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BATTERED WOMAN SYNDROME, EXPERT TESTIMONY, AND THE DISTINCTION BETWEEN JUSTIFICATION AND EXCUSE

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Robert Schopp and his coauthors, Barbara Sturgis and Megan Sullivan, discuss the practical effects and the viability of the battered woman syndrome as a support for self-defense. The authors detail the conflict inherent in demonstrating the "reasonableness" of the defendants' actions through the premise that she was psychologically impaired. They argue that current research on battered women does not show key characteristics posited by the theory. The authors conclude that, use of the syndrome to support a legal defense is misleading and may harm the credibility of women in their claims of self-defense.

I. INTRODUCTION

A series of controversial criminal cases has addressed the exercise of deadly force by battered women against their mates with whom they had engaged in extended relationships involving patterns of repetitive physical abuse of the women by the mates. In some of these cases the battered women exercised this force during an episode of physical abuse by the batterers.[1] In others the defendants exerted

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1. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 391-97 (1991) (analyzing a series of appellate opinions regarding such cases). Ordinarily, the batterer is the husband, estranged husband, or unofficial mate of the battered woman, but the broad principles discussed in this article also apply to other relationships such as that of an abused elderly person living with a battering adult offspring.

deadly force against the batterers in the absence of any occurrent abuse but in anticipation of renewed attacks. Some of the latter cases have occurred in circumstances in which the batterers presented no overt evidence of immediate threat because they were reclining in another room or sleeping.[2]

Commentators ordinarily refer to these two contrasting factual patterns respectively as confrontation and nonconfrontation cases. Although they dispute the relative frequency of each type of case, commentators agree that both occur and that the latter present more difficult circumstances for defendants who claim self-defense under traditional legal doctrine.[3] Early legal commentary regarding claims of self-defense by battered women often concentrated on the substantive law of self-defense and on the admissibility of expert testimony regarding the battered woman syndrome as relevant to self-defense. Some writers criticized substantive self-defense law as biased against battered women or against women generally and advocated either modifications of self-defense standards or a separate defense.[4] Many advocated admission of expert testimony regarding the battered woman syndrome as necessary to dispel stereotypes of battered women and to establish various components of the traditional or modified defenses.[5]

Recent articles address evidentiary and procedural issues as well as potential confounding effects of expert testimony regarding the battered woman syndrome.[6] Such testimony can mislead courts or juries when it is offered in support of a self-defense claim, but interpreted as evidence of mental illness relevant to the insanity defense, state of mind, or criminal intent.[7] The battered woman syndrome may become a new stereotype if expert testimony regarding the syndrome becomes so closely associated with self-defense by battered women that these defendants must establish that they suffer from the syn-

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2. State v. Norman, 378 S.E.2d 8, 9 (N.C. 1989); State v. Allery, 682 P.2d 312, 313-14 (Wash. 1984); Maguigan, *supra* note 1, at 391-97.

3. *Compare* CHARLES P. EWING, BATTERED WOMEN WHO KILL 34, 99-142 (1987) (stating that two-thirds of such homicides occur in nonconfrontation conditions) *with* Maguigan, *supra* note 1, at 388-401 (indicating that most homicides occur during confrontations).

4. Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 152 (1985) (calling for a new construct of self-defense); EWING, *supra* note 3, at 78-94 (discussing psychological self-defense as legal justification); Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 415-22 (1988) (advocating a reasonable battered woman standard).

5. EWING, *supra* note 3, at 94; Kinports, *supra* note 4, at 407-08; Maguigan, *supra* note 1, at 451-58; Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 205-20 (1986); *see infra* notes 23-103 and accompanying text regarding the battered woman syndrome.

6. Maguigan, *supra* note 1, at 420-42, 451-58 (discussing evidentiary and procedural issues); Schneider, *supra* note 5, at 198-200 (describing possible confounding effects of expert testimony regarding the battered woman syndrome).

7. State v. Edwards, 420 So. 2d 663, 677-78 (La. 1982); State v. Necaise, 466 So. 2d 660, 663-65 (La. Ct. App. 1985); Schneider, *supra* note 5, at 198-200.

drome in order to substantiate a defense.[8] Emphasis on the battered woman syndrome can distort the legal issues as the parties dispute whether the defendant suffered from the syndrome rather than disputing the justification for her use of defensive force.[9]

Although expert testimony regarding the battered woman syndrome has gained wide acceptance in the courts, the empirical foundation and legal significance of this syndrome remain obscure.[10] This article examines the empirical support for the syndrome and the relationship between the syndrome and self-defense doctrine in an effort to establish the appropriate interpretation and integration of these clinical and legal frameworks in circumstances in which battered women exercise deadly force against their batterers. This article advances the following five theses. First, although expert testimony regarding the battered woman syndrome has been widely admitted as relevant to self-defense, the sources usually cited as support for the syndrome by the admitting courts do not provide strong reason to accept it either as a clinical syndrome or as relevant to self-defense. Additional research provides at best equivocal support for the syndrome, and certain aspects of the syndrome that receive primary emphasis in the cases find little or no support in the research.[11]

Second, although future research might support the battered woman syndrome as a clinical syndrome, the battered woman syndrome as usually formulated has almost no relevance to self-defense doctrine or cases, including those regarding which this evidence has been admitted. Third, despite the irrelevance of the battered woman syndrome to these cases, expert and nonexpert testimony regarding battering relationships generally, and each particular defendant's relationship with her batterer, remains relevant. Fourth, standard self-defense doctrine, properly understood and applied to the facts, accommodates many of these cases. Fifth, the judicial opinions and the commentary demonstrate the practical significance of rigorous theoretical analysis of criminal law doctrine. Much of the doctrinal and applied controversy regarding these cases arises directly from the failure of legislatures and courts to maintain a clear and consistent

8. State v. Kelly, 685 P.2d 564, 570-71, 573-75 (Wash. 1984) (majority and dissent disputing the admissibility of evidence regarding whether the defendant suffered from the battered woman syndrome); Kinports, *supra* note 4, at 452-53 (discussing a rigid stereotype of the battered woman); Schneider, *supra* note 5, at 207 (discussing the battered woman syndrome as suggesting to some that all battered women are the same).

9. *Kelly*, 685 P.2d at 570-71, 573-75 (majority and dissent disputing the admissibility of evidence regarding whether the defendant suffered from the battered woman syndrome); Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 119-20 (1990) (discussing potential disputes about defendants' conduct not typical of the battered woman syndrome).

10. Maguigan, *supra* note 1, at 452; Schneider, *supra* note 5, at 200-01 (both authors discuss wide acceptance); *see infra* notes 34-103 and accompanying text (examining the empirical basis for the battered woman syndrome).

11. *See infra* notes 34-103 and accompanying text (examining the empirical research).

formulation of important conceptual issues, including the distinction between justification and excuse.

This analysis pursues both practical and theoretical agendas. Practically, it examines the appropriate role of evidence regarding the battered woman syndrome and the battering relationship in these cases. Theoretically, it addresses several controversial concerns arising in the theory of self-defense doctrine and in the broader theory of justification and excuse. Finally, it demonstrates the importance of these theoretical considerations in resolving the applied questions that become particularly cogent when battered women exercise deadly force against their batterers.

This project requires integration of analytic, empirical, and normative components. The analytic tasks involve clarification of several important concepts that remain either vague or ambiguous, giving rise to disputes among courts and commentators. These concepts include, for example, those represented by "battered woman syndrome," "reasonable belief," "imminence," and "objective." Evaluation of the significance of the battered woman syndrome for self-defense requires not only a clarification of the meaning of "battered woman syndrome" but also an examination of the empirical evidence supporting the claim that this syndrome occurs in the form alleged.[12] The exercise of force in self-defense is justified only when the party exercising that force has no safe alternative means of protecting herself. Support for this contention as applied to women who kill their batterers also requires examination of the empirical evidence regarding the availability or lack thereof of legal alternatives to defensive force.[13]

Finally, this project involves normative argument because it pursues both explicative and prescriptive aims. We address the significance of the battered woman syndrome for the law of self-defense as that law ought to be formulated and understood, supporting this interpretation by appeal to the principles that justify the use of defensive force.[14] Throughout the article, we attempt to explicitly identify and integrate these analytic, empirical, and normative components to support our theses regarding the manner in which evidence regarding battering ought to be integrated with self-defense doctrine.

This argument addresses several audiences, including experts, lawyers, and judges, regarding the appropriate use and interpretation of expert testimony concerning the putative relevance of the battered woman syndrome to self-defense. It is certainly not the case, however, that all courts currently accept evidence and argument based on the theory advanced here. Legislators and courts constitute the sec-

12. *See infra* notes 34-103 and accompanying text (examining the empirical research).

13. *See infra* notes 140-233 and accompanying text (examining the evidence regarding legal assistance).

14. *See infra* notes 244-326 and accompanying text.

ond audience in that the arguments presented here are directly relevant to the appropriate formulation and interpretation of the substantive law of self-defense. We accept the well-settled contemporary law of self-defense, and we interpret the vague or controversial aspects of that doctrine in a manner consistent with the justificatory foundation it represents. Thus, we examine the relevance of expert testimony regarding the battered woman syndrome to the substantive law of self-defense as it ought to be understood. Finally, we address theoreticians insofar as we pursue conceptually consistent approaches to these cases.

Part II briefly describes dominant self-defense doctrine, the battered woman syndrome, and the putative relevance of the latter to the former. This part identifies the aspects of the battered woman syndrome usually advanced as specifically relevant to self-defense. Analysis of the sources usually cited as support for the syndrome and of related research does not provide good reason to accept the empirical claims ordinarily made about these aspects of the battered woman syndrome. The possibility remains, however, that future data might provide support for the syndrome as usually formulated or in some alternative variation.

Accordingly, part III assumes future data will support the battered woman syndrome as a clinical syndrome and examines its significance for self-defense. Part IV analyzes several problematic aspects of self-defense doctrine and attempts to clarify the most justifiable interpretation of certain controversial elements. Application of the battered woman syndrome to these components demonstrates that the history of the battering relationship rather than the syndrome is primarily relevant to self-defense. This process also reveals the significance of the distinction between justification and excuse in these cases, and it explicates the importance of this distinction in the context of particular fact patterns involving both the battering relationship and the available legal alternatives to violent defense. Part V concludes the argument.

II. The Battered Woman Syndrome and Self-Defense

A. Self-Defense Doctrine

The parameters and variations of self-defense doctrine have been discussed extensively elsewhere. An outline of the primary components of the doctrine, however, is appropriate. Individuals may exercise force in self-defense only when they reasonably believe that doing so is necessary to protect themselves from the imminent use of unlawful force by others.[15] Deadly defensive force requires that the actor

15. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 5.7 (2d ed. 1986); Paul H. Robinson, Criminal Law Defenses §§ 131, 132 (1984).

reasonably believe it necessary to defend against the imminent use of unlawful force threatening death or serious bodily injury.[16] Some jurisdictions adopt the Model Penal Code provision requiring only belief, rather than reasonable belief. Other jurisdictions limit the defense to cases of actual necessity, disregarding entirely the defendants' beliefs regarding that necessity.[17] The Model Penal Code allows liability for negligent or reckless homicide for those who exercise deadly defensive force on the basis of negligently or recklessly held beliefs about the necessity of using such force.[18] A large majority of jurisdictions require reasonable belief in the necessity of exercising deadly force, either explicitly or through provisions similar to those of the Model Penal Code.[19]

Although some jurisdictions require retreat before exercising deadly defensive force, the majority do not, and those that do usually provide a dwelling exception for persons who are attacked in their own homes.[20] Thus, for most cases of self-defense by battered women involving attacks occurring in the home, the defendant has no duty to retreat.[21] States vary in their treatment of the imminence requirement. Some jurisdictions require an imminent attack. Others require an immediate attack or that the defensive force be immediately necessary.[22]

B. The Battered Woman Syndrome

The dominant conception of the battered woman syndrome as described in court opinions and by commentators is advanced by Lenore Walker.[23] It includes interpersonal and intrapersonal components.[24] The interpersonal component takes the form of the cycle of

16. LAFAVE & SCOTT, *supra* note 15, § 5.7(b); ROBINSON, *supra* note 15, § 131(d). Deadly force includes force threatening serious bodily injury. MODEL PENAL CODE § 3.11(2) (Official Draft and Revised Comments 1985); LAFAVE & SCOTT, *supra* note 15, § 5.7(a).

17. MODEL PENAL CODE, *supra* note 16, § 3.04(1); ROBINSON, *supra* note 15, §§ 121(c), 184(a),(b).

18. MODEL PENAL CODE, *supra* note 16, § 3.09.

19. LAFAVE & SCOTT, *supra* note 15, §§ 5.7(b), (c).

20. MODEL PENAL CODE, *supra* note 16, § 3.04(2)(b)(ii)(1); LAFAVE & SCOTT, *supra* note 15, § 5.7(f). Only a small minority of jurisdictions recognize a cohabitant exception to the dwelling exception.

21. Maguigan, *supra* note 1, at 419-20.

22. LAFAVE & SCOTT, *supra* note 15, § 5.7(d); ROBINSON, *supra* note 15, § 131(c); Maguigan, *supra* note 1, at 414-16. *See infra* notes 104-20 and accompanying text for further discussion of this requirement.

23. State v. Kelly, 478 A.2d 364, 369-73 (N.J. 1984); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984) [hereinafter BATTERED WOMAN SYNDROME]; LENORE E. WALKER, BATTERED WOMAN (1979) [hereinafter BATTERED WOMAN]. *Kelly* is often cited as the leading case addressing the relevance of the battered woman syndrome for self-defense, so we will use it to illustrate the most commonly accepted view. Kinports, *supra* note 4, at 396-408 (one of many commentators accepting Walker's theory of the battered woman syndrome).

24. It is very difficult to define the precise scope of the *battered woman syndrome* as Walker uses the term. Walker initially included the fact of battering, its widespread existence and the underreporting of incidents of battering in the battered woman syndrome. BATTERED

violence, which consists of a three-part repetitive pattern of interaction consisting of periods of gradual tension building, acute violence, and loving contrition. During the third phase the batterer apologizes for the acute violence and promises that it will not recur. Although courts and commentators describe all three phases, some battering relationships include only part of the cycle.[25] Repeated episodes of abuse within an ongoing relationship constitute the only common interpersonal factor across all cases.

Courts and commentators have generally emphasized the intrapersonal component of the battered woman syndrome when explaining the significance of the syndrome for these cases. They contend the recurring cycle of violence promotes a predictable set of psychological responses in the victims of battering. This set includes most prominently: depression, decreased self-esteem, and learned helplessness. This last trait consists of a perception of oneself as helpless to alter the battering relationship. People who suffer learned helplessness reportedly perceive themselves as having little or no ability to affect their own lives in general or the battering in particular. Courts and commentators have emphasized the significance of learned helplessness in explaining the relevance of expert testimony regarding battered woman syndrome to claims of self-defense.[26]

For the sake of clarity and consistency we follow the common practice of the courts and commentators in reserving the term "battered woman syndrome" for the set of intrapersonal psychological characteristics including depression, decreased self-esteem, and learned helplessness. We refer to the interpersonal relationship in-

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WOMAN, *supra* note 23, at 19. At that time, she used "learned helplessness syndrome" to explain, at least in part, how women respond to battering and "delayed action syndrome" to describe battered women's tendency to delay seeking help after an acute episode of battering. *Id.* at 58, 63.

Walker later redefined the battered woman syndrome as "the feelings, thoughts, and behaviors which constitute this syndrome as a reaction to a man's violence" and the "cluster of psychological sequela from living in a violent relationship" that women develop. BATTERED WOMAN SYNDROME, *supra* note 23, at xi, 1; *see also* People v. Aris, 264 Cal. Rptr. 167, 177 (Cal. Ct. App. 1989) (quoting Walker describing the battered woman syndrome as a pattern of psychological symptoms developing after the battered woman lives in a battering relationship). She also continued using the term broadly, encompassing both the battered woman's intrapersonal response to battering and all of the interpersonal variables in the battering relationship. BATTERED WOMAN SYNDROME, *supra* note 23, at 67-71. See *infra* notes 256-81 and accompanying text for an analysis of the battered woman syndrome with particular attention to whether the classification of these two components as parts of a syndrome is consistent with the notion of a syndrome, claims about the relationship of the battered woman syndrome to mental illness, and the putative significance of the battered woman syndrome to self-defense. Here, we merely describe briefly the battered woman syndrome as it has been articulated by courts and commentators.

25. *Kelly*, 478 A.2d at 371; BATTERED WOMAN SYNDROME, *supra* note 23, at 95-97; Kinports, *supra* note 4, at 397.

26. *Kelly*, 478 A.2d at 377; People v. Torres, 488 N.Y.S.2d 358, 361-62 (N.Y. Sup. Ct. 1985); State v. Allery, 682 P.2d 312, 315-16 (Wash. 1984); BATTERED WOMAN SYNDROME, *supra* note 23, at 86-94, 147; Kinports, *supra* note 4, at 398, 416; Schulhofer, *supra* note 9, at 119-22.

cluding repeated episodes of abuse within an ongoing relationship as the "battering relationship" or the "pattern of battering."

C. *The Putative Relevance of the Battered Woman Syndrome to Self-Defense*

Courts and commentators have argued that expert testimony regarding the battered woman syndrome provides juries with important information regarding several aspects of self-defense. Although commentators disagree about the relative frequency of confrontation and nonconfrontation cases, they agree that some cases involve circumstances in which the defendants exercise violence in the absence of an imminent overt attack.[27] Some contend that expert testimony regarding the battered woman syndrome explains how these defendants could reasonably believe that attacks were forthcoming and that defensive force was necessary despite the absence of immediate violence. Some courts and commentators discuss a special ability to perceive subtle clues of forthcoming violence as part of the battered woman syndrome, arguing that this aspect of the syndrome renders the perception of imminent violence reasonable despite the lack of external indicators accessible to most people.[28]

Some extend this reasoning to the issue of deadly force, arguing that the battered woman syndrome explains why these battered women reasonably believed deadly force to be necessary. According to this line of reasoning, the special capacity to perceive forthcoming violence absent overt indicators also enables these battered women to reasonably foresee that the violence will be of such severity as to justify the use of deadly force in self-defense. Thus, those who suffer from the syndrome can reasonably believe that deadly defensive force is necessary in circumstances in which such a belief would not appear reasonable to others. This argument concludes that expert testimony regarding the battered woman syndrome can explain to the jury the manner in which the syndrome renders reasonable these beliefs.[29]

Some advocate expert testimony as relevant to the credibility of the defendants' testimony. Many cases involve such intense and prolonged patterns of abuse that many jurors might doubt the defendants' credibility. These jurors might conclude that the defendants must be exaggerating the abuse because no one would have remained in the relationship if such abuse had actually occurred.[30] Such doubts might then lead the jurors to generally discount the defendants' testimony. Courts and commentators contend that expert testimony re-

27. *See supra* note 3 (citing commentators).

28. *Kelly*, 478 A.2d at 377-78; *Torres*, 488 N.Y.S.2d at 361-62; Kinports, *supra* note 4, at 416.

29. *Kelly*, 478 A.2d at 377-78; *Torres*, 488 N.Y.S.2d at 361-62.

30. State v. Gallegos, 719 P.2d 1268, 1271-72 (N.M. Ct. App. 1986); State v. Norman, 378 S.E.2d 8, 9-11 (N.C. 1989); *Allery*, 682 P.2d 312, 313.

garding the battered woman syndrome in general and learned helplessness in particular can correct this tendency to discount the defendants' testimony by enabling the jurors to understand that the defendants could have remained in these relationships for extended periods despite severe and frequent abuse. These witnesses explain that defendants who suffer learned helplessness either fail to perceive available alternatives to the relationships or are unable to exercise these options. Thus, learned helplessness supports the credibility of these defendants by rendering plausible their testimony that they remained in battering relationships for extended periods despite enduring severe abuse.[31]

Some endorse testimony regarding the battered woman syndrome as relevant to the claim that battered women are unable to leave the relationship. This argument takes two forms. The first, a variation of the credibility argument, depends on the contention that these defendants remained because they were unable to leave. The battered woman syndrome, particularly the learned helplessness aspect, explains the defendants' inability to leave their relationships earlier and thus, it renders credible the defendants' testimony that they did not leave despite the extended pattern of severe abuse.[32] The second form of this argument addresses the necessity requirement in self-defense doctrine. Some jurors might conclude that the defendants' use of defensive force was not necessary because they could have avoided the danger by leaving the battering relationships. The defendants rely on expert testimony regarding learned helplessness to explain why they were unable to leave the relationship, and thus, that defensive force was the only remaining method of self-protection.[33]

D. Battered Woman Syndrome Research

1. The Walker Studies

Cases and commentators rely heavily on Walker's 1979 and 1984 books.[34] The 1979 book contains a description of the battered woman syndrome as derived from Walker's clinical observation over an extended series of clinical cases. The syndrome formulated in this book provides the basis for the 1984 book which reports a process of self-report data collection designed to validate and refine knowledge of the battered woman syndrome. Walker interprets this data as strong support for the battered woman syndrome as she has described it.[35]

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31. *Kelly*, 478 A.2d at 375; Kinports, *supra* note 4, at 398.

32. *Kelly*, 478 A.2d at 375; Kinports, *supra* note 4, at 400.

33. State v. Hodges, 716 P.2d 563, 570 (Kan. 1986); *Kelly*, 478 A.2d at 372, 377; Kinports, *supra* note 4, at 416.

34. *See* sources cited *supra* note 23.

35. *See generally* BATTERED WOMEN SYNDROME, *supra* note 23.

Walker's earlier hypotheses about the reactions of battered women to the experience of battering described these women as having low self-esteem, holding traditional attitudes about the role of women, being the keepers of the peace in the marriage, suffering from severe stress reactions, and having a history of childhood violence and sex-role stereotyping.[36] She also hypothesized that battered women suffer from learned helplessness.[37] Learned helplessness is a concept derived from animal studies in which dogs were subjected to noncontingent aversive stimuli and later failed to take advantage of readily apparent opportunities to escape the aversive situation.[38] Walker posited that the inability of battered women to control the violence in the battering relationship would produce learned helplessness, thus explaining why many battered women remain in the battering relationship when they might have left.[39] Walker initially understood learned helplessness as including an external locus of control (the tendency to see one's life as controlled by forces outside oneself) and depression.[40] Walker developed the cycle theory of violence to further explain the battered woman's situation and to augment learned helplessness as an explanation for the battered woman remaining in the battering relationship.[41]

As Walker refined the theory, she correlated being in the battering relationship with a set of factors including traditional attitudes toward the role of women, external locus of control, low self-esteem, and depression, which explain the behavior of battered women within the relationship. She reaffirmed the notion that both learned helplessness and the cycle of violence affect the battered woman's decision to remain in the battering relationship and reduce her motivation to escape.[42]

Between 1978 and 1981, Walker studied over 400 women who were or had been in a battering relationship.[43] The study included lengthy interviews as well as the administration of psychological scales to measure the various personality characteristics Walker identified as important in understanding battered women.

Commentators have criticized this research on several grounds. The study relies on self-report survey data as elicited from a self-selected sample, and Walker provided no control group of women who were not in battering relationships, rendering it impossible to deter-

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36. BATTERED WOMAN, *supra* note 23, at 32-35.
37. *Id.* at 47-49.
38. *Id.* at 45-46.
39. *Id.* at. 47-49.
40. *Id.* at 48-51. It is often difficult to determine the precise conception of learned helplessness employed by Walker as well as by other commentators and by courts. See *infra* notes 121-24, 257-81 and accompanying text for further discussion of this issue.
41. *See supra* notes 23-26 and accompanying text.
42. BATTERED WOMAN SYNDROME, *supra* note 23, at 75-85.
43. *Id.* at 1-4.

mine whether her data was unique to battered women.[44] Information was gathered and recorded by interviewers who were familiar with the battered woman syndrome and the study's hypotheses. Interviewers were selected and trained in a manner calculated to produce a team with expectations and political commitments supportive of the study's hypotheses.[45] These interviewers asked the questions, recorded the battered women's answers, and coded their responses for analysis.[46]

This method of data gathering created substantial potential for selective or biased self-reporting by the subjects as well as for distortion through interviewer demand or bias in interpretation.[47] Although survey data is generally vulnerable to these concerns, and the conditions of selection and training exacerbate the danger of contamination in this study, survey responses are sometimes the best data available. Although different approaches to interviewer selection and training might have reduced the potential for contamination, surveys are widely used and accepted.[48] Thus, these criticisms raise serious concerns, but they do not in themselves render the study uninformative or inappropriate for consideration by courts or policymakers.

Other criticisms of Walker's study involve the lack of statistical analysis to test the significance of some findings, and the absence of clear theoretical foundations for interpretation of the data.[49] In addition, the data as presented indicate that a substantial but indefinite percentage of the subjects did not report experiencing the cycle of violence.[50] This raised serious questions about the frequency of the cycle of violence and about the intrapersonal aspect of the battered woman syndrome because Walker posits a causal relationship between this intrapersonal component and the cycle of violence which ostensibly causally contributes to it.[51]

Perhaps most troubling, however, is the apparent lack of clear support in the data for the conclusions drawn. Walker hypothesized that battered women had more traditional attitudes regarding the role of women in society, contributing to their willingness to tolerate violence by the batterers in order to maintain their relationships because they perceived few viable options for women.[52] Walker found, however, that battered women presented themselves as less traditional

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44. *Id.* at 202-09; David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 642 (1986).

45. BATTERED WOMAN SYNDROME, *supra* note 23, at 215-21.

46. *Id.* at 235.

47. Faigman, *supra* note 44, at 637-38 (discussing open-ended questions and experimenter demand).

48. Brief of *Amicus Curiae* American Psychological Association in Support of Defendant-Petitioner at 22, State v. Kelly, 478 A.2d 364 (N.J. 1984) (No. 20,219).

49. Faigman, *supra* note 44, at 636-43.

50. *Id.* at 639-40; Schulhofer, *supra* note 9, at 121.

51. BATTERED WOMAN, *supra* note 23, at 42-70.

52. *Id.* at 33-34.

than the normative group of college students.[53] Because of the control that batterers appear to exercise over battered women's lives, Walker also hypothesized that battered women would see themselves as having little control over their lives. Thus, she expected that battered women would manifest an external locus of control, reporting that forces outside themselves have more influence than they do over their lives. Contrary to this expectation, the battered women presented themselves as having significantly more control over their lives than did the sample on which norms for the measuring instrument were based. Also contrary to hypotheses, battered women who remained in the battering relationships portrayed themselves as feeling less controlled by powerful others than was predicted in that they did not differ significantly from the norm. Battered women described their lives as more affected by chance than the norm.[54]

Walker hypothesized that women who remain in battering relationships would have low self-esteem and that they would suffer from depression. Rather than suffering from low self-esteem, however, Walker's sample of battered women saw themselves as "stronger, more independent, and more sensitive than other women or men."[55] While the sample of battered women scored well into the depressed range on a self-report measure of depression,[56] those women who had remained married to the batterer revealed less depression than did those who had left the battering relationship, directly contradicting Walker's expectations.[57]

In sum, Walker's data does not support her hypotheses regarding the personality characteristics of battered women. Contrary to hypotheses, her sample of battered women, both in and out of battering relationships, demonstrated an internal locus of control and nontraditional attitudes towards women's role in society. They also evaluated themselves more positively than they rated other women or men. The only factor that clearly and consistently scored in the predicted direction was depression. The battered women suffered more depression than the norm. Depression, however, is symptomatic of a number of widely varying psychological and interpersonal problems; it is far from unique to the battered woman syndrome.[58]

To explain why some battered women remain in the battering relationship despite apparent opportunities to leave, Walker hypothesized the presence of both learned helplessness and a cycle of

53. BATTERED WOMAN SYNDROME, *supra* note 23, at 77-78.
54. *Id.* at 78-80.
55. *Id.* at 80.
56. *Id.* at 82.
57. *Id.*
58. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 229, 231 (3d ed. rev. 1987) (discussing Major Depression as occurring in 9-26% of females, and Dysthymia as common). Walker recognizes that learned helplessness may be synonymous with exogenous depression. BATTERED WOMAN SYNDROME, *supra* note 23, at 82.

violence. According to Walker, the noncontingent nature of the battering induces in the battered woman the belief that she cannot influence the events that affect her, reducing her motivation to respond in a manner that might enable her to escape from the relationship.[59] In addition, the behavior of the batterer in phase three of the cycle of violence—loving contrition—reinforces the battered woman's remaining in the relationship and believing the batterer will change.[60]

To determine the presence of learned helplessness, Walker measured the differences in levels of two clusters of emotions (fear/anxiety/depression and anger/disgust/hostility) between those battered women who remained in the battering relationship and those who had left the battering relationship. She found that, at the time of the last battering incident, the feelings of fear, anxiety, and depression of the battered women who had left had peaked and were declining while their levels of anger, disgust, and hostility were increasing. For those battered women remaining in the relationship their levels of both clusters of emotions were steadily increasing by the time of the last incident, but were lower in comparison with those battered women who had left.[61] Walker seems to understand the decline in the fearful emotions and the increase in the angry emotions for those battered women who had left as providing the impetus to break out of learned helplessness and leave the relationship.[62] However, fear, anxiety, and depression are not necessarily indicative of learned helplessness. Frequent abuse might elicit these emotions without producing learned helplessness.

In an attempt to further explore learned helplessness, Walker postulated that certain experiences within the battered woman's childhood would predispose her to develop learned helplessness in the battering relationship.[63] She developed a measure she labeled as childhood learned helplessness (Child LH) based on answers to interview questions about family relationships, childhood experiences (particularly experiences of violence or sexual abuse), and attitudes in the home. She examined the relationship of Child LH to a measure of learned helplessness in the battering relationship (Rel LH) based on reported battering and the battered woman's reaction to that battering. She further examined the relationship of Child LH to a measure of the battered woman's current state (C State) based on indices of the battered woman's current emotional functioning, including depression, alienation, and self-esteem.[64]

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59. BATTERED WOMAN, *supra* note 23, at 47-48.
60. BATTERED WOMAN SYNDROME, *supra* note 23, at 96.
61. *Id.* at 86-89.
62. *Id.* at 89.
63. *Id.*
64. *Id.* at 89-92.

She found no correlation between Child LH and Rel LH, that is, no apparent influence by childhood learned helplessness on learned helplessness in the relationship.[65] She found that both Child LH and Rel LH correlated with C State and that there was no difference in this relationship between battered women who remained in the battering relationship and those who had left.[66] Walker concluded that learned helplessness can develop either in childhood or within the battering relationship.[67] Even if one accepts these measures as indicative of learned helplessness, however, Walker's data refute her expectation that there are factors within the battered woman's childhood that make her vulnerable to developing learned helplessness within the battering relationship, and they are inconsistent with the notion that learned helplessness determines whether a battered woman leaves the relationship.

Critics have noted a more salient problem with Walker's reliance on the concept of learned helplessness as developed by Seligman.[68] Having experimentally induced learned helplessness in dogs, researchers found it virtually impossible to retrain them to engage in any conduct directed at reducing their discomfort or improving their environment.[69] Thus, Seligman's model would not explain how battered women, if they were suffering from learned helplessness, would eventually leave the battering relationship or kill their batterers. Rather, Seligman's work would predict that the battered women would never leave or take any other action to alter their situation.[70] It would be more consistent with the theoretical and empirical foundations of learned helplessness theory to contend that battered women who do *not* kill their batterers suffer learned helplessness and that battered women who kill their batterers differ from those who do not precisely because those who kill do *not* suffer learned helplessness.

Walker found some evidence for the cycle of violence. Sixty-five percent of the cases in her sample revealed tension building prior to an acute battering incident. Fifty-eight percent of the cases exhibited evidence of loving contrition after an acute incident.[71] Over time in the battering relationship, the proportion of tension building increased and the amount of loving contrition decreased.[72] Thus, a possible pay-off for women to remain in the relationship decreased over time. Walker's data does not reveal, however, whether the tension building and the loving contrition occurred in the same or different relationships. She also did not provide any time frame within which

65. *Id.* at 92.
66. *Id.* at 94.
67. *Id.* at 92.
68. Faigman, *supra* note 44, at 640-41.
69. *Id.*
70. *Id.*
71. BATTERED WOMAN SYNDROME, *supra* note 23, at 96-97.
72. *Id.*

the cycle was supposed to occur, noting that the tension-building stage can last for years.[73]

In summary, Walker's data provided incomplete support for some and actively undermined other of her hypothesized personality characteristics of battered women. Walker's measures related to learned helplessness included depression, low self-esteem, external locus of control, traditional views of women's roles, and fearful rather than angry emotional responses. Contrary to hypotheses, the data regarding self-esteem, locus of control, and traditional views of women's roles were not in the expected direction, and her analysis of current state, relationship, and child learned helplessness revealed minimal differences between those women who remained in the battering relationship and those who had left. She found indications of significant depression, but depression is relatively common in the general population, especially among women. Depression is not uniquely indicative of the battered woman syndrome. Collectively, the data and theoretical foundations of learned helplessness support the proposition that battered women, and especially battered women who kill their batterers, do *not* suffer learned helplessness, at least as well as it supports the contention that they do. The data included some evidence for parts of the cycle of violence, but provided no clear evidence of the entire cycle as a dominant pattern.

Despite this pattern of data failing to confirm, and in some cases directly undermining the hypotheses, Walker concluded that the data supported the cycle of violence and the battered woman syndrome, and courts and commentators have accepted syndrome testimony as well established.[74] At least one commentator discounts published criticisms of Walker's claims by contending that other sources provide independent support.[75] Other available research, however, provides no strong support for the proposition that the battered woman syndrome is an accurate description of a syndrome that regularly results from battering relationships.

2. *Further Relevant Research*

While research has revealed no studies which test Walker's entire battered woman syndrome, including depression, low self-esteem, traditional attitudes toward the female role, external locus of control, and learned helplessness, studies have addressed various aspects of the syndrome. A number of methodological problems make comparisons across studies difficult. These include varying samples (battered

73. BATTERED WOMAN, *supra* note 23, at 58.

74. State v. Kelly, 478 A.2d 364, 380 (N.J. 1984); BATTERED WOMAN SYNDROME, *supra* note 23, at 101, 147-48; Kinports, *supra* note 4, at 396-408. Legislatures have also endorsed the validity and relevance of expert testimony regarding the battered woman syndrome. *See, e.g.*, CAL. EVID. CODE § 1107 (West Supp. 1993).

75. Kinports, *supra* note 4, at 407.

women in shelters versus battered college students), sample selection (usually volunteers), lack of control groups in many of the studies, and widely varying methods of measuring the variables in question (self-report, clinical interview, objective psychological testing). Even assuming that the studies are comparable and measure what they purport to, they do not support the battered woman syndrome as Walker describes it.

Depression is the component of the battered woman syndrome that receives the strongest support in these studies, just as it did in Walker's work. Five of the studies reviewed found battered women to be depressed on various measures, including self-report and clinical diagnosis. As indicated by self-report, battered women were more depressed than either nonbattered women with relationship problems[76] or women from nonviolent families.[77] Also based on self-report, seventy-six percent of battered women interviewed by telephone were found to be depressed,[78] and high levels of depression were found in battered women residing in a shelter.[79] Clinical interview and psychiatric diagnosis classified 36.7% of women at a homeless abuse shelter as suffering Major Depressive Disorder.[80]

Two studies did not find the expected level of depression in battered women. One found no difference in depressive symptomology between battered women and nonabused women in that neither were depressed, and also found that both of those groups were significantly less depressed than a comparison group of nonbattered women who were in counseling at the time.[81] Objective psychological testing of another sample of battered women did not find a significant elevation on the scale measuring depression.[82] The studies generally support the claim that battered women often experience depressive symptomology at various degrees of severity and particularly that they see themselves as depressed. As noted previously, however, depression is common and is not a unique indicator of the battered woman syndrome.

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76. Jacqueline C. Campbell, *A Test of Two Explanatory Models of Women's Responses to Battering*, 38 NURSING RES. 18, 23 (1989).

77. Peter Jaffe et al., *Emotional and Physical Health Problems of Battered Women*, 31 CAN. J. PSYCHIATRY 625, 627-28 (1986).

78. Diane R. Follingstad et al., *Factors Moderating Physical and Psychological Symptoms of Battered Women*, 6 J. FAM. VIOLENCE 81, 87 (1991).

79. Roger E. Mitchell & Christine A. Hodson, *Coping with Domestic Violence: Social Support and Psychological Health Among Battered Women*, 11 AM. J. COMMUNITY PSYCHOL. 629, 640-41 (1983).

80. AMERICAN PSYCHIATRIC ASS'N, *supra* note 58, at 228-30 (discussing Major Depressive Disorder); Chole G. West et al., *Psychiatric Disorders of Abused Women at a Shelter*, 61 PSYCHIATRIC Q. 295, 298 (1990).

81. Margaret H. Launius & Bernard L. Jensen, *Interpersonal Problem-Solving Skills in Battered, Counseling, and Control Women*, 2 J. FAM. VIOLENCE 151, 158 (1987).

82. Lynne B. Rosewater, *Battered or Schizophrenic? Psychological Tests Can't Tell*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 200, 208-09 (Kersti Yllo & Michele Bograd eds. 1988).

Three studies found low self-esteem for battered women. Battered women were found to have lower self-esteem than nonbattered women in the community;[83] chronically abused women who remained in battering relationships were found to have lower self-esteem than formerly abused women who had left the battering relationships;[84] and seventy-six percent of a sample of battered women interviewed by telephone reported low self-esteem.[85] On a possibly related measure of ego-strength both battered women and women not physically abused were found to be low, but the battered women scored lower.[86] These studies contradict Walker's data which found that battered women did not rate themselves as having low self-esteem. These sources of data are difficult to compare because they lack standardization of measurement, adequate controls, and adequate sample size. The relationship between depression and low self-esteem calls for investigation to determine whether the low self-esteem is an artifact of depression. The only study, aside from Walker's, that assessed both depression and self-esteem found both depression and low self-esteem in battered women.[87]

Battered women do not appear to have more traditional attitudes towards women's role in society. One study found chronically abused women to have more traditional attitudes than formerly abused women,[88] while the other found that battered women had fewer traditional attitudes than women in satisfactory relationships.[89] Additionally, it seems intuitively reasonable that people suffering learned helplessness would perceive their lives as largely controlled by external forces rather than by their own internal processes. Yet, Walker's data provides no support for the hypothesis that battered women experience their lives as controlled by external forces. Chronically battered and formerly battered women scored no differently on internal locus of control, although battered women did score higher on control by chance factors.[90] A separate study found that battered women did not differ from controls and that both scored in the internal direction on a different measure of locus of control.[91] Based on

83. Mitchell & Hodson, *supra* note 79, at 641.

84. Michael B. Frisch & Cynthia J. MacKenzie, *A Comparison of Formerly and Chronically Battered Women on Cognitive and Situational Dimensions*, 28 PSYCHOTHERAPY 339, 340 (1991).

85. Margaret L. Trimpey, *Self-Esteem and Anxiety: Key Issues in an Abused Women's Support Group*, 10 ISSUES IN MENTAL HEALTH NURSING 297, 303 (1989).

86. Barbara Star, *Comparing Battered and Non-Battered Women*, 3 VICTIMOLOGY: AN INT'L J. 32, 39 (1978).

87. Mitchell & Hodson, *supra* note 79, at 640-41.

88. Frisch & MacKenzie, *supra* note 84, at 340.

89. Alan Rosenbaum & K. Daniel O'Leary, *Marital Violence; Characteristics of Abusive Couples*, 49 J. CONSULTING & CLINICAL PSYCHOL. 63, 67 (1981).

90. Frisch & MacKenzie, *supra* note 84, at 340.

91. Margaret H. Launius & Carol U. Lindquist, *Learned Helplessness, External Locus of Control, and Passivity in Battered Women*, 3 J. INTERPERSONAL VIOLENCE 307, 314 (1988).

self-report, a third sample of battered women indicated that they had equal control in the relationship with the man.[92]

Studies addressing learned helplessness in battered women have used significantly different conceptions of learned helplessness than did Walker. Walker specified situational variables, including battering incidents and sexual molestation of the battered women, and the affective response of the battered women to the situational variables as her measures of learned helplessness.[93] She also discussed other variables intuitively related to learned helplessness such as depression, self-esteem, and locus of control.[94] Other studies, in contrast, have emphasized performance on problem solving tasks as a measure of learned helplessness. They have evaluated how women respond to hypothetical vignettes and generate solutions to problem situations. Four of the studies found that battered women generated fewer solutions and fewer effective solutions to the hypothetical problem situations than did controls.[95] In contrast, another sample of battered women indicated that they had tried more solutions to their relationship problems than did nonbattered women with unsatisfactory relationships.[96]

The relationship between depression and hypothetical problem solving as a measure of learned helplessness may be important. Symptoms of Major Depressive Disorder can include slowing of both physical and cognitive functions.[97] Levels of depression less severe than Major Depressive Disorder could plausibly have similar effects on the ability to generate solutions to problems. The only study that explored both depression and problem solving found both depression and less effective problem-solving skills in battered women.[98] This finding is consistent with the interpretation of the results in these problem solving studies as indicative of depression.

Intuitively, it would seem that assertiveness would have some relevance to the notion of learned helplessness. Assertive behavior would seem inconsistent with the notion that battered women view themselves as unable to influence their environment. Battered women have been found to be no different from controls or norms on general assertion although they are less assertive in the relationship

92. Campbell, *supra* note 76, at 23.

93. BATTERED WOMAN SYNDROME, *supra* note 23, at 89-91.

94. BATTERED WOMAN, *supra* note 23, at 45-51.

95. Susan Claerhout et al., *Problem-Solving Skills of Rural Battered Women*, 10 AM. J. COMMUNITY PSYCHOL. 605, 610 (1982); Jerry Finn, *The Stresses and Coping Behavior of Battered Women*, SOC. CASEWORK: J. CONTEMP. SOC. WORK, June 1985, at 341, 346; Launius & Jensen, *supra* note 81, at 158; Launius & Lindquist, *supra* note 91, at 313.

96. Campbell, *supra* note 76, at 23.

97. AMERICAN PSYCHIATRIC ASS'N, *supra* note 58, at 218-24.

98. Lanius & Jensen, *supra* note 81, at 158-59.

with the batterer.[99] The latter might have some survival value, given that assertion could be seen as provocative by the batterer.

3. Summary

Neither Walker's data nor the later studies sufficiently support the battered woman syndrome as a pattern regularly produced by battering relationships. Some evidence supports the contention that battered women suffer from depression and anxiety. Moreover, less evidence supports the contention that they experience lower self-esteem, and have difficulty with certain types of problem-solving tasks. Quite possibly, however, depression can account for both the low self-esteem and difficulty with problem solving. The data provide no support for the contentions that battered women have traditional attitudes toward the female role in society nor that they demonstrate external locus of control. Battered women also appeared to function in the normal range of assertiveness, although not in the battering relationship itself. None of these studies evaluated Walker's cycle of violence. Taken collectively, the currently available data do not justify the claim that the battered woman syndrome, as usually formulated, provides a general portrait of those who have suffered battering relationships.

The data provide substantial support for the contention that battered women suffer significant depression and anxiety.[100] This elevated level of distress may resemble the pattern of distress suffered by others who experience various types of trauma or ongoing stress.[101] The argument for expert testimony regarding the battered woman syndrome does not rest, however, on the claim that battered women suffer distress. Rather, it requires that battered women typically suffer a particular syndrome, specific to battered women, that carries special significance for self-defense.[102] The presence of depression, anxiety, or a general distress syndrome does not substantiate this claim.

Perhaps most importantly from the perspective of the criminal courts, learned helplessness has been the aspect of the battered woman syndrome most frequently cited as central to cases of self-defense by battered women, yet it draws very little support from the available

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99. Frisch & MacKenzie, *supra* note 84, at 340; Launius & Lindquist, *supra* note 91, at 314; Rosenbaum & O'Leary, *supra* note 89, at 67; Star, *supra* note 86, at 41.

100. *See generally*, Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY: AN INT'L J. 460 (1977-78); Elaine Hilberman, *Overview: The "Wife-Beater's Wife" Reconsidered*, 137 AM. J. PSYCHIATRY 1336 (1980); Beth M. Houskamp & David W. Foy, *The Assessment of Posttraumatic Stress Disorder in Battered Women*, 6 J. INTERPERSONAL VIOLENCE 367 (1991); West et al., *supra* note 80.

101. Hilberman & Munson, *supra* note 100, at 1341 (discussing battered women as suffering a distress syndrome expected following intense and traumatic stress).

102. *See supra* notes 27-33 and accompanying text (discussing the putative significance of the battered woman syndrome for self-defense).

data. The complete body of work provides neither any clear conception of learned helplessness nor any good reason to believe that it regularly occurs in battered women. Some factors that seem intuitively related to learned helplessness, such as decreased self-esteem and problem-solving skills, are supported by some sources but not by others. In addition, the studies consistently report elevated depression which may account for these factors. The data consistently fails to support other intuitively plausible indicators of learned helplessness, including traditional gender roles and external locus of control. Collectively, the data reviewed supports the proposition that battered women do not suffer learned helplessness, at least as well as it supports the claim that they do. Finally, it would be more consistent with the theoretical and empirical foundations of learned helplessness to contend that battered women who kill their batterers differ from those who remain in the battering relationships without killing their batterers precisely because those who kill do *not* manifest learned helplessness.[103]

This review does not preclude the possibilities that one or more types of battered woman syndrome do occur, nor that future studies will provide strong supporting evidence for such a syndrome. For this reason, the following sections of this article assume for the sake of argument that such evidence is forthcoming, and they examine the significance for self-defense by battered women of a battered woman syndrome roughly similar to that usually formulated by the courts and commentators. These sections argue, however, that the battered woman syndrome bears almost no relevance to these cases.

III. The Relevance of the Battered Woman Syndrome to Self-Defense

A. Reasonable Belief in the Necessity of Force

1. Imminence or Immediacy

Battered women who exercise force in nonconfrontation situations encounter a threshold difficulty in providing grounds for a reasonable belief that any force was necessary. Most jurisdictions allow self-defense only when necessary to prevent the imminent or immediate use of unlawful force.[104] Some courts and commentators contend that rules requiring an immediate attack create an unfair disadvantage for battered women or for women generally because the reasonableness of the force exercised by these defendants arises from their history with their batterers, but the requirement of an immediate, as opposed to imminent, attack does not allow consideration of these

103. *See supra* notes 68-70 and accompanying text.
104. LaFave & Scott, *supra* note 15, § 5.7(d); Robinson, *supra* note 15, § 131(c).

factors. For this reason they advocate provisions requiring imminence rather than immediacy.[105]

This putative distinction regarding relevance of past experience does not characterize the ordinary meanings of "immediate" and "imminence." In ordinary language, both terms refer to the latency between the present and a forthcoming event, and neither addresses the relevance of past events for any judgment of that latency. "Imminent" means "impending threateningly . . . ready to befall or overtake one; close at hand in its incidence . . . coming on shortly."[106] "Immediate" means "present or next adjacent . . . occurring, accomplished, or taking effect without delay or lapse of time."[107] Both terms describe a relationship between the present and some future event that either occurs instantaneously or follows very shortly. "Imminent" suggests an ominous tone and arguably allows slightly longer latency than "immediate," but both are silent as to the relevance of past events.

Legal authorities define and use these two terms in a manner consistent with ordinary language. Black's Law Dictionary defines "immediate" as "present, at once; without delay," and it defines "imminent" as "near at hand; mediate rather than immediate; impending; on the point of happening; threatening; menacing."[108] As with the ordinary language meanings, both terms generally refer to the relationship between the present and some future event, and "imminent" seems to allow somewhat more latency than "immediate." Black's Law Dictionary specifically defines the meaning of "imminent danger" for purposes of homicide in self-defense in a manner that renders the two terms interchangeable. For that purpose, an "imminent danger" is an "immediate danger, such as must be instantly met."[109] Courts sometimes use "imminent" and "immediate" interchangeably,[110] and when interpreting self-defense provisions using either term have accepted evidence of past history as relevant.[111] In short, although some courts and commentators have attributed significance to the selection of "imminent" or "immediate," neither ordinary nor legal usage supports this attribution when the two terms are accurately interpreted. Therefore, the remainder of this article uses these terms interchangeably.

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105. State v. Hodges 716 P.2d 563, 570-71 (Kan. 1986); Maguigan, *supra* note 1, at 449-50.

106. I OXFORD ENGLISH DICTIONARY 1380 (Compact ed. 1971).

107. *Id.* at 960.

108. BLACK'S LAW DICTIONARY 749, 750 (6th ed. 1990).

109. *Id.* at 750.

110. State v. Kelly, 478 A.2d 364, 385 n.23 (N.J. 1984); State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989).

111. State v. Gallegos, 719 P.2d 1268, 1270 (N.M. Ct. App. 1986) ("immediate"); State v. Allery, 682 P.2d 312, 314-15 (Wash. 1984) ("imminent").

2. *Imminent or Immediately Necessary—The Justificatory Foundation*

Although the choice between "imminent" and "immediate" arguably carries no significance, courts and commentators sometimes overlook a related and more substantive distinction. Black's definition of an "imminent danger" as an "immediate danger, such as must be instantly met" suggests two different relationships. "Immediate danger" suggests the relationship discussed previously between the time an individual exercises defensive force and the time they expect the harm defended against to occur. The suggestion is that the unlawful aggression must be present or impending when the defensive force is used. In contrast, "such as must be instantly met" addresses the relationship between the time the defensive force is exercised and the time at which it must be exercised in order to prevent the threatened harm. In many cases, these relationships are interchangeable for practical purposes because the immediacy of the expected harm renders immediate the need to exercise defensive force. That is, *X* must shoot *Y* now rather than calling the police because *Y* is about to stab *X*.

In unusual circumstances, however, these relationships may diverge because force may be necessary now to prevent harm that will occur in the more distant future. Consider, for example, the case of the hikers *X* and *Y* who engage in a ten-day race across the desert. The only source of water in the desert is a single water hole approximately half way to the finish line. Each hiker must carry a five to six day supply of water and replenish the supply at the water hole in order to survive the race. During the first few days, *X* catches *Y* attempting to sabotage *X* by changing trail markers and attempting to steal *X*'s compass and water. If successful, each of these efforts would have caused *X* to die in the desert.

As day five begins, both hikers are almost out of water and must replenish their supplies the next day at the water hole. As *Y* passes *X* on the trail on the morning of the fifth day, *Y* holds up a box of rat poison and says to *X*, "I'll get you this time; I'll beat you to the water hole, get my water, and poison the rest; You'll never get out of here alive." Both hikers walk all day, but due to a sprained ankle, *X* can barely keep up with *Y*. That evening, as *X* is forced to stop due to the sprained ankle and exhaustion, *Y* says "I'll walk all night and get to the water hole before morning." As *Y* begins to walk away, *X*, who is unable to continue that night, says "wait," but *Y* walks in the direction of the water hole. *X* shoots *Y*, convinced by *Y*'s prior threats and sabotage that this is the only way to prevent *Y* from poisoning the water hole the next morning.

Y poses no immediate threat to *X* because *Y* will not poison the water until the next morning, and *X* will not suffer the fatal consequences of the act until a day or two later. Thus, even stipulating that

X can prevent *Y* from killing *X* only by shooting *Y*, a statute limiting self-defense to circumstances threatening imminent harm would not include *X*'s force within the scope of the defense. By requiring that the defensive force be "immediately necessary" rather than that the expected unlawful aggression be immediate or imminent, the Model Penal Code accommodates these cases and adopts a standard addressing the relation between the time the defensive force is exercised and the time at which it must be used in order to prevent the unlawful harm.[112]

Although the desert hiker case may seem somewhat fanciful, some battered women may encounter realistic circumstances in which this distinction becomes critical. Assume for the sake of argument that some battered women can accurately predict forthcoming violence from their batterers who are not currently aggressing and that these battered women will be unable to defend themselves or secure assistance at the time of the future attack.[113] Given these assumptions, for the battered women to prevent the forthcoming unlawful harm by the batterers, defensive force in the form of a "preemptive strike" may be immediately necessary during a period when battering is not imminent because the batterers are asleep, distracted, or too intoxicated to attack.[114]

The central question involves the appropriate relationship between the necessity and imminence requirements. A standard allowing defensive force only when immediately necessary to prevent unlawful harm treats imminence of harm as a factor regarding necessity. That is, the defensive force is justified only if necessary to prevent an unlawful harm, and the imminence of that unlawful harm contributes to, but does not completely determine, the judgment of necessity. In unusual circumstances such as those confronted by the desert hiker or by some battered women, defensive force may be immediately necessary to prevent unlawful harm, although that harm is not yet imminent. In these cases, imminence of harm does not serve as a decisive factor in the determination of necessity. A standard allowing defensive force only when necessary to prevent an imminent harm, in contrast, treats imminence of harm as an independent requirement for justified force in that the force must be necessary and the unlawful harm must be immediately forthcoming. Such a standard does not allow defensive force necessary to prevent delayed unlawful

112. MODEL PENAL CODE, *supra* note 16, § 3.04(1); LAFAVE & SCOTT, *supra* note 15, § 5.7(d).

113. See *infra* notes 126-233 and accompanying text for a discussion of these assumptions.

114. Richard Singer, *The Resurgence of Mens Rea: II-Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 480, 497 n.212 (discussing briefly earlier "preemptive strike" cases).

aggression, even if the present situation represents the last opportunity to prevent such harm.[115]

Given the assumptions stated previously, some battered women defendants fall within the parameters of justified self-defense as measured by standards treating imminence of harm as a factor relevant to necessity but not under standards requiring necessity and imminent harm separately. Legislatures and courts must select one of these relationships between necessity and imminence of harm in adopting and interpreting legal rules. The justification for allowing the exercise of force in self-defense should inform this choice.

Several principles and policies arguably support self-defense provisions. A complete review of self-defense theory would extend well beyond the scope of this project, but each theory offers some justification for allowing innocent victims the use of at least the degree of force necessary to prevent culpable aggressors from causing them a comparable degree of harm.[116] Dominant theories appeal to the social interests in minimizing harm, protecting the legal order, or favoring right over wrong. Some writers, for example, justify self-defense as minimizing social harm when the interests of assailants are appropriately discounted as compared to those of innocent parties.[117] Others interpret self-defense as a legal device that allows individuals to protect their autonomy and the legal order by preventing illegal assaults when institutional enforcement is not available. By doing so, they correct circumstances in which right would otherwise have to yield to wrong.[118]

Due to the general social policies against the private use of force and causing unnecessary harm, each of these theories limits justified self-defense to those circumstances in which it is necessary to achieve the justifying goal or to protect the underlying principle. Thus, one can exercise defensive force to minimize harm or protect the social order only when no nonviolent alternative will achieve that end. This necessity requirement is consistent with each proffered justification for self-defense, and indeed, some writers interpret necessity as the core of self-defense doctrine.[119] Imminence of harm remains consistent with this theoretical foundation when it serves as a factor regarding judgments of necessity because in most circumstances the judgment that no nonviolent alternative will suffice is more likely to

115. Robinson argues that necessity entails immediacy, rendering any mention of imminence superfluous. ROBINSON, *supra* note 15, § 131(c)(1) & (2). Unfortunately, statutes and common-law rules do not ordinarily recognize this insight.

116. *See* LAFAVE & SCOTT, *supra* note 15, § 5.7; ROBINSON, *supra* note 15, §§ 131-32; Robert F. Schopp, *Self-Defense: A Theory a Liberal Can Live With*, *in* IN HARM'S WAY (Jules Coleman & Allen Buchanan eds., forthcoming 1994).

117. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 10.5.2 (1978); ROBINSON, *supra* note 15, § 131(a).

118. FLETCHER, *supra* note 117, §§ 10.5.3-.4; Schopp, *supra* note 116.

119. FLETCHER, *supra* note 117, § 10.5; ROBINSON, *supra* note 15, § 131(c).

be accurate regarding an imminent harm than a remote one. Imminence of harm can undermine these justificatory theories, however, if it is accepted as an independent requirement of the defense.

Consider, for example, the desert hiker case discussed previously. A statute barring X, the victim of the initial aggression, from exercising immediately necessary force in self-defense because the harm was not yet imminent would protect the culpable Y at the expense of the innocent X, sacrificing an innocent life and protecting the culpable party. This result would constitute a greater social harm rather than a lesser one when the interests of the culpable party are appropriately discounted. Similarly, X would acquiesce in a felony, allowing disruption of the social order, and right would give way to wrong because Y's wrongful conduct would violate X's legitimate claim. In short, imminence of harm can promote the underlying justifications of self-defense when it serves as a factor to be considered in making judgments of necessity, but it can undermine those justifications if it is accepted as an independent requirement in addition to necessity. For these reasons, the Model Penal Code and some commentators advocate some variation of the "immediately necessary" formulation rather than "necessity and imminence."[120]

3. *Learned Helplessness as Disordered Thought and Special Capacity*

Immediate necessity, not imminence of harm, should be considered essential to self-defense claims, including those asserted by battered women. According to this interpretation, battered women defendants can justify the exercise of defensive force in nonconfrontation cases if they can demonstrate the ability to accurately perceive when that force becomes immediately necessary to prevent a future attack. Courts and commentators have advocated expert testimony regarding the battered woman syndrome for this purpose.[121]

Surprisingly, courts and commentators tend to emphasize the significance of learned helplessness both as a distortion of perception and thought and as a special capacity that renders these women's beliefs reasonable by enabling them to accurately predict future attacks in the absence of overt cues recognizable to most people.[122] One

120. MODEL PENAL CODE, *supra* note 16, § 3.04(1); LAFAVE & SCOTT, *supra* note 15, § 5.7(d). This article does not address considerations of error preference which might apply with particular significance to deadly force. *See* Schopp, *supra* note 116.

121. People v. Aris, 264 Cal. Rptr. 167, 177 (Cal. Ct. App. 1989) (quoting Lenore Walker as advocating this position); State v. Kelly, 478 A.2d 364, 378 (N.J. 1984) (describing the battered woman as particularly able to predict violence); People v. Torres, 488 N.Y.S.2d 358, 362 (N.Y. Sup. Ct. 1985) (describing "acute discriminatory powers" regarding danger); Kinports, *supra* note 4, at 416, 423-26 (indicating that a reasonable battered woman can perceive imminent danger when husband is sleeping).

122. *Compare* State v. Hodges, 716 P.2d 563, 567 (Kan. 1986) (describing battered women as terror stricken people whose mental state is distorted, as brainwashed and disturbed persons)

court, for example, described those suffering from the battered woman syndrome as "unable to think clearly" and as suffering "emotional paralysis" and the "delusion that things will improve."[123] This court also concluded, however, that evidence of the syndrome should be admitted because it would enable the jury to understand the defendant's "acute discriminatory powers" as relevant to her justificatory claim of self-defense.[124]

These sources appeal to the putative special predictive capacity to support the claim that defendants who exercise force in the apparent absence of explicit signs of imminent danger do so with a reasonable belief that the defensive force is immediately necessary. According to this reasoning, although an average juror might not perceive the danger in these situations as described in court, the defendants reasonably and accurately perceived the forthcoming danger and the immediate necessity of defensive violence by virtue of their special capacities.

The paradox arises from the apparent tension in describing those who suffer from the battered woman syndrome in a manner suggesting that the syndrome distorts their perceptions and judgment regarding the battering relationship yet simultaneously provides them with a special capacity to predict events within that relationship with superior accuracy. The mere fact that people suffer certain impairments of perception, thought, or judgment does not preclude the possibility that they might also possess superior capacities for specified tasks. The account of the battered woman syndrome as including both impairment and special capacities seems particularly awkward, however, because both involve the accuracy of the battered woman's judgments about the batterer and the battering relationship. At least at first glance, the description of learned helplessness apparently undermines the reasonableness of any beliefs these defendants might have about the batterers or their relationships. In what manner does expert testimony about the syndrome, with the impairment identified as learned helplessness, support the claim that these defendants possess a special capacity that grounds reasonable beliefs about forthcoming violence?

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with id. at 569 (describing battered women as particularly able to accurately predict abuse); *compare Kelly*, 478 A.2d at 364, 372 (describing the battered woman syndrome as producing psychological paralysis and the belief that the batterer is omnipotent) *with id.* at 378 (describing battered women as particularly able to predict abuse accurately). *See generally* Kinports, *supra* note 4, at 416-22 (discussing the dispute regarding the notion that battered women suffer a syndrome that renders their beliefs more accurate and reasonable).

123. *Torres*, 488 N.Y.S.2d at 361.

124. *Id.* at 362.

4. *The Battered Woman Syndrome or the Pattern of Battering as Supporting Reasonable Belief*

Assume a particular battered woman does not suffer from the battered woman syndrome. She has experienced an extended battering relationship, but she has not developed the pattern of psychological characteristics such as depression, decreased self-esteem, and learned helplessness that constitute the syndrome assumed to have been established for the purpose of this section. This battered woman kills her batterer as he sleeps in a drunken stupor because she fears that he will attack her severely when he regains consciousness. She might plausibly argue that she reasonably believed she would be in severe danger when he awoke because she recognized a pattern of speech and conduct that preceded previous severe beatings. She might contend that the beatings have escalated over the past few months concurrent with his escalating alcohol consumption. She could further testify that she has learned to keep track of his drinking because the beatings have increased in intensity in proportion to the amount he drank and that on the day in question, he had just drunk more than she had ever seem him drink in one day.

Alternately, she might provide a much less specific explanation. She might testify that she killed him as he slept because she felt very frightened when he threatened her before he passed out. She has learned to trust her fear, she testifies, because the intensity of the beatings often seemed to reflect the intensity of fear she felt when he threatened her. "I don't know how I can tell," she testifies, "but when I started to shake like that, I always knew it would turn out real bad."

This defendant's testimony presents a plausible claim of reasonable belief on the basis of her extended experience with the batterer.[125] Although the more precise explanation based on the amount he drank and the pattern of escalation provides a more detailed account of the origins of her belief, the second variation based only on the intensity of her fear and her experience of severe abuse following more intense fear does not seem implausible. Many people who have lived with another for an extended period learn to recognize or predict the other's moods or conduct without being able to articulate an explanation.

This defendant has experienced an extended pattern of battering and puts forward a plausible claim of reasonable belief that an attack was forthcoming, but her evidence for this claim makes no reference to the battered woman syndrome or any of its components. Her claim is plausible, though not obviously persuasive, and any competent attorney would prefer to support it with additional evidence. Expert testimony regarding the syndrome, however, would not necessarily

125. Here we address only the belief that an attack was coming, not the issue of legal alternatives to defensive force which is discussed *infra* notes 140-233 and accompanying text.

support the defendant's story. As described, this defendant does not suffer from the battered woman syndrome. If she did, an expert could testify that she suffered depression, decreased self-esteem, and learned helplessness, but this testimony would not support the contention that she reasonably believed an attack forthcoming because these characteristics do not increase the reliability of her beliefs or the accuracy of her predictions.

Her testimony is plausible not because it is associated with a clinical syndrome but because it describes an ordinary pattern of inductive inference familiar to most people. She reasoned from her prior experience with this person in similar circumstances to an inference regarding his likely conduct the following morning. Although individual behavior is difficult to predict, the best indicators of future violence are past violent behavior by the same person in similar circumstances.[126]

Additional physical evidence or testimony confirming her account would render it more persuasive. Emergency room records might confirm her claim of escalating violence by documenting increasing severity of injuries, for example, or neighbors might testify that her husband had been drinking more heavily recently. Family or friends might be able to testify that they had observed suspicious injuries that seemed to be associated with increased distress. Each of these sources of evidence would confirm her account of the batterer's past conduct, supporting her inference regarding his expected behavior. Compelling evidence confirming her description of his past pattern of behavior in similar circumstances would render her belief regarding the forthcoming attack very reasonable because it would provide exactly the kind of information that ordinary people like the jurors usually rely on in drawing inferences about the likely behavior of other people.

This kind of supporting evidence, however, may not be available for defendants who have lived in isolation from friends, families, and medical care. Similarly, those who have successfully concealed the pattern of past abuse from others may not have access to such evidence. These defendants would find it difficult to establish their belief as reasonable because they would have difficulty confirming the occurrence of the series of past events from which they drew their inference regarding the anticipated attack.

Testimony regarding the battered woman syndrome would not cure this problem, however, because it would describe the defendant's psychological characteristics rather than the series of events that serve to render her inference reasonable. To the extent that expert testimony emphasizes learned helplessness, it portrays the battered woman as unable to accurately perceive and evaluate the batterer, the

126. JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR 88-92, 104-05 (1981).

relationship, and her options, actively undermining the contention that her beliefs regarding these issues were reasonable. Such testimony tends to portray her beliefs as the product of the type of psychological impairment known as learned helplessness rather than as a product of past experience which the jury recognizes as providing good reasons for a belief.[127]

In short, some battered women may well be able to predict forthcoming abuse with sufficient accuracy to support a reasonable belief, but these beliefs are the product of neither a special capacity nor the battered woman syndrome. They reflect an ordinary process of inductive inference from past behavior in similar circumstances. The appropriate supporting evidence involves confirmation of this past behavior, enabling the jury to draw the same reasonable inference. Thus, the critical evidence establishes the past pattern of battering rather than the battered woman syndrome. Although not always available, this type of evidence supports the required inferences, and lawyers, jurors, and courts are familiar with it and likely to understand it.

5. *Reasonable Belief in the Necessity of Deadly Force*

To establish self-defense, the battered woman who kills her batterer in a nonconfrontation situation must demonstrate not only that she reasonably believed an attack was forthcoming but also that she reasonably believed that deadly force was necessary and proportionate to the impending assault. Standard self-defense doctrine allows the exercise of deadly force only when such force is necessary to prevent another from using unlawful deadly force against the actor.[128] Deadly force means force likely to cause death or serious bodily injury.[129] An extended series of cases recognizes considerations such as size, gender, and past history with the assailant as relevant to the reasonableness of the decision to exercise deadly force in self-defense. The belief that deadly force was necessary must have been reasonable in light of the information available to the defendant at the time she acted.[130]

A defendant who has experienced an extended battering relationship involving serious bodily injury has reasonable grounds to believe that if an attack is forthcoming, it is likely to include the danger of

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127. See *infra* notes 244-55 and accompanying text for a discussion of the appropriate interpretation of "reasonableness."

128. MODEL PENAL CODE, *supra* note 16, § 3.04(2)(b); LAFAVE & SCOTT, *supra* note 15, §§ 5.7(a) & (b).

129. MODEL PENAL CODE, *supra* note 16, § 3.11(2); LAFAVE & SCOTT, *supra* note 15, § 5.7(a).

130. Smith v. United States, 161 U.S. 85, 88 (1896); State v. Hodges, 716 P.2d 563, 571 (Kan. 1986); Kress v. State, 144 S.W.2d 735, 738-39 (Tenn. 1940); State v. Painter, 620 P.2d 1001, 1004 (Wash. Ct. App. 1980); Maguigan, *supra* note 1, at 416-23.

serious injury.[131] Thus, by establishing her reasonable beliefs that an attack was forthcoming and that past attacks by this batterer have included conduct likely to inflict serious bodily injury, the defendant demonstrates the basis for a reasonable belief that deadly force is proportionate to the threat. If in addition, the defendant's experience provides her with a basis to believe that due to factors such as size, gender, or physical disadvantage she can prevent the batterer from causing her serious bodily injury only by exercising deadly force, then she reasonably believes that deadly force is necessary.

Analogous reasoning applies in confrontation cases in which the defendant exercises deadly force which is apparently disproportionate to the attack. In these cases the defendant can establish a reasonable belief that defensive force was necessary by presenting evidence that an attack occurred and alternatives were not available, but she may encounter difficulty supporting a reasonable belief that deadly force was necessary and justified if the attack in progress included only nondeadly force. If a battered woman has experienced a pattern of battering in which nondeadly force has escalated during the abuse, however, that history in conjunction with the occurrent nondeadly attack provides a basis for a reasonable belief that deadly force is forthcoming. She can support a reasonable belief in the necessity of exercising deadly defensive force, therefore, by presenting evidence of the occurrent nondeadly force, the past pattern of escalation, and the lack of safe alternatives.[132] Although case law allows evidence of the defendant's past pattern of battering by the batterer to establish reasonable belief in the necessity of deadly force regarding either the confrontation or nonconfrontation situations, we directly address the nonconfrontation cases as the most problematic for the defendants.[133]

A critic might advocate admitting expert testimony regarding the battered woman syndrome in these cases on the following basis. Evidence of past battering sufficient to support the battered woman's exercise of deadly force in the circumstances would describe severe and repetitive abuse. Thus, it would elicit highly emotional reactions from many ordinary people, including jurors.[134] For this reason, some courts might preclude such evidence as relevant but inadmissible because highly prejudicial.[135] Expert testimony regarding the syndrome,

131. *Kress*, 144 S.W.2d at 738-39 (recognizing the history of battering by the batterer and the size and gender of the parties as relevant to the justification of the defendant's resorting to deadly force).

132. This reasoning accepts for the sake of argument the proportionality requirement as a legitimate constraint on self-defense. For an argument that it is at best a concession to error preference, see Schopp, *supra* note 116.

133. *See supra* note 130 and accompanying text (citing authority regarding the relevance of the defendant's history with the assailant).

134. *See, e.g.*, State v. Gallegos, 719 P.2d 1268, 1271-72 (N.M. Ct. App. 1986); State v. Norman, 378 S.E.2d 8, 9-11 (N.C. 1989). Both cases describe egregious patterns of abuse.

135. JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 185, at 779 (4th ed. 1992).

should be admitted, such a critic might contend, as the only available means of making the admittedly relevant evidence of past abuse available to the jury.

The response to such a critic has three parts. First, a well-established exception to the general rule against character evidence allows evidence regarding past aggression by the victim in homicide cases when there is controversy regarding who initiated the aggression.[136] This exception, in conjunction with the relevance of the battered woman's past history with the batterer to her reasonable belief in necessity, supports the admissibility of such evidence. Second, not all courts currently accept the argument presented in this article. As indicated previously, the purpose here is to demonstrate that the basic principles underlying widely accepted self-defense doctrine support the contention that courts *should* allow argument and evidence on the basis endorsed here.

Third, the relative weight of the probative value and prejudicial effect will vary from case to case. If the former outweighs the latter in a particular case, then this evidence of past abuse should be admitted for the reasons already stated. If the prejudicial effect outweighs the probative value in a particular case, then the evidence would not be admissible, but calling it part of a battered woman syndrome renders it no less prejudicial and no more probative. Thus, in each case, either the evidence should be admitted under ordinary law or it should be precluded as overly prejudicial. Either conclusion depends on the relative weight of the probative and prejudicial effects of the evidence of past abuse without regard to the battered woman syndrome.

6. *Retreat as a Legal Alternative to Defensive Force*

The availability of safe legal alternatives to defensive force undermines the claim that the exercise of deadly defensive force was necessary. If victims of impending unlawful force can protect themselves through retreat or recourse to institutional resources such as police or the courts, then the private use of force is not necessary.[137] In some circumstances, escape from the dangerous situation provides an alternative means of avoiding the threatened injury. This alternative rarely applies in confrontation cases because jurisdictions requiring retreat limit this duty to circumstances in which one can retreat in safety, and only in rare circumstances would one be able to retreat in safety during an attack.[138]

The opportunity to retreat can undermine the claim that defensive force is strictly necessary in nonconfrontation cases because the

136. *Id.* § 193.
137. LAFAVE & SCOTT, *supra* note 15, § 5.7(a).
138. MODEL PENAL CODE, *supra* note 16, § 3.04(2)(b)(ii); LAFAVE & SCOTT, *supra* note 15, § 5.7(f).

defendant with the opportunity to retreat before an attack begins may be able to avoid the threat of harm without exercising force. In the majority of jurisdictions, however, innocent individuals have no duty to avoid using force in self-defense if doing so would require that they retreat from a place in which they have a right to stay. Of the minority of jurisdictions that enforce a general duty to retreat before exercising force or deadly force in self-defense, most recognize a dwelling exception allowing deadly force without retreat by those who are attacked in their homes.[139] Thus, the dispute regarding whether the battered woman syndrome renders the defendant unable to exercise the alternative of retreat is irrelevant to cases that occur in the home. Regardless of whether she could retreat, there is no legal reason why she *should* do so before using defensive force. Ordinary self-defense doctrine allows one to exercise defensive force, including deadly force, in one's own home when one has no safe alternative except retreat.

7. *Institutional Legal Alternatives*

Available legal alternatives other than retreat may preclude the justified use of force in self-defense. Institutional assistance (for example, police intervention or restraining orders) undermines the claim that defensive force is necessary provided that assistance is available and effective. Confrontation cases involving an attack in progress would rarely offer an opportunity to resort to these options, but the availability of legal alternatives may become a critical consideration in nonconfrontation cases. The defendant who exercises violence against a batterer who is not battering her at that time must explain why her exercise of force was necessary to prevent an anticipated attack. To support the claim that she reasonably believed that her exercise of force was necessary for self-defense, she must demonstrate that she reasonably believed that these legal alternatives were either unavailable or ineffective.

Data supports this belief as both reasonable and accurate in at least some cases. The history of institutional failure to effectively intervene in ongoing battering relationships has been well documented elsewhere.[140] This article addresses only the evidence regarding the current status of such legal alternatives.

Criminal prosecution and civil protective orders provide appropriate legal responses to battery. Effective intervention through

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139. LAFAVE & SCOTT, *supra* note 15, § 5.7(f). Although a few jurisdictions recognize an exception to this exception when the assailant is a cohabitant of the dwelling, most do not.

140. *See, e.g.*, ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987); Stephen E. Brown, *Police Responses to Wife Beating: Neglect of a Crime of Violence*, 12 J. CRIM. JUST. 277 (1984); Loraine P. Eber, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L.J. 895 (1981); Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When Police Won't?*, 95 YALE L.J. 788 (1986); Barbara Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74 (1983); Kinports, *supra* note 4.

either type of legal action requires that a series of legal actors implement the appropriate substantive law. Criminal prosecution is separate and distinct from a civil protective order, and in all states except New York, a victim of domestic assault may pursue the former while concurrently seeking the latter.[141] Physical assault or threat of assault constitutes a criminal offense in every state, regardless of whether a relationship exists between the victim and assailant. Many additional forms of domestic violence, including sexual assault, destruction or theft of property, kidnapping, and involuntary confinement, violate criminal prohibitions. The victim of such conduct may initiate a criminal complaint in the proper office.[142] However, a battered woman is far more likely to become involved in the criminal justice system through the intervention of the police department in her jurisdiction.

a. Police Response

Often, police officers are the only arm of the legal system immediately available to the battered woman, because most domestic violence occurs in the evening hours and on weekends.[143] Domestic disturbance incidents constitute the largest volume of calls received by police departments each year.[144] Police dispatchers,[145] and individual officers,[146] make critical determinations regarding which calls elicit a response. Individual battered women have attempted to hold police departments accountable under 42 U.S.C. § 1983 for failing to respond to their calls for help.[147] Some sources explain that police hesitancy to

141. NATIONAL INST. OF JUSTICE, CIVIL PROTECTION ORDERS LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT (1990).

142. Lisa G. Lerman & Naomi R. Cahn, *Legal Issues in Violence Toward Adults*, *in* CASE STUDIES IN FAMILY VIOLENCE 73, 79 (Robert T. Ammerman & Michael Hersen eds., 1991).

143. ELIZABETH SCHNEIDER, LEGAL REFORM EFFORTS TO ASSIST BATTERED WOMEN: PAST PRESENT AND FUTURE 40 (1990).

144. CLARE CORNELL & ROGER LANGLEY, INTIMATE VIOLENCE IN FAMILIES 131 (1985).

145. In one study, police dispatchers were found to underreport the violence faced by the battered woman. Nan Oppenlander, *Coping or Copping Out: Police in Domestic Disputes*, 20 VICTIMOLOGY 449 (1982).

146. Police officers may choose not to respond to domestic disturbance calls because they believe such incidents are personal matters and police intervention will only make matters worse. James Walter, *Police in the Middle: A Study of Small City Police Intervention in Domestic Disputes*, 9 J. POLICE SCI. & ADMIN. 248, 253 (1981).

147. *See* Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1990) (holding battered woman alleged sufficient facts to withstand motion for summary judgment on equal protection claim against police for treating domestic assault cases less seriously than other forms of assault); Hynson v. City of Chester, 731 F. Supp. 1236 (E.D. Pa. 1990) (holding battered woman alleged sufficient facts to withstand motion for summary judgment on her equal protection claim against the city for treating domestic violence calls as less serious than other assault incidents); Dudosh v. City of Allentown, 665 F. Supp. 381 (E.D. Pa.), *reconsideration denied*, 668 F. Supp. 944 (E.D. Pa.), *vacated*, 853 F.2d 917 (3d Cir. Pa.), *cert. denied*, 488 U.S. 942 (1988) (holding battered woman alleged sufficient facts to withstand motion for summary judgment on equal protection claims against police for adhering to classification system which distinguished between domestic violence and other assault cases); Bartalone v. County of Berrien, 643 F. Supp. 574 (W.D. Mich. 1986) (holding battered woman alleged sufficient facts to withstand motion for summary judgment as to equal protection claim against a police office which failed to respond to her call and

respond to these calls stems from officers' perceptions that domestic disturbance calls involve a high risk of injury and death.[148] Current statistics reveal, however, that only five percent of felonious deaths to officers occur while answering domestic calls, making such calls one of the *least* frequent types of incidents involved in police injuries.[149]

Police officers who respond to a domestic disturbance call must decide whether the situation merits an arrest. Historically, state statutes prohibited arrests in misdemeanor cases unless the violation occurred in the presence of an officer. Therefore, officers frequently could not make a warrantless arrest unless a felony had occurred.[150] By 1983, twenty-eight states had legislation that allowed police to make warrantless arrests in cases of domestic assault where officers had probable cause to believe batterers had committed misdemeanor assaults.[151] Only Alabama and West Virginia remained without such legislation by 1988.[152]

Although legislation authorizing the arrest of men who batter is often discretionary, fifteen states require that police arrest the offender in a domestic violence incident.[153] Mandatory arrest provisions have sometimes resulted in police arresting the battered woman as well as the batterer.[154] Some states have amended their statutes to provide for arrest of the "primary aggressor."[155] In addition to the above legislative measures, nineteen states require police to arrest if the batterer has violated a protective order.[156]

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against the chief of police for allowing such action in domestic violence cases); Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984) (alleging that police violated battered woman's constitutional right to equal protection by ignoring her repeated attempts to seek police protection).

148. Uniform Crime Reports revealed that 32% of all reported assaults on police officers and 16% of all officer deaths recorded during the 10-year period from 1968 to 1977 occurred in connection with "disturbance calls." However, during those years statistics within the category of "disturbance call" included not only domestic disturbances but barroom fights and street disturbances as well. The statistics from these years are often cited to demonstrate the danger posed by calls from battered women, without clarification that only a fraction of the calls involved situations of spousal abuse. U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 13 (1982).

149. JOEL GARNER & ELIZABETH CLEMMER, NATIONAL INST. OF JUSTICE, DANGER TO POLICE IN DOMESTIC DISTURBANCES—A NEW LOOK (1986).

150. GAIL A. GOOLKASIAN, NATIONAL INST. OF JUSTICE, CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES 34 (1986).

151. *Id.* at 53 n.25.

152. VICTIM SERVS. AGENCY, THE LAW ENFORCEMENT RESPONSE TO FAMILY VIOLENCE: A STATE BY STATE GUIDE TO FAMILY VIOLENCE LEGISLATION (1988).

153. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY, 46, 64 n.182 (1992).

154. SCHNEIDER, *supra* note 143, at 33-34.

155. Sarah Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 214-15 (1988).

156. Zorza, *supra* note 153, at 64 n.183.

Much of this legislative activity has no doubt been catalyzed by the now famous study conducted by Sherman and Berk[157] which suggested that arrest deters subsequent violence more effectively than other police responses, such as mediation or separating the parties. Unfortunately, extensive replication efforts provide only equivocal support for the deterrent effect found in the initial Minneapolis experiment.[158] Numerous replications found that arrest of the batterer results in increased violence toward the battered woman.[159] Indeed, Dr. Sherman recently stated that "mandatory arrests in domestic violence cases may cause more violence against women in the long run."[160]

In many cases, the effects of new domestic assault laws on the lives of battered women remain undeterminable. The recent changes in legislation regarding domestic violence have only begun to alter action within individual police departments. The practical effect of statutory reform requires corresponding departmental policy and awareness of the changes by individual officers.[161] Many police departments adopted broad policies advocating arrest in cases of domes-

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157. Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984). This study initially found arrest to be an effective deterrent to batterers. Attempts to replicate the deterrent effect evidenced in this work have met with mixed results. *See infra* notes 158-79 and accompanying text.

158. *See, e.g.*, Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1 (1992). In attempting to replicate the findings of the Minneapolis experiment, the results in three of the cities, including Minneapolis, show that arrest has a deterrent effect. *But see* NATIONAL INST. OF JUSTICE, THE MEASUREMENT OF RECIDIVISM IN CASES OF SPOUSE ASSAULT (1984); NATIONAL INST. OF JUSTICE, FEMALE SPOUSE ABUSE AND THE POLICE RESPONSE (1983); NATIONAL INST. OF JUSTICE, THE VARIABLE EFFECTS OF ARREST ON CRIMINAL CAREERS: THE MILWAUKEE DOMESTIC VIOLENCE EXPERIMENT (1984). These studies found no real difference in future domestic assault incidents regardless of whether police used arrest, separation, or mediation.

159. Sherman, *supra*, note 158. *But see* Franklyn W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183 (1990). Data from this study showed that victims whose partners were arrested were no less likely to experience repeated violence from that partner than were victims whose partners were not arrested. This inconsistency may be linked to the source of recidivism data. Several of the same authors later noted that, regarding efforts to replicate the Minneapolis experiment,

> [e]xamination of victim interview data reveals alarmingly high levels of repeat incidents of spouse abuse, suggesting that the scope of the problem is far greater than police data indicate. Official records, those based on rearrest by police, show predictably lower prevalence and incidence rates of recidivism than do interview data.

J. David Hirschel et al., *The Failure of Arrest to Deter Spouse Abuse*, 29 J. RES. CRIME & DELINQ. 7, 29 (1992).

160. Daniel Goleman, *Do Arrests Increase the Rates of Repeated Domestic Violence?*, N.Y. TIMES, Nov. 27, 1991, at C8.

161. *See* Helen Eigenberg & Laura Moriarity, *Domestic Violence and Local Law Enforcement in Texas: Examining Police Officers' Awareness of State Legislation*, 6 J. INTERPERSONAL VIOLENCE 102 (1991). In assessing the knowledge of Texas police officers regarding changes in state law, the authors found that 35% did not know they could make a warrantless arrest in cases of domestic violence when the violation was not witnessed by the officer. Almost one in six believed that an arrest could not be made unless a serious injury had transpired.

tic violence[162] but failed to take the steps necessary to ensure that officers implement these policies.[163]

Despite laudable changes in state legislation and departmental policies, many police officers clearly remain reluctant to make arrests in cases of domestic assault.[164] Studies reveal that only ten to eighteen percent of reported domestic violence incidents between husbands and wives resulted in the arrest of the batterer,[165] although injuries to the victim provide prima facie evidence for assault in about thirty-four percent of domestic disputes attended by police.[166] In states having mandatory arrest laws, the arrest rate rises to approximately forty percent.[167] These statistics do not improve when the battered woman specifically requests that the police arrest her assailant.[168]

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162. According to the Washington based Crime Control Institute, the number of police departments inclined to arrest in cases of minor domestic assault tripled in one year, from 14 of 140 major cities in 1984, to 44 of those same cities in 1985. L.A. TIMES, Jan. 27, 1986, pt. I, at 2.

163. Although the number of police departments indicating arrest as their preferred policy when confronting batterers rose from 10% in 1984 to 31% one year later, 47% of those departments made no effort to provide officers with guidelines or instruction regarding the change. LAWRENCE W. SHERMAN ET AL., POLICE POLICY ON DOMESTIC VIOLENCE: A NATIONAL SURVEY, CRIME CONTROL REPORTS 1 (1986); *see also* Maria K. Pastoor, *Police Training and the Effectiveness of Minnesota "Domestic Abuse" Laws*, 2 LAW & INEQ. J. 557, 562-63, 571 (despite a Minnesota state statute requiring that batterers be arrested, the police chief failed to issue a statement mandating arrest for almost a year, and individual officers continued to resist implementation of the law); Philip M. Boffey, *Domestic Violence: Study Favors Arrest*, N.Y. TIMES, Apr. 5, 1983, at C1 (although the New York Police Department adopted a policy of mandatory arrest in domestic violence cases, the policy is reportedly "widely disregarded").

164. DONALD G. DUTTON, THE DOMESTIC ASSAULT ON WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES 139, 143-44 (1988).

165. *See* Lee H. Bowker, *Police Services to Battered Women: Bad or Not So Bad*? 9 CRIM. JUS. & BEHAV. 476 (1982) (only 10% of domestic violence cases result in arrest, despite the fact that grounds for arrest exist in over half of the cases); Ida Johnson, *A Loglinear Analysis of Abused Wives' Decisions to Call the Police in Domestic-Violence Disputes*, 18 J. CRIM. JUS. 147 (1990) (18% of domestic assault calls responded to resulted in arrest of the batterer); Douglas A. Smith & Jody R. Klein, *Police Control of Interpersonal Disputes*, 31 SOC. PROBS. 468 (1984) (arrest rate for domestic violence was 11.8%); Robert E. Worden & Alissa A. Pollitz, *Police Arrest in Domestic Disturbances: A Further Look*, 18 LAW & SOC. REV. 105 (1984) (arrest rate for domestic violence in 24 U.S. cities was 10%).

166. Donald G. Dutton, *The Criminal Justice Response to Wife Assault*, 11 LAW & HUMAN BEHAV. 189, 197 (1987).

167. *See* Kathleen J. Ferraro, Protecting Women: Police and Battering (paper presented at the American Sociological Association, Washington D.C. 1985); *see also* Kathleen J. Ferraro, *Policing Woman Battering*, 36 SOC. PROB. 63 (1989) (stating that after adopting a mandatory arrest policy, police made arrests in only 43% of the cases where there was probable cause and the offender was present).

168. Bowker, *supra* note 165. Police were specifically requested by the battered woman to arrest in 82% of the incidents considered in this study, but arrest occurred in only 14% of the cases. Most of the officers either refused to arrest claiming there was no case (27%) or talked the battered woman into working out differences with the batterer (41%). Another study revealed that 60% of victims asked to have their spouses arrested, but officers complied in only 28% of the cases. Eileen Abel & Edward Suh, *Use of Police Services by Battered Women*, 1987 SOC. WORK 526.

Individual officers may consider many factors in determining whether arrest is appropriate in a given situation.[169] Studies of police response to domestic assault suggest that although legal factors play a role in arrest decisions,[170] extralegal factors are highly determinative.[171] The batterer's criminal record,[172] his belligerence toward responding officers,[173] and his alcohol use during the incident[174] all strongly affect the arrest decision. Although race of the victim and severity of her injuries have been shown to have little impact,[175] her behavior,[176] allegations of violence, and willingness to sign an arrest warrant[177] influence officers' decisions to arrest her assailant. Finally, if someone other than the battered woman calls police to the scene, the probability that the batterer will be arrested increases significantly.[178] After an arrest occurs, criminal charges may be filed against the batterer. Depending on the jurisdiction these charges may be filed by the police officer or by the prosecutor.[179]

Although the actions of police departments in cases of domestic violence have received the most intense scrutiny, prosecutors, judges, and court personnel also have direct and significant effects on the availability of legal alternatives to battered women seeking protection from their batterers. Each may hinder or aid the battered women's attempts to secure criminal and civil remedies. Although police officers are most often associated with dissuading the victims of domestic assault from proceeding in criminal court, district attorneys have also been identified as playing this role.[180] The discretion inherent in

169. This pattern may vary in jurisdictions which have adopted mandatory arrest laws regarding domestic violence.

170. Pam Waaland & Stuart Keeley, *Police Decision Making in Wife Abuse: The Impact of Legal and Extralegal Factors*, 9 LAW & HUM. BEHAV. 355 (1985).

171. Richard Gondolf & J. Richard McFerron, *Handling Battering Men: Police Action in Wife Abuse Cases*, 16 CRIM. JUST. & BEHAV. 429 (1989). The results of this study suggest that the antisocial characteristics of the batterer, as opposed to the facts surrounding the battering incident, are strongly related to action taken by police. "Police appear to be responding to antisocial men who have had previous arrests, abused alcohol, committed general violence, and been excessively verbally abusive [to the officer]. The level of abuse through the sample was sufficiently extreme to warrant police action, regardless of the antisocial behavior exhibited by the batterer."

172. *Id.*; *see* Sarah F. Berk & Donileen R. Loseke, *"Handling" Family Violence: Situational Determinants of Police Arrest in Domestic Disturbances*, 15 LAW & SOC. REV. 317 (1980).

173. *See* Berk & Loseke, *supra* note 172; Gondolf & McFerron, *supra* note 171.

174. Berk & Loseke, *supra* note 172; Worden & Pollitz, *supra* note 165.

175. Worden & Pollitz, *supra* note 165.

176. Waaland & Keeley, *supra* note 170.

177. Berk & Loseke, *supra* note 172.

178. *Id.*; Worden & Pollitz, *supra* note 165.

179. Lerman & Cahn, *supra* note 142, at 79.

180. Sarah Eaton & Ariella Hyman, *The Domestic Violence Component of the New York Task Force Report on Women in the Courts: An Evaluation and Assessment of the New York City Courts*, 19 FORDHAM URB. L.J. 391, 427-28 (1992).

the job often acts to keep domestic assault cases out of court.[181] Prosecutors may not consider domestic violence a "real crime"[182] and may experience frequent frustration with battered women who drop charges against their batterers.[183] Prosecutors have also been criticized for minimizing charges in cases of domestic abuse[184] and demonstrating reluctance to assist victims with obtaining protection orders unless the battered women show visible signs of injury.[185]

Historically, judges have emphasized civil process over criminal prosecution.[186] Advocates still contend that judges lack understanding concerning domestic violence issues, although progress has been made.[187] Judges may fail to believe battered women unless they have visible injuries[188] and may even blame the battered women, presuming that they provoked the batterers.[189] When batterers are processed through the criminal courts, they are rarely charged with felonies,[190] and sentences tend to be lenient.[191] This may stem in part from the attitude expressed by some judges that the woman being battered is as blameworthy as her violent mate.[192] Ironically, when the violence ultimately culminates in the death of one of the parties, men who kill their wives are far less likely to be charged with murder than women who kill their husbands.[193]

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181. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 148, at 23-24; *see also* Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 66-67 (1984).

182. Eaton & Hyman, *supra* note 180, at 456.

183. *Id.* at 463; *see also* LISA G. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE, 13, 17-18, 23 (1981).

184. Eaton & Hyman, *supra* note 180, at 462.

185. *Id.* at 460.

186. Terry Fromson, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135, 150 (1977).

187. Eaton & Hyman, *supra* note 180, at 410.

188. *Report of the New York Task Force on Women In the Courts*, 15 FORDHAM URB. L.J. 1, 47 (1986-87) [hereinafter *Taskforce Report*].

189. *Id.* at 32-33.

190. *See* Pastoor, *supra* note 163, at 566 & n.35-37.

191. *See* CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 142 (1989). The author notes that although few domestic abuse cases ever reach court, those that do frequently result in the batterer receiving a suspended sentence or a small fine. *See also* Dutton, *supra* note 166, at 200. Even when the arrest of a batterer ends in conviction, in most cases this means discharge or probation. If we accept the data, for every 100 wife assaults, about 14 are reported, 7 detected, 1 arrest is made, .75 men are convicted, and .38 men are punished with a fine or jail time.

192. As stated by one judge,

> Even if the woman shows up in my court with visible injuries, I don't really have any way of knowing who's responsible or who I should kick out of the house. Yes, he may have beaten her, but nagging and a sharp tongue can be just as bad. Maybe she used her sharp tongue so often that she provoked him to hit her.

GAIL A. GOOLKASIAN, NATIONAL INST. OF JUSTICE, CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES 81 (1986).

193. *See* Roberta K. Thyfault et al., *When Battered Women Kill: Evaluation and Expert Testimony Techniques*, *in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 71-72 (Daniel J. Sonkin ed., 1987); George W. Bernard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ACAD. OF PSYCHIATRY & L.

b. Civil Protective Orders

Civil protective orders may include *ex parte* temporary orders of protection, permanent orders, and orders to vacate. In forty-nine of the fifty states, a battered woman can apply for a protective or restraining order against her abuser.[194] A court may issue a temporary order of protection on an emergency basis within a few hours of request, usually after a hearing at which only the victim is present.[195] Many states also provide for orders to vacate whereby a judge requires an abusing spouse to temporarily vacate the home with the aim of allowing time for the resolution of underlying disputes.[196] This type of order is usually issued only when the abused spouse seeks such a remedy, and victim awareness of this remedy is questionable.[197]

Generally, when a battered woman files a petition for a protection order, or seeks to have a temporary order made permanent, the court schedules a hearing which usually takes place within two weeks of filing.[198] The batterer is served with notice, and both parties may attend a hearing to determine if the order should be made permanent.[199]

Civil protection orders vary from state to state, but usually contain several common provisions. First, they attempt to protect the battered woman from further violence by limiting the batterer's access to her.[200] The order may also provide for custody of the children,[201] and typically directs the batterer to leave and stay away from the residence occupied by the battered woman and her children.[202] Protection orders may last up to one year,[203] and consequences for violation of such orders vary from state to state.[204] Violation typically constitutes either contempt of court[205] or a misdemeanor,[206] punishable by a jail sentence or a fine in most states.[207] A court hearing is usually required to prove that a protection order has been violated, and both the victim and the abuser are allowed to present evidence.[208]

271, 279 (1982). When a spouse is killed, charges are much more likely to be reduced when the defendant is male (47.8%) than when the defendant is female (18.2%).

194. NATIONAL INST. OF JUSTICE, *supra* note 141.

195. Lerman & Cahn, *supra* note 142, at 77.

196. NATIONAL INST. OF JUSTICE, *supra* note 141.

197. *Id.*

198. *See* Lerman & Cahn, *supra* note 142, at 76-77.

199. *Id.*

200. SCHNEIDER, *supra* note 143, at 28.

201. *Id.* at 37.

202. *Id.* at 28.

203. Lerman & Cahn, *supra* note 142, at 76.

204. NATIONAL INST. OF JUSTICE, *supra* note 141, at 40.

205. *See, e.g.*, CAL. PENAL CODE § 136.2 (West 1988); MINN. STAT. ANN. § 518B.01(14) (West 1990); N.J. STAT. ANN. § 2C:25-15 (West 1982).

206. SCHNEIDER, *supra* note 143, at 28.

207. Lerman & Cahn, *supra* note 142, at 77. In most states, jail sentences are a maximum of six months, and fines up to $500.

208. *Id.*

Although civil protection orders provide a viable source of legal protection for some battered women, economic, logistical, and systemic factors can render them less useful for others. Twenty-three states require a filing fee in order to petition for a protection order,[209] and almost all of these include the battering spouse's income in determining a battered woman's eligibility for a fee waiver,[210] creating a difficult problem for the battered woman who is economically dependent on her batterer. Economic limitations may further trap the battered woman attempting to obtain a protection order by leaving her unable to hire legal counsel to represent her interests,[211] which may include the exclusion of the batterer from the residence, as well as custody and child support provisions.[212] This is especially crucial when the batterer is in a position to hire an attorney or is provided a public defender because he faces criminal charges which may result in a jail term.[213]

Several noneconomic factors render various types of civil protective orders difficult to obtain for some battered women. Numerous states limit protection order remedies to victims who are married or who live with their abusers,[214] effectively ignoring the serious danger faced by women who are divorced or separated from their batterers. Despite the emergent circumstances which usually surround incidents of domestic assault, only twenty-three states provide for the issuance of protective orders after business hours.[215] Although some states provide assistance in filing complaints,[216] court clerks often serve a screening function in the petitioning process, and may hinder the battered woman's pursuit of such an order.[217] There are reports that some judges are reluctant to issue protective orders to battered women, minimizing the severity of the violence they have endured and doubting their credibility.[218] In addition, some judges reportedly re-

209. NATIONAL INST. OF JUSTICE, *supra* note 141, at 19.

210. SCHNEIDER, *supra* note 143, at 39.

211. Some states have attempted to alleviate this problem, providing legal assistance for the victims of domestic assault. *See, e.g.*, CAL. PENAL CODE § 136.2 (West 1988); TEX. HUM. RES. CODE ANN. § 51.005(3)(F) (West Supp. 1990).

212. NATIONAL INST. OF JUSTICE, *supra* note 141, at 19.

213. SCHNEIDER, *supra* note 143, at 39.

214. Lerman & Cahn, *supra* note 142, at 76. This limitation conflicts harshly with reality. Although women who are divorced or separated comprise only 10% of the adult female population, this group accounts for 75% of all battered women. These women, who no longer live with their abusers, report being battered 14 times more often than do women still living with their batterer. CAROLINE HARLOWE, FEMALE VICTIMS OF VIOLENT CRIME 5 (Bureau of Justice Statistics Jan. 1991).

215. NATIONAL INST. OF JUSTICE, *supra* note 141, at 15.

216. *See, e.g.*, ME. REV. STAT. ANN. tit. 19, § 764 (West 1981); MINN. STAT. ANN. § 518B.01(4)(d) (West 1990).

217. SCHNEIDER, *supra* note 143, at 39.

218. *Id.* at 38.

fuse to utilize vacate orders directing batterers to leave, forcing battered women to flee with their children.[219]

Once a battered woman obtains a protective order, she is at the mercy of the police and legal system to enforce it. Police officers sometimes fail to arrest the batterer for violation of a protective order,[220] electing not to pursue violators even in states mandating arrest in such situations.[221] Judges also sometimes fail to enforce protective orders,[222] tending to scold the batterer for the first violation,[223] rather than rendering punishment. Subsequent violations often result in only nominal sanctions,[224] and some judges hesitate to order jail time or other punishments for even serious repeat offenders.[225] Some judges have reportedly charged victims with aiding and abetting violations of the order by the batterer, holding that the battered woman waives the order by "letting" the batterer into the home.[226] Such approaches to enforcement often compound the battered woman's difficulties with police, who may claim they are unable to act without such orders,[227] and contradict the representations of other court personnel who promise victims that civil protection orders will be enforced.[228] From poor police response to blatant bias by courtroom personnel, some battered women attempting to utilize protection orders encounter obstacles to receiving aid from a system which is supposed to work for them.[229]

Future availability of effective legal assistance depends partly on the court's decisions in cases such as *DeShaney v. Winnebago County*

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219. *Taskforce Report*, *supra* note 188, at 48.

220. SCHNEIDER, *supra* note 143, at 40.

221. *Id.* Despite having a mandatory arrest statute for violations of court orders of protection, police in Hennepin County, Minnesota, which includes Minneapolis, made arrests in only 22% of the cases where arrest was required by state law. Beverly Balos & Katie Trotsky, *Enforcement of the Domestic Abuse Act in Minnesota: A Preliminary Study*, 6 LAW & INEQ. J. 83, 93 (1988).

222. *Taskforce Report*, *supra* note 188, at 48.

223. *Id.* at 44-45; *see also* Eaton & Hyman, *supra* note 180, at 443.

224. Eaton & Hyman, *supra* note 180.

225. *See* Eaton & Hyman, *supra* note 180, at 444-45; *see also* NATIONAL INST. OF JUSTICE, *supra* note 141, at 3.

226. SCHNEIDER, *supra* note 143, at 38-39.

227. NATIONAL INST. OF JUSTICE, *supra* note 141, at 60.

228. *Id.* at 52-53.

229. *See generally* COMMONWEALTH OF MASS., GOVERNOR'S STATEWIDE ANTI-CRIME COUNCIL, VIOLENT CRIME IN THE FAMILY: ENFORCEMENT OF THE MASSACHUSETTS ABUSE PREVENTION LAW (Report of the Governor's Battered Women's Working Group 1985). This report examined the implementation of the Massachusetts Abuse Prevention Law, which, among other things, provided for civil orders of protection. The report stated that police, prosecutors, clerks, and judges continued their resistance against providing battered women with protection, despite the new law. Numerous types of impropriety by the police were reported, including failure to provide information required by law and failure to arrest batterers for clear violations of protection orders issued by the courts. Court clerks were found to discourage or actively bar victims from pursuing legal remedies, and judges engaged in misrepresentations of the law, applying it unequally among individuals. All court personnel were cited as making frequent biased comments regarding the race, welfare status and gender of the victims of domestic violence.

Department of Social Services.[230] In *DeShaney*, the Supreme Court held that a state child welfare agency had not violated a child's constitutional rights when it failed to protect the child from abuse, despite reports of abuse that culminated in an investigation by the state agency. Citing the absence of a "special relationship" between the child and the state, the Court found that the state had no affirmative duty to protect the child from his father, and that such a constitutional duty arises only after the state has undertaken to impose limitations on an individual's "freedom to act on his own behalf."[231] Following *DeShaney*, several courts have held that police departments could not be held liable for their failure to protect individual victims of domestic violence from their abusers.[232] The "special relationship" requirement as declared in *DeShaney* may effectively counter the pressure generated by years of legislative efforts to improve police responses to complaints of domestic abuse.

The current availability of assistance such as effective police intervention and enforcement of restraining orders varies significantly across jurisdictions. Where such alternatives are inadequate or absent, defendants can argue persuasively that defensive force is necessary despite the lack of an immediate attack. That is, if defendants have a basis in experience for anticipating a future attack, no duty to retreat, no access to legal alternatives, and good reason to believe that they will be unable to effectively protect themselves at the time of the attack, then they might reasonably believe that immediate defensive force is necessary to protect themselves from the unlawful use of force by their batterers. This argument leaves open important questions regarding cases in which the defendant was aware of available legal alternatives or in which her belief regarding the lack of legal alternatives was unreasonable. These questions require consideration of additional principles of criminal law and are addressed in later sections.[233]

In summary, the criminal justice system constitutes an appropriate legal institution to which a battered woman can and should appeal, but the statutes, policies, and practices of this system may vary signifi-

230. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989).

231. *Id.*

232. *See* Balisteri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1988) (holding that the police cannot be held liable for failure to arrest absent proof of differential treatment, based on the court's determination that decisions regarding arrest are within the proper discretionary authority of law enforcement under the holding in *DeShaney*); Howell v. City of Catoosa, 729 F. Supp. 1308 (N.D. Okla. 1990) (dismissing the claims of a battered woman against a police department because individual police officers were under no duty to assist her under the law as rendered in *DeShaney*, and there was insufficient evidence of a police policy of indifference toward the victims of domestic violence); Hynson v. City of Chester, 731 F. Supp. 1236 (E.D. Pa. 1990) (holding that battered women were not entitled to police protection under the state domestic violence statute, and no "special relationship" existed between the victim and the state).

233. *See infra* notes 282-326 and accompanying text (addressing mistake regarding justification).

cantly among and within jurisdictions. Thus, the quality and predictability of intervention available varies substantively across battered women and their circumstances. Civil protective orders provide an alternative remedy, but similar concerns regarding consistency and predictability apply.

8. Summary: The Battered Woman Syndrome or the Pattern of Battering

A defendant's claim that she reasonably believed that the use of deadly force was necessary despite the absence of an occurrent attack requires a broad body of evidence addressing the indicators of forthcoming violence, the severity of past abuse, the relative size and strength of the parties, the location of the violence, and the availability of assistance. A defendant's ability to secure and present this evidence may vary widely according to the circumstances of the events, the legal alternatives and assistance available, and the willingness of others to testify. To demonstrate the reasonableness of her belief that deadly force was necessary, the defendant must provide the jury with evidence describing the events and information on which she based the belief. By doing so, she enables the jury to draw the same inference that she drew from these events.

Expert testimony regarding depression, decreased self-esteem, learned helplessness, or other psychological characteristics of the defendant does not show the defendant's "reasonableness." Such testimony may assist the jury in understanding the defendant, but it does not inform them regarding the events and information that would lead the jurors to the inference of necessity, enabling them to understand her corresponding inference as reasonable.[234] The evidence required to establish the defendant's reasonable belief in the necessity of deadly force must demonstrate the pattern of battering and the lack of available legal alternatives to defensive force, rather than the presence of the battered woman syndrome.

B. Credibility and the Failure to Leave Prior to Using Deadly Force

1. Credibility and the Battered Woman Syndrome

As described previously, the credibility argument has usually taken two forms. First, the defendant may offer testimony regarding the battered woman syndrome generally to support her claim that she endured a prolonged pattern of severe abuse without leaving the relationship. This general testimony supports her credibility by demonstrating that her conduct as she reports it would not be unusual for a battered woman. Second, she may offer testimony specifically ad-

234. *See infra* notes 248-52 and accompanying text (discussing subjective and objective accounts of reasonableness).

dressing her learned helplessness to explain why she was unable to leave the relationship earlier.[235] Some defendants may offer testimony for either purpose separately, but a defendant might pursue both purposes by offering expert testimony describing battered woman syndrome generally and her own learned helplessness specifically as support for the claim that she was unable to leave, explaining why she did not do so despite the severe abuse.[236]

Defendants also offer social and economic explanations for their failure to leave. These might include, for example, their lack of financial resources or family support, the need to provide food and shelter for the children, or fear of retaliation from the batterer.[237] Such factors may well improve the defendant's credibility in the eyes of the jury by providing plausible explanations for the defendant's failure to leave the battering relationships. These explanations may portray the earlier failure to leave as reasonable insofar as these practical barriers might have appeared more difficult to overcome than the periodic abuse until that battering escalated to a degree of severity that triggered the defensive force. Alternatively, such circumstances might lead jurors to conclude that the combination of periodic abuse and practical barriers to leaving would prevent many ordinary people from making the reasonable decision to leave, making the battered woman's decision understandable if not "reasonable" under the given standard.

Social or economic explanations that render the defendant's failure to leave either reasonable or unreasonable but understandable serve a purpose because the aim of the credibility argument is to render the defendant's account believable, rather than to portray the defendant's prior failure to leave as reasonable. Ordinary self-defense doctrine demands that one act on a reasonable belief that defensive force is necessary at the time it is exercised; it does not demand that one demonstrate an ideally reasonable life history. Practical explanations for the defendant's failure to leave earlier appeal to factual circumstances depriving a defendant of the opportunity to leave or rendering the decision to leave very difficult rather than focusing on a defendant's impaired mental and/or emotional state.

The variation of the argument appealing to the battered woman syndrome relies on learned helplessness as a psychological trait rendering the defendant unable to leave by preventing her from recognizing and taking advantage of available opportunities to alter her

235. *See supra* notes 30-33 and accompanying text.

236. State v. Kelly, 478 A.2d 364, 375-77 (N.J. 1984); People v. Torres, 488 N.Y.S.2d 358, 362 (N.Y. Sup. Ct. 1985); Kinports, *supra* note 4, at 398, 400, 416; Schulhofer, *supra* note 9, at 119.

237. *Kelly*, 478 A.2d at 377; *Torres*, 488 N.Y.S.2d at 362; State v. Allery, 682 P.2d 312, 315 (Wash. 1984); Kinports, *supra* note 4, at 405.

situation.[238] Assuming for the sake of argument that there is evidence supporting the occurrence of some form of battered woman syndrome, and further assuming that the syndrome is pathognomonic to battered women, then the fact that a particular woman suffers that syndrome supports the claim that she has been battered.[239] Thus, a pathognomonic battered woman syndrome would support the defendant's credibility regarding her testimony about the battering relationship, and by extension it would support her general credibility or at least tend to correct the tendency to suspect that she exaggerated. For this reason, testimony regarding a well-grounded pathognomonic battered woman syndrome would be relevant to the self-defense claim.

Alternatively, the assumed battered woman syndrome may not be pathognomonic in that the syndrome may take a form that is also associated with etiologies other than battering. Walker's data, for example, supports the contention that battered women experience elevated depression as compared to the general population.[240] Depression is such a common disorder, however, that the presence of a depressive syndrome would provide no support for the claim that the person suffering the syndrome had been battered.[241] Others claim that battered women suffer a pathological syndrome similar to that manifested by those who endure stress or trauma of various types.[242] Such a syndrome would provide little support for the defendant's credibility unless further evidence suggested that the probability of her having suffered the other relevant forms of stress or trauma was low. In short, a well-supported pathognomonic battered woman syndrome would strengthen the defendant's credibility and a nonpathognomonic battered woman syndrome might provide less support for the probability that this particular defendant's suffering that syndrome is attributable to battering rather than to some alternative etiology.

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238. People v. Aris, 264 Cal. Rptr. 167, 178 (Cal. Ct. App. 1989) (describing the proffered testimony of Lenore Walker); *Kelly*, 478 A.2d at 372, 377; *Torres*, 488 N.Y.S.2d at 361-62; Kinports, *supra* note 4, at 398.

239. A symptom or syndrome is pathognomonic when it is "specifically distinctive or characteristic of a disease or pathologic condition; a sign or symptom on which a diagnosis can be made." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 977 (26th ed. 1981). Thus, if the battered woman syndrome were pathognomonic to women who had endured battering relationships, that a particular defendant suffered from the battered woman syndrome would provide strong support for her claim that she had experienced a pattern of battering. In contrast, if a defendant suffers a common syndrome such as depression, which occurs in many people in a variety of circumstances, the mere presence of the depressive syndrome would not indicate any particular etiology.

240. *See supra* notes 76-82 and accompanying text (discussing the well-established finding that battered women suffer depression).

241. AMERICAN PSYCHIATRIC ASS'N, *supra* note 58, at 229, 231 (discussing the prevalence of depressive disorders).

242. *See supra* notes 100-01 and accompanying text (discussing the general distress response involving anxiety and depression).

2. *Credibility and the Pattern of Battering*

Regardless of the availability of a well-supported battered woman syndrome, evidence confirming a history of battering provides the best support for the defendant's credibility because it directly supports the aspect of her testimony that jurors may find dubious. Documents and witness testimony from various sources can support the claim of ongoing battering. The defendant's children, relatives, friends, neighbors, co-workers, medical personnel, or social workers might have witnessed either the battering or evidence of that abuse, such as past injuries or chronic fear of the batterer. Medical records from emergency room visits might reveal a pattern consistent with battering, regardless of the explanation that was given for each event individually. In any particular case such evidence may not be available, but the same holds true for evidence regarding the claim that the defendant suffers from the battered woman syndrome, even if one assumes that some battered woman syndrome has been generally established. To the extent that experts can testify regarding the general phenomena of battering relationships, as opposed to this particular defendant's relationship, testimony regarding the prevalence of such patterns of battering would support the defendant's testimony more directly than would testimony regarding the battered woman syndrome.

A defense attorney should use all available and relevant evidence. However, the attorney should not attempt to establish the battered woman syndrome at the expense of seeking and presenting traditional evidence from witnesses and documents. Traditional evidence has the advantages of directly supporting the defendant's credibility regarding the battering and facilitating the process of seeking, presenting, and admitting the evidence because it is already in a form with which lawyers and courts are familiar. Expert testimony regarding the syndrome carries potential risk for the defendant. Testimony regarding the battered woman syndrome, and particularly learned helplessness, portrays the defendant as one who suffers psychological impairment undermining the accuracy of her perceptions and judgment regarding the batterer and the relationship. To the extent such testimony focuses on the defendant's psychological and mental impairment, it may actively undermine her credibility with the jury by portraying her relevant beliefs as the product of a pathological syndrome rather than as reasonable inferences from her experience.[243] In short, testimony regarding a well-supported battered woman syndrome may be relevant to the defendant's credibility under certain limited conditions, but as with the claims of reasonable belief regarding the necessity of force or deadly force, traditional evidence demon-

243. *See infra* notes 256-81 and accompanying text (discussing the battered woman syndrome as a pathological syndrome).

strating the pattern of battering rather than expert testimony regarding the syndrome is most directly relevant.

IV. Self-Defense by Battered Women as Justification and Excuse

A. Reasonable Belief

Part III identified evidence describing the pattern of battering, rather than expert testimony regarding the battered woman syndrome, as the evidence most relevant to the self-defense claim advanced by battered women who kill their batterers in nonconfrontational situations. Evidence confirming the pattern of events leading the defendant to infer the necessity of exercising deadly defensive force would provide jurors with the basis needed for them to draw the same inference. Part IV examines several controversial aspects of self-defense doctrine integrating self-defense by battered women with the broad theory of justification and excuse. Throughout this section, it is critical to recall that this article advances a prescriptive theory regarding the manner in which legislatures and courts ought to address these issues. Not all legislatures and courts currently do so.

Although the majority of jurisdictions require a reasonable belief in the necessity of exercising deadly force in self-defense, cases and commentators continue to debate the appropriate standard of reasonableness. Courts frequently frame this issue as a choice between subjective and objective standards.[244] This formulation can obfuscate rather than clarify the issue, however, because it is very difficult to determine what "subjective" and "objective" mean. In some cases, two jurisdictions apparently adopt equivalent standards, yet one labels that test "subjective" while the other describes it as "objective."[245]

Some cases require that the defendant's belief be reasonable from the defendant's point of view rather than from the perspective of the jury.[246] Unfortunately, it becomes rather difficult to explain exactly what it means to say that a belief is reasonable from a particular party's point of view. Ordinarily, standards requiring reasonable belief are labeled "objective" and contrasted to those labeled "subjective" which take into the account the individual's perspective in that they address actual mental states of that person.[247] Thus, the requirement that a belief be reasonable from the defendant's point of view

244. State v. Hodges, 716 P.2d 563, 569 (Kan. 1986); State v. Leidholm, 334 N.W.2d 811, 816-18 (N.D. 1983); State v. Allery, 682 P.2d 312, 314-15 (Wash. 1984).

245. Maguigan, *supra* note 1, at 410 (comparing New York and Washington standards).

246. *Allery*, 682 P.2d at 314-15; Maguigan, *supra* note 1, at 409.

247. LaFave & Scott, *supra* note 15, § 3.7(a)(2) (contrasting objective fault based on a reasonableness standard to fault requiring subjective awareness).

seems to call for an objective assessment from the defendant's subjective perspective, whatever that might mean.

To be reasonable in ordinary language is to be "endowed with reason . . . sensible . . . marked by reasoning . . . agreeable to reason."[248] Thus a belief is reasonable if it is formed and held according to reason or for sound reasons. Similarly, an arresting officer arrests a suspect on the basis of reasonable belief when he makes an arrest on the basis of "facts and circumstances within the arresting officer's knowledge, and of which he had reasonably trustworthy information."[249] A mistake relevant to criminal guilt is reasonable if it is based on reasonable grounds.[250] A person reasonably believes that a fact exists for the purpose of tort law if he believes it and "the circumstances which he knows, or should know, are such as to cause a reasonable man so to believe."[251] A reasonable man for this purpose possesses "normal acuteness of perception and soundness of judgment."[252] In short, a reasonable belief, in both ordinary language and legal usage, is grounded in good reasons and reasoning. That is, a reasonable belief is formed and held on the basis of ordinarily reliable evidence as acquired by unimpaired perception and evaluated through normally sound reasoning and judgment.

The standard of reasonableness takes on particular significance in cases in which the defendant offers expert testimony regarding the battered woman syndrome. Psychologists, psychiatrists, or members of other clinical professions ordinarily present this testimony, emphasizing learned helplessness and other psychological characteristics of the defendant.[253] Such testimony apparently portrays the defendant as suffering certain patterns of psychological impairment, suggesting to some courts and commentators that it is relevant to insanity or diminished capacity rather than to a justificatory defense requiring a reasonable belief.[254] Advocates of syndrome testimony in self-defense cases deny that the syndrome constitutes a mental illness and offer the testimony to establish the reasonableness of the defendants'

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248. II OXFORD ENGLISH DICTIONARY, *supra* note 106, at 2432.

249. BLACKS LAW DICTIONARY, *supra* note 108, at 1265.

250. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1045-48 (3d ed. 1982).

251. Mitchell v. Harmony, 54 U.S. (13 How.) 115, 135 (1851) (the Supreme Court applies a similar conception of a reasonable belief as one based on good reasons); RESTATEMENT (SECOND) OF TORTS § 11 (1965).

252. RESTATEMENT (SECOND) OF TORTS, *supra* note 251, § 11, cmt. (a).

253. State v. Hodges, 716 P.2d 563, 565-66 (Kan. 1986) (discussing proposed testimony of psychologist Dr. Ann Bristow); State v. Kelly, 478 A.2d 364, 372-73 (N.J. 1984) (discussing proposed testimony by Dr. Lois Veronen); *see supra* notes 28-33 and accompanying text (discussing the nature of the testimony offered regarding the battered woman syndrome).

254. *See, e.g.*, State v. Necaise, 466 So. 2d 660, 663-65 (La. Ct. App. 1985) (discussing offered testimony regarding the battered woman syndrome as addressing mental defect or disorder short of insanity as not admissible regarding criminal intent); Rocco C. Cipparone, Jr., Comment, *The Defense of Battered Women Who Kill*, 135 U. PA. L. REV. 427 (1987) (advocating the use of the insanity defense by women who kill their batterers while suffering from the battered woman syndrome); Schneider, *supra* note 5, at 198-200.

beliefs regarding the necessity of deadly force.[255] To understand the appropriate role for expert testimony and its relevance to reasonable belief, one must clarify the meaning of "the battered woman syndrome", "mental illness", and "reasonable belief", and examine the relationships among them.

B. The Battered Woman Syndrome and Mental Illness

Generally defined, the "battered woman syndrome" consists of a set of psychological characteristics including depression, decreased self-esteem, and learned helplessness.[256] Although advocates deny that the syndrome constitutes a mental illness, courts and commentators discuss it as distortion of thought and perception, impaired ability to perceive and realistically appraise alternatives, and delusions regarding the batterer and the relationship.[257] This discussion of the battered woman syndrome as a pattern of impaired psychological process is consistent with its categorization as a syndrome.

A syndrome is a set of symptoms that tend to occur together in a recognizable pattern.[258] A symptom is a sign or manifestation of a pathological, mental, or physical condition.[259] A clinically significant syndrome of psychological symptoms constitutes a mental or psychological disorder in contemporary clinical terminology.[260] "Disorder" differs from "disease" in that "disorder" refers to a functional disturbance or abnormality without implying any particular etiology. A "disease", in contrast, is a structural or functional disorder of the body or part of the body.[261] Most recognized psychological disorders are syndromes rather than diseases in that identifying a pattern of psychological dysfunction does not in itself imply a specific underlying physical etiology.[262] This does not rule out the possibility, of course, that some physical disease might cause a particular psychological disorder. In short, a psychological syndrome is a clinically significant pattern of impaired psychological functioning, and a psychological disorder is a recognized syndrome.

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255. *Hodges*, 716 P.2d at 569; *Kelly*, 478 A.2d at 377-78; Kinports, *supra* note 4, at 409-22; Schneider, *supra* note 5, at 199-215.

256. *See supra* notes 23-26 and accompanying text (discussing the usual formulation of the battered woman syndrome).

257. *See supra* notes 121-24 and accompanying text (discussing the battered woman syndrome as involving disordered perception, thought, and ability to take effective action).

258. AMERICAN PSYCHIATRIC ASS'N, *supra* note 58, at 405; ROBERT J. CAMPBELL, PSYCHIATRIC DICTIONARY 618 (5th ed. 1981); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 239, at 1287; II OXFORD ENGLISH DICTIONARY, *supra* note 106, at 3210.

259. AMERICAN PSYCHIATRIC ASS'N, *supra* note 58, at 405; CAMPBELL, *supra* note 258, at 615; DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 239, at 1285; II OXFORD ENGLISH DICTIONARY, *supra* note 106, at 3208.

260. AMERICAN PSYCHIATRIC ASS'N, *supra* note 58, at 401, 405.

261. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 239, at 385; MICHAEL S. MOORE, LAW AND PSYCHIATRY 186-89 (1984); I OXFORD ENGLISH DICTIONARY, *supra* note 106, at 748 (disease), 756 (disorder).

262. AMERICAN PSYCHIATRIC ASS'N, *supra* note 58, at 401 (defining mental disorder).

Ordinary and clinical usage defines "illness" in a manner more consistent with "disorder" than with "disease". People are ill when they suffer unsound or disordered health involving pain, discomfort, or inconvenience.[263] An "illness" consists of an impairment of function when measured against some predefined level of health or adequate functioning. Persons are ill when they suffer impairment of their capacity to function at an ordinary level. They suffer mental or psychological illness when they suffer functional impairments of mental or psychological processes.[264] Thus, a psychological disorder is a recognized psychological syndrome, which in turn, is a recognized pattern of mental or psychological illness.

Legal authorities sometimes fail to clearly state any technical legal definition of "mental illness", assuming that the clinical term suffices as a legal definition and relying on expert witnesses to determine whether an individual suffers such an illness.[265] Yet, other statutes and court opinions provide legal definitions of "mental illness" for specific purposes. Wisconsin's civil commitment statute, for example, defines "mental illness" for the purpose of commitment as "a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life."[266] In *McDonald v. United States*, the court defined "mental disease" for the purpose of that jurisdiction's insanity test as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior control."[267]

Both of these definitions are consistent with the ordinary conception of psychological disorder as functional impairment of psychological processes. Each describes certain types of functional impairment of psychological processes and identifies rough criteria of adequate functioning selected for a specific legal purpose. The Wisconsin commitment statute specifically lists the processes impaired and states criteria in terms of reality relatedness and ability to live independently in ordinary conditions, because the statute is intended to limit involuntary commitment to those who are unable to live safely without confinement.[268] The *McDonald* standard addresses impairment ("abnormal condition of the mind") of mental or emotional processes,

263. I OXFORD ENGLISH DICTIONARY, *supra* note 106, at 1373.

264. MOORE, *supra* note 261, at 189-95. This brief analysis is sufficient for the purpose of this paper; we do not pursue the extended philosophic debate regarding the concepts of illness and disease. *See, e.g.*, ARTHUR L. CAPLAN, CONCEPTS OF HEALTH AND DISEASE (1981).

265. MOORE, *supra* note 261, at 228-30.

266. WIS. STAT. ANN. § 51.01(13)(b) (West 1987).

267. McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962).

268. WIS. STAT. ANN. § 51.001 (West 1987).

adopting behavior control as a criterion of adequacy because the court understood criminal responsibility as a matter of behavior control.[269]

Contrary to the assertions of courts and commentators, the battered woman syndrome, understood as a set of psychological characteristics roughly similar to those usually subsumed under this syndrome, constitutes a psychological disorder and thus, a mental illness. Depression is a widely recognized and quite common psychological disorder with a well-established clinical syndrome.[270] Learned helplessness as described by the courts and commentators consists of the battered woman's impaired ability to accurately perceive, evaluate, and adaptively act upon her own situation, the batterer, the relationship between the two, and her options.[271] Some sources apparently believe that learned helplessness prevents battered women from recognizing more adaptive alternatives to continuing participation in ongoing battering relationships, although others seem to interpret the battered woman syndrome as a form of dysfunction that renders battered women unable to act on alternatives.[272] If one accepts the former interpretation, learned helplessness constitutes impairment of cognitive process, and if one accepts the latter, it represents some unexplained disruption of decision-making or volitional ability.[273] In either case, learned helplessness constitutes a form of psychological impairment. If battered women regularly manifest some recognizable pattern of impairment, we can legitimately refer to their impairment as a syndrome which constitutes a psychological disorder frequently suffered by battered women.

Some writers object to the characterization of the battered woman syndrome as a psychological disorder, contending that it is more appropriately understood as a normal response to an abnormally stressful situation.[274] As described in the literature, the syndrome occurs in response to a highly stressful abusive situation. Other well-established psychological disorders such as depressive and anxiety disorders occur in response to identifiable precipitants, yet they remain psychological disorders because the individual suffers a recognizable pattern of impaired psychological process.[275] Similarly, certain types of psychological impairment such as delusions or hallucinations are a

269. *McDonald*, 312 F.2d at 851-52. Legal authorities sometimes use various terms such as *mental illness*, *mental disease*, or *disorder of mind* interchangeably. We will generally use the term *psychological disorder* to refer to any functional impairment of psychological processes.

270. AMERICAN PSYCHIATRIC ASS'N, *supra* note 58, at 218-24, 228-33 (describing widely accepted depressive syndromes).

271. *See supra* notes 30-33 and accompanying text.

272. *See supra* notes 30-33 and accompanying text.

273. ROBERT F. SCHOPP, AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY § 6.3 (1991) (discussing the difficulty with explicating "volitional" impairment).

274. *See, e.g.*, Kinports, *supra* note 4, at 417; Schneider, *supra* note 5, at 214-15.

275. AMERICAN PSYCHIATRIC ASS'N, *supra* note 58, at 247-51 (describing Post-Traumatic Stress Disorder involving anxiety, depression, and other symptoms that occur in reaction to external stressors).

normal response to certain toxic substances, yet they constitute impairment of psychological process and, thus, symptoms in a recognized psychopathological syndrome.[276] Indeed, fractured bones are a statistically normal and fully understandable response to abnormal physical stressors such as impact with a moving automobile, yet such fractures remain pathological.

The claim that the battered woman syndrome is a normal response to the situation might mean either that it is statistically normal, understandable, or free of functional impairment.[277] If research substantiates a syndrome, the first two interpretations may well be accurate, but these do not undermine the categorization of the syndrome as a psychological disorder. The battered woman syndrome may occur frequently and understandably to women in battering relationships, just as some of the psychological and physical disorders discussed previously occur frequently and understandably in response to various sources of stress. If it does, however, that relationship between the pattern of battering and the battered woman syndrome does not render the syndrome less a disorder; rather, it explains the situational source of the disorder. Only the claim that the syndrome is a normal response in the third sense is incompatible with the categorization of the syndrome as a psychological disorder. This claim, however, is also incompatible with the contention that the battered woman syndrome occurs at all, because the syndrome has been defined as a pattern of psychological impairment which typically occurs in battered women.

Although some cases apparently interpret the battered woman syndrome as a psychological disorder and thus infer that defendants who claim they suffer the syndrome must be raising the insanity defense, this does not follow.[278] The insanity defense does not apply to all who suffer psychological dysfunction; rather, it exculpates those who suffer disorders giving rise to certain kinds of excusing conditions regarding their criminal conduct.[279] Although insanity standards vary across jurisdictions and commentators, psychopathology sufficient to establish the defense usually includes gross distortion of thought or perception such as hallucinations or delusions.[280] The syndrome as usually formulated does not include such pathology.[281]

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276. *Id.* at 109-11 (describing Organic Delusional Syndrome and Organic Hallucinosis).

277. I OXFORD ENGLISH DICTIONARY, *supra* note 106, at 1492 (normal as conforming to the usual condition or standard; i.e., statistically normal); III OXFORD ENGLISH DICTIONARY 1246 (Compact ed. Supp. 1987) (normal as health and not impaired).

278. Schneider, *supra* note 5, at 198-200.

279. SCHOPP, *supra* note 273, § 2.1.1.

280. *Id.* §§ 6.4, 6.5.

281. *See supra* notes 34-102 regarding the battered woman syndrome. The *Torres* court refers to "delusions" but does not substantiate that term. Rather this opinion demonstrates the confusion wrought by the contemporary discussion of the battered woman syndrome. People v. Torres, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985).

In summary, if future research substantiates a battered woman syndrome roughly similar to the syndrome as usually formulated by courts and commentators, that syndrome constitutes a psychological disorder, and therefore, a type of mental illness in both ordinary and legal usage. The vague and confused discussion of the battered woman syndrome in court opinions often arises from the attempt to accept and understand the pattern of psychological impairment described as the syndrome while simultaneously denying that it constitutes mental and emotional impairment. Although the putative battered woman syndrome is a psychological disorder, it does not follow either that a defendant who suffers the syndrome must rely on the insanity defense rather than self-defense or that the syndrome constitutes the type of disorder that can ground the insanity defense.

C. Reasonable Belief: Justification and Excuse

Courts and commentators find it difficult to explain the relationship of the battered woman syndrome to self-defense because the syndrome constitutes a pattern of psychological impairment, rendering it apparently more relevant to excuse than to justification requiring reasonable belief. Defendants who raise justificatory defenses to criminal charges concede that their behavior fulfills the offense elements for the definition of the criminal offense, but they claim they should be exonerated because their actions were appropriate under the circumstances. The law not only exculpates defendants who can show justification, it sanctions their actions. In contrast, those who claim excuse acknowledge the wrongfulness of the conduct while denying culpability due to some disability-based excusing condition. Although commentators debate the precise parameters and significance of these categories, the basic distinction between defenses that justify conduct and those that excuse actors is widely accepted.[282] Some commentators question the susceptibility of the criminal law to precise boundaries between justification and excuse.[283]

Most contemporary authorities classify self-defense as a justification, categorizing conduct constituting assault or homicide as acceptable when it is necessary to prevent the exercise of unlawful force against an innocent party.[284] Self-defense constitutes a justification rather than an excuse because the rationale for the defense rests on the acceptability of the conduct under the circumstances rather than

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282. FLETCHER, *supra* note 117, § 10.1; H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 13-14 (1968); ROBINSON, *supra* note 15, §§ 24, 25; Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 PAC. L.J. 1233, 1235 (1993).

283. Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61 (1984); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

284. FLETCHER, *supra* note 117, § 10.5; ROBINSON, *supra* note 15, §§ 131, 132; *see supra* notes 128-39 regarding other conditions of the defense such as proportion and retreat.

on any claim of disability or lack of responsibility on the part of the actor. The defense reflects the justificatory circumstances consisting of the unlawful attack on the defendant by the party which the defendant injured and the necessity of the defensive force as the only available means of preventing unlawful harm to the defendant by the assailant.[285]

Understood in this manner, the foundation of the defense rests on the circumstances in which the defendant exercised defensive force, rendering the defendant's mental state apparently irrelevant. Yet, the majority of jurisdictions formulate the defense in terms of a reasonable belief regarding necessity rather than in terms of actual necessity.[286] This formulation reflects two intuitively plausible concerns. A statute allowing the defense on the basis of actual necessity regardless of the defendant's beliefs regarding that necessity would allow exculpation of those who maliciously injured others while unaware of the justificatory circumstances, and it would deny exculpation to those who honestly but mistakenly thought they were acting from necessity. Yet, some consider both of these results unjust because the unknowingly justified defendant does not seem intuitively to deserve exculpation while the mistaken defendant does.[287]

Statutes formulated in terms of reasonable belief regarding necessity apparently address both of these concerns in a more satisfactory manner. Malicious but unknowingly justified defendants lack reasonable beliefs that the justificatory circumstances apply and fail to qualify for exculpation, while honestly mistaken defendants qualify as long as their mistakes were reasonable. Finally, these statutes inculpate defendants who exercise force as a result of an unreasonable assessment of the circumstances, and these defendants arguably deserve to be held liable for exerting force without exercising reasonable care.

Despite these apparent advantages, statutes requiring reasonable belief for justified self-defense remain seriously flawed. Actors may form unreasonable beliefs for at least three different types of reasons, generating important discrepancies regarding culpability and justified liability under these statutes. First, defendants may form unreasonable beliefs because they fail to exercise appropriate care in their evaluation of the situation. A racist defendant, for example, who sees an individual of another race approaching with a baseball bat, might honestly but mistakenly believe that he is in danger. If this defendant shot and wounded the approaching person without exercising the care necessary to notice that he was only one block from a ball field and that many people on the street were carrying balls, bats, and gloves,

285. ROBINSON, *supra* note 15, § 132.

286. *See supra* note 19 and accompanying text.

287. ROBINSON, *supra* note 15, §§ 122, 184 (discussing respectively the debates regarding the unknowingly justified actor and mistakenly unjustified actor); Schopp, *supra* note 282, at 1258-78 (advancing a theory intended to accommodate these difficult cases).

we might reasonably conclude that he ought to be held liable for negligently or recklessly concluding he was in danger. This defendant's culpability would lie in his exercising potentially lethal force without exercising a corresponding degree of care in assessing the situation. In cases of this type, a standard requiring reasonable belief for self-defense might seem appropriate to many observers. The Model Penal Code approach addresses some of these cases more precisely, holding defendants liable for negligent acts.[288]

Second, defendants may form an unreasonable belief regarding necessity due to circumstances that limit or distort the information available to the actor. Suppose, for example, that while walking home from work, a plumber is confronted in the dark by a person who appears to be a robber armed with a pistol. When the person says "your money or your life," the plumber strikes the apparent robber with the wrench the plumber was carrying home from work. It later becomes clear that the apparent robber was a retarded person playing a game with a toy gun. Standard self-defense law accommodates these cases, however, by specifying that the defendant's belief must be reasonable in the circumstances. The defendant's belief must be reasonable to one who sees what she sees and knows what she knows.[289] Thus, the plumber's belief may be unreasonable in light of all relevant information, yet reasonable in the circumstances the plumber confronted because these circumstances provided the plumber with access to only a subset of the relevant information.

Third, a defendant might form an unreasonable belief as to the necessity of exercising defensive force due to impaired capacity. Suppose two retarded adolescents get into an argument in the school doorway when they both try to pass through a door in opposite directions at the same time. The one attempting to enter the building yells "I'll get you" and picks up a rock in order to hit the other with it. The second could simply swing the door closed and call the teacher, but due to fear and limited intelligence, he never thinks of that possibility. Instead, he hits the first student in the head with the baseball bat he was carrying out to the school yard, inflicting serious injury. This defendant's belief was not reasonable in the circumstances because any reasonable person exercising ordinary care and competence in the circumstances would have recognized the alternative of closing the door and calling the teacher. In contrast to the racist defendant in the first

288. MODEL PENAL CODE, *supra* note 16, § 211.1(1), (2) (listing the usual culpability elements for assault); *see supra* notes 17-19 and accompanying text (discussing the Model Penal Code approach which allows self-defense on the basis of belief rather than reasonable belief, but holds defendants liable for negligent or reckless offenses if those beliefs are held negligently or recklessly).

289. *See supra* notes 128-30 and accompanying text (discussing authority for the relevance of size, gender, and history to reasonable judgments).

case, this defendant failed to derive a reasonable belief due to lack of competence rather than inadequate care.

Some readers may conclude that this retarded defendant ought to be held to the standard of an ordinary person, and thus these readers would endorse conviction of the defendant in this case. These readers would find satisfactory self-defense provisions requiring reasonable beliefs. Those who find this conclusion intuitively unjust might consider several possible strategies. First, there is the Model Penal Code's approach, requiring only a belief in the necessity of exercising deadly force rather than a reasonable belief.[290] This approach would also exculpate the racist defendant in the first case, however, and many readers may think that these defendants differ in a manner that warrants different treatment.[291]

Second, some might argue that the defendant's limited intelligence should be considered a circumstance relevant to the reasonableness of his belief. Jurors would then decide whether the belief was reasonable given a person of such limited intellectual endowment, applying the standard of the reasonable retarded person. This notion is difficult to explicate because limited mental capacity directly undermines the capacity to reason with ordinary speed and accuracy, apparently generating the notion of the "reasonable person with impaired reasoning."[292] Such an interpretation renders the reasonable person standard incoherent in light of both the ordinary and the legal meaning of "reasonable" as grounded in good reasons and good reasoning.[293] Furthermore, once we incorporate psychological aberration into the standard of reasonableness, consistency would seem to require a separate standard for the "reasonable psychotic."[294] If a defendant can demonstrate a long-term pattern of unreasonable beliefs, attitude, and behavior, should they be measured by the standard of the "reasonable unreasonable person"?

Although the suggestions that one might formulate standards for the "reasonable retarded person" or the "reasonable psychotic" seem implausible, courts and commentators have seriously proposed standards for the "reasonable battered woman."[295] Some have interpreted the "reasonable battered woman" standard as the conduct of the reasonable woman who has been battered, or that of the reason-

290. *See supra* notes 17-19 (discussing the Model Penal Code approach to self-defense).

291. This assumes that both defendants cause injury but not death, and that the jurisdiction has no negligent assault statute.

292. AMERICAN PSYCHIATRIC ASS'N, *supra* note 58, at 28-33 (discussing "mental retardation" as involving arrested development of cognitive functions).

293. *See supra* notes 248-52 and accompanying text ("reasonable" as involving good reasons and good reasoning).

294. AMERICAN PSYCHIATRIC ASS'N, *supra* note 58, at 404 (defining *psychotic* as involving serious impairment of reality testing).

295. Maguigan, *supra* note 1, at 442-43 (discussing courts and commentators suggesting a standard for reasonable battered woman).

able woman with the battered woman syndrome. Courts and commentators have used the standard in either fashion, and they sometimes do not differentiate between these two interpretations. The first variation is merely a statement of the "reasonable woman" standard variation of standard self-defense doctrine as applied to a defendant who has been battered. Standard doctrine measures reasonableness in light of all that the defendant knows, including her history with the person against whom she exercises the defensive force.[296] A reasonable woman who has been battered by the batterer simply includes this past history in the information she considers in forming her reasonable belief.[297] As a restatement of standard doctrine, this interpretation fails to serve its intended purpose because those who suggest it apparently understand it as a proposal to revise and improve that doctrine.[298] Furthermore, understood in this manner, the proposal calls primarily for ordinary factual evidence supporting the defendant's claims regarding the past pattern of abuse rather than expert testimony addressing the battered woman syndrome.[299]

The second variation has been proposed as one that more appropriately allows for the defendant's battered woman syndrome, including especially her experience of learned helplessness.[300] This proposal ordinarily accompanies the claims that the battered woman syndrome is not a mental illness and that testimony regarding the syndrome is relevant to the defendant's reasonable beliefs.[301] As argued previously, however, the syndrome as usually formulated is a psychological disorder if it occurs at all.[302] It is difficult, therefore to contend that one ought to apply a special standard to the reasonable person with the battered woman syndrome but ought not apply a special standard for the reasonable psychotic or the reasonable retarded person. This approach requires a rationale for indexing reasonableness to one particular psychological disorder but not to others, and it calls for some coherent notion of "reasonableness" that can vary according to the presence of psychological disorders. Psychosis, retardation, and the presumed battered woman syndrome differ in the manner and degree

296. *See supra* notes 128-30 and accompanying text (discussing authority for the relevance of size, gender, and history to reasonable judgments for self-defense).

297. *See supra* notes 125-36 and accompanying text.

298. Kinports, *supra* note 4, at 409-22 (endorsing a special standard of reasonableness for battered women); Maguigan, *supra* note 1, at 442-45 (discussing such special standards).

299. *See supra* notes 125-36 and accompanying text (discussing the most appropriate forms of evidence).

300. Kinports, *supra* note 4, at 396-422 (discussing a special standard for battered woman and the importance of the battered woman syndrome for the reasonableness of perceptions by these women).

301. State v. Kelly, 478 A.2d 364, 377-78 (N.J. 1984) (discussing the battered woman syndrome as relevant to the reasonableness of defendant's beliefs); Kinports, *supra* note 4, at 417-22 (discussing the battered woman syndrome as not a mental illness and as relevant to the reasonableness of the defendant's beliefs).

302. *See supra* notes 256-81 and accompanying text.

in which they distort psychological process, but share in common the property that they involve distortion of psychological process.

Recall the retarded defendant in the school who seems to raise serious concerns about the reasonable belief standard, and consider the possibility that there might be an insanity defense available as a third strategy for exculpating such defendants. Due to the defendant's intellectual impairment, he believed that his use of force was necessary and therefore justified. Due to his functional impairment of psychological processes, he did not know that his conduct was wrong. The most common standards for the insanity defense include provisions excusing those whose psychological disorder prevents them from knowing their conduct is wrong.[303] Thus, one could plausibly argue for inclusion of such a defendant under these provisions.

This approach to the retarded defendant who mistakenly believes that defensive force is necessary exculpates the defendant but it does not endorse his conduct as justified. It excuses the defendant for committing unjustified conduct because he was not culpable for the mistaken belief on which he acted, and thus, he was not culpable for his conduct. A statutory system that observed the distinction between justification and excuse by justifying on the basis of actual necessity and maintaining a separate excuse for those who engage in unjustified conduct because they nonculpably but mistakenly believe their conduct to be justified, would accommodate this defendant under that excuse, bypassing the need to appeal to the insanity defense.[304] This excuse would not apply to the negligently mistaken bigot in the first hypothetical because his failure to exercise due care before inflicting serious harm renders him culpable for his mistake. It would, however, exculpate the plumber who exercised what he reasonably but inaccurately believed to be necessary defensive force in response to deceptive circumstances.

An independent excuse for those who mistakenly but nonculpably believe defensive force is necessary appropriately addresses the culpability of the defendant rather than the acceptability of the conduct or the reasonableness of beliefs in circumstances. The criterion of culpability allows appropriate disposition of all three cases, inculpating the negligent bigot but exculpating the plumber and the retarded defendant. Standards that compress justification and excuse into a single provision requiring reasonable belief in justificatory conditions accommodate only one subset of nonculpable but unjustified defendants. These standards exculpate those who, like the plumber, are misled by deceptive circumstances into forming beliefs which are false but reasonable in the circumstances. They do not,

303. SCHOPP, *supra* note 273, § 2.1 (discussing the most common standards).

304. ROBINSON, *supra* note 15, § 184 (proposing an excuse for mistakes regarding justification which addresses the actors' culpability for their mistakes).

however, appropriately exculpate those defendants, like the retarded boy in the school, who form unreasonable beliefs through no fault of their own due to impaired capacities.

One must clearly distinguish reasonable, understandable, and nonculpable beliefs in order to address these cases and issues in a satisfactory manner. As discussed previously, reasonable beliefs are formed and held on the basis of ordinarily reliable evidence as acquired through unimpaired perception, and evaluated through normally sound judgment.[305] Although the reasonableness of a belief is determined by the soundness of the evidence and psychological processes that produce and maintain it, it might be understandable that a person would hold an unreasonable belief. That is, others might understand why a person holds an unreasonable belief because they can advance an explanation for that person's holding that belief. These explanations might appeal, for example, to the bigoted defendant's prejudice and lack of due care, or to the retarded defendant's impaired reasoning ability, to explain how they derived their false and unreasonable beliefs in the necessity of exercising defensive force. These explanations render such defendants' beliefs understandable to others but not reasonable because they explain those beliefs by appeal to the defendants' unreliable belief-forming processes.

Unreasonable but understandable beliefs can be either culpable or nonculpable. The bigot's belief, for example, is understandable but culpable because the explanation that renders it understandable appeals to his negligent failure to exercise due care by seeking and considering easily available evidence that would have called his belief into question.[306] The retarded defendant's belief, in contrast, is understandable but not culpable because the explanation that renders it understandable appeals to his impaired capacity to reason clearly or quickly.[307] Thus, understandability is a property of the relationship between a belief and the ability of other parties to explain it, while reasonableness is a property of the relationship between a belief and the belief-holder's foundation in evidence and belief-forming processes for that belief.

Judgments of culpability for a mistaken belief represent attributions of responsibility for that mistake to the belief-holder as a competent moral agent. Attributions of culpability for a belief require both that the individual possessed the capacities of a competent agent and that she had the opportunity to exercise them regarding this belief.[308] That a belief is understandable, therefore, does not entail any conclusion regarding either its reasonableness or the belief-holder's culpabil-

305. *See supra* notes 248-52 and accompanying text.
306. *See supra* notes 287, 290 and accompanying text (discussing the bigot example).
307. *See supra* notes 289-90 and accompanying text (describing retarded boy example).
308. SCHOPP, *supra* note 273, §§ 4.2, 4.4, 6.5, 7.4.

ity because each of these latter properties addresses different relationships than that addressed by understandability. A fully satisfactory system of criminal defenses must provide the conceptual structure needed to evaluate reasonableness, understandability, and culpability independently.

D. Culpability and Battered Women as Justified or Excused

A statutory scheme justifying self-defense on the basis of actual necessity, regardless of beliefs, and maintaining a separate excuse for those who exercise force due to nonculpable mistakes regarding necessity reflects the conceptual distinctions among reasonableness, culpability, and understandability, and it addresses a particularly problematic subset of self-defense cases involving battered women. Battered women who kill their batterers in nonconfrontation situations must demonstrate not only that further abuse was forthcoming but also that their own use of defensive force was necessary to prevent it. Although standard self-defense doctrine does not require that one retreat from one's own home before exercising such force, it does require that one make use of available legal protection. Nonconfrontation cases, especially those in which the defendant approaches the batterer, raise serious questions about the defendant's failure to exercise legal alternatives such as calling the police or securing restraining orders.[309]

Some defendants may not have such alternatives available. If the battered woman called police but they failed to respond or they responded but failed to make an arrest, for example, she can cogently argue that effective legal alternatives were not available. Furthermore, a defendant who had unsuccessfully sought legal protection in the past can reasonably argue that her experience demonstrates that such alternatives are not available.[310]

Defendants who have not personally sought legal assistance might demonstrate the necessity of defensive force through expert testimony regarding the lack of effective legal protection in their jurisdictions. Although many jurisdictions have recently initiated new statutes, policies, and practices to provide more effective legal alternatives to defensive force for many battered women, the practical effect

309. *See, e.g.*, People v. Aris, 264 Cal. Rptr. 167, 171 (Cal. Ct. App. 1989); People v. Norman, 378 S.E.2d 8, 9-11 (N.C. 1989); State v. Allery, 682 P.2d 312, 313-14 (Wash. 1984).

310. The issue may be more complex if the defendant has not received assistance because she refused to cooperate with legal officials. Suppose, for example that this defendant has previously elicited assistance from officials but then changed her story or refused to cooperate in the prosecution of the batterer. These circumstances raise the additional question regarding defendants' responsibility for causing the conditions of their own defenses. *See* Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).

of these changes varies widely, and no one suggests that all battered women have access to effective legal protection across jurisdictions.[311]

Defendants who can enter evidence to demonstrate that their jurisdictions have not yet established reliable patterns of effective legal intervention in battering relationships can use this evidence to support the claim of necessity required for justified self-defense. That is, by showing that the past pattern of battering supports their claims that serious bodily injury was forthcoming and that they would be unable to protect themselves at the time of the attack, and by showing that effective legal protection was not available in their jurisdiction, they can support their contentions that their own exercise of force was necessary to prevent the unlawful use of force against them.[312]

A penal code clearly differentiating justification based on actual necessity from excuse based on nonculpable mistake regarding necessity would accept as justified the defensive force exercised by these defendants who lack legal alternatives. This justification defense would reflect the circumstances necessitating their defensive force and would require no inquiry into the defendants' beliefs or into the reasonableness, understandability, or culpability of those beliefs. Some battered women, for example, might kill their batterers out of a desire for revenge in circumstances in which they believed they had effective legal alternatives, although in fact they did not. These unknowingly justified defendants would qualify for a justification defense based upon actual necessity because their conduct was justified by the circumstances. They would remain vulnerable, however, to attempt liability because their conduct would have constituted homicide had the circumstances been as they believed them to be.[313]

Some battered women might kill their batterers out of desire for revenge in circumstances of actual necessity. Suppose, for example, Jones accurately believes that her batterer will beat her severely, as he has previously, when he awakens from his drunken stupor. Jones attempts to call the police, but discovers that the January blizzard preventing her from leaving her isolated farmhouse has also blown down the telephone lines, preventing her from securing legal assistance. Jones responds to this discovery with malevolent glee, realizing that these circumstances create actual necessity because the forthcoming beating is virtually certain, she will be unable to defend herself at that time, and legal assistance is not available. She plunges a kitchen

311. *See supra* notes 140-233 and accompanying text (discussing the current state of criminal and civil alternatives available to battered women).

312. Recall that we argue that the law *ought* to be understood in this manner, not that this argument would currently succeed in all jurisdictions. The purpose here is to explain to courts and legislators why the law ought to be formulated and interpreted in a manner consistent with this argument.

313. ROBINSON, *supra* note 15, § 122; Schopp, *supra* note 282.

knife into her batterer's chest, delighted by the opportunity to exploit the justificatory circumstances.

Some readers might respond intuitively that Jones did not deserve a defense due to her malevolent delight in killing the batterer. These readers might contend that Jones killed the batterer because she wanted to, rather than because she had to.

Justification defenses exculpate actors because their conduct was acceptable under the circumstances, not because they manifest admirable attitudes.[314] Suppose Smith is carrying his softball bat home from a softball game. As he turns a corner, he encounters Spike in the act of swinging a tire iron at Mother Beneficence in order to steal the alms she has collected for the poor. As the attack is already in progress, Smith has only two choices; he can hit Spike with the bat, protecting Mother Beneficence, or he can refrain, allowing Spike to severely injure Mother Beneficence. Suppose also that as Smith perceives the situation, he feels no concern for Mother Beneficence, but he recognizes Spike as someone he has always hated and experiences a sensation of delight when he realizes that he now has an opportunity to attack Spike as he has always wanted to.

Although Smith's intervention with the bat is motivated by his hatred for Spike, it seems clear that Smith acts as he ought to. Some readers might evaluate Smith's character more positively if he were to intervene from a sense of duty or from concern for Mother Beneficence, but few would argue that he ought to allow Spike's attack to continue rather than act from impure motives. Smith's act seems clearly the more justified of the only two available options. When forced to choose between intervening in a manner that injures the culpable Spike or refraining and allowing comparable injury to the innocent Mother Beneficence, Smith justifiably chooses the act that directs the unavoidable injury toward the party whose culpable attack creates the need for someone to absorb such injury. Although Smith acts with malice, Smith performs the right act, and therefore, Smith's act is justified.

Jones, like Smith, engages in acceptable conduct under the circumstances. Smith and Jones both encounter circumstances in which they must act in a manner that directs forthcoming injury either toward the culpable party who embodies the danger or toward an innocent victim. The malicious satisfaction that each experiences might affect one's evaluation of the actor's characters, but it does not alter the conditions that justify the acts. The mere fact that the same person fills the roles of innocent victim and intervener in the Jones story creates no morally relevant reason that renders the intervention less justified. Distinct justification defenses addressing justificatory cir-

314. Schopp, *supra* note 282 (discussing justifications as exceptions to general prohibitory norms).

cumstances and excuses addressing culpability facilitate satisfactory analysis and disposition of such cases by directing attention toward the presence or lack of justificatory circumstances rather than toward the actor's motives or beliefs.

A clear distinction between justification defenses grounded in justificatory circumstances, and excuses recognizing the defendants' lack of culpability facilitates differential analysis of at least three additional types of cases involving self-defense claims by battered women. First, evidence presented to the court may demonstrate that legal protection was available and that this defendant resorted to violence despite being aware of these alternatives. Second, evidence may establish that such alternatives were available but that the defendant exercised force because she was unaware of these opportunities. Third, the court may lack reliable information about the availability of legal protection because the jurisdiction lacks a reliable pattern of performance in this area.

Consider each type of case in sequence. The first set of cases involves defendants who resorted to violence despite their awareness of effective legal alternatives. Self-defense arguments probably would not succeed for these defendants, but there is no reason they should. These cases would involve the knowing use of unnecessary force, and homicide statutes would appropriately apply, although provocation may reduce the appropriate degree of homicide.[315]

The second set of defendants resorted to violence because they mistakenly believed that they lacked legal alternatives and thus that defensive force was necessary for self-protection. If the penal code compresses justification and excuse into a single provision by granting a justification defense to those who reasonably believed their force was necessary, the court must inquire into the reasonableness of these defendants' beliefs. Although not necessarily decisive, the evidence before the court indicating that alternatives were available weighs against the defendants in this inquiry. This evidence may be misleading in that the court's opportunity to gather and weigh this evidence differs significantly from that of the defendants who must decide and act under great stress, but the stronger the evidence demonstrating the availability of legal alternatives, the stronger the inference that the defendant's contrary belief was not reasonable.

An appeal to the battered woman syndrome cannot render these defendants' beliefs reasonable. As a syndrome, the battered woman syndrome constitutes a pattern of psychological dysfunction which cannot provide the foundation in reliable evidence and belief-forming

315. MODEL PENAL CODE, *supra* note 16, § 210.3(1) (indicating extreme mental or emotional disturbance reduces murder to manslaughter); LAFAVE & SCOTT, *supra* note 15, § 7.10 (discussing provocation and manslaughter).

processes needed to establish a belief as reasonable.[316] If further research supports the battered woman syndrome as a clinical syndrome, and if clinical evidence supports the contention that a particular defendant suffers from that syndrome, her suffering may well explain why she believed her action necessary. Such an explanation might assist the jury in understanding, for example, that due to learned helplessness, the defendant perceived the batterer as omnipotent and failed to recognize the availability of legal assistance. By appealing to learned helplessness, this explanation renders the belief understandable rather than reasonable, however, and understandability entails neither reasonableness nor any conclusion regarding culpability.[317] One cannot resolve these cases by modifying the notion of reasonableness for the reasons discussed previously.[318] Rather, one must recognize the distinction between defenses reflecting justificatory circumstances and those recognizing the actor as lacking culpability.

A separate excuse for those who exercise force due to a nonculpable mistake regarding justification emphasizes the defendant's culpability for her mistake rather than the reasonableness of her belief constituting the mistake. From this perspective, the central question is not whether she had good reason for her belief, but rather whether she is appropriately held culpable for it. The retarded defendant in the school discussed earlier lacked good reason for his mistaken belief that force was necessary, but he was not culpable for his mistake because it was the product of defective capacities.[319]

Assuming for the sake of argument that the battered woman syndrome occurs as now formulated, learned helplessness may constitute an impairment analogous to that of the retarded defendant in that it undermines the individual's ability to accurately assess the relevant information and draw appropriate conclusions. Learned helplessness differs from retardation in that it is a relatively narrow impairment, affecting only the battered woman's ability to accurately perceive and evaluate the batterer, the relationship, and her options regarding that relationship. This could be sufficient in some cases, however, to generate a nonculpable mistake regarding her ability to secure legal protection.[320] Under this rationale, a defendant suffering the hypothetical battered woman syndrome might qualify for excuse be-

316. *See supra* notes 248-52 and accompanying text (discussing reasonable beliefs as those based on good reasons and good reasoning).

317. *See supra* notes 305-08 and accompanying text (distinguishing reasonableness and understandability).

318. *See supra* notes 248-52 and accompanying text (discussing the ordinary and legal conception of reasonableness).

319. *See supra* notes 290-94 and accompanying text (describing the example of the retarded boy).

320. We put aside the apparent tension between claims of learned helplessness and her active self-help in the form of killing the batterer. For discussion of that issue, see *supra* notes 68-69 and accompanying text.

cause the syndrome produces an unreasonable but nonculpable mistaken belief that she lacks any alternatives to violence.

Alternatively, assume for the sake of argument that additional research fails to support the claim that the battered woman syndrome occurs. This failure would not undermine the well-documented existence of battering. In the absence of the syndrome, the battered woman remains an individual who suffers periodic assaults. Given the prior assumptions regarding the forthcoming abuse and her inability to protect herself at that time, she might exercise force in a nonconfrontation situation out of fear of the anticipated abuse. If legal alternatives were available but her abuse-driven fear led her to believe that her defensive force was necessary, the jury must determine in each case whether the severity of the abuse and her resulting fear was sufficient to render her mistake nonculpable rather than negligent or reckless.[321] Thus, a statutory system separating justification defenses from excuses for nonculpable mistakes regarding justification would provide these defendants with plausible arguments for exculpation.

A clear distinction between justification and a separate excuse for nonculpable mistakes explicates the intuition represented by the proposals for a subjective standard of reasonableness or for a "reasonable battered woman" standard.[322] The plumber who strikes the retarded "assailant" with the toy gun reacts reasonably to the circumstances with which he is confronted. Although the force is not justified when all the relevant circumstances are known, the plumber responds in a reasonable manner to the circumstances presented during the "attack," and thus, he behaves responsibly. Because he behaves responsibly, he is not culpable or blameworthy for his actions.[323] Thus, he is appropriately excused for his nonculpable mistake.

The retarded boy in the school door and the battered woman who fails to exercise available legal alternatives due to her battered woman syndrome or abuse-driven fear also lack culpability for their mistaken beliefs that contribute to their unjustified uses of force. The plumber's misleading circumstances, the retarded boy's impaired capacities, and the battered woman's battered woman syndrome or abuse-driven fear all constitute factors relevant to the appropriate exculpation of these defendants because they defeat ascriptions of culpability. Thus, courts should engage in subjective inquiries regarding

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321. This interpretation assumes a conventional interpretation of justification and excuse. For an alternative account that would address some of these cases as systemically complete mitigation, see Schopp, *supra* note 282.

322. *See supra* notes 295-302 and accompanying text (discussing the "reasonable battered women" proposal).

323. The plumber is neither culpable nor blameworthy, rendering this distinction irrelevant to this case. For a discussion of conditions under which this distinction can become significant, see Schopp, *supra* note 282.

these defendants, but these inquiries are relevant to culpability and excuse rather than to standards of reasonableness for justification.

Finally, consider the third set of cases in which the court lacks clear information regarding the availability of legal assistance in this jurisdiction at the time the defendant exercised force against the batterer. If the court cannot ascertain this information at trial, it probably would not have been available to the defendant when she exercised her force against the batterer. If the penal code compresses justification and reasonable mistake regarding justification into a single defense by allowing the justification for those who reasonably believed their conduct was necessary, it seems plausible to say that one cannot reasonably believe that legal alternatives are not available in the absence of information. That is, if one has no reliable information regarding alternatives, one does not have good reason to conclude that they are unavailable and therefore, that lethal action is justified. One can only conclude that one does not know whether it is justified. Thus, one who lacks information providing good reason to believe that alternatives are unavailable cannot reasonably believe that defensive force is necessary.

By addressing justification defenses and nonculpable mistakes regarding justification separately, the criminal law can accommodate these cases appropriately through an analysis parallel to that which has already been discussed. Although these defendants lacked reliable information regarding legal alternatives, it remains true that in each case such alternatives either were available or they were not. If they were not, the defensive force was justified by actual necessity. If the alternatives were available but the defendants' battered woman syndrome or abuse-driven fear led them to believe that they were not, the juries would have to determine for each defendant whether the severity of the syndrome or the abuse was sufficient to render that defendant's mistake nonculpable rather than negligent or reckless. The former conclusion would generate exculpation under the excuse for nonculpable mistake regarding justification, and the latter would result in liability for negligent or reckless homicide.

This practical result is less than fully satisfactory for two reasons, but these concerns arise from the realistic problems involving factual uncertainty rather than from inadequacies in the law. First, the jury would face difficult determinations of fact in the absence of satisfactory evidence or clear criteria of adequacy. They would have to make judgments, for example, of the probability that assistance was available, of the potential danger to the defendant in an unsuccessful call for assistance, and of the severity of each defendant's battered woman syndrome or abuse-driven fear. Although these determinations are troubling, so are many similar judgments juries must make in other

types of cases.[324] Second, some cases would result in exculpation in circumstances which would render it impossible for anyone including the jury to differentiate justification from excuse. Although this result would blur the expressive significance of the decision, it reflects the unavoidable responsibility of courts to make decisions in conditions of uncertainty.

In short, a penal code that maintains a rigorous distinction between justification and excuse by separating self-defense justified by actual necessity from excused mistakes can accommodate many of the problematic cases. Those who fail to qualify under this interpretation are those who have the weakest claims to exculpation because they knowingly refuse to take advantage of available legal alternatives. Furthermore, this approach relies primarily on evidence of the pattern of battering rather than on the tenuous support for the battered woman syndrome. Finally, it is consistent with the conceptual and normative foundations of self-defense, and it clarifies the relevance of the battering evidence for the appropriate defenses.[325]

Compressing these defenses into a single provision and interpreting "reasonable belief" as innocent, blameless, or nonculpable beliefs blurs the conceptual distinction between justification and excuse. Although both justification and excuse exculpate, conflating the two in a single defense can also have practical significance. First, it can have practical effects on the rights and duties of third parties who may become involved.[326] Second, it distorts the expressive function of the

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324. The criminal law can address error preference regarding some of these issues through procedural devices such as the burden of proof. A discussion of procedural issues would extend beyond the scope of this paper. *See, e.g.*, Maguigan, *supra* note 1 at 437-42, 451-58 (discussing procedural and evidentiary recommendations).

325. Although the excuse for nonculpable mistake regarding justification appropriately addresses some cases involving battered women, the experience of battering is neither necessary nor sufficient for the excuse. The analysis presented throughout this article demonstrates that battering is not sufficient because some battered women who kill their batterers qualify for justification rather than excuse, and some qualify for neither. Battering is not necessary for the excuse because the core of the exculpatory condition consists of the distorted information, impaired capacities, or other significant conditions that render the defendant nonculpable for the mistake. Notice that a defendant who makes such nonculpable mistakes regarding justification due to significant psychological dysfunction might also be subject to the insanity defense or to civil commitment.

326. FLETCHER, *supra* note 117, §§ 10.1.1, 10.5.4(B); ROBINSON, *supra* note 15, § 121(d). Fletcher and Robinson contend that justification defenses create a social matrix of duties and responsibilities such that third parties may assist a justified actor and may not resist or interfere. Excuses do not carry corresponding significance for third parties. For an alternative theory advocating a revised social matrix of duties and responsibilities, see Schopp, *supra* note 282. All three commentators agree that justifications and excuses differ in their significance for third parties.

The revised social matrix and the analysis advanced in this article would provide a justification defense for third parties who assist battered women in killing their batterers in certain limited conditions. A complete explication would require a lengthy addition to this article, but the basic form of the analysis is that a third party would be justified in assisting the battered woman when all the conditions articulated here for the exercise of justified deadly force by the battered woman continued to apply despite the availability of the third party assistance.

criminal law because it becomes impossible to determine whether a particular decision expresses approval of the defendant's use of force or merely absolves her of responsibility.

Third, the failure to clearly differentiate justification and excuse can undermine legitimate exculpatory defenses for defendants such as those previously discussed who exercised deadly force due to an unreasonable but nonculpable belief that they lacked legal alternatives. Finally, conflating the two types of defenses promotes the current state of confusion regarding the putative significance of expert testimony regarding the battered woman syndrome for claims of self-defense. It is at least plausible to suspect that juries might be more likely to arrive at legally and morally defensible verdicts when presented with distinct claims of justification and excuse accompanied by instructions and evidence clearly identified with each. We should consider the possibility that some cases in which expert testimony was admitted resulted in intuitively unsatisfactory decisions because of that testimony rather than despite it.

V. Conclusion

The controversy regarding battered women who kill their batterers in the absence of occurrent attacks or threats demonstrates the critical importance to the criminal law of empirical rigor, careful attention to the jurisprudential foundations of legal doctrine, and the integration of the two. Although expert testimony regarding the battered woman syndrome has been widely endorsed by courts, commentators, and statutes, the battered woman syndrome lacks empirical support as a clinical syndrome. Furthermore, the battered woman syndrome bears almost no relevance to rigorously formulated and interpreted self-defense doctrine. If future research were to provide adequate empirical support for the battered woman syndrome, the syndrome could have limited relevance when admitted for the purposes of supporting the defendant's credibility or advancing an excuse for nonculpable mistake regarding justification.

When justification and excuse are distinguished, other central concepts of self-defense doctrine are clarified, and expert testimony regarding the syndrome is differentiated from ordinary factual evidence and expert testimony regarding the pattern of battering, many of the problematic issues and cases can be addressed more satisfactorily. A statutory scheme providing justification defenses based on actual necessity and separate excuses for nonculpable mistakes accommodates many of the most troubling circumstances in which battered women kill their batterers in nonconfrontational situations. Some of these defendants would qualify for a justification defense, but others would be excused. Finally, some would fail to qualify for either type of defense. Thus, this approach has the additional virtue of

avoiding a new stereotype by treating each battered woman in the manner appropriate to the circumstances in which she acted.

Evidence regarding the pattern of battering, rather than the battered woman syndrome, addresses the critical issues most directly. Many cases remain difficult to decide satisfactorily, but these cases reflect the widespread practical impediments to accurately reconstructing and evaluating past events as well as the ordinary requirement that courts decide under conditions of uncertainty. These difficulties are not unique to the substantive legal doctrine of self-defense generally or to cases of defensive force exercised by battered women specifically.