NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 9 | Issue 1 Article 5

1991

YOU'VE COME A LONG WAY, BABY: THE BATTERED WOMAN'S SYNDROME REVISITED

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Gladys, an impoverished black woman, had been battered by her husband throughout their marriage.[1] The abuse began the day after they were married, and continued intermittently for the next seven years.[2] Her husband Ernest's excessive drinking usually accompanied the violence, and the abuse occasionally occurred in public.[3] One day, after a series of arguments during which an inebriated Ernest refused to give her money to shop for food for the family, he started to club and bite her while they were walking down the street.[4] During the ensuing struggle, Gladys pulled a pair of scissors from her purse and stabbed her husband, killing him.[5]

During a five year marriage Sherry was frequently pistol whipped, threatened with knives, and once beaten so badly with a tire iron that she was hospitalized.[6] Sherry filed for divorce and obtained restraining orders against her husband.[7] Disregarding the restraining orders, he persistently stalked and harassed her, lurking in doorways and leaping out to assault her.[8] She returned home one evening only to find him hiding in her darkened apartment.[9] When he told her he was going to kill her and seemed to be groping in a

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[1] State v. Kelly, 478 A.2d 364, 369 (N.J. 1984). *See also* LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 208-09 (1989); Elizabeth M. Schneider, *Describing and Changing Women's Self-Defense Work and the Problems of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986) [hereinafter Schneider, *Describing*].

[2] *Kelly*, 478 A.2d at 369.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] State v. Allery, 682 P.2d 312, 313-14 (Wash. 1984); *see also* David B. Kuhns, Note, State v. Allery: *Expert Testimony on the Battered Woman Syndrome is Admissible*, 21 WILLIAMETTE L. REV. 410 (1985).

[7] *Allery*, 682 P.2d at 313; Kuhns, Note, *supra* note 6, at 410.

[8] *Allery*, 682 P.2d at 313; Kuhns, Note, *supra* note 6, at 410.

[9] *Allery*, 682 P.2d at 313; Kuhns, Note, *supra* note 6, at 410.

kitchen drawer for a knife, she shot and killed him.[10]

Brenda testified that her husband had twice tried to kill her, once by smothering her with a pillow, and then by placing a radio in the bathtub while she was bathing.[11] He had also threatened to kill her children if she pursued a domestic violence charge she had brought against him.[12] In between these outbursts of acute violence, some of which had been witnessed by others, their marriage was superficially calm.[13] One night, Brenda noticed a gun she had never seen before on a table by her husband's bedside.[14] Convinced the gun signaled an escalation in his intentions and that he would kill her with it, she picked up the gun and shot him after he had hit her.[15]

Gladys,[16] Sherry,[17] and Brenda[18] are representative of battered women who have asserted a defense of justifiable homicide.[19] Usually, the woman has survived years of beatings, alternating with periods of relative domestic tranquility.[20] Women who have raised evidence of Battered Woman's Syndrome in support of justifiable homicide have generally been the victims of at least two acute battering incidents.[21] The cases tend to follow one of two scenarios: (1) at some point in the latest incident, the woman perceives a shift in her attacker, indicative of increased danger.[22]

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[10] *Allery*, 682 P.2d at 313-14; Kuhns, Note, *supra* note 6, at 410. Originally, Sherry Allery had been convicted of second degree murder. Her conviction was overturned on appeal. *Allery*, 682 P.2d at 313.

[11] State v. Koss, 551 N.E.2d 970, 971 (Ohio 1990).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] State v. Kelly, 478 A.2d 364 (N.J. 1984).

[17] State v. Allery, 682 P.2d 312 (Wash. 1984).

[18] State v. Koss, 551 N.E.2d 970 (Ohio 1990).

[19] WALKER, *supra* note 1. *See also* CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE (1989); MILDRED DALEY PAGELOW, WOMEN-BATTERING (1981).

[20] *Kelly*, 478 A.2d at 369 (N.J. 1984); *Koss*, 682 P.2d at 315 (Wash. 1984); *Kelly*, 551 N.E.2d at 971 (Ohio 1990). *See* WALKER, *supra* note 1, at 6; PAGELOW, *supra* note 19, at 21.

[21] WALKER, *supra* note 1, at 102. Cases which exemplify this include: *Kelly*, 478 A.2d 364 (N.J. 1984); People v. Torrez, 488 N.Y.S.2d 358 (N.Y. Sup. Ct. 1985); State v. Norman, 378 S.E.2d 8 (N.C. 1989); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983); *Koss*, 551 N.E.2d 970 (Ohio 1990).

[22] State v. Allery, 682 P.2d 312, 313 (Wash. 1984).

As he is about to strike her, she repels the attack with deadly force,[23] (2) or, as in the case of Brenda above, after years of savage brutalization, the woman takes advantage of an opportunity to catch her abuser off-guard and kills him to defend herself from the brutality she knows will inevitably come when he awakens.[24]

This Note will examine the legal issues surrounding the use of Battered Woman's Syndrome by defendants claiming justifiable homicide. It will review the current experts' theories concerning battered women and survey the court cases decided in the last decade to assess the trends in the acceptance of these theories. Although there have been many instances in which Battered Woman's Syndrome has been asserted by a defendant,[25] this Note will be confined to an examination of those cases in which a woman who killed her spouse/boyfriend was charged with homicide, and asserted a complete defense to the homicide charge.[26]

The analysis will focus on the two controversial issues common to all Battered Woman's Syndrome cases: whether expert testimony on Battered Woman's Syndrome will be admissible, and if so, to what degree, and which standard of reasonableness should be applied to the perceived danger. Finally, this Note will offer some reflections from the feminist literature on the use of Battered Woman's Syndrome, along with recommendations for changes in the law of justifiable homicide as it pertains to battered women.

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[23] *Kelly*, 478 A.2d at 369 (N.J. 1984).

[24] WALKER, *supra* note 1. *See also* GILLESPIE, *supra* note 19.

[25] For example, in a highly publicized case in New York City, Hedda Nussbaum asserted Battered Woman's Syndrome to justify her inability to prevent her common-law husband from beating and eventually killing their adopted daughter. Nussbaum exchanged her testimony against her husband, Joel Steinberg, for immunity from prosecution in the child's death. WALKER, *supra* note 1, at 147-51. Another notorious case, made into a television movie, dealt with a woman (Francine Hughes) who used Battered Woman's Syndrome to buttress her plea of temporary insanity when she was tried for setting her abusive husband on fire. *Id.* at 25.

[26] Of necessity, this analysis will focus on cases reported on the appellate level. However, there is agreement among experts that many of the cases of battered woman killing their attackers are not in print because the women have not appealed their convictions. *See generally* GILLESPIE, *supra* note 19; WALKER, *supra* note 1.

I. PSYCHOLOGICAL AND SOCIOLOGICAL FACTORS

A. Definitions

Who are these battered women? Experts in the field agree that they can be "everywoman"- they come from every nation, socioeconomic background and level of education; they are mothers and homemakers, and many are successful professionals.[27] Lenore Walker,[28] the preeminent expert on Battered Woman's Syndrome in the United States, defines the typical battered woman as one who is "subjected repeatedly to coercive behavior (physical, sexual, and/or psychological) by a man attempting to force her to do what he wants . . . and who, as a member of a couple, has experienced at least two acute battering incidents."[29]

According to Walker, the dynamics of the abusive relationship occur in a cycle composed of three phases: tension-building, the acute battering incident, and the tranquil, loving or nonviolent phase.[30] The first phase is characterized by minor battering incidents, such as slaps, controlled verbal abuse and psychological warfare.[31] The woman allows the behavior to continue because the incidents seem comparatively minor, and because she desperately wants to prevent the violence from growing worse;[32]

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[27] *See* PAGELOW, *supra* note 19, at 21; WALKER, *supra* note 1, at 101. *See generally* GILLESPIE, *supra* note 19. Walker's text contains case studies of battered women who were, variously, a Baltimore socialite married to surgeon, a member of the Hawaiian royal family, a psychologist, a lawyer, a waitress, a middle class Jewish editor (Hedda Nussbaum), and an elementary school teacher. Additionally, one judge noted "researchers have shown that many battered women are highly competent . . . career women, who include among their ranks doctors, lawyers, nurses, homemakers, politicians and psychologists." Commonwealth v. Stonehouse, 555 A.2d 772, 807 (Pa. 1989).

[28] Dr. Lenore Walker has provided expert testimony on Battered Woman's Syndrome in over 150 homicide trials throughout the United States. She is the Executive Director of the Domestic Violence Institute in Denver Colo., a Professor of Psychology at the University of Denver, and serves as President of the Psychology of Women Division of the American Psychological Association.

[29] WALKER, *supra* note 1, at 102. Dr. Walker was the first psychologist to study thoroughly the psychological profile of battered women. Her extensive research led her to develop the concept of Battered Woman's Syndrome and subsequently coin the term.

[30] *Id.* at 42-44.

[31] *Id.* at 42.

[32] *Id.* at 43.

she is also committed to preserving the relationship, and willing to make what seem like minor sacrifices to do so.[33] This desire proves to be a double-edged sword, for her docile behavior legitimizes her partner's belief that he had a right to abuse her in the first place.[34] During this phase the woman commonly goes to excessive lengths to rationalize her mate's behavior and conceal the abuse from others, isolating herself from potential sources of assistance.[35] As the cycle progresses, "her [placatory] techniques become less effective, and violence and verbal abuse worsen."[36] The spiralling effect of the loss of control adds exponentially to the pressure.[37] At some point, the tension becomes so unbearable that the woman withdraws emotionally, triggering the next phase.[38]

The acute phase is remarkable for its savagery and uncontrolled nature;[39] the violence escalates to a point of a rampage, resulting in serious injury and sometimes death.[40] At this point, the woman feels psychologically trapped.[41] Her outwardly submissive demeanor functions as a defense mechanism, cloaking a sense of distance from the attacks and from their terrible pain.[42] The knowledge that her attacker is so much physically stronger than she reinforces her need to maintain the appearance of calm.[43]

The third phase is distinguished by forgiveness, relative tranquility and an illusory sense of resolution.[44] The couple experiences profound relief that the violence has abated, and the batterer often exhibits warm, loving behavior towards his mate.[45]

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[33] *Id.*

[34] WALKER, *supra* note 1, at 43.

[35] *Id.* In fact, even if she manages to call the authorities, police departments across the country attest to the difficulty in breaking up an acute battering incident because of its savage intensity. *Id.* at 44.

[36] *Id.* at 43.

[37] *Id.*

[38] *Id.* The psychological anguish the woman feels causes her to distance herself emotionally from her mate. *Id.*

[39] WALKER, *supra* note 1, at 43.

[40] *Id.* Some women will even provoke an acute incident, just to "get it over with," thus ending the tension associated with waiting for the explosion. *Id.*

[41] *Id.* at 44.

[42] *Id.*

[43] *Id.*

[44] WALKER, *supra* note 1, at 44-45.

[45] *Id.*

He begs her forgiveness, and promises there will be no recurrences.[46] This final phase is the one in which the woman sustains the greatest psychological harm.[47] The two parties exhibit their mutual emotional dependence - her for his caring behavior, he for forgiveness. "Underneath the grim cycle of tension, violence, and forgiveness that make their love truly terrifying, each partner may believe that death is preferable to separation. . . . In fact, many battered women who kill their abusers start out intending to commit suicide themselves."[48]

It would be difficult to comprehend the plight of a battered woman without first examining the profile of a typical batterer. The following description was developed by Dr. Walker after extensive research and treatment of couples and individuals in battering relationships.[49] Most batterers begin their relationships with seemingly normal behaviors; the violence is rarely apparent at the outset.[50] The batterer tends to believe in the supremacy of the male and adheres to stereotypical sex roles within the family.[51] He commonly believes others are responsible for causing his (re)actions, and experiences chronic, pathological jealousy.[52] Typically, he also experiences abnormal reactions to stress, and compulsively consumes alcohol in attempts to relieve that stress.[53] Most batterers view sex as an act of power or violence;[54] frequently, batterers engage in and seem to require increasingly aberrant sexual behavior in order to become aroused.[55] The man believes his acts of violence are justifiable and that the woman "caused" them;[56] he is also convinced

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[46] *Id.* at 45.

[47] *Id.* During this phase, the woman convinces herself that it will never happen again. She tells herself that this loving man is the one she fell in love with, and, sensing his despair at the chance of losing her, she seeks to reassure him and preserve his fragile emotional stability. This illusory rapprochement is a trap. *Id.*

[48] *Id.* The battered woman who kills herself sees suicide as the only way to break the batterer's control over her and escape further torture. *Id.*

[49] WALKER, *supra* note 1, at 6-7.

[50] *Id.* at 71.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] WALKER, *supra* note1, at 71.

[55] *Id.*

[56] *Id.*

that his violent behavior is beyond his conscious control.[57] Further, his battering follows a pattern and he is likely to have battered more than one woman, often in similar scenarios.[58]

B. Psychological Factors

A facility with Battered Woman's Syndrome requires an exploration of the psychological forces that shape the battered woman's behavior and the treatment she receives in our judicial system. According to Walker, Battered Woman's Syndrome is best understood as a subgroup of what the American Psychological Association defines as Post Traumatic Stress Disorders, rather than some form of mental illness.[59] Persons suffering from Post

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[57] *Id.*

[58] *Id.* at 71-72. Walker's findings comport with those of other researchers as well. *See id.* at 72.

[59] WALKER, *supra* note 1, at 48 (referring to the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL, 236 (3d ed. 1980)). Like Rape Trauma Syndrome and Battered Child Syndrome, this symptomology, also experienced by Vietnam War Veterans, includes reexperiencing of past traumatic events, numbing of emotions, avoidance of reminders of the abuse or trauma, and a hypervigilance to cues of further violence. *Id.* at 48, 179-80. It is important to underscore the point that women suffering from Battered Women Syndrome are not considered mentally ill, or psychotic; in fact, evidence indicates that once a battered woman is free of her tormentor, she is most likely to become symptom free. *Id.* at 181. Many cases describe this symptomology; *see, e.g.*, People v. Aris, 264 Cal. Rptr. 167, 178 (1989). There is an additional theoretical construct, that of intermittent reinforcement, which operates to keep the woman in the relationship. As Walker describes it,

> The battered woman may not know, from one minute to the next, whether she'll be faced with her "good" husband or her "bad" husband. Sometimes he indulges her . . . [with] loving behavior. At other times he displays physical and psychological cruelty. Likewise, she may not know if sex will be pleasurable and loving, or if it will take the form of violent rape. In situations where the nature of the couple's sexual experience differs according to the whims and personality changes of the batterer, loving sex often has the effect of a positive reinforcement for the battered woman. Because it is sometimes pleasurable, at the times when it is abusive she may still hope that "the next time will be better."

WALKER, *supra* note 1, at 47 (applying the behavioral psychology theory to explain one of the factors which tend to keep the woman with her abuser). *See also supra* note 47 and accompanying text.

Traumatic Stress Disorder are defined as those having been repeatedly and unpredictably exposed to a stressor and who develop certain psychological symptoms, such as heightened vigilance and flashbacks, that affect their ability to function long after the original trauma has occurred.[60] As such, these women are "emotionally devastated by unalleviated stress, entrapment, and terrible isolation."[61] The continuing abuse stimulates the development of coping responses that severely circumscribe the woman's ability to see alternatives to her traumatic situation.[62] "[W]hether it is true or not, [she] ceases to believe anything she can do will have a predictable, positive effect."[63]

The dynamic of fear is the dominant psychological component underlying the battered woman's behavior;[64] it permeates her entire existence.[65] As Walker notes:

> Terror of her abuser is a seed . . . planted in the psyche of the battered woman by repeated subjection to psychologically sadistic manipulation and physical bullying; it grows and

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[60] *Id.* at 48, 179-80.

[61] *Id.* at 46-47. Or, as a Kansas court described it, "[t]he abuse is so severe, for so long a time, and the threat of great bodily harm so constant . . . [they become] terror-stricken people whose mental state . . . bears a marked resemblance to that of a hostage or a prisoner of war." Commonwealth v. Stonehouse, 555 A.2d 772, 801-02 n.6 (Kan. 1989) (quoting State v. Hundley, 693 P.2d 475, 479 (Kan. 1985)).

[62] WALKER, *supra* note 1, at 48, 50.

[63] *Id.* at 48. Walker's theory relies in part on the concept of learned helplessness (developed in part by other psychologists, as well as through her own extensive research over the past 10 years). This theory posits that the intermittent reinforcement characteristic of the third phase of the battering cycle makes it more likely that the woman will remain with her abuser because she comes to believe that the only way she can control the situation is by ensuring its predictability. She avoids the unknown (even escape) at all costs, convinced that the demons she knows are preferable to those she does not know at all. This intermittent reinforcement renders the battered woman so unable to predict her own safety that she is convinced nothing she or anyone else can do will alter her horrible circumstances. *Id.* at 50-51.

[64] *Id.* at 64.

[65] *Id.* Other experts, and courts, have concurred with Walker's assertion that fear is the controlling factor in the battered woman's behavior. *See, e.g.*, Tourlakis v. Morris, 738 F. Supp. 1128, 1134 (S.D. Ohio 1990); *see also* Phyllis L. Crocker, *The Meaning of Equality For Battered Women Who Kill Men In Self-Defense*, 8 HARV. WOMEN'S L.J. 121 (1985); Roberta K. Thyfault, *Self-Defense: Battered Woman Syndrome On Trial*, 20 CAL. W. L. REV. 485, 489 (1984).

> grows until she is incapable of believing in the effectiveness of taking positive action on her own behalf . . . . It is common for a severely battered woman to believe that the batterer is omnipotent, capable of coming after her no matter where she is, even capable of transcending death itself to inflict pain and terror on her again. This supposedly irrational fear finds its logical basis within the context of the battering situation, for it is the situation itself that invokes it.[66]

C. Sociological Factors

The dynamic of fear described above serves only as a partial answer to the question most commonly asked of battered women: why do they remain in relationships with the men who abuse them so severely?[67] Experts explain that this pattern of fear, in combination with certain societal factors, gives rise to the seemingly illogical phenomenon of passivity.[68]

These societal forces can be broken down into several categories. It is of primary importance to recognize that the fear battered women experience is entirely well-founded and rationally based.[69] Research conducted by domestic violence experts indicates that *it is statistically more likely that battered women will be killed by their abusive partners during separation, divorce and custody proceedings - i.e, when the woman has left or has tried to end the relationship - than at any other time in the relationship.*[70] Those who leave and survive have

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[66] WALKER, *supra* note 1, at 64.

[67] *Id.* at 70. The issue of why the battered woman remains with her abuser has been commented upon by a number of other experts who lend support to Walker's theory that fear is the controlling factor in these women's lives. *See, e.g.*, People v. Torres, 488 N.Y.S.2d 358, 362 (N.Y. Sup. Ct. 1985); *see also* Elizabeth M. Schneider, *Equal Rights To Trial For Women: Sex Bias In The Law Of Self-Defense*, 15 HARV.C.R.-C.L. L. REV. 623, 626-27 (1980) [hereinafter Schneider, *Equal Rights*]; Thyfault, *supra* note 65, at 488-89.

[68] WALKER, *supra* note 1, at 70.

[69] *Id.* at 65.

[70] *Id.* (emphasis added). Walker's assertion is based on her own research conducted in Denver, Colorado, as well as on homicide statistics compiled by the Centers for Disease Control (CDC) in Atlanta, Georgia, and in Virginia and New York. The CDC statistics, analyzed by a team of sociologists, indicate that most of the women had been killed *after* they separated from or divorced their partners. *Id. See also* State v. Allery, 682 P.2d 312 (Wash. 1984); Thyfault, *supra* note 65, at 494.

usually been met with coercive and sadistic responses by their batterers.[71] Often, the man terrorizes the woman by holding children or pets hostage, or by publicly humiliating her in such a way that she is socially ostracized and alienated from those who might otherwise offer her assistance.[72] Walker's research indicates that battered women who eventually kill their abusers have usually been through one or more such attempts at escape from their torture.[73] *The lesson they invariably learn is that it is too dangerous to leave.*[74] Walker explains that these findings reflect the batterer's extreme fear of abandonment, which leads him to kill rather than separate from the battered woman.[75] As a result, the woman correctly concludes that her abuser will do anything to keep her from leaving him, including killing her, her children or other family members.[76]

Walker further theorizes that a number of psycho-social concepts taught to females in our society conditions them to accept the battering relationship.[77] She posits that women are taught to accept the temper outbursts of men without allowing such outbursts

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As one of Thyfault's sources so movingly notes,

> Patricia Gross's husband tracked her from Michigan to Mississippi and threatened to kill her relatives there to force her to return to him. Judy Austin's live-in boyfriend chased her from California to Arizona to Wyoming . . . . Mary McGuire's husband, teaching submission, made her watch him dig a grave, kill the family cat, and decapitate a pet horse. When she fled he brought her back with a gun held to her child's head . . . . Agnes Scott's husband found her and cut her up seven years after she left him. There are cases on record of men still harassing and beating their wives twenty-five years after the wives left them and tried to go into hiding. If researchers were not quite so intent upon assigning the pathological behavior to the women, they might see that the more telling question is not "Why do the women stay?" but "Why don't the men let them go?"

Thyfault, *supra* note 65, at 494 n.86 (quoting ANN JONES, WOMEN WHO KILL, 298-99 (1980)).

[71] WALKER, *supra* note 1, at 76.

[72] *Id.*

[73] *Id.* at 102.

[74] *See generally* GILLESPIE, *supra* note 19; WALKER, *supra* note 1.

[75] *See generally* GILLESPIE, *supra* note 19; WALKER, *supra* note 1.

[76] WALKER, *supra* note 1, at 65-66.

[77] *Id.* at 70; *see also* GILLESPIE, *supra* note 19, at 107-15.

to diminish the love they feel for their mates.[78] Additionally, she argues that, in our culture, women are trained to believe they must put up with flaws in the men they love in order to get any love in return.[79] Such conditioning is reinforced by societal beliefs that women are somehow responsible for the behavior of their husbands,[80] and by the training they receive in being the peacemaker in their relationships.[81] Cementing these concepts is the fact that, like most of us, they too have often been told "it takes two to make a fight;"[82] this inclines women to believe they are partially responsible for their abuse.[83] As evidence of the commonality of this psycho-social training, most battered women's internal dialogue is: "if I were only a better wife, I could make him stop beating me."[84]

Other societal factors present often insurmountable barriers to battered women leaving the abusive situation.[85] Many are women of limited financial means, mothers with children to support, and with no resources to assist them in making a successful transition.[86] Repeated injuries and psychological torture have often resulted in the woman quitting her job[87] (thus limiting her financial

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[78] WALKER, *supra* note 1, at 70.

[79] *Id.*

[80] *Id.*

[81] People v. Aris, 214 Cal. Rptr. 167, 178 (1989).

[82] WALKER, *supra* note 1, at 72.

[83] *Id.* at 70.

[84] *Id.* This adage does not hold true in battering relationships, where the man frequently picks fights without provocation, often waking his mate in her sleep to initiate an acute battering incident. Walker asserts that the batterer's behavior is essentially unmotivated by any action the woman takes or doesn't take, and that men who batter in one relationship tend to batter in all their intimate relationships. Additionally, research indicates that the batterer's need to control by creating behavioral standards is common to all spousal battering relationships. *Id.* at 70-71.

[85] Crocker, *supra* note 65, at 133; Schneider, *Equal Rights, supra* note 67, at 626-27. *See generally* GILLESPIE, *supra* note 19; WALKER, *supra* note 1.

[86] GILLESPIE, *supra* note 19, at 80.

[87] Crocker, *supra* note 65, at 133; Schneider, *Equal Rights, supra* note 67, at 626-27. *See generally* GILLESPIE, *supra* note 19; WALKER, *supra* note 1. Additionally, the man's jealousy is so intense that he will not tolerate the woman having any type of relationship, either work or friendship, outside the home. Her earning power is also seen as a threat to his masculinity, and most batterers use coercion to keep their women at home. GILLESPIE, *supra* note 19, at 128; WALKER, *supra* note 1, at 103, 105, 179; Thyfault, *supra* note 65, at 486-88.

resources further) and in her severe isolation, so that she has no neighbors or friends she can call upon for help.[88] Alternatively, if the woman is employed in a professional capacity, she may be reluctant to sever the relationship with her abuser because she knows that one of the costs she will bear is the loss of her job and income.[89]

This is not the end of the story. Even if the woman leaves the relationship and seeks assistance in a victim's shelter, she will often need to turn to traditional governmental agencies for help.[90] Many women in shelters are forced by necessity to obtain emergency welfare payments, and to rely on the police for assistance in obtaining belongings from their home.[91] Further complicating the situation, she and her children often require medical attention and must depend on public assistance to meet their needs.[92] It is no wonder that the prospect of such a scenario proves daunting to most women, especially when their lives have been an unending cycle of terror and physical abuse.[93]

Many experts believe that the violence inherent in our society plays a part in the increasing violence towards women.[94] The magnitude of this problem is evidenced by statistics which indicate that at least two million women are severely beaten by their husbands every year in this country.[95] Experts estimate that the actual number is far greater.[96] These experts proffer a social learning theory as a partial explanation of this domestic violence

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[88] GILLESPIE, *supra* note 19, at 80.

[89] PAGELOW, *supra* note 19, at 121. Pagelow concludes from her research that leaving the abusing relationship most often requires the woman to relocate; this is due to the extremely high probability that her former abuser will not let her alone. Even those women who seek assistance in victims' shelters have said that they quit their jobs for fear their spouses will commit further violence. This fear was well grounded, as there are many reported incidents of such men stalking their former mates at their places of work, or following them when they left work to harass or commit further violent acts. *Id.*

[90] Crocker, *supra* note 65, at 132-34; *see generally* WALKER, *supra* note 1.

[91] PAGELOW, *supra* note 19, at 153.

[92] *See generally* WALKER, *supra* note 1.

[93] *Id.* at 64.

[94] PAGELOW, *supra* note 19, at 19-27 (summarizing research studies conducted on an international scale).

[95] See authorities cited in GILLESPIE, *supra* note 19, at 202.

[96] *Id.* at 12-13.

epidemic.[97] This theory suggests that when a man first acts violently against a woman, and that act provides satisfactory solutions (to him), and leads to no unpleasant consequences (for him), those acts are likely to be repeated.[98] This social learning theory also encompasses the notion that our society is one in which men are trained for "competition, aggressiveness, . . . physical force, . . . and a need to dominate and control women" within the family structure.[99] Other authorities contend that on some levels our society condones or excuses men who beat women, thus creating significant indifference to the problems of such violence.[100] As Gillespie states, "[w]e, as a nation, suffer from a painful ambivalence about violence against women. We simultaneously deplore it and excuse it . . . instead of blaming the perpetrator, we go to great lengths to . . . blame the victim."[101]

Some of these theorists contend that domestic violence is a natural outgrowth of the sexual stereotyping inherent in our social system, which also contributes significantly to the limited response our judicial system has offered victims of domestic violence.[102] Gillespie theorizes that, because we do not encourage women to defend themselves, a woman who wields a deadly weapon, even in self-defense, presents a deeply disturbing image that strikes at the core of our society's cultural stereotypes.[103] These cultural stereotypes follow the battered woman who acts in self-defense throughout our justice system, diminishing the opportunity she has for fair treatment.[104] Gillespie persuasively argues that these stereotypes are an underlying cause of the difficulty battered women experience in obtaining police protection from their abusive

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[97] PAGELOW, *supra* note 19, at 29.

[98] *Id.* at 31.

[99] *Id.*

[100] GILLESPIE, *supra* note 19, at 11.

[101] *Id.* Prosecutors have argued that defendants provoked their attacker by dating other men. Commonwealth v. Stonehouse, 555 A.2d 772, 811 (Pa. 1989). They have also argued that the women had been the willing partner in the abuse, or had incurred their injuries as part of a "love game." Crocker, *supra* note 65, at 133 n.61.

[102] WALKER, *supra* note 1, at 70; GILLESPIE, *supra* note 19, at 11.

[103] GILLESPIE, *supra* note 19, at 12. *See also* State v. Wanrow, 559 P.2d 548 (Wash. 1977); Schneider, *Equal Rights*, *supra* note 67, at 627-28.

[104] GILLESPIE, *supra* note 19, at 12.

mates.[105] Frequently, the police are either reluctant to intervene in the domestic situation, or refuse to arrest the batterer.[106] Further, if a woman actually kills her abuser, the investigating police often characterize the events as the result of the parties quarreling or engaging in a domestic altercation.[107] This characterization along sex-stereotyped lines makes it far more likely that the woman's behavior will be interpreted as motivated by anger rather than by "fear and self-preservation."[108] The investigation then tends to become focused on standard motives for murder, such as revenge and jealousy.[109]

II. CURRENT STATE OF THE LAW

There are two major hurdles facing a battered woman asserting self-defense in a homicide case.[110] First, she must convince the court to admit expert testimony on Battered Woman's Syndrome.[111] Second, she must convince the court that the syndrome explains sufficiently why she experienced such an immediate fear of death that it justified her killing in self-defense.[112] While significant progress has been made in overcoming the first

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[105] *Id.* at 12-15.

[106] *Id.*

[107] *Id.* at 15.

[108] *Id.*

[109] *Id.* at 16.

[110] A complete defense to homicide is defined as total exculpation of the crime. As the court in People v. Aris, 264 Cal Rptr. 167 (1989) explains, the California Penal Code (§§ 197, 198) defines a homicide committed in self-defense as a "justifiable homicide," as distinguished from an "excusable homicide." The distinction is that justifiable homicide finds the accused's behavior not criminal, while excusable homicide may find the defendant guilty of a lesser charge. *Id.* at 178 (citing CAL. PENAL CODE §§ 195, 197 (West 1988)). This court and others have also used the term "imperfect self-defense," classifying a crime as voluntary manslaughter when the "person has killed another in honest but unreasonable belief in the need to kill, or when she uses more force than is reasonably necessary . . . ." SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES, 849 (5th ed. 1989).

[111] *See generally* GILLESPIE, *supra* note 19; WALKER, *supra* note 1.

[112] This Note does not address the use of the Battered Woman's Syndrome to buttress a claim of diminished capacity or temporary insanity. Further, this author concurs with experts in the field that the temporary insanity defense raises a number of issues detrimental to the woman's cause. *See infra* notes 276-80 and accompanying text.

obstacle, the second remains a serious problem in some jurisdictions. Each of these issues will be discussed in turn.

A. Admissibility of Expert Testimony

Within the past decade, expert testimony on the Battered Woman's Syndrome has gained increasing acceptance in most jurisdictions in the United States.[113] Until recently, many courts found such testimony inadmissible on the grounds that there was insufficient scientific research to warrant its admission.[114]

For example, in 1983 the District of Columbia Court of Appeals in *Ibn-Tamas v. United States*[115] held that it was not reversible error to exclude expert testimony on the Battered Woman's Syndrome, and sustained Ibn-Tamas' conviction for murder.[116] Beverly Ibn-Tamas killed her husband in the midst of an acute

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[113] Even on the appellate court level, the case law in this area is voluminous. Hence, a selective number of cases will be examined which exemplify significant trends in the field. States that have accepted such testimony include: Florida, Georgia, Illinois, Kansas, Maine, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Tennessee, Texas and Washington. While there are no states which exclude expert testimony on Battered Woman's Syndrome categorically, courts in at least two states (California, Minnesota) have disputed its relevance and applicability within the last few years. *See, e.g.*, People v. Aris, 264 Cal. Rptr. 167 (Cal. App. 4th 1989) and State v. Hennum, 441 N.W.2d 793 (Minn. 1989). Note also that of the few cases involving battered women that have reached the federal courts the constitutional challenges raised by appellants have never been sustained. *See, e.g.*, Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), *aff'd* 474 U.S. 140 (1985); Tourlakis v. Morris, 738 F.Supp. 1128 (S.D. Ohio 1990); Fennell v. Goolsby, 630 F. Supp. 451 (E.D. Pa. 1985).

[114] *See, e.g.*, Ibn-Tamas v. United States, 455 A.2d 893 (D.C. 1983).

[115] *Id.* Beverly Ibn-Tamas was originally convicted of second degree murder and appealed on grounds that expert testimony should have been admitted to support her claim of justifiable homicide. The Court of Appeals, 407 A.2d 626 (D.C. 1979), remanded for consideration of the expert's (Dr. Walker) qualifications, and for determination of whether her methods had attained general acceptance among the scientific community. *Id.* at 640. This was one of the first courts to consider testimony on Battered Woman's Syndrome in a positive light. On remand, however, the trial court concluded that the expert testimony should be excluded due to the novelty of the scientific theory. This decision was upheld on appeal. *Ibn-Tamas*, 455 A.2d 893 (D.C. 1983). *See also* Mira Mihajlovich, Comment, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253 (1986).

[116] *Ibn-Tamas*, 455 A.2d 893.

battering incident.[117] She testified that there had been recurring episodes of violence during their marriage, and that her husband had knocked her to the ground, pressed his knee to her neck until she lost consciousness, threatened her with a loaded pistol, threw her out of a moving car to end an argument with her, threatened to kill her if she ever called the police, and threatened to fracture her skull if she ever tried to leave him.[118] Dr. Ibn-Tamas kept a number of loaded guns in the house.[119] On the day she killed him, he beat her with his fists and, despite her pregnancy, kicked her in the abdomen and picked up a loaded .38 caliber revolver, threw a suitcase at her and told her to pack up and leave.[120] Continuing his threats to kill her, he started down the stairs and, as she attempted to take her daughter with her out the door, he jumped out at them from the stair landing where she shot him.[121]

The court, applying the test developed in *Frye v. United States*,[122] found that "the defendant failed to establish a general acceptance by the expert's colleagues of the methodology used in the expert's study of 'battered women.'"[123] The difficulty Beverly Ibn-Tamas faced at trial was that the study of battered women was in its infancy.[124] In the final analysis, Dr. Walker's proffered testimony was judged inadmissible because Battered Woman's Syndrome had not yet been researched with sufficient thoroughness and scientific rigor to meet the evidentiary requirements for expert testimony.[125] The D.C. court was not alone in holding such testimony to be

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[117] Ibn-Tamas v. United States, 407 A.2d 630, 630-33 (D.C. 1979).

[118] *Id.* at 629.

[119] *Id.* at 630.

[120] *Id.* at 630-31.

[121] *Id.* at 626, 630.

[122] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The *Frye* standard, as articulated by the D.C. Appellate Court, is that there must be a "reliable body of scientific opinion supporting a novel scientific theory before it is admissible as evidence." *Ibn-Tamas*, 455 A.2d 893-94 (D.C. 1983). For further discussion of the *Frye* test, *see* WALKER, *supra* note 1, at 280.

[123] *Ibn-Tamas*, 455 A.2d 893, 893 (D.C. 1983). It is reasonable to hypothesize, however, that the male judges' gender bias influenced their decision in this case, as the concurring opinion expresses serious concern about Dr. Walker's characterization of men and her theories on the influence of sex-role socialization on woman battering. For a further discussion of the gender bias issue in the justice system, *see infra* notes 288-362 and accompanying text.

[124] WALKER, *supra* note 1, at 268-74.

[125] Ibn-Tamas v. United States, 407 A. 2d 626, 637-38 (D.C. 1979).

inadmissible.[126]

In marked contrast, seven years later a federal appeals court[127] stated that "the trend among state appellate courts favors the admissibility of expert testimony on Battered Woman's Syndrome."[128] So much progress has been made that numerous courts have agreed with the Ohio Supreme Court's finding that Battered Woman's Syndrome has "gained substantial scientific acceptance to warrant admissibility into evidence."[129]

The watershed case in admitting expert testimony of Battered Woman's Syndrome is *State v. Kelly*.[130] In 1984, the New Jersey Supreme Court ruled that the testimony met the standards for admissibility as an expert opinion,[131] and was relevant to a determination of the self-defense standard under New Jersey law.[132] The New Jersey criminal code limits deadly force used in self-defense to situations where the "actor reasonably believes that such force is necessary to protect [her]self against death or serious bodily harm."[133] In the first such decision of its kind, the court held that expert testimony on Battered Woman's Syndrome could be heard to

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[126] *See, e.g.*, People v. White, 414 N.E.2d 196 (Ill. 1980) (exclusion of testimony on Battered Woman's Syndrome was irrelevant); State v. Necaise, 466 So. 2d 660 (La. App. 1985) (testimony inadmissible to show state of mind); Buhrle v. State, 627 P.2d 1374 (Wyo. 1981) (testimony inadmissible because defendant did not fit profile of battered woman).

[127] Tourlakis v. Morris, 738 F. Supp. 1128 (S.D. Ohio 1990).

[128] *Id.* at 1133. The court also pointed out that state courts have approached the issue of admissibility as a state evidentiary question rather than one raising constitutional issues. In fact, the court found that there were only two reported state court decisions on this subject that made reference to the constitutional implications; in both cases the references were made only in passing. *Id.*

[129] State v. Koss, 551 N.E.2d 970, 972 (Ohio 1990) (overruling State v. Thomas, 423 N.E.2d 137 (Ohio 1981)). Other state courts which have upheld the admissibility of expert testimony, or ruled that its exclusion is reversible error include: Hawthorne v. State, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982); Chapman v. State, 367 S.E.2d 541 (Ga. 1988); People v. Minnis, 455 N.E.2d 209 (Ill. 1983); State v. Hodges, 716 P.2d 563 (Kan. 1986) (*rev'd on other grounds*); State v. Kelly, 478 A.2d 364 (N.J. 1983); State v. Hill, 339 S.E.2d 121 (S.C. 1986); State v. Allery, 682 P.2d 312 (Wash. 1984).

[130] *Kelly*, 478 A.2d 364; *see also* James R. Acker and Hans Toch, *Battered Women, Straw Men, and Expert Testimony: A Comment on* State v. Kelly, 21 CRIM. L. BULL. 125 (1985).

[131] *Kelly*, 478 A.2d at 380.

[132] *Id.* at 368.

[133] N.J.S.A. 2C:3-4(b)(2) (cited in *Kelly*, 478 A.2d at 364, 377).

determine whether the defendant's belief that the regular pattern of serious physical abuse, combined with the prior threats to kill her, formed a reasonable basis upon which she could determine that her life was in danger.[134]

Gladys Kelly was charged with reckless manslaughter.[135] The court reasoned that expert testimony on Battered Woman's Syndrome would be of vital importance in buttressing Kelly's credibility by demonstrating that her experiences paralleled those of other women in abusive relationships.[136] Further, the court held that the expert testimony would be central to assessing the honesty of the defendant's belief that she was in imminent danger of harm.[137] The testimony would also be relevant in dispelling the myths and misconceptions the jury held about battered women and their ability to leave the abusive relationship.[138]

In a unanimous opinion rendered the same year as *Kelly*, the Washington Supreme Court held that evidence of Battered Woman's Syndrome was properly admissible at trial to aid the jury in assessing the defendant's perception of danger posed by the decedent.[139] In reaching this conclusion, the *Allery* court ruled that admissibility of expert testimony is dependent on three factors: whether the witness qualifies as an expert;[140] whether the expert's opinion is based on a theory generally accepted in the scientific community;[141] and whether the expert testimony could be helpful to the trier of fact.[142] Significantly, the court found that the expert witness' methodology in diagnosis and treatment of battered women had received sufficient general acceptance in the mental health community to satisfy the second requirement of the test.[143] The court underscored this holding by finding that the testimony could contribute substantially to the jury's understanding of the accused's

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[134] *Kelly*, 478 A.2d at 375.

[135] *Id.* at 368.

[136] *Id.* at 375.

[137] *Id.* at 376-77. Prior to this case, the New Jersey standard of self-defense did not include admission of evidence concerning defendant's state of mind. Schneider, *Describing, supra* note 1, 208 n.80 (1986).

[138] *Kelly*, 478 A.2d at 377.

[139] State v. Allery, 682 P.2d 312, 313-16 (Wash. 1984).

[140] *Id.* at 315.

[141] *Id.*

[142] *Id.*

[143] *Id.*

state of mind and reasonableness of her fear that her life was in danger, thus meeting the final requirement.[144]

Expert testimony on Battered Woman's Syndrome was first accepted in New York in 1985.[145] In *People v. Torres*, the New York Supreme Court faced a case of first impression in which a battered woman proffered expert testimony on Battered Woman's Syndrome to bolster her claim of self-defense.[146] The court found that such testimony met the twofold test required in New York for determining admissibility: (1) the testimony must be outside the common knowledge of the trier of fact;[147] and (2) the state of scientific knowledge must be sufficiently developed to permit a reasonable opinion by an expert.[148] Ironically, the New York court ruled on the second prong by applying the *Frye* standard and admitted the expert testimony.[149] However, the *Ibn-Tamas* court used the same *Frye* standard and excluded the expert testimony.[150] The different outcomes are likely due to the increased acceptance that Battered Woman's Syndrome had been accorded in other jurisdictions in the intervening years, as a result of the substantial research efforts in the domestic violence field.[151]

A 1990 Ohio case illustrates the encouraging degree of acceptance accorded to expert testimony in battered women's assertions of justifiable homicide.[152] In *State v. Koss*, the Ohio Supreme Court specifically overruled prior precedent,[153] and found that the trial court should have admitted expert testimony to demonstrate how Battered Woman's Syndrome could have led the defendant to perceive she was in immediate fear of death and thus entitled to the affirmative defense of justifiable homicide.[154] The court based its holding on an interpretation of proposed changes in the penal code which were designed to inject subjectivity into the

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[144] *Allery*, 682 P.2d at 317.

[145] People v. Torres, 488 N.Y.S.2d 358 (N.Y. Sup. Ct. 1985).

[146] *Id.* at 358.

[147] *Id.* at 362.

[148] *Id.*

[149] *Id.* at 363.

[150] Ibn-Tamas v. United States, 455 A.2d 893, 894 (D.C. 1983).

[151] *See, e.g.*, State v. Hundley, 693 P.2d 475 (Kan. 1985); State v. Kelly, 478 A.2d 364 (N.J. 1984).

[152] State v. Koss, 551 N.E.2d 970 (Ohio 1990).

[153] *Id.* at 974.

[154] *Id.* at 973.

reasonableness standard in homicide cases.[155] At trial, Mrs. Koss sought to admit evidence that she suffered from Battered Woman's Syndrome, but the court refused to allow her to admit expert testimony to support her claim of justifiable homicide.[156] She was found guilty of voluntary manslaughter and sentenced to eight to twenty-five years in prison.[157] On appeal, the court in *Koss* emphasized that it was crucial for the jury to understand the defendant's state of mind at the time of the shooting, and that expert testimony was thus vital to the jury's assessment of whether she honestly believed she was in imminent danger.[158]

Acceptance of expert testimony on Battered Woman's Syndrome is by no means uniform. Aside from earlier cases which disallowed expert testimony on the basis of the novelty of its scientific theory,[159] objections have been raised regarding how the testimony will be utilized by the defense.[160] For example, in a recent Minnesota case the state's highest court held that expert testimony could only be introduced to explain Battered Woman's Syndrome in a general sense, and could not be used to explain why this particular defendant believed she acted in self-defense.[161] At trial, the lower court had allowed the prosecution's motion for a forced psychiatric examination of the defendant to counter her claim that she suffered from Battered Woman's Syndrome.[162] While agreeing with other jurisdictions that expert testimony on Battered Woman's Syndrome is beyond the understanding of the ordinary lay person, and had gained sufficient scientific status to warrant admissibility,[163] this court ruled that the testimony could not include whether this particular defendant suffered from the syndrome.[164] The court appears to have grounded its holding on

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[155] *Id.* at 974. For a fuller discussion of the standards of reasonableness, see *infra* notes 178-287 and accompanying text.

[156] *Id.* at 972.

[157] *Koss*, 551 N.E. at 970.

[158] *Id.* at 974.

[159] *See* State v. Thomas, 423 N.E.2d 137 (Ohio 1981).

[160] *See* State v. Hennum, 441 N.W.2d 793 (Minn. 1989).

[161] *Id.*; *see also* Sarah Crippen Madison, *A Critique and Proposed Solution to the Adverse Examination Problem Raised by Battered Woman Syndrome Testimony in* State v. Hennum, 74 MINN L. REV. 1023 (1990).

[162] *Hennum*, 441 N.W.2d at 797.

[163] *Id.* at 797-98.

[164] *Id.* at 799.

a finding that the forced psychiatric examination to determine whether the defendant suffered from Battered Woman's Syndrome was improper.[165] Thus, if the prosecution was to be foreclosed from introducing such expert testimony, so should the defense.[166] The court apparently concluded that the need for a compelled adverse medical examination of the defendant could have been obviated by limiting the scope of the defense's expert testimony.[167] This logic is flawed. The court seems to have confused two separate standards: the issue of forced medical examinations under evidentiary rules relevant to defendant's rights;[168] and the usefulness of expert testimony to assist the trier of fact in assessing whether the defendant's actions meet the standards of self-defense.[169] It would have been more logical for the court to rule that the adverse medical exam was improper on its merits, and to have ruled independently on the admissibility of expert testimony, without linking the two.[170] Fortunately, the reasoning in *Hennum* does not appear to have been followed elsewhere.

Some commentators have asserted that expert testimony on Battered Woman's Syndrome invades the province of the jury because the subject matter is within the ken of the average juror.[171] It is important to note, however, that one critic was a dissenting judge in a case where the majority held the countervailing opinion;[172] another seems to have reached her conclusion by noting, and then discarding, the opinions of domestic violence experts.[173] Additionally, both critics appear to grossly simplify the psychological and sociological phenomena material to the claim of self-defense which other courts have specifically found to be outside the bounds of common knowledge.[174] As such, their argument has little merit.

A somewhat more troubling criticism leveled at the use of expert testimony is that its probative value is outweighed by its prejudicial impact because it tends to focus the jury's attention on the

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[165] *Id.* at 798-99.

[166] *Id.* at 800.

[167] *Hennum*, 441 N.W.2d 793 (Minn. 1989).

[168] Madison, Comment, *supra* note 161, at 1052-54 (1990).

[169] *Id.*

[170] *Id.*

[171] Mihajlovich, Comment, *supra* note 115, at 1263-66.

[172] *Ibn-Tamas*, 407 A.2d 626, 654 (D.C. 1979) (Nebeker, J., dissenting).

[173] Mihajlovich, *supra* note 115.

[174] *See, e.g.*, State v. Koss, 551 N.E.2d 970, 973 (Ohio 1990).

batterer's prior bad acts.[175] Again, as this assertion only appears in a dissenting opinion where the majority has specifically rejected this premise, it is not entirely persuasive.[176] Further, the Federal Rules of Evidence, which many states have adopted, specifically permits evidence of the victim's character to support a claim of self-defense in a homicide case.[177]

It is evident from the foregoing review that, while the acceptability of expert testimony is a definite trend, its use is inextricably entwined with a court's ruling on reasonableness in self-defense cases. The standards of reasonableness utilized in various jurisdictions are explored below.

B. The Imminence of Perceived Danger and the Issue of Reasonableness in Claims of Self-Defense to Homicide

The issue of reasonableness is at the heart of any defendant's claim of self-defense to homicide. Standards of reasonableness have plagued battered women asserting claims of self-defense,[178] and have been the source of many battered women's convictions for homicide.[179] This has been especially apparent in those self-defense cases where the battered woman seized an opportunity to kill her attacker during a temporary cessation in the abuse.[180] Two categories of proof have emerged, as courts have approached the reasonableness question both from the standpoint of case law and statutory requirements.[181] The more conventional view is that the

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[175] *Id.* at 977-78 (Holmes, J., dissenting). The dissent's view of expert testimony focuses on the potentially prejudicial value of expert testimony, whereas the majority emphasizes that expert testimony could assist the trier of fact in assessing the defendant's belief that she was in imminent danger. *Id.* at 973.

[176] *Id.* at 973.

[177] FED. R. EVID. 404(a). The Advisory Committee's Notes state, in part, that an accused may introduce pertinent evidence of the victim's character to support a self-defense claim. 56 F.R.D. 183, 219.

[178] *See* State v. Norman, 366 S.E.2d 586 (N.C. App. 1988), *rev'd*, 378 S.E.2d 8 (N.C. 1989).

[179] *See generally* GILLESPIE, *supra* note 19, WALKER, *supra* note 1.

[180] *See, e.g.*, People v. Aris, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989); State v. Hennum, 441 N.W.2d 793 (Minn. 1989).

[181] There has been considerable academic debate as to the merits of each argument, as well as disputes triggered by such cases as that of Bernhard Goetz, which received wide public attention. People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).

defendant's actions must appear objectively reasonable to the average juror (the "reasonable man" standard).[182] This objective standard for self-defense is defined as the defender's belief that she was in imminent peril of death or serious bodily harm[183] and that her "beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances."[184] By contrast, the subjective standard embodies the theory that the "justification of self-defense is to be evaluated in light of *all* the facts and circumstances known to the defendant, including those known substantially before the killing."[185] As will be discussed below, these standards do not always reflect a bright line in the case law; decisions often exhibit an amalgam of the two theories, thus rendering the self-defense claim more complex.

The objective standard poses particular difficulties for battered women. As the court in *State v. Wanrow* so forcefully argued:

> [W]omen suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons . . . . Until such time as the effects of [this nation's history of sex discrimination] are eradicated, care must be taken to assure that our self-defense instructions

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For a fuller discussion of the debate, *see generally* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, 2d ed. (1960); KADISH & SCHULHOFER, *supra* note 110, at 847-49; GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART (1961); Dolores A. Donovan & Stephanie M. Wildman, *Is The Reasonable Man Obsolete? A Critical Perspective on Self-Defense And Provocation*, 14 LOY. L.A. L. REV. 435 (1981).

[182] However, as Gillespie points out,

> A judge's instruction that tells the jurors to evaluate a self-defense situation according to what a reasonable man would have done in the circumstances inevitably invites them to look at the incident as though it were a fight between two men. And that image carries with it . . . all of our society's rules about how a true man - who is of course a reasonable fellow - behaves in a fair fight. He stands and faces his adversary, meeting fists with fists. . . . [H]e doesn't use a weapon unless one is being used against him . . . .

GILLESPIE, *supra* note 19, at 99.

[183] United States v. Peterson, 483 F.2d 1222, 1230 (D.C. Cir. 1973), *cert. denied* 414 U.S. 1007 (1973).

[184] *Id.*

[185] State v. Wanrow, 559 P.2d 548 (Wash. 1977).

> afford women the right to have their conduct judged in light of the . . . handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.[186]

Although the *Wanrow* case did not address the issue of battered women, it did open the door for courts to employ the subjective view of reasonableness to women in justifiable homicide cases. In *Wanrow*, the court ruled that the defendant was entitled to assert self-defense when she had reason to believe the homicide victim was a dangerous man and was startled to find him in the living room after he broke into the house.[187] In this landmark case, the court eloquently underscored the need for a subjective standard by stating that:

> [t]he impression created - that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defense, unless the jury finds her determination of the degree of danger to be objectively reasonable - constitutes a . . . distinct misstatement of the law . . . .[188]

The decision in *State v. Kelly* discussed above[189] exemplifies some of the difficulties inherent in applying standards of reasonableness in battered women's assertions of self-defense. While the opinion clearly set precedent by ruling that expert testimony on Battered Woman's Syndrome was relevant to the issue of self-defense,[190] the court seemed particularly concerned with its applicability in explaining why the defendant had remained in the

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[186] *Id.* at 558-59. Although the defendant in *Wanrow* was not a battered woman who killed her abuser, the case is considered a watershed in applying the subjective standard of reasonableness because it was the first case in which a woman successfully asserted a claim of self-defense based on her knowledge of her attacker's dangerous nature and the disparity between their physical statures. *Id.* at 548.

[187] *Id.* at 557.

[188] *Id.* at 558.

[189] State v. Kelly, 478 A.2d 364 (N.J. 1984).

[190] *Id.* at 364, 374-77.

abusive relationship.[191] The court reasoned that, once the jury had either accepted or rejected the defendant's explanation for staying in the relationship, no expert would be required to "tell the jury the logical conclusion, namely, that a person who has in fact been severely and continuously beaten might very well reasonably fear that the imminent beating she was about to suffer could be either life-threatening or pose a risk of serious injury."[192] Thus, the court applied an objective standard to the defendant's actions, while applying a subjective standard to the reasonableness of her belief. However, by focusing on the reasonableness of the woman's fear, the court failed to adequately address the larger problem of the reasonableness of her actions.[193] Such an undue emphasis on why Gladys Kelly stayed in the marriage highlights the battered woman's dilemma in self-defense cases: explanation of her actions from a perspective as a victim of abuse fails to fully explain why she believed it was necessary to act this time.[194]

In two cases with remarkably similar fact patterns, courts in California and North Dakota have upheld diametrically opposite positions on the objective/subjective standard issue.[195] Both raise similar questions regarding the requirement of imminence of the threatened harm in self-defense situations,[196] and both cases can be described as "sleeping murder" cases.[197] Their differing results demonstrate the tension between the two standards.

In *People v. Aris*[198] the California Court of Appeals upheld a conviction of second-degree murder on grounds that Aris had failed to demonstrate an honest belief that she was in "imminent danger of death or great bodily injury from the victim."[199] At the trial, the defendant testified that her husband beat her repeatedly

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[191] *Id.* at 364, 378.

[192] *Id.* at 378.

[193] Schneider, *Describing, supra* note 1, at 209-11.

[194] *Id.* at 211.

[195] People v. Aris, 264 Cal. Rptr. 167 (Ct. App. 1989); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983).

[196] *See Aris*, 264 Cal. Rptr. at 172-74; *Leidholm*, 334 N.W.2d at 814-17.

[197] This is a colloquial term used throughout the domestic violence literature to describe a case in which a battered woman kills her abuser during a lull in the attack. *See generally* GILLESPIE, *supra* note 19; WALKER, *supra* note 1.

[198] *Aris*, 264 Cal. Rptr. 167 (1989). For a general discussion of *Aris*, *see* WALKER, *supra* note 1, at 283-84.

[199] *Aris*, 264 Cal. Rptr. at 171.

and severely throughout their ten-year marriage, and that she had left him numerous times during that period.[200] On each occasion, through a mixture of threats and cajolery, he convinced her to reconsider her decision and take him back.[201] On the night of his death, her husband had assaulted her again and threatened "that he didn't think he was going to let [her] live till the morning."[202] He fell asleep shortly thereafter, and she left the bedroom to find some ice for her bruised face.[203] She found a gun she hadn't known her husband possessed on top of the refrigerator and picked it up, believing she would need it when he started hitting her again.[204] She sat down on the bed and, certain that her husband would make good his threat upon wakening, shot and killed him.[205]

In support of its decision, the court cited California's penal statute: "[h]omicide is . . . justifiable . . . when there is reasonable ground to apprehend . . . [an] imminent danger, [and] the circumstances [are] sufficient to excite the fears of a reasonable person . . . ."[206] The court interpreted this statute as requiring both an honest belief that the danger was imminent,[207] and that "a reasonable person in the same circumstances would have had the same perception and done the same acts."[208] Thus, in *Aris*, the court applied a subjective standard to the belief, and an objective standard to the act. While this is the identical analysis in *State v. Kelly*,[209] the results achieved are mirror images of one another.

In holding that the trial court's exclusion of expert testimony on Battered Woman's Syndrome was harmless error,[210] the California Supreme Court went further in applying the objective reasonableness standard, finding that expert testimony could only have been used to demonstrate factors that would have been "irrelevant to the issue of a reasonable person's conduct."[211] The

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[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Aris*, 264 Cal. Rptr. at 171.

[205] *Id.*

[206] *Id.* (citing to CAL. PENAL CODE §§ 197, 198 (West 1988)).

[207] *Id.* at 172.

[208] *Id.*

[209] State v. Kelly, 478 A.2d 364 (N.J. 1984).

[210] People v. Aris, 264 Cal. Rptr. 167, 171 (Ct. App. 1989).

[211] *Id.* at 176.

court implied that, as a matter of law, a sleeping victim posed no immediate threat to the defendant, and hence, no reasonable person would have believed in the imminence of the danger.[212] Such a conclusion is contrary to ample research findings which indicate that it is all too common for there to be a lull in an acute battering incident.[213] Often the batterer falls asleep, but once he reawakens, the battering usually continues at the same or heightened intensity.[214] The holding in *Aris* is also distinguishable from *State v. Kelly*,[215] and *State v. Koss*,[216] both of which held that an understanding of defendant's state of mind was crucial to a determination of reasonable belief.[217] In sum, the *Aris* court ruled that the fact that the victim was shot while asleep was dispositive of any claim of self-defense.[218]

By contrast, in *State v. Leidholm* a unanimous North Dakota Supreme Court reversed, affirming a battered woman's claim of self-defense when she killed her sleeping husband.[219] The factual pattern in *Leidholm* bears significant similarities to that in *Aris*. The Leidholm marriage followed the typical battering cycle filled with a mixture of alcohol abuse, moments of kindness toward one another, and moments of violence, culminating in Mrs. Leidholm killing her

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[212] *Id.* This reasoning also, of course, undermines the potential usefulness of expert testimony in battered women's assertion of justifiable homicide.

[213] *See, e.g.*, Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227, 231 (1986); Crocker, *supra* note 65, at 127-28.

[214] Thyfault, *supra* note 65, at 493-94 nn.84-85 (describing two cases in which women killed their abusers during a cessation in the attacks). *Accord* State v. Leidholm, 334 N.W.2d 811 (N.D. 1983). *See generally* GILLESPIE, *supra* note 19; WALKER, *supra* note 1.

[215] State v. Kelly, 478 A.2d 364 (N.J. 1984).

[216] State v. Koss, 551 N.E.2d 970 (Ohio 1990).

[217] *Kelly*, 478 A.2d at 373; *Koss*, 551 N.E.2d at 974.

[218] *Aris*, 264 Cal. Rptr. 167, 171 (1989). The court relied on rulings in other state courts which reached similar conclusions in dealing with battered women who kill their sleeping abusers. *Id.* at 175. *See, e.g.*, State v. Stewart, 763 P.2d 572 (Kan. 1988) (held self-defense not available if husband asleep); People v. Norman, 378 S.E.2d 8 (N.C. 1989). Although the *Aris* opinion acknowledged that other state courts (*e.g.*, State v. Leidholm, 334 N.W.2d 811 (N.D. 1983)) have held differently, the court did not find these other cases compelling; the court gave no specific reason for this conclusion. *Aris*, 264 Cal. Rptr. at 167.

[219] *See* State v. Leidholm, 334 N.W.2d 811 (N.D. 1983); see also Kris H. Davick, Comment, 60 N.D.L. REV. 141 (1984).

husband when he fell asleep after a prolonged battering incident.[220] The *Leidholm* court held that the subjective, rather than the objective standard was appropriate and central to determining whether the defendant had reason to believe she was faced with an imminent threat to her life.[221]

The *Leidholm* court cogently reasoned that the most sensible and just approach is to view "an accused's actions . . . from the standpoint of a person whose mental and physical characteristics are like the accused's and who sees what the accused sees and knows what the accused knows."[222] In reaching this conclusion, the court found the following view persuasive:

> The significance of the difference in viewing circumstances from the standpoint of the "defendant alone" rather than from the standpoint of a "reasonable cautious person" is that the jury's consideration of the unique physical and psychological characteristics of any accused allows the jury to judge the reasonableness of the accused's actions against the accused's subjective impressions of the need to use force rather than against those impressions which a jury determines that a hypothetical reasonably cautious person would use under similar circumstances.[223]

The *Leidholm* court further observed that:

> a defendant's conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under the like circumstances, but what [s]he h[er]self in good faith honestly believed and had reasonable ground to believe was necessary for [her] to do to protect h[er]self from apprehended death or great bodily

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[220] *Id.* at 813.

[221] *Id.* at 813-14.

[222] *Id.* at 817-18.

[223] *Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983) (quoting State v. Kelly, 655 P.2d 1202, 1203 (Wash. 1982)).

injury.[224]

As mentioned above, a battered woman who kills her sleeping abuser can face formidable difficulties in asserting a claim of justifiable homicide. In *State v. Norman*,[225] North Carolina courts had two opportunities to address the issue of reasonableness and imminence of the harm.[226] The first appeal Judy Norman filed resulted in a remand, on grounds that her belief in the necessity of killing her husband was sufficient to entitle her to a claim of self-defense for shooting her sleeping husband.[227] Mrs. Norman's story is replete with accounts of the sadistic torture and imprisonment she suffered at her husband's hands.[228] This court employed a four-part test as set forth in *State v. Gappins*:

> (1) It appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and (2) defendant's belief was reasonable in that the circumstances as they appeared to them at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.[229]

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[224] 334 N.W. 2d at 818 (quoting State v. Hazlett, 113 N.W.2d 374, 380-81 (N.D. 1907)).

[225] State v. Norman, 366 S.E.2d 586 (N.C. App. 1988), *rev'd* 378 S.E.2d 8 (N.C. 1989). *See also* Kerry A. Shad, State v. Norman: *Self-Defense Unavailable to Battered Women Who Kill Passive Abusers*, 68 N.C. L. REV. 1159 (1990).

[226] *See generally* Shad, *supra* note 225.

[227] *Norman*, 366 S.E.2d 586 (N.C. App. 1988).

[228] He had, among other things, beaten her while she was pregnant, causing the baby to be born prematurely, forced her into prostitution, beat her into compliance, put cigarettes on her skin, forced her to sleep on the concrete floor in the basement and eat dog food, repeatedly threatened to cut her heart out, attempted to force more sleeping pills into her when she attempted suicide, and threatened to cut off her breasts. *Id.* at 587.

[229] *Id.* at 590 (quoting State v. Gappins, 357 S.E.2d 654 (N.C. 1987).

In its analysis, the court rejected the prosecution's contention that, because the decedent was asleep at the time of the shooting, the defendant's belief in the necessity of killing her husband was unreasonable, as a matter of law.[230] The court concluded that killing a passive victim *does not* preclude a defense of justifiable homicide,[231] and emphatically opined that

> we do not believe that a battered person must wait until a deadly attack occurs or that the victim must be actually attacking or threatening to attack at the very moment defendant commits the unlawful act for her to act in self-defense. Such a standard would ignore the realities of the battered woman's condition.[232]

The court applied a subjective standard to the first prong of the four-part test, and a mixture of the subjective and objective standard to the second.[233] It found that the record reflected sufficient evidence to permit a juror, representing the person of ordinary firmness, to infer that defendant's belief was reasonable under the circumstances in which she found herself.[234] The court also held that the defendant had met the other two requirements of the test;[235] that is, she had not been the original aggressor, and the degree of force she used had been appropriate to her situation.[236]

One year later, the state supreme court reversed this ruling, and held that the evidence failed to support a claim of self-defense.[237] The fact that the victim had been asleep when killed

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[230] *Id.* Note that this position was reversed on appeal; *see supra* note 225. It is also in exact opposition to *Aris*, 264 Cal. Rptr. 167 (1989) (killing a sleeping victim completely defeats a claim of self-defense).

[231] *Norman*, 366 S.E.2d 586, 592.

[232] *Id.*

[233] *Id.*

[234] *Id.* at 592. The court also held that reasonableness of Mrs. Norman's belief in the necessity to kill her husband must be measured in light of her inability to withdraw from the hostile situation and her degree of vulnerability to the victim. *Id.*

[235] *Id.*

[236] *Norman*, 366 S.E.2d at 592.

[237] State v. Norman, 378 S.E.2d 8 (1989).

was considered dispositive.[238] Though it acknowledged that courts are divided on this point,[239] the supreme court focused its attention on the reasonableness of the battered woman's fear, and concluded that a sleeping victim would pose no imminent threat to a reasonable person.[240] In a compelling dissenting opinion, Judge Martin characterized the majority as inordinately concerned that the law of self-defense would be "expanded beyond the limits of immediacy and necessity."[241] The majority's concern seems to have been motivated by fears that allowing Judy Norman to plead self-defense would set a dangerous precedent by "legaliz[ing] the opportune killing of allegedly abusive husbands by their wives."[242] Though the dissent agreed that a self-defense claim must be based on the defendant's reasonable belief she was in immediate danger, the judge concurred with the lower court in construing the evidence to show that Battered Woman's Syndrome would have created just such a reasonable belief in this defendant's mind.[243]

The majority's characterization of the events and evidence introduced at the trial shows a marked lack of understanding of Battered Woman's Syndrome.[244] This is exemplified by the assertion that Judy Norman was responding to a "simple assault,"[245] and could have left the scene.[246] In affirming Norman's conviction and upholding the principle of objective reasonableness, the North

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[238] *Id.* at 9. The state supreme court could not find that the defendant's actions fulfilled the requirement that the defendant have a reasonable fear of imminent death at the time she shot her husband. *Id.* at 13. The court in *Aris*, 264 Cal. Rptr. 167 (1989), had similar difficulty, with the same result for the defendant.

[239] 378 S.E.2d at 15.

[240] *Id.* at 13.

[241] *Id.* at 16 (Martin, J., dissenting).

[242] *Id.* at 15.

[243] *Id.* at 20 (Martin, J., dissenting).

[244] State v. Norman, 378 S.E.2d 8, 14 (N.C. 1989). Despite extensive testimony on Battered Woman's Syndrome, on how this defendant fit the battered woman profile, and on the escalated violence exhibited by the decedent the night he died, the court concluded there was no evidence that Judy Norman had a reasonable belief she was faced with imminent death or great bodily harm. *Id.* at 13. In fact, the court appeared to conclude that, at the time of the shooting, she had no reason to fear her husband at all. *Id.* at 13. Further, the court minimized evidence that Judy had ever been seriously harmed, despite testimony to the contrary from independent witnesses. *Id.* at 10-12.

[245] *Id.* at 13.

[246] *Id.*

Carolina Supreme Court made it more problematic for other battered women to assert a claim of justifiable homicide in non-traditional confrontation cases.

A case decided in January 1991 in New York City serves to highlight further the formidable barriers battered women continue to face in the judicial system.[247] Sarah Smith, a black social worker, was convicted of murdering her abusive husband. Smith's verdict was a "striking exception to a series of prominent cases in which battered women seemed to gain greater acceptance" for a self-defense claim.[248] She testified that she killed her sleeping husband during a temporary lull in the violence because she believed he would follow through on a drunken threat made earlier that evening to "kill her soon."[249] This testimony was apparently successfully countered by the prosecution's assertions that she could have fled the scene, and that the danger she faced was not imminent.[250] In addition to the threats on the night he died, Smith's husband had a history of violence and assaultive behavior.[251] He had twice been arrested for assaulting police officers, and had boasted to Smith that he would escape prosecution for killing her as he had for the other felonies.[252] Thus, despite testimony detailing years of battering, a battered woman whose experience alerted her to a shift in the danger her abuser posed ultimately failed to convince a jury that her actions were justified.[253]

A number of the cases discussed above make reference, either directly or indirectly, to the doctrine of retreat.[254] This factor has

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[247] Tim Golden, *Abused Wife Found Guilty of Murder*, N.Y. TIMES, Jan. 25, 1991 at B1 (summarizing People v. Smith, Ind. No. 4824/89, Bronx Cty. Sup. Ct.).

[248] *Id.*

[249] *Id.* at B3.

[250] *Id.*

[251] *Id.*

[252] *Golden, supra* note 247, at B3.

[253] This is the standard of imminence of the harm and reasonableness applied in People v. Goetz, 497 N.E.2d 41 (N.Y. 1986) (whether, given Goetz's previous experiences as a mugging victim, and his size in relation to his alleged attackers, it was reasonable for him to believe he was in imminent danger).

[254] The doctrine of retreat survives in the penal code of the following states: Connecticut, Delaware, New York, New Jersey, New Hampshire. Rocco C. Cipparone, Jr., Comment, *The Defense Of Battered Women Who Kill*, 135 U. PA. L. REV. 427, 433 (1987). Two courts that have made indirect reference to the doctrine concluded that because a sleeping victim posed no "immediate" threat to the battered woman, she could have left the scene without resorting to homicide. *Aris*,

complicated courts' assessment of reasonableness in battered women's self-defense cases. Retreat is one of the most difficult concepts for courts to comprehend because the common misconception is that the woman should have left the situation before resorting to deadly force, thus negating the imminent danger factor.[255] There is no common law or judicial construct requiring a battered woman to retreat, except at the instant she confronts and kills her abusive mate;[256] nor does she waive her legal right to act in self-defense because she has chosen, for whatever reason, to stay in her own home.[257] The *Leidholm* court underscored this view of retreat by noting that the defendant was under no obligation to leave her home as she was not the original aggressor, and that her failure to retreat was nullified by her honest, reasonable belief that she could not withdraw safely.[258] However, despite the legal irrelevance of this issue, courts often find the question difficult to separate from a determination of the reasonableness of the defendant's behavior.[259]

The standard most often cited in determining when an opportunity to retreat defeats the right of self-defense is when the actor knows that she can retreat with complete safety.[260] The question of whether a battered woman can safely retreat is one ideally suited for explanation as part of an expert's testimony.[261] The answer may well be pivotal to the woman's defense. The expert

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264 Cal. Rptr. 167 (1989); *Norman*, 378 S.E.2d 8 (N.C. 1989).

[255] GILLESPIE, *supra* note 19, at 121-22.

[256] *Id.* at 144-45.

[257] *Id.*

[258] *Leidholm*, 334 N.W.2d 811 at 820-21 (N.D. 1983). *Accord* Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989).

[259] *See, e.g.*, People v. Aris, 264 Cal. Rptr. 167 (Ct. App. 1989). Also, as Gillespie ironically observes,

> In case after case, in which the obligation to retreat was at issue in the trial or on appeal, women have been convicted for killing men who were holding them with one hand and beating them with the other or had them pinned down on the floor or trapped in a corner or were menacing them with a knife or a loaded gun.

GILLESPIE, *supra* note 19, at 81. In addition, the court in *Kelly* had difficulty distinguishing the issue of why Gladys stayed in the marriage from the issue of the reasonableness of her actions. State v. Kelly, 478 A.2d 364 (N.J. 1984); *see also supra* notes 189-94 and accompanying text.

[260] *See, e.g.*, MODEL PENAL CODE § 3.04(2)(b)(iii) (1962).

[261] *See* GILLESPIE, *supra* note 19, at 145.

can testify to the factors common to battered women and educate the jury regarding the inapplicability of retreat to battered women in self-defense situations.[262] Such testimony can include explanation of one of the symptoms battered women experience, principally the "constant re-experiencing of [prior traumatic] events [and] the psychic numbing and emotional anesthesia that is characterized by a diminished responsiveness to events in the outside world."[263] The expert can also demonstrate an issue central to these justifiable homicide cases: that all battered women experience a heightened awareness of their abusive mate's behavior, often being capable of perceiving subtle distinctions others would not notice.[264] This ability makes the battered women more apt than an outsider to accurately detect a time when the batterer is truly likely to pose an imminent threat.[265] In fact, this hypervigilant response mechanism to such signals of 'unusual' violence has been characterized as a crucial survival skill.[266]

Additionally, expert testimony can be vital in rebutting the retreat issue by demonstrating that extreme fear is the single most frequently cited reason battered women remain in their violent relationships.[267] The witness can cite the numerous studies which document a battered woman's utterly realistic perception that her only choice is between staying and being beaten, or leaving and being killed.[268] Given this Scylla and Charybdis choice, it is not surprising that so many of them decide to stay.[269]

The question of which standard of reasonableness to apply has been considered by criminal law scholars and judges whose long-standing dispute on this subject is reflected in the lack of uniformity among the states in utilizing one standard of reasonableness.[270] Scholars have generally criticized the objective standard as having

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[262] *See id.* at 145-56.

[263] *Id.* at 155.

[264] Blackman, *supra* note 213, at 229.

[265] *Id.*

[266] *Id.*

[267] WALKER, *supra* note 1, at 64-65.

[268] *Id.*

[269] GILLESPIE, *supra* note 19, at 152-54, summarizing research work in the area of domestic violence. *See also* ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987); C. Robert Showalter, et al., *The Spousal-Homicide Syndrome*, 3 INT'L J. LAW & PSYCHIATRY 117 (1980).

[270] *See supra* notes 159-70 and accompanying text.

three major flaws.[271] First, the fundamental concept in criminal law of *mens rea* leads us to the inexorable conclusion that a person can only be held criminally liable for an act when she possessed criminal intent to kill.[272] The *mens rea* concept refers to the defendant's mental state and to the degree of criminal intent.[273] It is interpreted to mean that a person can only be held criminally accountable for an act if she had an intent to kill.[274] If she acted in self-defense, she is not guilty at all.[275] As such, it is profoundly unjust as well as illogical to determine criminal liability through the application of an objective standard because it completely ignores the defendant's actual mental state.[276] Or, more simply, as Justice Holmes observed in an oft-quoted epigram: "[d]etached reflection cannot be demanded in the presence of an uplifted knife."[277] Second, the objective standard ignores social reality by assuming that all people are alike and will respond to identical situations in an identical fashion.[278] This assumption fails to take into account the actor's individually and her honest perceptions of available options.[279] Third, the standard may serve as a "potent force in perpetuating the social inequities that they ignore."[280]

Perhaps in response to the above concerns, several states have completely abolished the objective standard of reasonableness, either in their state criminal statutes or by court decisions.[281] Others, such as North Dakota,[282] have followed the reasoning of those commentators advocating the approach used in the Model Penal Code.[283] This approach represents a partial subjectivization of the

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[271] *See* authorities cited *supra* note 178-79 and accompanying text.

[272] GILLESPIE, *supra* note 19, at 121. *See also supra* note 140.

[273] *See* KADISH & SCHULHOFER, *supra* note 110, at 217.

[274] *See id.* at 218.

[275] GILLESPIE, *supra* note 19, at 121-22.

[276] *Id.* at 122.

[277] KADISH & SCHULHOFER, *supra* note 110, at 849 (quoting Brown v. United States, 256 U.S. 335, 343 (1921)).

[278] GILLESPIE, *supra* note 19, at 122.

[279] *Id.*

[280] *Id.* at 121-22.

[281] The states are: Delaware, Hawaii, Kentucky, and Pennsylvania. States that have adopted the position by court decision include: Colorado, Ohio and Indiana. GILLESPIE, *supra* note 16, at 218 n.121.

[282] State v. Leidholm, 334 N.W.2d 811, 820-21 (N.D. 1983).

[283] MODEL PENAL CODE § 3.04(2)(b)(iii) (1962).

objective, reasonable person standard by requiring only that a defendant demonstrate an honest belief in the necessity for using deadly force;[284] once this is established, the reasonableness of her actions is not questioned.[285]

III. SOME FEMINIST PERSPECTIVES

A persistent and vigorous debate exists in the feminist community regarding the issues raised by battered women asserting claims of justifiable homicide. Some experts, like Lenore Walker,[286] Elizabeth Schneider,[287] and Cynthia Gillespie[288] believe that the social conditions causing women to defend themselves are poorly understood in the courtroom, and that expert testimony can contribute significantly in improving courts' and juries' understanding.[289] In this regard, Walker argues that it is especially vital to emphasize that the "behavior of battered women who kill their abusers needs to be understood as *normal*, not abnormal.[290] Defending oneself from reasonably perceived danger of bodily harm or death ought to be considered a psychologically healthy response."[291] And, as noted above, the woman's response is indicative of an ability to discern that the situation had escalated beyond the point at which she could reasonably expect to survive.[292]

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[284] *Id.*

[285] *Id.*

[286] *See supra* note 28 (a description of Dr. Walker's credentials).

[287] Elizabeth Schneider is an attorney and Professor at Brooklyn Law School. She has written extensively on the subject of women's rights and is a frequent contributor to the *Women's Rights Law Reporter.* She served as counsel to the Women's Self-Defense Law Project in New York City, and was co-counsel on appeal in State v. Wanrow, 559 P.2d 548 (Wash. 1977) and co-counsel for *amicus curiae* in State v. Kelly, 478 A.2d 364 (N.J. 1984).

[288] Cynthia Gillespie is an attorney in Seattle active in women's defense work. She founded the Northwest Women's Law Center in Seattle, Washington, and has provided expert testimony on Battered Women's Syndrome in a number of homicide trials. She has conducted extensive case study research on the fate of battered women who kill in self-defense.

[289] Schneider, *Equal Rights, supra* note 67. *See* GILLESPIE, *supra* note 19; WALKER, *supra* note 1.

[290] WALKER, *supra* note 1, at 169.

[291] *Id.*

[292] Blackman, *supra* note 213, at 229.

The concern expressed by these experts is underscored by the masculine origins of the law of self-defense. As Gillespie observes, our notions of self-defense hearken back to a situation in which a man "stands and faces his adversary, meeting fists with fists . . . [and] doesn't use a weapon unless one is being used against him."[293] Gillespie also contends that, even if the court uses the "reasonable person" standard rather than the "reasonable man" standard, fighting will still be defined in our society along sex stereotypical lines;[294] and the outlook for the battered woman claiming she killed in self-defense will suffer accordingly.[295] Moreover, the traditional notion of self-defense, which tends to be defined as an actor responding to a single encounter, is totally at odds with battered women's experiences.[296]

Authorities also agree that the gender bias issue pervades the judicial and law enforcement systems in an insidious fashion.[297] The police force is not only the battered woman's first line of defense, it is the legal system's first opportunity to communicate to the battered woman that she is not to blame for the abuse and that society does not condone it.[298] Nevertheless, police policy toward battered women runs the gamut from "outright refusal to arrest batterers and recognize domestic violence as a criminal matter, to a practice of giving domestic violence calls lower priority than non-

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[293] GILLESPIE, *supra* note 19, at 99. *See also* Schneider, *Equal Rights*, *supra* note 67, at 631-33.

> [T]he [equal force] rule rests on the assumption of two adversaries equal in size, strength and physical training. However, few women have the size or strength of a male assailant or the training in physical combat necessary to protect themselves. . . . The woman believes, usually correctly, that her husband is capable of severely injuring or killing her without a weapon. . . .
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> The deadly force rule is particularly troublesome for a battered woman. Although she may have no alternative but to defend herself with a weapon, the traditional interpretation of the . . . rule can render her use of a deadly weapon unreasonable.

Id. For an additional comment on the gender-bias issue in reasonable self-defense claims, see *supra* notes 94-109 and accompanying text.

[294] GILLESPIE, *supra* note 19, at 99-100.

[295] *Id.*

[296] Mihajlovich, *supra* note 115, at 1257.

[297] Schneider, *Describing*, *supra* note 1, at 198-200.

[298] Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response To The Abuse Of Women: A Lack Of Coordination*, 8 N.Y.L.S. J. HUM. RTS. 149, 160 (Fall 1990).

domestic disputes."[299] It is chilling to note that, according to one survey, police procedures in fewer than twenty-five percent of the jurisdictions examined required arresting the batterer.[300]

Three cases, similar to *State v. Allery*,[301] highlight the tragedy faced by a multitude of women whose reliance on law enforcement was sadly misplaced. Roxanne Gay,[302] the wife of a professional football player, frequently called the police when her husband beat her.[303] On arriving at the house, the officers usually ended up discussing football with her husband, taking no action on her behalf.[304] Another woman, Clara[305] stabbed her boyfriend with a kitchen knife while he was twisting the belt that he had been beating her with around her neck.[306] Shortly before, she had called the police because he was drunk and violent.[307] When they arrived, not only did they refuse to arrest the boyfriend, but they suggested *Clara* be arrested for assault since the boyfriend had sustained an injury to his hand while struggling with her.[308] Carol Stonehouse, a Pittsburgh police officer, repeatedly requested assistance *from her own police force* in preventing her former boyfriend Bill (also a police officer) from his continual harassment and attacks.[309] On over fifty occasions, he broke into her apartment, destroyed its contents, and threatened her with bodily harm.[310] Since those she asked for help, including the Internal Affairs Department, were all Bill's colleagues, they dismissed her complaints

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[299] *Id.* at 161 (footnotes omitted) (citing Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When The Police Won't*, 95 YALE L.J. 788, 788-89 nn.3-4 (1986)).

[300] *Id.* at 161 n.77. This is likely due to the fact that domestic violence situations pose such a great danger to anyone attempting to interrupt them. *See* WALKER, *supra* note 1, at 44.

[301] State v. Allery, 682 P.2d 312 (Wash. 1984). *See supra* notes 6-10 and accompanying text.

[302] GILLESPIE, *supra* note 19, at 13.

[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] GILLESPIE, *supra* note 19, at 13.

[308] *Id.*

[309] Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989) (emphasis added); *see also* Gayle Stommen, Comment, 63 TEMP. L. REV. 375 (1990).

[310] *Stonehouse*, 555 A.2d at 774-90.

as frivolous and took no action.[311] Nevertheless, Stonehouse eventually succeeded in obtaining several restraining orders, but they proved ineffective, as Bill continued his attacks.[312] She moved several times, only to find the attacks escalate in frequency and severity;[313] she even woke up to find him in her bedroom at night, menacing her infant granddaughter.[314] The last time Bill came after Carol with a .357 Magnum, she managed to get to her service revolver, and killed him.[315] Despite the prosecutor's contention that Pittsburgh's law enforcement system was "ready, willing and able to protect women who are victims of domestic violence,"[316] the police lieutenant who arrested Carol testified that police reports are almost never made in domestic disturbance situations.[317] While these stories may seem egregious examples of the situation many battered women find themselves in vis á vis law enforcement, they are not uncommon occurrences.[318]

A summary of a nationwide survey of the legal system's response to abused women[319] indicates that while some inroads have been made, legislatures, police departments, prosecutors and judges have failed to vigorously respond to the epidemic of violence against women in our society.[320] As recently as 1989, a New York City task force[321] determined that the "Byzantine nature of the present . . . complaint process makes it difficult for at-risk persons to obtain an order of protection,"[322] and that even the most determined domestic violence victims were likely to find the system

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[311] *Id.*

[312] *Id.*

[313] *Id.*

[314] *Id.*

[315] *Stonehouse*, 555 A.2d at 794-95.

[316] *Id.* at 807.

[317] *Id.* at 807-08.

[318] *See generally* GILLESPIE, *supra* note 19, WALKER, *supra* note 1; Crocker, *supra* note 65; Schneider, *Equal Rights*, *supra* note 67.

[319] Litsky, *supra* note 300. *See also Stonehouse*, 555 A.2d at 808-09 (noting that research conducted in England revealed that police are among those groups with the highest incidence of wife-beating) (citing Lenore E. Walker et al., *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 1-2 (1982)).

[320] Litsky, *supra* note 300, at 151.

[321] *Id.* at 158 n.52.

[322] *Id.* at 158-59 nn.52-53.

too onerous.[323] Obtaining "restraining" orders is also hampered by many states' limiting relief to abused spouses.[324] Moreover, as *Allery*[325] and *Stonehouse*[326] so vividly illustrate, even if a woman succeeds in obtaining an order of protection, its effectiveness is extremely limited.[327]

In the last few years, an encouraging trend has emerged in police response to battered women,[328] perhaps due in part to several recent court decisions that imposed liability on the police for failure to protect battered women.[329] However, despite marked progress over the last decade in changing police department policies to offer greater protection to battered women, "judicial attitudes and courtroom practices have . . . lagged behind."[330] This is attributable to the fact that judicial misconceptions about the nature of woman abuse matches that of the jury.[331] Gillespie points to the recent

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[323] *Id.* at 159 nn.53-54.

[324] *Id.* at 159 nn.53-54.

[325] State v. Allery, 682 P.2d 312 (Wash. 1984).

[326] Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989).

[327] Litsky, *supra* note 300, at 160 n.67 ("Orders of Protection are only worth the paper they are written on.") (quoting Ellen Yaroshefsky, Private Practitioner, Remarks at a Panel Discission on Battered Women, presented by the Legal Association for Women, New York Law School, Nov. 3, 1989).

[328] *Id.* at 165.

[329] *Id.* at 162. Litsky summarized three court cases which held police departments liable for failure to protect battered women from their abusive partners. *Id.* at 164-65 (discussing Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984)); Bruno v. Codd, 396 N.Y.S.2d 974 (Sup. Ct. 1977); Sorichetti v. City of New York, 408 N.Y.S.2d 219 (Sup. Ct. Bronx County 1978)). Litsky concluded that by holding the police departments liable, these cases may have served as an impetus to improve police responsiveness to battered women. *Id.* at 164-65.

[330] Litsky, *supra* note 300, at 169 (citing *Recent Developments: Judging Domestic Violence,* 10 HARV. WOMEN'S L. J. 278 (1987)).

[331] GILLESPIE, *supra* note 19, at 191-92 (citing *Report of New York Task Force On Women In The Courts,* 15 FORDHAM URBAN L.J. 1 (1986-87); *The First Year Report Of The New Jersey Supreme Court Task Force On Women In The Courts,* 9 WOMEN'S RTS. L. REP. 129 (1986)). For a more detailed discussion of a nation-wide survey of gender bias, *see* Gail Diane Cox, *Reports Track Discrimination: Fourteen Volumes Chronicle How Women Are Treated in Court,* N.Y.L.J. Nov. 26, 1990, at 1. A further example of gender bias is evident in Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989). The prosecutor stressed that if Carol Stonehouse had wanted to, she could have ended the "relationship" with her abusive partner Bill. *Id.* at 783. Notably, the prosecutor asserted that since Carol was a police officer, she could not have been a victim of abuse. *Id.* The prosecutor attempted to prove that Carol deliberately provoked Bill by dating other men. *Id.* at 776. However, the prosecutor

studies of gender bias undertaken in New York and New Jersey, both of which concluded that women are systematically discriminated against in the courts.[332] In summarizing the findings, she observed that:

> myths, biases and stereotypes about women pervade the decision-making process and often affect the outcome of cases. Women are apt to be regarded as inherently less credible than men and, when they appear in court seeking justice as victims of violence, they are frequently the targets of the most callous sort of victim blaming.[333]

Gillespie deplores the gender bias exemplified by a judge's ruling that a woman had not made a sufficient case for self-defense to send the question to the jury,[334] despite having heard evidence that her partner pistol-whipped her, pointed a loaded gun at her, and threatened to kill her just before she shot him.[335] As she so convincingly argues, judges with gender-biased attitudes are common throughout our judicial system, even at the lower court level,[336] where the battered woman who has killed her abuser in self-defense will first appear.[337]

Gillespie further contends that this gender bias extends to the preoccupation of juries with the question of why the woman did not leave the violent relationship.[338] She asserts that the question subsumes two assumptions: that controlling male violence "is the woman victim's responsibility, not the man's;"[339] and that the

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completely ignored the fact that Carol had stopped dating Bill years before because he was married. *Id.* at 775. The trial court also found her assertion of self-defense unreasonable precisely because the "relationship" continued. *Id.* at 783. Clearly these distorted characterizations of an abusive situation indicate how gender bias severely skews the perception of the issues of reasonable fear of bodily harm.

[332] GILLESPIE, *supra* note 19, at 191.

[333] *Id.*

[334] *Id.* at 192.

[335] *Id.*

[336] *Id.* Clearly, if the woman chooses to assert a claim of self-defense, she will most likely have to take her claim to trial in order to be vindicated.

[337] GILLESPIE, *supra* note 19, at 192.

[338] *Id.*

[339] *Id.*

family home belongs to him, and "he has the right to drive her out of it."[340] As she points out, it is the woman who is forced (if she does decide to leave) to abandon her home and her possessions and surrender her freedom to hide behind locked doors in an overcrowded shelter.[341] Moreover, these sexist attitudes are reflected in the fact that a woman's reasonableness is so suspect that she requires an expert witness to explain why, after she has been repeatedly beaten and threatened with death, she has good reason to fear her tormentor.[342]

There are some theorists who argue that the use of Battered Woman's Syndrome, as presented by an expert witness, poses the danger of encouraging courts to find the women mentally ill, with the consequence that the woman's own psychological condition, rather than the underlying social conditions, will be blamed.[343] This is a compelling argument, as testimony focusing on the helplessness, handicaps, and passivity of battered women tends to reinforce just those stereotypes about women the expert testimony is designed to dispel.[344] In addition, the legal system's traditional expectation that a woman who kills a man will rely on an insanity or diminished capacity defense also serves to strengthen the stereotype of women as irrational and emotional.[345] Further, Schneider persuasively argues that the word 'syndrome' (in Battered

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[340] *Id.*

[341] *Id.*

[342] GILLESPIE, *supra* note 19, at 192-93. As Gillespie so compellingly asks:

> How else can one account for the fact that a jury that has heard testimony that a man once plunged his hand up to the elbow into his wife's rectum and tore out a fistful of her intestines should need an *expert* to explain that when the man grabbed her and choked her and threatened to rip out her windpipe her fear that he might do it was reasonable?

Id. at 192-93 (emphasis in original).

[343] WALKER, *supra* note 1, at 10-13. But it has been contended that the standard of reasonableness makes it too difficult in some cases for a battered woman to successfully assert a claim of justifiable homicide, and that a plea of temporary insanity makes an acquittal more likely. Cipparone, *supra* note 255, at 428-29. It is possible that the author's gender (male) influenced his opinion. Two other authors propose a different solution: that the battered woman plead excuse, (rather than justifiable homicide) and accept a charge of manslaughter. *See* Mihajlovich, *supra* note 115; Cathryn Jo Rosen, *The Excuse of Self-Defense, Correcting A Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U.L. REV. 11 (1986).

[344] Schneider, *Describing*, *supra* note 1, at 197-200.

[345] GILLESPIE, *supra* note 19, at 179-80.

Woman's Syndrome) tends to connote mental infirmity, and can lead to a court perceiving the defendant as somehow mentally impaired.[346] "Regardless of its more complex meaning, the term 'battered woman syndrome' has been heard to communicate an implicit but powerful view that [the woman is] suffering from a psychological disability and that this disability prevents [her] from acting 'normally.'"[347] It is also notable that the more practical implication of some sort of insanity defense is that even if the defense is successful, the woman will be incarcerated in a mental institution rather than acquitted in a self-defense claim.[348] This is cruelly ironic, for, as Walker points out, most battered women who kill their abusers show no signs of Post Traumatic Stress Disorder once they are able to live without fear of further violence.[349]

Additionally, as Schneider contends, the notion of Battered Woman Syndrome "contains the seeds of old stereotypes of women in new form . . . which has the potential to exclude battered women whose circumstances depart from the model and force them once again into pleas of insanity or manslaughter rather than expanding our understanding of reasonableness."[350]

The foregoing discussion of Battered Woman's Syndrome from the feminist perspective has been criticized by commentators on several grounds. One charge has been that expert testimony on the

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[346] Schneider, *Describing, supra* note 1, at 207, 217. As Schneider notes, a number of courts have characterized expert testimony on Battered Women's Syndrome as indicative of "extreme emotional disturbance, misunderstanding the purpose for which the testimony was offered." *Id.* at 217 n.148. She references the following cases: Ledford v. State, 333 S.E.2d 576 (Ga. 1985) (court ordered competency hearing); State v. Edwards, 420 So. 2d 663 (La. 1982) (appellate counsel claims that trial counsel was ineffective for failure to present Battered Woman's Syndrome to show diminished capacity); State v. Martin, 666 S.W.2d 895 (Mo. Ct. App. 1984); People v. Powell, 424 N.Y.S.2d 626 (Tompkins County Ct. 1980), *aff'd*, 442 N.Y.S.2d 645 (App. Div. 1981) (testimony on battered woman's syndrome relevant to diminished capacity); State v. Kelly, 685 P.2d 564 (Wash. 1984) (prosecutor's theory that Battered Woman Syndrome is analogous to insanity defense); *but cf.* People v. Torres, 488 N.Y.S.2d 358 (N.Y. Sup. Ct. 1985) (Battered Woman's Syndrome specifically not offered for mental disease or defect).

[347] Schneider, *Describing, supra* note 1, at 207.

[348] WALKER, *supra* note 1, at 176-78.

[349] *Id.*

[350] Schneider, *Describing, supra* note 1, at 216.

subject leads to the establishment of a new category of self-defense.[351] However, authorities on battered women's defense, such as Schneider and Thyfault,[352] rebut this allegation by emphasizing that the "battering, or a history of abuse alone, does not justify a homicide,"[353] and that the testimony is offered only to help the jury understand how the phenomenon impacts the woman's claim of self-defense.[354] The court in *Koss* agreed, stressing the relevance of the expert testimony about a defendant's reasonable belief she was in imminent danger.[355]

Another criticism is that allowing battered women to plead justifiable homicide will either foster a climate of "open season on men,"[356] create a law biased in women's favor,[357] or encourage other women willfully to kill their abusers without reason.[358] Dennis Watkins, president of the Ohio Prosecuting Attorney's Association, asserted that "[n]ow instead of going to the courts or getting a divorce, these women will think, 'Maybe I'll kill him.'"[359] These concerns are groundless and highly conclusory, and seem to reflect an unconscious male fear that women will rightfully defend themselves when attacked. As noted above, the recommended approach, favoring the subjective standard of reasonableness, is entirely gender neutral.[360]

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[351] "The battered wife syndrome is yet another new defense seeking the attention of criminal law specialists." Schneider, *supra* note 1, at 199 n.18 (quoting James R. Acker & Hans Toch, *Battered Women, Straw Men, and Expert Testimony: A Comment on* State v. Kelly, 21 CRIM. L. BULL. 125 (1985)).

[352] Schneider, *Describing, supra* note 1, at 199; Thyfault, *supra* note 65, at 495.

[353] Thyfault, *supra* note 65, at 495.

[354] *Id.*

[355] *Koss*, 551 N.E.2d 970, 974 (Ohio 1990).

[356] GILLESPIE, *supra* note 19, at 10 (referring to remarks made in response to Francine Hughes' acquittal).

[357] *Id.*

[358] Tamar Lewin, *More States Study Clemency for Women Who Killed Abusers*, N.Y. TIMES, Feb. 21, 1991, at A19.

[359] *Id.* These remarks were made in response to the Ohio governor's recent grant of clemency to twenty-six women imprisoned in Ohio for killing their abusers. *Id.*

[360] As evidence of the doctrine's gender neutrality, *see e.g.*, People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).

IV. SUMMARY AND RECOMMENDATIONS

The lack of uniformity among U.S. jurisdictions poses formidable barriers to battered women asserting claims of justifiable homicide. This task is made more difficult by the varying interpretations placed on reasonableness, and whether the subjective or objective standard is applied to the belief and/or the defendant's actions, or both. Lack of uniformity is further complicated by the two types of factual patterns that emerge in these cases: the confrontation case, where the woman repels her abuser with deadly force in the midst of an acute battering attack;[361] and the sleeping victim case, where the abused woman kills her batterer during a (temporary) lull in his attacks.[362] As noted above, there is no uniform approach taken by U.S. courts in either type of situation, although juries traditionally have had a harder time acquitting defendants in the second category.

The task of altering statutes to accommodate more fairly the factual issues in battered women's justifiable homicide cases by legitimizing the subjective standard presents significant difficulties. As criminal law is a state matter, changes in the law must be accomplished on a state by state basis for the change to be effective. Even if these changes are made, the resulting statutes will have to be sufficiently specific to ensure that all courts in that state interpret them congruently. This seems a daunting prospect, with a mixed chance of success.

Despite the foregoing, there are some solutions for redressing the inequities in our judicial system. The following persuasive recommendations were culled from a variety of sources in the domestic violence literature.[363]

A. Suggested Changes in the Application of Standards of Reasonableness

The concept of imminence of the harm should be relaxed somewhat, as it is more appropriately applicable to the traditional equal force scenario, and has minimal relevance in most battering

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[361] *See, e.g.*, State v. Kelly, 478 A.2d 364 (N.J. 1984).

[362] *See* State v. Koss, 551 N.E.2d 970 (Ohio 1990).

[363] GILLESPIE, *supra* note 19, at 184-85.

situations. One remedy, suggested by the Model Penal Code,[364] and by the *Leidholm* court,[365] would open up the time frame sufficiently for the battered woman to act *before* her abuser strikes her again.[366] Alternatively, courts could define a statutory requirement of "imminence" as "impending," which would be perfectly consistent with a gap in time between the perception or the imminent event and its occurrence.[367]

It has also been suggested that the subjective, rather than the objective standard, should be employed uniformly in determining whether the actor's behavior meets the test of reasonableness.[368] As noted earlier, the subjective standard is not only more applicable to battered women's self-defense claims,[369] it is more logically in line with the concept of *mens rea* implicit in our criminal law system.[370] Further, past actions of the abuser should be considered relevant in all cases and admitted into evidence to provide the jury with an understanding of the defendant's genuineness of belief.[371] At a minimum, Gillespie proposes that the "reasonable man" standard be replaced by the "reasonable person" standard, rendering the standard gender neutral.[372]

In addition, some commentators have proposed the abolition of the retreat doctrine in battered women's self-defense cases.[373] The doctrine poses two major obstacles: it requires a battered woman to flee her home, and it is frequently confused with the question of why the woman stayed in the relationship.[374] Failing a formal repeal of the retreat portion of a statute, appropriate jury instructions explaining that the woman had no affirmative obligation to terminate the relationship or to leave her home would sufficiently emasculate the doctrine and restore a more balanced approach to justifiable homicide cases.

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[364] MODEL PENAL CODE § 3.04(2)(b)(ii) (1962). *See also* GILLESPIE, *supra* note 19, at 186.

[365] State v. Leidholm, 334 N.W. 811 (N.D. 1983).

[366] *Id.* at 815.

[367] GILLESPIE, *supra* note 19, at 187.

[368] *Leidholm*, 334 N.W. at 818. See also Davick, *supra* note 219.

[369] *Id.*

[370] GILLESPIE, *supra* note 19, at 121.

[371] *See supra* note 130 and accompanying text.

[372] GILLESPIE, *supra* note 19, at 189.

[373] *See* State v. Allery, 682 P.2d 312, 316 (Wash. 1984).

[374] *See supra* notes 255-62 and accompanying text.

B. Suggestions Regarding the Use of Expert Testimony

Most advocates of reform agree that expert testimony on Battered Woman's Syndrome should be admissible in all cases.[375] While, as noted above, some critics have argued that this is a recommendation of a separate law for battered women,[376] this assertion lacks merit. Significantly, expert testimony on a wide variety of subjects is admissible in all jurisdictions, and testimony about Post Traumatic Stress Disorder in particular can be useful to defendants of *either* gender in a variety of contexts, including rape and child abuse.

Defense attorneys should emphasize, through the use of expert testimony, the notion that the battered woman was responding appropriately to her situation, and that her fear of death or serious harm was, indeed, reasonable.[377] This testimony should underscore the battered woman's characteristically heightened sense of awareness to danger, as well as the view that battered women are more likely to be killed themselves if they attempt to escape their violent relationships. [378] Further, testimony explaining the 'flashback' sensations battered women experience would help serve to convince a jury of the woman's perception of imminent danger.[379] While some explanation of why the woman remained in the relationship is useful to allay confusion, attempts should be made to de-emphasize the concepts of learned helplessness and victimization.[380] This will minimize the sexual stereotyping of the actor, which only serve to highlight the apparent contradiction of a helpless woman who took direct action to save her life.[381]

C. A Preliminary Suggestion for Reform

One recommendation not mentioned by any of the experts above is to take the legal solutions one step further by creating a new category of self-defense, tentatively entitled the Battered Woman

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[375] *See generally* GILLESPIE, *supra* note 19; WALKER, *supra* note 1; Blackman, *supra* note 209; Crocker, *supra* note 65; Schneider, *supra* note 1; Thyfault, *supra* note 65.

[376] *See supra* notes 171-76.

[377] Madison, *supra* note 161, at 1029.

[378] GILLESPIE, *supra* note 19, at 170.

[379] *See id.* at 156.

[380] *See* Blackmun, *supra* note 265, at 230.

[381] *See id.*

Defense. This proposal would include a completely subjective standard of reasonableness, such as that used by the court in *Leidholm*,[382] and would eliminate completely the requirement for imminence of the harm as it is currently employed. The standards of proof would include: (a) that a defendant offer, through expert testimony by a mental health professional experienced in diagnosing Battered Woman's Syndrome, evidence that she had been through a minimum of two acute battering cycles before the killing; (b) a requirement that a defendant demonstrate an honest belief that her abusive spouse's behavior had escalated to such a degree within the 48 hours preceding the homicide that she was in fear for her life or of grave bodily injury; and (c) a statutory rejection of the retreat doctrine, thus simplifying the jury's ability to reach a conclusion regarding the defendant's actions.

This suggested reform would address many of the significant difficulties currently associated with battered women's self-defense claims. It is believed, by many of the experts mentioned above, and by this author, that the current formulations of criminal codes are poorly equipped to address battered women's circumstances with sufficient fairness. The approaches used in even the more enlightened jurisdictions are, at best, efforts to fit a square peg into a round hole, as battered women who resort to killing their batterers often do not conform to the legal standards used to maintain a claim of self-defense. While it is certainly true that legislation codifying this proposal would likely encounter many obstacles to passage, it would go far in eliminating much of the gender bias inherent in the criminal codes and allow juries to assess more accurately the blameworthiness of a battered woman defendant.

D. Suggested Changes in Social Policies

Experts in the field of domestic violence agree that a variety of social remedies are desperately needed.[383] They propose that more victim's shelters be established to meet the needs of battered women.[384] In addition, our legal system should facilitate speedy divorces in cases of battery, and cease awarding joint custody to

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[382] State v. Leidholm, 334 N.W.2d 811 (N.D. 1983).

[383] GILLESPIE, *supra* note 19, at 193; WALKER, *supra* note 1, at 235-38, 242.

[384] Crocker, *supra* note 65, at 132-34.

parents in such divorce cases.[385] Likewise, changes are needed in the manner in which our police forces respond to domestic violence situations.[386] At a bare minimum, police officers must be more willing to take the battered woman's complaints seriously, and to intervene more vigorously on her behalf.

Several encouraging notes of reform have been observed in recent months. Senator Biden, the Chairman of the Senate Judiciary Committee, has introduced in Congress a bill that is aimed at stemming violence against women and that increases funding for services to aid victims.[387] The statute would create federal penalties for abusers who cross state lines to attack their spouses, would make protective court orders issued in one state valid in all 50, and would authorize $125 million for domestic-violence programs. [388] This sum would include $75 million for battered-women's shelters, triple the current federal contribution.[389] Also, in what may presage a growing trend, governors in Ohio and Maryland granted clemency to women who were serving sentences for killing men that had abused them.[390]

In conclusion, it is clear that adoption of the recommendations outlined above, along with the proposed federal legislation,[391] can go a long way towards a more just treatment of battered women at all levels in our society. It is also clear that significant inroads have been made in the defense of battered women in society's recognition of the magnitude of the domestic violence epidemic. However, it must be emphasized that none of the foregoing suggestions encompass a methodology for eradicating the gender bias that pervades our social order and system of justice. While such concerns are beyond the scope of this note, it is clear that

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[385] WALKER, *supra* note 1, at 139, 145-47, 163-64.

[386] GILLESPIE, *supra* note 19, at 13; Barbara K. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 103 (1983).

[387] Linda P. Campbell, *U.S. Help Needed, Battered Women Tell Panel*, CHICAGO TRIBUNE, Dec. 12, 1990, at 6. The bill has been approved by the Senate Judiciary Committee, but failed to reach the Senate floor prior to the holiday adjournment. *Id.* Senator Biden intends to reintroduce the bill in the 1991 session. *Id.*

[388] *Id.*

[389] *Id.*

[390] Lewin, *supra note 360*, at A19; Sam Roberts, *Trying to Give Equal Justice to Jailed Women*, N.Y. TIMES, Mar. 4, 1991, at B1.

[391] Campbell, *supra* note 388, at 6.

the work of educating the public and the judicial system about the realities of domestic violence must continue. Sadly, Sarah Smith's[392] recent conviction, in a state that utilizes a subjective standard of reasonableness in justifiable homicide cases, serves as a potent and vivid reminder that the battle for acceptance of battered women's claims of self-defense is still not won.

Alene Kristal

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[392] *See* Golden, *supra* note 248.