

HAUTE COUTURE, POORLY TAILORED CRIMES, AND ILL-FITTING VERDICTS

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I. INTRODUCTION—AT THE EMPIRICAL/NORMATIVE INTERFACE

In viewing the designated topics of this Tenth Anniversary Issue of the *Duke Journal of Gender Law & Policy* (that is, “any relevant issue relating to the Yates trial or gender-specific criminal defenses,” or on the “Battered Woman Syndrome, Expert Testimony, the ‘Heat of Passion’ Defense, The Provocation Doctrine”), I find much of my past research and writing efforts to be either directly on point, or, in an indirect and prepositional way, to be *about* point: standing above, below, beneath, or beside these focal topics, adding context, chiaroscuro, and color to them, while illuminating less obvious but no less relevant legal, theoretical, and psychological issues that stand in their penumbra. This mélange of relevant research topics includes Insanity,¹ the Self-Defense Defense² (including Battered Woman Syndrome and Expert Testimony effects on mock jurors’ verdicts, and their reasons for their verdicts), Infanticide,³ the Murder versus Manslaughter distinction⁴ (where “heat of passion” and provocation

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1. E.g., NORMAN J. FINKEL, *INSANITY ON TRIAL* (1988); Norman J. Finkel, *De Facto Departures from Insanity Instructions: Toward the Remaking of Common Law*, 14 *LAW & HUM. BEHAV.* 105 (1990) [hereinafter Finkel, *De Facto Departures*]; Norman J. Finkel & Sharon F. Handel, *How Jurors Construe “Insanity,”* 13 *LAW & HUM. BEHAV.* 41 (1989); Norman J. Finkel, *The Insanity Defense: A Comparison of Verdict Schemas*, 15 *LAW & HUM. BEHAV.* 533 (1991); Norman J. Finkel & Kevin B. Duff, *The Insanity Defense: Giving Jurors a Third Option*, 2 *FORENSIC REPORTS* 235 (1989); Norman J. Finkel, *The Insanity Defense Reform Act of 1984: Much Ado About Nothing*, 7 *BEHAV. SCI. & L.* 403 (1989); Norman J. Finkel et al., *Insanity Defenses: From the Jurors’ Perspective*, 9 *LAW & PSYCHOL. REV.* 77 (1985); Norman J. Finkel & Christopher Slobogin, *Insanity, Justification, and Culpability: Toward a Unifying Schema*, 19 *LAW & HUM. BEHAV.* 447 (1995); Norman J. Finkel & Solomon M. Fulero, *Insanity: Making Law in the Absence of Evidence*, 11 *MED. L.* 383 (1992); Norman J. Finkel & Sharon F. Handel, *Jurors and Insanity: Do Test Instructions Instruct?*, 1 *FORENSIC REPORTS* 65 (1988); Solomon M. Fulero & Norman J. Finkel, *Barring Ultimate Issue Testimony: An Insane Rule?*, 15 *LAW & HUM. BEHAV.* 495 (1991).

2. Norman J. Finkel et al., *The Self-Defense Defense and Community Sentiment*, 15 *LAW & HUM. BEHAV.* 585 (1991) [hereinafter Finkel et al., *The Self-Defense Defense*] (finding that mock jurors gave, as their first verdict preference, a not guilty by reason of self-defense verdict to the battered woman who kills her spouse, even in the non-confrontational killing scenarios).

3. Norman J. Finkel et al., *Commonsense Judgments of Infanticide: Murder, Manslaughter, Madness, or Miscellaneous?*, 6 *PSYCHOL. PUB. POL’Y & L.* 1113 (2000) [hereinafter Finkel et al., *Commonsense Judgments of Infanticide*] (manipulating the variables of the age of the infant, the level of violence exhibited in the manner of the death, the age of the mother, and the level of depression of the mother, and finding that the verdicts, and reasons for the verdicts, did not look like those we previously found for murder, manslaughter, or madness).

4. Norman J. Finkel, *Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction*, 74 *NEB. L. REV.* 201 (1995) (testing two famous manslaughter cases

were systematically varied), Mistakes⁵ (of fact and law), Impossible Act and Mistaken Act cases,⁶ and Crime Prototypes.⁷ In the context of my earlier research, I propose to focus here on the general topic of gender-specific criminal defenses, “designer defenses,” if you will, or what I prefer, “haute couture” defenses.

My plan is to extract some lessons from these past empirical inquiries and then apply them to four current (and longstanding) questions within the law, which are centrally relevant to the haute couture topic. The four questions I have in mind are: (1) Should culpability’s cloth be weighted more with the woof of objectivity or the warp of subjectivity, or should a euphemistic balance be woven?; (2) Can the old excuse versus justification distinction be re-cut and re-made, or be trimmed with mitigation, in order to fit these defendants with rightful verdicts and proportionate⁸ sentences?; (3) Do we need, for the sake of fairness, special designer defenses for women?; and (4) Is there a better way to clothe various defendants in sensible verdicts? The hope behind this effort is to find some empirical threads that could inform the law, threads that would lead the law out of some labyrinthine dead ends that have hemmed in the law, and certain crimes, defenses, and defendants. But there is a second, qualifying hope: I seek only those golden threads that do not sacrifice sacred normative principles for the latest fashion craze. Put another way, what may be practical must also be principled.

To carry out this plan, I must cross and re-cross an “is/ought” divide, a prospect that frequently produces fright and flight in empirically-minded researchers, for “normative ground” is an oxymoron, whose substance is all too infirm. Moreover, the intrepid adventurer who makes the crossing may be greeted with suspicion by the normatively-minded inhabitants, for his language,

under many variations, which revealed what commonsense factors and inferences mock jurors used to discriminate manslaughter from second-degree murder).

5. Norman J. Finkel & Jennifer L. Groscup, *When Mistakes Happen: Commonsense Rules of Culpability*, 3 PSYCHOL. PUB. POL’Y & L. 65 (1997) [hereinafter Finkel & Groscup, *When Mistakes Happen*] (summarizing three experiments in which mistakes of fact and mistakes of law were varied).

6. Norman J. Finkel et al., *Lay Perspectives on Legal Conundrums: Impossible and Mistaken Act Cases*, 19 LAW & HUM. BEHAV. 593 (1995) [hereinafter Finkel et al., *Lay Perspectives*] (showing, through five impossible act cases, that the subjective *mens rea* was more determinative of verdict than the objective *actus reus*, or lack of it, but subjectivity had its limits in mistaken act cases).

7. Norman J. Finkel & Jennifer L. Groscup, *Crime Prototypes, Objective vs. Subjective Culpability, and a Commonsense Balance*, 21 LAW & HUM. BEHAV. 209 (1997) [hereinafter Finkel et al., *Crime Prototypes*] (showing, in two experiments, across eight different types of cases, that people have a variety of prototypes, rather than a single prototype, and that these prototypes reveal an admixture of subjective and objective components); Norman J. Finkel, *Commonsense Justice, Psychology, and the Law: Prototypes Common, Senseful, and Not*, 3 PSYCHOL. PUB. POL’Y & L. 461 (1997) [hereinafter Finkel, *Commonsense Justice, Psychology, and the Law*] (developing the concept of prototypes, and their place and function in juror decision making).

8. See generally Norman J. Finkel et al., *Recidivism, Proportionality, and Individualized Punishment*, 39 AM. BEHAV. SCI. 474 (1996) [hereinafter Finkel et al., *Recidivism*] (analyzing two experiments: in the first experiment, two Supreme Court recidivist cases, *Rummel* and *Helms*, were used, with many variations, and the findings revealed that mock jurors make proportionate sentencing judgments, rather than escalating the punishments geometrically or exponentially, despite the prosecution’s urging; in the second experiment, based on variations of the *Morgan* case, a perpetrator-by-means case, mock jurors and mock judges made individualized decisions, rather than administering equalist justice).

the talk of facts, holds little currency here. Despite these fears, I keep to my plan because I believe that the normative questions I have in mind are grounded on empirical evidence, and that the latter can inform the former.

To briefly illustrate, consider the following compound sentence, where the contentions are not only familiar, but generally agreeable: From a deserved punishment perspective,⁹ laws regarding crimes ought to fit the defendant's culpability, both the objective act (*actus reus*) and the subjective intent (*mens rea*), and punishments ought to be tailored proportionately to culpability. With two "oughts," this sentence seems unarguably normative. But let us see where we end up when we apply these well-accepted principles to a specific case.

To apply them, we realize that there is a prior step that needs consideration: the step of "getting" the law's principles. At jury trials, this is formally done when judges read patterned instructions to the jurors, or, in bench trials or appellate cases, when judges remind themselves or each other of the law. But all of these intended recipients, jurors, judges, and justices, must *construe* the laws they hear; in this process, instructive words conveying abstract principles are necessarily filtered through the subjectivity of the recipient.¹⁰

The outcome of this instruction process, when empirical assessments are made of what mock jurors understand,¹¹ reveals low comprehension rates, on the average, and significant variation among what individual jurors remember and comprehend. Each juror's understanding of "culpability," its parts (that is, *actus reus* and *mens rea*), and what "objective" and "subjective" mean, may differ from the understandings other jurors hold, even if all agree with the abstract sentiment conveyed.¹² Thus, what first appears as a simple, objective act—that of conveying information from the judge's mind to the jurors' minds about certain normative principles—must involve subjective, psychological processes. Furthermore, empirics become an important tool at this interface, when the goal is understanding these psychological processes and their outcomes, and how the former transforms and nuances the latter.¹³

Now we are ready to move to the second step, the application of these construed principles and normative "oughts" to the messy "what is" of the case. If

9. See generally, e.g., SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* (1998) (highlighting, through normative analysis, motive and indifference as key discriminative and determinative concepts).

10. See generally Norman J. Finkel, *Commonsense Justice and Jury Instructions: Instructive and Reciprocating Connections*, 6 PSYCHOL. PUB. POL'Y & L. 591 (2000) [hereinafter Finkel, *Commonsense Justice and Jury Instructions*] (explicating why a host of sanctioned factors, relating to jury instructions and jury discretion, are more likely to account for apparently odd verdicts, rather than fingering the usual suspect, jury nullification).

11. See generally Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 PSYCHOL. PUB. POL'Y & L. 743 (2000) (finding vagueness and purposeful ambiguity in damage award instructions); Joel D. Lieberman & Bruce D. Sales, *Jury Instructions: Past, Present, and Future*, 6 PSYCHOL. PUB. POL'Y & L. 587 (2000) (reviewing problems, conceptual, empirical, and linguistic, that surround jury instructions); Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 PSYCHOL. PUB. POL'Y & L. 712 (2000) (reviewing the instructions courts give jurors, or could give jurors, about general damages in civil litigation, and find a lack of guidance).

12. See generally Finkel, *Commonsense Justice and Jury Instructions*, *supra* note 10.

13. *Id.*

our first jury instruction step produces variation, this second application step is far more likely to introduce even greater variation, with serious disagreements a possibility, for as Holmes stated in *The Common Law*,¹⁴ the application of principles to cases is not only not syllogistic, but it may not even be avowed and conscious, as each justice does his or her “legal reasoning” in his or her own way.¹⁵ When the adjudication of “great cases, like hard cases”¹⁶ is done by ordinary citizens,¹⁷ we learn that they first deconstruct the abstract principles by finding the particular perceived unfairnesses in the case facts, and then weigh these unfairnesses in complex ways in a moral analysis.¹⁸ Perhaps something like this also occurs among more learned hands. Nonetheless, in the realm of the “ought,” there is likely to be solid agreement at the abstract level regarding lofty principles, such that we all might agree that the “perfect-little-black-dress” is the Platonic ideal; down to earth, however, for a fashionable fit at this “what is” level, the dress must be tailored to the reality of the defendant and her crime.

In my contextualization of the problem, empirical lessons may be particularly informing because these normative debates are about certain crimes, defendants, and defenses, as we try to understand specific people in specific contexts.¹⁹ We are dealing with “thoughts *with content*,” to turn a Kantian phrase,²⁰ and factual content becomes particularly apropos when claims are advanced that (a) these alleged crimes may be poorly tailored for certain defendants, most notably female defendants, and (b) the verdicts and sentences that typically follow are either ill-fitting, simply wrongful, or fundamentally unfair²¹ to many of these defendants.

14. OLIVER W. HOLMES, *THE COMMON LAW* 1 (Harvard University Press 1963) (1881). See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986) (Dworkin agrees with Holmes that judges do not decide cases in syllogistic fashion, and puts forth a chain novel way of deciding); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990) (Posner also agrees with Holmes, but disagrees with Dworkin, and puts forth a pragmatic form of decision making).

15. If this were not so, we would have 100% 9-0 or 8-0 decisions in the Supreme Court, instead of 33 unanimous decisions in 79 cases (39%) in the Court's 2000 term, whereas there were 43% where either a 5-4 or 6-3 split resulted. *The Term in Review*, 8 PREVIEW U.S. SUP. CT. CAS. 416 (Charles F. Williams ed., 2001); for the 2001 term, the percentages were quite similar: 40.5% of the cases were unanimous, whereas 44.3% involved a 5-4 or 6-3 split. *The Term in Review*, 8 PREVIEW U.S. SUP. CT. CAS. 422 (Charles F. Williams ed., 2002).

16. *Northern Securities Company v. United States*, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting).

17. See generally Norman J. Finkel, *When Principles Collide in Hard Cases: A Commonsense Moral Analysis*, 7 PSYCHOL. PUB. POL'Y & L. 515 (2001) [hereinafter Finkel, *When Principles Collide*] (in which some forty-five “hard cases” were tested, where basic principles clash, such as rights versus duties, in order to determine how ordinary citizens decide hard cases; the results showed that they employ not a legal analysis, but a moral analysis).

18. *Id.*

19. See generally Craig Haney, *Making Law Modern: Toward a Contextual Model of Justice*, 8 PSYCHOL. PUB. POL'Y & L. 3 (2002) (finding that a legal model of behavior still clashes with psychological models, and urges and defends a “new realism,” based on a view of human nature that is “more consistent with contemporary psychological thinking”).

20. IMMANUEL KANT, *CRITIQUE OF PURE REASON*, reprinted in KANT SELECTIONS 57 (Theodore M. Greene ed., 1957) (“Thoughts without contents are empty, intuitions without concepts are blind.”).

21. See generally NORMAN J. FINKEL, *NOT FAIR!: THE TYPOLOGY OF COMMONSENSE UNFAIRNESS* (2001) [hereinafter FINKEL, *NOT FAIR!*] (unpacking the concept of unfairness, through multiple students, across the age span and cultures). See also CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE*:

The second part of Kant's famous phrase, "that intuitions without concepts are blind,"²² is apropos as well. As the political scientist, Professor Thomas Spragens, Jr., puts it:

Useful empirical investigation and explanation of social behavior cannot proceed by a random compilation of facts and observations. The strategy of data collection is driven by a conceptual framework of some sort that directs the attention of researchers and suggests to them what they need to look for. And the role of concepts is even more fundamental than that, for as philosophers of science have taken pains in recent decades to remind us, the observations that produce research data are themselves in some inescapable ways "theory-laden."²³

Endorsing Spragens' point carries consequences, so I hereby make confession regarding the concept that underlies my fact-lessons. The notion is "commonsense justice,"²⁴ and I have defined and differentiated it from "black-letter law" this way:

There are two types of "law." There is the type we are most familiar with, namely "black-letter law," the "law on the books." This is the law that legislators enact, the law that was set down by the Founding Fathers in the Constitution, the law that evolves through common-law cases and through appeals decisions. It is the law that law school students study, judges interpret, and jurists analyze. But there is another law—although "law" may be too lofty or lowly a term to describe it: I call it "commonsense justice," and it reflects what ordinary people think is just and fair. It is embedded in the intuitive notions jurors bring with them to the jury box when judging both a defendant and the law. It is what ordinary people think the law ought to be.

These commonsense notions are at once legal, moral, and psychological. They provide the citizen on the street and the juror in the jury box with a theory of why people think, feel, and behave as they do, and why the law should find some defendants guilty and punishable and others not. Black-letter law also has its theories of human nature, culpability, and punishment. But there is mounting and persuasive evidence that the "law on the books" may be at odds with commonsense justice in many areas.²⁵

In Part II, I develop some of commonsense justice's (CSJ) basic lessons, and relate these to the first question, that of objectivity versus subjectivity. There are three key lessons regarding CSJ: (1) that subjective intent is more powerfully determinative of culpability than the objective act, though objectivity plays an important secondary role by anchoring judgments to reality, especially when

BATTERED WOMEN, SELF-DEFENSE, AND THE LAW (1989). Gillespie, for one, puts forth the poorly tailored crimes and ill-fitting verdicts arguments, claiming that "the law of self-defense is a law for men," *id.* at 4, and that "the law of self-defense discriminates against women," *id.* at 182.

22. KANT, *supra* note 20, at 57.

23. Thomas A. Spragens, Jr., *Theories of Justice, Rights, and Duties: Negotiating the Interface Between Normative and Empirical Inquiry*, in HUMAN RIGHTS AND DUTIES: PSYCHOLOGY'S CONTRIBUTIONS (Norman J. Finkel and Fathali M. Moghaddam eds., forthcoming 2003) (manuscript at 20, on file with author).

24. NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 5 (1995) [hereinafter FINKEL, COMMONSENSE JUSTICE].

25. *Id.* at 2.

mistakes are involved and must be weighed,²⁶ (2) that the principle of proportionality reigns strongly when punishments are to be set, and that CSJ generally rejects equalism as disproportionate,²⁷ and (3) that jurors are likely to have a multiplicity of prototypes regarding certain crimes and certain defendants, rather than some stereotypic one-size-fits-all model.²⁸

In Part III, the broad topic is “battered women,” with the specific focus on those who may (or may not) have Battered Woman Syndrome—but who unquestionably kill their spouses in non-confrontational situations and who plead not guilty by reason of self-defense (NGRSD). In this part, the second question, regarding excusing and justifying defenses, is taken up, along with mitigation as a fallback (that is, a default option) verdict. The transition from objectivity versus subjectivity to justification versus excuse is straightforward, for the second distinction is often a proxy for the first, where it is claimed that the justification rationale is based on the blamelessness of the objective act (*actus reus*), whereas the excusing rationale condemns the act but not the subjectivity (*mens rea*) of the actor.

I first separate the *excusing condition* argument from the *justifying condition* argument, and deal with excuse first. Here, I set aside some empirical errors and normative confusions in order to see the issue more clearly. When this is done, I conclude that expert testimony regarding Battered Woman Syndrome (BWS) is not likely to increase NGRSD verdicts in any significant way, because there are too many different (and, in some instances, opposing) prototypes for battered women who kill, rather than some stereotypic, one-size-fits-all defendant.²⁹ Factually, BWS fails to fit the majority of defendants who do not display “learned helplessness,” but who, to the contrary, say they have a plan to leave and believe that they have significant control³⁰ over the batterer’s violence. Regarding the minority of defendants where BWS appears to fit (that is, that percentage displaying learned helplessness, passivity, distorted perceptions and thinking, and the belief that they have no control over the batterer’s violence), syndrome testimony alone will not be dispositive, I believe, because it fails to explain adequately why a passive, beaten-down woman with learned helplessness suddenly helps herself—by becoming an active, preemptive killer who deserves an excusing self-defense verdict.

The failings of the syndrome as an explanatory construct, unfortunately, are matched by normative confusions. Many advocates favor a justification defense, though the facts do not.³¹ By pushing a justification defense against the

26. Finkel et al., *Lay Perspectives*, *supra* note 6, at 594.

27. Finkel et al., *Recidivism*, *supra* note 8, at 486.

28. Finkel & Groscup, *Crime Prototypes*, *supra* note 7, at 211.

29. See, e.g., Finkel et al., *The Self-Defense Defense*, *supra* note 2, at 597-98.

30. See generally Diane R. Follingstad et al., *Effects of Battered Women’s Early Responses on Later Abuse Patterns*, 7 VIOLENCE & VICTIMS 109 (1992) (examining women who are still in (IN) a battering relationship, those who got out (OUT), where the relationship was either short-term (SHORT) or long-term (LONG), and their views on a number of factors, including their perceived control).

31. See generally Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45 (presenting an excellent review of the justification defense, its advocates, their reasons, and the weaknesses of these positions, along with how a justification defense may be constructed).

facts, advocates ignore the development of an excusing condition defense that is clearly differentiated from insanity (NGRI). Such a defense and differentiation are important, for as it has stood and still stands, BWS testimony—about a disordered mind with distorted perceptions and thinking—pulls powerfully toward the insanity (NGRI) verdict—and pushes justification advocates into a deep, subjective bind.

In the objective direction, the hard case to make is for the *justification verdict*. Here, BWS must be altered so dramatically, as Schopp, et al. detail,³² that it becomes almost unrecognizable. In such a make-over, we must pare away the distortions in perceiving and thinking, and the learned helplessness passivity as well. Moreover, we must bring into the syndrome the notion of “the keen psychologist,”³³ which is a very different prototype than we started with, where she is now an especially good predictor of violence from objectively minimalist cues; from this “keen psychologist” view, she objectively and accurately perceives that necessity-is-now, where she has no alternatives but to preemptively strike at this moment in time in order to prevent an unavoidable felony assault from occurring, which would invariably cause her severe injury or death.

But all of these alterations, all the letting out and taking in that needs to happen for a justification defense to fit the facts, will not be enough conceptually, as long as the justification rationale is tied exclusively to the objective act. For these proposed alterations to fit, the objective vs. subjective wall that firmly divides justification from excuse must be breached.

Still, there are structural problems that must be overcome, which center on the “default verdict.” To explicate, if either the excusing or justifying case fails to persuade the jury, what then? If the jury has only the prosecution’s charge of either second-degree or first-degree murder, let us say, these verdict options may not fit the defendant’s intentions, which can look quite different from a killing done with either “deliberation” or “premeditation.” Moreover, manslaughter’s mitigating option, in the unlikely event that it is provided by the judge to the jury, is not likely to fit the defendant’s emotions and actions *at the moment of the act*, particularly if, given a sleeping victim, “heat of passion” or “extreme emotional disturbance” seem absent, and if the killing is not “of a sudden.” But the structural problems multiply if “mistake” is involved, for it may be a hard sell to make the case that the mistake was “reasonable.” To push the point further, an “honest but unreasonable mistake of fact”³⁴ claim would likely fare even worse, for imperfect or putative self-defense claims may exhaust all of the viable verdict options, leaving these defendants with no fitting room and no verdict option to try on.

In Part IV, I extract certain lessons from infanticide and its fashion swings across four centuries of Anglo-American law, and apply these lessons to the

32. *Id.* at 66.

33. *Id.* at 69, n.121; *see also* State v. Kelly, 478 A.2d 364, 378 (N.J. 1984) (describing the battered woman as particularly able to predict violence); People v. Torres, 488 N.Y.S.2d 358, 362 (N.Y. Sup. Ct. 1985) (describing “acute discriminatory powers” regarding danger).

34. *See generally* Richard Singer, *The Resurgence of Mens Rea: II—Honest But Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459 (1987) (providing a thorough account of the legal history of mistake of fact in self-defense situations, and how the common law and treatise writers dealt with this problem).

third question, on the need for special designer defenses. I argue that these special designer defenses suffer from the problems of validity, generalizability, and unequal protection unfairness.³⁵ But we also run into some of the same problems with the battered woman who kills, for infanticide cases encompass differentiable prototypes, where some of these defendants fail to fit with either murder, manslaughter, or madness, but seem, rather, to fall into a needed miscellaneous category—that does not exist.

In the concluding Part V, I take up the fourth and last question, regarding whether there is a better way to shape the law to the distinguishing fact patterns and prototypes that prevail, such that more defensible crimes and punishments result, hinged in greater part to the subjective *mens rea*. By discarding failed solutions, we end up giving up on the search for that Platonically perfect “little black dress.” Rather than leaving us with nothing to wear, I argue that both the wardrobe, and the fit, are enhanced.

II. CSJ: WHERE SUBJECTIVITY, PROPORTIONALITY, AND COMPLEX PROTOTYPES REIGN

“Impossible act” cases,³⁶ a legal conundrum of sorts, present a wonderful opportunity to test whether commonsense justice (CSJ) places greater accent on subjective intent or the objective act in determining culpability, and for comparing CSJ’s analysis to that of black-letter law. According to Fletcher,³⁷ black-letter law has long been divided on this question, as the law’s conjoining euphemism—that *actus reus* and *mens rea* both must be proved for guilt—merely obfuscates the tension beneath a trite maxim. But if we take the euphemism at face value, then the law ought to have little difficulty finding such defendants not guilty, for there is no criminal act. Still, what about CSJ?

In Finkel, et al.’s work,³⁸ the participants, who were undergraduate students, were randomly assigned a booklet containing one of five impossible act cases (which I identify for the reader as TREE STUMP, DEAD BODY, NO BULLETS, SUGAR CUBES, and EFFIGY). In all of the cases, the subjective intent of each defendant is clear—to kill a person—but because of various mistakes (for example, perceiving a tree stump as a man, believing that a dead man was alive and sleeping, believing that a gun was loaded when it was not, believing that a sugar cube was a cube of arsenic, and believing that sticking pins in a doll could kill a man), the criminal act became impossible. Despite the impossibility, the guilty verdict percentages were 53% (TREE STUMP), 91% (DEAD BODY), 100% (NO BULLETS), 100% (SUGAR CUBES), and 17% (EFFIGY). Only in EFFIGY did objectivity dominate over subjectivity, because participants judged the act as

35. See generally Finkel et al., *Commonsense Judgments of Infanticide*, *supra* note 3.

36. See generally Finkel et al., *Lay Perspectives*, *supra* note 6.

37. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 119 (1978) (noting that this “conjoining” euphemism blurs and simplifies the centuries-old tension between objective and subjective views that “interweave in contemporary thinking about criminal law”). If the conflict between these perspectives is “camouflaged by . . . legal maxims that create the image of unity in criminal theory,” as Fletcher believes, then there may be much to gain, through empirical testing, as Finkel suggests, “from disjoining the nexus and seeing how the dichotomous parts play out.” Finkel et al., *Lay Perspectives*, *supra* note 6, at 594.

38. See generally Finkel et al., *Lay Perspectives*, *supra* note 6.

non-credible, an act that could not effect a killing. The reason the guilty percentage was not higher in TREE STUMP involved the low probability of an *immediate* death, had the mistake in perception not occurred: for if the defendant clearly saw the tree stump for what it was, he would have to undertake a search for his target, which might take a while, or might be fruitless. In contrast, if the mistakes in perception and belief had not occurred in DEAD BODY, NO BULLETS, and SUGAR CUBES, the murderous act would almost certainly have resulted quickly, and CSJ does not let these defendants off the culpability hook for their mistakes. In short, subjective intent is weighted more heavily, and the impossibility of these objective acts does not undermine guilt or exculpate such defendants, save when the threat is judged to be either non-credible or not immediately likely.

In a second experiment,³⁹ “mistake” was varied off a self-defense case that loosely paralleled *Goetz*,⁴⁰ the case of the subway vigilante, where the self-defense variation served as a baseline control condition and produced 62.5% not guilty by reason of self-defense (NGRSD) verdicts. When the mistake was REASONABLE, the NGRSD percentage was 78.6%, a seemingly curious rise⁴¹ over the baseline self-defense case. But when the mistake became more and more unreasonable, as in DUBIOUS MISTAKE, UNREASONABLE MISTAKE, and DELUSIONAL MISTAKE, the NGRSD percentages dropped precipitously, to 25%, 4%, and 0%, respectively. If CSJ had not only weighed subjectivity more heavily but taken an unrestrained plunge into subjectivity, then any mistake ought to have exculpated equally well, as reasonable mistakes, honest but unreasonable mistakes, or outright delusional mistakes are equivalent from a subjective vantage point. But the results do not come out that way. As the second experiment showed, objectivity was also important for CSJ, as the mistake had to have some basis in objective reality: in short, the mistake must be plausible rather than absurd.⁴²

There is another CSJ principle that shows brightly as well. This is the principle of proportionality, where the degree of guilt and the severity of the punishment are hinged, proportionately, to the degree of culpability; this shows most clearly in recidivism cases,⁴³ where the prosecution invites jurors to escalate the punishment dramatically and disproportionately, but where the results

39. *Id.*

40. *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986) (also known as the “subway vigilante” case, as Goetz, who was previously mugged on the subway and was now carrying a gun, shot four young men who approached him, where the threat to his life was objectively questionable). See generally GEORGE P. FLETCHER, *A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* (1988).

41. Finkel et al., *Lay Perspectives*, *supra* note 6, at 603-06. In this variation, the man draws his gun and fires when he sees the teenager’s gun, which, after the fact, turns out to be a water gun. Participants wrote that this defendant has been punished enough for his reasonable mistake, for he will suffer the guilt of his action for a lifetime.

42. *Id.*

43. Finkel et al., *Recidivism*, *supra* note 8, at 476-82. We tested variations of the cases of *Solem v. Helm*, 463 U.S. 277 (1983) (writing a “no account check” was the crime, which in one variation was repeated numerous times, and where the prosecution, in several variations, was urging a most severe level of punishment for this “recidivist,” who apparently did not learn his lesson) and *Rummel v. Estelle*, 445 U.S. 263 (1980) (deciding a shoplifting case, where the crime was repeated many times, with our variations paralleling those in our Helm case).

reveal proportionate sentencing. Proportionality, along with the subjective orientation, both emerge in a perpetrator-by-means case,⁴⁴ where guilty verdicts, sentence length, and a “let stand” measure to an appeals version of the case, all reveal an endorsement of the principle of proportionality and the subjective orientation. But the clearest indications of proportionality and subjectivity arise in felony-murder and accessory felony-murder cases, for proportionality is pitted against the principle of “equalism,” where all defendants (e.g., triggerman, sidekick, lookout, and getaway driver) are judged equally culpable and all are seen as deserving of the same sentence, despite clear differences in both level of participation and culpable intent.⁴⁵ Yet time and time again, ordinary citizens reject equalism in favor of proportionalism.⁴⁶

The final point I wish to make concerns crime prototypes.⁴⁷ Crime prototypes are images of crimes and criminals that citizens have, and which jurors bring with them to the jury box. These prototypes have been empirically and conceptually linked to jurors’ story constructions and verdicts.⁴⁸ In two experiments, we found three or four prototypes emerging for each case, and “while the subjective element of motive dominated the culpability determination in Experiment I, objectivity prevailed in most cases in Experiment II. A common-sense and complex balancing of objective and subjective factors is the rule, while

44. *Id.* at 482-86. We tested variations of *Regina v. Morgan*, 2 W.L.R. 923 (1975) (Morgan enlisted a number of men to “rape” his wife, claiming that she wanted to enact this fantasy, and hence it was not rape) and *Director of Public Prosecutions v. Morgan*, A.C. 182 (1976) (raising questions about the accomplices’ “mistake,” and whether this was a reasonable mistake, an honest but unreasonable mistake, and if the accomplices were found not guilty for their mistake, then was Morgan, the perpetrator-by-means, also not guilty, by using the accomplice felony-murder doctrine?).

45. *See, e.g.*, *Tison v. Arizona*, 481 U.S. 137 (1987) (finding, in a 5-4 decision, that the death penalty under the following circumstances did not violate the Eighth Amendment: in an accessory felony-murder, accomplices did not kill nor intend to kill, but their participation might be judged as more substantial than in *Enmund*); *Enmund v. Florida*, 458 U.S. 782 (1982) (finding, in a 5-4 decision, that the death penalty for the accessory in felony murder, where *Enmund* was the getaway driver, who did not kill, did not intend to kill, and who was not at the scene of the killing, violated the Eighth Amendment).

46. *See generally* Norman J. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819 (1990); Norman J. Finkel et al., *Equal or Proportional Justice for Accessories? Children’s Pearls of Proportionate Wisdom*, 18 J. APPLIED CHILD DEV. 229 (1997); Norman J. Finkel & Kevin B. Duff, *Felony-Murder and Community Sentiment: Testing the Supreme Court’s Assertions*, 15 LAW & HUM. BEHAV. 405 (1991); Norman J. Finkel & Stefanie F. Smith, *Principals and Accessories in Capital Felony-Murder: The Proportionality Principle Reigns Supreme*, 27 LAW & SOC’Y REV. 129 (1993) (showing, clearly and consistently, through experiments with college students, adults, and elementary school children, that citizens reject the equalist punishment and disproportionate punishment they find in accessory felony-murder).

47. *See generally* Finkel & Groscup, *Crime Prototypes*, *supra* note 7; Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857 (1991); Loretta J. Stalans, *Citizens’ Crime Stereotypes, Biased Recall, and Punishment Preferences in Abstract Cases: The Educative Role of Interpersonal Sources*, 17 LAW & HUM. BEHAV. 451 (1993) (pointing to the power of lay citizens’ crime prototypes, which typically derive from media sources and personal experiences, and how these may be significantly at odds with the law’s crime definitions).

48. Finkel & Groscup, *Crime Prototypes*, *supra* note 7, at 209 (describing how crime prototypes “were elaborated through narratives, yielding 600 detailed stories, across seven different cases, in two experiments. These stories were manipulated under conditions that explored the prototypicality of the case, the verdict outcome, and whether it was a rightful or wrongful decision”).

simplicism was the rare exception.”⁴⁹ Of particular note is the multiplicity of prototypes for each case (for example, a euthanasia case, an insanity case, a heat of passion case, and a self-defense case were used in Experiment I, while a burglary case, a kidnapping case, a rape case, and a self-defense case were used in Experiment II), rather than a single image of what an alleged crime and criminal look like. Now, it is time to apply these lessons learned regarding subjectivity, proportionality, and multiple prototypes to the case of a battered woman who kills her spouse in a non-confrontational setting.

III. WHEN A BATTERED WOMAN KILLS: DOES EXCUSE OR JUSTIFICATION BEST FIT?

A. Where Expert Syndrome Testimony Is Not Needed—Confrontational Killings

1. Evolutions in Law, Empirics, and Community Sentiment

I begin this analysis by setting aside *confrontational* killing cases. I do so because the vast majority of defendants in confrontational circumstances do not need supporting expert witness testimony on Battered Woman Syndrome (BWS)⁵⁰ to make the case for justification. Expert testimony regarding BWS is, at best, unnecessary and irrelevant, and at worst, it may undermine and contradict the justification defense being proffered, for it portrays the defendant as one that more closely fits with insanity (NGRI), an excusing condition argument.⁵¹ BWS testimony is unnecessary because confrontational killings fit squarely within an easily accessible heuristic. This turns out to be the dominant, longstanding prototype in self-defense cases—that of the chance medley, where the confrontation typically involves two males. This available heuristic works hand-in-glove with the “settled law” on confrontational killings, such that jurors are likely to have little trouble understanding (and empathizing with) why this female defendant killed a male in a confrontational circumstance. Thus, jurors are likely to have little trouble judging her as “non-culpable” by the existing rules of law,⁵² for a female killing a male during a physical confrontation neither alters the basic prototype nor pushes it into questionable areas, as it simply reflects a “what is good for the goose is good for the gander” version of equal justice, a basic fairness principle.⁵³

49. *Id.*

50. They may benefit from expert testimony regarding *the facts* of “battered women” and “violence in marital relationships” generally, but this is quite different from “syndrome” testimony. Fact testimony may bolster the defendant’s credibility and her story in the jurors’ minds, particularly if jurors are either not familiar with marital violence and its frequency, severity, and lethality, or disbelieve the serious harmful effects that frequently result in these cases. See generally Finkel et al., *The Self-Defense Defense*, *supra* note 2.

51. See *infra* notes 76-119 and accompanying text (focusing on non-confrontation killings and expert testimony on BWS to help make the justification defense and whether this testimony undermines or contradicts the justification argument).

52. Finkel et al., *The Self-Defense Defense*, *supra* note 2, at 593-601.

53. See FINKEL, NOT FAIR!, *supra* note 21, at 186.

There is another factor that works in favor of these defendants, which again makes expert syndrome testimony unnecessary. Although the general law and the dominant prototype have not changed much in recent times, community sentiment has.⁵⁴ The level of empathic understanding for battered women has increased in recent decades, for newspaper coverage, Court TV coverage, and television and movie portrayals of violence in marital relationships have heightened citizens' awareness of this problem and changed the "community's sentiment" in directions more favorable to female defendants.⁵⁵

Paralleling the enlightenment of community sentiment, there have been more enlightened decisions within the law regarding the specific requisites for a successful NGRSD, for these decisions have been interpreted in ways that increasingly favor such defendants.⁵⁶ However, not long ago, we could find cases where the "threats" of "hands, fists, or feet" were not deemed to be "serious," and where the "equal or proportional response" requirement was understood narrowly or literally, and where these requisites, singly or in combination, would oftentimes doom an NGRSD bid.⁵⁷ But empirical studies like Wolfgang's,⁵⁸ showing that most women who get killed in marital relationships get killed by hands, fists, and feet, inform both lay citizens and the law, and this empirical information has helped dilate both black-letter law's and CSJ's views of "serious threat."⁵⁹ Moreover, there was the landmark case of *State v. Wanrow*,⁶⁰ which recognized that women typically have a different socializing history regarding violence than do men: the *Wanrow* court held that women are not socialized to "put up their dukes" when the batterer comes at them with his fists (a

54. See, e.g., Finkel et al., *The Self-Defense Defense*, *supra* note 2, at 600.

55. *Id.* at 589-600. In this experiment, mock jurors had a wide array of verdict options, which included first-degree murder, second-degree murder, voluntary manslaughter, guilty but mentally ill, not guilty by reason of insanity, and not guilty by reason of self-defense (NGRSD). By providing more options than jurors typically get at trial, we purposefully stretch the canvas wide, so to speak, allowing mock jurors a full landscape on which to designate their preferred verdict choice. In the three confrontational cases, the dominant verdict, by far, was NGRSD, with 80%, 78%, and 71% of the verdicts falling in this NGRSD category. But even for the non-confrontational scenarios, where the batterer was watching television or asleep at the moment of the act, NGRSD verdicts were still dominant, 42% and 45%, respectively, though significantly lower than for the confrontational killing scenarios.

56. See generally Schopp et al., *supra* note 31 (reviewing relevant concepts, such as imminence or immediacy, reasonable belief in the necessity of deadly force, and retreat, among others, and how case law and doctrine have treated these issues); Singer, *supra* note 34 (citing and discussing recent cases).

57. See, e.g., *People v. Caudillo*, 146 Cal. Rptr. 859 (Cal. 1978) (agreeing with defendant's claim that there was not enough evidence to support a finding that he intended to inflict great bodily injury on the victim when, in the course of a number of crimes, defendant held a knife to the victim's throat, and she sustained a slight cut to her throat); *People v. Jones*, 12 Cal. Rptr. 777 (Cal. App. 1961) (denying a defendant's appeal of her manslaughter conviction when she claimed she shot her husband in self-defense, after he picked up a knife, threatened to throw the knife at her, threatened to kill her, and, according to her story, advanced on her with the knife).

58. MARVIN E. WOLFGANG, *PATTERNS IN CRIMINAL VIOLENCE* (1958) (beginning the exploration of interpersonally relevant, being directly relevant to spousal batterings and killings).

59. See FINKEL, *COMMONSENSE JUSTICE*, *supra* note 24, at 233.

60. 559 P.2d 548 (Wash. 1977). This case led the court to speak about the "reasonable battered woman," and posit that there were different developmental and socializing patterns for women, as opposed to men, when it came to violent confrontations.

proportional response), but rather, they are likely either to cower and be beaten or reach for more deadly force, if the latter is available.⁶¹ In addition, better empirical data has debunked a longstanding “masochistic view” (i.e., that such women want to be beaten), so “blaming of the victim/defendant”⁶² has fallen by the wayside, as a slain myth. Also slain were the views that battered women do not try to escape or do not seek protection from the police and courts, along with the erroneous view that leaving is easy.⁶³ Finally, “disproportionate responding” cases were already being recognized by courts with NGRSD verdicts in male vs. male confrontations, where a significant size and power differential put the smaller defendant in much greater risk of serious harm or death.⁶⁴ In sum, better

61. *Id.*

62. See MELVIN LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* ch. 7 (1980).

63. See, e.g., ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 113 (1987). Browne studied battered women who did kill, and a comparison group of battered women who did not kill. She writes:

In the homicide group, many of the women stayed because they had tried to escape and been beaten for it, or because they believed their partner would retaliate against an attempt to leave him with further violence. Almost all of the women in both the homicide and the comparison groups—98 percent and 90 percent, respectively—thought the abuser could or would kill them; and many, especially in the homicide group, were convinced that they could not escape this danger by leaving.

Id. See also CHARLES P. EWING, *BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION* 61-76 (1987) (maintaining that women kill to prevent their batterers from destroying them psychologically, and thus they are fighting back in self-preservation); George W. Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ASS'N PSYCHIATRY & L. 271, 277-80 (1982) (showing that attempting to leave is a high-risk time for being killed).

64. See, e.g., *State v. Schroeder*, 261 N.W.2d 759 (Neb. 1978) (sustaining a judge's ruling that an instruction about imminent danger and self-defense was not warranted, because deadly force was not warranted when the threat was not imminent, where at trial, the defendant offered testimony that he killed his larger cellmate while the victim was asleep, because the victim threatened to sodomize the defendant when he awoke). This issue also arose in an 1830 case, that of *Grainger v. State*, 13 Tenn. 459 (1830). As presented by Singer, *supra* note 34, at 479-80, the *Grainger* court found that:

[T]he victim, Broach, had ‘displayed the traits of a reckless bully,’ the court further declared that the defendant had ‘behaved like a timid, cowardly man.’ The court concluded that it ‘is equally certain to our minds that Broach only designed to commit a trespass and battery to the body of Grainger, without intending to kill him.’ Nevertheless, the court held that if Grainger himself thought that he was in danger, even if that was an unreasonable belief, the killing was in self-defense. The court made clear that it was the defendant's mental state, and not that of a reasonable man—certainly not a reasonable timid coward—that was to be assessed. Mistake, and fear, were to be judged by a subjective test.

But see *Shorter v. People*, 2 N.Y. 193 (1849) (according to Singer, *supra* note 34, at 481-82, this court “explicitly excoriated the subjective approach adopted by the *Grainger* court as ‘going too far.’ It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief”).

Still, the “subjectivization of the reasonable man,” according to Singer, was evident in most cases. In *Hill v. State*, 49 So. 145 (Miss. 1908), the size disparity between defendant and victim was recognized, along with the fact that the fists of a much bigger man could inflict great bodily harm. In *State v. Jennings*, 28 P.2d 448, 451 (Mont. 1934), the height and weight differentials between the aggressor and the defendant were taken into account. The “badly ruptured state” of the defendant, as opposed to the victim, was considered in *State v. Bartlett*, 71 S.W. 148, 150 (Mo. 1902). The smallness of the defendant, and the fact that he was missing three fingers, were considered in *Cook v. State*, 12 So. 2d 137, 139 (Miss. 1943). The poor physical condition of the defendant regarding a possible second blow to the stomach was considered in *State v. Dunning*, 506 P.2d 321, 322 (Wash. Ct. App. 1973).

empirical facts about relationship violence have helped change the context, the sentiment, and the law, which leads to greater appreciation and support for the battered woman's NGRSD claim.

Still other self-defense requisites have evolved or have been satisfied in confrontational killings in ways that also favor the NGRSD claim. For instance, the "imminence" requirement, that the serious threat must be an imminent or immediate threat,⁶⁵ is typically satisfied to the jury's satisfaction in confrontations, whereas the "castle" or dwelling exception to the "retreat" requisite has been interpreted as fitting the woman's situation, for it is her castle, too.⁶⁶ Given a more enlightened and evolved law and sentiment, fact-finders do not need an expert to educate them about, or guide them through, the subjective netherworld of a new psychological syndrome. Jurors are the "reasonable person" standard-bearers at these trials, able to invoke common knowledge to backlight and contextualize the particular case facts, and able to use their ordinary common sense to adjudicate confrontational killings, without special assistance of an expert.

2. Excuse vs. Justification: A Distinction Surfaces, Submerges, and then Rises Once More

Assuming that the jury finds such a defendant NGRSD, what is the theoretical rationale that underlies this verdict? Is this a justifying or excusing verdict? In current and common parlance, it would appear to be a justifying verdict, because this defendant was caught in a maddening situation, rather than because she was mad (but not blameworthy) at the time of the act. Her *actus reus*, then, is that of a sane and innocent person caught in an "insane situation," and thus her actions become justified because we value saving an innocent life more than not taking the life of a perpetrator intent on wrongfully causing serious harm or death.

But there is historical and legal context to consider, and when we do so, the answer becomes less clear. In older times, prototypical chance medley cases involved forfeiture, whereas prototypical felony-prevention cases did not.⁶⁷ Thus, if we categorize what she did as "chance medley," even if she satisfies *se defendendo* (that is, she retreated to a wall),⁶⁸ some blame might still be imputed, specifically if it appears that she either provoked or participated in this escalating

The age of the defendant, in this case 65, and the character of the deceased, were both weighed in *Lundy v. State*, 127 S.W. 1032, 1034 (Tex. Crim. App. 1910).

A very early case, *Monroe v. State*, 5 Ga. 85 (1848), involved a preemptive strike, where prior threats and beatings that the victim made and administered to the defendant led the defendant to lie in wait, but the court said that this could be self-defense. And, in a battered wife case, *State v. Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983), the court endorsed the subjective view, where the "mental and physical characteristics are like the accused's and who sees what the accused sees and knows what the accused knows." But see *People v. Lumsden*, 94 N.E. 859, 861 (N.Y. 1911), where this court, like some others, worried about a subjective test, where "mere fear or fancy or remote hearsay information or a delusion pure and simple and not rationally supported by any action or conduct of the [victim]" might "invite the use of deadly force."

65. See Schopp et al., *supra* note 31, at 64-70.

66. *Id.*

67. See Singer, *supra* note 34, at 471-72.

68. *Id.*

confrontation. A chance medley casting, coupled with the allegation of some culpability on her part, moves the inquiry from the *actus reus* to her *mens rea*, and seems to move the underlying rationale from justification to excuse, or even to manslaughter's mitigation, if she failed to retreat (that is, failed to satisfy *se defendendo*), killed on the spot, or provoked the confrontation.⁶⁹

But there is a second possibility, for we can also categorize what happened as felony-prevention, since the perpetrator was intending to commit an assault on the defendant. And there is a third possibility that complicates the picture considerably, one which I only raise now but will consider more fully when we turn to the harder case, the non-confrontational killing: the possibility, and the likelihood, that this "battered woman who kills during a confrontation" scenario fits poorly with either felony-prevention or chance medley, for the latter two situations, unlike the former, typically involve strangers, with no "relationship history" to color the current killing event, such that the "context" is all "present time," at the moment of the act.⁷⁰ If the battered woman who kills in a confrontation scenario does not fit well within the ambit of either historical prototype, then perhaps it will not be easily draped and fitted by either the justification or excuse rationale.

This theoretical divide between excuse and justification became moot, historically, when the distinction was erased, as felony-prevention and chance medley were legally rolled into one and the same self-defense verdict; remnants of the distinction, such as forfeiture, were abolished, and justification and excuse would be used interchangeably.⁷¹ This theoretical distinction may also be moot by CSJ standards, for different reasons, as ordinary citizens may judge this lofty debate as much ado about nothing, as a distinction without a difference. "It's simply self-defense," says the layperson. However, this debate may turn consequential when we consider: (1) the default option, (2) what happens when mistake occurs and the excusing rationale resurfaces, and (3) what happens when the killing is non-confrontational. We now move along this course, in a step-by-step sequence.

What happens if the jury does not believe that all the self-defense requisites are met, or if they believe she was not entirely non-culpable for the deadly confrontation that ensued? Here, the default verdict option is likely to be manslaughter, or extreme emotional disturbance (EED), under the newer Model Penal Code scheme.⁷² Under certain construals of the confrontation, this verdict may be fitting.

But what happens when "mistake" enters the picture, where, for example, the defendant is mistaken about the "serious threat" that is approaching? If the law falls back on its "mistake of fact" jurisprudence,⁷³ outcomes are likely to vary. If the mistake is reasonable, NGRSD may still result.⁷⁴ If the mistake is

69. *Id.*

70. *Id.*

71. *Id.* at 486.

72. MODEL PENAL CODE § 2.04 (Proposed Official Draft 1962) [hereinafter MPC].

73. Finkel & Groscup, *When Mistakes Happen*, *supra* note 5, at 70-77.

74. Singer, *supra* note 34, at 474-75, among others, credits East's *Pleas of the Crown*, with requiring that the necessity to use deadly force must be reasonable. If it is reasonable, "then the killing is

honest but unreasonable, however, the outcome is in greater doubt: we do not know with certainty whether such a mistake will still exculpate, or whether it will only mitigate, or whether it will remit nothing; moreover, if it does exculpate, we may not be sure whether it does it for justifying or excusing reasons.⁷⁵ There is still another possibility: if the mistake is grand enough—being an outright delusion—it might exculpate through an insanity (NGRI) verdict, which is an excusing condition. With mistake of fact, then, all bets are off as to predicting the verdict⁷⁶ and its underlying rationale, for verdicts may run the culpability table, from full culpability to mitigation to exculpation, and, under the latter, either the justifying or the excusing rationale may carry the day.

But to assess the character (reasonable, honest but unreasonable, delusional) of the mistake, jurors must leave the objective world of acts and facts and enter the subjectivity of the defendant. When we leave daylight for darkness, jurors are now among the excusing conditions, for justifying conditions are assessed in the light, with eyes wide open, with an anchor grounded in the objective situation, and with basic common sense. But what happens if the jurors reject the NGRSD claim here? What is the default verdict then? It might be manslaughter/EED if the mistake is seen as mitigating rather than exculpating. But what if the mistake earns the defendant no mitigation whatsoever? Does the

non-culpable; if it is not reasonable, the killing will be manslaughter.” EDWARD H. EAST, A TREATISE OF THE PLEAS OF THE CROWN (P. Byrne ed., Law Bookseller 1806) (1803).

75. Singer, *supra* note 34, at 472-73, writes:

In recent years, Professors Fletcher and Robinson have reemphasized the distinction between justification and excuse which was understood before 1800, and which underpinned the distinction between the two common law views of self-defense. A person who seeks to justify her act is arguing not only that the act was not wrong, but that she did what the law, or the state, or morality, demanded of her, and indeed, that she should be applauded for her conduct. The actor seeking an excuse, on the other hand, acknowledges that he should not have committed the act. The actor argues instead that for some reason peculiar to him, he should be neither blamed nor punished, while excuse acknowledges that the act was wrong but seeks to exculpate the actor.

One question dealt with by Robinson, which is philosophically important in determining the relationship of mistake to excuse and justification, is whether a mistake as to the existence of facts which would justify an act should result in calling the act “justified” or “excused.” Some view a mistake which leads to what would be a justifiable act had the actor been correct as, nevertheless, a justified act, apparently based on the notion that one should assess the moral worth of an act *ex ante*. See, e.g., PETER LOW ET AL., CRIMINAL LAW 541-48 (1982). Other writers, however, classify such a mistake as an excuse, apparently assessing the act *ex post* and determining that the actor has not in fact achieved a social good, which is required by the definition of a justified act. See, e.g., PAUL ROBINSON, 1 CRIMINAL LAW DEFENSES 83-101 (1984). As these writers put it, the doctrine of justification looks solely at the act, never at the actor. See also Fletcher, *supra* note 37, at 759.

See also Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61, 81 (1984), where Dressler sees Fletcher's account of justification as “tied to the view of the justified actor as a good person. . . . His ‘right’ is more the rightness of a Kant than a Bentham.” This, for Dressler, blurs the distinction between a not wrongful act and a wrongful act, what he sees as the key justification vs. excuse distinction. Greenawalt puts the key distinction in terms of warranted and unwarranted behavior, though he clearly acknowledges the “perplexing borders” problem of justification and excuse. Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1899-1900 (1984).

76. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 151-163 (3rd ed. 2001). In Chapter 12, *Mistakes of Fact*, Dressler provides excellent examples of this variation across strict-liability offenses, specific-intent offenses, and general-intent offenses.

default verdict then swing to the highly culpable end of the continuum, to second-degree murder, for instance, and would this murder verdict fit with the culpability level of the mistaken defendant who kills in a confrontation?

There is another possibility, of course, where the verdict swings all the way to the non-culpable, non-blameworthy end of the continuum, to insanity (NGRI). This verdict can legitimately result if the jurors construe the mistake as delusional. But what is the likelihood that a mistake of fact scenario reaches the delusional level? Not likely, but not impossible either.⁷⁷ However, even if the mistake of fact is not delusional, the verdict may still end up as NGRI because the jurors do not have available what they most want—the verdict option that best fits with their construal of the facts. If this is the situation, then the likelihood of jury nullification or a partial nullification⁷⁸ increases. This problem, as we shall shortly see, will grow more acute as we deal with the far more problematic cases, where the battered woman kills in non-confrontational situations, which we take up next.

B. When Experts Enter, But BWS Need Not—Non-Confrontational Killings

1. When an Apparent Death Blow Does Not Kill the NGRSD Possibility

A non-confrontational killing appears to deliver a fatal blow to an NGRSD claim, particularly to the justification claim. On its face, the non-confrontational killing fails to meet the “imminence” requirement, particularly when the alleged “serious threat” is sleeping or watching television when he is killed. In addition, the “escape/retreat” requirement may doom an NGRSD claim as well, as options other than using deadly force become evident to those “reasonable person/jurors” sitting on the objective, judgmental sideline.⁷⁹

Under non-confrontational fact conditions, citizens ask the most asked question of such cases: “But why didn’t she just leave?”⁸⁰ Though asked most frequently, that question is less relevant to the NGRSD claim than the question: “Why did she kill?” Breaking this down into multiple questions, we can ask whether, from her subjective vantage point, she believed that serious threat was imminent, and that this was her last opportunity to defend herself before the sure-to-come confrontation would likely end her life? Did she “see,” from her subjective vantage point, where her past history with the batterer weighs heavily, that the escape/retreat possibility was an illusion? Did she believe, from her geographic and interpersonal vantage points, that there was no safe shelter or

77. In one experiment, where we tested a “delusional mistake” involving strangers on a subway, 0% of mock jurors registered a NGRSD verdict. See Finkel et al., *Lay Perspectives*, *supra* note 6, at 605. But in an earlier experiment, involving a mistake about the seriousness and imminence of a threat in a marital relationship featuring a long history of battering, 74% found the wife/defendant not guilty by reason of insanity (NGRI). See Finkel et al., *Insanity Defenses: From the Jurors’ Perspective*, *supra* note 1, at 81-84.

78. See, e.g., FINKEL, *INSANITY ON TRIAL*, *supra* note 1, at 166-81; FINKEL, *COMMONSENSE JUSTICE*, *supra* note 24, at 30-33; Finkel et al., *Commonsense Justice and Jury Instructions*, *supra* note 10, at 595-600.

79. See, for example, the facts cited by both BROWNE, *supra* note 63, at 171-74, and EWING, *supra* note 63, at 46-50.

80. *Id.*

protective family or friends to which she could turn? Did she believe, from her subjective vantage point, weighted by a history of phone calls to the police, that law enforcement would fail her, as it had in the past? And did she believe, from past failures of courts to impose or to effectively guarantee restraining orders, that this option would fail her, as it had previously failed her? In sum, did she see and believe that there were really no other options available, in her reality, save the kill or be killed options?

Notice, that in stating these questions, I have not mentioned the Battered Woman Syndrome at all. It is quite possible, as Schopp, et al. claim, for some defendants to answer all of the above questions with a “Yes,” and back up their answers with only factual testimony without invoking BWS.⁸¹ If these defendants did that, claim Schopp, et al., they would be presenting a justification claim, relying on a “reasonable belief” argument, which these authors believe is conceptually and empirically sounder than the syndrome/excuse strategy.⁸² I will evaluate Schopp, et al.’s justification position in due course, but first I turn to the more typical position, which does rely on BWS to make the NGRSD claim.

2. BWS—Does it Transmute a Justifying Claim into an Excusing Claim, Akin to NGRI?

The legal, jurisprudential, and psychological advocates of battered women who kill, claim that (1) they are making a justification argument, and (2) this argument is very different from insanity (NGRI).⁸³ When they attempt to make their case at trial, they not infrequently turn to expert testimony on BWS to bolster their contentions with empirical facts.⁸⁴ However, when we parse the arguments in light of the law and of the nature of BWS, or evaluate the arguments in terms of what CSJ is likely to comprehend, it appears that a straightforward excusing argument is being made, one much akin to insanity.⁸⁵

81. Schopp et al., *supra* note 31, at 71-73.

82. *Id.* at 104.

83. See generally, e.g., GILLESPIE, *supra* note 21; Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L. J. 121 (1985); Pamela Jenkins & Barbara Davidson, *Battered Women in the Criminal Justice System: An Analysis of Gender Stereotypes*, 8 BEHAV. SCI. & L. 161 (1990); Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393 (1988); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986); Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149 (1978). These articles address issues of bias and gender stereotypes in cases where women kill their batterers: for example, whether there is bias in the law, in prosecutorial discretion, and in jurors' decision making, and whether some special defense, a different norm, a different situation claim, or what I am calling a “haute couture” defense, would help or hurt such defendants.

84. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 426 n.168 (1991) (documenting that BWS testimony is most often admitted).

85. Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 122 (1990). As Schulhofer states: “A third difficulty with the Walker approach is that its attempt to answer the requirements of the prevailing paradigm leads it to a Catch-22. The very dynamic that it uses to satisfy imminence and necessity (learned helplessness and the inability to act) leaves it without an explanation for what the woman *did*—kill her husband. Indeed, in some respects the theory of learned helplessness seems inconsistent with the act of killing. The result is not only a theoretical

To evaluate the BWS strategy, let us begin by rephrasing the above questions, but this time inserting BWS or its defining elements into the questions. Did the defendant believe, from her subjective viewpoint, colored and distorted by her BWS, that serious threat was imminent when objectively it was not, and did she then come to believe that this was her last opportunity to defend herself, when, in objective reality, it was not? Did she “see,” from her subjective vantage point, distorted by her BWS history, that there was no escape/retreat option, when, in objective reality, there was? Did BWS distort her perceptions and beliefs, such that she believed that there was no safe shelter anywhere, when, in objective reality, there may have been such options? Did BWS cause her to misperceive and misbelieve that the police and the courts would do nothing to aid her, when, in fact, they might have, had she tried those options? In sum, did BWS cause her to believe that there really were no other options available, save kill or be killed, when, in objective reality, other options were available?

Now, let us add a few more questions. Did the alleged “cycle of violence,” a key causal, interpersonal element that is said to produce the intrapsychic BWS,⁸⁶ contribute to her development of “learned helplessness,” a key symptom of BWS,⁸⁷ which in turn led to distortions of perceptions and beliefs, such that she saw, from her subjective vantage point, no exit to the situation, for she saw the situation as hopeless and herself as helpless? Did her “learned helplessness” also leave her with the subjective sense that she had no control whatsoever over either the situation or the batterer (that is, an external locus of control), although in objective reality she could have and did have some degree of control? Did her “depression,” another key symptom associated with BWS,⁸⁸ produce depressogenic thinking, depressed emotionality, and depressed motivation to make changes, such that, in her subjective reality, she believed that resistance was futile? Did her depression, and her learned helplessness, come to produce a chronic “passivity,” an alleged correlate of BWS,⁸⁹ and therefore an inability to plan a way out, let alone carry out a plan of escape? And did her “traditional beliefs” (such as “one does not exit or divorce,” for marriage is “until death do us part”), also an alleged correlate of BWS,⁹⁰ close off certain exit options in her subjective reality, when, in objective reality, those options were viable?

To answer all of these questions with a “Yes,” the advocate of this BWS strategy is going to call a psychological expert to testify, and this expert will present BWS and its symptomatology for the jury, relating symptoms to syndrome, and relating both to the defendant’s actions. But there is no getting around the psychological fact that the jurors will hear the expert saying that she has a “mental disorder,” BWS, for the shorthand, heuristic translation of this testimony, the one the jurors are likely to get, is that “she was not in her right mind.”

When the argument is analyzed this way, the defense ends up presenting an excusing rather than a justifying defense, which is not all that different, or

anomaly but a serious practical obstacle to success in battered spouse litigation.” *See also, generally*, Catharine A. MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703, 734-36 (1982).

86. *See infra* notes 103-111 and accompanying text.

87. *See infra* notes 103-111 and accompanying text.

88. *See infra* notes 103-111 and accompanying text.

89. *See infra* notes 103-111 and accompanying text.

90. *See infra* notes 103-111 and accompanying text.

different at all, from insanity. After all, the expert tells the jurors that the defendant's perceptions, thinking, beliefs, judgments, emotions, and actions are not what they are for you and me, we non-BWS individuals, and the jurors are likely to hear and comprehend it that way.

In this light, the "reasonable person" standard is inapt, for this is not a reasonable person. What she is, and what the standard ought to be, say some, is a "reasonable battered woman."⁹¹ But what does this new norm or standard convey? Does it mean that her behavior, when evaluated against the reference subgroup of battered woman, is "reasonable"? That interpretation makes "reasonable" a synonym for "what the average" battered woman does, but that proposition is demonstrably false, in terms of killing a spouse, for the vast majority of battered women do no such thing.⁹² A second way of making sense of the term is to invoke the ordinary, dictionary meanings of the word.⁹³ But this construal does not work either, because the battered woman who kills, and particularly the battered woman with BWS who kills, looks nothing like dictionary "reasonable," as her actions contradict the ordinary meaning of "reasonableness."

So in what sense is she "reasonable"? It would seem to mean something like the following: "she is behaving and thinking 'unreasonably,' although this is not that uncommon among battered women, which makes it 'reasonable' in that it represents a significant minority of the subgroup." If we accept this interpretation because the "ordinary, dictionary meanings" do not fit, and because the "statistical average" meaning is patently untrue, then the argument still amounts to a claim that she is not a blameworthy person, which is the basic format of the insanity argument, the prototypical excusing condition. Try as some do to escape from insanity's gravitational pull, this BWS strategy seems to push

91. Schulhofer, *supra* note 85, at 106. Schulhofer differentiates three different perspectives or approaches, that of *equal treatment*, *different norms*, and *different situations*. The equal treatment argument is the least objectionable, holding to the same rules for women as for men. That different norms ought to be used, and that differences in situations ought to be recognized, are far more controversial, raising the specter of reverse discrimination or unequal treatment. See also Isabel Marcus et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 27 (1985) (MacKinnon notes that arguing for a different norm or situation, based in part on Carol Gilligan's notion of a "different voice," turns out to be arguing for "the voice of the victim"); Kinports, *supra* note 83, at 393 (arguing that a "reasonable battered woman" perspective ought to be adopted). But see Nancy Fiora-Gormally, *Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?*, 2 LAW & HUM. BEHAV. 133, 163-65 (1978) (arguing that a new standard is not needed, but rather, an adjustment of existing statutes such that the same standard applies to all victims). See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (presenting a challenge to Kohlberg's moral development (e.g., LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE (1981)), arguing that his stages may fit men, but they do not fit women, for women's moral development involves a greater consideration of caring and connection, where the responsibilities to relationships form the context); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987) (exposing problems of acculturation and role stereotyping that lead to a power imbalance, where men may dominate and women may be subordinate).

92. See BROWNE, *supra* note 63, at 113 (comparing battered women who kill with battered women who do not).

93. Where some of its meanings are "agreeable to reason," "not extreme or excessive," "moderate," "fair," "having the faculty of reason," "rational," "possessing sound judgment." WEBSTER'S SEVENTH COLLEGIATE DICTIONARY 713 (1969).

the defendant further into insanity's orbit.⁹⁴ Once jurors are asked to contemplate either "an unreasonably reasonable" battered woman or "a reasonably unreasonable" battered woman, both resulting from a syndrome, jurors are no longer in the objective reality of a situation, but in the nooks and crannies of an unusual mind.

Still, there are some things about battered women that do not look like insanity, and here I speak about battered women, and not BWS. There is typically a lengthy history of batterings, which no one deserves. In commonsense parlance, her treatment has been unfair.⁹⁵ Before the killing, then, she is easily seen as the victim, and the batterer, as the villain. Thus, the history and context for the battered woman are likely to generate far more sympathy than they would, typically, for the insanity defendant. Then there are differences in terms of the "threat" she poses to the community. From research findings⁹⁶ regarding battered women who kill, this group is generally one of the least violent groups, which contrasts with findings regarding other mental disorders that are linked to insanity claims.⁹⁷ In addition, the battered woman, if she is dangerous, is only likely to be dangerous to the batterer, and thus, with the batterer now deceased, she poses little threat to others; this, however, is not the case with insanity defendants.

While battered women are likely to have our sympathy for what they have suffered, the criminal law turns out to be a poor vehicle for compensating victims for past abuses, or for dealing with victims at all. That is the job of civil law, or psychotherapy. Criminal law focuses on retribution, judging the defendant's culpability for an alleged criminal act; it does not make restitution to a victim, even when the victim happens to be the defendant; and besides, restitution would be impossible in these cases, where so much undeserved abuse has already happened.

But CSJ is a player in this criminal law context, for jurors judge the situation and render a verdict, and jurors may not neatly compartmentalize criminal law's function and civil law's function.⁹⁸ Put another way, CSJ may do both, judging retribution and making restitution, all through the one task it is sanctioned to do, rendering a verdict.⁹⁹ Here, black-letter law and CSJ may indeed part ways.

94. Schopp et al., *supra* note 31, at 92-93 ("Psychologists, psychiatrists, or members of other clinical professions ordinarily present this testimony, emphasizing learned helplessness and other psychological characteristics of the defendant. Such testimony apparently portrays the defendant as suffering certain patterns of psychological impairment, suggesting to some courts and commentators that it is relevant to insanity or diminished capacity rather than to a justificatory defense requiring a reasonable belief. . . . Although advocates deny that the syndrome constitutes a mental illness, courts and commentators discuss it as a distortion of thought and perception, impaired ability to perceive and realistically appraise alternatives, and delusions regarding the batterer and the relationship.").

95. See FINKEL, NOT FAIR!, *supra* note 21, at 91.

96. See generally, e.g., BROWNE, *supra* note 63; EWING, *supra* note 63.

97. See generally, e.g., Eric Silver, *Punishment or Treatment? Comparing the Lengths of Confinement of Successful and Unsuccessful Insanity Defendants*, 19 LAW & HUM. BEHAV. 375 (1995) (presenting data that successful insanity acquittees have major psychological disorders, rather than minor disorders or no disorder).

98. See, e.g., Finkel et al., *The Self-Defense Defense*, *supra* note 2, at 600.

99. *Id.*

3. BWS—Does the Mistake of Fact Doctrine Rescue this Defendant, via Excuse?

Does the BWS argument work any better if we look at it in the light of the mistake of fact doctrine? For instance, this woman with BWS clearly makes mistakes in perceiving, thinking, and judging people and situations accurately.¹⁰⁰ But problems arise over the nature and extent of her mistakes, for these are neither simple nor everyday mistakes; nor are they the sort of reasonable and plausible mistakes that anyone could make; nor are they the poet's "to err, is human"¹⁰¹ sort of mistakes. "No, ladies and gentlemen of the jury, you will need to hear special testimony from a psychological expert in order to understand these unusual mistakes, for consulting your own mistake experiences will prove inadequate; you will not be able to contextualize her mistakes with your own, for the defendant's mistakes are different in both nature and degree. Her mistakes may be 'honest mistakes,' but they are certainly 'unreasonable,' as they result from her disorder, BWS, which colors and distorts her perceptions, thinking, and judgments quite beyond what happens in ordinary situations."

Once again, this argument does not fit with justification,¹⁰² particularly if we define a justification argument as one that begins and ends with the objective act and situation. Using this definition, the BWS argument represents the opposite sort of argument, for her mistakes are steeped in subjectivity, beginning and ending in the defendant's mind. Furthermore, to adjudicate this matter favorably for the defendant, the jurors will be asked to set aside their reasonableness standard and replace it with some version of a fiction, that of the "average person with Battered Woman Syndrome," as this aggregate reflects no one thing or person. But in the form this argument takes, this is just the sort of "jump-shift" jurors are asked to make in insanity cases, where they are asked, in using the *M'Naghten* rule, for example, to judge the defendant's delusions from the defendant's point of view, "as if" they were true.¹⁰³

Both of the advocates' arguments—that this is justification, and that it is distinct from insanity—rest heavily on the background facts that dramatically establish the defendant as the victim and the victim as the villain. This may work as a visceral appeal, but not necessarily as a legal argument. This *dramatis personae* factor ("the S.O.B. deserved it") is asked to carry the considerable freight that goes with a justification claim, and it is likely to buckle under the strain of a non-confrontational killing, where, at the "moment of the act," the batterer is sleeping or watching television. Then there is the problem of the subjective syndrome, BWS, explaining the "why" of it, which ends up sounding more like NGRI's excuse than NGRSD's justification. Finally, if the defense pushes mistake to the fore, is not the prosecution likely to raise the issue of whether the defendant bears culpability for bringing about the mistake? When it comes to an insanity claim and jurors' relevant and determinative *de facto*

100. See DRESSLER, *supra* note 76, at 151-63, for a discussion of mistake of fact.

101. ALEXANDER POPE, PASTORAL POETRY AND AN ESSAY ON CRITICISM 297 (Emile Audra & Aubrey Williams eds., Yale U. Press 1962) (1711).

102. See FLETCHER, *supra* note 37, at 759-62; ROBINSON, *supra* note 75, at 83-90; Singer, *supra* note 34, at 498-99. But see LOW ET AL., *supra* note 75, at 541-48.

103. See, e.g., FINKEL, INSANITY ON TRIAL, *supra* note 1, at 155-81.

constructs,¹⁰⁴ culpability for bringing about one's disability/mistakes is a major factor for many jurors, particularly those that find the defendant culpable and guilty.¹⁰⁵

4. When the Empirical Foundation of BWS Begins to Crack

It is one thing to question whether the BWS argument best fits on the excusing or justifying side of a theoretical divide, and to argue, as I have, that, as a legal doctrine and strategy, the excusing rationale is likely to fit better with the law and play better to the jury, under these non-confrontational case facts. My argument draws on the fact that BWS, as an excuse, more closely parallels insanity's basic argument, whereas BWS, as a justification, departs in too many significant ways from prototypical self-defense scenarios. In addition, I argue that the mistake doctrine is not likely to rescue the justification rationale, for it, too, analogizes better with insanity's excuse than it does with self-defense's justification. But these arguments begin on the normative, conceptual, and theoretical end of things, and where empirics do enter the debate, they do so in the form of which rationale "best fits with the facts" analysis, which subserves the normative.

But under this subsection, the challenge goes to the empirical facts *per se*, those that allegedly constitute the BWS specifically, for if many of the defining features of the syndrome *are not so*, then the empirical foundation of BWS, as we know it, begins to crumble. And if the supportive facts fall, then BWS must fall as an explanatory construct (for either the excusing or justifying claim), because the supportive construct lacks validity. By implication, then, the law would be ill-advised to erect any theoretical edifice on such a substantively weak base.

What are the valid facts of BWS, and do the facts fit the argument? Reviewing Lenore Walker's¹⁰⁶ original findings, as well as more recent empirical work on the subject, Schopp, et al.¹⁰⁷ conclude that a number of Walker's conclusions are either not supported or are contradicted by the evidence she provides, while findings from other research also contradict many of alleged symptoms that Walker claims constitute BWS.¹⁰⁸ For example, the interpersonal factor, the "cycle of violence" that allegedly causes many of the intrapsychic symptoms, is not found in the majority of woman said to have BWS. Nor do we find low self-esteem, nor the traditional attitudes about marriage and divorce that battered women with the syndrome are said to hold; to the contrary, many battered women see themselves as stronger and more independent, and their values are

104. See generally, e.g., FINKEL, INSANITY ON TRIAL, *supra* note 1; Finkel, *De Facto Departures*, *supra* note 1; Finkel & Handel, *How Jurors Construe "Insanity," supra* note 1 (empirical studies in which mock jurors, students and adults, detail and explain their relevant and determinative constructs in insanity cases, for their guilty or NGRI verdicts; these constructs turn out to be more numerous than those embedded in legal tests, and certain constructs go into insanity's essential matter in a deeper way than the law's largely symptomatic constructs).

105. See, e.g., FINKEL, INSANITY ON TRIAL, *supra* note 1, at 170.

106. See generally LENORE E. WALKER, THE BATTERED WOMAN (1979) (Walker's now classic investigation, based on interviews with battered women); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984) (the work most frequently cited regarding the syndrome, and Walker's identification and elucidation of its causes and its essential components).

107. See Schopp et al., *supra* note 31, at 53-63.

108. *Id.* at 63-64.

found to be less traditional than non-battered women.¹⁰⁹ Moreover, the lack of plans or the inability to plan for leaving, and the hypothesized external locus of control and the belief that they could not control, have not been supported in the research literature; to the contrary, they have been contradicted. For instance, in the expressed opinions of the battered women assessed by Follingstad, et al.,¹¹⁰ of those who were in long-term (LT) or short-term (ST) battering relationships, and those who were still in these relationships (IN) or those who got out (OUT), most had made plans to leave, sometimes as early as the very earliest of batterings, and most believed that they could control and did control, to some degree, the batterer's violence. Furthermore, the so-called "passivity" is not a state that characterizes most battered women, and the "depression" that does fit these women also fits many women with other disorders, who do not have BWS.¹¹¹

These findings, when taken together, show that some of the alleged symptoms either do not occur, are opposite of what has been alleged, or do not occur with any greater frequency for battered women than for non-battered women. Particularly, "learned helplessness," the key concept upon which BWS rests, lacks empirical support: this concept, which Walker borrowed from Seligman's¹¹² work with dogs and then analogized to battered women, fails to appear in the majority of cases. The most favorable conclusion about BWS, then, is that if it occurs, it occurs in, at best, a minority of cases.¹¹³

But there is a finding that is less frequently cited, perhaps because it does not fit well with the learned helplessness imagery and with all the distortions in perception and thinking that are said to follow, or because it seems to contradict the distortion picture.¹¹⁴ This finding portrays the battered woman as having

109. *Id.* at 64.

110. See generally Follingstad et al., *supra* note 30.

111. See David L. Faigman, Note, *Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 640-43 (1986) (making the methodological point that, without a control group or groups, women not in a battering relationship, women with other disorders other than BWS, etc., it is impossible to draw conclusions about whether her findings are unique to women with BWS or women in battering relationships).

112. See generally MARTIN SELIGMAN, *HELPLESSNESS* 21-44 (1975) (finding that, when Seligman exposed dogs to repeated trials of inescapable shock, two-thirds of the dogs failed even to try to escape when escape was subsequently possible).

113. Schopp et al., *supra* note 31, at 59, reach this conclusion:

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

114. See, e.g., Elizabeth Bochnak, *Case Preparation and Development*, in *WOMEN'S SELF-DEFENSE CASES: THEORY AND PRACTICE* 45 (Elizabeth Bochnak ed., 1981) (stating: "The battered woman

keener and more accurate perceptions, which lead to more accurate predictions from minimal cues as to whether or not her mate will erupt with violence, and how imminent that violence will be.¹¹⁵ If future empirical work shows this finding to be common, or even shows it to be a significant factor in a subset of battered women, that would have implications for the justifying argument, which I will develop a bit later.

5. When the Prototype of the Battered Woman Who Kills Fragments

Let us assume, from the available evidence,¹¹⁶ that BWS, as commonly understood, fits only a minority of battered women, and a minority of battered women who kill. Based on Ewing's categories and percentages,¹¹⁷ there appear to be four prototypes of battered women who kill: (1) the confrontational case, which comprises about 33% of the killings; (2) the "battered woman who files for divorce, moves out, and gets an order of protection, but is repeatedly pursued and beaten by her husband,"¹¹⁸ and ultimately kills him in desperation, a pattern that accounts for about 40% of the cases; (3) the 6% who arrange to have someone kill their spouses, and (4) the 21% who kill their spouse when he is asleep or watching television.¹¹⁹

While there are some who believe that Ewing's findings underrepresent the percentage of confrontational killings,¹²⁰ the point I wish to make depends only on the existence of the qualitative categories. That point is that BWS is likely to help most and to fit best only those of the last category. Earlier, we set aside confrontation cases because these needed no syndrome expert testimony, being the easiest to make a standard NGRSD claim based on justification. On different grounds, we can set aside the "contract killing" cases, for these are the least sympathetic cases and the least likely candidates for an NGRSD verdict, as these involve the most planning and premeditation, and therefore they likely fall on the most culpable end, where first-degree murder charges may be brought and

learns to recognize the small signs that precede periods of escalated violence. She learns to distinguish subtle changes in tone of voice, facial expression, and levels of danger. She is in a position to know, perhaps with greater certainty than someone attacked by a stranger, that the batterer's threat is real and will be acted upon."); *see also* State v. Kelly, 478 A.2d 364 (N.J. 1984); People v. Torres, 488 N.Y.S.2d 358 (N.Y. Sup. Ct. 1985) (arguing for keener perceptions, a special ability). *But see* State v. Hodges, 716 P.2d 563, 567 (Kan. 1986) (the learned helplessness picture, of "terror stricken people whose mental state is distorted, as brainwashed and disturbed persons" is the prototype).

115. Bochnak, *supra* note 114, at 45, n.121.

116. *See, e.g.*, BROWNE, *supra* note 63, at 12-17; EWING, *supra* note 63, at 23-34.

117. EWING, *supra* note 63, at 34.

118. Schulhofer, *supra* note 85, at 118.

119. EWING, *supra* note 63, at 34. Ewing reports that his goal was "to supplement the picture provided by Walker, Browne, Jones, Totman and Barnard," and he "examined American wire service reports, articles in major newspapers and magazines, scholarly articles, books, and trial and appellate court opinions published between 1978 and 1986, describing cases in which battered women had killed men who had allegedly battered them." *Id.* at 31. He goes on to state that "Clearly, no claim can be made that these 100 cases are representative of the larger population of battered women who kill their batterers." *Id.*

120. *See, e.g.*, Kinports, *supra* note 83, at 447 (raising the point that "many battered women cannot substantiate their testimony about the abusive relationship. Indeed, because of their fear and shame, they may not have told anyone about the beatings or even sought medical treatment, or they may have tried to cover up the cause of their injuries").

found. And we can probably set aside those cases of the second variety, because these women seem too active for the syndrome, and this level of activity does not match well with the passivity, depression, and learned helplessness picture; however, if we jettison a good bit of the learned helplessness imagery, and add the keener perceptions symptom, then this subgroup may be back in the NGRSD picture, where either a justifying or excusing rationale is advanced. But at this stage in the empirical development of the BWS construct, and in the selling of BWS to courts and jurors, we seem to be stuck at a stage where experts¹²¹ want to dress all battered women who kill in the same syndrome outfit, an off-the-rack strategy that is bound to fail, because there is no *one* prototype of the battered woman who kills.

6. Fashioning an Excusing Condition Defense, and Default Options

To maximize the likelihood that an excusing condition defense will work and that it will be seen as distinct from insanity, one would optimally start with those cases where battered women were planning a way out, but where their plans were consistently thwarted by the batterers' violence, threats of further and worse violence, and by his control over all financial resources. Moreover, this defense would be further supported if it could be shown that her plans were not aided by either police deterrence, court protection orders, or safe harbors provided by shelters, family, or friends. Thus, although she was trying to exit, the weight of accomplishing this fell exclusively on her shoulders, which were blocked by the much broader shoulders of the batterer. By accenting her planning, one accents that her drive of self-preservation (and the drive to protect children, if there be children) was alive, rather than having been worn away by years of learned helplessness, depression, and passivity. Finally, her history with the batterer can be used to support the "serious threat" requisite, and her "keen psychologist" status, being able to predict that serious threat will be forthcoming from minimalist cues, can support her judgment that mere "threats of serious harm" were "serious threats," since he had acted and made good on his threats many, many times before.

But here, her judgment of the serious threat may be an "overestimation," in this particular, deadly instance, and her estimation of its imminence may be distorted in the foreshortened direction, in this particular instance, although these "over and under" mistakes seem to be honest ones that are not off the mark by much. Moreover, if she is mistakenly off in her assessment of the necessity to use deadly force now, she is not off by much, given the serious harms he had inflicted in the past. And let us further stipulate that none of these mistakes is of the delusional variety.

She may, then, "over-predict" violence and dangerousness, much like the best psychologists do in making "risk assessments," even though courts will still accept the latter's predictive expertise in a variety of legal settings.¹²² Her "mis-

121. See, e.g., EWING, *supra* note 63, at 51-60; Schopp et al., *supra* note 31, at 46-47; Schulhofer, *supra* note 85, at 120-22.

122. E.g., Barefoot v. Estelle, 463 U.S. 880 (1983) (sustaining the decision and endorsing the place of the predictions under Texas's death penalty scheme, which the Court endorsed in *Jurek*, when the defendant appealed his death penalty sentence given in Texas, where two psychiatrists testified at the penalty phase that Barefoot presented a continuing threat to society. An amicus brief was filed

takes” include “not seeing a viable escape/retreat option,” one that would put an end to the misery and abuse that have dominated her life so unfairly, and for which she was not responsible for bringing about. This mistake, too, is an honest one, which, like the mistakes about “serious threat” and “imminence,” may fall somewhere in between “reasonable” and “unreasonable,” though all of these mistakes can be clearly understood from the jurors’ perspective of a reasonable person judging another reasonable person in dire straits.

It seems to me that if the killing was done in the manner suggested above, we would not applaud the act, as felony-prevention once was applauded, for the killing under the circumstances I describe is not the doing of the right thing. Still, though we do not justify it, we might excuse it as not blameworthy. Said another way, under the conditions I have laid out above, the killing would not be justified because basic mistakes (perhaps good faith mistakes, given her specific circumstances and history) were made and led directly to a killing that was not warranted at that particular moment, as the facts existed then. My excusing condition argument analogizes this situation with putative, imperfect, or mistaken self-defense, and analogizes her mistake or mistakes to good faith predictions of violence that result when experts professionally conduct risk assessments, where their predicted outcomes are in error (i.e., false positives), and where the mistake falls into what I would call an “honest but inflated” category.

Regarding putative, imperfect, or mistaken self-defense, the *Goetz*-like case¹²³ is instructive: if the actual *Goetz* case produced a not guilty verdict on the main charges, like the defendant in my research, where a mistaken self-defense version (that is, where a water gun is mistaken for a real gun) produced 78.6% NGRSD verdicts,¹²⁴ then jurors are responding positively to allegedly honest mistakes, where background factors may sensitize the defendant to over-predict serious and imminent threat. Moreover, we should note another difference, in that in the real *Goetz* case and in the hypothetical research case, the victim or victims were strangers to the defendant; in the case of the battered woman who kills, the victim is no stranger, of course, and as such, her predictions of imminent violence are not being generalized from past incidents *unrelated to the present victim*. In short, she has more reason to believe that her assessments—of seriousness, imminence, and that no escape/retreat option exists—are reliable and valid.

Moving to the analogized mistake, if experts are not held liable for their mistaken predictions, given that their risk assessments are up to professional standards, then this non-professional, with her battle-honed perceptions, ought

by the American Psychiatric Association, pointing out the inaccuracies of such predictions and urging repeal of the decision.); *Jurek v. Texas*, 428 U.S. 262 (1976) (holding that, to find for death, the jurors must unanimously agree that “(a) whether the defendant’s conduct that caused the death was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, (b) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and (c) if raised by the evidence, whether the defendant’s conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased,” at 262; questions (a) and (c) are typically answered in the affirmative, in the culpability phase, so that the death decision comes down to question (b)).

123. See *supra* notes 34-40 and accompanying text.

124. Finkel et al., *Lay Perspectives*, *supra* note 6, at 605-606.

not to suffer a blameworthy judgment either. Regarding the scientific process of predicting,¹²⁵ she is doing more or less what professionals do, from more data, as it turns out, and she certainly draws on a more extensive history of experiences with her “predictee” than professionals typically have when they make predictions about their “predictees,” as her experiences are first-hand, rather than second-hand.

But what if jurors do not believe that her mistakes were of the “honest but inflated” variety? What are the default options? The jurors may see her mistakes as “honest but unreasonable,” or worse, as “careless” mistakes, for which some culpability attaches; it could be even worse, if jurors believe that her mistakes go beyond carelessness, to reckless mistakes. In these instances, the fallback or default verdicts can be negligent homicide, for the careless or honest but unreasonable mistake, or reckless homicide, for the reckless mistake.¹²⁶ If jurors believe that there was no mistake, and further, believe that she meant to kill her husband while using mistake as pretext, then the deliberateness and planfulness of this execution could land her in the second-degree or even first-degree murder category.¹²⁷ This sort of schema allows jurors to grade the culpability, which they do anyway,¹²⁸ but now they can find the verdict categories that reflect their gradations, which they rarely have.

These recommendations build upon those facts regarding battered women that have been firmly established, by many researchers, while eschewing those alleged facts that have a questionable empirical basis, or ones that have been contradicted by more well-controlled studies. These excusing defense recommendations, in fact, do not rest on a “syndrome” at all, let alone a “one-size-fits-all” syndrome that must be false, given the wide and significant variation

125. See, e.g., VERNON L. QUINSEY ET AL., VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK 141-69 (1998); Grant T. Harris et al., *Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients*, 26 LAW & HUM. BEHAV. 377, 377-79 (2002).

126. My recommendations both endorse and disagree with some of the Model Penal Code's various recommendations. MODEL PENAL CODE § 3.11(2) (Official Draft and Revised Comments 1985). My recommendations endorse the negligent and reckless homicide options of the MPC (§ 3.09), but they do not agree with the MPC's doing away with the “reasonable” requirement and replacing it with a “belief” (§ 3.04(1)), for the latter recommendation of just a “belief,” any belief, makes the assessment entirely subjective, which tolerates far too much within an exculpatory sweep. My recommendations, then, can be characterized as quasi-objective, quasi-subjective, for they expand to some degree the “reasonable belief” view to also incorporate “honest but over-inflated mistakes,” and they recognize that any assessment of mistakes is going to require a subjective perspective. But my recommendations require that the subjective perspective be anchored in some ways to what is objectively reasonable. These recommendations are consistent with how CSJ evaluates impossible and mistaken act cases, as shown in Part II. On the other hand, my recommendations do not swing to the objective extreme that is found in some jurisdictions, that requires the defense to be limited to “actual necessity.”

127. DRESSLER, *supra* note 76, at 505-506. Dressler uses the Pennsylvania Model to illustrate the difference between first-degree murder and second-degree murder. First-degree murder is a “willful, deliberate, and premeditated” killing, whereas second-degree murder involves “intentional killings that are *not* premeditated and deliberate; intent-to-inflict-grievous-bodily-injury killings; reckless killings; and deaths that occur during the commission of felonies *not* listed in the first-degree section of the murder statute.”

128. See, e.g., FINKEL, INSANITY ON TRIAL, *supra* note 1, at 155-81; FINKEL, COMMONSENSE JUSTICE, *supra* note 24, at 279-97; see also PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY & BLAME 212-15 (1995).

among battered women, and battered women who kill.¹²⁹ The approach I am advocating eliminates the need to use a false stereotype in order to set up a “different norm” or “different situation” approach, as either of those approaches smacks of differential and preferential treatment, which are legally problematic¹³⁰ and seem to violate commonsense notions of fairness;¹³¹ this recommended approach is an equal treatment approach, as it can work for females and males. These recommendations have the empirical virtue of not endorsing some illusion of one prototypical pattern for battered women who kill, which is empirically false, and thus they are consistent with individualized culpability assessments tied to the specific facts of the case. These recommendations do build upon CSJ findings about subjectivity and objectivity, and how both relate to culpability, as we saw in Part II, and they also rely on findings that show consistently that jurors grade culpability, but frequently do not have the verdict option choices to fit their distinctions.¹³² Finally, these empirical factors point in the normative direction of excuse, which has been endorsed by many legal writers as being more consistent with an internal examination of one’s perceptions, thinking, and mistakes, much more so than justification.¹³³

C. Non-Confrontational Killings and the Justification Defense

1. The Legal and Factual Preconditions for a Justification Defense

In my opinion, the best defense for the justification defense is the one put forth by Schopp, et al. in their extensive review and analysis of the psychological and legal literatures on self-defense justification.¹³⁴ Like my view on the excuse defense, their view relies on the factual pattern of battering rather than on BWS testimony.¹³⁵ On the legal side, their case rests firmly on the distinction between excuse and justification, as they believe that this distinction is legally and theoretically essential, and one that ought not to be blurred, erased, or rolled into one. Specifically, they rely on a “reasonable belief” argument to make their case, though here they are acutely aware that different jurisdictions interpret the phrase differently. Still, they note that even with differing interpretations, most jurisdictions frame the contention as “a choice between subjective and objective standards,” which Schopp, et al. recognize “can obfuscate rather than clarify the issue, however, because it is very difficult to determine what ‘subjective’ and ‘objective’ mean. In some cases, two jurisdictions apparently adopt equivalent

129. The eighty-seven cases of battered women who killed their batterers that Charles Ewing analyzed, and the forty-two cases of battered women who killed that were analyzed by Angela Browne, show wide variance in the histories, and the situations and circumstances surrounding the killing, its precipitators, and the manner of its execution. See generally EWING, *supra* note 63; BROWNE, *supra* note 63.

130. See, e.g., Schulhofer, *supra* note 85, at 105-11.

131. FINKEL, NOT FAIR!, *supra* note 21, at 122-24.

132. See *supra* note 126 and accompanying text.

133. See, e.g., FLETCHER, *supra* note 37, at 799-802; ROBINSON, *supra* note 75, at 91-97; Singer, *supra* note 34, at 516-18.

134. Schopp et al., *supra* note 31, at 91-112.

135. *Id.* at 91.

standards, yet one labels that test 'subjective' while the other describes it as 'objective.'"¹³⁶ Schopp, et al. illustrate the confusion:

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

To be reasonable in ordinary language is to be "endowed with reason . . . sensible . . . marked by reasoning . . . agreeable to reason." . . . In short, a reasonable belief, in both ordinary language and legal usage, is grounded in good reasons and reasoning. That is, a reasonable belief is formed and held on the basis of ordinarily reliable evidence as acquired by unimpaired perception and evaluated through normally sound reasoning and judgment.¹³⁷

Schopp, et al. know that this confusion makes their task of supporting a justificatory defense an uphill one.¹³⁸ Supporting a separate excuse defense for non-confrontational killings, as I do, is clearly the easier case to make, because "an excuse bias" exists in courts, commentators, and probably jurors, who "find it difficult to explain the relationship of the Battered Woman Syndrome to self-defense because the syndrome constitutes a pattern of psychological impairment, rendering it apparently more relevant to excuse than to justification requiring reasonable belief."¹³⁹ This "excuse bias" becomes another good reason to jettison the BWS, along with the factual reasons that the syndrome is a mix of contradictory symptoms and failings.

What further complicates Schopp, et al.'s task is that they do not wish to appeal to a "different norm" argument, where appeals are made to the likes of the "reasonable retarded person," the "reasonable psychotic," or "reasonable battered woman" standards; they prefer, rather, to find a prescriptive line that

136. *Id.*

137. *Id.*

138. *Id.* at 105. What would be argued, and what would be needed to support the argument, are the following:

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

Id. With all these showings necessary, it is indeed an uphill task.

139. *Id.* at 97.

adheres to equal treatment, as I do.¹⁴⁰ They will necessarily narrow this justificatory defense because they believe that an “independent excuse for those who mistakenly but nonculpably believe defensive force is necessary appropriately addresses the culpability of the defendant rather than the acceptability of the conduct or the reasonableness of beliefs in circumstances.”¹⁴¹ Thus, they search for a justificatory defense that would apply to certain defendants (who do not pursue an independent excuse defense), where their case fact patterns are distinct from the excusing patterns, and where a “conceptual structure” is preserved which evaluates “reasonableness, understandability, and culpability independently.”¹⁴²

2. The Look and Feel of this Justification Raiment

To meet all of Schopp, et al.’s justificatory preconditions, such a defendant is first going to have to show, through her testimony, ordinary witness testimony, or expert witness testimony, that she tried to use available legal protections, like calling the police or getting restraining orders, but that these alternatives either failed her consistently or were not available to her. Schopp, et al. argue that “a defendant who had unsuccessfully sought legal protection in the past can reasonably argue that her experience demonstrates that such alternatives are not available.”¹⁴³ Then the distinction between the imminence of the harm and the imminent necessity to use deadly force will be necessary. As Schopp, et al. put it:

[B]y showing that the past pattern of battering supports their claims that serious bodily injury was forthcoming and that they would be unable to protect themselves at the time of the attack, and by showing that effective legal protection was not available in their jurisdiction, they can support their contentions that their own exercise of force was necessary to prevent the unlawful use of force against them. . . . This justification defense would reflect the circumstances necessitating their defensive force and would require no inquiry into the defendants’ beliefs or into the reasonableness, understandability, or culpability of those beliefs.¹⁴⁴

This, then, is the essence of their justification argument.

They also create a default option for the following “impossible act-like” condition. They ask us to consider the possibility that some battered women

might kill their batterers out of a desire for revenge in circumstances in which they believed they had effective legal alternatives, although in fact they did not. These unknowingly justified defendants would qualify for a justification defense based upon actual necessity because their conduct was justified by the circumstances. They would remain vulnerable, however, to attempt liability be-

140. *Id.* at 100. Schopp, et al. do not want to “incorporate psychological aberration into the standard of reasonableness,” because “consistency would seem to require a separate standard for the ‘reasonable psychotic.’”

141. *Id.* at 102.

142. *Id.* at 104.

143. *Id.*

144. *Id.*

cause their conduct would have constituted homicide had the circumstances been as they believed them to be.¹⁴⁵

This analysis seems odd, and a bit contradictory: in the first part of their analysis, the subjective factors—an emotion, motive, and intention of revenge—which all seem unwholesome and blameworthy, are outweighed by the objective fact that actual necessity did exist, albeit unknown to her subjectivity; but in the second part of the analysis, it is her subjectivity that does her in, for she is found culpable and guilty of attempt liability, as now the objective facts (i.e., the impossibility of the act) do not rescue her from culpability.

Schopp, et al. then use another hypothetical variant—where the killing results from actual necessity but from suspect motives—to differentiate this variation from the impossible act scenario above, as this new variation would result in a justification defense without any attempt liability being imposed. They write:

Suppose, for example, Jones accurately believes that her batterer will beat her severely, as he has previously, when he awakens from his drunken stupor. Jones attempts to call the police, but discovers that the January blizzard preventing her from leaving her isolated farmhouse has also blown down the telephone lines, preventing her from securing legal assistance. Jones responds to this discovery with malevolent glee, realizing that these circumstances create actual necessity because the forthcoming beating is virtually certain, she will be unable to defend herself at that time, and legal assistance is not available. She plunges a kitchen knife into her batterer's chest, delighted by the opportunity to exploit the justificatory circumstances.¹⁴⁶

The authors anticipate the criticism—that Jones does not deserve a justification defense due to her malevolent delight in killing, and that she “killed the batterer because she wanted to, rather than because she had to.”¹⁴⁷ But they answer the criticism by stating that “[j]ustification defenses exculpate actors because their conduct was acceptable under the circumstances, not because they manifest admirable attitudes.”¹⁴⁸

Schopp, et al. may be legally correct here, but not necessarily to the full extent they imagine. This might indeed be the verdict that would be reached in this case *by a judge in a bench trial*, where a judge (as opposed to jurors) may be more likely to find her “malevolent satisfaction” to be an irrelevant motive/intent. But I would argue that this is probably not how jurors are likely to adjudicate this case, based on the results from those impossible act cases,¹⁴⁹ where motive and intent typically predominate over the objective act for ordi-

145. *Id.* at 105. See generally Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993) (defending the position that the imminence requirement need not be replaced with necessity in cases where self-defense is claimed, or in those cases where a woman kills a batterer).

146. Schopp et al., *supra* note 31, at 105-06.

147. *Id.* at 106.

148. *Id.*

149. Finkel et al., *Lay Perspectives*, *supra* note 6, at 599-600.

nary citizens, and where citizens do not let the malevolent defendant off the culpability hook for reasons of fortuity.¹⁵⁰

3. The Inability to Free the “Objective Assessment from the Defendant’s Subjective Perspective, Whatever That Might Mean”

The bigger problem with Schopp, et al.’s justification argument, in my opinion, is that it tries too hard to hold to an objective/justification vs. a subjective/excuse distinction. The problem is that the objectivity vs. subjectivity distinction fails to hold. Like adjacent colors on a garment, they bleed into one another, particularly when thrown into the assessment wash; such an objective assessment ends up being impure, for it involves subjectivity, much like the jurors’ subjective assessment of a mistake ends up considering the objective reality of the mistake. What is worse, for the argument, is that the subjective stain cannot be removed, for any independent assessment of either “reasonableness” or “culpability” must involve subjectivity, and, normatively, it ought to.

Schopp, et al. return to a “plumber example” they detailed earlier, where the plumber/defendant forms “an unreasonable belief regarding necessity due to circumstances that limit or distort the information available to the actor.”¹⁵¹ Note that this example is close, in many ways, to what we called a “reasonable mistake” example, which we tested with mock jurors, involving a man who kills a young man on the subway, when the latter points (what we find out later to be) a water gun at the defendant; our results, to recall, showed that 78.6% of the mock jurors found this defendant NGRSD.¹⁵² With that finding in mind, why do Schopp, et al. call their plumber’s belief “an unreasonable belief”? Why call it “an unreasonable belief” when, in the subsequent quote detailing the story, they seem to acknowledge that it would likely be a reasonable belief in the eyes and minds of the jurors, who “see what [the plumber] sees, and who know what [the plumber] knows.”¹⁵³ If the answer is that a “reasonable belief” must always be objectively true, and therefore anything that departs from the objective truth must be a subjective and unreasonable belief, then such a legal answer and law will not track the *mens rea* of the defendant, as Pillsbury strongly argues that it must in any normative system where “deserved punishment” is hinged to the

150. Recall the findings for the case DEAD BODY, in Finkel et al., *Lay Perspectives*, *supra* note 6, at 600-601. See also *supra* notes 34-47 and accompanying text.

151. Schopp et al., *supra* note 31, at 99.

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

Id.

152. See *supra* notes 36-40 and accompanying text.

153. Schopp et al., *supra* note 31, at 99.

blameworthiness of the motive.¹⁵⁴ Moreover, such an answer, if this is what Schopp, et al. are really putting forth, is likely to be an anathema to jurors and their commonsense justice, for three reasons. First, jurors begin their culpability analysis with the subjective motive and intent, so asking them to ignore this factor runs counter to how they perform their moral analysis.¹⁵⁵ Second, jurors also take objectivity into account, for objective facts anchor and validate mistakes in the psychological reality, *as it is realistically construed* by the defendant, and thus subjectivity is a part of the objective assessment. And third, because jurors consider and weigh the defendant's culpability for bringing about the mistake, which, if done for the examples offered by Finkel, et al. and Schopp, et al., would end up with a finding of no culpability for bringing about the mistake, in either example.

Schopp, et al. end on an ambiguous note. On the one hand, they acknowledge that their plumber behaved responsibly, and was "not culpable or blameworthy for his actions," and as such "he is appropriately excused for his non-culpable mistake."¹⁵⁶ But on the other hand, they state in a footnote, "[t]he plumber is neither culpable nor blameworthy, rendering this distinction [between justification and a separate excuse for nonculpable mistakes] irrelevant to this case."¹⁵⁷ Now it appears as if the very distinction they insist upon becomes irrelevant in this example, such that we can see the plumber as either excused or justified. The subjective factor has indeed bled into the objective, as the neat and tidy separation and compartmentalization break down.

4. Summary—What Does It Mean?

What is left standing of Schopp, et al.'s justification defense for non-confrontational killings involves a reasonable belief that no alternatives existed, at the time when another reasonable belief was formed and acted upon that there was a necessity to use deadly force. These two "reasonable beliefs" in the sentence must involve the defendant's subjectivity and the objective facts, for they are judgments that depend upon a construal of the situation. Nonetheless, these reasonable beliefs are arrived at for good reasons and by good reasoning. From the defendant's point of view, this is a quasi-objective, quasi-subjective judgment,¹⁵⁸ as all judgments must be.

That does not mean, however, that outside evaluators, be they jurors or judges, have to necessarily agree with the defendant's point of view and conclusion.¹⁵⁹ A few jurors or judges might see things differently and find some culpability. Could the plumber, for example, strike with the wrench in a way that would disarm or injure the alleged robber, without necessarily killing him?

154. PILLSBURY, *supra* note 9, at 47-61.

155. Finkel, *When Principles Collide*, *supra* note 17, at 527.

156. Schopp et al., *supra* note 31, at 109.

157. *Id.* at n.323.

158. See, e.g., Finkel & Slobogin, *Insanity, Justification, and Culpability*, *supra* note 1, at 586-589 (Professor Slobogin puts forth a quasi-objective, quasi-subjective justification defense as a substitute for traditional insanity defenses).

159. *Id.* at 596-597. The results for Slobogin's test reveal agreement and disagreement among mock jurors who were undergraduate students, mock jurors who were law school students, and some law professors.

Could the man on the subway, for example, merely pull his gun, issue a warning, fire a warning shot, or fire in a way that disables the alleged robber, as some of our mock jurors thought, which accounted for the 21.4% who found culpability and guilt in that scenario?¹⁶⁰ The justification cases of Schopp, et al. that are left standing, then, probably would enjoy the support of a consensus of the jurors, although they would not likely have unanimous consent. The jurors' or judges' judgments are also quasi-objective, quasi-subjective, as they must be, and as Kant would insist.¹⁶¹ These conditions, then, would probably fit few defendants, perhaps very few, who kill in non-confrontational settings. Yet the worth of Schopp, et al.'s prescriptive approach cannot be measured by numbers and percentages. If it fits within and among the law's deeper principles, and it also fits certain defendants' fact patterns, then it ought to fly.

If such a defendant makes errors, like the plumber's error of not being able to see all of the objective truth clearly, or the man on the subway not seeing the whole truth of the "water" gun, these appear as nonculpable errors, the sort of mistakes that many or most of us are likely to make in those situations. They are different in degree, rather than kind, from the mistakes of those defendants I would grant an excusing defense for, where their mistakes are "honest but overestimation" mistakes regarding the seriousness and imminence of the threat at that moment, and an "honest but underestimation" mistake of the availability of alternatives at that moment.

All of this would leave us with multiple verdicts and default options. There would be the standard self-defense justification verdict for the confrontational killing. There would be Schopp, et al.'s justification verdict for non-confrontational killings. There would be my excusing verdict for non-confrontational killings. And there would still be the NGRI verdict possibility, an excusing condition, where the perceiving, thinking, and judgment are far more seriously impaired. There would also be fallback or default verdicts for mistakes—such as not thinking about others, and not thinking about alternatives—that are seen as culpable and warrant some punishment.

Both the empirical and the normative disciplines have some lessons to learn from all this. Some empiricists have offered up a one-size-fits-all prototype of the battered woman, the battered woman with syndrome, and the battered woman with syndrome who kills.¹⁶² Sketchy facts were all too quickly parlayed into a syndrome without nuance, before the facts were empirically validated, and before they were conceptually evaluated for consistency.¹⁶³ Some normativists, for their part, grabbed this off-the-rack offering as a haute couture defense, but the garment neither fit well, nor did it wash.¹⁶⁴ Yet matters may be changing, on both sides of the divide.

We may be getting closer to solid empirical facts, upon which sounder conceptualizations may be built. We may be getting closer to conceptualizations that fit with objective fact patterns, where distinctions we find worthy are made.

160. Finkel et al., *Lay Perspectives*, *supra* note 6, at 605.

161. KANT, *supra* note 20.

162. *See generally*, e.g., WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 106.

163. *Id.*

164. *See supra* note 83 and accompanying text.

This analysis aims at just those ends. The problems addressed here began at the empirical/normative interface, though they quickly spread to and infected the upper reaches: they affected how legal conceptualizations cohere with one another, and how conceptualizations square with lofty, normative principles more generally. But the infection spreads downward as well, for these lofty, fundamental principles come to earth where the road and the sky meet at trial. A haute couture approach did not provide a sound answer, for that Platonic ideal of a little black dress that works for all defendants . . . turns out to be an illusion. We are still a long way from bringing well-tailored charges that suit these defendants, and we are a long way from offering—to the defendant, the fact-finders, and the law—verdict options that track culpability fairly. Until poorly tailored crimes are altered and fitting verdicts are fashioned, our legal wardrobe closet will remain all too bare to clothe all the sizes and situations that appear in court. Until this changes, apparent “wrongful” verdicts will continue to result.

IV. LESSONS LEARNED FROM INFANTICIDE’S FASHION CYCLES

A. Mothers Who Kill Their Children and Battered Women Who Kill Their Spouses

The origins and outlines of a new legal specie, “infanticide,” were first seen in England in the late 19th century, and with passage of parliamentary acts in the 20th century (1922 and 1938),¹⁶⁵ its shape and texture would be cut, made, and trimmed. On this matter, English law took a very different turn from American law. In England (as in Austria, Canada, Germany, and New Zealand),¹⁶⁶ infanticide became a separate crime category, a “haute couture” defense, to be viewed as manslaughter rather than murder; in the United States, by contrast, infanticide would continue to be treated like any other murder.¹⁶⁷

Dobson and Sales, in their comparison and analysis of how law and science regard depression in relation to birth and lactation, find significant disparities between these positions, with the law’s account not being grounded in, or consistent with, established science facts. They then focus more narrowly and comparatively on infanticide law in England and the United States, and pose this question: Does the overly broad and generous treatment of infanticide in England, or the narrow and harsh treatment of it in the United States, best fit with

165. For a review of these acts, and the history that led up to them, see 1 NIGEL WALKER, *CRIME AND INSANITY IN ENGLAND* (1968). Walker notes that these acts created an intermediate verdict, similar to what the British created with “diminished responsibility” in the 1957 Homicide Act. With infanticide, though, the act had unintended consequences.

[H]er counsel could safely say to the court “she knew that she was killing the child, and that this was morally and legally wrong. She had not lost her self-control, and could have refrained if she had wanted to. Her temporary disorder was in fact quite unconnected with what she did. But you have had evidence that at the time the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child, and so you must find her guilty not of murder but of infanticide.”

Id.

166. Velma Dobson & Bruce Sales, *The Science of Infanticide and Mental Illness*, 6 *PSYCHOL. PUB. POL’Y & L.* 1098, 1099 (2000).

167. *Id.* at 1098-1099 (reviewing how various states handled this crime of murder).

the facts of science regarding child birth, lactation, and mental illness? They conclude that the English law, which was fashioned “to accommodate public opinion in favor of leniency toward new mothers, appears to have become an anachronism,”¹⁶⁸ for it fails to fit the science. But Dobson and Sales also conclude that the “myopic” American law does not fit well either, particularly where the defendant suffers from a psychosis, “one of the most severe forms of mental illness,” which “increases greatly in prevalence in the 1st months after childbirth and continues to show an elevation in prevalence into the 2nd postpartum year,” and where this “psychotic state can provide justification for both diminished capacity and insanity defenses.”¹⁶⁹

Finkel, Burke, and Chavez¹⁷⁰ extended Dobson and Sales’ question, in empirical and conceptual ways, by asking whether the crimes of murder, manslaughter, or madness best fit the jurors’ intuitive, commonsense justice (CSJ) notions, as the latter were applied to a number of infanticide scenarios where key variables (for example, the *time* between birth and the death of the infant, the level of the defendant’s *depression*, the *age* of the defendant, and the *manner* of the death) were experimentally manipulated.¹⁷¹ Unlike the alleged leniency sentiment in England, these researchers found signs that American sentiment seemed to be shifting in a harsher direction, particularly among female mock jurors.¹⁷² Regarding the “fit” issue, they concluded that none of the verdict categories examined fits these defendants all that well, as their results favored a “miscellaneous” category.¹⁷³

“Infanticide” is a problem with a 450-year history to it, whereas “battered women who kill and plead self-defense” is a phenomenon that burgeoned in the last three decades of the twentieth century.¹⁷⁴ Whether old or new, though, both may strut down fashion runways as this season’s “hot, new legal numbers,” because high profile, headline-making cases grab the public’s attention. Consider this editorial, entitled “Killing Babies,”¹⁷⁵ from The Washington Post, as illustrative: “The combined lesson of two court decisions Thursday—one in Maryland and one in Delaware—is that killing one’s baby will, first, bring scant punish-

168. *Id.* at 1109.

169. *Id.* at 1107-08.

170. Finkel et al., *Commonsense Judgments of Infanticide*, *supra* note 3, at 1113-1114.

171. *Id.* at 1123-1126. The authors found no main effect for *time*, but significant main effects for *depression*, *age*, and *manner* of death, with a *time* x *depression* interaction effect. For the main effects, mitigation was greatest for the youngest defendant (age fourteen, but the nineteen-year-old college student and the twenty-six-year-old woman were treated alike; mitigation was greatest when the manner of death was the least violent, and mitigation was greatest with the highest level of depression, psychotic depression. Regarding the interaction effect, *depression* was most mitigating at T2 (one week), rather than at T1 (less than twenty-four hours) or T3 (three months).

172. *Id.* at 1123-1124. At the harshest end of their verdicts, 40% of the verdicts overall were for first-degree murder, with another 24% for second-degree murder, whereas at the most lenient end, there were only 0.4% for NGRI, and 14% for GBMI (Guilty But Mentally Ill). At the mitigating range, there were 12% for voluntary manslaughter and 9% for involuntary manslaughter. Regarding the gender effects of the participants, females gave significantly harsher verdicts (e.g., first-degree murder) than the males for the older women (nineteen and twenty-six years old), for defendants at the D2 and D3 levels of depression, and at the later times, T2 and T3.

173. *Id.* at 1131.

174. See *supra* notes 61-74 and accompanying text.

175. *Killing Babies*, WASH. POST, July 11, 1998, at A18.

ment and, second, will not be deemed subsequently to preclude future custody over children.” This editorial centered on two cases, that of Amy Grossberg and her former boyfriend, Brian Peterson, who killed their baby, dumped it in a trash bin, and sought to conceal it, and who were sentenced to two and a half and two years, respectively, and that of Latrena Pixley, who smothered her infant daughter Nakya (who ended up in a dumpster), and who received a sentence of weekends in detention for three years, and was then granted custody of her two-year-old son. The editorial mentioned that a judge found “an absence of common sense” and called for a harsher presumption, believing that community sentiment favored harsher treatment, though the judge’s evidentiary basis for this attribution was not cited.¹⁷⁶

In the past year, it was the Texas trial of Andrea Yates,¹⁷⁷ who killed her five children and then made a confession, that grabbed the headlines and Court TV coverage.¹⁷⁸ Technically, this was not a neonaticide case, for the youngest of the five children, Mary, age six months, was well over the one-day line that defines neonaticide; moreover, for the four oldest children, this was technically not an infanticide case, for the one-year age line that defines infanticide was only met in little Mary’s case; while filicide would fit all of the killings, this case played like infanticide in the minds of many citizens.¹⁷⁹ For some, it also played like a gender case, with a woman tied to home and kids, psychologically deteriorating again into psychotic delusions while her husband left for work, where she ends up bearing the brunt of a legal decision for problems and crimes not entirely of her own making.¹⁸⁰ But most of all, it played out as an insanity trial, and given the psychiatric testimony of postpartum psychosis and depression, along with the long history of severe mental illness and the suicide attempts in the past, many citizens seemed perplexed by the jury’s first-degree murder verdict, finding such a verdict (and sentence) far too harsh; they were left wondering whether a “wrongful” verdict had resulted.¹⁸¹

176. *Id.*

177. In the 230th District Court, Harris County, Texas, *The State of Texas v. Andrea Pia Yates*, Cause No. 880,205, 883,590.

178. Every major newspaper ran stories on this trial. It was featured almost nightly on CNN. *See, e.g., CNN Live Event/Special 11:54*, (Cable News Network, Feb. 18, 2002); *CNN Live Event/Special 10:34*, (Cable News Network Mar. 12, 2002). Rusty and Andrea Yates were interviewed by Ed Bradley on *60 Minutes. Why Did She Do It?* (CBS television broadcast Dec. 9, 2001) (Burrelle’s Information Services, CBS News Transcripts). Erica Lehrer Goldman wrote stories that were picked up by the American Lawyer Media, one of which featured the convergence of reality with television fiction, ‘*Law & Order: Show May Figure in Yates Appeal*, AMERICAN LAWYER MEDIA, Apr. 12, 2002.

179. If we try to fit the Andrea Yates situation into variables that Finkel, et al. manipulated, *Commonsense Judgments of Infanticide*, *supra* note 3, at 1128-1130, we have an older woman (who gets less mitigation than a younger woman), who kills the children at a much later time period after birth (which gets less mitigation), and where the manner of death is more violent, though not at the highest level of violence possible (which gets less mitigation). On the other hand, her level of depression is arguably psychotic, which gets the most mitigation.

180. *See, e.g., Susan L. Pollet, Outside Counsel Courts Address Mothers Who Kill*, N.Y. L. J., May 31, 2002, at 4.

181. *See, e.g., Carol Christian & Lisa Teachey, Yates Found Guilty*, HOUSTON CHRON., Mar. 13, 2002, at A1; *see also* Faigman, *supra* note 111, at 647 (describing the harsh effects of the traditional objective standard as applied to battered women).

Even with this short topical introduction and scant review of a few high-profile cases, we see familiar issues emerging: (1) an issue involving prototypes (do such killings involve different patterns, rather than a one-size fits all defendants pattern?); (2) a question about where community sentiment currently stands (has sentiment moved toward the more lenient or harsher end?); (3) pragmatic and theoretical questions regarding the fit between the law's crime category and the culpability of such defendants (how should the law treat such cases in terms of verdict and sentence, and what crime category best fits the culpability of such a defendant and is most consistent with the rest of criminal law?); (4) the law's fit with the facts of science (is the law grounded on established science facts, or is the factual support suspect?); and (5) an empirical and normative question about gender bias and equal treatment (is there a gender bias, and, if so, is it in the harsher or more lenient direction, and what should be the law's position be on such cases?). These questions also link the topics of mothers who kill their children with battered women who kill their spouses. As to broad questions, first there is a science/law interface question: Does the crime category (for example, infanticide) actually fit the facts, as science sees those facts? Put another way, do certain behavioral assumptions used to erect and support new law turn out to be myths, when substantively assessed, such that the law above becomes merely Babel? Second, regarding internal consistency, does the infanticide crime category fit the several prototypes and varied instantiations that comprise the category? Third, when it comes to culpability and the factors that ought to weigh in that judgment, is there consistency across legal realms, or will we find inconsistencies and outright contradictions? Fourth, is there consistency or contradiction between how the law treats these defendants and where CSJ stands? Put another way, is the law reflecting accurately the community's prevailing sentiment, or is the law wearing yesterday's look?

Then we have a number of more specific questions that link these seemingly disparate topics of battered women who kill their spouses and mothers who kill their children, where these specific linkages might pull toward a more lenient verdict. For example, there is the alleged factual link that a serious depression, perhaps one that reaches psychotically distorting severity, is common to both types of cases.¹⁸² Second, there is the background specter of insanity, which looms large over these killings, and which seems either to diminish her capacity or exclude culpability entirely. Third, there is a history to the Andrea Yates case, as there is in cases of battered women who kill their spouses, that provides a context for understanding these deadly moment-of-the-act actions. And fourth, there is the allegation, looming large once more, that unfair gender issues result—but ought to be rectified.¹⁸³

There are, though, specific linking issues which seem to cut the other way, increasing the likelihood of a harsher verdict and sentence. For example, we learn from insanity research that the appearance of “planfulness” often enough produces either an outright guilty verdict or a guilty but mentally ill (GBMI)

182. See, e.g., BROWNE, *supra* note 63, at 102; EWING, *supra* note 63, at 11; WALKER, THE BATTERED WOMAN SYNDROME, *supra* note 106, at 111; Dobson & Sales, *supra* note 166, at 1100.

183. See *supra* notes 108-110 and accompanying text.

verdict,¹⁸⁴ even when the facts of the killing are “bizarre” and support a severe mental illness. Given that general finding, jurors can all too easily infer planfulness on the part of the battered woman who kills, particularly when her husband is sleeping; and for Andrea Yates, the fact that she chose to kill her five children during a 9:00 A.M.-to-10:00 A.M. window of opportunity, where her crime would not be detected or thwarted, might easily be construed as revealing planfulness, to the inferring jurors, as would the manner and order of her killing, which can be inferred as being premeditated to maximize the likelihood that the killing of all the children would be successful. And then there is the apparent fact that alternatives and escape routes existed.¹⁸⁵

Apart from the links, there are obvious differences between battered women who kill their spouses and murdering mothers who kill their children. There are the alleged biological and physiological factors operating in infanticide killings that may undercut culpability, whereas these factors are not alleged in battered women who kill cases.¹⁸⁶ There are legal and theoretical distinctions as well, for the battered woman’s self-defense claim (be it a justifying or excusing claim), if successful, ends with a non-blameworthy judgment, whereas for infanticide, excluding an insanity verdict, only mitigation results in English courts.¹⁸⁷ And there is the sense that community sentiment, CSJ, may be moving in opposite directions for these two types of killings.¹⁸⁸ Now, we turn to the community’s sentiment and the law’s reflection of it throughout history, and a review of infanticide’s recurrent fashionableness and fades, or its rather bumpy walk down the historic runway.

B. Changing Sentiments Germinating New Prototypes

In this subsection, I rely heavily on the archival work of Hoffer and Hull.¹⁸⁹ In the first period they examined, from 1558 to approximately 1600, they concluded that the “English authorities condemned the act of child murder, but did not energetically suppress it.”¹⁹⁰ They find only a few such cases actually brought to trial, and the severe sentencing that typically resulted for murder (that is, the death sentence) was rarely given for infanticide cases.¹⁹¹ It would seem, then, that the law looked the other way or jurors looked leniently on these defendants. Regarding the prevailing prototypes, people recognized that these cases often involved single, servant-class women, who may have been either

184. See, e.g., Caton F. Roberts et al., *Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense*, 11 LAW & HUM. BEHAV. 207, 209-210 (1987).

185. In the Yates trial, see *supra* note 71, the prosecution repeatedly pointed out other choices she could have made, other options she could have pursued. This is similar to prosecutors’ frequent strategy when a battered woman kills a sleeping husband, where the prosecutor addresses that question in many jurors’ minds (“But why didn’t she leave?”), showing that in the objective realm, she could have done just that.

186. Dobson & Sales, *supra* note 166, at 1102-1104.

187. *Id.* at 1101.

188. Finkel et al., *Commonsense Judgments of Infanticide*, *supra* note 3, at 1119-1121.

189. PETER C. HOFFER & N.E.H. HULL, *MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND 1558-1803* (1984).

190. *Id.* at ix.

191. *Id.* at ix, 32-36.

raped or pressured into sex by their older masters.¹⁹² In trying to account for this leniency, Finkel, et al. offered the following possibilities:

[T]hus, if they were already victimized, charging and punishing them might have been seen as double punishment. Sympathy might also attach when considering the consequences, for these women were likely facing bleak social, economic, and marital prospects if the bastard issue lived, and this may have been punishment enough. And there may have been understanding around the dangerousness of the abortion option, which, in those times, involved remedies that could easily prove fatal to the mother.¹⁹³

The lenient sentiment may have led some to believe defendants' frequent rebuttal claims—that the infant was stillborn or died during delivery (as infant mortality was high); of course, without the forensics we have today, establishing that the death resulted from murder was far more problematic then. But even if the stillborn rebuttal was suspicious, there was usually enough “reasonable doubt” for jurors to void a conviction, or for magistrates to avoid bringing charges in the first place.¹⁹⁴

But there was a dramatic change toward harshness in the period from approximately 1600 to 1720, where “late Tudor and early Stuart criminal tribunals, in contrast, witnessed a leap of indictments and a still steeper climb in the percentage of guilty verdicts.”¹⁹⁵ The legal centerpiece for harshness was the Jacobean infanticide law of 1624; the act affirmed that infanticide was no more or less a murder than before, and it presumed that concealment indicates murder, unless a witness can rebut the presumption; but it was in the language and tone of the act where the condemnation was clearly unmistakable.¹⁹⁶

With the growing perception that traditional societal norms and values were breaking down, enmity toward these women grew, as a different prototype would emerge—which accented lewd and immoral women engaging in “great mischief.”¹⁹⁷ This Jacobean infanticide law spread from England to New England, where more indictments, convictions, and harsher sentences followed.

192. *Id.* at 13.

193. Finkel et al., *Commonsense Judgments of Infanticide*, *supra* note 3, at 1116.

194. HOFFER & HULL, *supra* note 189, at 9.

195. *Id.* at x.

196. *Id.* at 19-20.

WHEREAS, many lewd women that have been delivered of bastard children, to avoid their shame, and to escape punishment, do secretly bury or conceal the death of their children, and after, if the child be found dead, the said woman do alledge, that the said child was born dead. . . .

II. For the preventing therefore of this great mischief, be it enacted by the authority of this present parliament, That if any woman . . . be delivered of any issue from her body, male or female, which being born alive, should be the laws of this realm be a bastard, and that she endeavour privately, either by drowning or secret burying thereof, or any other way, either by herself or the procuring of others, so to conceal the death thereof, as that it might not come to light, whether it were born alive or not, but be concealed: in every such case the said mother so offending shall suffer death as in the case of murther, except such mother can make proof by one witness at the least, that the child (whose death was by her so intended to be concealed) was born dead.

Id.

197. *Id.* at 20.

This is starkly illustrated by the murder conviction percentage for infanticide cases (seventeen out of thirty-one cases, or fifty-five percent) in Massachusetts from 1624 to 1730, which exceeded the conviction rate for the murder of adults (eighteen of forty-five cases, or forty percent) in the same state and time period, and similar findings occurred in England during this period as well.¹⁹⁸

But differentiations among murdering mothers were being made, and these differentiations would produce different prototypes. For example, in England, 94% of these infanticide cases involved a victim less than one day old (that is, a neonaticide); for the remaining 6%, where the victim was an older infant (that is, a filicide), conviction rates were higher, indicating that jurors, and possibly prosecutors, judged these mothers more harshly.¹⁹⁹ There are correlates of neonaticide and filicide cases that make sense of this differential treatment. For example, the vast majority of neonaticide cases typically involved younger, single mothers, whereas filicide defendants were more often older, and more likely to be married.²⁰⁰ Moreover, the killing of an older infant did not look like a late-term abortion; this abortion possibility was legally significant, as Sir Matthew Hale noted, for “if the child was killed before it was fully removed from the vaginal cavity, ‘it was no felony,’ for the child was not ‘*in rerum natura*.’”²⁰¹ Furthermore, citizens attributed greater depression to the neonaticide mother in contrast to the older filicide mother, as birth *per se* could be analogized to one of manslaughter’s provocations; with filicides, though, more deliberation and premeditation were inferred.²⁰² But whether the period was harsh, or lenient like before, or lenient again thereafter, there was a constant: fathers who killed their infants typically received higher conviction rates and harsher sentences than mothers who killed.²⁰³ This gender difference was the opposite of what occurs when a husband kills his spouse and a wife kills her husband, for the latter case is generally charged with a more serious crime, where conviction rates are higher, and where sentences are longer.²⁰⁴

From 1730 onward, in both England and New England, leniency became more and more evident, as the conviction rates for murder in infanticide cases in Massachusetts dropped to 13%, with a steady decline continuing well into the next century.²⁰⁵ The change in sentiment toward leniency was related to changing economic and material conditions, and to changes in attitudes regarding births out of wedlock.²⁰⁶ For example, illicit sexuality was on the rise during this period, as premarital pregnancy rates were at 40%, but this fact was regarded with greater tolerance, as bastardy became a less stigmatized condition. And a “maternal sentiment” was growing as well. There was, for example, a “benefit-of-linen” defense: if it could be shown that the single woman made linen for her infant before its birth, and thus she had made preparation for the child, then this

198. *Id.* at 38, 44.

199. *Id.* at 54.

200. *Id.*

201. *Id.* at 155.

202. *Id.* at 77-78.

203. *Id.* at 108-109.

204. See BROWNE, *supra* note 63, at 11.

205. HOFFER & HULL, *supra* note 189, at 75-77.

206. *Id.* at 65-66.

was taken as evidence of maternal sentiment, and therefore the death and concealment would be more favorably construed.²⁰⁷ The “want-of-help” defense was used to construe deaths at birth as tragic accidents rather than murders. And finally, leniency attached for “temporary fits,” in which women went “out of their senses” during the childbirth period, or so it was assumed, such that mental incapacitation or temporary insanity defenses were on the rise.²⁰⁸

C. Anchoring Emotions and Motives to Physical and Mental Conditions

For the young servant girl, raped or pressured into sex by her older master, facing the bleakest of futures, it is not hard to conjure her likely emotions—fear, dread, shame, embarrassment, depression, helplessness, hopelessness, and such; nor is it hard to imagine how these emotions might motivate the acts of hiding and concealing the pregnancy, abandoning and concealing the infant right after birth, or claiming a stillborn birth. We may disapprove of her acts, but we understand “where they come from,” and the unenviable and fearful choices she faced. However, for the older, married woman, who gave birth some time ago but claims that the older infant died naturally, or conceals the death and the body, a different set of emotions are likely to be conjured, which give rise to a different set of motives, which are all less generously attributed. And for the young single or married woman, pregnant, radiating, and happily tatting linen and lace as her maternal sentiment and fetus grow toward the due date, we infer still other emotions and motives.

Of course, we can play this conjuring and inferring game with various battered women prototypes, making backward attributions as to motives and emotions from the facts surrounding the killings of their husbands. Here, our starting scenes may reveal: confrontation or no confrontation; no knife or gun in his hand; evident escape avenues but no imminence; and a sleeping victim, like Hamlet’s father, who cries out in death that a planned, premeditated, and preemptive strike happened. In any legal system not based on strict liability, we have to make just those sorts of attributions, for the *mens rea* needs to be inferred either to sustain the charge or defeat it. Still, our attributions for battered women go straight to the psyche, to that likely mix of mental, emotional, and motivational elements that we must somehow sort for culpability determinations, whereas something is different for the infanticidal women of England, for their psychic flotsam, it is claimed, results from a deeper bodily disturbance.

Where a woman by any willful act or omission causes the death of her child being under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offense would have amounted to murder she shall be guilty of felony, to wit infanticide, and may for such offense

207. *Id.* at 68-69.

208. *Id.* at 69-70.

be dealt with and punished as if she had been guilty of the offense of manslaughter of the child.²⁰⁹

Thus, the theory here is that the physical concomitants of gestation, birth, and lactation diminish the mental and emotional to such a degree as to warrant manslaughter's mitigation. These notions were not new; in fact, they had been around for more than 150 years, entering the legislative debate in 1772 regarding a bill by Edmund Burke and Charles Fox to repeal *21 James I c. 27*, which failed,²¹⁰ and they entered the treatise writings of Blackstone and Foster, where the latter made note that "[f]rom the delicacy of their Frame [women] seem to be the most susceptible of Human Passions."²¹¹ But as Finkel, et al. note, "[o]f course, as fathers had none of this real or romanticized biology going on (i.e., with postpartum claims being ludicrous for male perpetrators), their conviction rates for infanticide were much higher all along."²¹²

From their analysis, Dobson and Sales conclude that these attempts to anchor the law's mitigation verdict to "science facts" fail.²¹³ While we can certainly view gestation, birth, and lactation as physical processes and causes, their effects at the physical level are off-point; rather, what matters for the law, and about which we can say nothing definitive, is what these physical causes *inevitably* do at the level of responsibility.

Regarding the mildest forms of depression, the "baby blues," their timing and severity do not work: the baby blues come a few days too late to account for neonaticides, and its level of depression does not reach clinical depression levels to adequately account for infanticides. As for clinical depression, this occurs somewhat later than baby blues, if it occurs at all, so again this type cannot account for the neonaticide deaths of the first twenty-four hours. Moreover, while the level of this clinical depression is higher than that for baby blues, it is still short of psychosis, where exculpation via insanity might be claimed. But the main problems with clinical depression are its commonness and indiscriminate-ness: it affects so many people, and so many women in particular, that the clinical depression associated with some births is not discriminable from clinical depressions unrelated to birth. Finally, whereas psychotic depression is at a level that would warrant exculpation or mitigation, this condition is extremely rare, affecting only a microscopic fraction of women, of women who give birth, and women who give birth and who kill their infants.²¹⁴ While these latter cases

209. Dobson & Sales, *supra* note 166, at 1099 (citing Bartholomew & Bonnici, *Infanticide: A Statutory Offense*, 6 MED. J. AUSTRALIA 1018, 1018-1019 (1965)).

210. Finkel et al., *Commonsense Judgments of Infanticide*, *supra* note 3, at 1119.

211. HOFFER & HULL, *supra* note 189, at 87 (citing MICHAEL FOSTER, A REPORT ON SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER. . . TO WHICH ARE ADDED DISCOURSES UPON THE CROWN LAW 305 (1762)).

212. Finkel et al., *Commonsense Judgments of Infanticide*, *supra* note 3, at 1119. This harsher treatment of men, or a more lenient treatment of women, is supported by the results from a number of studies. See, e.g., P.T. d'Orbán, *Women Who Kill Their Children*, 134 BRIT. J. PSYCHIATRY 560, 569 (1979); M.N. Marks & R. Kumar, *Infanticide in England and Wales*, 33 MED. SCI. & L. 329, 333-334 (1993); Phillip J. Resnick, *Child Murder by Parents: A Psychiatric Review of Filicide*, 126 AM. J. PSYCHIATRY 325, 332 (1969).

213. Dobson & Sales, *supra* note 166, at 1109.

214. *Id.* at 1103.

would warrant mitigation, at least, as Dobson and Sales believe, the overly generous English system hands out wholesale mitigation indiscriminately, to all women who kill their infants. Such a formula rests precariously on certain cause-and-effect views, such that birth always produces psychotic levels of depression, or, if we see psychotic depression, then we can conclude that it results from childbirth and lactation. These views are refuted by epidemiological work.²¹⁵ In the end, there is no science that sustains wholesale mitigation.

Hence, the hypothesized physical cause that allegedly produces the mental and emotional capsizing in infanticide defendants does not work for the vast majority of cases. English law, then, rests on a myth about the physical effects of the birth process, not on solid and sound science. But if we shed the myth, then what? Setting the myth aside may help us to see that the myth was just a convenient cover for underlying leniency sentiments, which are now exposed. The leniency sentiments may arise from within the law, or from CSJ, or both, where jurists and jurors come to see these defendants as less culpable than your run of the mill first-degree and second-degree murderers. These leniency sentiments may be grounded loosely on empirical facts—the mental, emotional, and motivational facts, as we fathom them—and on the normative judgments we apply to them. These facts and judgments may be supportable, but the mythic cover story—that “the body did it”—drives the reasonable reasons underground.

Creating a haute couture defense is not the answer. English law already has answers and options at the ready. There is the excusing defense of insanity, and there is the mitigating defense of diminished responsibility. These defenses offer, potentially, equal protection to all genders that seek these shelters. But what of American law?

D. Retro Insanity, Where No Such Insanity Exists

The issue of insanity returns once again, for with clinical depression, and surely with psychotic depression, an insanity claim could be fashioned for some defendants. This, of course, would be an excusing condition defense, for justification is a preposterous proposition in infanticide cases. If insanity is the likely strategy, and the evidence for it appears strong, then why did it fail in the Andrea Yates case? Some recent history regarding the insanity defense, coupled with some distant history, may reveal an answer.

Following the shooting of President Reagan, and the subsequent trial and NGRI verdict for John Hinckley, Jr., two years of Senate and House Hearings before committees and subcommittees were held, with the expressed purpose of limiting the insanity defense.²¹⁶ The newly enacted IDRA test was, in actuality, a retro test, for Congress, after much ado, had decided to lop off the volitional prong of the ALI test that Hinckley was tried under, which left a semantic version of the *M'Naghten* test of 1843²¹⁷ as all that remained standing. Others, dur-

215. *Id.* at 1105-1106.

216. *Limiting the Insanity Defense: Hearings Before the Subcomm. on Criminal Law of the Comm. of the Judiciary*, 97th Cong. Sess. 2 (1982). The Insanity Defense Reform Act (IDRA) of 1984, Pub. L. 98-473, §§ 20, 401-02 (1984) was a result. While this statute was limited to federal criminal prosecutions, it provided one model to the many states considering limiting or abolishing the insanity defense.

217. FINKEL, *INSANITY ON TRIAL*, *supra* note 1, at 39.

ing the two-year debate, like the Attorney General, favored an even more retro test, a reversion to the 1724 Wild Beast test, a test that did in Mad Ned Arnold because the prosecution showed that he was not totally mad all the time. Specifically, even though all the townsfolk knew Mad Ned to be mad, hallucinating as he was about devils and imps, and as delusional as he was that Lord Onslow was directing those devils and imps to torture him, Mad Ned Arnold did buy pistol and shot, and in that lucid moment, he revealed planfulness—for it could be inferred from that purchase that he knew what was what, and knew what he was doing.²¹⁸ In the 1800 case of Hadfield, the defendant's able attorney Erskine made great sport of the Wild Beast test, arguing that if this was the essence of insanity, then no such insanity ever existed in the world. Erskine was arguing that the legal test of the time did not fit with the facts of madness, as the science of the day purported them, nor did it fit with ordinary citizens' commonsense understandings of "sane" and "insane."²¹⁹

With this as backdrop, let us consider possibility number one: suppose that Andrea Yates's confession and the manner and order to the drownings were seen as signs of planfulness, much like Mad Ned's purchase of pistol and shot revealed his planfulness, for her own actions, and particularly her words, seemed to convey that she knew what she had done, and knew that it was wrong. Under this strict rule and retro interpretation, Andrea Yates was left with no well-tailored verdict option to fit the delusional shape of her *mens*. Put another way, insanity under Texas law was defined in a way so it could not fit, and manslaughter would not fit, for the act seemed more planful than "of a sudden."²²⁰ But when madness and manslaughter are eliminated, what remains on the rack—as the ill-fitting best-of-the-worst—is first-degree murder, the prosecution's choice.

But let us consider possibility number two. If the essence of insanity is delusion, as Erskine had argued in Hadfield's case, rather than the illusory "total deprivation of mind" that the wild beast test proclaimed, then we need to enter

218. *Id.* at 12.

219. *Id.* at 14-16.

220. Erica Lehrer Goldman, *Monday Morning Quarterbacks Look at Lawyers in Yates Case*, AMERICAN LAWYER MEDIA, TEXAS LAWYER, Mar. 18, 2002, at 19. In this article, the strategy of prosecutors Joseph Owmy and Kaylynn Williford emerges. For one, they would attack defense's notion that these were "altruistic" killings. But their main strategy, according to the Monday Morning Quarterbacks cited in this article, was of "never deviating from their trial themes: 1. Yates did it; 2. she said she did it; 3. what she did was a crime; and 4. she knew it was wrong. "They stuck to those themes patiently, redundantly, and even boringly," Gordon says, "to create neurologically a memory that was indelible, so when the jurors went back to the jury room they could recite the prosecutions' statements." Granted, Gordon says, the prosecution is "playing to a home crowd," describing Harris County as governed by a "law and order" philosophy.

Griffitts says Williford's technique of systematically going through each of Yates' acts on the day of the murders was very persuasive, particularly the points she made about Yates' deliberateness in waiting for her husband to go to work, locking the back door, hiding the dead children from the others and her actions following the murders. Williford's use of visual imagery was also persuasive—the image of a bathtub filled with urine, feces and vomit, the fistful of hair—and forced jurors to use more senses than just hearing."

These strategic points, coupled with the vivid illustrations, aim directly at the *M'Naghten*-like language of the Texas statute on insanity, which focuses on symptoms of insanity. See FINKEL, *INSANITY ON TRIAL*, *supra* note 1, at 75.

the defendant's subjectivity and see the world as she saw it; this means, in the words of the *M'Naghten* rule, "as if the facts of the delusion were true."²²¹ From inside her delusion we may see Andrea Yates' killings as an altruistic saving of souls from the devil and damnation, or a sending off to heaven of these little doomed angels before they "stumbled" into Satan's grasp.²²² We might see this as an honest but delusional mistake, where, like putative self-defense, she believed she was rescuing her children from terrible harms that were about to befall. The fact that these harms did not exist in the objective, consensual world of prosecutors and jurors ought not to matter, in possibility number two, if we see the action subjectively, from inside the delusion. There are still other possibilities. We might see her act as an honest but mistaken euthanasia, a mercy killing that foreshortens their suffering, or we might see it as a product of extreme emotional distress. From these various insider positions, the motive for this act may look very different from first-degree murder, such that a mitigating EED or an excusing insanity verdict (NGRI) may be the better fit.

But if possibility number one resulted, then the jury's attention was focused to the surface, to her actions, and to questions about whether her symptoms were severe and continual enough; the jury's attention was not focused on the deeper question of whether she had the capacity to make "response-able" choices unaffected by delusions. Moreover, at the surface level, in terms of her appearance, she may have looked more composed than jurors might have expected, given their prototype of "insanity via postpartum psychosis" projects, but they were seeing a defendant medicated into competence in order to stand trial.²²³ Tactically, she might have been better off waiving her right to be competent to stand trial, so that the jury could see her as she was, then, without medication, where her courtroom demeanor might have more closely matched her insanity claim²²⁴ and the jurors' prototype.

Again, the remedy for the problems I have outlined is not a haute couture defense. It is, rather, an appropriate insanity defense, which would fit both females and males, where the particular schema would allow for an assessment of gradations of culpability for the act and gradations of culpability for bringing about one's mental deterioration. Within these gradations would be the possibility for mitigation short of exculpation.²²⁵ Had the jurors had such a schema, they would have found a verdict that matched their assessment of her culpability.

221. FINKEL, *INSANITY ON TRIAL*, *supra* note 1, at 21.

222. See Finkel et al., *Lay Perspectives*, *supra* note 6, at 603.

223. Prototype theory and research would suggest that when an insanity defense is raised, jurors' prototypes of insanity would lead them to expect a wild, bizarre, "out of it" defendant. A quiet, sedate defendant, where that demeanor is largely produced by drugs, is likely to contradict the expectations of the insanity prototype, leading jurors to more closely consider the guilty prototype. See generally, e.g., Finkel & Groscup, *Crime Prototypes*, *supra* note 7; Finkel, *Commonsense Justice, Psychology, and the Law*, *supra* note 7.

224. This was precisely the issue raised in *Riggins v. Nevada*, 504 U.S. 127 (1992), where the Court ruled that Riggins could come to trial unmedicated.

225. See FINKEL, *INSANITY ON TRIAL*, *supra* note 1, at 279-81. In Finkel's schema, there are more verdict categories that track gradations, and where NGRI verdicts result in fewer cases than traditional two-choice tests.

V. EXIT THE LITTLE BLACK DRESS, AND ENTER A WIDER WARDROBE

In regard to two types of murder—where battered women kill their husbands and where mothers kill their children—special designer defenses have been proposed or enacted that are tailored to women’s different roles, relationships, and situations.²²⁶ The arguments for these haute couture defenses rest on empirical claims regarding the distinctiveness of the woman’s biology and/or psyche, where it is held that certain internal and external factors shape women’s thoughts, emotions, and actions differentially. But there is also a normative argument about gender-specific facts necessitating a separate defense, for it is claimed by proponents that the law fails to take into account certain relevant factors, when it ought to, which leaves women with verdicts that poorly fit their culpability and with sentences disproportionate to their blameworthiness.

To opponents of haute couture defenses, and I am one, it is quite possible to agree with the above conclusion, or with an even broader one, which does not necessitate dividing the law and the citizenry by gender. For example, one can agree that existing laws regarding the use of deadly force and self-defense claims where marital violence erupts do not fit many defendants, male or female, because the law has been slow to recognize what psychology and ordinary citizens already recognize—that multiple prototypes exist and give rise to different motives for various actions—and where culpability distinctions that do not currently exist are needed, for both empirical and normative reasons. The law has been slow to accommodate this prototypical diversity; in fact, the law has taken two prototypes involving killings between strangers, felony prevention and chance medley, and rolled them into one, and then has tried to shoehorn the ill-fitting battered woman who kills her spouse prototype into the mix. But it does not mix well. And the law has been slower still to toss from its wardrobe that one-size-fits-all little black dress, which does not fit with the sizeable differences among defendants, the sizeable history and relationship differences that exist among prototypes, and the varied degrees of culpability that CSJ sees, attributes, and wishes to register through appropriate verdict options.

My opposition to these haute couture defenses builds from the lowly toward the lofty, for the problems start with the down-to-earth facts of the Battered Woman Syndrome (BWS) and the facts relating childbirth and lactation to depression and murder—where these foundational facts falter. Specifically, we learn that the BWS, as proposed by Lenore Walker,²²⁷ does not fit all whom we try to dress in it: in fact, the majority of battered women do not manifest the key symptoms that comprise the syndrome, and many show characteristics opposite to what BWS predicts.²²⁸ Here, the consistency and coherence of the syndrome are in doubt. But even for the minority of women who do display the syndrome’s defining symptoms, neither the symptoms nor the overarching syndrome adequately explain why this passive, depressed woman, immobilized with learned helplessness, suddenly changes form and dysfunction and actively kills. Thus, the gap between her symptoms and her use of deadly force is neither bridged by a cause-effect link nor even by an adequate explanation. De-

226. See Schulhofer, *supra* note 85, at 124.

227. See generally WALKER, THE BATTERED WOMAN SYNDROME, *supra* note 106.

228. For a summary of results, see Schopp et al., *supra* note 31, at 95-96.

signer defenses have been built on a faulty foundation, where firmer science evidence does not support what has been newly fashioned.

The problems with an infanticide defense are slightly different, though the resulting haute couture problem is much the same as in the battered women who kill cases. In infanticide cases, the initial focus is no longer on the interpersonal situation and its intrapsychic effects, for the specific cause of the infanticide, according to English law, has been back-dated and set within her body. Shifting to a more distal cause, though, which resides further back in time or deeper into the body, does not make the haute couture argument easier to sustain, for at trial the case will turn by what can be supported at the *mens rea/actus reus* level. If this is so, then proponents of an excusing condition must show that the bodily effects of birth and lactation inevitably or predominantly cause serious mental impairments that undermine the actor's status as a legally responsible actor, whereas proponents of a mitigating condition must show that a diminished capacity short of insanity typically results from these bodily effects. But these claims cannot be sustained, in the vast majority of cases. In terms of the severity, timing, distinctiveness, and invariability of those depressions most associated with birth and lactation (that is, the baby blues and clinical depression), they are: (1) not severe enough in the vast majority of cases to warrant the excusing condition of insanity; (2) occur too late after birth to account for the neonaticides, and are indistinct from the depressions that occur in so many conditions unrelated to birth; and (3) do not invariably produce a diminished capacity that automatically warrants mitigation. In this case, the law and science do not align, because the law has gone out on an empirical limb that does not support its normative distinctions.

There is yet another component to these stories, which involves jurors and their CSJ. Some believe that the law and CSJ do not align in cases of battered women who kill and infanticide cases, though there is disagreement about if this is, in fact, so, and if it is so, why this misalignment results and what it means.²²⁹ Others go further from less, asserting that community sentiment is biased against these defendants: this assertion is typically put forth based on unverifiable claims that wrongful and harsher verdicts (that is, vengeful nullifications) result more frequently than they should, or more frequently than they do for male defendants; more importantly, these claims are frequently made without first carefully ruling out more benign confounds that could better explain these results.²³⁰ Contradicting these harsher claims are contrary findings from mock juror research, which suggest that jurors are leniently inclined when it comes to verdict (that is, NGRSD), when battered women kill their spouses in non-confrontational situations,²³¹ and there is evidence in infanticide cases that mock

229. See generally Finkel, *Commonsense Justice and Jury Instructions*, *supra* note 10 (considering the vagueness that surrounds jury instructions, which thereby allows jurors to reconstrue these instructions in ways more consonant to their commonsense justice).

230. *Id.*

231. See Finkel et al., *The Self-Defense Defense*, *supra* note 2, at 597; see also Diane R. Follingstad et al., *Factors Predicting Verdicts in Cases Where Battered Women Kill Their Husbands*, 13 LAW & HUM. BEHAV. 253, 262 (1989); Jessica P. Greenwald et al., *Psychological Self-Defense Jury Instructions: Influence on Verdicts for Battered Women Defendants*, 8 BEHAV. SCI. & L. 171, 176 (1990).

jurors do not reach overwhelmingly for the harshest first-degree or second-degree murder verdicts.²³²

What we do know from CSJ findings generally is that commonsense justice is favorably inclined toward subjectivity, where CSJ's culpability analysis begins.²³³ A subjective inclination should initially favor the battered woman who kills her spouse and the mother who kills her child, for there is a willingness on the part of jurors to enter the thinking, feeling, subjective world of such defendants, and to see the world from that perspective. But objectivity plays a significant, albeit secondary role, as mistakes are culpably measured by their reasonableness in reality. Thus, jurors are likely to take a quasi-subjective, quasi-objective, vantage point when judging the culpability of alleged mistakes, and this may hurt a justification claim for the battered woman who kills in a non-confrontational setting, though it may hurt an excusing claim much less. But even where a delusional belief cannot be anchored to objective, reasonable ground, jurors still have an excusing insanity defense which they may use, particularly in those infanticide and battered women cases where they find defendants non-culpable for bringing about the mental deterioration.

Still, there is a contrast between CSJ and black-letter law. Whereas jurors naturally move back and forth between subjectivity and objectivity, blending the two as they try to understand another's construal of a situation that has history to it, the law's conceptual distinction between excuse and justification appears to rest on a rigid distinction between subjectivity and objectivity. In this legal framework, thinking-feeling-action patterns are neatly compartmentalized into either subjective or objective slots, where the actor may be non-blameworthy in the former but where the action (and actor) may be laudable in the latter. Such a rigid distinction does not fit the psychological facts and processes involved in construing. This normative distinction, though, without supportive empirical ground beneath, leaves the law and certain defendants exposed.

A justification defense is likely to fit many of the confrontational cases, but very few of the non-confrontational cases, particularly if not a ounce of subjectivity is to be added to a jury instruction. But with a mix of objectivity and subjectivity, an excusing condition can be more easily fashioned, which can also be made conceptually distinct from insanity. And the excusing condition of insanity can fit for some infanticide cases, particularly where psychosis is evident, but this requires a legal test of insanity that fits with the facts, as opposed to a retro test that requires a total deprivation of mind where no such insanity ever existed in the world. Commonsense justice, from the research evidence,²³⁴ is prepared to accept that some delusions can lead to tragic outcomes under certain conditions, and they would choose verdict options that reflect this judgment, if the law does its part by providing the appropriate options.

Providing options is key, for there are a number of prototypes that reflect different motives and levels of culpability, rather than a single stereotype that the law tries to clothe in a one-size-fits-all little black dress. Providing default options is also key, for there are cases involving mistake that may fail to reach

232. See Finkel et al., *Commonsense Judgments of Infanticide*, *supra* note 3, at 1125.

233. See *supra* notes 34-47 and accompanying text.

234. See Finkel et al., *The Self-Defense Defense*, *supra* note 2, at 593-596.

the excusing or mitigating thresholds, but where the verdict of murder poorly fits. My analysis points to a faulty alignment between shaky facts and normative defenses that rise from these facts. My analysis also points to a misalignment between law and CSJ, where jury instructions fail to provide jurors with the verdict options that reflect their culpability distinctions. The approaches I have defended seek to expand the wardrobe, fit verdicts to the facts, and fit facts with the normative principles worth preserving. I argue that the haute couture option does none of these. A designer defense, fundamentally, is a stereotype. As a stereotype, it indiscriminately lumps all instantiations into the same little black dress, that redounds to no good for either the law or for women, for individualized assessment and sizing, a fundamental fairness principle, is lost rather than found.