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DISPELLING THE MYTHS ABOUT THE “BATTERED WOMAN’S DEFENSE:” TOWARDS A NEW UNDERSTANDING

*Michael Dowd**

Twelve years ago I was forced to learn something about battered women in the course of representing a woman who had killed her abusive husband. Before that time, I had known women were abused but viewed their tragedy as a private or personal injustice. During that case, however, I began to learn that the injustice of abuse by an individual man was a symptom of a pervasive denial of human rights which made society itself the accomplice of the man who had beaten my client.

Since then, I have represented a dozen other women who have fought back against their abusers, and I have consulted in fifty to a hundred similar cases across the country. Those twelve years have affirmed and sharpened — but not altered — my initial discovery about the true nature of the dilemma facing battered women: that is, that the denial of the equality of women in cultures which perceive such treatment as both acceptable and lawful is essential to the existence of domestic violence. This denial is the cornerstone of men’s violence against women and ultimately operates to deny battered women a fair trial when they are successful in fighting back against their abusers.

This essay explores the growth of the use of self-defense by battered women from a historical perspective in order to explain the magnitude of the prejudices these women face focusing on the development of Battered Woman’s Syndrome as an aid in this effort and confronting the myth of what has been called the “battered woman’s defense.” In so doing, this essay suggests that a redefinition of Battered Woman’s Syndrome will ease much of the criticism from feminists and eliminate the confusion in the legal profession surrounding the use of self-defense by battered women. The essay also charts the subtle changes in the prejudices that continue to deny women equality in the courtroom and concludes by suggesting strategies which will enable judges and juries to view the use of self-defense by a battered

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woman through the woman's own eyes while recognizing the need for the continued struggle to end domestic violence.

A. The Historical Background of Violence Against Women

From the beginning of time, women have been perceived as inferior to men. Examination of the history of western civilization reveals laws authorizing the use of violence against women to chastise and control them. For example, in Roman times, a husband was permitted to use reasonable physical force to discipline his wife, including blackening her eyes or breaking her nose.¹ In the context of property rights, the English principle of coverture established that a married woman could not own property free from her husband's claim or control.² In fact, women themselves were seen as property. Even worse, English rape laws viewed rape as a crime against the husband, father or fiancé of the victim.³ Rape cases were considered properly disposed of if the male "owner" of the victim was compensated for the damage to his "property." Marital rape was inconceivable, as wives could not legally refuse their husbands' conjugal rights. A sixteenth century Russian code wisely cautioned husbands not to strike their wives on the face or ear since they would be sorely disadvantaged should the wife become blind, deaf or otherwise incapacitated.⁴ In many parts of Europe, a man could kill his wife without penalty well into the 1600s.⁵ By contrast, a wife who killed her husband was penalized as if she had committed treason because her act of homicide was considered analogous to murdering the king.⁶

English common law sanctioned wife-beating under the infamous "rule of thumb," which decreed that a man might use a "rod not thicker than his thumb" with which to chastise his wife.⁷ Oddly enough, this restriction was meant to be a means of protecting wives from over-zealous husbands. American states adopted this rule in the early nineteenth century in formal recognition of a husband's right to beat his wife.⁸ By 1910, only thirty-five out of forty-six states had

1. See Beirne Stedham, *Right of Husband to Chastise Wife*, 3 VA. L. REV. 101 (1917).

2. BLACK'S LAW DICTIONARY 366 (6th ed. 1990).

3. ROBERT T. SIEGLER, *DOMESTIC VIOLENCE IN CONTEXT* 8 (1989).

4. MILDRED DALEY PAGEDLOW, *FAMILY VIOLENCE* 282 (1984).

5. SIEGLER, *supra* note 3, at 9.

6. WILLIAM BLACKSTONE, *COMMENTARIES* 613 (West 1897).

7. LENORE WALKER, *THE BATTERED WOMAN* 12 (1979).

8. Victoria Mikesell Mather, *The Skeleton in the Closet: The Battered Woman's Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 547-48 n.17 (1988).

passed reform legislation classifying wife-beating as assault.⁹

B. The Integration of Old Ideas into Modern Society

The legalized injustices of pre-modern times documented a societal state of mind not easily erased after being in place for centuries. Indeed, it is only in the last ten years that most states have made it a crime for a man to rape his wife. Some states require physical injury to accompany the rape,¹⁰ while North Carolina and Oklahoma still view marital rape as no crime at all.¹¹ The real legacy of these laws and practices, however, remains in our perceptions of women and their position with respect to men. This legacy is alarmingly illustrated in those parts of our society where a woman's wifely "duties" include sexual submissiveness.

1. Traditional Female Stereotypes

It is no surprise that a man authorized to abuse his wife would be the king of the castle and the breadwinner, and the woman relegated to the traditional supporting roles of housewife and mother. National magazines have featured stories on the "corporate wife" and her importance in supporting her husband's career.¹² Nursing and teaching have been the traditional careers for women. It was not long ago that a woman could not be found in the board room, a police department, or construction site. Few women could aspire to be doctors or lawyers, or occupy any position which might be overly time consuming and interfere with wifely and motherly duties. To be sure, these professions did not fit the image of a "good woman" who was passive and submissive.

Bound up in these traditional beliefs about a woman's role was the understanding that what happened between a man and a woman behind closed doors was a private family matter. And, not surprisingly, it is behind closed doors that women have been regularly abused. Although the government's fundamental obligation to its citizens is its duty to protect them from harm, an informal exception has existed for the husband who beats his wife. Only recently have police departments begun to vigorously arrest wife beaters, less out of concern for

9. SIEGLER, *supra* note 3, at 9.

10. WAKEMAN/WALWORTH, INC., 45 FROM THE STATE CAPITALS 1 (Aug. 5, 1991).

11. *Id.* at 3.

12. See, e.g., Ann Dransfield, *The Uneasy Life of the Corporate Spouse*, FORTUNE, Aug. 20, 1984, at 26; *How Spouses Influence Executives?*, BUS. WK., May 2, 1983, at 17; Norman N. Mlackak, *Life With the CEO: Glamour and Junkets — or Heroic Patience?*, INDUSTRY WK., Oct. 1, 1984, at 74; *The Organization Man, Cont'd*, NEWSWEEK, Oct. 27, 1980, at 96.

the individual woman than as a result of lawsuits based on equal protection claims for a failure to protect.¹³

In this reality, battered women have known that they could expect little protection from a society made up of individuals who resembled, at least in thought, the men who beat them. Some of these women have died as a result, but others, in the face of impending death, have fought back and killed their abusers. As a result of their actions, the women in the latter group encountered a system of justice that prosecuted them with a lightening quickness and efficiency never provided when the circumstances were reversed. Not surprisingly, the attitudes that permeated a world in which wife-beating was accepted had little tolerance for the woman who fought back. On the rare occasions when women were successful in court, it was only at the expense of being perceived as insane.

Perhaps the best known case was that of Francine Hughes, whose story was dramatically portrayed in the television movie *The Burning Bed* in 1984.¹⁴ Although seen as a landmark case in recognizing the plight of battered women, the fact remains that Ms. Hughes premised her defense on the ground of temporary insanity. Nonetheless, that case, which was tried in the midst of a feminist movement aimed at achieving equality for women in all areas of society, marked the end of one era and the beginning of another.¹⁵

The legacy of Ms. Hughes' story was the need to view abused women who fought back against their abusers as reasonable in their efforts to survive, an important component of the early struggle for equality. As a result, women were no longer defending themselves in court in clear cases of self-defense by arguing that they were deranged at the time. On a broader scale, however, the movement for equality attempted to develop an awareness of the plight of battered women and the basic injustice of their situation. Society thus began to recognize the significance of the problem of battered women. By the mid-1970s, the first battered women's shelters had been opened in the United States¹⁶ and old ideas about women in the criminal justice sys-

13. See, e.g., *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D.C. Conn. 1984); *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (1977), *rev'd on other grounds*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 901, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

14. NBC, Oct. 8, 1984. Ms. Hughes premised her defense on temporary insanity and was exonerated on these grounds.

15. See JULIE BLACKMAN, *INTIMATE VIOLENCE* 5-7 (1989).

16. See Richard J. Berk, Phyllis A. Newton & Sarah Fenstermaker Berk, *What a Difference a Day Makes: An Empirical Study of the Impact of Shelters for Battered Women*, 48 J. MARRIAGE & FAM. 481, 482 (Aug. 1986).

tem had begun to be challenged.

Despite this progress, changing the beliefs of society has been, and continues to be, extremely difficult. Indeed, violence has always been seen as "appropriate" only in male terms. A good man was ambitious, aggressive and in control. A good woman, on the other hand, was demure, passive and submissive. These stereotypes undoubtedly run contrary to the reality that in some situations, the use of force by a woman is a necessary and acceptable thing. Nonetheless, these perceptions of gender-related qualities have been a natural extension of the stereotypes embedded in the psyche of a society resisting the pressure of a women's movement dedicated to the achievement of equality.

2. *The Law Begins to Grapple With the Reality of Women Who Kill — the 1970s*

The case of Yvonne Wanrow, decided by the Supreme Court of the State of Washington in 1977, marked a pivotal advance for women in the context of self-defense cases.¹⁷ Ms. Wanrow had appealed a murder conviction complaining that the trial court had instructed the jury on the issue of self-defense using only the masculine gender to explain the circumstances justifying the use of force. She and her lawyers believed that the use of the masculine gender implicitly advised the jury to use a male standard in assessing the propriety of a woman's conduct.

The most noteworthy progress resulting from this case boiled down to a woman's right to have "she" and "her" substituted for "he" and "him" when a jury considered the circumstances in which a battered woman used force to defend herself. Despite this advance, the legal community's search for a new standard against which to judge battered women has caused much controversy and remains unresolved.

a. *Some Suggested Standards*

Progressing beyond the "reasonable man" standard for self-defense, the debate continues today about what standard to apply in the case of a battered woman. Some suggest a sex-neutral standard considering all of the circumstances surrounding the participants at the time of the incident, including individual characteristics and histories of the parties.¹⁸ In applying this standard, both lay and expert testimony would be used to explain the individual's violence, and to dispel

17. *Washington v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977).

18. See Mather, *supra* note 8, at 571. My own experience suggests women have received the fairest trial in situations where the sex-neutral standard has been used.

misconceptions about violence which occurs in intimate settings. Critics suggest, however, that this standard reinforces sexual stereotypes by focusing on the weaknesses and idiosyncracies of women, especially battered women.¹⁹

A second alternative is the "reasonable woman" standard. Advocates argue that a woman's perceptions of danger, harm, and force are different from a man's and therefore that her reactions when threatened by her abuser are significantly different from those of a man in similar circumstances.²⁰ Accordingly, a woman's actions should be judged by a different standard. Opponents of this theory see stereotypes emerging which are similar to those which arise with the use of the sex-neutral standard because it, too, could operate to exclude certain women from the group who do not fit the image of a "weak" or "helpless" victim.²¹

A third approach is the creation of an entirely new concept of self-defense based on the reasonable *battered* woman.²² A major problem with this theory, however, is that it may create equal protection problems since it provides women with a defense not available to men. Like the two theories advanced earlier, this approach also engenders the vision of the "weak" woman which many critics find objectionable.²³

b. The Battered Woman's Syndrome

Lenore Walker, a psychologist, has developed a vehicle to assist women in explaining their experiences in the context of a criminal trial dealing with a woman's use of force in self-defense.²⁴ In her book, *The Battered Woman*, published in 1979, Dr. Walker outlined a theory based on research with battered women, relating the structure of a battering relationship from the perspective of the abused woman. She offered Battered Woman's Syndrome as a way to explain why a woman stayed in the relationship with her batterer. Dr. Walker further described the characteristics of these relationships. She suggested that battering relationships have a cycle of violence consisting of three phases and that women in these relationships often suffer from "learned helplessness."²⁵ The three phases of the repeated cycle

19. *Id.*

20. *Id.* at 573. See also Holly Maguigan, *Battered Women and Self-Defense: Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 402-05 (1991).

21. Mather, *supra* note 8, at 573.

22. *Id.* at 571-72.

23. *Id.*

24. WALKER, *supra* note 7.

25. *Id.* at 42-70.

of violence consist of a tension-building phase, an acute battering incident, and a contrition phase, where the batterer showers affection on the woman with promises never to repeat his conduct.²⁶ Later anecdotal information suggests that the contrition phase may disappear over time, replaced by a period better described as a "lull in hostilities." At this time the apologies and remorse that helped keep the woman in the relationship are replaced by the woman's fear of leaving her batterer.²⁷

Dr. Walker's landmark work also described a series of myths associated with battered women and the characteristics of the women themselves. The myths included beliefs that battering was not widespread; that it did not happen to middle-class white women; that battered women were masochists; that they could leave their batterers at any time; and that such women deserved to be beaten.²⁸ Among other things, the women themselves were said to suffer from low self-esteem, to harbor traditional values about relationships, to accept responsibility for the abuse and to believe they were isolated.²⁹

The last element of the Battered Woman's Syndrome as described by Dr. Walker is the problem of learned helplessness, a concept developed from research conducted by Martin Seligman during the 1960s.³⁰ Seligman reported that dogs, when placed in cages with a divider, would jump from one side of the cage to the other after the side on which the dog had been sitting received a charge of electricity. Afterwards, a shock would be administered to the side to which the dog had jumped, causing him to jump back to his original position. In this way, neither side of the cage was free from the electrical current. After a short while, the dog would no longer attempt to jump because it had learned there was nothing it could do to avoid the shock. Seligman argued that this phenomenon occurred because the animal had learned that it was helpless and therefore made no effort to escape from its plight.

Dr. Walker applied this principle of learned helplessness to battered women.³¹ Repeated beatings, like electric shocks, seem inescapable to women in abusive relationships. Although these women initially believe they can control the violence by their behavior, they eventually

26. *Id.* at 55.

27. This information was compiled by the New York State Office for the Prevention of Domestic Violence.

28. *Id.* at 18-30.

29. *Id.* at 31-35.

30. See EDWARD GONDOLF & ELLEN FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 13 (1988).

31. *Id.* at 11-12.

recognize the futility of accommodating the abuse, or of refraining from conduct that precipitates the violence. In this way, battered women come to believe that nothing they do can alter the violence, and subsequently become passive and lose their ability to perceive alternatives.

C. Using Battered Woman's Syndrome in Court

The confluence of currents in the social stream of the 1970s spawned a movement dedicated to equality for women and led to the development of Battered Woman's Syndrome as a body of research that could explain the reasonableness of a battered woman's use of force. This theory led to the birth of what has been called the "battered woman's defense." While both laymen and lawyers have misunderstood the use of Battered Woman's Syndrome in supporting a claim of self-defense, the so called "battered woman's defense" is nothing more than the use of expert testimony, in a self-defense case, as a way to explain a woman's acts in the context of her experiences as a battered woman.

When applied in the context of criminal cases, Battered Woman's Syndrome thus offers the defense attorney a way to explain the conduct of a woman in a battering relationship who fights back and kills her abuser. Because the battered woman's behavior is predicated on scientific research, Battered Woman's Syndrome may be explained to the jury or judge through the testimony of an expert. The expert must convey the underlying premise that a battered woman is a normal, reasonable person, caught in irrational circumstances, responding as any reasonable person would. In this way, a lawyer handling a woman's self-defense case may use Battered Woman's Syndrome to argue that what happened to one woman can happen to anybody under similar circumstances. In other words, testimony about Battered Woman's Syndrome transforms the battered woman into "everywoman," a reasonable person who uses force in self-defense.

Despite its advantages, the use of Battered Woman's Syndrome creates a dilemma for the battered woman's attorney. For one thing, an apparent contradiction exists in the use of force by someone who suffers from learned helplessness. This however, can be explained as an instinctual response to a survival situation, where the threatened violence by the abuser exceeds prior violence levels. Furthermore, because it is the battered woman herself who has experienced the repeated danger posed by the batterer — and is therefore best able to judge when the level of violence will escalate to an extreme level — her decision to fight back takes on added credibility.

Not all of the challenges to the battered woman's use of self-defense can be so easily dismissed. This is due in large part to the fundamental nature of some of these remaining problems, which stem from firmly entrenched stereotypes about women and from misconceptions by both lawyers and laymen about what the "battered woman's defense" really is. Not until these problems are acknowledged and understood can battered women truly receive fair trials when they encounter the criminal justice system.

1. *Placing the Battered Woman's Syndrome in Social and Historical Context*

The initial reception given to the use of self-defense by a battered woman was colored by the social upheaval which accompanied its advent on the legal scene. At that time, women were challenging their place in the existing societal order by attempting to occupy roles traditionally reserved for men. No less traumatic was the understanding that a *normal* woman could be trapped in an abusive relationship where the use of force became the only "right" thing to do to ensure her survival. The images presented by these concepts seemed to be on a collision course with themselves, and not surprisingly, self-defense by a battered woman came to be viewed as a semantic and social oxymoron.

The conflicting images evoked by battered women who argued self-defense also presented these women with a "catch-22."³² The same beliefs about sexual stereotypes and prejudices that justified the historical victimization of women now denied them their right to defend themselves against such treatment. These stereotypes of women as pure and passive, as caregivers and nurturers, have been taught and accepted by men — *and women* — for centuries, making the erosion of such beliefs a long and frustrating process. The reinforcement of these stereotypes in religion, in the media and in the observations of everyday life, has created a further obstacle to erasing the prejudices which face battered women who claim self-defense.

2. *Problems of Representation*

Beyond the problem of prejudice is the entirely different concern of the attorney's lack of awareness of the applicability of self-defense to battered women. To be sure, too little attention has been paid to cases in which women were not defended properly in court, not because of a

32. "A problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 215 (1989).

biased or ignorant judge, but as the product of inaction or ignorance on the part of the battered woman's attorney. These injustices surface, if at all, while the convicted defendant languishes in jail and belatedly realizes what could have been done for her case.

Thus, although the attorney is an important element in any successful defense, the attorney's role takes on added significance when the defendant is a battered woman. In these cases, the attorney must have the vision needed to structure the case carefully, and the judge must be willing to let the jury hear the claim of self-defense as well as the accompanying expert testimony which supports it. Consequently, an attorney or judge encumbered by prejudices about battered women will not be helpful to a woman's defense. Even the unbiased attorney who denies the reality of societal prejudice in order to absolve himself of any responsibility is powerless to correct this prejudice and to defend the battered woman effectively.

A problem of a different nature is the general reception accorded to a battered woman's invocation of self-defense by those members of the legal profession involved in battered women's cases. Prosecutors, defense lawyers and judges react with a mixture of awe, skepticism and discomfort upon learning that a defendant will be offering Battered Woman's Syndrome to support a claim of self-defense. These reactions have often made it seem as if the battered woman's attorney were relying on highly technical and virtually incomprehensible legal principles.

At the very least, most practitioners have erroneously assumed that the battered woman's defense is a type of self-defense which includes psychiatric dimensions, placing it somewhere between insanity and the heat of passion.³³ In fact, judges have even ordered psychiatric examinations of women who offer expert testimony on Battered Woman's Syndrome in the mistaken belief that a form of insanity defense would be presented. Thus, part of the problem lies in the reluctance of lawyers to accept the simple reality that the "battered woman's defense" is an application of self-defense to the circumstances of the battered woman's life.

D. Clearing up the Confusion through Redefinition

The use of Battered Woman's Syndrome to support a claim of self-

33. See N.Y. PENAL LAW § 40.15 (McKinney 1987) ("In any prosecution for any offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect."). See also N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1987) ("defendant acted under the influence of extreme emotional disturbance").

defense has been badly misunderstood by some and roundly criticized by others. In easing this criticism and confusion, I believe that a redefinition of the descriptive terminology used to describe the experiences of the battered woman will have a positive impact. Similarly, attention must be focused on the use of expert testimony in describing Battered Woman's Syndrome so that it does not exceed its legitimate bounds. And finally, the technical construct of imminence in the use of a self-defense claim must be reconsidered in order to accommodate the realities of the battered woman's experience.

1. *Redefining Battered Woman's Syndrome*

For individuals on all sides of the question, the descriptive word "syndrome" has provoked debate, concern and misunderstanding. Feminists, for example, fear that use of the term "syndrome" has resulted in the labeling of battered women as abnormal, and consequently absolved society of any responsibility for the battered woman's situation by placing the blame on the victim.

For the defense attorney who uses Battered Woman's Syndrome to explain why his client's actions were reasonable, the challenge in overcoming the negative implications arising from the term "syndrome" is especially burdensome. Indeed, jurors who have little understanding of the battered woman's situation may readily conclude that Battered Woman's *Syndrome* describes a disorder which results from physical abuse — or perhaps even a pre-existing defect — and causes the woman to remain in a battering relationship.³⁴ In this construct, the woman stays with her batterer because the abuse she has suffered impairs the rational decision-making ability which would allow her to leave. This understanding, which is premised, at least in part, on the word "syndrome," makes it difficult to build a self-defense case grounded in reasonableness, especially when the woman's prior decisions reflect an absence of that quality. Nonetheless, the confusion resulting from a descriptive name change at this time would make the existing problems worse. An alternative, however, lies in achieving a new understanding of the phrase Battered Woman's Syndrome.

In its most technical sense, "syndrome" refers to a group of symp-

34. In fact, battered women sometimes suffer from some form of malady, like post-traumatic stress disorder, as a result of the continual violence. Although this fact could give rise to an insanity defense or a mitigating psychiatric defense such as extreme emotional disturbance, the heavy burden of proof on this issue makes such a possibility unlikely. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 4.5 (1986). The prosecution's right to a psychiatric examination of the woman in cases where there is a mitigating or exculpating psychiatric defense is also problematic.

toms which characterize a disease or disorder.³⁵ However, instead of imposing the abnormalities inherent in its given name onto the victim — the battered woman — I believe practitioners should view Battered Woman's Syndrome as the responses and characteristics of a *normal* woman who finds herself in a defective or dysfunctional relationship, surrounded by the realities of life confronting a woman today. The major defects associated with Battered Woman's Syndrome should accordingly be placed on the relationship, the batterer and society.

2. Tailoring Expert Testimony

The renewed understanding of the uniqueness of a battered woman's self-defense case should not end with terminology. To be sure, some of the responsibility for the confusion surrounding the battered woman and her defense must be placed on defense lawyers, who have at times inartfully and inaccurately used expert testimony to aid their clients. This has resulted, in part, from the fact that battered women's attorneys deal with a source of expert testimony seldom understood by their adversaries and judges. Thus, some lawyers have seized on this lack of knowledge as a means of extending the expert's testimony beyond its evidentiary potential. Not surprisingly, this has led to chaotic rulings by trial courts, and presented appellate courts with the onerous task of trying to make sense out of them.

In addressing the problems presented by the use of expert testimony in battered women's cases, lawyers must ultimately aim to use the expert's testimony on Battered Woman's Syndrome to assist the fact-finder in understanding the state of mind of the battered woman at the time she fought back against her abuser. On a general level, the expert must dispel myths and misconceptions about the battered woman, explain the woman's inability to escape the battering relationship and provide juries and judges with an understanding of the circumstances that led to the woman's realistic decision to use deadly force.

More specifically, lawyers should elicit from the expert information explaining how the history of prior violence and abuse bears on the battered woman's state of mind. The expert must also chart the characteristics of a battering relationship by describing the cyclical nature of the violence and the concept of learned helplessness.³⁶ In discussing learned helplessness, the expert may explain how the numerous real constraints facing a woman trying to escape a battering relation-

35. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1197 (1989).

36. See *supra* notes 30-31 and accompanying text.

ship contribute to a sense of helplessness and ultimately prevent the battered woman from leaving. This testimony may include evidence regarding the poor performance of police and the courts in protecting women, the lack of space in battered women's shelters, the likelihood of increased violence when a woman attempts to leave and the potential financial hardship which might result. These factors, together with evidence of the prior violence of the abuser, are part of a woman's state of mind which is critical to her defense, and to convincing a jury that her actions are not products of defective or delusional thinking.

3. *Reassessing the Law of Self-Defense in Light of the Battered Woman's Experience*

Many women arguing self-defense³⁷ have had difficulty explaining the apparent excessiveness of their use of force in response to an assailant's violence, as well as the timeliness of their response to the threatened or actual harm. For battered women, these challenges are especially great.³⁸ This is particularly true when the woman has used a knife or gun in response to an unarmed attack, or has used force after she has been threatened with death but not assaulted.³⁹ In order to overcome these inconsistencies between the law and the reality of the battered woman, the legal profession must try to achieve an understanding of the battered woman's use of force which places it within the confines of the definition of self-defense.

In most jurisdictions, the use of force in response to a threat by the abuser is considered timely only when violence by the assailant is im-

37. Self-defense generally applies when:

One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes that he is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger.

LAFAYE & SCOTT, *supra* note 34, at § 5.7.

38. The stringency of the definition has led other battered women's advocates besides the author to call for a redefinition of self-defense for battered women. *See, e.g.*, Maguigan, *supra* note 20, at 400, who claims that the law of self-defense does not need to be reformed, but that the application of existing law must take into account the social context of the woman's abuse and the husband's killing.

39. Interestingly, scholars disagree on the frequency of the occurrence of killings in non-confrontational settings. While many believe that most attacks by battered women are in fact non-confrontational, statistics indicate otherwise. *See Maguigan, supra* note 20, at 384. ("[O]ver seventy percent of all battered women who kill do so when faced with either an ongoing attack or the imminent threat of death or serious bodily injury; and some studies suggest that the figure may be closer to ninety percent.") (Citation omitted). Regardless of this debate, practitioners must be prepared to deal with the problems posed in cases where the woman has killed her abuser in situations which may not appear to fall within the constraints of imminence.

minent.⁴⁰ The concept of imminence is non-specific; in other words, it can mean violence resulting from an immediate threat or an attack which could occur at any time. Thus, a woman who shoots a sleeping man or one with his back turned does not appear to meet the criterion of imminence. Nonetheless, in an appropriate case, the battered woman's testimony about the abuse over time, and about her belief that she could not escape her abuser in any real way, together with expert testimony about the reality of those beliefs, may provide the context needed to meet the test of imminence — even when the abuser's back was turned or the woman killed in an unarmed attack.

A helpful analogy to understanding this redefinition of imminence may be to view the battered woman as a hostage who is told she would be killed the next day and then strangles a sleeping guard in an effort to escape. The perception of the reality of this threat gained over time is thus accepted as sufficiently imminent to justify the use of whatever force is necessary to achieve freedom. Indeed, many women live in homes with abusive men, and their situation is as dangerous and hopeless as any hostage. These women's knowledge of their "captors" makes them best able to assess the severity of the threat. And while they may learn to be helpless, their helplessness is produced by the realities of their daily existence and not some distorted by-product of violence.

E. A Final Solution: A Call for Increased Public Understanding of All Battered Women

Despite these possibilities for progress, the question remains: why are lawyers, judges and juries unable to equate the predicament of the battered woman with that of the hostage? Unfortunately, my experience suggests that a battered woman's self-defense case is harder to win today than in the early 1980s, even in light of the increased media attention which has generated an assumption that the problem is being resolved.

40. See, e.g., N.Y. PENAL LAW § 35.15(1) (McKinney 1987) ("A person may . . . use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or *imminent* use of unlawful physical force by such other person. . . .") (emphasis added). The Model Penal Code defines "imminence" in terms of self-defense as "immediately necessary . . . on the present occasion." MODEL PENAL CODE § 3.04 (1).

While most states follow the imminence standard, a minority have adopted an immediate standard. See Maguigan, *supra* note 20, at 414. An imminence jurisdiction is more receptive to the battered woman's situation because it considers the importance of the social context of the defendant's actions. *Id.* at 415. Similarly, imminence jurisdictions are more likely to admit expert testimony on Battered Woman's Syndrome than immediate jurisdictions. *Id.*

The reality, however, is markedly different. Our daily newspapers are spotted with reports of women murdered clutching orders of protection or fleeing like fugitives from men in relentless pursuit.⁴¹ And as one author has argued, there seems to be a "backlash" against the progress which women have made over the last few decades.⁴² This phenomenon is reflected in the fact that battered women, after choosing life over death, are still prosecuted with vigor by the very organs of government which had earlier stood by and done nothing.

An ironic twist to the increased public awareness is that it has informed the ignorant as well as the enlightened. Those who previously responded to the case of a battered woman with prejudice now pretend to accept the legitimacy of a true battered woman's self-defense, as well as the accompanying expert testimony, but structure their opposition to the defense by asserting that the woman in question "does not fit the mold." This skewed perception has given rise to distinctions between "good" and "bad" battered women.⁴³

This categorization of battered women defendants also reinforces the pervasiveness of societal stereotypes about women. "Good" battered women are passive, loyal housewives, acting as loving companions to their abusers. These women must have flawless characters and continually appeal to the police and courts for help, regardless of the futility of their efforts. By contrast, the "bad" battered woman is one who fails to possess any of the virtues of the "good" woman, and who may have even obtained an education and pursued a career. This demonstration of control often operates to disqualify the "bad" battered woman from the group.⁴⁴ Infidelity or abuse of drugs is equally discrediting.

Thus, the frontal assault on battered women as a whole has been replaced by the individual disqualification of certain women from the group. As a result, the struggle for today's battered woman defendant has shifted from a fight to get in the door to a battle over the appropriateness of her particular presence in the courtroom. And while the rhetoric may have changed, the underlying prejudice has not.

41. See, e.g., Terry Spencer, *Witnesses Tell of Couple's Fights Preceding Slaying*, L.A. TIMES, Jan. 4, 1992, at B8.

42. See SUSAN FALUDI, *BACKLASH* (1991).

43. See Maguigan, *supra* note 20, at 444.

44. I represented a woman in 1984, in Queens County, who had shot her abusive husband. During the course of the trial the prosecutor tried to introduce evidence that my client was a sloppy housekeeper, did not toilet-train her children, and had an affair. The judge permitted the testimony and instructed the jury that this was evidence demonstrating what she had done to provoke her husband to beat her. The prosecutor in that case was a woman. Both judge and prosecutor claimed to be sympathetic to battered women, but my client did not fit their perceived mold.

The shift in semantics has also added to the misperception of progress. In its simplest form, the reduction of openly biased language in the courtroom and increased media attention obscure the continuing magnitude of the problem of prejudice. On the other hand, the media's prolonged examination of domestic violence may at least have heightened public awareness, and this exposure, together with other hard-fought advances by women, may begin to change the prospects for equality.

Moving beyond the concerns of prejudice, there remains the problem of denial. Even the community of decent people finds society's inability to quell the tide of violence against women too horrific to accept. The reality of life for a battered woman is indeed beyond the knowledge of the average person, and while denying the truth of a battered woman's story can be easier than confronting it, the enlightened must aim to recognize the truth in order to foster society's acceptance of responsibility for the violence among us.

Those who have succeeded in accepting the pervasiveness of domestic violence have also succeeded in implementing some practical solutions. The heart and soul of the battered women's movement was, and is, the people who established shelters for women in abusive relationships. They are undaunted in their pursuit of equality and an end to domestic violence. Yet, for all they have been able to do in providing a safe haven, there remains a serious gap in the services battered women need when seeking to escape a battering relationship or after having successfully fought back against their abusers. For one thing, the lack of adequate representation of battered women in the courts has reached crisis proportions.⁴⁵

While the shelter system provides a safe have for women as well as a range of social services to aid the battered woman's move towards independence, for true justice the legal system must change. Proper use of a redefined Battered Woman's Syndrome is necessary to help juries understand the woman's state of mind. The concept of "immi-

45. Solving this problem is a fundamental goal of the Pace University Battered Women's Justice Center. This institution, established in October 1991, is a partnership between the State of New York and Pace University. It is the first Center at a major university working in collaboration with government and dedicated to the eradication of domestic violence. The Center trains lawyers to represent battered women in criminal and civil cases, and will also provide training for prosecutors involved in domestic violence-related cases. For the battered women in jail whom the system has already failed, the Center is working to provide assistance in the preparation of petitions for clemency. This alternative increasingly has been invoked by battered women and has come to be seen as an appropriate remedy for past societal injustices. See, e.g., *Florida Considers Clemency*, U.S.A. TODAY, Sept. 13, 1991, at 3A; *Ohio Governor Grants 25 Abused Women Clemency*, CHI. TRIB., Dec. 22, 1990, at 1.

nence" must be defined fairly to encompass the realities of battered women's lives. Most importantly, however, society must come to accept the fact that *any* woman can be battered, and that any woman, no matter how independent on the surface, can be trapped in a battering relationship.

