the extent it claims that the battered woman had avenues of escape available during prior beatings. The retreat rule is based on the theory that self-defense is not necessary whenever the defendant could retreat and thereby avoid the use of force. Because an abusive husband is certain to subject his wife to future violence, the fact that she failed to retreat from prior attacks has nothing to do with the fact that she again finds herself threatened with violence. In short, she could not have avoided the need to use defensive force on this occasion by retreating at some earlier time.

On the other hand, the argument may be that the defendant violated the retreat rule by unreasonably refusing to leave her husband permanently. This analysis is also misguided for several reasons. First, the battered woman's failure to leave her husband may well be reasonable; a reasonable person subjected to a prolonged history of abuse might come to believe that she cannot escape safely. Second, the retreat rule does not require one who fears another to take all steps necessary to prevent contact with that person. For example, one need not cower at home or steer clear of certain places in order to avoid meeting the feared aggressor.[204] Thus, the fact that the battered woman may have had prior opportunities to leave her husband does not diminish her honest and reasonable perception of

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[201] *See supra* notes 84-86 and accompanying text.

[202] *See supra* notes 19-48 and accompanying text.

[203] *See* People v. Emick, 103 A.D.2d 643, 658-59, 481 N.Y.S.2d 552, 561 (1984); Note, *Imperfect Self-Defense*, *supra* note 8, at 624-25; Note, *Empirical Dissent*, *supra* note 10, at 628.

[204] *See, e.g.*, People v. Emick, 103 A.D.2d 643, 661, 481 N.Y.S.2d 552, 563 (1984); Fielder v. State, 683 S.W.2d 565, 592 (Tex. Crim. App. 1985); State v. Starks, 627 P.2d 88, 91 (Utah 1981); 2 WHARTON'S CRIMINAL LAW 128 (C. Torcia 14th ed. 1979); Greenwood, *Regina v. Field*, 1972 CRIM. L. REV. 435, 435-36 (noting that one cannot be "driven off the streets and compelled not to go to a place where [s]he might lawfully be because [s]he had reason to believe that [s]he would be confronted by people intending to attack [her]. . . . [N]o one [is] obliged to get out of the way of possible attackers").

danger at the time she kills him; if she reasonably believes she cannot retreat with complete safety at that time, she is entitled to defend herself.[205]

III

OBJECTIONS AND ALTERNATIVES

As explained above, a battered woman who kills her abusive husband in a nonconfrontational setting can establish all the elements of a self-defense claim. Nevertheless, courts and commentators have advanced various objections to this defense. The criticisms that have not been addressed above fall into three categories: concerns that recognition of a self-defense claim in such cases will diminish the deterrent effect of the criminal law; objections based on the difficulties encountered in attempting to identify those homicide defendants who are truly battered women; and fears that the defense and the evidence admitted in its support will prejudice and confuse the jury. In addition, some critics suggest that battered women should rely on defenses other than a traditional self-defense claim.

A. Undermining Deterrence

Several courts and commentators express concern that acquitting battered women who kill their husbands in nonconfrontational settings may undermine the deterrent effect of the criminal law.[206] Some make the point more graphically, arguing that recognition of a defense in such cases will lead to "an open season on men,"[207] "smacks uncomfortably of frontier justice,"[208] and will foster "vigilante justice."[209] These concerns are greatly exaggerated.

Punishing the battered woman who kills her husband in order to

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[205] *See* State v. Kelly, 97 N.J. 178, 201 n.10, 478 A.2d 364, 375 n.10 (1984) (dictum); Fielder v. State, 683 S.W.2d 565, 592 (Tex. Crim. App. 1985); Comment, *supra* note 3, at 359-60.

[206] *See, e.g.*, State v. Kelly, 97 N.J. 178, 220 n.23, 478 A.2d 364, 385 n.23 (1984); Rosen, *supra* note 10, at 15, 31, 50 n.208.

[207] *E.g.*, A. JONES, *supra* note 1, at 290 (quoting newspaper accounts of verdict in the Hughes case); Schneider & Jordan, *supra* note 9, at 150 n.4 (citing various newspaper and magazine articles); Comment, *supra* note 3, at 363 (quoting spectator at trial where battered woman was acquitted).

[208] A. JONES, *supra* note 1, at 290 (quoting 1978 Newsweek article).

[209] Note, *Wife Abuse*, *supra* note 10, at 1731; *see also* A. JONES, *supra* note 1, at 290 (citing newspaper account of verdict in the Hughes case); Note, *Imperfect Self-Defense*, *supra* note 8, at 627-28 & n.55.

effectuate the goal of deterrence[210] assumes that the woman did not act justifiably in killing her husband. Well-established self-defense law recognizes the right to use deadly force to protect against the threat of serious bodily harm or death.[211] A battered woman faced with the choice of either using her one available opportunity to kill her husband or enduring future beatings, which are certain to occur and to result in serious bodily harm,[212] is in the same situation as the defendant in the classic case of self-defense who kills to avoid serious bodily harm. As long as the battered woman can establish that she killed in self-defense, her act was justifed. Therefore, the criminal law has no reason to punish her in the interest of deterrence — just as it finds no reason to punish the homeowner who kills an intruder to prevent a burglary or the person who uses defensive force instead of retreating.

Moreover, statistical evidence does not support these deterrence concerns. The press devotes far more attention to cases where battered women are acquitted or receive lenient sentences than to the many cases where they are convicted and sentenced harshly.[213] Nevertheless, these reports apparently have not encouraged numerous battered women to kill their husbands with the expectation of lenient treatment. In fact, the rate of homicides committed by women has not risen in recent years.[214] At the same time, however, the chances that a woman will be murdered by her husband or lover have steadily increased.[215] Perhaps the concerns about deterrence

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210 *See, e.g.*, Note, *Imperfect Self-Defense*, *supra* note 8, at 628-29.

211 *See supra* note 151 and accompanying text.

212 *See supra* notes 133 & 160-64 and accompanying text.

213 *See* A. JONES, *supra* note 1, at 319.

214 *See* E. LEONARD, WOMEN, CRIME, AND SOCIETY 28-32 (1982) (percentage of women arrested for homicide has remained stable at approximately 15% since the mid-1950s and in fact decreased slightly between 1970 and 1979); Hoffman-Bustamante, *supra* note 85, at 133; *see also* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 181 (1986) [hereinafter 1986 UNIFORM CRIME REPORTS] (in 1985, more than 87% of those arrested for murder or nonnegligent manslaughter were men); *id.* at 169 (total number of women arrested for murder or nonnegligent manslaughter decreased steadily from 1977 to 1986). Moreover, historically women have committed fewer violent crimes than men and have lower crime rates for virtually all crimes; *see* E. LEONARD, *supra*, at xi.

215 *See, e.g.*, 1986 UNIFORM CRIME REPORTS, *supra* note 214, at 11 (in 1985, 30% of female homicide victims were killed by their husbands or boyfriends, whereas only 6% of male victims were killed by their wives or girlfriends); A. JONES, *supra* note 1, at 319-20; Howard, *supra* note 2, at 67 & n.19; *see also* 1986 UNIFORM CRIME REPORTS, *supra* note 214, at 11 (in 1985, 12.2% of all murder victims were killed by spouses or lovers; almost 64% of these involved men killing women).

should be directed, therefore, at those homicides where the woman is the victim rather than the killer.

More specifically, the deterrence argument can be separated according to the two ways in which the criminal law attempts to deter. Punishment functions both as a specific deterrent, dissuading the defendant from committing additional crimes, and as a general deterrent, discouraging others from criminal activity. Neither aspect of deterrence justifies rejecting self-defense claims raised by battered women.

The specific deterrence argument erroneously presumes, however, that a battered woman defendant, left unpunished, is likely to become involved in future criminal activities.[216] In fact, women charged with homicide generally have the least extensive criminal records of any female defendants.[217] Thus, a battered woman is not likely to turn to other types of crime if she is acquitted on grounds of self-defense in a homicide prosecution. In most cases, the battered woman's criminal tendencies are limited to the peculiar circumstances in which she found herself at the time of the killing.[218]

Moreover, there is little empirical justification for concluding that a battered woman who kills her violent husband will become involved in another battering relationship and will again perceive the need to use self-defense against her abuser. Rather, the evidence suggests that battering relationships most often result from the man's personality traits, not the woman's masochism.[219] Researchers have found that once a battering relationship terminates, most victimized women do not become involved with another abusive man.[220] Accordingly, the law need not punish the battered woman

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[216] The goal of specific deterrence militates in favor of punishing a battered woman who kills her husband only if she represents a danger to society.

[217] *See* Schneider & Jordan, *supra* note 9, at 151; *see also* Walker, Thyfault & Browne, *supra* note 32, at 12 (battered women typically have no history of violent behavior).

[218] *See, e.g.*, Ripley v. State, 590 P.2d 48, 54 (Alaska 1979).

[219] *See* C. EWING, *supra* note 8, at 88-89; L. WALKER, *supra* note 18, at 15; Waits, *supra* note 3, at 304 n.208 (noting that batterers tend to become involved in other abusive relationships); *see also supra* notes 29-30 and accompanying text.

[220] *See* M. PAGELOW, *supra* note 18, at 59-62 (noting that of the minority of women studied who had been in more than one battering relationship, many indicated that there was no sign of violence until the relationships were well-established); J. TOTMAN, *supra* note 32, at 65-66; L. WALKER, *supra* note 18, at 15, 148; L. WALKER, *supra* note 16, at 28; Rounsaville & Weissman, *Battered Women: A Medical Problem Requiring Detection*, 8 INT'L J. PSYCHIATRY IN MED. 191, 201 (1977); *cf.* Gayford, *supra* note 2, at 28 (20 of 100 battered women studied had previously been involved in violent relationship); Gayford, *Battered Wives*, 15 MED. SCI. & L. 237, 244 (1975) ("The fact that

to deter her from killing again.[221]

The objection based on general deterrence maintains that recognizing self-defense claims raised by battered women encourages other abused women to resort to similar self-help methods.[222] Not only is this argument unsupported by the statistical evidence cited above, but it is also based on two unlikely factual premises: first, that battered women know the nuances of the law of self-defense and the success rates of self-defense claims in similar cases and, second, that they decide to kill their husbands only after rationally calculating the likelihood that they will be convicted. A battered woman may intentionally kill her husband and may even premeditate the killing, but she usually does not do so after carefully weighing the costs and benefits.[223] Instead, in most such cases, the woman seems to behave impulsively. She may be acting in a daze when she kills[224] and may simply reach for an easily accessible weapon.[225] In fact, the woman frequently reports that she armed

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women enter into a second or even a third violent relationship is no proof that she likes it, or even encourages violence.").

[221] Ewing even argues that a battered woman who is imprisoned for killing her abusive husband will be more likely to kill again in self-defense if she should become involved in another battering relationship than a battered woman who kills her abusive husband and is acquitted. The former woman, stigmatized by a felony conviction, will likely lose any social support network and means for financial independence that she had prior to her imprisonment. Thus, she will be even less able to escape a subsequent abusive relationship. *See* C. EWING, *supra* note 8, at 89.

[222] Some commentators argue, however, that society's interest in general deterrence does not justify the imposition of punishment on a particular defendant because "one [person] ought never to be dealt with merely as a means subservient to the purpose of another." I. KANT, THE PHILOSOPHY OF LAW 195 (W. Hastie trans. 1887).

[223] *See, e.g.*, C. EWING, *supra* note 8, at 87.

[224] For examples of such cases, see State v. Heidmous, 75 N.C. App. 488, 490, 331 S.E.2d 200, 201 (1985); State v. Felton, 110 Wis. 2d 485, 493, 329 N.W.2d 161, 165 (1983); State v. Hoyt, 21 Wis. 2d 284, 288, 128 N.W.2d 645, 647 (1964) (per curiam).

[225] *See, e.g.*, A. BROWNE, *supra* note 62, at 140; C. EWING, *supra* note 8, at 39-40, 87; L. WALKER, *supra* note 18, at 42; Howard, *supra* note 2, at 84.

For examples of such cases, see Ibn-Tamas v. United States, 407 A.2d 626, 630 (D.C. 1979) (picked up gun off bureau where husband had left it); Strong v. State, 251 Ga. 540, 540-41, 307 S.E.2d 912, 913 (1983) (picked up knife lying on coffee table); State v. Griffiths, 101 Idaho 163, 165, 610 P.2d 522, 524 (1980), *cert. denied*, 454 U.S. 1057 (1981) (opened armoire to get purse but instead grabbed gun); State v. Jacoby, 260 N.W.2d 828, 831 (Iowa 1977) (picked up gun husband kept on a shelf); State v. Hodges, 239 Kan. 63, 64, 716 P.2d 563, 565 (1986) (reached for gun in closet); State v. Lynch, 436 So. 2d 567, 568 (La. 1983) (grabbed gun from nearby dresser drawer); State v. Guido, 40 N.J. 191, 195-96, 191 A.2d 45, 48 (1963) (picked up gun that husband had used to threaten her); State v. Gallegos, 104 N.M. 247, 251, 719 P.2d 1268, 1272 (Ct. App. 1986) (picked up loaded rifle that husband kept in living room); People v. Torres, 128 Misc. 2d 129, 132, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985) (grabbed pistol with which husband had threatened her); State v. Heidmous, 75 N.C. App. 488, 490, 331

herself only for the purpose of threatening her husband or fending off his attack and was thereafter forced to use the weapon because he made a sudden move.[226] Some battered women do not even aim their weapons.[227] In those cases where the woman does not methodically plan her actions, she probably is not influenced by the disposition of prior similar cases.

Related to these concerns about the general deterrent effect of the criminal laws is the "slippery slope" argument: the self-defense argument suggested here cannot be limited to abused women who kill in nonconfrontational settings. Rather, the same defense will be available to other defendants who subjectively felt that their use of deadly force was necessary or who believed that they needed to act in self-defense because the criminal justice system would not adequately protect them.[228]

Obviously, acquittals should be limited to cases of justifiable self-defense. Nevertheless, recognizing self-defense claims raised by some battered women who kill under nonconfrontational circumstances will not necessarily lead to a record number of acquittals in other types of cases. Initially, it is doubtful many other defendants could make a plausible argument that they acted in self-defense — that they honestly and reasonably believed they were faced with an imminent threat of death or serious bodily harm even though the

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S.E.2d 200, 201 (1985) (reached for gun husband kept on nearby shelf); Easterling v. State, 267 P.2d 185, 187 (Okla. Crim. App. 1954) (saw husband's knife lying open on dresser); Kress v. State, 176 Tenn. 478, 483, 144 S.W.2d 735, 736-37 (1940) (reached under pillow, where husband kept gun); State v. Hoyt, 21 Wis. 2d 284, 288, 128 N.W.2d 645, 647 (1964) (per curiam) (happened to see gun).

[226] *See* Rosen, *supra* note 10, at 38 n.160. For examples of such cases, see United States v. Iron Shield, 697 F.2d 845, 846 (8th Cir. 1983); Ibn-Tamas v. United States, 407 A.2d 626, 630-31 (D.C. 1979); People v. Reeves, 47 Ill. App. 3d 406, 408, 362 N.E.2d 9, 11-12 (1977); State v. Osbey, 238 Kan. 280, 282, 710 P.2d 676, 678 (1985); State v. Edwards, 420 So. 2d 663, 670 (La. 1982); State v. Kelly, 97 N.J. 178, 189-90, 478 A.2d 364, 369 (1984); People v. Powell, 102 Misc. 2d 775, 778, 424 N.Y.S.2d 626, 629 (1980), *aff'd*, 83 A.D.2d 719, 442 N.Y.S.2d 645 (1981); Fielder v. State, 683 S.W.2d 565, 593 (Tex. Crim. App. 1985); *see also infra* notes 248-249 and accompanying text.

[227] For examples of such cases, see People v. Moore, 43 Cal. 2d 517, 521-22, 275 P.2d 485, 489 (1954) (closed her eyes when she fired shots); Smith v. State, 247 Ga. 612, 613, 277 S.E.2d 678, 679 (1981) (closed eyes when firing shots); State v. Hundley, 236 Kan. 461, 462, 693 P.2d 475, 476 (1985) (closed eyes when firing shots); State v. Seelke, 221 Kan. 672, 681, 561 P.2d 869, 875 (1977) ("fired aimlessly, not knowing where the shots were going"); State v. Lynch, 436 So. 2d 567, 568 (La. 1983) (did not aim when she shot).

[228] *See, e.g.*, Rosen, *supra* note 10, at 44, 54; Comment, *supra* note 107, at 1276; *cf.* C. EWING, *supra* note 8, at 90-91 (suggesting that the burden of proving a self-defense claim could be imposed on the defendant rather than the prosecutor to minimize the number of spurious claims).

alleged assailant was not in the midst of attacking them at the time they acted.

Of course, one can imagine a hypothetical case where a weak, insecure defendant kills a larger, stronger bully in a nonconfrontational setting, where the bully has been threatening and abusing the defendant for some time, and the defendant's previous calls for help to the police have been unavailing.[229] Nevertheless, such a case differs significantly from that involving a battered woman. The claim that the hypothetical defendant reasonably believed escape from the bully was impossible is less credible than the battered woman's argument. Furthermore, the likelihood of continued violence is less certain. In addition, the psychological impact of repeated abuse by someone with whom one has an intimate relationship is much more severe than the effect of abuse by a stranger:

> The violent criminal victimization of the battered women [sic] is unique not simply because it is repeated over time by a single perpetrator who is intimately related to the woman and often results in more severe psychological injury, but also because in many cases the woman has no viable means of escape. Unlike the ordinary victim of violent crime, she is often effectively trapped in a continuing relationship with the perpetrator, a relationship which holds only the promise of more victimization and even greater psychological injury.[230]

Thus, given the intimate relationship involved, the battered woman's claims that her husband's abuse reasonably led her to believe that her only opportunity to defend herself arose at a time when he was not actually attacking her and that there was no other way for her to protect herself seem more defensible than similar claims by defendants in other cases.

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[229] Such a hypothetical case would be different from cases involving battered women because the unresponsiveness of the police is typically limited to domestic disturbance cases and is not a problem where violence occurs between nonfamily members. *See* materials cited *supra* note 37.

[230] C. EWING, *supra* note 8, at 72-73; *see also* Waits, *supra* note 3, at 282-83 n.74; Note, *Imperfect Self-Defense*, *supra* note 8, at 623-24.

The impact of repeated abuse by parents on their children, or by homosexuals on their lovers, may well be analogous to that suffered by a battered woman. Battered children or homosexuals who kill their abusers in nonconfrontational settings may therefore have self-defense claims similar to those raised by battered women. Discussion of the psychological effects of such abuse is, however, beyond the scope of this Article. For a discussion of these issues, see, *e.g.*, Haynes v. State, 134 Ga. App. 588, 215 S.E.2d 342 (1975); Jahnke v. State, 682 P.2d 991 (Wyo. 1984); G. MORRIS, THE KIDS NEXT DOOR: SONS AND DAUGHTERS WHO KILL THEIR PARENTS 145-83 (1985); Crocker, *supra* note 9, at 122 n.6.

B. Identifying "The Battered Woman"

Perhaps more troublesome is the fear that, given the difficulty researchers have had agreeing on a definition of "battered woman,"[231] every woman who kills her husband will raise an issue of self-defense simply by claiming that she was abused.[232] This concern is fueled by the fact that many battered women cannot substantiate their testimony about the abusive relationship. Indeed, because of their fear and shame, they may not have told anyone about the beatings or even sought medical treatment, or they may have tried to cover up the cause of their injuries.[233] Nevertheless, this difficult definitional problem should not invalidate legitimate self-defense claims raised by battered women.

Given that the reasonable battered woman standard should be used to evaluate only self-defense claims raised by actual victims of spousal abuse, defining the term "battered woman" becomes essential. Experts tend to agree that repetition is a key ingredient in battering relationships.[234] A pattern of violence suggests a reasonable probability of future beatings and increases the likelihood that the woman will experience feelings of helplessness.[235]

Dr. Walker defines a battered woman as any woman who has been subjected to physical, psychological, or sexual abuse by her husband and who has been through the three-phase cycle characteristic of battering relationships at least twice.[236] Although a number of courts and commentators have adopted this definition,[237] others

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[231] *See supra* note 3.

[232] *See, e.g.*, Gayford, *supra* note 2, at 34; Note, *Wife Abuse*, *supra* note 10, at 1716, 1720 n.115.

[233] *See, e.g.*, C. EWING, *supra* note 8, at 16; R. LANGLEY & R. LEVY, *supra* note 18, at 117; D. MARTIN, *supra* note 22, at 11, 73; L. WALKER, *supra* note 18, at 150; Frieze, *supra* note 16, at 102; Gayford, *supra* note 2, at 25, 31; Hilberman & Munson, *supra* note 21, at 460, 464. For examples of such cases, see State v. Hodges, 239 Kan. 63, 67, 716 P.2d 563, 566 (1986); State v. Lambert, 312 S.E.2d 31, 33 (W. Va. 1984) (husband would not permit defendant to get medical treatment for injuries).

[234] *See, e.g.*, L. WALKER, *supra* note 16, at xv (defining battered woman as one who has experienced the three-part cycle of violence at least twice); Gayford, *supra* note 2, at 19 (defining battered woman as one "who has received deliberate, severe, and repeated demonstrable physical injury from her marital partner"); Note, *supra* note 18, at 138-39 n.22 (defining battered woman as one "who has suffered serious or repeated physical injury from the man with whom she lives") (quoting definition adopted by the House of Commons Select Committee on Violence in Marriage).

[235] *See supra* notes 133-38 and accompanying text.

[236] *See* L. WALKER, *supra* note 16, at xv.

[237] *See, e.g.*, State v. Kelly, 97 N.J. 178, 193, 478 A.2d 364, 371 (1984); A. BROWNE, *supra* note 62, at 14; Waits, *supra* note 3, at 267-68 n.1; *cf.* Parker & Schumacher, *The Battered Wife Syndrome and Violence in the Nuclear Family of Origin: A Controlled*

have criticized it as too expansive and imprecise.[238] To her credit, Walker has proposed a definition that, unlike others, recognizes the devastating effects of psychological abuse as well as physical violence.[239]

Literally interpreted, however, Walker's definition may be too broad to be useful in the context of evaluating self-defense claims raised by women who have killed their husbands. Evidence that the defendant's husband slapped her or humiliated her in front of friends[240] on two occasions during their twenty-year marriage, and later apologized both times, does not by itself establish that the defendant is a battered woman. Rather, in identifying an abused woman, the jury should consider the number of times the woman has been battered, the severity of the abuse she has suffered, and the frequency of such incidents.

Because these three factors can be combined in an endless number of permutations, it is impossible to articulate a precise definition that applies satisfactorily in all cases. Ultimately, whether a particular defendant is a battered woman remains a jury question.

Pilot Study, 67 AM. J. PUB. HEALTH 760, 760 (1977) (defining the battered woman syndrome as "a symptom complex of violence in which a woman has, at any time, received deliberate, severe, and repeated (*more than three times*) demonstrable injury from her husband, with the minimal injury of severe bruising") (emphasis added); Rounsaville & Weissman, *supra* note 220, at 192 (defining a battered woman as any woman "who had evidence of physical abuse *on at least one occasion* at the hands of an intimate male partner") (emphasis added).

[238] *See, e.g.*, C. EWING, *supra* note 8, at 9; Note, *Empirical Dissent*, *supra* note 10, at 626 n.27.

[239] *See* C. EWING, *supra* note 8, at 9; K. HOFELLER, *supra* note 34, at 117 (women reported that "the emotional mistreatment was far more devastating than any physical injuries they had suffered"); J. TOTMAN, *supra* note 32, at 47; L. WALKER, *supra* note 16, at xv (most of the women surveyed described "psychological humiliation and verbal harassment as their worst battering experiences," even if they had been physically abused); *cf.* Gayford, *supra* note 220, at 238 (although his definition fails to include psychological abuse, such abuse can cause "suffering and hardship"); Gayford, *supra* note 2, at 19 (although his definition fails to include psychological abuse, such violence is widespread).

[240] Although humiliation is one form of psychological abuse, Walker has emphasized that her concept of battering does not include isolated examples of minor psychological abuse common in many relationships. In fact, Walker found that all of the 435 battered women she studied had been subjected to each of the eight forms of abuse considered "psychological torture" by Amnesty International: isolation; exhaustion caused by deprivation of food or sleep; "[m]onopolization of perception including obsessiveness and possessiveness"; threats, including death threats, directed at the woman, family, and friends; "degradation," including humiliation and name-calling; administration of drugs or alcohol; "[a]ltered states of consciousness produced through hypnotic states"; and "[o]ccasional indulgences which, when they occur at random and various times, keep hope alive that the torture will cease." L. WALKER, *supra* note 18, at 27-28.

In resolving this issue, the jury should be instructed to focus on whether a woman subjected to the abuse inflicted on this particular defendant could reasonably have come to believe that her only means of protecting herself was to kill her husband.[241]

Even though the jury must decide whether the defendant is a battered woman, the judge should follow the approach taken by some courts and exclude expert testimony concerning the battered woman syndrome if the jury could not justifiably conclude that a particular defendant is a battered woman.[242] Once the defendant has presented some evidence of abuse, however, the judge should give the parties freedom to present testimony about the relationship between the defendant and her husband. If the court follows this approach, the prosecution and defense may call expert witnesses to analyze the defendant's status as a battered woman. The defense may also present any lay witnesses or medical records that corroborate the defendant's reports of abuse. The prosecution may then point out the absence or unpersuasiveness of such corroborating testimony. In turn, the defense may explain the reasons why the woman failed to inform others of her husband's violence.

Ultimately, it is the jury's responsibility to resolve any discrepancies in the testimony. Although the jury can never be absolutely certain that the battered woman reasonably believed that killing her husband was necessary to protect herself, this uncertainty is no different from that arising in any case where the trier of fact is required to draw indeterminate inferences about state of mind. Moreover, there is no reason to suspect that the jury is any less capable of carrying out this function in cases involving battered wo-

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[241] As discussed in Part II(A), the defendant's reaction to her husband's violence may have been "reasonable" even though it was not the one that the ideal woman or that most women would have had. An uncertain, but significant, percentage of women who are abused by their husbands leave the relationship or otherwise obtain help. *See supra* notes 46-48 and accompanying text. Precisely what distinguishes the women who manage to escape from those who do not is not known. Nevertheless, the jury's determination as to whether the history of abuse inflicted on the defendant reasonably could have led to the onset of the battered woman syndrome is not a standardless one. The jury's decision should be guided by a description of the characteristics typical of abused women and battering relationships, *see supra* notes 16-28 and accompanying text, by an explanation of the reasons why battered women endure such relationships, *see supra* notes 29-48 and accompanying text, and by an attempt to match those factors to the facts of the case before it.

[242] *See, e.g.*, Meeks v. Bergen, 749 F.2d 322, 328 (6th Cir. 1984); Fennell v. Goolsby, 630 F. Supp. 451, 459 (E.D. Pa. 1985); State v. Anaya, 438 A.2d 892, 894 (Me. 1981); Fielder v. State, 683 S.W.2d 565, 594-95 (Tex. Crim. App. 1985); State v. Allery, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984); Buhrle v. State, 627 P.2d 1374, 1377 (Wyo. 1981).

men than it is in other cases where the facts are not clearly established by an eyewitness account and the parties' versions conflict. The jury is not likely to accept an implausible self-defense claim where the defendant fails to offer evidence corroborating the alleged abuse.[243]

In fact, because the cases involving battered women who kill their husbands in nonconfrontational settings tend to follow a certain pattern, the jury's task may be simplified. Typically, the battered woman admits that she killed her husband.[244] Indeed, she frequently calls the police immediately after the incident and does nothing to attempt to conceal her complicity.[245] In addition, the woman often does not realize she has killed her husband until she is informed he is dead.[246] She may not even remember the events leading up to the killing.[247] When she learns her husband is dead, she frequently expresses grief and remorse,[248] explaining that she

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[243] For a discussion of the possibility that admission of evidence describing the abuse inflicted on the defendant may prejudice the jury in her favor, see *infra* Part III(C).

[244] *See, e.g.*, C. EWING, *supra* note 8, at 45.

[245] *See, e.g.*, A. BROWNE, *supra* note 62, at 141; Walker, Thyfault & Browne, *supra* note 32, at 12. For examples of such cases, see People v. Bush, 84 Cal. App. 3d 294, 296-97, 148 Cal. Rptr. 430, 432 (1978); People v. Welborn, 242 Cal. App. 2d 668, 672, 51 Cal. Rptr. 644, 646-47 (1966); Smith v. State, 247 Ga. 612, 613, 277 S.E.2d 678, 679 (1981); State v. Hodges, 239 Kan. 63, 64, 716 P.2d 563, 565 (1986); State v. Hundley, 236 Kan. 461, 463, 693 P.2d 475, 476 (1985); State v. Seelke, 221 Kan. 672, 674, 561 P.2d 869, 871 (1977); State v. Edwards, 420 So. 2d 663, 668 (La. 1982); People v. Giacalone, 242 Mich. 16, 20, 217 N.W. 758, 759 (1928); People v. Emick, 103 A.D.2d 643, 644, 481 N.Y.S.2d 552, 553 (1984); People v. Powell, 102 Misc. 2d 775, 778, 424 N.Y.S.2d 626, 629 (1980), *aff'd*, 83 A.D.2d 719, 442 N.Y.S.2d 645 (1981); State v. Felton, 110 Wis. 2d 485, 493, 329 N.W.2d 161, 165 (1983); F. MCNULTY, *supra* note 1, at 186 (describing facts in the Hughes case); *see also* United States v. Iron Shield, 697 F.2d 845, 846 (8th Cir. 1983), and Commonwealth v. Helm, 485 Pa. 315, 319, 402 A.2d 500, 502 (1979) (defendants attempted to get medical help for their husbands).

[246] *See, e.g.*, A. BROWNE, *supra* note 62, at 141; L. WALKER, *supra* note 16, at 53; Walker, Thyfault & Browne, *supra* note 32, at 12. For examples of such cases, see Strong v. State, 251 Ga. 540, 541, 307 S.E.2d 912, 913 (1983); State v. Felton, 110 Wis. 2d 485, 493, 329 N.W.2d 161, 165 (1983).

[247] *See, e.g.*, A. JONES, *supra* note 1, at 382 n.294; L. WALKER, *supra* note 18, at 40; Walker, Thyfault & Browne, *supra* note 32, at 12-13. For examples of such cases, see United States v. Iron Shield, 697 F.2d 845, 846 (8th Cir. 1983); Langley v. State, 373 So. 2d 1267, 1271 (Ala. Crim. App. 1979); People v. Welborn, 242 Cal. App. 2d 668, 672, 51 Cal. Rptr. 644, 646 (1966); State v. Felton, 110 Wis. 2d 485, 493, 512, 329 N.W.2d 161, 164-65, 173 (1983); State v. Hoyt, 21 Wis. 2d 284, 288-90, 128 N.W.2d 645, 648 (1964) (per curiam).

[248] *See, e.g.*, A. BROWNE, *supra* note 62, at 141; A. JONES, *supra* note 1, at 320. For examples of such cases, see People v. Bush, 84 Cal. App. 3d 294, 297, 148 Cal. Rptr. 430, 432 (1978); People v. Reeves, 47 Ill. App. 3d 406, 409, 362 N.E.2d 9, 12 (1977); State v. Young, 344 So. 2d 983, 986 (La. 1977); F. MCNULTY, *supra* note 1, at 187, 190 (describing facts in the Hughes case).

did not intend to kill him but only to prevent him from inflicting further abuse or from impeding her escape.[249]

Where the facts differ markedly from this model, courts frequently reject self-defense claims. For example, in *Buhrle v. State*,[250] the defendant brought a gun with her when she went to visit her husband after he had moved out of their home. She did not admit shooting him until some time later, and she attempted to conceal the gun and rubber gloves she used in the killing.[251] The defendant was convicted of murder, and the Wyoming Supreme Court affirmed, recognizing that "this is not the standard battered woman self-defense situation."[252] Likewise, in *State v. Martin*,[253] the Missouri Court of Appeals observed that, unlike most homicide cases involving battered women, the defendant had hired someone else to kill her husband.[254] Any such differences between a particular case and other similar cases can be brought to the jury's attention to rebut the defendant's self-defense claim.

Although such discrepancies should be explored to aid the jury's determination of the self-defense issue, those differences are not conclusive proof that the defendant is not a battered woman who killed in self-defense. In *Kress v. State*,[255] for example, the Tennes-

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[249] *See, e.g.*, L. WALKER, *supra* note 18, at 41; Walker, Thyfault & Browne, *supra* note 32, at 12. For examples of such cases, see United States v. Iron Shield, 697 F.2d 845, 847 (8th Cir. 1983); People v. Welborn, 242 Cal. App. 2d 668, 672, 51 Cal. Rptr. 644, 647 (1966); Strong v. State, 251 Ga. 540, 541, 307 S.E.2d 912, 913 (1983); People v. White, 90 Ill. App. 3d 1067, 1069, 414 N.E.2d 196, 198 (1980); People v. Reeves, 47 Ill. App. 3d 406, 409, 362 N.E.2d 9, 12 (1977); State v. Seelke, 221 Kan. 672, 674, 561 P.2d 869, 871 (1977); State v. Edwards, 420 So. 2d 663, 669 (La. 1982); People v. Emick, 103 A.D.2d 643, 647, 481 N.Y.S.2d 552, 554 (1984); Easterling v. State, 267 P.2d 185, 187 (Okla. Crim. App. 1954); State v. Moore, 72 Or. App. 454, 457, 695 P.2d 985, 986, *review denied*, 299 Or. 154, 700 P.2d 251 (1985); State v. Kelly, 33 Wash. App. 541, 542, 655 P.2d 1202, 1202 (1982), *rev'd*, 102 Wash. 2d 188, 685 P.2d 564 (1984); *see also supra* notes 223-27 and accompanying text (describing impulsive nature of many killings by battered women).

[250] 627 P.2d 1374 (Wyo. 1981).

[251] *Id.* at 1375-76.

[252] *Id.* at 1377; *see also* People v. White, 90 Ill. App. 3d 1067, 1069, 414 N.E.2d 196, 198 (1980) (finding evidence sufficient to support defendant's voluntary manslaughter conviction where she gave conflicting stories to the police and apparently attempted to clean up blood and conceal murder weapon); State v. Necaise, 466 So. 2d 660, 669 (La. Ct. App. 1985) (finding sufficient support for defendant's manslaughter conviction where, among other things, evidence suggested that defendant had wiped fingerprints off weapons and had not called the police).

[253] 666 S.W.2d 895 (Mo. Ct. App. 1984).

[254] *Id.* at 900 n.2; *see also* State v. Leaphart, 673 S.W.2d 870, 872 (Tenn. Crim. App. 1983).

[255] 176 Tenn. 478, 144 S.W.2d 735 (1940).

see Supreme Court reversed a battered woman's second-degree murder conviction, noting that "[u]nder the facts appearing we do not consider defendant guilty of murder."[256] In that case, the defendant lied to the police about killing her boyfriend and hid the pistol used to kill him.[257] Under such circumstances, the defendant should be permitted to proffer testimony explaining why her behavior differed from that of other battered women[258] or why her actions were in fact consistent with those expected of a battered woman.[259] The jury need not accept such testimony, but it should be given the opportunity both to weigh the differences between the case before it and other homicide cases involving battered women and also to consider the defendant's explanations for those differences in determining whether or not this defendant was truly a battered woman.[260]

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[256] *Id.* at 485, 144 S.W.2d at 737.

[257] *Id.* at 479, 144 S.W.2d at 735; *see also* People v. Minnis, 118 Ill. App. 3d 345, 347-49, 455 N.E.2d 209, 211-13 (1983) (reversing defendant's murder conviction because trial court excluded expert testimony about the battered woman syndrome even though defendant had apparently attempted to conceal her husband's death by dismembering his body, disposing of it in various locations, and making excuses for his absence from work); State v. Savoy, 418 So. 2d 547, 550-51 (La. 1982) (reversing defendant's second-degree murder conviction and entering judgment of acquittal because prosecution did not prove beyond a reasonable doubt that defendant had not acted in self-defense even though she lied to the police several times about the circumstances of her husband's death and threw away the gun that killed him).

[258] In Kress v. State, 176 Tenn. 478, 483, 144 S.W.2d 735, 737 (1940), for example, the defendant testified that she lied to the police about shooting her boyfriend because she wanted to take him to a hospital immediately.

[259] In People v. Minnis, 118 Ill. App. 3d 345, 357, 455 N.E.2d 209, 218 (1983), for example, an expert witness testified that the defendant's decision to dismember her husband's body was consistent with her claim that she was an abused woman; her actions were influenced by "her emotional reaction to the shock of the situation," including her husband's previous abuse, and in fact may have been designed to ensure that he could not abuse her again. *But cf.* Ledford v. State, 254 Ga. 656, 656, 333 S.E.2d 576, 576-77 (1985) (finding evidence sufficient to support defendant's murder conviction where she burned husband's body and staged burglary in an apparent attempt to evade suspicion).

[260] *See, e.g.*, Fennell v. Goolsby, 630 F. Supp. 451, 459-60 (E.D. Pa. 1985); People v. Minnis, 118 Ill. App. 3d 345, 357, 455 N.E.2d 209, 218 (1983).

Such cases are no different from cases where a murder defendant disposes of the weapon or otherwise tries to evade detection and then argues at trial that the death was accidental. The jury may infer that the defendant's concealment attempts suggest a consciousness of guilt, thereby rebutting the claim of accident. On the other hand, the jury may vote to acquit despite the evidence that differentiates the case from other cases of accidental death.

Any discrepancies between a particular defendant's characteristics and the profile of the typical battered woman should be treated similarly, for one can be a battered woman even though she does not match all the stereotypes. For example, some battered women do attempt to leave their husbands, do seek help from others, or do fight back. *See, e.g.*, L. WALKER, *supra* note 18, at 149-50; Waits, *supra* note 3, at 296-97; Note,

The tendency to insist instead upon an inflexible, archetypical concept of the battered woman highlights a second definitional problem arising in these cases. Some commentators assert that the defendant's act of killing her husband demonstrates that she is *not* a battered woman.[261] Because research shows that battered women are generally passive and helpless, one would expect them to endure their husband's abuse rather than fight back. A woman who manages to kill her husband does not fit this model. Accordingly, because she is not a battered woman, her self-defense claim cannot be evaluated by looking at the perceptions and behavior of the reasonable battered woman.

Although research suggests that battered women usually make no attempt to resist their husbands' assaults,[262] the fact that a woman has killed her abusive husband does not disprove her status as a battered woman. Rather, studies identify a number of explanatory factors distinguishing the battered woman who ultimately kills her husband from the one who does not. These studies indicate that the women who kill suffer more frequent and more brutal abuse than other battered women.[263] These women then receive a beating that

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Empirical Dissent, *supra* note 10, at 641 n.114; *see also supra* note 46 and *infra* note 262 and accompanying text. Likewise, because battered women come from all socioeconomic groups and educational levels, *see supra* note 22 and accompanying text, some are employed or have other independent means of financial support. *See, e.g.*, L. WALKER, *supra* note 18, at 148; Gayford, *supra* note 220, at 240; *cf.* Crocker, *supra* note 9, at 148 & n.126 (noting that merely because a battered woman may be employed does not necessarily mean that she is economically independent). These differences in the behavior and characteristics of various battered women should not be used to obscure obvious similarities. Such differences can be brought to the jury's attention for purposes of aiding its determination whether the defendant in a particular case is in fact a battered woman. Nevertheless, they should not be used automatically to reject the defendant's claim that she is a battered woman and therefore to conclude that her self-defense claim cannot be evaluated according to the reasonable battered woman standard. *See, e.g.*, C. EWING, *supra* note 8, at 57-59; Crocker, *supra* note 9, at 144-50. *But see* State v. Kelly, 33 Wash. App. 541, 543, 655 P.2d 1202, 1203 (1982), *rev'd*, 102 Wash. 2d 188, 685 P.2d 564 (1984) (holding evidence of defendant's prior aggressive acts admissible to prove that she was not a battered woman); Note, *Empirical Dissent*, *supra* note 10, at 644 (arguing that because no one pattern describes the behavior of every battered woman, courts should not rely on one theoretical model to describe all such women).

[261] *See* C. EWING, *supra* note 8, at 56; Acker & Toch, *supra* note 10, at 154; Crocker, *supra* note 9, at 136; Note, *Empirical Dissent*, *supra* note 10, at 640-41.

[262] *See* L. WALKER, *supra* note 18, at 26-27, 149-50; L. WALKER, *supra* note 16, at 62; Hilberman & Munson, *supra* note 21, at 465-66; Steinmetz, *supra* note 19, at 324; Walker, Thyfault & Browne, *supra* note 32, at 12; Case/Comment, *supra* note 2, at 148. *But cf.* Waits, *supra* note 3, at 296 (battered women vary in the extent to which they fight back).

[263] Most women who killed their abusive husbands had suffered more serious physical injuries as a result of the violence; were beaten more often; experienced a rapid,

seems even more life-threatening than prior assaults,[264] and, because a weapon is easily accessible, they strike back.[265] This research suggests that the act of killing an abusive husband is not inconsistent with the conduct expected of battered women. Therefore, the definition of "battered woman" should encompass the woman who kills as well as the woman who passively endures the abuse.

C. *Prejudicing and Confusing the Jury*

The validity of self-defense claims raised by battered women who kill their husbands in nonconfrontational settings has also been challenged on the ground that this defense and the evidence admitted to support it are likely to prejudice and confuse the jury. Commentators make two interrelated points: jurors will be apt to vote to acquit simply because the defendant is a battered woman; and they will be prejudiced in the defendant's favor because the evidence at trial will paint the homicide victim in an unsympathetic light.

The critics who make these arguments offer no empirical evidence to support their assumptions about the jury's likely reaction to a homicide case involving a battered woman. In fact, the number of cases in which battered women are convicted[266] suggests that these concerns about prejudice are substantially overstated. It seems equally plausible that a jury's natural biases might disfavor the battered woman who kills her husband. The jury may well treat the woman who resorts to violence — in conflict with the jury's concept of appropriate female behavior — more harshly than it would the man who kills. Consistent with this theory, studies show that the conviction rates and sentences for female defendants exceed

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rather than gradual, increase in the severity of the abuse; had been subjected to a life-threatening or severely violent act during the first battering experience; had been threatened with a weapon on at least one occasion; had been threatened with death; and had been subjected to sexual abuse as well as physical and psychological abuse. *See* A. BROWNE, *supra* note 62, at 127, 181-82; C. EWING, *supra* note 8, at 34-36; L. WALKER, *supra* note 18, at 41-44; Note, *Empirical Dissent*, *supra* note 10, at 642-43 n.126.

In addition, the abusive husbands who were killed by their wives were more likely to have abused the children as well. Certain demographic factors may also distinguish battered women who kill from those who do not — those in the former group tend to be older and to have received less formal education. Finally, abuse of alcohol and/or drugs by either or both of the parties may increase the chances of homicide. *See* C. EWING, *supra* note 8, at 36-39; L. WALKER, *supra* note 18, at 41, 43; Note, *Empirical Dissent*, *supra* note 10, at 642-43 n.126.

[264] *See supra* note 131 and accompanying text.

[265] *See supra* note 225 and accompanying text.

[266] *See supra* note 62 and accompanying text.

those for male defendants who committed similar crimes.[267]

Specifically, the first concern about prejudice maintains that self-defense claims raised by battered women who kill in nonconfrontational settings are in reality "attempts to establish the defense that one who is a victim of family abuse is justified in killing the abuser."[268] According to these critics, the jury may conclude that the abuse suffered by the defendant excuses the killing and thus proves the defendant's innocence.[269] As one court noted, "the law of self-defense will not be judicially orchestrated to accommodate a theory that the existence of battered woman syndrome in an abusive relationship operates in and of itself to justify or excuse a homicide."[270]

Certainly, the law does not authorize the use of defensive force against another simply because that person has previously engaged in violent behavior.[271] Therefore, every battered woman who kills her abusive husband has not necessarily acted in self-defense. Despite her husband's past wrongs and the natural sympathy aroused by her story, the jury will be instructed not to acquit on self-defense grounds unless all the requisite elements of the defense are present: the defendant must have honestly and reasonably believed that her husband posed an imminent danger of death or serious bodily harm.

A battered woman claiming self-defense, however, is not maintaining that she had a right to kill because she was a battered woman. Rather, she is making the same self-defense claim raised in other types of cases. While she is not entitled to more favorable treatment than other defendants, she also cannot be dealt with more harshly. Therefore, the jury must determine, as it would in any other case, whether the defendant's perceptions and actions were

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[267] *See, e.g.*, L. BOWKER, WOMEN, CRIME, AND THE CRIMINAL JUSTICE SYSTEM 216-17 (1978); A. BROWNE, *supra* note 62, at 11; A. JONES, *supra* note 1, at 8-9.

[268] State v. Burton, 464 So. 2d 421, 428 (La. Ct. App.), *writ denied*, 468 So. 2d 570 (La. 1985); *see also* State v. Walker, 40 Wash. App. 658, 664, 700 P.2d 1168, 1173 (1985); Rosen, *supra* note 10, at 44; Comment, *Women Who Kill*, *supra* note 10, at 429 n.12; *cf.* Jahnke v. State, 682 P.2d 991, 997 (Wyo. 1984) (making same argument in case involving battered child who killed his abusive father).

[269] *See* State v. Young, 344 So. 2d 983, 988-89 (La. 1977); Acker & Toch, *supra* note 10, at 143; Crocker, *supra* note 9, at 149 n.132.

[270] State v. Leidholm, 334 N.W.2d 811, 820 n.8 (N.D. 1983).

[271] *See, e.g.*, Langley v. State, 373 So. 2d 1267, 1271 (Ala. Crim. App. 1979); State v. Necaise, 466 So. 2d 660, 671 (La. Ct. App. 1985); May v. State, 460 So. 2d 778, 785 (Miss. 1984) ("Battering husbands may well be deserving of society's condemnation. When they batter their wives they should be — and are — subject to prosecution. But they do not all deserve to be killed."); State v. Leidholm, 334 N.W.2d 811, 819-20 (N.D. 1983).

consistent with those of a reasonable person in her circumstances. To do so, it must hear testimony describing the husband's violent acts and reputation. This evidence of past abuse is not admitted to justify the homicide; instead, it is an attempt to explain the defendant's state of mind at the time of the killing. In other self-defense cases, courts admit such evidence despite the danger that the jury will be prejudiced in favor of the defendant.[272] Likewise, the jury should be trusted to follow the judge's instructions and acquit the battered woman only if the evidence supports her defense.

Additionally, one has no right to use self-defense in retaliation for previous wrongs or assaults.[273] However, the battered woman raising a self-defense claim does not seek, as some assert, "legally licensed revenge."[274] Like other defendants who are acquitted on grounds of self-defense after presenting evidence of the victim's prior violence, a battered woman who argues that she killed her husband in self-defense is not requesting a "right of retaliation."[275] Instead, she is arguing that she used the only means reasonably available to protect herself from future beatings.

A second, related source of prejudice identified by critics likewise arises from the admission of evidence concerning the husband's brutality. Such evidence, the commentators claim, diverts the jury's attention away from the critical time when the defendant killed her husband and encourages the jury to "blam[e] the victim."[276] Proving that the defendant was a battered woman necessarily proves as well that her husband was a batterer, thus prejudicing the prosecutor's case and making the jury "more inclined to lend a sympathetic ear to the defendant's version of the facts."[277] As a result,

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[272] *See supra* notes 82-83 and accompanying text.

[273] *See, e.g.*, People v. Triolo, 332 Ill. 410, 413-14, 163 N.E. 784, 785 (1928); People v. White, 90 Ill. App. 3d 1067, 1070, 414 N.E.2d 196, 199 (1980); State v. Crigler, 23 Wash. App. 716, 719, 598 P.2d 739, 741 (1979).

[274] Rittenmeyer, *supra* note 10, at 395; *see also* Note, *Wife Abuse*, *supra* note 10, at 1725.

[275] Rittenmeyer, *supra* note 10, at 395. Moreover, under current law, a defendant's self-defense claim is not automatically defeated even if her killing was motivated in part by her desire for revenge. Therefore, as long as all the elements of self-defense are present in a battered woman's case, she does not lose her defense because she also acted out of vengeance in killing her husband. *See* W. LAFAVE & A. SCOTT, *supra* note 55, at 458.

[276] Acker & Toch, *supra* note 10, at 147; *see also* State v. Burton, 464 So. 2d 421, 428 (La. Ct. App.), *writ denied*, 468 So. 2d 570 (La. 1985); Fielder v. State, 683 S.W.2d 565, 595 (Tex. Crim. App. 1985); C. EWING, *supra* note 8, at 61-62; Acker & Toch, *supra* note 10, at 146-49.

[277] Fielder v. State, 683 S.W.2d 565, 595 (Tex. Crim. App. 1985) (emphasis deleted).

> [t]he jury's natural inclination [will] be to shift its inquiry from the proper issue, of whether the wife reasonably perceived herself in danger of imminent serious bodily harm, to the irrelevant issue of whether the wife should be faulted for killing such an overbearing, cruel and physically abusive husband.[278]

Once again, this potential for prejudice is not unique to cases involving battered women. When self-defense is at issue, courts routinely admit testimony describing the victim's acts of violence even though that evidence tends to depict the victim as a belligerent bully.[279] The possibility that this evidence will prejudice the prosecution by creating undue sympathy for the defendant and hostility towards the victim is outweighed by its relevance in establishing the defendant's state of mind at the time of the homicide. In fact, refusing to admit such testimony may infringe on the defendant's due process right to present relevant evidence in her defense.[280]

D. Alternative Defenses

In addition to objecting to the validity of self-defense claims raised by battered women who kill in nonconfrontational settings, some commentators propose that defendants in such cases rely on alternative defenses. Some of these suggestions require modifying the current law of self-defense, while others involve wholly different defenses.

1. Reformulations of Self-Defense Doctrine

Professor Charles Ewing advances the most ambitious of the proposed modifications to the law of self-defense. Ewing argues that although battered women are not entitled to acquittal under current self-defense doctrine, the defense should be broadened to permit a defendant to kill when she is being threatened with "extremely serious psychological injury."[281] Ewing defines "extremely serious psy-

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[278] Ibn-Tamas v. United States, 407 A.2d 626, 649 n.8 (D.C. 1979) (Nebeker, J., dissenting); *see also id.* at 650.

[279] *See supra* notes 82-83 and accompanying text.

[280] *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284, 294-95, 302 (1973) (reversing a defendant's conviction as violative of due process where trustworthy evidence critical to his defense had been excluded at trial). For a discussion of this doctrine in cases involving battered women who killed their husbands, see Fennell v. Goolsby, 630 F. Supp. 451, 460-61 (E.D. Pa. 1985); Hawthorne v. State, 470 So. 2d 770, 787 & n.10 (Fla. Dist. Ct. App. 1985) (Ervin, C.J., concurring in part & dissenting in part); People v. Minnis, 118 Ill. App. 3d 345, 355, 455 N.E.2d 209, 217 (1983); State v. Kelly, 97 N.J. 178, 203 n.11, 478 A.2d 364, 376 n.11 (1984).

[281] C. EWING, *supra* note 8, at 79.

chological injury" as a "gross and enduring impairment of one's psychological functioning which significantly limits the meaning and value of one's physical existence."[282] This defense — labelled psychological self-defense — would be available to anyone who reasonably believes that she must kill in order to protect herself from being "reduced to a psychological state in which [her] continued . . . existence will have little if any meaning or value."[283] According to Ewing, the use of defensive force in such circumstances is legitimate because the result of such "extremely serious psychological injury" is "a life hardly worth living."[284] Therefore, defensive force is justified if used to protect one's "psychological integrity" as well as to avoid death or serious physical harm.[285]

Ewing's theory of psychological self-defense suffers from hopeless ambiguity. Certainly, as Ewing observes, juries in criminal cases must often reconstruct the defendant's state of mind at the time of the crime and determine the reasonableness of that mental state.[286] Ewing's proposal, however, requires an inquiry of a wholly different order. Ewing himself admits that "the abstract, intangible nature of the psychological factors involved" makes the questions to be answered by the jury "not only difficult but also at least somewhat speculative."[287] He dramatically understates the problem.

A jury cannot possibly evaluate whether the danger confronting a defendant was of sufficient magnitude to constitute "extremely serious psychological injury." Whether the threat to the defendant's "psychological integrity" was severe enough to lead to "annihilation of [her] psychological sel[f]," making "life hardly worth living," cannot be objectively determined by a judge or jury, even with the help of expert testimony.[288] The concept of what deprives life of meaning is so subjective and value-laden that it has no rational limiting principle. For example, could defendants who killed their spouses' lovers advance the theory of pschological self-defense because the extramarital affair made the rejected spouse's life "hardly worth living"? Or, could the defense be used to exonerate workaholic defendants who killed the employers who intended to discharge them because the agony of being fired and losing a valued

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282 *Id.*
283 *Id.* at 77-78.
284 *Id.* at 78, 79.
285 *See id.* at 80.
286 *See id.* at 92-94.
287 *Id.* at 92.
288 *Id.* at 78, 80.

job was so upsetting as to "significantly [limit] the meaning and value" of a dedicated employee's life?

Ewing anticipates that recognizing the claim of psychological self-defense would primarily benefit battered women.[289] To the extent courts thus limit the defense, however, they will de facto have created a "battered woman syndrome defense." Treating defendants who happen to be battered women differently from all other defendants — unlike the approach suggested in this Article — may well perpetuate stereotypes about women,[290] foster the perception that battered women are being given a unique right to defend themselves and a "license to kill,"[291] and may even give rise to equal protection concerns.[292] Ewing resists instituting a specific defense for battered women because he believes that juries will react negatively to such special treatment. Moreover, he believes that the status of being a battered woman should not by itself justify homicide.[293] Nevertheless, if courts narrowly limit his proposal as he predicts, that is precisely the result that will follow.[294]

Of course, given the inherent ambiguity of psychological self-defense, it is conceivable the defense would not be limited to battered women. In that event, the vagueness of Ewing's concept of psychological death not only becomes more problematic, it virtually guarantees that his proposal will never be adopted. The concerns of deterrence and spurious claims that have already been voiced in the debate surrounding battered women's self-defense claims[295] are sure

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[289] *See id.* at 79, 97.

[290] The creation of a special "battered woman" defense may have a tendency to perpetuate sexual stereotypes and thus may be used to justify continued gender discrimination. *See* Crocker, *supra* note 9, at 136; Schneider, *supra* note 3, at 639-40. On the other hand, treating battered women just like other defendants who argue that they killed in self-defense, as this Article proposes, is not as likely to contribute to the survival of such stereotypes so long as juries receive accurate information about the nature of the battered woman syndrome and faithfully apply the same legal standard used in other self-defense cases. *See* Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 214-15 (1986).

[291] *See supra* notes 268-75 and accompanying text.

[292] *See supra* notes 116-20 and accompanying text.

[293] *See* C. EWING, *supra* note 8, at 57, 78-79.

[294] Ewing notes that a psychological self-defense claim might also be appropriate in cases where battered children kill abusive parents. *See id.* at 79; *see also supra* note 230. Even if the theory is so extended, however, it may still be viewed as creating a special defense available only to some defendants and is, therefore, likely to encounter criticism similar to that discussed in text — for example, that a "license to kill" has been given to all victims of family violence.

[295] *See supra* Parts III(A) and III(B).

to be repeated with even greater force.[296]

Professor Cathryn Rosen proposes a different modification of self-defense doctrine. She suggests that cases involving battered women demonstrate the advisability of recasting self-defense as a claim of excuse rather than justification.[297] She maintains that, even though self-defense is almost universally considered a justification,[298] explaining the use of defensive force by a strict balancing of evils can be difficult in some cases.

As Rosen points out, the view that self-defense is a justification depends on the assumption that the life of the aggressor is worth less than the life of the defender.[299] Given that assumption, it is difficult to explain why the law considers the use of defensive force the lesser evil when the defender made an honest and reasonable mistake and the supposed aggressor did not in fact pose any threat.[300] Nor is it apparent why the law justifies killing to avoid serious bodily harm or unlawful entry into the home[301] or when the defendant could have retreated and thus avoided injury.[302] Nevertheless, while Rosen's point is well-taken, these conceptual problems characterize the law of self-defense generally. They are not specific to cases involving battered women. Moreover, although the distinction between justification and excuse may have some academic or theoretical importance,[303] it makes no practical difference to the defendant whether the jury determines that her use of defensive force was justified or excused. In either case, she is acquitted and goes free.[304]

Whatever the merits of Rosen's proposal, resolving the issues raised in this Article does not require such a radical rethinking of the doctrine of self-defense. As the discussion in Part II demon-

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296 Ewing concedes that his proposal would "require a major change in substantive criminal law and would likely come about, if at all, only after significant public and political debate." C. EWING, *supra* note 8, at 97.

297 *See* Rosen, *supra* note 10, at 49-55; *see also supra* notes 108-10 and accompanying text.

298 *See supra* note 110 and accompanying text.

299 *See* Rosen, *supra* note 10, at 47-49; *see also, e.g.*, C. EWING, *supra* note 8, at 84-85; Acker & Toch, *supra* note 10, at 152.

300 *See* Rosen, *supra* note 10, at 31, 47-48; *see also, e.g.*, Greenawalt, *supra* note 77, at 1907-08; Note, *Imperfect Self-Defense*, *supra* note 8, at 632 & n.89.

301 *See, e.g.*, C. EWING, *supra* note 8, at 80, 81-82.

302 *See, e.g., id.* at 80-81; Greenawalt, *supra* note 77, at 1905-07.

303 *See, e.g.*, Crocker, *supra* note 9, at 130-31 (characterizing the difference as "an important ideological distinction"); Greenawalt, *supra* note 77, at 1899-1900 (arguing that the distinction is important because it reflects a fundamental moral judgment).

304 *See, e.g.*, State v. Leidholm, 334 N.W.2d 811, 815 (N.D. 1983).

strates, modifying the self-defense doctrine — along the lines suggested by Ewing or Rosen or in any other respect[305] — is not necessary to accommodate self-defense claims raised by battered women. Rather, those cases can, and should, be treated like any other case of self-defense.

2. *Different Defense Strategies*

Other commentators propose that battered women who kill under nonconfrontational circumstances rely on defenses other than self-defense. For example, some suggest that the battered woman should attempt to convince the jury to find extenuating circumstances and thus reduce the verdict to voluntary manslaughter rather than murder.[306] Voluntary manslaughter is an appropriate verdict even though the defendant intended to kill if, at the time of the killing, she was acting in the heat of passion brought about by "adequate provocation." Provocation is adequate if it would have "cause[d] a reasonable [person] to lose [her] normal self-control."[307]

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[305] Others propose different modifications of the law of self-defense. One commentator, for example, recommends expansion of the concept of imperfect self-defense, *see supra* note 64, to mitigate murder to voluntary manslaughter whenever the defendant honestly feared her assailant but understandably failed to satisfy some other requirement of the self-defense claim. *See* Note, *Imperfect Self-Defense*, *supra* note 8, at 635-38. If the defendant could explain to the jury's satisfaction why one of the traditional elements of self-defense was missing, the jury would be permitted to exercise compassion and convict on the lesser charge of manslaughter. The author would apply this doctrine to cases where battered women kill their husbands in nonconfrontational settings because these women "misjudge[d]" the need to use defensive force due to "a defective reasoning and/or perceiving system." *Id.* at 635. As explained above, however, a battered woman's perception of the danger posed by her husband is not "defective." Rather, as argued in Part II *supra*, such defendants may well be able to demonstrate that they acted exactly as a reasonable person in their circumstances would have acted and that all of the elements of a traditional self-defense claim are satisfied.

Finally, another commentator suggests that the cases involving battered women demonstrate that defendants should prevail on self-defense claims as long as they reasonably believed their use of defensive force was necessary. *See* Note, *supra* note 185, at 658-60. No requirement of imminence or retreat would be imposed; rather, the jury could consider the imminence of the danger and the defendant's opportunity to retreat in determining whether her use of defensive force was necessary. The author recognizes, however, that redefining self-defense to focus only on the "necessity" of the defendant's actions is more unstructured than the present formulation of the defense and therefore necessarily provides less guidance to juries, courts, and potential defendants regarding the scope of the permissible use of defensive force. *See id.* at 660.

[306] *See, e.g.*, Case/Comment, *supra* note 2, at 155-57; Comment, *supra* note 122, at 225-29; Note, *Wife Abuse*, *supra* note 10, at 1724-25.

[307] W. LAFAVE & A. SCOTT, *supra* note 55, at 653. Some jurisdictions instead apply the Model Penal Code's formulation, which mitigates murder to manslaughter if the defendant was acting "under the influence of extreme mental or emotional disturbance

To the extent that these commentators are suggesting that a history of abuse is at best a mitigating circumstance rather than a complete defense, the discussion in Part II explaining why self-defense is an appropriate claim provides a sufficient response. Voluntary manslaughter is the proper verdict for the battered woman who kills because she is angry. The battered woman who kills because she is afraid and wants to protect herself, however, is entitled to an outright acquittal on self-defense grounds.

In addition, determining whether a battered woman was subjected to provocation that would have caused the "reasonable person" to lose self-control raises the same problems encountered in ascertaining whether that same "reasonable person" would have felt the need to use defensive force.[308] Moreover, unless the defendant's conduct is compared with that of the reasonable battered woman, she will probably be convicted of murder because the reasonable person who had not experienced a prolonged history of abuse would not have been provoked by threats,[309] a past assault,[310] or a sleeping husband. Finally, in identifying the sources of the provocation, courts typically focus only on the circumstances at the time of the killing and do not recognize claims that the defendant was provoked by a number of events occurring over an extended period of time.[311]

Thus, relying on a voluntary manslaughter defense does not

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for which there is reasonable explanation or excuse." MODEL PENAL CODE § 210.3(1)(b) (Official Draft 1962); *see* W. LAFAVE & A. SCOTT, *supra* note 55, at 660.

[308] *See, e.g.*, Kelman, *supra* note 79, at 636-37; Note, *Imperfect Self-Defense*, *supra* note 8, at 635.

[309] Typically, insulting or abusive words are not considered adequate provocation. *See* W. LAFAVE & A. SCOTT, *supra* note 55, at 657-58.

[310] In most jurisdictions, a voluntary manslaughter verdict is inappropriate if sufficient time elapsed between the provoking event and the killing such that a reasonable person would have "cooled off" during that period. *See id.* at 661-62. As a result, a battered woman who kills her husband at some point after an assault has ended may have difficulty convincing a jury not only that she was reasonably provoked but also that she did not cool off in the interval before the killing. *See, e.g.*, C. EWING, *supra* note 8, at 45; Comment, *Crimes Code*, *supra* note 10, at 129-31.

[311] *See, e.g.*, Kelman, *supra* note 79, at 645 nn.138-39. Some courts, however, have rejected this limited view of provocation. *See, e.g.*, People v. Berry, 18 Cal. 3d 509, 515-16, 134 Cal. Rptr. 415, 418-19, 556 P.2d 777, 780-81 (1976); People v. Borchers, 50 Cal. 2d 321, 328-29, 325 P.2d 97, 102 (1958); Commonwealth v. McCusker, 448 Pa. 382, 389, 292 A.2d 286, 290 (1972).

Thus, in cases involving battered women, some courts have ruled that the history of the violent relationship is relevant in determining whether or not the defendant was reasonably provoked. *See, e.g.*, State v. Kelly, 97 N.J. 178, 218-19, 478 A.2d 364, 384 (1984); State v. Felton, 110 Wis. 2d 485, 509, 329 N.W.2d 161, 172 (1983); State v. Hoyt, 21 Wis. 2d 284, 291, 128 N.W.2d 645, 649 (1964) (per curiam).

avoid the difficulties confronting the battered woman who claims that she killed in self-defense. Unless the court adopts the approach suggested in Part II(A) and applies a reasonable battered woman standard, the battered woman's heat of passion defense will likely prove as unsuccessful as her self-defense claim.[312]

Finally, some commentators argue that a battered woman who kills in a nonconfrontational setting should base her defense on a claim of insanity.[313] As noted above, the battered woman syndrome is not a form of mental illness.[314] Therefore, although a battered woman may be suffering from some diagnosable mental disease, the mere fact that she has the traits characteristic of battered women does not support an insanity defense. In fact, a battered woman with a legitimate self-defense claim can demonstrate that her perceptions and behavior were reasonable for one in her circumstances rather than distorted by some impaired mental state.

Moreover, in many cases an insanity defense is likely to be unsuccessful. Although the battered woman may be acting under stress and may even be in a daze when she kills,[315] she generally retains her ability to form the requisite intent to kill. Typically, she knows the probable consequences of her actions at the time of the killing

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[312] Some courts have properly concluded that a reasonable battered woman standard must be used in ruling on heat of passion defenses raised by battered women. *See, e.g.*, State v. Felton, 110 Wis. 2d 485, 509-10, 329 N.W.2d 161, 172 (1983); State v. Hoyt, 21 Wis. 2d 284, 291, 128 N.W.2d 645, 649 (1964) (per curiam).

[313] *See* Rittenmeyer, *supra* note 10, at 392; Comment, *Women Who Kill*, *supra* note 10, at 439-44. Two definitions of the insanity defense are currently in use. A majority of jurisdictions, including the federal courts, follow the M'Naghten rule, which acquits a defendant by reason of insanity if, at the time of the crime, she suffered from a mental disease or defect that made her unable to "know the nature and quality of the act [s]he was doing" or unable to realize that it was wrong. W. LAFAVE & A. SCOTT, *supra* note 55, at 310, 330-31. The Model Penal Code standard, which has been adopted in a significant minority of jurisdictions, *see id.* at 330-31, recognizes an insanity defense if, at the time of the crime, the defendant suffered from some mental disease or defect that impaired either her cognitive abilities — so that she lacked "substantial capacity . . . to appreciate the criminality [wrongfulness] of [her] conduct" — or her volitional capacity — so that she lacked "substantial capacity . . . to conform [her] conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (Official Draft 1962).

[314] *See supra* note 90 and accompanying text. Although psychiatric classifications may not be conclusive in defining the legal concept of mental disease, *see, e.g.*, United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966); State v. Garrett, 391 S.W.2d 235, 239 (Mo. 1965), they are obviously relevant. Moreover, a battered woman must introduce evidence of some "mental abnormality" in support of her insanity defense. *See* W. LAFAVE & A. SCOTT, *supra* note 55, at 312. *But cf.* Comment, *Women Who Kill*, *supra* note 10, at 441-42 (arguing that the battered woman syndrome does constitute a mental disease or defect).

[315] *See supra* note 224 and accompanying text.

and understands that killing is morally and legally wrong. She simply intends to kill to protect herself from her husband's violence.[316] In addition, although the battered woman may have believed that the only way for her to protect herself was to kill her husband, that belief does not necessarily indicate that she was substantially unable to control her conduct at the time she killed.[317] In such cases, an insanity defense is unlikely to prevail, particularly at a time when the defense is generally viewed with suspicion and is being severely curtailed in many jurisdictions.[318] In fact, juries acquit only a very small percentage of battered women by reason of insanity.[319]

Finally, the heat of passion defense results in a manslaughter conviction, and possibly a prison sentence, and the insanity defense leads to involuntary commitment to a mental hospital for an indefinite period of time.[320] These dispositions are not appropriate for conduct that should be deemed justifiable self-defense.

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316 *See, e.g.*, C. EWING, *supra* note 8, at 45-46; L. WALKER, *supra* note 18, at 41; Dvoskin, *supra* note 37, at 344 (noting that, even if the battered woman is suffering from depression, that condition is not likely to result in "thought disorder or reality-testing difficulties"); Note, *Battered Wife's Dilemma*, *supra* note 8, at 918. In such cases, it will be difficult for the battered woman to satisfy either the M'Naghten standard or the cognitive prong of the Model Penal Code test. *See supra* note 313. *But cf.* Comment, *Women Who Kill*, *supra* note 10, at 441-42 (arguing that the battered woman may be unable to appreciate the wrongfulness of her conduct).

317 *See, e.g.*, C. EWING, *supra* note 8, at 46; Dvoskin, *supra* note 37, at 344. Therefore, in such cases it will be difficult for the battered woman to satisfy the volitional prong of the Model Penal Code test. *See supra* note 313. *But cf.* Comment, *Women Who Kill*, *supra* note 10, at 442-44 (arguing that the battered woman may be substantially unable to control her conduct).

Some courts, however, have recently expressed dissatisfaction with the volitional prong, and, as a result, jurisdictions that apply the Model Penal Code standard may abolish that prong of the defense. *See, e.g.*, United States v. Lyons, 731 F.2d 243, 248-49 (5th Cir.) (en banc), *cert. denied*, 469 U.S. 930 (1984).

318 *See, e.g.*, S. KADISH, S. SCHULHOFER & M. PAULSEN, supra note 140, at 88-89, 104-05 (4th ed. Supp. 1985).

319 *See* C. EWING, *supra* note 8, at 45, 155 n.25. *But cf.* Comment, *Women Who Kill*, *supra* note 10, at 444 (describing two cases where battered women were acquitted by reason of insanity). For other cases where battered women attempted to raise insanity defenses, see, *e.g.*, People v. Seipel, 108 Ill. App. 2d 384, 386, 247 N.E.2d 905, 908-09 (1969), *cert. denied*, 397 U.S. 1057 (1970); State v. Guido, 40 N.J. 191, 200-05, 191 A.2d 45, 50-53 (1963); State v. Felton, 110 Wis. 2d 485, 514-16, 329 N.W.2d 161, 174-75 (1983).

320 *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 55, at 360-61 & n.5. Moreover, in Jones v. United States, 463 U.S. 354, 368-69 (1983), the Supreme Court held that a defendant acquitted by reason of insanity may be involuntarily hospitalized for a period of time longer than the maximum prison sentence prescribed for the crime with which she was charged.

CONCLUSION

Self-defense claims raised by battered women like Francine Hughes may not resemble classic cases of self-defense. Nevertheless, the battered woman who kills in a nonconfrontational setting is equally entitled to acquittal as long as she can show that she honestly and reasonably believed that her violent husband posed an imminent threat of death or serious bodily harm. In many cases, she can do so by presenting evidence describing the nature of the abusive relationship and its impact on her. That evidence will demonstrate that a reasonable person in the defendant's circumstances would eventually have come to believe she could neither escape nor defend herself during a beating and that the only way to protect herself was to strike back under nonconfrontational circumstances. In such cases, the appropriate defense is a traditional self-defense claim, and the appropriate verdict is acquittal.