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Victimization as a Defense: Valid Protection for the Innocent or Escape from Criminal Responsibility?

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VICTIMIZATION AS A DEFENSE: VALID PROTECTION FOR THE INNOCENT OR ESCAPE FROM CRIMINAL RESPONSIBILITY?

At the core of our criminal justice system are safeguards and protections for a defendant accused of a crime.[1] To ensure that those not responsible for their actions are not punished, states

[1] *See* U.S. CONST. amend. V. The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.; U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment also subjected states to due process, stating:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.; Katz v. United States, 389 U.S. 347, 359 (1967). In *Katz*, the FBI taped the defendant's phone conversation while the defendant was on a public payphone. *Id.* at 358. Statements from this conversation were introduced into evidence and the defendant was eventually convicted. *Id.* The government had wiretapped the phone without first getting a warrant. *Id.* at 359. Since a "search and seizure warrant" is used to safeguard citizens' constitutional rights, the Court held that wiretapping without obtaining the proper warrant was improper and a violation of a defendant's constitutional rights. *Id.* at 357-59; Miranda v. Arizona, 384 U.S. 436, 437 (1966). *Miranda* primarily dealt with the constitutional rights to which a criminal suspect is entitled. *Id.* at 439. The Court stated that "[t]he cases before us raise questions which go to the root of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for a crime." *Id.* The Court specifically set forth the warnings to be given a suspect before any interrogation may begin. *Id.* at 444-45. "The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court." *Id.* at 469. "[A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today." *Id.* at 471. "[I]t is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him." *Id.* at 473. "[T]his warning is an absolute prerequisite to interrogation." *Id.* at 471. "No amount of circumstantial evidence . . . will suffice [as] . . . assurance that the accused was aware of this right." *Id.* at 471-72.; Mapp v. Ohio, 367 U.S. 643, 655 (1961). *Mapp* extended the obligation to safeguard a citizen's Fourth and Fourteenth Amendment due process rights to the states. *Id.* Essentially, the Court held that the states are also required to adhere to the same "exclusionary rule" for Fourth Amendment violations that federal courts follow. *Id.*

have developed statutes providing for insanity and justification defenses.[2] Despite these laws, there is little sympathy in a court of law for an individual accused of murder. However, when the defendant has been the subject of victimization,[3] sympathy can potentially play a significant role in the trial process.[4] Although some critics believe that it is too easy to assert victimization as an excuse for criminal behavior, others believe that allowing evidence of victimization serves to rebut any assumption of criminal intent.[5]

As more became known about instances of victimization, defendants introduced their experiences as victims in support of a defense to murder.[6] The majority of battered women and chil-

[2] *See, e.g.*, ALASKA STAT. § 11.81.330 (1992) (Justification: Use of Non-Deadly Force in Defense of Self); ARIZ. REV. STAT. ANN. § 13.404 (1992) (Justification; Self-Defense); LA. CODE CRIM. PROC. ANN. art. 657 (West 1992) (Insanity Proceedings); ME. REV. STAT. ANN. tit. 17-A, § 101 (West 1992) (Defenses and Affirmative Defenses; Justification); N.D. CENT. CODE § 12.1-05 (1991) (Justification — Excuse — Affirmative Defenses); N.D. CENT. CODE § 12.1-05-03 (1991) (Affirmative Defense, Self-Defense); WASH. REV. CODE ANN. § 10.77.020 (West Supp. 1992) (Criminally Insane — Procedures); *see also* MODEL PENAL CODE art. 3 (discussing principles of justification); *id.* art. 4 (discussing defense of mental disease). *But see* Christine A. Gardner, *Post Partum Depression Defense: Are Mothers Getting Away With Murder?*, 24 NEW ENG. L. REV. 953, 982 (1990) (discussing some states' abolition of insanity defense).

[3] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2550 (1986). "Victimization" is defined as "[t]he act or process of victimizing or the state of being victimized." *Id.* A "victim" is defined as "[a] person subjected to deprivation, or suffering" or "anyone who suffers . . . incidentally." *Id.* As a result, it is submitted that victimization includes individuals suffering from both mental and physical disabilities which affect their state of mind.

[4] *See* Cathryn J. Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 18 (1986). Justification defenses deem behavior otherwise criminal as acceptable to society. *Id.* According to the author, "[t]he conduct is paradigmatically wrong but, due to compelling circumstances and proper motive, the case is exceptional and the conduct should not be punished." *Id.* The act is acceptable to society because the extreme circumstances under which it was committed neutralize its criminality by removing the criminal component of the act. *Id.* Therefore, an exception to the criminal law is warranted. *Id.* For a justification defense to be successful, it must comply with certain requirements and only then will the criminal prohibitions against it be disregarded. *Id.* at 18-19; *see also infra* notes 86-93 and accompanying text (discussing sympathetic effect on jury of evidence of previous victimization of defendant).

[5] *See infra* notes 37-52 and accompanying text (discussing how victimization as defense is implemented and its various criticisms).

[6] *See, e.g.*, People v. Weinstein, 1992 WL 365725, at *1 (Sup. Ct. New York Cty. 1992). In *Weinstein*, the defendant allegedly killed his wife by strangulation. *Id.* The defendant claimed that he lacked the requisite mental capacity for a conviction because of a cyst located in the frontal lobe of his brain which altered his mental state. *Id.* The court allowed expert testimony concerning various medical tests such as the positron emission tomography test ("PET") and the skin conductance response test ("SCR"). *Id.* at *1-2. PET was used to allow experts to make evaluations as to the metabolic functioning of the defendant's various brain regions. *Id.* at *2. SCR was used to evaluate whether lesions in the frontal lobe were present. *Id.* at *3. However, the court held that the defendant's condi-

dren have been able to establish that their status as abused persons[7] bears directly on the issue of imminent harm in support of a self-defense claim.[8] People suffering from post partum depression[9]

tion did not pass the test of admissibility. *Id.* at *1; *cf.* Poblet v. Parisi, 130 Misc. 2d 521, 522, 496 N.Y.S.2d 936, 937 (Sup. Ct. Queens County 1985). *Poblet* dealt with a plaintiff suing to recover for "post-traumatic neurosis syndrome which she claimed was a result of a car accident." *Id.* The plaintiff suffered from nightmares, insomnia, anxiety, fear of situations similar to that in which her car accident took place, lack of concentration, undue residual stress, apprehension, and fearfulness. *Id.* The court held that the syndrome, which was claimed to be of a psychiatric and/or psychological origin, was "highly subjective in nature." *Id.* at 939. As a result, the majority did not accept the syndrome as an "injury" for which plaintiff could recover. *Id.*; *see also* Anne D. Brusca, *Post Partum Psychosis: A Way Out For Murderous Moms?*, 18 HOFSTRA L. REV. 1133, 1135 (1990) (discussing unsuccessful attempts at using post partum depression, pre-menstrual syndrome, XYY chromosome, and junk food diet defenses to negate evidence of criminal state of mind); Diana J. Ensign, *Links Between the Battered Woman Syndrome and the Battered Child Syndrome: An Argument for Consistent Standards in the Admissibility of Expert Testimony in Family Abuse Cases*, 36 WAYNE L. REV. 1619, 1625 (1990) (discussing battered woman and battered child syndromes as defenses); Gardner, *supra* note 2, at 976-77 (discussing post partum depression and pre-menstrual syndrome, with their ability to alter one's state of mind, as defenses to murder); Jennifer L. Grossman, *Post Partum Psychosis — A Defense to Criminal Responsibility or Just Another Gimmick?*, 67 U. DET. L. REV. 311, 333-43 (1990) (detailing failed attempts using post partum depression and pre-menstrual syndrome as defenses to murder and success of Post Traumatic Stress Disorder as defense to murder due to its acceptance in medical field); Maureen Balleza, *A New Mental Disorder Appears in Abuse Cases*, N.Y. TIMES, Oct. 9, 1992, at D16. Three children died from either a heart attack or an overdose of medication while under a woman's care. *Id.* Although the woman has not yet been charged, it is suspected that she suffers from "Munchausen's Syndrome by Proxy." *Id.* This syndrome causes either parents, or those entrusted with the care of a child, to cause that child to become ill so the guardian can get the "sympathy and attention they gain from others and for the sense of control they gain from caring for a sick child." *Id.*.

[7] *See* Scott L. Feld & Murray A. Straus, *Escalation and Desistance of Wife Assault in Marriage*, 27 CRIMINOLOGY 141, 141 (1989) (stating majority of couples nationwide experience incidents of assault during marriage); Gardner, *supra* note 2, at 983 n.245. "The National Center on Child Abuse and Neglect study for the year extending from May 1, 1979 to April 30, 1980, estimated 652,000 cases of child abuse and neglect in the United States." *Id.* (citations omitted). In 1985, over 1.9 million children were reported as victims of abuse. *Id.* at 983-84. Incidents of child abuse resulting in fatalities rose in 1986. *Id.* at 984 n.250 (citations omitted); Mira Mihajlovich, Comment, *Does Plight Make Right?: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253, 1255 n.13 (1987). Abuse, which can include a slap as well as a severe beating, is common among the majority of American couples. *Id.* (citations omitted). It is estimated that 4.7 million woman are badly battered each year. *Id.*; *see also* UNITED STATES COMMISSION ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 1 (1982) (estimating that there are over one million battered wives in this country and that one out of three marriages experiences spousal violence); JANET ROSENBERG, 911 — FAMILY VIOLENCE: HELPING THE VICTIM 65 (1986). According to FBI statistics, one-fourth of all murders occur within the family. *Id.*; DANIEL J. SONKIN, DOMESTIC VIOLENCE ON TRIAL 98 (1987) (indicating that intimate relationships have higher risk of injury than violence on streets); Mary Suh, *Understanding Battered Women*, MS., Apr. 1989, at 63. It has been reported that in a single year as many as 1.8 million men beat their wives. *Id.*; Anne Summers, *The Hedda Conundrum*, MS., Apr. 1989, at 54 (revealing that "more than three people die a day as a result of abuse and neglect").

[8] *See infra* notes 32-54 and accompanying text (discussing battering syndromes and their

and acute grief syndrome[10] have also attempted to advance the proposition that their affliction altered their mental state, resulting in actions for which they should not be held accountable.[11]

This Note will explore the various types of victimization defenses which defendants have introduced to be released from culpability. It will first discuss the battered woman and battered child syndromes and their relevance to a valid self-defense claim when an abused person kills his or her attacker. It will assert that the admission of expert testimony on these syndromes neither violates nor expands the traditional standards of self-defense. Next, this Note will discuss cases of post partum depression and acute grief syndrome, where lack of mental culpability has also been suggested as a defense to murder. Finally, this Note concludes that because sufficient medical knowledge of the latter two conditions is lacking, a functional legal defense cannot be formulated without opening the door to rampant abuse.

I. THE TRADITIONAL RULES OF SELF-DEFENSE AS APPLIED TO THE BATTERED WOMAN AND BATTERED CHILD SYNDROMES

Many victims of abuse who kill their abusers assert a claim of self-defense.[12] Self-defense permits a person to use necessary force

use as defense).

[9] *See infra* note 103 and accompanying text (discussing post partum depression and its use as defense to murder).

[10] *See infra* notes 114-117 and accompanying text (discussing acute grief syndrome and its use as defense to murder).

[11] *See* State v. White, 456 P.2d 797, 800 (Idaho 1969) (mother who killed infant child asserted insanity due to post partum depression as defense and was acquitted); Commonwealth v. Comitz, 530 A.2d 473, 478 (Pa. Super. Ct. 1987) (mother drowned infant son and asserted insanity defense based on post partum depression resulting in guilty but mentally ill verdict); *see also* People v. Burton, 153 Misc. 2d 681, 682, 590 N.Y.S.2d 972, 973 (Sup. Ct. Bronx Cty. 1992) (defendant tried to introduce expert testimony on "acute grief" syndrome to show trauma and extreme stress led to his alleged untruthful confession); People v. Shelton, 88 Misc. 2d 136, 142-47, 385 N.Y.S.2d 708, 712-16 (Sup. Ct. New York Cty. 1976), *aff'd*, 78 A.2d 821, 434 N.Y.S.2d 649 (1st Dep't 1980) (evidence of "extreme emotional disturbance" allowed as mitigating factor in murder trial).

[12] *See* State v. Wilson, 487 N.W.2d 822, 822 (Mich. Ct. App. 1992) (battered woman killed husband after 48 hours of abuse was permitted to offer evidence of battered woman syndrome in support of self-defense); State v. Hennum, 441 N.W.2d 793, 795-96 (Minn. 1989) (battered woman killed husband in sleep after hours of brutal abuse and asserted self-defense); State v. Koss, 551 N.E.2d 970, 971 (Ohio 1990) (battered woman shot and killed husband and asserted self-defense); Bechtel v. State, 840 P.2d 1, 6 (Okla. Crim. App. 1992) (battered woman shot husband as he moved for her and asserted self-defense); *see also* Mark Hansen, *Battered Child's Defense*, A.B.A. J., May 1992, at 28, 28 (discussing acquittal on parricide charges against abused seventeen year old girl); David Margolick, *When Child Kills Parent, It's Sometimes to Survive*, N.Y. TIMES, Feb. 14, 1992, at D20. In 1992, for

to protect him or herself from harm.[13] A successful self-defense claim must pass a two prong test.[14] First, the defendant must prove that he or she had a reasonable belief that grave bodily injury was imminent.[15] Second, the defendant must show that physical force was essential to avert the threatened injury.[16]

A battering relationship does not consist solely of isolated incidents of beatings.[17] Generally, a couple goes through a cycle[18] which consists of three phases: a period where tension escalates between the abuser and his victim, leading to a period of actual

the first time in this country, the Washington Court of Appeals recognized the battered child syndrome as a factor in determining guilt in a murder case. *Id.* The murder conviction of a boy who killed his stepfather was overturned specifically for the reason that the jury was not informed of the battering relationship and thus was not capable of assessing a self-defense claim in such a situation. *Id.*

[13] *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 454, 454-57 (2d ed. 1986) (discussing use of force to protect oneself; justification); *see also* Rosen, *supra* note 4, at 27.

> One has a legal right to kill in self-defense. Moreover, such intentional homicides are encouraged because they are not harmful to society and may be beneficial. Yet the criminal law's general goal of reducing the amount of violence in society remains the same. To harmonize the principle that killings in self-defense are justified with the principle that human life is the highest value protected by the law, the range of defensive conduct that will be justified must be narrowly circumscribed.

Id.

[14] *See* LAFAVE & SCOTT, *supra* note 13, at 454. Since there are two requirements of a successful self-defense claim, a two prong test is inferred. *Id.* "The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense." *Id.* "One who is not the aggressor . . . is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger." *Id.*

[15] *See id.* at 458-59 (essence of self-defense is that bodily harm was imminent).

[16] *See id.* at 457-58. Some jurisdictions have additional requirements for self-defense. *Id.* One such example is having the defendant prove that he or she was not the initial aggressor and if he or she was, that the defendant effectively withdrew from the situation. *Id.* Other jurisdictions require proof that no alternative was available, such as the possibility of retreat. *Id.*

[17] *See infra* notes 18-26 and accompanying text (discussing battering cycle in detail); *see also* Rocco C. Cipparone, Comment, *The Defense of Battered Women Who Kill*, 135 U. PA. L. REV. 427, 429 (1987) (stressing that retaliation is result of years of violence and not of one incident).

[18] *See* State v. Koss, 551 N.E.2d 970, 973 (Ohio 1990) (accepting proposition that cycle must occur at least two times for woman to be considered battered); Bechtel v. State, 840 P.2d 1, 8 (Okla. Crim. App. 1992). The *Bechtel* court stated: "[I]n order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship . . . once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman". *Id.*; *see also* Cipparone, *supra* note 17, at 431. To be considered a battered woman, the beating incident must occur more than once. *Id.* at n.27 (citations omitted). Although the exact number of times is debatable, it has been accepted that, at a minimum, the battering must occur twice. *Id.* at 431.

battering, followed by "calm, loving respite."[19] This cycle of violence leads to what is known as "learned helplessness."[20] Learned helplessness is a psychosocial theory which explains why women in this type of situation, although possessing the ability to act, remain passive and nonresponsive.[21]

Battered children also become convinced that they are helpless.[22] Like the battered woman, the battered child has "a special feeling of imminence—he or she has to live with the [abuser]."[23] The child believes that unless he or she acts, the abuse will eventually result in his or her death.[24] The child feels a sense of help-

[19] *See Bechtel*, 840 P.2d at 8. "A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man to coerce her to do something he wants her to do without any concern for her rights. *Id.* Battered women include wives or women in any . . . intimate relationship with men." *Id.*; *see also* LENORE WALKER, THE BATTERED WOMAN 55-63 (1979). Domestic violence occurs in cycles with three phases. *Id.* at 55. The first phase has been termed "the tension building phase," where the man only mildly abuses his wife. *Id.* at 56. During this phase, victims of the abuse contemplate leaving and in some instances, have actually tried to leave but most, nevertheless, remain with their batterers. *Id.* The second phase, where fatal violence is likely to occur, involves an "acute battering incident." *Id.* at 59. At this point, the woman is mostly concerned with surviving the beatings instead of leaving the relationship, and her behavior is considered "learned helplessness." *Id.* at 60. The third and final stage is one of calm. *Id.* at 65. As a result of the victim's learned helplessness, her hope that the relationship is salvageable, and her love for her abuser, she will probably succumb to her abuser's empty promises of rehabilitation. *Id.* at 68. Nonetheless, and contrary to the her hopes, the cycle reoccurs to the woman's detriment. *Id.* at 69. However, the next time the tension phase will be more abusive and the contrition period will be less meaningful. *Id.*

[20] *See* WALKER, *supra* note 19, at 43. In explaining "learned helplessness," Dr. Walker stated that a battered woman commonly experiences severe stress reactions such as anxiety, depression, fear, and general suspiciousness. *Id.* The battered woman also believes that no one can help resolve her predicament and thus feels completely helpless. *Id.*

[21] *See* Mihajlovich, *supra* note 7, at 1258. Experiments on rats and dogs showed that when "continuous negative stimuli" was administered, the animals developed a feeling of powerlessness and thus became "compliant, passive and submissive." *Id.* (quoting Dr. Lenore Walker). Dr. Walker claims that women in a battering situation tend to act the same way. *Id.* "They believe they are helpless and this belief becomes their reality." *Id.* "[They] allow what they perceive to become beyond their control, [and] therefore, they do not attempt to escape the battering relationship." *Id.*

[22] *See* Nancy Blodgett, *Self-Defense: Parricide Defendants Cite Sexual Abuse as Justification*, A.B.A. J., June 1987, at 36, 36. "Well over 90 percent of the kids who kill their parents are physically, emotionally or sexually abused." *Id.* "The majority of youths who commit parricide have also attempted suicide within six months of their murder." *Id.* at 37; *see also* Gardner, *supra* note 2, at 983-84. Despite Congress's attempts to protect children from abuse and neglect through legislation, incidents of child abuse rose during the 1980s. *Id.* at 983. This was compounded by the fact that charges of child abuse and neglect are rarely prosecuted. *Id.* at n.252. Even when agencies are informed of the abuse, they tend not to pursue prosecution. *Id.* at 984 n.254.

[23] Blodgett, *supra* note 22, at 37 (asserting that children commit parricide because they cannot escape abusive home life).

[24] *See id.* at 36 (discussing how children kill because they are convinced no one is going to help); *see also* Marcia Chambers, *Children Citing Self-Defense in Murder of Parents*, N.Y.

lessness similar to that of a battered woman, in that acting with deadly force seems to be the only possible escape.[25]

The rebirth of the women's movement in the 1960s brought national recognition to problems of domestic violence and, as a result, the battered woman and battered child syndromes have been legally acknowledged as support for a self-defense claim to murder.[26]

In many cases, self-defense can be successfully asserted without evidence of either the battered woman or battered child syndromes.[27] However, when a victim kills either after the violence has ceased or when imminent danger is no longer apparent, a claim of self-defense is more troublesome.[28] In this situation, the

TIMES, Oct. 12, 1986, at 38. "[D]efense lawyers are now more likely to mount a vigorous and often highly publicized defense based on the idea that battered children, like battered wives, reach a point where their fear of being killed becomes unbearable and they kill in self-defense." *Id.*

[25] *See* Blodgett, *supra* note 22, at 36. The author explains that a child acts out of fear that he or she will be murdered at some point. *Id.* The author quoted a Long Island, New York lawyer, Paul Gianelli, who stated "I sense the community can appreciate the helplessness a child feels when he or she is put in a situation by a parent where death feels like the only alternative." *Id.* at 37.

[26] *See* Ensign, *supra* note 6, at 1621-22. "Although wife battering is not a new phenomenon, it has grown more visible due to feminists who brought the issue to the public's attention." *Id.*; Rosen, *supra* note 4, at 12. "Probably as a result of the rebirth of the women's movement in the 1960s, national attention once again has focused on the problems of domestic violence." *Id.*; *see also* Chambers, *supra* note 24, at 38 (child abuse is emerging as viable defense to parricide); Margolick, *supra* note 12, at A1. "Maybe we've jumped that hurdle of being able to show to a jury and a community that a child cannot endure years and years of severe emotional, physical and sexual abuse and not be expected to defend herself at some point." *Id.* (quoting Bryan Johnson, defense attorney in Tyler, Texas).

[27] *See* Cipparone, *supra* note 17, at 432-33 (in many instances, self-defense is successful excuse for action); *see also* Bechtel v. State, 840 P.2d 1, 5 (Okla. Crim. App. 1992). The imminence requirement was satisfied because the husband moved towards the wife. *Id.* Also, because the beatings were life-threatening, the requirement of serious injury was met. *Id.* at 4. *But see* People v. Wilson, 487 N.W.2d 822, 822 (Mich. Ct. App. 1992) (imminence not apparent since husband was killed in sleep and thus, evidence regarding battered woman syndrome was necessary); State v. Hennum, 441 N.W.2d 793, 795-96 (Minn. 1989) (same); State v. Koss, 551 N.E.2d 970, 971 (Ohio 1990) (since husband killed after violence ceased, battered woman testimony was essential to defense); Margolick, *supra* note 13, at D20.

> For claims of self-defense to be upheld . . . the law has generally required a reasonable fear of imminent deadly harm. Courts and juries have found that element lacking in the killing of husbands or parents, for battered women and children often ambush their targets or kill them while they are asleep.

Id.

[28] *See* Rosen, *supra* note 4, at 13. Self-defense is not as justified where imminent danger is not apparent. *Id.* These types of cases "do not fit neatly into the categories of good and evil created by the criminal justice system." *Id.* Simply put, murder is not condoned unless it is justified. *Id.* Sometimes, the killing will be clearly justified, as when the woman retaliates *during* an acute battering incident. *Id.* However, the woman often reacts with deadly

imminence requirement for a valid self-defense claim, on its face, seems to be lacking.[29]

As more scientific knowledge of the battered woman and child syndromes emerged,[30] it became possible to overcome the myths associated with the syndromes and to better understand the battered person's perception of reality.[31] Evidence of the syndromes has become relevant to the establishment of a sincere belief by the battered person that bodily injury would ensue in a situation where one not affected by the syndrome would not possess such a

force when she probably would not have been killed during the attack or simply in response to "verbal threats unaccompanied by any contemporaneous overt physical aggression." *Id.* at 14.

[29] *See, e.g.*, People v. Lucas, 324 P.2d 933, 936 (Cal. Ct. App. 1958). The *Lucas* court stated that although harm was threatened, if it was not supported by the threatener's ability to follow through, imminence was not present. *Id.* "[T]hreats alone, unaccompanied by some act which induces in defendant a reasonable belief that bodily injury is about to be inflicted, do not justify a homicide." *Id.*; *see also Wilson*, 487 N.W.2d at 823 (questioning imminence when wife killed husband in sleep); *Hennum*, 441 N.W.2d at 801 ("substantial grounds exist which tend to excuse or mitigate [defendant's] culpability, although it does not amount to a defense"); *Koss*, 551 N.E.2d at 974 (history of physical abuse contributes to state of mind and perception of imminent danger); *Bechtel*, 840 P.2d at 5 (victim must be threatened with severe force at moment she kills attacker); Cipparone, *supra* note 17, at 437. "[T]he threatened harm might never occur, and even if it does, it might not rise to a level justifying the use of deadly force in response." *Id.* "Accordingly, a defendant . . . must show that death or serious bodily injury was imminent at the particular instant at which the killing occurred." *Id. See generally* Susan Estrich, Book Note, *Defending Women*, 88 MICH. L. REV. 1430, 1432 (1990) (reviewing CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF DEFENSE AND THE LAW (1989)). "The hard question in self-defense cases, however, is not whether it will suffice for a woman to use less force than her male attacker; it is whether she is privileged to use more, to use deadly force when he may not." *Id.*; Leslie Malkin, Book Note, 18 OHIO N.U. L. REV. 623, 625 (1992) (reviewing GILLESPIE, *supra*). "[T]he requirement of imminent danger is often what poses the largest roadblock to the battered woman's use of self-defense in a trial." *Id.*; Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 634 (1980). "Homicides committed by battered women frequently occur with a time lag, while the man is asleep or while his back is turned." *Id.* This poses obstacles to the women's self-defense claim. *Id.*

[30] *See* WALKER, *supra* note 19, at 242-50 (discussing medical acceptance of battering syndromes and steps medical and psychiatric professions are taking to prevent domestic violence).

[31] *See* Dunn v. Roberts, 963 F.2d 308, 313 (10th Cir. 1992) (discussing expert testimony needed to "dispel . . . perception that a woman in a battering relationship is free to leave at any time," further explaining why women stay despite repeated abuse); *Wilson*, 487 N.W.2d at 824 (discussing need to dispel common misconceptions concerning child's behavior following sexual abuse); *Koss*, 551 N.E.2d at 973. "In determining whether the defendant had reasonable grounds for an honest belief that she was in imminent danger, you must put yourself in the position of the defendant, with her characteristics, knowledge, or lack of knowledge, and under the same circumstances and conditions that surrounded the defendant at the time." *Id.*; *Bechtel*, 840 P.2d at 8. "Misconceptions regarding battered woman abound, making it more likely than not that the average juror will draw from his or her own experience or common myths, which may lead to a wholly incorrect conclusion." *Id.*

belief.[32] Thus, evidence of the syndromes has been utilized in the majority of jurisdictions to prove lack of mental culpability,[33] and to establish self-defense when a battered person kills his or her abuser.[34] However, critics argue that these victimization defenses

[32] *See Koss*, 551 N.E.2d at 977 (although battered woman may have valid self-defense claim, nonbattered woman would not); *Bechtel*, 840 P.2d at 8. "Expert testimony . . . is admissible if it will assist the trier of fact in search of the truth and augment the normal experience of the juror by helping him or her draw proper conclusions concerning particular behavior of a victim in a particular circumstance or circumstances." *Id.*; *see also In re Meyer*, 132 Misc. 2d 415, 418, 504 N.Y.S.2d 358, 361 (Fam. Ct. Kings Cty. 1986). "[B]oth the legislature and the courts have broadened the rules of evidence in child protective proceedings to permit the trial court to receive relevant evidence which would not be admissible in other litigations." *Id.*

[33] *See, e.g.*, *Dunn*, 963 F.2d at 313. In *Dunn*, a battered woman asserted that her affliction with the battered woman syndrome prevented her from having the requisite mental intent to commit the crime of aiding and abetting her husband in a felony. *Id.*; *Ex. rel.* Betty J.W., 371 S.E.2d 326, 327 (W. Va. 1988). In *Betty J.W.*, the mother of five children was charged with "knowingly allowing" another person, her husband, to abuse their children. *Id.* The mother offered evidence of the battered woman's syndrome to rebut the presumption that she condoned the behavior by not leaving immediately. *Id.* at 332. The court stated that the battered woman's syndrome did not relieve the defendant of obligation, but did suffice to show that waiting until her husband was away to remove the children was reasonable. *Id.*; *see also* United States v. Homick, 964 F.2d 899, 905 (9th Cir. 1992). Although the battered woman's syndrome was deemed not to have influenced the defendant-wife in abetting her husband in a crime, the court did acknowledge that under certain circumstances, the battered woman syndrome is relevant to the charges of aiding and abetting. *Id.*; Daniel Wise, *Sentence Reduction Given Abused Woman*, N.Y.L.J., Oct. 23, 1992, at 1. A Brooklyn judge reduced a battered woman's sentence for possession of cocaine with intent to distribute to the minimum of 60 months. *Id.* In doing so, he stated that a departure from strict adherence to sentencing is authorized "when [it] 'hinder[s]' the objective of providing a 'just punishment for the offense.' " *Id.* (quoting Judge Jack B. Weinstein, in United States v. Gaviria, CR89-901, United States District Court, E.D.N.Y., Oct. 22, 1992). "The guidelines . . . do not promote 'just punishment' because they fail to take account of the 'endemic sociological and psychological realities' facing 'subservient women.' " *Id.* "Such women . . . 'deserve less punishment than the usual defendant when the man orders her to commit a crime and she obeys.' " *Id.*; Jahnke v. State, 682 P.2d 991, 1043 (Wyo. 1984) (admitting expert testimony on history of abuse of parricide defendant to explain how battered children perceive imminence).

[34] *See, e.g.*, Hawthorne v. State, 408 So. 2d 801, 804 (Fla. Dist. Ct. App. 1982) (evidence of abuse admitted to support self-defense); Smith v. State, 277 S.E.2d 678, 683 (Ga. 1981) (evidence of battered woman syndrome admitted); State v. Hundley, 693 P.2d 475, 475 (Kan. 1985) (evidence of battered woman syndrome admitted to support self-defense); May v. State, 460 So. 2d 778, 784 (Miss. 1985) (evidence of abuse admitted to demonstrate battered woman syndrome); State v. Kelly, 478 A.2d 364, 372 (N.J. 1984) (allowed expert testimony on battered woman syndrome for self-defense); People v. Torres, 128 Misc. 2d 129, 131, 488 N.Y.S.2d 358, 360 (Sup. Ct. Bronx Cty. 1985) (testimony regarding battered woman syndrome admitted); *Koss*, 551 N.E.2d at 970-71 (expert testimony admitted to support battered wife's claim of self-defense); *see also* Joelle A. Moreno, *Killing Daddy: Developing a Self-Defense Strategy for the Abused Child*, 137 U. PA. L. REV. 1281, 1297 (1989). The author discusses in detail two parricide cases where testimony concerning previous abuse was admitted. *Id.* In the first, a teenage boy tried on many occasions to kill his father. *Id.* He was subsequently charged with attempted murder and acquitted after six weeks of testimony regarding the physical and sexual abuse the boy was forced to endure from his father. *Id.* at 1298. The second depicts the case of a boy who killed his legal guardian. *Id.*

provide the defendant with an easy "excuse" to avoid the seriousness of the crime committed.[35]

A. *Theory of Excuse*

Those who believe the admission of syndrome evidence should be barred argue that such practice not only stretches traditional self-defense concepts beyond their common law and statutory meanings, but also permits an acquittal where one would not otherwise be had.[36] These critics reject the notion that a battered person's behavior is rooted in self-defense, and argue that it is simply an excuse in the guise of justification.[37]

Our criminal law provides specific defenses to protect those

Testimony and evidence of previous beatings was allowed, but the jury convicted him anyway. *Id.* However, the jury did ask the judge for leniency in sentencing, and the boy was sentenced to one year probation and a $1,000 fine. *Id.*; Hansen, *supra* note 12, at 28 (discussing Texas case which allowed evidence of previous abuse of defendant-daughter by father in father's murder trial); Margolick, *supra* note 12, at D20 (discussing case overturning murder conviction of abused stepson). *But see* Fultz v. State, 439 N.E.2d 659, 662 (Ind. Ct. App. 1982) (evidence of battered woman syndrome properly excluded in effort to prove self-defense because deceased's threats were insufficient to lead defendant to form reasonable belief of imminent danger); State v. Stewart, 763 P.2d 572, 577 (Kan. 1988) ("There is no exception to this requirement [imminent danger] where the defendant has suffered long-term domestic abuse and the victim is the abuser."); State v. Martin, 666 S.W.2d 895, 900 (Mo. Ct. App. 1984) (fact that defendant was subject to past abuse was irrelevant if no imminent danger); State v. Norman, 378 S.E.2d 8, 14 (N.C. 1989) (evidence of abuse was properly excluded where there was no imminent danger).

[35] *See infra* notes 36-37, 39, & 41-42 (discussing theory of excuse).

[36] *See* Rosen, *supra* note 4, at 15 n.18.

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

Id. (citations omitted). *But see* Estrich, *supra* note 29, at 1437. "I am not ready to abandon the requirements of self-defense . . . . Admitting evidence of past batterings and expert testimony of Battered Woman's Syndrome may not move us to try walking in that woman's shoes, but at least it tells us more about the person we are judging." *Id.*

[37] *See* Rosen, *supra* note 4, at 22. "[E]xcuse focuses on the actor's subjective perceptions. An excused actor has committed a harmful act that the criminal law seeks to prevent. Unlike a justified act, the excused act did not avoid a greater societal harm or further a greater societal interest." *Id.* The actor is still not liable because the manner in which it was committed does not satisfy the components deemed necessary to be criminal—mainly a vindictive or guilty mind. *Id.* "The actor is excused despite the harmful act because, due to internal or external pressure, [he or she] was not morally blameworthy." *Id.* The crime was committed in a manner and under such circumstances that the excused "did not have a fair opportunity to choose meaningfully whether to inflict the harm." *Id.* Because the law presumes free will, one who cannot make a conscious decision as to whether to obey or violate the law is not a proper individual for criminal punishment. *Id.* As a result, excuses apply only when the conduct in question was mostly a result of "coercive influences." *Id.*

lacking criminal intent.[38] Therefore, while the law recognizes that battered women and children do not satisfy the statutory definition of possessing a criminal mind, it is debated whether they should be entitled to a complete justification defense.[39] Critics enumerate potential problems if such defendants are afforded a valid self-defense claim.[40] They fear that such an expansion of self-defense will encourage self-help and the use of force in revenge, and thereby open the door for abuse.[41] These opponents contend that, ultimately, there will be an undesirable extension of the laws of self-defense to anyone who believes in his or her mind that deadly force is necessary.[42] Finally, critics claim that the law would be condoning the use of more violence than the actor was threatened with, which is, in and of itself, against the traditional rules of self-defense.[43]

[38] *See supra* note 2 and accompanying text (discussing constitutional protections for defendants lacking criminal intent).

[39] *See* Rosen, *supra* note 4, at 33-45. In discussing a theory of excuse versus a valid justification defense, the author notes:

> Principles of excuse have become merged with principles of justification in the law of self-defense. Consequently, results in some cases are illogical and inconsistent with basic principles of criminal law. The problem is particularly apt to arise when demands are made to justify self-help behavior that is harmful to society in instances where the actor cannot fairly be held blameworthy because of circumstances particular to that individual.

Id. at 45.

[40] *See infra* notes 42-44 and accompanying text (discussing potential problems of allowing defense supported by syndrome).

[41] *See* Rosen, *supra* note 4, at 15. "Much of the debate concerns the potential impact the defense may have on the ability of the criminal law to deter battered women [and children] from engaging in unnecessary self-help or from killing in revenge or retaliation." *Id.*; Jahnke v. State, 682 P.2d 991, 1004-08 (Wyo. 1984). In fear of promoting the use of self-help, the court refused to allow psychiatric testimony on the effect of long-term abuse on the defendant's perception of danger on the night he murdered his parent. *Id.*

[42] *See* Rosen, *supra* note 4, at 15 (discussing possibility of undesirable extension of self-defense); Mihajlovich, *supra* note 7, at 1263-69 (discussing how allowing testimony on battering syndromes is problematic); *Jahnke*, 682 P.2d at 1004-08 (rejecting subjective approach in child abuse case because beyond traditional self-defense standards).

[43] *See* Estrich, *supra* note 29, at 1430. "[T]hese women responded not only with violence, but with greater violence. [There] are cases in which abused women killed their husbands, are tried for murder, and plead self-defense. And mostly, they fail." *Id.*; Rosen, *supra* note 4, at 13. When battered women kill it is often difficult to judge imminent danger. *Id.* Despite the battered woman's previous victimization, her perception of the danger at the time of the murder may have been distorted. *Id.* The woman may have perceived that the harm was deadly, when it really was not. *Id.*; *see also Jahnke*, 682 P.2d at 1008. The court refused to acknowledge a self-defense claim for parricide by holding "whoever purposely and with premeditated malice . . . kills any human being is guilty of murder." *Id.*

B. Subjective Approach

Although there are potential problems with admitting syndrome evidence, a plausible solution exists. Even though criminal law tends to be overinclusive, it need not approach admission of the syndromes on an all or nothing basis. Therefore, while this Note does not suggest that the mere evidence of prior abuse will exculpate a defendant, it is suggested that due to the uniqueness of a battered person's position, a subjective approach would serve the defendant's needs, while simultaneously furthering the goals of the law. Implementing a subjective approach as some courts already do, would enlighten the jury as to the abuser's course of conduct in similar situations.[44]

By invoking the subjective standard, the law is neither expanding the traditional laws of self-defense, nor creating an excuse for acquittal. The subjective approach merely provides the jury with a complete understanding of the situation to accurately assess the presence of imminent danger.[45] Therefore, the pivotal

[44] *See* WALKER, supra note 19, at 73. Despite the frequency of the battering incidents, an abused person may not know that a specific beating is imminent. *Id.* However, Dr. Walker reports that once the beating begins, all battered persons are well aware that the beating can be fatal. *Id.* at 75; *supra* notes 18-22, 46 and accompanying text (discussing how battering incidents happen in reoccurring cycles and how battered person perceives imminent danger). *But see* State v. Koss, 551 N.E.2d 970, 977 (Ohio 1990). The court suggested that to invoke a subjective standard is to provide the battered woman with an excuse and not a justification defense. *Id.* The majority stated that the defendant responded to both external and internal pressures, for which she was not responsible but which "were created by her social reality as a battered woman." *Id.* The court further noted that, although a battered woman was not to blame for her conduct, a woman who did not suffer from the syndrome would be culpable under identical circumstances. *Id.*; Rosen, *supra* note 4, at 18-19. The author notes:

> Each justification defense is defined by a particular set of circumstances under which it is appropriate to disregard the criminal law's prohibition against acting. The law assumes that, when the circumstances that define the justification exist, the defendant has accomplished a socially desirable objective by committing the act or, at least has not harmed society.

Id. Thus, justified conduct is desired and encouraged. *Id* at 19. "In a situation of conflict, the justified act is the one that should prevail." *Id.* Paul Robinson, "a leading proponent of systemization of criminal defenses," has set forth three categories of justification defenses: "lesser evils, authorized use of defensive force, and authorized use of aggressive force." *Id.* at 19-20. According to Robinson, all three categories are justified because in each, the benefit to society is greater than the harm it causes society. *Id.* at 20.

[45] *See* Estrich, *supra* note 29, at 1436. "[R]easonableness is not an invitation to blind ourselves to particular realities of the situation in favor of normative standards that simply are not applicable. . . . [I]f we can be convinced that the woman [or child] is right, or even probably right, then how can [his or] her belief not be reasonable?" *Id.* In other words, implementing the subjective standard would allow a jury to see the reasonableness from a battered person's perspective, whereas objectively, a nonbattered person would not per-

question has been whether evidence of the syndromes is probative of the defendant's reasonableness in his or her belief that he or she was in imminent danger of death or serious bodily harm.[46] The special subjective knowledge of the battered woman or child has cast additional light on this inquiry.[47] For example, the battered person may have prior knowledge of the abuser's behavior patterns which usually precede the abuse, and thus will know when another beating is imminent.[48] Although normal threats of violence will not justify the use of deadly force, threats in a battering relationship must be taken more seriously since such threats are usually carried out.[49] Therefore, if jurors are instructed to put themselves in the shoes of the battered person under the same circumstances, they too may sense the presence of imminent danger.[50] Accordingly, expert testimony regarding the

ceive such danger. *Id.*

[46] *See id.* "To the extent that her experience as a battered woman, and the syndrome from which she suffers, makes her a better judge than us of the seriousness of the situation she actually faces, there should be no question that such evidence is not only relevant, but also highly probative." *Id.* The woman and the expert may possess knowledge concerning the risks involved in a battering relationship with which the average lay person is not familiar. *Id.* A battered person may accurately foresee a serious beating where a nonafflicted person would simply not recognize the danger. *Id.*; *see also* People v. Jackson, 95 Cal. Rptr. 919, 921 (Cal. Ct. App. 1971) ("the diagnosis of the 'battered child syndrome' has become an accepted medical diagnosis"); People v. Henson, 33 N.Y.2d 63, 70, 349 N.Y.S.2d 657, 665, 304 N.E.2d 358, 361 (1973). "[A]lthough the decision to admit such expert testimony is within the discretion of the trial court, there is little doubt of its relevancy in [child] prosecutions . . . ." *Id.*

[47] *See supra* notes 45-46 and accompanying text (discussing how circumstances under which battered persons live render them able to perceive seriousness of danger where one not afflicted may not); *see also* Estrich, *supra* note 29, at 1436 (discussing how battered person is best judge of seriousness of attack by his or her abuser).

[48] *See* Estrich, *supra* note 29, at 1436 (discussing effects of continual beatings on abused and how abused person perceives abuser's behavior in different, and possibly more accurate, light).

[49] *See* State v. Koss, 551 N.E.2d 970, 973 (Ohio 1990). The *Koss* court found that "[e]xpert testimony regarding the battered woman syndrome can be admitted to help the jury not only understand the battered woman syndrome but also to determine whether the defendant had reasonable grounds for an honest belief that she was in imminent danger when considering the issue of self-defense." *Id.*; GILLESPIE, *supra* note 29, at 68 (discussing effects of threats in battering context); *see also In re Young*, 50 Misc. 2d 271, 272-73, 270 N.Y.S.2d 250, 252 (Fam. Ct. Westchester Cty. 1966). "The overriding concern of the Family Court is the abused child. If the Court is to effectively protect that child . . . it is apparent that rules of evidence must be adopted which will permit the Court a full inquiry into all of the facts and circumstances . . . ." *Id.*

[50] *See* State v. Hennum, 441 N.W.2d 793, 798 (Minn. 1989) (expert testimony allowed to "show the reasonableness of the defendant's fear that she was in imminent peril of death or serious bodily injury."); Estrich, *supra* note 29, at 1436 (evidence of previous beatings can reveal reasonableness of defendant's perceptions); Moreno, *supra* note 34, at 1286. "Battered children and women perceive, more acutely than strangers, the imminence and

syndrome should be admissible to prove that the defendant had a subjective belief of imminent danger.[51]

II. THE NEED FOR EXPERT TESTIMONY

There are many myths concerning the circumstances surrounding abused victims.[52] Mainly, society is unsympathetic and often views the passive behavior of a woman as acceptance of the attacks, and not a result of "learned helplessness;" thus, her predicament is her own fault and not her abuser's.[53] Although similar misconceptions exist for battered children, due to society's views of the vulnerability of children, their helplessness is more easily

degree of danger at the hands of their abusers. Victims of continued abuse 'become attuned to stages of violence . . . [and learn to] interpret certain conduct to indicate an imminent attack or a more severe attack.' " *Id.* (quoting Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 127 (1985).

[51] *See infra* notes 61-70 (discussing need for expert testimony on battering syndromes to support defense to murder).

[52] *See* Malkin, *supra* note 29, at 628. "[J]uries are usually unfamiliar with domestic violence. . . . [T]he use of the 'reasonable man' standard results in juries being unable to find the abused woman's actions justifiable and reasonable." *Id.* Society simply does not associate violent acts with women. *Id.* "Some judges, prosecutors, and police officers still retain the attitude that the woman 'asked for it,' or worse, deserved it." *Id.* at 627; *see also* Ibn-Tamas v. United States, 407 A.2d 626, 655 (D.C. 1979) (refusing to reverse lower court decision to exclude expert testimony on battered woman syndrome because of lack of scientific knowledge); Commonwealth v. Moore, 514 N.E.2d 1342, 1345 (Mass. App. Ct. 1987) (refusing to reverse lower court's decision omitting expert testimony on battered woman syndrome because self-defense was never asserted, therefore imminence question was irrelevant); Ensign, *supra* note 6, at 1625. The author notes that most people do not know of the severe violence that occurs in abusive relationships and tend to believe that divorce is the answer to spousal abuse problems. *Id.* What these people do not take into consideration is the wife's emotional or economic dependence on her husband. *Id.*

See generally KERSTI YLLO, FEMINIST PERSPECTIVES ON WIFE ABUSE 14 (1988). "[T]he U.S. Department of Health, Education, and Welfare noted that children from homes where the wife is battered are at a very high risk of receiving their father's abuse." *Id.* "Similar to the battered woman scenario, battered child homicide cases receive less judicial sympathy." *Id.* "Although expert testimony is extremely important in homicide defense cases, it is usually excluded." *Id.* at 1640. Despite the concern and attention given to child abuse in this country, there are still instances where the system fails. *Id.* As with woman battering, the legal system, and society in general, cannot rely merely on the progress made to date. *Id.*; Hansen, *supra* note 12, at 28. "Lawmakers and the Courts are just starting to extend to battered kids the same right to defend themselves that battered women have largely won." *Id.*; Margolick, *supra* note 12, at D20. Although there is a present movement recognizing an abused child's right to act in self-defense, it is "intermittent." *Id.*

[53] Ensign, *supra* note 6, at 1624 (discussing misconceptions about battered woman's predicament and her refusal/inability to leave). *But see* People v. Garcia, 54 Cal. App. 3d 61, 65-66 (Cal. Dist. Ct. App. 1975), *cert. denied*, 426 U.S. 911 (1976). The *Garcia* court noted that since the 1970s, courts have been more amenable in allowing testimony concerning the man's behavior and his threats to harm the woman in determining the battered woman's reasonableness in her belief that the use of deadly force was necessary to avert the threatened harm. *Id.*

understood.[54] The two syndromes require expert testimony in both to enlighten the jury as to the reasonableness of the individual's perception of imminent danger.[55]

Where the threat of death or serious bodily harm is not imminent, a court should, according to concepts of traditional self-defense, require the woman or child to explain why he or she did not resort to an alternative course of action before turning to violence.[56] If there was a safe avenue of retreat available, some feel that such an avenue should have been pursued.[57] It is also argued that a history of battering by the now-deceased should not support

[54] *See* Moreno, *supra* note 34, at 1301 n.145. "Parents' actions against their children have a strong influence because of the nature of the parent-child relationship." *Id.* Children depend upon their parents for all their needs, i.e., survival, affection, attention and " 'an understanding of what the world in which they live is all about.' " *Id.* (quoting Ellen Bass, *Introduction* to I NEVER TOLD ANYONE: WRITINGS BY WOMEN SURVIVORS OF CHILD SEXUAL ABUSE 23, 26-27 (E. Bass & L. Thornton eds., 1983)); *see also* Gardner, *supra* note 6, at 984-85 nn.254-55. Agencies designed to protect children often did not prosecute child abusers, which spurred Congress to enact reporting laws. *Id.* n.254. In addition, many states such as Arkansas, Maine, Massachusetts, Minnesota, Missouri, New York, Pennsylvania, Virginia, Washington, and West Virginia have enacted similar statutes requiring that any suspicion of child abuse be reported to the appropriate authorities. *Id.* These states require that suspicion of child abuse be reported directly to the District Attorney's office and/or medical examiner or coroner. *Id.* at 985 n.255; Karla O. Boresi, Comment, *Syndrome Testimony in Child Abuse Prosecutions: The Wave of the Future?*, 8 ST. LOUIS U. PUB. L. REV. 207, 209 (1989). Although expert testimony is not "automatically admissible," recently it seems that more courts are permitting such evidence, at least to rebut the suggestion that the injuries to the child were accidental. *Id.* The battered child syndrome tends to stand up to the requirement of scientific certainty and does not unfairly prejudice the defendant. *Id.* at 213. The syndrome has been determined to be a reliable scientific concept, and thus is usually admitted into court. *Id.* (citations omitted).

[55] *See* Ensign, *supra* note 6, at 1624 (discussing similarities between two syndromes and how expert testimony needed in both); *see also* State v. Koss, 551 N.E.2d 970, 974 (Ohio 1990). "Expert testimony would be essential to rebut the general misconceptions regarding battered women." *Id.*; Kit Kinports, *Women on the Verge*, A.B.A. J., Nov., 1989, at 129, 130 (reviewing LENORE WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (1989)) (discussing need for expert testimony on battered woman syndrome to aid in self defense claim); Rosen, *supra* note 4, at 39. "Among the trial tactics the creators of the battered woman's defense recommend is the careful and strategic use of lay and expert testimony to neutralize stereotypical prejudices and ideas that may interfere with the jury's ability to perceive the defendant's conduct as a reasonable act of self-defense." *Id.*

[56] *See* Estrich, *supra* note 29, at 1433. "Is it so wrong at least to ask whether alternatives were available? Is it unreasonable to expect that where death or serious bodily harm is not imminent, a woman [or child] be required to explain why she did not resort to such alternatives before she resorts to armed violence?" *Id.*

[57] *See id.* at 1434 (explaining that if one can safely retreat, that, and not deadly force, should be first option); *see also* Malkin, *supra* note 29, at 626. The author argues that unless there is an overt aggressive act by the abuser, deadly force is not justified. *Id.* The author believes imminent danger cannot be present if the abuser is asleep. *Id.* The abused person had alternatives, i.e., leaving the home or seeking help, which would have avoided both a beating and the abuser's death. *Id.* In short, verbal threats do not justify deadly force. *Id.*

a battered person's claim of self-defense but should work against it.[58] Because the woman or child is aware that a beating is certain to occur at some time soon, the duty to remove oneself from the situation has increased.[59] Failure to do so should not convert a genuine belief into imminent harm.[60]

The expert can show that the circumstances the battered person is forced to deal with are comparable to those of an individual in a hostage situation: the battered person lives under long-term, life-threatening pressures which put him or her in constant fear of death or serious bodily injury.[61] The battered person fears a threat not just when it is made, but for days, weeks, and even months later.[62] The determinative issue should not be whether imminent danger should be a required element, but rather how to interpret the imminent danger of a battering situation. The criminal justice system must look not to whether the danger was in fact objectively imminent, but whether, given the circumstances, the defendant had a reasonable belief that danger was imminent.[63] An expert is able to "shed light on why years of unrelenting abuse might foster an apprehension of imminent danger in these cases."[64] Specifically, with the battered woman syndrome, the ex-

[58] *See* Malkin, *supra* note 29, at 626 (arguing that lack of reasonableness is shown by not removing self from obviously dangerous situation).

[59] *Id.*

[60] *Id.*

[61] *See* LAFAVE & SCOTT, *supra* note 14, at 458. The authors present a hypothetical to illustrate the problems of the imminence requirement. *Id.* If the captor in a hostage situation tells the hostage that he intends to kill him in three days, and if, on the first day, the hostage has an opportunity to kill the captor and avoid his own death, isn't he justified in doing so? *Id.* Strict adherence to the imminence requirement, in effect, would prevent a hostage from using deadly force until his captor is actually attacking him. *Id.* For the battered woman, the situation is analogous. *Id.* She sees no escape and does not feel safe. *Id.* She fears the next attack, and unless she resorts to deadly force, another beating is unavoidable. *Id.* Thus, a battered woman perceives the threat as imminent. *Id.*; *see also* Suh, *supra* note 7, at 63. The battering relationship is comparable to torture. *Id.* "It's a kind of captor/captive process where he's totally controlling her life. One of the things that happen when the violence reaches terrifying levels is that you start to get depressed and numb. It's a common survival tactic for victims of all kinds of violence . . . ." *Id.*

[62] *See* LAFAVE & SCOTT, *supra* note 13, at 458 (discussing effects of "learned helplessness" resulting from repeated abuse).

[63] *See* Malkin, *supra* note 29, at 626. "The woman [or child] obviously should not have to wait until [his or] her attacker is already beating [him or] her before [he or] she can resort to deadly force." *Id.*

[64] Kinports, *supra* note 55, at 130; *see* Moreno, *supra* note 34, at 1288. "Abused children, like battered women, perceive the behavior of their batterer with a degree of knowledge and familiarity not accounted for in the rational observation standard of the self-defense model; Rosen, *supra* note 4, at 34 ("The woman's fear of the man will be influenced by her knowledge of his character and reputation for violence.")." *Id.*

pert can explain why a woman entered into such a relationship and why she remained despite the abuse.[65] In child abuse cases, the expert can show the reasonableness of self-defense after enduring years of severe "emotional, physical and sexual abuse."[66] The expert's job is to make a battered woman or child's reality available to the finder of fact, and demonstrate how his or her actions had "purpose and logic"[67] within the context of the horror which he or she has faced.[68] Since expert testimony is admissible if it will assist the trier of fact in search of the truth, evidence concerning the abuse of the defendant should be admitted to evaluate whether the abused's actions were reasonable in light of his or her situation.[69]

The majority of courts have recognized the importance of such testimony and have therefore admitted expert testimony on the battering syndromes.[70] These courts have made admission contingent upon the following four criteria: A) it must be "relevant and material"[71] to the issue of self-defense; B) the subject of the expert testimony cannot be within the common understanding of the jury; C) the battering syndrome must be "sufficiently devel-

[65] *See* WALKER, *supra* note 19, at 29-30 (discussing psychological inability to leave after battering).

[66] Margolick, *supra* note 12, at A1. "Maybe we've jumped that hurdle of being able to show to a jury and a community that a child cannot endure years and years of severe emotional, physical and sexual abuse and not be expected to defend herself at some point." *Id.*

[67] Kinports, *supra* note 55, at 131.

[68] *See* Malkin, *supra* note 29, at 627. In discussing the abusive relationship, the author states that the abused may be acting reasonably by staying. *Id.* "The victim may have experienced years of isolation from family or friends imposed by the batterer. [He or s]he often has no real support system." *Id.* Thus, the victim may feel as if he or she has no where to turn. *Id.* The victim simply remains with the abuser and hopes things will get better. *Id.* His or her self-confidence is too low for anything else. *Id.*

[69] *See* Blodgett, *supra* note 22, at 37. An expert can show that victims of domestic abuse have a "special feeling of imminence — they have to live with the victim." *Id.* The author claims that a threat that others may not reasonably perceive as imminent would reasonably appear imminent to an abused individual. *Id.*

[70] *See* People v. Smith, 387 N.W.2d 814, 816 (Mich. 1986) (stating if expert testimony will aid factfinder or help determine facts in issue, it should be admitted); State v. Kelly, 478 A.2d 364, 379 n.13 (N.J. 1984) (holding expert testimony admissible to prove objective reasonableness of defendant's fear of danger); People v. Henson, 33 N.Y.2d 63, 71, 349 N.Y.S.2d 657, 665, 304 N.E.2d 358, 362 (1973) (discussing how battered child syndrome has become "an accepted medical diagnosis"); State v. Leidholm, 334 N.W.2d 811, 817-18 (N.D. 1983) (same); State v. Koss, 551 N.E.2d 970, 974 (Ohio 1990) (discussing how battered woman syndrome has gained acceptance as admissible evidence); State v. Allery, 682 P.2d 312, 314-15 (Wash. 1984) (allowing expert testimony on battered woman syndrome).

[71] State v. Thomas, 423 N.E.2d 137, 138 (Ohio 1981).

oped, as a matter of commonly accepted scientific knowledge;"[72] and D) "its prejudicial impact [cannot] outweigh its probative value."[73]

III. Criteria for Admitting Expert Testimony

A. *Relevance*

Expert testimony on battering syndromes is relevant to the issue of whether the defendant acted in self-defense because it can explain the reasonableness of the battered person's perception that danger or great bodily harm was imminent.[74] The reasonableness and imminence requirements of self-defense can only be understood within the framework of the battering syndromes.[75]

B. *Outside the Knowledge of the Jury*

On its face, the expert's testimony appears to provide a jury with common knowledge.[76] Generally, a jury is able to assess the

[72] *Id.*

[73] *Id.*

[74] *See supra* notes 45-52 and accompanying text (discussing imminence in context of battered women and children).

[75] *See Kelly*, 478 A.2d at 373. *Kelly* was one of the first cases to emphasize the need for expert testimony on the battered woman syndrome. *Id.* The court found that the syndrome was relevant to the woman's self-defense claim because it related to the issue of whether she honestly and reasonably believed she was in imminent danger. *Id.* at 377; West v. State, 617 P.2d 1362, 1366 (Okla. Crim. App. 1980). A defendant must show that there was a reasonable belief as to the imminence of great bodily harm or death and as to the force necessary to repel it. *Id.* Many of the symptoms of the battered woman syndrome are very relevant to the standard of reasonableness in self-defense, i.e., a greater sensitivity to danger stemming from the intimacy of the relationship. *Id.*; Price v. State, 98 P. 447, 459 (Okla. Crim. App. 1908). The *Price* court held that "[w]hat is or is not an overt demonstration of violence varies with the circumstances." *Id.* Thus, considering the battered woman's particular circumstances, her perception of the situation and her belief as to the imminence of great bodily harm or death may be deemed reasonable. *Id.*; Walker, *supra* note 19, at 31-55. The defendant's particular experiences as a battered woman affect the reasonableness of her perceptions of danger and its imminence, and of the necessary actions to protect herself. *Id.*; *see also* Hansen, *supra* note 12, at 28. "In a battering case . . . the defense tries to show how an abusive relationship can affect the battered victim's perceptions of what constitutes an imminent threat." *Id.* In Washington, a boy who shot his father as he walked through the front door was permitted to argue self-defense at trial, providing the jury with the task of evaluating whether the defendant's perception of imminency was reasonable. *Id.*

[76] *See* State v. Koss, 551 N.E.2d 970, 974 (Ohio 1990). "The difficulty with the expert's testimony is that it sounds as if an expert is giving knowledge to a jury about something the jury knows as well as anyone else, namely, the reasonableness of a person's fear of imminent serious danger." *Id. But see* Terry v. State, 467 So. 2d 761, 764 (Fla. Dist. Ct. App. 1985) (expert testimony aids jury in evaluating case); State v. Gunter, 554 A.2d 1356, 1363 (N.J. 1988) (battering relationship embodies features beyond "the jury's ken"); State v.

reasonableness of a person's fear of imminent danger.[77] However, such expert testimony is aimed at a special area of knowledge with which the jury is likely to be uninformed.[78] In fact, the average person is unfamiliar with the complex behavior of a victim involved in a battering relationship and has many misconceptions as to the options available to the abused.[79] Therefore, if an expert testifies to the pressures the woman or child endures, a jury will better comprehend the situation.[80] Hence, expert testimony enables the jury to put aside "prior conclusions" and to dispel "com-

King, 522 A.2d 455, 461 (N.J. 1987) (admitting expert testimony if subject matter is "beyond the ken of the average juror"); Estrich, *supra* note 29, at 1436 (expert testimony is only admissible if expert has "special knowledge" about something jury does not).

[77] *See* Cipparone, *supra* note 17, at 434. "In many situations, the circumstances under which a battered woman killed her batterer will have been such that she will have little difficulty satisfying the traditional self-defense standard." *Id.*; *see also* Estrich, *supra* note 29, at 1436 (expert testimony is admissible when subject beyond average knowledge of jury).

[78] *See* People v. Torres, 128 Misc. 2d 129, 134, 488 N.Y.S.2d 358, 363 (Sup. Ct. Bronx Cty. 1985). "[T]his determination that the subject matter of the battered woman is one outside of the common knowledge of the trier of fact is in line with a recent trend of decisions receiving in evidence expert testimony concerning similarly complex psychological and social phenomena." *Id.* In short, the court found that the average layman has many misconceptions regarding available options to a victim of abuse. *Id.* at 135, 488 N.Y.S.2d at 362; *see also* Tourlakis v. Morris, 738 F. Supp. 1128, 1134 (S.D. Ohio 1990) (proponents of expert testimony contend that jurors suffer from various misconceptions); State v. Hennum, 441 N.W.2d 793, 798 (Minn. 1989) (expert testimony can "dispel the common misconceptions that a normal or reasonable person would not remain in such an abusive relationship"); Commonwealth v. Dillon, 598 A.2d 963, 969 (Pa. 1991) (Cappy, J., concurring) (discussing necessity of expert testimony to dispel myths regarding battered women).

[79] *See Tourlakis*, 738 F. Supp. at 1134 ("learned helplessness" beyond ken of most jurors); *Torres*, 128 Misc. 2d at 133, 488 N.Y.S.2d at 362 (expert testimony allows jury to understand unique pressures in life of battered woman); *Dillon*, 598 A.2d at 966 (Nix, C.J., concurring) ("expert testimony can be introduced to show how battering relationship generates different perspectives"); State v. Hill, 339 S.E.2d 121, 122 (S.C. 1986) (testimony relevant to explain why women remain in abusive relationship); Moreno, *supra* note 34, at 1304. The author discusses child abuse as being "an extremely complex problem." *Id.* There are common misconceptions involving abused children. *Id.* at 1304-05. When the children try to seek help and confide in the non-abusing parent, they are usually "told that they are 'lying' or 'making it up.' " *Id.* at 1305. "The children are left 'feeling hopeless and uncared for.' " *Id.* quoting Brandt Steele, *Psychodynamic Factors in Child Abuse*, *in* THE BATTERED CHILD 81, 84 (R. Helfer & R. Kempe eds., 1987). Expert witnesses can explain these pressures to the jury. *Id.* at 1306.

[80] *See Koss*, 551 N.E.2d at 974 (expert testimony assists trier of fact in determining if defendant acted out of honest fear of imminent danger); *see also Tourlakis*, 738 F. Supp. at 1134 (expert testimony provides reasons why battered women perceive imminent danger); State v. Pargeon, 582 N.E.2d 665, 667 (Ohio Ct. App. 1991) (testimony determines if defendant acted out of honest belief of imminent danger); Hansen, *supra* note 12, at 28. In a murder case, the defense will frequently attempt to show how an abusive wife-husband or child-parent relationship can influence the battered person's views of what actually is an imminent threat. *Id.*

mon myths" in order to reach a decision on the merits.[81]

C. *Accepted Scientific Knowledge*

Since the late 1970s, many books and articles have been written on both the battered woman syndrome and the battered child syndrome.[82] Knowledge of the battering syndromes has surpassed theory and has been classified in the medical profession as a valid disorder.[83] Most courts that have dealt with these issues have held that the syndromes have gained substantial scientific acceptance in order to warrant admissibility.[84]

[81] *Torres*, 128 Misc. 2d at 133, 488 N.Y.S.2d at 362 (expert enables jury to disregard prior conclusions and myths); Kitchens v. McKay, 528 N.E.2d 603, 606 (Ohio Ct. App. 1987) (expert testimony aids trier of fact in search of truth); *see also* FED. R. EVID. 702. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*; Ensign, *supra* note 6, at 1641. "Because an average juror cannot appreciate the dynamics involved in a battering relationship, expert testimony on the battered woman syndrome and the battered child syndrome will assist the trier of fact." *Id.*

[82] *See, e.g.*, ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987) (describing battered woman syndrome); CHARLES P. EWING, BATTERED WOMEN WHO KILL (1987) (describing battered woman syndrome); WALKER, *supra* note 19, at 11-69 (same); *see also* ROBERTA KALMAR, CHILD ABUSE: PERSPECTIVES ON DIAGNOSIS, TREATMENT AND PREVENTION (1977) (same); BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE (1984) (same); NIGEL PARTON, THE POLITICS OF CHILD ABUSE (1985) (discussing alternative child abuse ideologies); Stephen Antler, *The Rediscovery of Child Abuse*, *in* THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT 39 (Leroy H. Pelton ed., 1981) (discussing battered child syndrome); Edward Zigler, *Controlling Child Abuse: Do We Have the Knowledge and/or the Will?*, *in* CHILD ABUSE 3 (George Gerbner et al. eds., 1980) (discussing battered child syndrome).

[83] *See supra* notes 18-26 and accompanying text (discussing medical determinations and definitions of battering syndromes).

[84] *See, e.g.*, People v. Burton, 153 Misc. 2d 681, 686, 590 N.Y.S.2d 972, 977 (Sup. Ct. Bronx Cty. 1992). The *Burton* court stated that the field of knowledge in both the "abused child syndrome" and the "battered woman's syndrome" was sufficiently classified and developed to be "an apt subject for judicial notice." *Id.*; *Torres*, 128 Misc. 2d at 135, 488 N.Y.S.2d at 363. "Upon careful reflection and analysis . . . it is the opinion of this court that the theory underlying the battered woman's syndrome has indeed passed beyond the experimental stage and gained a substantial enough scientific acceptance to warrant admissibility." *Id.* The *Torres* court noted that many articles and books have been published on the syndrome and recent findings of researchers have confirmed its presence. *Id.*; *Koss*, 551 N.E.2d at 974. The *Koss* court held that "the battered woman syndrome has gained substantial scientific acceptance to warrant admissibility." *Id.*; State v. Turner, 675 P.2d 539, 539 (Utah 1983) (battered child syndrome found widely accepted in medical field); *see also* Ensign, *supra* note 6, at 1637. The present trend has dictated that the testimony be admitted. *Id.* The New Jersey Supreme Court has recognized at least five books and almost 70 scientific articles and papers about the battered woman syndrome. *Id.* at 1638. Thus, the syndrome had a sufficient scientific basis to produce reasonably reliable results. *Id.* at 1635. Acceptance is granted by the scientific community when the evidence is sufficient to determine its reliability. *Id.* at 1634.

D. Probative Value v. Prejudicial Impact

Since jurors often view the expert witness as a highly educated individual in his or her field, they often tend to view such testimony as infallible.[85] Also, evidence concerning the abuse endured by the defendant may divert the jury's attention from the relevant issues to the prior bad acts and alleged bad character of the abuser.[86] Thus, trial courts must carefully consider the undue prejudicial effects that may result by admitting expert testimony.[87]

To deter the jury from focusing on the deceased's wrongdoings, an expert is not allowed to give an opinion regarding whether the victim actually suffered from the syndrome.[88] The only admissible testimony is a scientific definition of the syndrome and its symptoms.[89] Courts have held that an expert cannot state whether the

[85] *See Koss*, 551 N.E.2d at 978 (Holmes, J., concurring). Judge Holmes warned that "[i]mbued with the 'aura of infallibility' typically ascribed to expert witnesses, and benefiting from the tendency of scientific testimony to be exceptionally persuasive, the effect of the expert's testimony could be to enhance the relevance of conclusions that are not germane to a claim of lawful justification." *Id.*; *see also* Barefoot v. Estelle, 463 U.S. 880, 926 (1983) (Blackmun, J., dissenting) (expert testimony has aura of infallibility); State v. Pargeon, 582 N.E.2d 665, 666 (Ohio Ct. App. 1991) (testimony's prejudicial impact outweighs probative value); John R.T. Mitchell, Book Note, 16 URB. LAW. 527, 527 (1984) (reviewing PETER B. DORRAM, THE EXPERT WITNESS (1984)). An oft-called expert witness once stated that an expert witness is "someone who commands a cash price for his services because of an ability to wow his audience — usually a selected audience of twelve good people." *Id.*

[86] *See Koss*, 551 N.E.2d at 977 (diverting juror's attention presents real danger of abuse of system); *see also* Mihajlovich, *supra* note 7, at 1274. "The effect of the battered woman's testimony is to emphasize the defendant's weakness and helplessness, overshadowing the battered woman's right to defend herself." *Id.* Jurors tend to perceive her as the victim, not the deceased. *Id.*

[87] *See Koss*, 551 N.E.2d at 977 ("caution[ing] trial courts to carefully weigh prejudicial impact of such expert testimony").

[88] *See* State v. Hennum, 441 N.W.2d 793, 799 (Minn. 1989). In *Hennum*, the court permitted expert testimony on the battered woman syndrome, but only in a narrow context. *Id.* The court distinguished between expert testimony concerning the battered woman syndrome in general, and testimony regarding whether the defendant actually suffered from the syndrome. *Id.* The court did not allow expert testimony regarding the defendant's condition. *Id.*; *see also* People v. Aris, 264 Cal. Rptr. 167, 179 (Cal. Dist. Ct. App. 1989) (testimony cannot be used to explain defendant's belief in need to defend self and actions taken). *But see* State v. Myers, 570 A.2d 1260, 1266 (N.J. Super. Ct. 1990) (existence and impact of battered woman syndrome appropriate subject of testimony); Commonwealth v. Dillon, 598 A.2d 963, 970 (Pa. 1991) (testimony permits jury to review evidence rationally and without prejudice); *see also* People v. Draper, 468 N.W.2d 902, 903 (Mich. 1991) (same); (expert testimony limited to characteristics of an abused child); People v. Beckley, 456 N.W.2d 391, 407 (Mich. 1990).

[89] *See, e.g.*, *Hennum*, 441 N.W.2d at 799 (expert may only testify to description of general syndrome and characteristics of individual suffering from such syndrome); *see also Draper*, 468 N.W. 2d at 903 (same); (testimony in abuse cases is limited to characteristics of an abused child); *Beckley*, 456 N.W.2d at 407.

defendant actually is an abused woman or child,[90] but only whether the defendant's behavior is characteristic of an abuse victim.[91] Consequently, issues of the abused's credibility go to the jury untainted by biases created by overreliance on the expert.[92]

Because expert testimony on battered woman and child syndromes generally satisfies the four requisite criteria, it is often admitted to assist the trier of fact in its determination of self-defense.[93] However, new "victimization" defenses have emerged in recent years which have not yet reached that level of accepted scientific knowledge.[94] Among these, post-partum depression and acute grief syndrome are most noteworthy.[95]

IV. THE INSANITY DEFENSE AS APPLIED TO POST PARTUM DEPRESSION AND ACUTE GRIEF SYNDROME

As the law began to recognize that some individuals who com-

[90] *See Beckley*, 456 N.W.2d at 407 (testimony is limited to behavior traits of an abused person); *Hennum*, 441 N.W.2d at 779 (expert not allowed to testify as to whether defendant suffered from syndrome).

[91] *See Beckley*, 456 N.W.2d at 407. Expert testimony was limited to an explanation of the behavior traits at issue. *Id.* The court held that the expert could not testify as to the credibility of the child. *Id.* at 409; *see also* People v. Nelson, 561 N.E.2d 439, 443 (Ill. Ct. App. 1990) (expert cannot testify as to credibility of child victim); *Draper*, 468 N.W.2d at 903 (psychologist opinion limited to characteristics of abused child, not whether child-defendant was abused); *Hennum*, 441 N.W.2d at 799 (expert testimony limited to characteristics of an abused woman and no testimony allowed as to whether defendant was an abused woman).

[92] *See* People v. Wilson, 487 N.W.2d 822, 823 (Mich. Ct. App. 1992) (stating that it is for jury to decide credibility issue without overreliance on expert testimony).

[93] *See, e.g.*, State v. Koss, 551 N.E.2d 970, 975 (Ohio 1990). "Where evidence establishes that a woman is a battered woman, and when an expert is qualified to testify about the battered woman syndrome, expert testimony concerning the syndrome may be admitted to assist the trier of fact in determining whether the defendant acted in self-defense." *Id.*; People v. Aris, 264 Cal. Rptr. 167, 181 (Cal. Ct. App. 1989) (admitting expert testimony on battering syndrome); Ibn-Tamas v. United States, 407 A.2d 626, 655 (D.C. 1979) (same); *see also* Hansen, *supra* note 12, at 28. An appellate court in the state of Washington held that evidence that the defendant had been consistently abused by his stepfather should be admitted to allow the jury to evaluate whether the defendant's actions were reasonable with respect to his fears of imminency. *Id.*; Margolick, *supra* note 12, at D20. As a result of a new Texas law permitting a defendant accused of killing a family member to introduce evidence of prior abuse, the juries in Texas often hear "chilling" stories of battering incidents. *Id.*

[94] *See infra* notes 111-14 & 137-40 and accompanying text (discussing why post partum depression and acute grief syndrome are not accepted in medical field).

[95] *See, e.g.*, Mitchell v. Commonwealth, 781 S.W.2d 510, 511 (Ky. 1989) (defendant found guilty but mentally ill after asserting post partum depression as defense to murder of her child by suffocation and disposal of body in lake); Commonwealth v. Comitz, 530 A.2d 473, 474 (Pa. Super. Ct. 1987) (defendant found guilty but mentally ill after asserting post partum depression as defense to murder of her son by dropping him in stream).

mitted crimes were not fully responsible for their actions, an insanity defense emerged.[96] States developed guidelines and standards to aid in the determination of the sanity or insanity of a defendant.[97] The *McNaughten*[98] and the American Law Institute (ALI) tests[99] are the two models most frequently incorporated into state penal statutes.[100] To be proven legally insane pursuant to the *McNaughten* test, it must be shown that the defendant, due to a defect of reason or disease of the mind, either did not realize the nature and quality of his or her actions or if he or she did, did not know that it was wrong.[101] According to the ALI test, a defendant is legally insane if, at the time of the criminal behavior, the defendant lacked the capacity to either appreciate the criminality of his or her conduct or to conform that conduct to the requirements of the law.[102] In recent years, attempts at employing these

[96] *See* Gardner, *supra* note 6, at 968-77 (discussing emergence of insanity defense under *McNaughten* and American Law Institute tests); *see also* Brusca, *supra* note 6, at 1149-59 (same).

[97] *See infra* note 100 and accompanying text (insanity defense in various jurisdictions).

[98] *See* Gardner, *supra* note 6, at 967. The *McNaughten* test has been stated as follows: to establish a defense on the grounds of insanity,

> it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Id.

[99] *See* Brusca, *supra* note 6, at 1154-55.

> A number of jurisdictions have adopted the rule of the American Law Institute (ALI) Model Penal Code, which combines and refines the earlier insanity test. This test excuses criminal conduct which results from a mental disease or defect if the defendant lacked substantial capacity to appreciate the criminality, or wrongfulness of his conduct or to conform such conduct to the requirements of law.

Id.; *see also* AMER. LAW INSTITUTE, MODEL PENAL CODE, art 4. § 4.01 (Mental Disease or Defect Excluding Responsibility).

[100] *See, e.g.*, ALA. CODE § 13A-3-1 (1975) (adopting ALI Model Penal Code); ALASKA STAT. § 12.47.020 (1982) (same); ARK. CODE ANN. § 5-2-312 (Michie 1987) (same); CAL. PENAL CODE § 1026 (West Supp. 1990) (same); *see also* DEL. CODE ANN. tit. 11 § 401 (1982) (adopting *McNaughten* test); LA. REV. STAT. ANN. § 14.14 (West 1974) (same); N.Y. PENAL LAW § 30.05(1) (McKinney 1975) (adopting both *McNaughten* and ALI tests).

[101] *See* Brusca, *supra* note 6, at 1149-59 (discussing *McNaughten* test).

[102] *See* Gardner, *supra* note 6, at 973-76. The author discussed a case decided pursuant to the ALI test where the mother "snapped" and killed her three-month old infant by throwing him on the floor and fracturing his skull. *Id.* at 973. Although the testifying expert stated that the defendant was not schizophrenic and did know right from wrong, (which would have resulted in conviction if the *McNaughten* test was applied), she was suffering from a mental dysfunction rendering her incapable of conforming her conduct to the law. *Id.* at 973-74. As a result, her acquittal was affirmed. *Id.* at 974. The author also noted that since conviction or acquittal depends on a number of factors, including which insanity test the state adopts, the form of expert testimony given, or the severity with which the person is afflicted, consistent decisions are not possible. *Id.* at 976.

tests in cases involving dubious conditions have presented troublesome questions for the courts.

A. *Post Partum Depression*

In the 1980s, post partum depression began to emerge as a possible defense for a mother who murdered her infant child.[103] Post partum depression alters the personality of the mother and causes her to become depressed.[104] The symptoms and seriousness of the effects vary among women.[105] Thus, post partum depression has been distinguished and categorized according to its various degrees of severity.[106] The mildest and most common form is referred to as the "baby blues," where the mother experiences a period of minor emotional letdown.[107] The secondary category is called post partum depression in which the mother becomes genuinely depressed.[108] The most severe and rare form is termed post partum psychosis and is exemplified by a serious emotional dysfunction.[109]

[103] *See* State v. Barsness, 473 N.W.2d 325, 326 (Minn. Ct. App. 1991) (expert allowed to testify regarding symptoms of post partum depression); State v. Holden, 365 S.E.2d 626, 628 (N.C. 1988) (expert could testify as to whether defendant suffered from post partum depression); State v. Daniel, 354 S.E.2d 216, 217 (N.C. 1987) (post partum depression is mitigating factor for sentencing). *See generally* BLACK'S LAW DICTIONARY 778 (6th ed. 1990). Infanticide is the murder or killing of an infant soon after birth. *Id.* The fact of the birth distinguishes it from "feticide" or "procuring abortion," which is the destruction of the fetus in the womb. *Id.*

[104] *See* Grossman, *supra* note 6, at 312-13 (discussing depression felt by new mothers).

[105] *See infra* notes 107-09 (discussing levels and categories of post partum depression).

[106] *See id.*

[107] Brusca, *supra* note 6, at 1133 n.3. "The 'baby blues' is a fleeting period of emotional letdown, in which the new mothers become sensitive, moody and tearful." *Id.* Between 50 and 80% of all new mothers suffer from the "blues" after giving birth. *Id.* at n.2.

[108] *See id.* at 1134 n.3. Post partum depression, the second category, is more severe than the baby blues. *Id.* at 1142. It affects 10 to 15% of all mothers. *Id.* In this phase, "involuntary tears turn into a genuine sadness and other symptoms of depression." *Id.* at 1143. This category "is characterized by irritability, anxiety, fatigue, lack of love for the child, and a sense of guilt and inadequacy related to the inability to function as a mother." *Id.*

[109] *See id.* at 1144. Post partum psychosis is the most severe of the three categories and occurs in only one or two deliveries out of every thousand. *Id.* The mother suffers from "confusion, delirium, hallucinations, insomnia, emotional lability, fatigue and irritability." *Id.* More severe symptoms may also occur. *Id.*

> The mother may exhibit an atypical or brief reactive psychosis . . . . She often has difficulty coping with the care of the infant and may appear confused, bewildered, perplexed and dreamy, complaining of poor memory although performing normally in formal memory tests. Classically she shows signs of psychotic depression with manic or schizophrenic features and some cognitive impairment that suggests an organic disorder of the brain . . . . Excessive concern with the baby's health, guilt about lack of love, and delusions about the infant's being dead or defective are common. She may deny having given birth or report hallucinations that command her to

There are several theories concerning the cause of post partum depression, but to date, none have been substantiated as fact.[110] The predominant hypothesis is that the radical change in a woman's hormone level after pregnancy causes the mood fluctuations.[111] Others suggest that it is a "hormonally assisted grief reaction that occurs predominantly in women who have expectations of pregnancy and delivery which are not met."[112] Yet, others suggest that sociological, psychological, and biological factors, acting either separately or in conjunction, cause post partum depression.[113]

B. Acute Grief Syndrome

Acute grief syndrome results from the trauma of extreme emotional stress which affects the mental operation of the mind.[114] The extreme stress may be caused by a variety of experiences such as a death in the family, involvement in an accident, or other similar events.[115] Those claiming to suffer from acute grief syndrome contend that due to the level of stress they have encountered, their actions were not the result of a rational mind and thus warrant the protection of the insanity defense.[116]

harm the baby.
Id.

[110] *See infra* notes 111-13 (discussing possible causes of post partum depression).

[111] *See* Grossman, *supra* note 6, at 970 n.76. "The withdrawal of hormones following the delivery of the placenta is believed to be the main contributor to [post partum depression]." *Id.*

[112] *Id.* at n.77. Factors such as the woman's attitude toward her pregnancy, whether the pregnancy was planned or not, the mother's degree of narcissism, or vulnerability have been suggested as potential contributors. *Id.*

[113] *See* Gardner, *supra* note 6, at 956-57 (discussing various factors which may contribute to post partum depression).

[114] *See* People v. Burton, 153 Misc. 2d 681, 683, 590 N.Y.S.2d 972, 974 (Sup. Ct. Bronx Cty. 1992). The acute grief syndrome is caused by trauma attendant upon circumstances of extreme stress. *Id.* It is the mental operation of the mind produced by emotional stress which affects human behavioral patterns. *Id.* In *Burton*, the defendant confessed to murdering his mother, and, at his trial, tried to introduce expert testimony on the acute grief syndrome to show that he confessed because of the stress that he was under. *Id.* The defendant argued that factors contributing to his stress were his young age, discovering his mother's body, coping with her death, and his father's absence from New York during the ordeal. *Id.* In addition, the defendant asserted duress as he was isolated from his loved ones while at the police station and was threatened to be charged with the statutory rape of his girlfriend if he did not confess to the murder. *Id.* The defense concluded that the acute grief which the defendant was forced to deal with manifested a traumatized psychological state which caused him to confess to a crime he did not commit. *Id.*

[115] *See id.* (describing situations where there may be extreme stress causing acute grief).

[116] *See id.* In *Burton*, the defendant contended that "evidence [of acute grief syndrome]

C. *Failure Under the Present Insanity Standards*

In most instances, one suffering from post partum depression or acute grief syndrome will not be able to sufficiently prove insanity under the present standards.[117] As mentioned, the *McNaughten* test requires that a defendant not know that his or her conduct was wrong.[118] Courts have held that when a defendant tries to hide his or her crime by fabricating a story, there is an inference of sanity.[119] Judges tend to interpret concealment and denial as proof of the defendant's knowledge of right and wrong; and since most mothers who kill their babies try to hide their crime, failing to meet the standards of the *McNaughton* test is inevitable.[120]

has potential to assist the jury and should, with adequate instruction, nonetheless be tested through cross-examination and countervailing expert testimony." *Id.* at 691, 590 N.Y.S.2d at 978. However, the court rejected this contention for two reasons. *Id.* First, it did not meet the prevailing New York standard of scientific reliability, and second, the testimony was not necessary since it tracts the same process which the jury is fully capable of understanding, such as determining the witness's credibility. *Id.*; People v. Shelton, 88 Misc. 2d 136, 141-46, 385 N.Y.S.2d 708, 711 (Sup. Ct. New York Cty. 1976), *aff'd*, 78 A.D.2d 821, 434 N.Y.S.2d 649 (1st Dep't 1980). In *Shelton*, the defendant asserted extreme emotional distress as a defense to murder charges. *Id.* at 141, 385 N.Y.S.2d at 712. The court noted that extreme emotional disturbance is an emotional state of an individual who has no mental disease or defect rising to the level established by insanity defense statutes. *Id.* at 146, 385 N.Y.S.2d at 716. An individual who is extremely emotionally disturbed due to exposure to an extremely unusual amount of stress tends to lose self-control and reason. *Id.* at 141, 385 N.Y.S.2d at 712. He or she is overcome by intense feelings, such as passion, anger, distress, and grief. *Id.* In these cases, expert testimony has been found to be relevant and material, although not controlling, since the jury may reject the defense offered by the expert. *Id.* at 146, 385 N.Y.S.2d at 715. However, it should be noted that although emotional distress evidence was admitted, it was done so only as a mitigating factor and not as support for an insanity defense. *Id.* at 141-46, 385 N.Y.S.2d at 712-15. In fact, it is listed as an affirmative defense under subdivision 1(a) of section 125.25 of the New York Penal Law, which as a "mitigating circumstance," would reduce the murder conviction to manslaughter in the first degree. *Id.*

[117] *See* Brusca, *supra* note 6, at 1166 n.205 (discussing problem presented by temporary nature of post partum depression); *see also* People v. Nelson, 561 N.E.2d 439, 443 (Ill. Ct. App. 1990) (noting several obstacles which impede use of such defenses); *Burton*, 153 Misc. 2d at 686, 590 N.Y.S.2d at 977. In *Burton*, the defendant failed to meet the standards of admitting evidence on the "acute grief syndrome." *Id.* "[T]he field of knowledge relating to 'acute grief syndrome' has neither sufficiently been classified nor developed to be an apt subject for judicial notice." *Id. But see* Mitchell v. Commonwealth, 781 S.W.2d 510, 511 (Ky. 1989) (defendant found guilty but mentally ill after asserting post partum depression as defense to murder of her child); Commonwealth v. Comitz, 530 A.2d 473, 474 (Pa. Super. Ct. 1987) (defendant found guilty but mentally ill after asserting post partum depression as defense to murder of her son).

[118] *See supra* note 98 (discussing *McNaughten* test).

[119] *See* Gardner, *supra* note 6, at 970 (discussing standards of determining insanity).

[120] *See* State v. Holden, 365 S.E.2d 626, 630 (N.C. 1988). "[E]vidence of planning, weighing of options, and covering her own tracks tended to negate defendant's claim that she was unable to appreciate her situation or the nature of her conduct." *Id.*; *Dahmer Dilemma*, NAT'L L.J., Feb. 24, 1992, at 16. "By all accounts, [Dahmer] knew exactly what he

The predominant test for insanity under the ALI is whether the defendant can conform his or her conduct to the law.[121] Therefore, if a defendant is able to refrain from his or her delusional urges to harm others in the presence of bystanders, he or she is presumed able to conform to and abide by the law.[122] Since postpartum depression and acute grief syndrome are temporary, and allege an inability to control behavior only during the crime, there will likely be a finding of capability to conform conduct to the law.[123] Therefore, it seems the only way to provide a valid defense for these defendants is to expand the present concept of insanity to include guidelines which would serve to exculpate them.

However, such an expansion would contradict the evolution of the insanity defense in criminal law.[124] The more stringent standards now utilized are a result of reforms made to the insanity defense.[125] For example, the Insanity Defense Reform Act of 1984 placed a larger burden on a defendant asserting insanity by completely removing the volitional aspect of the ALI standard, and requiring the defendant prove his or her insanity by "clear and convincing evidence."[126] Some states have even abolished the

was doing, and his attempts at covering up his atrocities are evidence of someone in control of at least a good part of his faculties." *Id.*; *see also* State v. White, 456 P.2d 797, 798 (Idaho 1969). In *Comitz*, the defendant mother did not admit dropping her child into a stream, but contended that he was kidnapped. *Id.* The court found that even if the defendant was suffering from post partum depression, she was aware that her actions would cause harm or death to her son. *Id.* at 800. Such a finding is detrimental to an insanity defense under the *McNaughten* standard as it substantiates knowledge of right and wrong. *Id.*

[121] *See supra* notes 99 & 102 and accompanying text (discussing ALI test).

[122] *See* State v. Doyle, 287 N.W.2d 59, 66 (Neb. 1980) (Clinton, J., dissenting). "Guilty knowledge may be inferred from the defendant's denials as well as from the concealment and burying of the child." *Id. But see* People v. Skeoch, 96 N.E.2d 473, 473-74 (Ill. 1951). A defendant-mother's conviction of murder for suffocating her six-day old son by tieing a plastic diaper around his neck was reversed for failure to admit evidence of post partum depression. *Id.*; Grossman, *supra* note 6, at 335. This author discusses a California case where the judge overturned a lower court's murder conviction of a defendant-mother who ran over her six-week old son and then dumped his body in a garbage can. *Id.* Upon retrial she was found not guilty by reason of insanity. *Id.*

[123] *See infra* notes 145-49 (discussing temporary nature of post partum depression and acute grief syndrome).

[124] *See infra* notes 126-28 (discussing reforms made to insanity defense).

[125] *See* Grossman, *supra* note 6, at 312 n.5. Since the attempted assassination of President Reagan by John Hinckley, the insanity defense has been criticized and re-evaluated. *Id.*; *see also* Gardner, *supra* note 6, at 977-78. The Hinckley acquittal resulted in reforms to the insanity defense. *Id.* The Insanity Defense Reform Act of 1984 was a result of public outrage at Hinckley's acquittal. *Id.* at 978.

[126] *See* 18 U.S.C. § 17 (Supp. IV 1986). The new Act refined and narrowed the ALI test. *Id.* The Act provides:

insanity defense completely and contend that an insane person should be held accountable for his or her criminal behavior.[127] Therefore, since efforts have been directed at curbing the insanity defense, alterations to suit the needs of a post partum depression or acute grief victim would directly contradict the current state of the law.[128]

D. Admissibility of Expert Testimony

The admission of expert testimony on post partum depression and acute grief syndrome is not feasible under present standards.[129] Unlike the battered woman and child syndromes, post

> (a) Affirmative Defense.—It is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
>
> (b) Burden of Proof.—The defendant has the burden of proving the Defense of insanity by clear and convincing evidence.

Id. The Act further limits the insanity defense by amending Rule 704 of the Federal Rules of Evidence, which now provides:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of the fact alone.

FED. R. EVID. 705; Therefore an expert can no longer make a judgment as to whether the defendant is legally insane. *Id.*

[127] *See* Gardner, *supra* note 6, at 978. Some states, including Idaho, Montana, and Utah, have gone as far as abolishing the insanity defense. *Id.*; *see also* Stephen M. Glynn, *If Dahmer's Not Crazy, Who Is?*, NAT'L L.J., Mar. 9, 1992, at 13 (stating that mentally insane person can still be responsible for his acts).

[128] *See* Gardner, *supra* note 6, at 983-85. Child protection has become extremely important, as exemplified by the passing of the Child Abuse Prevention and Treatment Act by Congress in 1974. *Id.* This Act gave national recognition to child abuse by allocating funds for state use in research and prevention measures. *Id.* It also created the National Center on Child Abuse and Neglect. *Id.* In 1984, in response to rising child abuse statistics, Congress passed amendments to its 1974 Act which required the states to enact child abuse reporting statutes. *Id.* However, many incidents of child abuse are still not reported. *Id.* To allow post partum depression to support a defense to the murder of one's child would contradict congressional efforts to curb child abuse. *Id.*; *see also* People v. Burton, 153 Misc. 2d 681, 683, 590 N.Y.S.2d 972, 974 (Sup. Ct. Bronx Cty. 1992). The *Burton* court held that the "acute grief syndrome" has not made a "clear and convincing showing that its reliability enjoys any requisite standing and/or scientific recognition among the particular field of psychiatric or psychological authorities to allow expert testimony on its consequences," clearly following the trend to curb novel mental defects used as defenses to murder. *Id.*

[129] *See* People v. Wilson, 487 N.W.2d 822, 823 (Mich. Ct. App. 1992) (holding that admissibility of expert testimony depends on whether information is necessary and helpful to trier of fact); State v. Hennum, 441 N.W.2d 793, 798-800 (Minn. 1989) (asserting that expert testimony must be outside knowledge and experience of jury and must add preci-

partum depression and acute grief syndrome have failed to meet the requirements of reliability and scientific acceptance set by today's courts.[130] Although defendants often try to introduce expert testimony on these mental conditions, they are without sufficient reliability to sanction their use in the courtroom.[131]

sion or depth to jury's ability to reach conclusion about subject); State v. Koss, 551 N.E.2d 970, 972 (Ohio 1990) (citing as requirements for admissibility: relevance and materiality to self-defense, outside knowledge of jury, commonly accepted scientific knowledge, and probative value outweighing prejudicial impact). *But see* FED. R. EVID. 702. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*

[130] *See* Brusca, *supra* note 7, at 1140. The legal system relies upon the American Psychiatric Association's publication of *Diagnostic and Statistical Manual of Mental Disorders* to determine "general acceptance" in the medical profession. *Id.* Since there are numerous medical opinions as to the causes of post partum depression and a general lack of knowledge concerning the disorder, the medical field has not classified post partum depression as a "bona fide disorder." *Id.* As a result, courts are hesitant to admit such evidence. *Id.*; *Burton*, 153 Misc. 2d at 686, 590 N.Y.S.2d at 976-77: "[U]nlike 'rape trauma syndrome' . . . or 'sexually abused child syndrome' . . . or 'battered woman's syndrome' . . . or 'battered child syndrome' . . ., the field of knowledge relating to 'acute grief syndrome' has neither sufficiently been classified nor developed to be an apt subject for judicial notice" nor has there been any convincing showing that its reliability receives any scientific recognition to allow expert testimony on its consequences. *Id.* at 686, 590 N.Y.S.2d at 977. Further, there is "no proof to assume that it enjoys a foundation outside the courtroom to be accepted inside it." *Id.* The court maintained that there can be "little doubt" that the theory is just an abstraction that has not received any significant support other than the claim of its proponent. *Id.* Instead, there must be some type of theoretical framework formulative of the expert's hypothesis and an adherence to scientific investigation. *Id.* The court concluded that the proffered evidence on the syndrome was unsupported and that any scientific method minimizing the possibility of jury bias was lacking. *Id.* The only support for the syndrome was general diagnostic textbooks, as opposed to specialized literature, reports, workshops, or validated data. *Id.* As a result, if such testimony were admitted, there would be reliance on an informally classified psychiatric condition which lacks diagnostic criteria and clarity and which contains a "breadth of inferences it presupposes to predict as consequences without corresponding verification of its premise." *Id.*; *see also* Frye v. United States, 293 F. 1013, 1018-20 (D.C. Cir. 1923) (requiring "general acceptance in the medical field" of illness before expert testimony can be given).

[131] *See Burton*, 153 Misc. 2d at 688, 590 N.Y.S.2d at 978. "[E]xperts . . . would not, indeed do not, deem this theory beyond the realm of isolated speculation without a level of reliability sufficient to warrant its use in the courtroom." *Id. But see id.* at 682, 590 N.Y.S.2d at 973. There is debate as to whether scientific evidence, such as testimony explaining human behavior, should receive a special approach, that is, a more liberal standard. *Id.* The defendants argued that because psychiatry is accepted in the field of medicine, testimony on the acute grief syndrome should also be accepted. *Id.* They asserted that explanatory testimony was relevant because it would aid the jury in making its own determination as to whether the opinion was reliable. *Id.* In short, the theory's success as a defense should depend on the weight the jury gives to it and not its admissibility. *Id.*; *see also* People v. Taylor, 75 N.Y.2d 282, 288, 552 N.E.2d 131, 135 522 N.Y.S.2d 883, 887 (1990). In *Taylor*, the majority stated that New York courts have allowed expert testimony where it was needed to "help . . . clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of a typical juror." *Id.* (citation

It is conceded that the exclusion of evidence of a pertinent mental condition impedes a defendant's right to present an effective defense.[132] Thus, certain biological and psychological factors which alter a person's mental operation are relevant to an insanity defense, and expert testimony on these conditions should be admissible. However, this is assuming that the defendant's mental state is deemed to be outside the realm of jury knowledge since only evidence beyond a jury's everyday experience is allowed via expert testimony.[133] Even if post partum depression and acute grief syndrome were considered outside the knowledge of the jury, this alone is insufficient to warrant their admissibility.[134] Enough must be known about the conditions to enable a court to reach a definitive conclusion on the defendant's state of mind.[135] If the syndromes are scientifically accepted, their probative value would outweigh their prejudicial impact, warranting admissibility. However, if evidence of these conditions is not sufficiently developed in the scientific community, there is great potential for jurors to place a degree of overreliance on the expert and the testimony he is giving, however unreliable it may be.[136] At this time, the medical field cannot agree on the causes of post partum de-

omitted); Gardner, *supra* note 7, at 970-72 (discussing the theories that abound as to the cause of post-partum depression).

[132] *See* Chambers v. Mississippi, 410 U.S. 284, 290 (1973) (discussing unconstitutionality of mandated exclusion of relevant mental condition); Washington v. Texas, 388 U.S. 14, 18 (1967) (same).

[133] *See* People v. Ciaccio, 47 N.Y.2d 431, 437, 391 N.E.2d 1347, 1351, 418 N.Y.S.2d 371, 374 (1979). Expert testimony is inadmissible on any issue which is within the knowledge of the jury. *Id.* "It is always within the sole province of the jury to decide whether the testimony of any witness is truthful or not. The jurors are fully capable of using their ordinary experience to test the credibility of the victim-witness." *Id.*

[134] *See supra* notes 72-88 (discussing requirements for admissibility of expert testimony).

[135] *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define . . . . [T]he thing . . . must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.*

[136] *See Burton*, 153 Misc. 2d at 684, 590 N.Y.S.2d at 978. When scientific evidence is novel, special challenges are presented. *Id.* 684, 590 N.Y.S.2d at 978. There are great risks in admitting untrustworthy opinions since the jury can be misled by the seemingly superior knowledge with which they are presented. *Id.* As a result of this "aura of certainty," they may tend to give too much weight to the evidence when it is presented by experts with such imposing credentials. *Id.* They may overestimate its probative value and overlook the fact that the evidence is only conjectural in nature. *Id.* Thus, the weight of the opinion may be over-credited without critical scrutiny. *Id.*; *see also* United States v. Barnard, 490 F.2d 907, 912-13 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974). "The effect of receiving such testimony . . . may be two-fold; first, it may cause juries to surrender their own common sense in weighing testimony; second, it may produce a trial within a trial on what is a collateral . . . matter." *Id.* at 912.

pression or acute grief syndrome, nor can it concur that they are mental/physical disorders. What is agreed is that "more research is needed."[137] In addition, the American Psychiatric Association does not list these disorders as diseases in and of themselves.[138] As a result, post partum depression and acute grief syndrome fail the accepted scientific knowledge requirement for admission of expert testimony.[139]

Thus, these two mental conditions are in the same scientific stages as other disorders on which expert testimony has been held inadmissible.[140] In *People v. Williams*,[141] the trial judge refused to admit the testimony of a medical expert to show that individuals addicted to heroin are "unworthy of belief."[142] Since the relevant fields of knowledge for either mental condition have not been sufficiently classified nor developed, they are not proper subjects for judicial notice and their failure to meet the entrenched standards of admissibility should bar their use in the courtroom. "The courtroom is not an appropriate setting to break ground that has not been broken in the laboratory or in the workplace."[143]

[137] *In re* M.Z., 15 Misc. 2d 564, 578, 590 N.Y.S.2d 390, 399 (Family Ct. 1992).

[138] *See* People v. Nelson, 561 N.E.2d 439, 634 (Ill. Ct. App. 1990). The *Nelson* court stated:

> Many obstacles impede the recognition of post partum psychosis as a defense to criminal homicide. Primarily, it is not fully accepted as a distinct mental illness by the American medical and psychiatric communities. This in turn has hindered research, which makes it difficult for expert psychiatric witnesses to offer conclusive evidence regarding the syndrome's causes and effects. The illness's episodic nature also makes it suspect. So too does its temporary duration, because by trial time, the woman may have recovered from its effects. This presents a scenario that is sometimes too convenient for a jury to accept: a woman asks to be found not guilty because she was 'insane' at the time of the crime, but then claims she does not require incarceration or commitment to a mental institution because she has recovered.

Id.; *see also* People v. Burton, 153 Misc. 2d 681, 682, 590 N.Y.S.2d 972, 973 n.1 (Sup. Ct. Bronx County 1992). "It is noted that the American Psychiatric Association does not recognize "acute grief" as a classified emotional condition or disorder." *Id.*

[139] *See supra* notes 105-17 (discussing various hypotheses formulated on cause of post partum depression and acute grief syndrome).

[140] *See Ciaccio*, 47 N.Y. 2d at 439, 391 N.E.2d at 1351, 418 N.Y.S.2d at 375. The New York Court of Appeals held that it was error to admit testimony by a detective that it was "not unusual" for hijackers to act as the defendant did in this case. *Id.*

[141] 6 N.Y.2d 18, 159 N.E. 2d 549 187 N.Y.S.2d 750 (1959).

[142] *Id.* at 6 N.Y.2d at 23, 159 N.E.2d at 552, 187 N.Y.2d at 754 at 552.

[143] *Burton*, 153 Misc. 2d at 686, 590 N.Y.S.2d at 977. After making an inquiry into the "reliability of the theory of acute grief, the court . . . [found] no proof to assume that it enjoys a foundation outside the courtroom to be accepted inside it." *Id.* Thus, expert testimony on the syndrome was precluded. *Id.* "Implicit is the proposition that expert testimony based on speculation devoid of factual underpinnings and/or unconfirmed by scientific proof cannot form a rational basis for establishing credibility in a court of law." *Id.*

E. Temporary Insanity

The temporary nature of post partum depression and acute grief syndrome presents another obstacle to their use as a defense.[144] A mother suffering from post partum depression will return to stability several months after giving birth.[145] It appears that one claiming to be a victim of acute grief syndrome will also regain lucidity once the pressure of the tragedy which triggered the grief is released.[146] An unsettling result occurs if a defendant claims insanity and is excused from both prison time and the rehabilitation process usually afforded an insane defendant—it seems that they are literally getting away with murder.[147]

A possible solution lies in the acceptance of post partum depression and acute grief syndrome as evidence at trial to explain the victim's state of mind and reducing a murder charge to manslaughter. Some courts have already allowed evidence of these conditions as a mitigating factor.[148] This appears to be the only plausible solution considering the various pitfalls in providing a complete insanity defense: failure to pass the present insanity requirements, compounded by recent attempts at curbing insanity as a defense, lack of scientific knowledge of these conditions, and their temporary nature.

[144] *See infra* notes 146-48 and accompanying text (discussing temporary nature of post partum depression and acute grief syndrome).

[145] *See* Brusca, *supra* note 7, at 1166 n.205 (discussing temporary nature of post partum depression).

[146] *See supra* notes 115-17 (discussing symptoms of acute grief syndrome).

[147] *See* Brusca, *supra* note 7, at 1166 n.205. In addition to the fact that post partum depression is not accepted in the medical field, its temporary nature poses another obstacle for the defendant. *Id.* Patients with post partum depression fluctuate between psychosis and lucidity, making the condition difficult to diagnose. *Id.* For example, when a mother murdered her child she may have been in a state of psychosis but, either before the crime or after, she was perfectly stable. *Id.* The defense attorney is presented with a difficult duality of trying to prove a temporary psychosis which is no longer a danger to anyone and which does not warrant rehabilitative institutionalization, while simultaneously trying to prove that the defendant was indeed insane at the time of the murder. *Id.* This theory may not go over well with a jury who is faced with a deceased child and a mother who would escape all punishment for the infant's murder. *Id.*

[148] *See id.* at 1160-62 (discussing several cases where mothers suffering from post partum depression asserted it as defense to murder of their child and received reduced conviction); *see also* People v. Shelton, 88 Misc. 2d 136, 136, 385 N.Y.S.2d 708, 708 (Sup. Ct. N.Y. County 1976) (court allowed defendant to claim "extreme emotional disturbance" [caused by grief] as mitigating factor in murder defense).

CONCLUSION

To safeguard individuals who lack the requisite level of culpability, our system of criminal law has formulated specific defenses. Both the justification defense and the insanity defense have served to protect the innocent. As medical knowledge of specific psychological conditions develops and becomes generally accepted within the scientific community, the criminal justice system must recognize these conditions as determinative of a defendant's state of mind, and thus his or her culpability. The law has sought to preserve the rights of abuse victims by allowing expert testimony on the battered woman and child syndromes to aid in proving a reasonable belief of the presence of imminent danger. Currently, the law is struggling to protect persons afflicted with post partum depression and acute grief syndrome. However, these psychological conditions do not fit within the confines of an insanity defense mainly because medical knowledge of these conditions is scarce and skepticism widespread. Further, the questionable legitimacy of these conditions warrants placing the rights of the deceased above the prejudicial impact of withholding such evidence. Until post partum depression and acute grief syndrome reach the standards of scientific acceptability set by society, expert testimony on these mental conditions must be excluded.

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