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## Battered Woman Syndrome: A Tool for Batterers?

### Cover Page Footnote

Many thanks to my husband, Jason D. Griffith, for his support while I was writing this Note and throughout law school. I would also like to thank Thane Rosenbaum for helping me develop my topic and Ruth Jones for her insightful comments on prior drafts of this Note.

## BATTERED WOMAN SYNDROME: A TOOL FOR BATTERERS?

MELANIE FRAGER GRIFFITH\*

### INTRODUCTION

On January 23, 1995, defense attorney Johnnie L. Cochran Jr. announced that several previously undisclosed witnesses would be testifying for his client, Orenthal James Simpson—a man who once plead no contest to battering his ex-wife, Nicole Brown Simpson,<sup>1</sup> and who was acquitted of murdering both her and Ronald Lyle Goldman.<sup>2</sup> When defense attorneys disclosed that they would call Dr. Lenore E. Walker as an expert on behalf of O.J. Simpson, both the prosecution and advocates for battered women<sup>3</sup> across the nation were shocked. As media correspondents focused on the legal implications of Cochran's eve-of-trial announcement that he was adding names to the

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1. See David Margolick, *Prosecution Quickly Tries to Tarnish Simpson's Image*, N.Y. Times, Feb. 1, 1995, at A14 (detailing the responding officers' testimony about the incidents that led to the 1989 charges against O.J. Simpson for abusing his wife); see also *People v. Simpson*, No. BA097211, 1995 WL 36094, at \*19-34 (Cal. Super. Ct. Jan. 31, 1995) (official transcript of examination of John Edwards).

2. See *People v. Simpson*, No. BA097211, 1995 WL — (Cal. Super. Ct. Oct. 3, 1995) (official transcript of not guilty verdict).

3. The term "battered woman" as used in this Note refers to any woman who has been abused by her spouse or lover more than once and remains in the relationship. See Julie Blackman, *Intimate Violence* 191 (1989). The above definition includes a woman who is not married to or living with the batterer. *Id.*; see *infra* note 135 (defining a "battered woman"); see also *infra* part II.B.1 (outlining the components of the battered woman syndrome).

While it is true that battering also occurs in same-sex relationships and situations where the woman is the aggressor, the majority of battering incidents considered by the criminal justice system occurs where the aggressor is a man and the victim is a woman. See generally *No More! Stopping Domestic Violence*, Ms., Sept./Oct. 1994, at 1-65 (addressing the issue of domestic violence from a feminist perspective and setting forth statistics about the pervasiveness of the problem). Non-traditional types of domestic violence are beyond the scope of this Note. The use of masculine pronouns in the context of a batterer and feminine pronouns in the context of a victim, however, is not intended to minimize such incidents of abuse. For a discussion on the specific dynamics of battered men, see Julia J. Chavez, *Battered Men and the California Law*, 22 Sw. U. L. Rev. 239 (1992).

Battered women who are not married to the batterer, as any individual, can seek an order of protection from a state's criminal court. Many states also allow some women to petition for a civil protective order even if they are not married to or currently living with the batterer. See, e.g., N.Y. Fam. Ct. Act § 812(1)(a)-(d), (5) (McKinney 1995) (outlining who can pursue an order of protection in family court). For a survey of states that have enacted statutes authorizing civil orders of protection for domestic abuse and the distinctions among those statutes, see generally Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, Fam. L.Q., Spring 1989, at 43.

defense's witness list,<sup>4</sup> many members of the battered women's movement felt betrayed by Dr. Walker's decision to testify on O.J. Simpson's behalf.<sup>5</sup>

Dr. Walker has been a voice for battered women for more than twenty years.<sup>6</sup> In 1979, Dr. Walker developed the much cited, but perhaps little understood, "battered woman syndrome"—a theoretical explanation of the psychological impact of prolonged spousal abuse.<sup>7</sup> She has authored ten books on the subject of domestic violence.<sup>8</sup>

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4. By constitutional mandate, the discovery process in criminal cases must be reciprocal in nature. According to Article I, § 30(c) of the Constitution of the State of California, "In order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process."

The California legislature enacted reciprocal discovery statutes binding on the prosecuting attorney and the defense counsel in a criminal trial. See Cal. Penal Code § 1054.1, .3 (West 1990 & Supp. 1995) (setting forth what evidence shall be subject to reciprocal discovery); see also *Izazaga v. Superior Court*, 815 P.2d 304, 316-17 (Cal. 1991) (ruling that a defendant's disclosure of witnesses pursuant to reciprocal discovery provisions of the Penal Code triggers the defendant's right to discover the prosecution's rebuttal witnesses).

Judge Lance Ito had scheduled opening arguments to begin on January 24, 1995. Thus, it was startling to learn on January 23, 1995 that crucial expert and alibi witnesses had been added to the defense team's list of witnesses.

5. See Debra J. Saunders, *Sleeping With the Enemy*, S.F. Chron., Feb. 3, 1995, at A23 ("Some feminists are furious at battered-woman-syndrome maven Lenore Walker's decision to testify on O.J. Simpson's behalf. They feel it is a betrayal of Walker's lifework to take the stand on behalf of a batterer."); see also Sheryl McCarthy, *O.J. on Trial: One More Sellout in the O.J. Case?*, N.Y. Newsday, Jan. 27, 1995, at A4 (reporting that some advocates for battered women attribute Dr. Walker's decision to testify for O.J. to the fact that she is "a greedy publicity seeker and promoter of false information . . . [who] has exploited battered women to advance her own career").

6. Dr. Walker is one of the most recognized advocates for battered women, working on various fronts to combat domestic violence:

For 20 years, Lenore Walker has devoted herself to battered women, testifying as an expert witness in courtrooms across America. Her groundbreaking forays into the psyches of abused wives have helped shape laws, public opinion and, time and time again, individual fates.

In feminist forums, at psychological seminars and in the shelters where battered wives hid, Walker was a heroine.

Tamara Jones, *The Witness's Startling Stand: Champion of Battered Women to Testify in O.J. Simpson's Defense*, Wash. Post, Feb. 4, 1995, at D1.

7. See generally Lenore E. Walker, *The Battered Woman* 42-70 (1979) [hereinafter *The Battered Woman*] (outlining the battered woman syndrome and the theory of "learned helplessness" as it relates to victims of domestic violence).

Many commentators, including Ann Jones, an author and advocate for battered women, have criticized the increased use of Dr. Walker's battered woman syndrome in the legal arena. See Ann Jones, 'Battered-Woman' Defense, USA Today, Feb. 14, 1995, at 15A.

8. McCarthy, *supra* note 5, at A4. For a sample of Dr. Walker's work, see *The Battered Woman*, *supra* note 7; Lenore E. Walker, *The Battered Woman Syndrome* (1984) [hereinafter *The Battered Woman Syndrome*]; Lenore E. Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (1989) [hereinafter *Terrifying Love*]. Dr. Walker has also written numerous law review and other scholarly articles on the subject of battered women and domestic violence in general. See, e.g.,

Newspaper reports have referred to Dr. Walker as the "patron saint of battered women,"<sup>9</sup> a "hero" to advocates for victims of domestic violence,<sup>10</sup> an "honored pioneer,"<sup>11</sup> a "trail-blazing researcher in the study of battered women,"<sup>12</sup> and "the mother of the battered women's syndrome."<sup>13</sup> Dr. Walker chairs an American Psychological Association task force on family violence.<sup>14</sup> Perhaps most important for the development of the battered woman syndrome as a legal concept, Dr. Walker has testified at more than 350 trials as an expert on the battered woman syndrome, usually on behalf of women accused of killing their abusive husbands.<sup>15</sup>

The battered woman syndrome describes a cycle of brutality where violent episodes gradually increase, eventually culminating with an explosive and vicious encounter. After a period of contrition, the cycle repeats itself as the violence and abuse continuously worsen.<sup>16</sup> Additionally, according to the battered woman syndrome, the victim becomes helpless in the face of unpredictable abuse—she is unable to escape from the batterer's control, often acting in ways that society regards as abnormal, even masochistic.<sup>17</sup>

Since its inception in the late 1970s, the battered woman syndrome has benefited victims of domestic violence—most prominently, those women who are on trial for killing their batterers and who plead self-defense.<sup>18</sup> By explaining a woman's behavior according to patterns

Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 Notre Dame J.L. Ethics & Pub. Pol'y 321 (1992) [hereinafter Walker, *Syndrome and Self-Defense*].

9. Jones, *supra* note 6, at D1.

10. Sue Reilly, *Valley Chronicle: Nothing Funny About Effects of Simpson Trial*, L.A. Times, Feb. 6, 1995, at B5 (Valley Edition) (reporting that Betty Fisher, executive director of Haven Hills, a nonprofit agency that serves victims of family violence, viewed Dr. Walker as "a hero of hers"). Reilly explains that until the announcement that Dr. Walker was going to testify for O.J. Simpson, "every client of Haven Hills ha[d] been given Walker's book, 'The Battered Woman.' It ha[d] been the agency's textbook. Now, that will probably change." *Id.* According to the director of the program, "We will try to find another text for our clients . . . I feel Lenore Walker has violated our trust." *Id.*

11. Bettina Boxall, *Abuse Expert Stirs Uproar With Simpson Defense Role*, L.A. Times, Jan. 29, 1995, at A1.

12. *Id.*

13. Jones, *supra* note 6, at D1 (quoting defense attorney Johnnie Cochran Jr.'s statements to the jurors about Dr. Walker); see also *People v. Simpson*, No. BA097211, 1995 WL 27396, at \*20 (Cal. Super. Ct. Jan. 25, 1995) (official transcript of opening statement by Mr. Cochran) (referring to Dr. Walker as the "No. 1 expert in America, perhaps in the world").

14. Lenore E. Walker, remarks made by press release distributed by Israel E. Levine, Chief Operating Officer of Richard Cohen Associates, Public Relations Counsel 1 (Jan. 27, 1995) [hereinafter Press Release] (on file with the *Fordham Law Review*).

15. See McCarthy, *supra* note 5, at A4-A5.

16. See *infra* part II (describing Dr. Walker's theory entitled battered woman syndrome).

17. See *infra* part II.B.1.b (describing the "learned helplessness" component of the battered woman syndrome).

18. See *infra* part III.A.

observed in battered women generally, expert testimony on the battered woman syndrome gives context to a woman's decision to resort to violence.<sup>19</sup> A woman asserting a self-defense claim has the burden of proving that she acted "reasonably" in light of her perception of imminent and life-threatening danger.<sup>20</sup> The battered woman syndrome provides a psychological explanation of prolonged spousal abuse, and therefore is relevant in a trial where the woman's state of mind is at issue.<sup>21</sup>

Battered woman syndrome evidence has been relied upon in other contexts as well.<sup>22</sup> The week before Cochran's announcement, prosecutor Marcia Clark had relied on Dr. Walker's theory in an effort to gain admission of evidence<sup>23</sup> of particular acts of prior abuse of Nicole Brown Simpson by O.J. Simpson.<sup>24</sup> In fact, the prosecution's theory

19. *Id.* The claim of self-defense translates into an argument that the defendant was justified in using force against the victim. As illustrated by New York's Penal Law, "A person may . . . use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person . . ." N.Y. Penal Law § 35.15(1) (McKinney 1987 & Supp. 1995). The statute goes on to state that a person may not use deadly force unless "[h]e reasonably believes that such other person is using or about to use deadly physical force," and he is unable to retreat with complete safety. *Id.* § 35.15(2)(a).

When a battered woman is on trial for the murder of her husband, evidence on the battered woman syndrome can help the trier of fact understand why the woman's perception of imminent danger was reasonable, thereby justifying her use of deadly force.

20. See generally Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. Pa. L. Rev. 379, 382 (1991) (arguing that proposals for "radical redefinition of various elements of self-defense jurisprudence" will not meet the need to change the "courtroom climate in which battered women's homicide cases are tried").

21. See, e.g., *State v. Kelly*, 478 A.2d 364, 375-77 (N.J. 1984) (determining that evidence on the battered woman syndrome is relevant to the reasonableness of the defendant battered woman's belief, to her state of mind, and to bolster her plea of self-defense).

22. See discussion *infra* part III.

23. For a brief discussion of the circumstances under which evidence of a party's or a witness' character can be introduced at trial, see *infra* note 205.

24. After a pre-trial hearing during which the prosecution argued that evidence of prior abuse of Nicole Brown Simpson by O.J. Simpson should be admissible, Judge Lance Ito ruled that certain incidents of "[O.J. Simpson's] prior assaults upon Nicole Brown Simpson may be admitted at trial as to the issues of motive, intent, plan and identity." See *People v. Simpson*, No. BA097211, 1995 WL 21768, at \*1-2 (Cal. Super. Ct. Jan. 18, 1995) (Ruling on Defendant's In Limine Motion To Exclude Evidence of Domestic Discord) (deciding that "evidence of defendant's prior assaults upon Nicole Brown Simpson may be admitted at trial as to the issues of motive, intent, plan and identity"). As Judge Ito explained:

In broad brush, the prosecution seeks to admit this evidence to establish a pattern of conduct which they characterize as a classic example of Battered Wife Syndrome . . . indicating an escalating course of conduct indicative of the motive, planning, intent and identity of the assailant in the homicide of Nicole Brown Simpson and Ronald Goldman.

*Id.* at \*1.

of the motive behind the killing of Nicole Brown Simpson was that O.J. Simpson was a batterer who tormented, brutalized, and eventually murdered his ex-wife.<sup>25</sup> It was the defense, however, that sought to admit expert testimony specifically on the battered woman syndrome.<sup>26</sup> Although Dr. Walker was ultimately removed from the defense's witness list,<sup>27</sup> her association with O.J. Simpson's defense

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25. The presentation of the prosecution's case began with evidence of prolonged and repeated incidents of abuse and battering. Nicole Brown Simpson's sister, Denise Brown, testified to witnessing O.J. Simpson beat and threaten Nicole Brown Simpson. Ronald Shipp, a friend of the Simpsons, testified to Nicole Brown Simpson's request for help in light of her husband's abuse, as well as to O.J. Simpson's admission on the day following Nicole Brown Simpson's murder that he had dreamed about killing his ex-wife. Other evidence presented at the opening of the prosecution's case included an audio tape of Nicole Brown Simpson's frantic call to 911 emergency, police photographs of a bruised Nicole Brown Simpson, and police reports from when officers had been summoned by her to the Simpson estate. *See generally* People v. Simpson, No. BA097211, 1995 WL 36094, at \*19-34 (Cal. Super. Ct. Jan. 31, 1995) (official transcript of examination of Sharyn Gilbert and John Edwards); People v. Simpson, No. BA097211, 1995 WL 36096, at \*2-35 (Cal. Super. Ct. Jan. 31, 1995) (official transcript of examination of John Edwards and Mike Farrell); People v. Simpson, No. BA097211, 1995 WL 37667, at \*20-35 (Cal. Super. Ct. Feb. 1, 1995) (official transcript of examination of Ronald Shipp); People v. Simpson, No. BA097211, 1995 WL 42097, at \*4-29 (Cal. Super. Ct. Feb. 3, 1995) (official transcript of examination of Robert Lerner, Catherine Boe, and Carl Colby); People v. Simpson, No. BA097211, 1995 WL 44173, at \*3-33 (Cal. Super. Ct. Feb. 6, 1995) (official transcript of examination of Denise Brown).

26. *See* People v. Simpson, No. BA097211, 1995 WL 27396, at \*20 (Cal. Super. Ct. Jan. 25, 1995) (official transcript of opening statement by Mr. Cochran) (discussing Dr. Walker and her forthcoming testimony).

27. To date, it is unclear precisely why Dr. Walker was dropped as a witness for Simpson. What is clear, however, is that the prosecution omitted a significant portion of its case depicting Nicole Brown Simpson as a battered woman, perhaps suffering from battered woman syndrome. The court had ruled admissible various incidents of abuse and explained that according to California precedent,

Where a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults upon the same victim, when offered on disputed issues, e.g. identity, intent, motive, etcetera, are admissible based solely upon the consideration of identical perpetrator and victim without resort to a 'distinctive modus operandi' analysis of other factors.

People v. Simpson, No. BA097211, 1995 WL 21768, at \*2 (Cal. Super. Ct. Jan. 18, 1995) (Ruling on Defendant's In Limine Motion To Exclude Evidence of Domestic Discord) (quoting People v. Zack, 184 Cal. App. 3d 409 (1986)).

With minimal evidence of battered woman syndrome introduced at trial, however, the defense had little to rebut with Dr. Walker's testimony. Perhaps, the defense was concerned that Dr. Walker's inconsistent writings regarding men who batter would become a hotly contested debate that was not worth waging. *See infra* part IV.A. Finally, it is possible that Dr. Walker herself felt the pressure and displeasure of other members of the battered women's movement regarding her participation in the trial.

Regardless of the reason not to use Dr. Walker in the Simpson trial, for purposes of this Note, two things remain clear: first, Dr. Walker initially agreed to testify on behalf of an admitted batterer in his murder trial, and, second, other defendant-batterers may try to rely on her actual testimony, or at least her theory, to bolster their claims of innocence. As such, it is still relevant to examine how courts can guard against the improper use of the battered woman syndrome as a tool for batterers.

raises the question of whether battered woman syndrome can or should be used by criminal defendant-batterers.<sup>28</sup>

The possibility that an expert on the battered woman syndrome could testify for a defendant-batterer raises the specter of confusion surrounding the way practitioners may properly utilize or challenge the use of the battered woman syndrome in the courtroom. Dr. Walker stated that her reasons for agreeing to join O.J. Simpson's defense team stemmed from her desire to prevent her theory from being misrepresented.<sup>29</sup> In a press release distributed by her public relations firm, Dr. Walker asserted that her participation in the O.J. Simpson trial would "consist of helping the defense understand the patterns of domestic violence reported in the Simpson family and of offering psychological research in an objective manner to evaluate such pat-

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28. For purposes of this Note, the term "defendant-batterer" will include alleged batterers.

Critics of Dr. Walker emphasize that because Dr. Walker is known for her pioneering work as an advocate for battered women, when she testifies as an expert for a *batterer*, jurors are likely to be significantly influenced.

Recently, Dr. Walker testified as an expert for George Samuel Wade, at his Fort Lauderdale trial for the murder of his ex-lover, Suzanne Emerick. After the jurors declined to convict the defendant of first degree murder, Wade's attorney was quoted as saying of Lenore Walker: "There's no question the jury loved her, because I spoke to the jurors after the trial . . . She was a star in every respect." Ronnie Greene, *From Broward Trial to the O.J. Spotlight Abuse Expert Saved Wife Killer's Life*, Miami Herald, Feb. 2, 1995, at 1A, 5A; see also *infra* part III.D (discussing the impact of Dr. Walker's participation in that trial as an expert for the defendant-batterer).

29. Dr. Walker's critics are not convinced that her motives for agreeing to testify as an expert on behalf of O.J. Simpson are purely objective. Some believe that by agreeing to testify for a defendant-batterer she is nothing more than a "domestic violence profiteer." Greene, *supra* note 28, at 5A. "She's playing both sides . . . This woman was betraying not only my daughter, but all the women in this country who consider her an authority on this complex issue." *Id.* (quoting the mother of a murder victim describing her view of Lenore Walker, who appeared as an expert for the man accused of murdering her daughter). Others accuse her of "sleeping with the enemy." Saunders, *supra* note 5, at A23. Still others question her expertise, citing that the bulk of her research has focused on battered women, not men who batter. See discussion *infra* part IV.A.2. Critics, including Molly Chaudhuri, a former prosecutor with the Norfolk district attorney's office in Massachusetts, note that Lenore Walker is "not an authority on men who batter [and] is thus not qualified to testify about O.J. Simpson." See Alison Bass, *Women's Advocate Takes Heat for Role in Trial: Sees Defense Testimony as 'Teaching Moment'*, Boston Globe, Feb. 4, 1995, § 3, at 8. These critics challenge her ability to assess adequately the likelihood of O.J. Simpson's innocence or guilt. See *id.* As one scholar noted:

"It's only slight hyperbole to say that O.J. may be the first actual batterer she has interviewed," said Richard J. Gelles, director of the family violence research program at the University of Rhode Island. "If she develops a psychological profile of O.J., to what is she going to compare it? She, of all the domestic violence experts in the country, is the least experienced in analyzing data from men who batter."

*Id.*; see also *infra* text accompanying note 138 (discussing Dr. Walker's research in the development of the battered woman syndrome).



terns.”<sup>30</sup> Dr. Walker emphasized that, as a professional, she testifies about the same underlying facts of domestic violence whether asked to do so by the prosecution or the defense.<sup>31</sup> Furthermore, she believes that information about the syndrome is objective evidence which can appropriately be used by either party in a criminal trial.<sup>32</sup>

The above view, however, ignores the dynamics of a criminal trial. Even if Dr. Walker testifies about the same facts associated with domestic violence, regardless of who pays her fee, some believe her words have a heightened impact when she testifies on behalf of a batterer.<sup>33</sup> As a former prosecutor explained, “Here you have the foremost feminist academic advocate for battered women sitting on the stand for O.J. As a juror, if I wasn’t listening to anything she said, I would be struck by the fact that she came and spoke on his behalf.”<sup>34</sup>

As a prerequisite to the admissibility of expert testimony of any kind, the proponent of such evidence must meet certain standards. According to state and federal rules of evidence, expert testimony is admissible only if it will be helpful<sup>35</sup> to the jury and does not include ultimate conclusions about the dispositive issue relating to the mental state of a criminal defendant.<sup>36</sup> The defense in the Simpson case, however, was not planning to rely on Dr. Walker’s testimony simply to

30. Press Release, *supra* note 14, at 1. In the press release distributed on behalf of Dr. Walker and her colleague, Dr. Geraldine Butts Stahly, Dr. Walker explained the basis for her forthcoming testimony:

As we began to examine the evidence over the past five months, which included some 40 hours of evaluation of O.J. Simpson himself, we realized that the potential for long-term harm to battered women was present if the facts, patterns and significance of the battering in this case were misinterpreted, distorted or otherwise misused by either side.

*Id.* at 2.

31. *Id.* at 1.

32. *Id.*

33. See Bass, *supra* note 29, § 3, at 8.

34. *Id.* § 3, at 8 (quoting a former district attorney about the impact of Dr. Walker’s testimony on behalf of a batterer).

35. The Federal Rules of Evidence have such a requirement: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Fed. R. Evid. 702.

California’s Evidence Code uses similar language in outlining the purpose of admitting expert testimony: “If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . .” Cal. Evid. Code § 801 (West 1966 & Supp. 1995).

36. The Federal Rules of Evidence explain the limits of opinion testimony by an expert as follows:

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

Fed. R. Evid. 704(b).

educate the jury about the psychological impact of prolonged spousal abuse according to the battered woman syndrome.<sup>37</sup> Rather, Dr. Walker was going to testify that "it cannot be predicted that a particular batterer will turn out to be a killer unless there is evidence of prior escalating life-threatening behavior."<sup>38</sup> According to Dr. Walker, such behavior was not evident in the Simpsons' relationship.<sup>39</sup> Such testimony suggests that O.J. Simpson, and the patterns of violence in his relationship with Nicole Brown Simpson, were not typical of abusive relationships resulting in homicide.<sup>40</sup> The logic to such a conclusion is arguably misleading. This Note asserts that it is improper to extrapolate information regarding the actions of a defendant-batterer from evidence relating to the psyche of a victim.<sup>41</sup>

The precise ramifications that Dr. Walker's decision to testify for an accused batterer will have on the legal community's use of the battered woman syndrome in criminal trials remains unclear.<sup>42</sup> What is

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37. See *supra* notes 35-36 and accompanying text (discussing the limited purpose for admitting expert testimony).

38. Press Release, *supra* note 14, at 2 (quoting Dr. Walker); see also Alan Dershowitz, *Why Spousal Abuse Doesn't Predict Murder*, *The Fordham Advocate*, Feb. 1, 1995, at 6 ("Because so few 'batterers' end up killing, all reputable social scientists agree that spousal murder cannot be predicted from a history of spousal abuse."); 'This Case is About a Rush to Judgment . . . Win at Any Cost,' *Wash. Post*, Jan. 26, 1995, at A14 [hereinafter *Rush to Judgment*] (transcribing portions of Cochran's opening statement).

As discussed in this Note, the argument advanced by O.J. Simpson's defense attorneys is an improper and misleading use of the battered woman syndrome. See *infra* part II (describing the battered woman syndrome) and part IV.A (discussing why it is improper to extrapolate information about the actions of a defendant-batterer from a theory relating to the state of mind of a battered woman).

An example of the potential misuse of the theory is evidenced by the Simpson case. Rather than manifesting the "helplessness" associated with the battered woman syndrome, Nicole Brown Simpson has been portrayed as a vibrant and independent woman who had, to a certain extent, escaped from O.J. Simpson's rigid control: she had divorced him, was living apart from him, and was building a life for herself and her children. O.J. Simpson's defense attorneys could attempt to portray their client's relationship with his ex-wife as wholly distinct from any patterns detailed in the battered woman syndrome, thus, attempting to minimize a claim that because he abused her in the past, he likely murdered her. See *People v. Simpson*, No. BA097211, 1995 WL 27396, at \*22 (Cal. Super. Ct. Jan. 25, 1995) (official transcript of opening statement by Mr. Cochran) (transcribing Johnnie Cochran's opening statement and his remarks about the alleged domestic violence including that, "according to the lady who is the mother of this particular area, and although domestic violence is a very, very serious problem in this country, the level of violence in this case, the pattern is atypical").

39. See McCarthy, *supra* note 5, at A4, A22.

40. According to the defense, the relationship between O.J. Simpson and Nicole Brown Simpson can arguably be distinguished from the typical patterns of battering relationships for a number of reasons. See *People v. Simpson*, No. BA097211, 1995 WL 27396, at \*52-53 (Cal. Super. Ct. Jan. 25, 1995) (official transcript of opening statement by Mr. Cochran).

41. See *infra* part IV.

42. Regardless of her motives, Dr. Walker's decision to testify on behalf of an admitted batterer will not pass unnoticed. Rather, her willingness to participate in a

apparent, however, is that when a batterer is on trial for the abuse or murder of his wife, courts must be prepared to respond to the defendant-batterer's attempt to rely on the battered woman syndrome. As discussed in this Note, reliance on expert testimony on the battered woman syndrome to explain the behavior of a defendant-batterer is irrelevant and misleading. This Note examines how the battered woman syndrome has, in some instances, become a tool for the batterer. This Note also explores ways for victims of domestic violence, in conjunction with prosecutors and the courts, to guard against a defendant-batterer's improper reliance on the battered woman syndrome in a criminal trial.<sup>43</sup>

Part I describes the long history of violence against women. Part II outlines the battered woman syndrome—a theoretical explanation of the psychological impact of prolonged spousal abuse. Part III reviews the various ways in which victims of domestic abuse have used the battered woman syndrome: as a mechanism to support a claim of self-defense; as an argument in favor of clemency and probation; and as a justification for custody of their children. While acknowledging that the battered woman syndrome may bolster a battered woman's case, part III examines ways in which the battered woman syndrome also has been used to hinder the legal claims of battered women. Part IV urges courts to guard against a batterer's manipulation of the battered woman syndrome to maintain his claim of innocence. Courts must shift the focus of a trial away from the victim's mental state and how it comports with the battered woman syndrome. As such, they can better avoid the illogical conclusion that the defendant must not be guilty if the pattern of abuse in a given relationship does not fall squarely within the bounds of the battered woman syndrome.<sup>44</sup> This Note concludes that to avoid the distorted reliance by a defendant-batterer on a theory designed to explain the actions of a battered woman, courts

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trial that is receiving unprecedented media attention will undoubtedly impact the manner in which the battered woman syndrome is both viewed and relied upon in the future. See, e.g., *supra* note 10 (discussing a battered woman's support agency's decision to replace Dr. Walker's book as a text for its clients).

43. See *infra* note 205 and accompanying text (discussing the procedure for admitting expert testimony on the battered woman syndrome and how such evidence does not violate the limited admissibility rules for character evidence).

44. See Jones, *supra* note 7, at 15A (arguing that courts "twist [the battered woman syndrome] and recruit it to the other side"). Ann Jones, a noted expert on battered women and critic of the overuse of the battered woman syndrome in court, asserts:

Given the convoluted career of battered-woman syndrome, you can easily imagine the arguments: Nicole Simpson doesn't pass the battered-woman-syndrome test. By that standard (the only standard courts accept), she wasn't a *real* battered woman. Setting aside for the sake of scientific theory her real bruises and her real calls to the police, if she wasn't a real battered woman, then O.J. must not be a real batterer—and certainly not one who would kill.

*Id.*

must limit the admissibility of expert testimony on the battered woman syndrome in the prosecution of a batterer.

## I. THE HISTORICAL PERSPECTIVE OF VIOLENCE AGAINST WOMEN

Throughout history, society has tolerated—even legally sanctioned—abuse against women.<sup>45</sup> For centuries, social structures have endorsed male domination within and outside the family unit.<sup>46</sup> A review of American legal history uncovers a time when married women, as compared to men, were practically paralyzed under the law.<sup>47</sup> Society's perception of women as subordinate to men has hindered victims of domestic abuse in their struggle for legal recourse.<sup>48</sup> Understanding the historical sanction of violence against women provides context to the ongoing struggle to eradicate the continued abuse of women.<sup>49</sup>

### A. Legal and Social Reinforcement of Violence Against Women

A review of western civilization uncovers numerous laws authorizing the use of physical force to discipline and censure women.<sup>50</sup> The Romans had the most extensive legal restrictions on the rights of women. For example, the first marriage law in Roman times required wives to "conform themselves entirely to the temper of their hus-

45. See discussion *infra* part II.A.

46. See Susan Schechter, *Toward an Analysis of the Persistence of Violence Against Women in the Home*, *Aegis*, July/Aug., 1979, at 47 (describing domination as a social structure in which certain groups of people can determine and limit the spheres of activity of other groups by threatening or using force in order to coerce compliance).

47. See, e.g., Sarah Grimké, *Legal Disabilities of Women: Letters on the Equality of the Sexes and the Condition of Women* 74-83 (1837), reprinted in *Freedom, Feminism, and the State* 121-27 (Wendy McElroy ed., 1982). "[A] wife dares not do what will be disagreeable to one who is, in his own estimation, her superior, and who makes her feel, in the privacy of domestic life, that she has thwarted him." *Id.* at 123.

48. See Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* 216 (1982) ("The patriarchal family predates capitalist society, and so does violence against women within it."); see also Marvin Harris, *Why Men Dominate Women*, *N.Y. Times (Magazine)*, Nov. 13, 1977, at 46 (tracing men's domination of women back to band and village societies and rejecting the view that such domination occurred because it is natural for men to be aggressive and take control).

49. See Kathleen Hofeller, Ph.D., *Battered Women, Shattered Lives* 49-66 (1983) (discussing the historical precedents for wife beating). "Cultural conceptions of femininity not only influence the relative overall social status of women, but also effectively control behavior through the process of socialization; women who are brought up to believe that they are weak, incompetent, and helpless are less likely to challenge existing restrictions." *Id.* at 49.

50. For a comprehensive examination of how religions have historically condoned wife beating and the effect of that condonation on the law, see Kathleen A. McDonald, *Battered Wives, Religion & Law: An Interdisciplinary Approach*, 2 *Yale J.L. & Feminism* 251 (1990); see also Rhonda L. Kohler, Comment, *The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence*, 25 *Loy. L.A. L. Rev.* 1025, 1031-33 (1992) (describing how wife beating has been condoned throughout history).

bands."<sup>51</sup> Husbands, in turn, could rule their wives as "necessary and inseparable possessions."<sup>52</sup> The reach of a Roman husband's control extended beyond the boundaries of daily life: "A Roman wife remained under the guardianship of her husband, who possessed *patria potestas*,<sup>53</sup> including the power to sell his wife and children into slavery or put them to death."<sup>54</sup> Furthermore, Roman law specifically authorized a husband to use violence to punish his wife, including breaking her nose or blackening her eye.<sup>55</sup>

Both legal and moral codes of pre-capitalist and early capitalist societies in Western Europe facilitated violence against women. According to English common law, a wife "came under the control of her husband [who] had the legal right to use force against her in order to insure that she fulfilled her wifely obligations, which included consummation of the marriage, cohabitation, maintenance of conjugal rights, sexual fidelity, and general obedience and respect for his wishes."<sup>56</sup> An 1878 publication entitled *Wife Torture in England* documented

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51. McDonald, *supra* note 50, at 254 (quoting R. Emerson Dobash & Russell P. Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 *Victimology* 426, 427 (1977-78)).

52. *Id.*

53. *Patria potestas*, as used in Roman law, is defined as "paternal authority" or "paternal power."

This term denotes the aggregate of those peculiar powers and rights which, by the civil law of Rome, belonged to the head of a family in respect to his wife, children (natural or adopted), and any more remote descendants who sprang from him through males only. Anciently, it was of very extensive reach, embracing even the power of life and death, but was gradually curtailed . . . .

Black's Law Dictionary 1127 (6th ed. 1990).

54. Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present* 9 (1987) (footnote omitted).

55. *See id.* Other societies had similar laws both authorizing violence against women and classifying women as mere chattel. A sixteenth century Russian code cautioned husbands not to strike their wives on the face or head, for fear that the husbands might be disadvantaged should the wives become deaf or blind. Mildred D. Pagelow, *Family Violence* 282 (1984). Additionally, in many regions of Europe, a man could kill his wife without penalty well into the 1600s. Robert T. Sigler, *Domestic Violence in Context* 9 (1989). On the other hand, a woman who killed her husband was punished as though she were guilty of treason, because her homicidal act was considered analogous to killing the king. William Blackstone, *Commentaries*, book IV, ch. 6, at 613 (West 1897) (noting that a wife's killing of her husband had formerly been denominated a petit treason).

56. R. Emerson Dobash and Russell Dobash, *Violence Against Wives: A Case Against the Patriarchy* 60 (1979) [hereinafter Dobash and Dobash] (footnote omitted).

In tracing the historical context within which wife battering has developed, Susan Schechter describes the result of a woman's legal and social status of "wife." "Her status as wife excluded her from the legal process, placed her in the same category as children and servants, required obedience, and gave her husband extraordinary discretion over determining punishable offenses." Schechter, *supra* note 48, at 217 (footnote omitted).

6000 of the most "brutal assaults" on women in England, and hypothesized as to why such abhorrent abuse continued:

The general depreciation of women *as a sex* is bad enough, but in the matter we are considering, the special depreciation of *wives* is more directly responsible for the outrages they endure. The notion that a man's wife is his *property* in the sense in which a horse is his property, . . . is the fatal root of incalculable evil and misery.<sup>57</sup>

English rape laws perceived rape as a crime against the husband, father, or fiancé of the victim.<sup>58</sup> As such, rape cases were settled properly if the male "possessor" of the female victim was compensated adequately for the damage to his personal belonging.<sup>59</sup> Marital rape was inconceivable under the law because a woman could not legally refuse her husband's conjugal rights.<sup>60</sup>

Coupled with the legal sanction of male domination were powerful moral codes that "provided ideological justification for patriarchal marriages . . . . Marriage laws explicitly recognized the family as the domain of the husband, forced women to conform to the man's will, and punished men and women unequally for infractions of marriage vows."<sup>61</sup> While ecclesiastical church courts in England could grant a woman a separation or divorce on the ground of cruelty—defined as "life-threatening acts of violence"—they rarely did.<sup>62</sup> Despite the fact that a husband's absolute power of chastisement was abolished in 1829, it was not until the passage of the Married Women's Property Acts<sup>63</sup> at the end of the 19th century that conviction for assault be-

57. Francis Power Cobbe, *Wife Torture in England*, quoted in Dobash and Dobash, *supra* note 56, at 73.

58. Sigler, *supra* note 55, at 8.

59. *Id.*

60. Only in the last 15 years have all 50 states made it a crime for a man to rape his wife. Oklahoma and North Carolina only recently acknowledged marital rape as a crime. See, e.g., N.C. Gen. Stat. § 14-27.8 (1993) (amending in 1993 a law that provided a defense to rape if the victim was the spouse of the person committing the act); Okla. Stat. Ann. tit. 21, § 1111 (West 1983 & Supp. 1995) (amending in 1983 a law that defined rape as "an act of sexual intercourse . . . accomplished with a male or female, not the spouse of the perpetrator" under certain circumstances including, *inter alia*, where the victim is under age sixteen, where the victim is incapable of consent by reason of mental illness or intoxication, and where force is used or threatened).

61. Schechter, *supra* note 48, at 217 (footnote omitted). R. Emerson Dobash and Russell Dobash outline the legal ramifications for a woman who decided to get married:

To be a wife meant becoming the property of a husband, taking a secondary position in a marital hierarchy of power and worth, being legally and morally bound to obey the will and wishes of one's husband, and thus, quite logically, subject to his control even to the point of physical chastisement or murder.

Dobash and Dobash, *supra* note 56, at 33.

62. Pleck, *supra* note 54, at 230 n.12.

63. For a discussion on the Married Women's Property Acts, see Stephen B. Presser & Jamil S. Zainaldin, *Law and Jurisprudence in American History* 523-30 (2d ed. 1989) (citing Maxwell Bloomfield, *American Lawyers in a Changing Society* 92-99, 104-08, 112-22 (Harvard Univ. Press 1976)). Bloomfield states, "Married women

came a ground for divorce.<sup>64</sup> Such grounds were rarely relied on, however, because of the difficulty of proving each element of divorce.<sup>65</sup> According to historians, "[a] divorce on the ground of cruelty was likely only if the husband's misconduct was persistent and sufficiently serious to 'break down her health or render serious malady imminent.'"<sup>66</sup> It was not until the last decade of the 19th century that "the legal right of the English husband to restrain his wife's liberty by physical means may be said to have been completely abolished."<sup>67</sup>

### B. *The History of Violence Against Women in America*

As with other areas of law, English common law pertaining to marriage notably influenced early American law. Following English common law, men could use physical force to discipline their wives under the "rule of thumb."<sup>68</sup> According to the rule, a husband could beat his wife as long as his stick was "no thicker than his thumb."<sup>69</sup> Ironically, the rule of thumb was intended to protect women from "over-zealous husbands."<sup>70</sup> Although the rule was not specifically sanctioned in statutory form, the Mississippi Supreme Court in 1824 upheld a husband's

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secured a greater measure of economic (and ultimately social) independence with the passage of the Married Women's Property Acts in a majority of states."

64. See Dobash and Dobash, *supra* note 56, at 63.

65. See Schechter, *supra* note 48, at 217-18; see also Dobash and Dobash, *supra* note 56, at 63 ("It was . . . very difficult to get a conviction for assault and the standard of proof was often so high as to make a conviction almost impossible.").

66. Dobash and Dobash, *supra* note 56, at 63 (citation omitted).

67. *Id.* (discussing *Reg. v. Jackson*, an 1891 case) (citation omitted).

68. Terry Davidson, *Wife Beating: A Recurring Phenomenon Throughout History, in Battered Women: A Psychological Study of Domestic Violence* 18 (Maria Roy ed., 1977), cited in U.S. Comm'n on Civil Rights, *Under the Rule of Thumb 2* (1982) [hereinafter *Rule of Thumb*].

69. *The Battered Woman*, *supra* note 7, at 12; see also *Rule of Thumb*, *supra* note 68, at 1 (describing the fact that church men were encouraged to beat their wives). According to 15th century Rules of Marriage:

When you see your wife commit an offense, don't rush at her with insults and violent blows. . . . Scold her sharply, bully and terrify her. And if this still doesn't work . . . take up a stick and beat her soundly, for it is better to punish the body and correct the soul than to damage the soul and spare the body. . . . Then readily beat her, not in rage but out of charity and concern for her soul, so that the beating will redound to your merit and her good.

*Id.* at 1 (quoting Terry Davidson, *Conjugal Crime* 99 (1978) (passage attributed to Friar Cherubino of Siena's Rules of Marriage compiled between 1450 and 1481)).

70. Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense:" Towards a New Understanding*, 19 *Fordham Urb. L.J.* 567, 568 (1992) (discussing the historical background of violence against women).

Some authors view the first legitimate systematic protection for victims of domestic violence as having evolved in the 17th century Puritan communities of the Massachusetts Bay Colony. See, e.g., Pleck, *supra* note 54, at 17-18 ("Neighbors were expected to watch each other so that the sins of a few would not jeopardize the standing of the entire community in God's eyes. Disorderly families defiled the institution of the family; a husband who beat his wife . . . disgraced himself in the eyes of his neighbors.").

right to chastise his wife.<sup>71</sup> Similarly, in 1864, a North Carolina court concluded that, absent permanent injury or an excess of violence, a state should refrain from interfering in cases of "domestic chastisement."<sup>72</sup> In the early 19th century, spousal rape similarly was not considered criminal.<sup>73</sup>

In 1871, Alabama and Massachusetts became the first states to outlaw wife beating.<sup>74</sup> While most states made wife abuse illegal in the early twentieth century, it was not regarded as a "real" crime, and men were rarely prosecuted.<sup>75</sup> By the first decade of the 20th century, only thirty-five of the forty-six states had classified wife beating as criminal assault by legislative action.<sup>76</sup>

Although wife beating was not statutorily sanctioned in the United States, a review of American history reveals that the legal system provided women, especially married women, with few legal or political

71. *Bradley v. State*, 1 Miss. (1 Walker) 156, 158 (1824) (upholding the role of husband as disciplinarian and stating that the law should not upset that role); see also *Dobash and Dobash*, *supra* note 56, at 62.

72. *State v. Black*, 60 N.C. (Win.) 262, 263 (1864) (ruling that the "law permits [a husband] to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself"); *Dobash and Dobash*, *supra* note 56, at 62.

73. Rapists married to their victims were not prosecuted. See Martin D. Schwartz, *The Spousal Exemption for Criminal Rape Prosecution*, 7 Vt. L. Rev. 33, 35-38 (1982) (discussing the history of the spousal rape exemption). All states have now abolished the marital rape exemption. See, e.g., Alaska Stat. § 11.41.443 (repealed 1989); Me. Rev. Stat. Ann. tit. 17A, § 251 (West 1983 & Supp. 1994), § 252 (repealed 1989); Neb. Rev. Stat. §§ 28-319 to -320 (1989); N.Y. Penal Law § 130.15 (repealed 1974). Some states, however, retain a vestige of the marital rape exemption by treating it more leniently than sexual assault crimes that take place outside the marriage. See, e.g., Ariz. Rev. Stat. Ann. § 13-1406 to -1406.01 (1989 & Supp. 1994) (categorizing first offense sexual assault of spouse as a class six felony—subsequent offenses are class two felonies; first offense sexual assault of person not a spouse is a class two felony); Va. Code Ann. § 18.2-61 (Michie 1988) (codifying a ten day reporting requirement as well as requiring that for action to be maintained, spouses must be living apart or serious physical injury must have been caused).

For a detailed discussion of marital rape laws, see John D. Harman, *Consent, Harm, and Marital Rape*, 22 J. Fam. L. 423 (1984) (discussing the role of consent in marital rape reform); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 U. Fla. L. Rev. 45 (1990) (proposing federal law abolishing marital rape exemptions); Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 Harv. L. Rev. 1255 (1986) (arguing that marital rape exemption and marital rape laws violate the Fourteenth Amendment).

74. *Dobash and Dobash*, *supra* note 56, at 63.

75. See Blackman, *supra* note 3, at 2 (describing mate abuse as marginalized and not treated as a criminal offense); see also Allen Steinberg, *The Criminal Courts and the Transformation of Criminal Justice in Philadelphia, 1815-1874* (1982) (unpublished Ph.D. dissertation, Columbia University) (explaining that because wife beating was not specifically protected by actual legal statutes, many women did indeed take their husbands to court throughout the nineteenth century).

76. Sigler, *supra* note 55, at 9; see generally Pleck, *supra* note 54, at 6 (tracing the "ebbs and flows in attention to the social issue of family violence through different periods of American History").



rights.<sup>77</sup> For example, women could not vote until 1920.<sup>78</sup> Historically, women were forbidden from entering into contracts. The common law principle of "coverture" provided that a wife could not own property free from her husband's claim or control.<sup>79</sup> Many states prohibited women from becoming attorneys.<sup>80</sup> In custody disputes, courts presumed that a child's best interest was to live with her father, absent a compelling showing that the father did not have the financial capacity to care for his child.<sup>81</sup> Furthermore, as in several western countries, men could legally discipline their dependents, including

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77. William Blackstone, Commentaries, book I, ch. 15, at 145 (West 1897) ("By marriage, the husband and wife are one person in law, that is, *the legal existence of the woman* is suspended during marriage, or at least is incorporated into that of the husband, under whose protection and cover she performs everything." (emphasis added)).

Some late 19th century writers objected to the "political enfranchisement" of women claiming "it would weaken and finally break up and destroy the Christian family." Presser & Zainaldin, *supra* note 63, at 558-59 (citing Orestes A. Brownson, The Woman Question, Articles I and II, reprinted from XVIII The Works of Orestes A. Brownson 388-89, 403 (Henry F. Brownson, ed., 1885)). The dissolution of the family union was cited as a reason not to provide women with political rights:

Extend now to women suffrage and eligibility; give them the political right to vote and to be voted for; render it feasible for them to enter the arena of political strife, to become canvassers in elections and candidates for office, and what remains of family union will soon be dissolved.

*Id.* at 558.

78. U.S. Const. amend. XIX, § 1 (extending the right to vote to women); *see also* United States v. Anthony, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) (No. 14,459) (upholding a guilty verdict of a woman who was indicted under an act of Congress making it an offense for any person to vote for a representative without the legal right to vote).

79. *See* Black's Law Dictionary 366 (6th ed. 1990) (defining coverture and describing how the restrictions on a wife's legal capacity to own property were removed by state Married Woman's Property Acts).

80. *See, e.g.,* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (rejecting Myra Bradwell's claim that the Privileges and Immunities Clause of the U.S. Constitution, Article IV, § 2, guaranteed her the right to obtain a license to practice law). In a concurring opinion, Justice Bradley characterized the legal rights of women as practically nonexistent:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. . . . It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the Legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

*Id.* at 141-42 (Bradley, J., concurring).

81. *See, e.g.,* The People *ex rel.* Barry v. Mercein, 3 Hill 399, 423 (N.Y. 1842) (describing the current law favoring custody with a father as "in accordance with the law of God").

their wives.<sup>82</sup> Such discipline often included the use of corporal violence.<sup>83</sup> Arguably, because women lacked significant legal status, there were no laws prohibiting violence against women.

### C. *Modern Society: Reforming the Standards of the Past*

Economic and social changes over the last 150 years, including the emergence of women into the paid work force, have challenged male domination in society.<sup>84</sup> Laws now prohibit the existence of separate rules that explicitly disadvantage women.<sup>85</sup> While modern laws do not espouse the standards of the past, the struggle for the recognition and protection of women's equality in society is ongoing. Furthermore, the eradication of legal support for battering has not meant full enforcement of laws against battering.<sup>86</sup>

Battered women often find themselves in emergency situations relying on a police force that gives domestic discord calls a low priority.<sup>87</sup> Often, when police officers arrive at the scene of a domestic violence call, they are unwilling to arrest the batterer.<sup>88</sup> As one battered woman explained, "I called the police one time. They not only did not respond to the call, they called several hours later to ask if things had 'settled down.' I could have been dead by then!"<sup>89</sup>

Battered women traditionally have not only faced a lack of enforcement by police of crimes involving domestic violence, but also a lack of understanding in the courtroom: "The criminal justice system in its general nonresponsiveness to the plight of battered women merely re-

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82. See generally Rule of Thumb, *supra* note 68, at 2 (tracing the history of spousal abuse from pre-Biblical times to the present). Even when a wife was legally shielded from her husband's corporal abuse, he retained the right to "restrain the wife of her liberty in case of any gross misbehavior." See *Mercein*, 3 Hill at 402.

83. See Rule of Thumb, *supra* note 68, at 2.

84. See generally Schechter, *supra* note 48, at 227 (presenting the struggles and accomplishments of the battered women's movement).

85. For example, Title VII of the Civil Rights Act of 1964 explicitly proscribes discrimination based on a person's sex. The statute provides: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a)(1) (1988).

86. For an example of how battered women often have trouble convincing the authorities to enforce laws in the context of domestic violence, see *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1521 (D. Conn. 1984) (acknowledging that "the police consistently afforded lesser protection when the victim" of abuse was a woman assaulted by a spouse or a boyfriend).

87. Del Martin, *Battered Wives* 92-93 (1981) (discussing the fact that police are slow to respond to domestic violence calls and often do nothing when they do show up).

88. *Id.* at 93 (outlining the Police Training Academy of Michigan's procedure for handling domestic calls); see also *Battered Women* 35 (Donna M. Moore ed., 1979) (quoting a battered woman on the police response to her call for help).

89. *Battered Women*, *supra* note 88, at 35.

flects the views held in the society at large."<sup>90</sup> Before courts were willing to admit expert testimony on the battered woman syndrome,<sup>91</sup> a battered woman who fought back against her batterer had to craft a defense to her actions that fit within the traditional legal notions of justification or excuse.<sup>92</sup> As one feminist scholar explains:

Substantive criminal law fails to account adequately for homicides committed by women that do not fit the traditional male-patterned homicide. A woman's acts might be understandable in light of mitigating facts, yet may fall outside of substantive criminal law doctrines such as passion and provocation, self-defense, insanity, and so-called diminished capacity. She is forced to engineer a way to present her reality within the confines of a structure that excludes her life experience.<sup>93</sup>

A battered woman, thus, had to attempt to portray her alleged crime in a way that did not account for the particular dynamics of her life.

Without the option to explain her behavior in the context of the battered woman syndrome, a battered woman criminal defendant was forced to rely on traditional rules of evidence to admit testimony about the specific dynamics of a battering relationship. Dr. Walker has explained why such restrictions are particularly devastating to a battered woman's case:

There is a fundamental difference between the way women tell of their battering experiences and what is permitted under the male-identified rules of evidence. Women tend to tell of the events in question rooted in their context, by weaving a tale of patterns of events and feelings in the context of how they happened. Rules of evidence call for the recitation of discrete events separated from feelings or opinions. Facts out of context may be acceptable, but they do not convey the battered woman's experience. Expert witnesses can tie together what the current evidentiary rules do not allow the defendant to say. Until feminist legal scholars argue for and attain reform in the rules of evidence, a battered woman will be constrained from putting her case in front of the trier of fact.<sup>94</sup>

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90. *Id.* at 80.

91. See *infra* part II (outlining the psychological component of the battered woman syndrome).

92. See Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. Ill. L. Rev. 45, 45 (1994) (detailing the "conflict inherent in demonstrating the 'reasonableness' of the defendant's actions through the premise that she was psychologically impaired").

93. Laura E. Reece, *Women's Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA Women's L.J. 53 (1991) (citations omitted).

94. Lenore E. Walker, *A Response to Elizabeth M. Schneider's Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 Women's Rts. L. Rep. 223-24 (1986).

When courts began to admit expert testimony on the battered woman syndrome,<sup>95</sup> battered women had an option to rely on expert testimony directed solely to the phenomenon of intimate violence.<sup>96</sup>

Despite the increased awareness of the particular dynamics of battering relationships in both a social and legal context, traditional female stereotypes have not completely disappeared.<sup>97</sup> Today, society is increasingly aware of the extent of domestic violence,<sup>98</sup> and laws no longer sanction violence against women.<sup>99</sup> Interfamilial abuse is generally viewed as a social and legal problem, not a private one.<sup>100</sup> In many ways, society has recognized its responsibility and developed programs to help victims of spousal abuse.<sup>101</sup> But there is still work to be done.

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95. See *infra* note 208 (listing cases where expert testimony on the battered woman syndrome was ruled admissible).

96. See *infra* part III (discussing the use of the battered woman syndrome in court). But see Schopp, *supra* note 92, at 46 (arguing that the "battered woman syndrome may become a new stereotype if expert testimony regarding the syndrome becomes so closely associated with self-defense by battered women that these defendants must establish that they suffer from the syndrome in order to substantiate a defense").

97. See Dowd, *supra* note 70, at 570. As one author notes:

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

*Id.*

98. Sigler, *supra* note 55, at 1-2 (explaining the present climate surrounding mate abuse as a result of decreased public acceptance of domestic violence and the increased willingness to allow intervention).

99. See *supra* notes 74-76 and accompanying text.

100. See Blackman, *supra* note 3, at 1-27 (discussing intimate violence as changing from a private to a public problem); Jane O'Reilly, *Wife Beating: The Silent Crime*, Time, Sept. 5, 1983, at 23 (describing the problem of mate abuse as no longer viewed as inevitable and private, and attributing the change, in part, to society's changing views of women's roles and rights). But see Margolick, *supra* note 1, at A14 (reporting on the events surrounding O.J. Simpson's arrest in 1989 for abusing his wife). As reported, "When [police officer Edwards] moved to arrest Mr. Simpson, . . . Mr. Simpson dismissed the episode as a 'family matter.'" *Id.*

101. See, e.g., Steven M. Morgan, *Conjugal Terrorism: A Psychological and Community Treatment Model of Wife Abuse* 42-54 (1982) (presenting two model programs developed to assist abused women); Lucile Cantoni, *Family Trouble Clinic: Family Service of Detroit and Wayne County, in Battered Women and Their Families* 129 (Albert R. Roberts, D.S.W. ed., Springer, 1984) (discussing a service for women which illustrates an effective police/social work cooperative effort to combat family violence); V.C.P. Batterer's Intervention Program, class discussion with participants of the Fordham School of Law Domestic Violence Clinic, including this author (Feb. 21, 1995) (discussing the necessity of community involvement in an effort to stop violence against women).

As the public increasingly acknowledges the pervasiveness of domestic violence in America—in part, as a result of wide-scale media attention to the issue—the need to address specific concerns of battered women has increased. Such need is evidenced by increased calls to domestic violence hotlines,<sup>102</sup> growing dockets in family courts and other forums designed to combat spousal abuse, and the existence of domestic violence task forces in local police precincts, specifically created to handle the increased number of domestic violence calls.<sup>103</sup> Statistics show that, despite the media attention given to a woman who kills her allegedly abusive husband, very few women in abusive relationships fight back.<sup>104</sup>

Many advocates for battered women assert that violence against women, particularly spousal abuse, is caused, in part, by an unwillingness to challenge historical values regarding the nature of the traditional American family and American society.<sup>105</sup> Thus, advocates' efforts to eliminate spousal abuse have included not just programs designed to give greater legal and social support to battered women, but also challenges to the fundamental causes of violence by: researching why battered women act in certain ways;<sup>106</sup> theorizing about the root causes of violence against women and how to prevent such

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102. See, e.g., Reilly, *supra* note 10, at B5 (citing the executive director of an agency that serves victims of family violence who estimates that "there [has been] an upswing of almost 30% in new callers to the agency since the Simpson trial began").

103. See, e.g., Rudolph W. Giuliani & William J. Bratton, Police Strategy No. 4: Breaking the Cycle of Violence 8-9 (Apr. 26, 1994) (outlining the new New York City Police Department policy on domestic incidents, including the mandate to: "track and record all calls for domestic incidents"; "refocus department resources"; "revise the department's directives and procedures"; and "revise and expand training").

104. It is estimated that of the 1.4 to 6 million women who are beaten by an intimate partner each year, only 800 to 1000 will be charged with the murder of their companion. See Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 Ohio St. L.J. 363, 366 & n.16 (1992) (citing to a study by the National Clearinghouse for Defense of Battered Women); see also O'Reilly, *supra* note 100, at 23 (reporting that of the nearly six million women abused by their mates, 2000 to 4000 will be beaten to death). See generally *No More! Stopping Domestic Violence*, *supra* note 3, at 1-65 (addressing the issue of domestic violence from a feminist perspective and setting forth statistics about the pervasiveness of the problem).

105. See Murray A. Straus & Richard J. Gelles, *Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families* at xvii (1989) (explaining the impetus for writing books on the subject of domestic violence, including the desire "to show that the major cause of these tragedies is to be found in the nature of the American family and American society, and to make clear that it is within our power to change . . . spouse abuse"); see also Hofeller, *supra* note 49, at 49-79 (outlining the historical precedents for wife beating and the social factors that currently contribute to such abuse).

106. For examples of works discussing research regarding why battered women act in certain ways, see the following: Edward W. Gondolf & Ellen R. Fisher, *Battered Women as Survivors: An Alternative to Treating Learned Helplessness* 11-25 (1988); *The Battered Woman*, *supra* note 7, at 42-70; Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191 (1993).

violence,<sup>107</sup> establishing support mechanisms for victims of domestic violence,<sup>108</sup> and educating the public about the pervasiveness of domestic violence in society.<sup>109</sup> In the legal arena, advocates have been working to have the experiences of battered women reflected in the substantive and procedural law,<sup>110</sup> and the idea that battered women's experiences may be used by a defendant-batterer to escape responsibility for his actions is a tragic irony.

## II. THE BATTERED WOMAN SYNDROME

This part outlines the theory known as the battered woman syndrome—a psychological illustration of the impact of prolonged spousal abuse. There are two elements to the theory: a cycle of varying degrees of violence in abusive relationships, and a phenomenon described as “learned helplessness” that is observed in victims of domestic abuse. This part initially describes the numerous myths about battered women. Dr. Walker formulated the battered woman syndrome, in part, in an effort to dispel such myths and to understand better the responses to prolonged spousal abuse.

### A. *Myths About Battered Women*

When a battered woman is scrutinized in a legal arena, whether as a defendant or as a witness for the prosecution, she must face the prospect that jurors and judges may view her actions as counter-intuitive. Such fact finders may rely improperly on stereotypes or myths about

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107. For examples of books that address the root causes of violence, see Richard J. Gelles & Claire P. Cornell, *International Perspectives on Family Violence* (1983) and Pleck, *supra* note 54. See also Martin Blinder, M.D., *Lovers, Killers, Husbands and Wives* (1985) (describing through case studies the unconscious psychodynamics of homicide and discussing the function of psychiatric testimony within the American criminal justice system).

108. See, e.g., Jennifer B. Fleming, *Stopping Wife Abuse: A Guide to the Emotional, Psychological, and Legal Implications for the Abused Woman and Those Helping Her* (1979) (furnishing insight, information, skills and knowledge to people who want to provide help to battered women); Hofeller, *supra* note 49, at 103-13 (outlining how to best combat wife abuse).

109. See, e.g., Mildred D. Pagelow, *Woman-Battering: Victims and Their Experiences* (Sage Library of Social Research 1982); Murray A. Straus et al., *Behind Closed Doors: Violence in the American Family* (1980) (presenting some of the main findings of research into family violence in an effort to make the general public aware of the many incidents and psychological consequences of physical abuse); see also Straus & Gelles, *supra* note 105 (compiling various articles on domestic violence specifically for the scholarly reader).

110. See *infra* part II; see also Roberta Flowers, *Does it Cost Too Much? A 'Difference' Look at J.E.B. v. Alabama*, 64 *Fordham L. Rev.* (forthcoming Nov. 1995) (criticizing the holding in *J.E.B.* and advocating for allowing gender to be a factor in the jury selection process); Elizabeth Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 *Women's Rts. L. Rep.* 195, 214 (1986) (discussing the emergence of the difference approach, which allows juries to take into account the different “experiences and perceptions” of battered women).

battered women when determining the reasonableness of her behavior. Despite a growing awareness of the domestic violence epidemic that plagues our society, many people still question why a battered woman does not leave an abusive relationship after the first violent episode.<sup>111</sup> Many people have difficulty understanding why battered women do not fight back, walk out, call the police after each incident, go to the hospital, or reveal the abuse to friends or family members.<sup>112</sup>

Because of the failure to understand why battered women do not leave an abusive relationship, many myths surround "the battered woman."<sup>113</sup> A battered woman is often perceived as a masochist<sup>114</sup> or as someone who deserves to be hit because she provoked her husband. Yet, she is also faulted for not aggressively prosecuting her batterer, and is criticized for not availing herself of an opportunity to have her husband arrested and put in jail.<sup>115</sup> Other myths suggest that many women are not truly subjected to severe violence, but tend to exaggerate the extent of the abuse. Many believe that spousal abuse only occurs among lower socio-economic groups,<sup>116</sup> that a battered woman generally has a past history of interfamilial abuse,<sup>117</sup> that a battered woman will remarry another violent man,<sup>118</sup> or that a woman is prone to use false accusations against her husband to gain a personal benefit

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111. See, e.g., Diana Patton, "He Never Hit Me"—*The Need for Expert Testimony in Domestic Violence Cases*, Ariz. Att'y (State Bar of Arizona), Jan. 30, 1994, at 10 (discussing the various myths held by the public that an expert witness should dispel at trial: (1) the victim is a masochist; (2) the woman provoked or deserved the beating; and (3) the battered woman is free to leave the battering situation at any time).

112. Although people often do not understand why a woman is seemingly passive to the hand of her abuser, many juries are reluctant to acquit a woman who does fight back and subsequently kills her attacker. See Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 973 (1995) (documenting the number of women who have been jailed for killing a partner who physically assaulted them).

113. In her book, *The Battered Woman*, *supra* note 7, at 18-35, Dr. Walker also discusses a series of myths associated with battered women and the characteristics of those women:

The myths included beliefs that battering was not widespread; that it did not happen to middle-class white women; that battered women were masochists; that they could leave their batterers at any time; and that such women deserved to be beaten. Among other things, the women themselves were said to suffer from low self-esteem, to harbor traditional values about relationships, to accept responsibility for the abuse and to believe they were isolated.

Dowd, *supra* note 70, at 573 (citations omitted) (discussing Lenore Walker's work).

114. Hofeller, *supra* note 49, at 2 (discussing the many myths and stereotypes that exist about wife abuse in the context of three case studies).

115. See *id.*

116. *Id.*

117. *Id.*

118. *Id.* at 3.

such as custody of the couple's children, a favorable divorce settlement, or a "convenient" justification for homicide.<sup>119</sup>

Advocates in the battered women's movement have worked diligently for the past twenty years to dispel the above myths about battered women.<sup>120</sup> As a result of these efforts, public awareness of domestic violence has increased, and many legislative and judicial reforms have been enacted to combat violence against women.<sup>121</sup> Yet, while awareness of the problem of domestic violence has increased,<sup>122</sup>

119. Most commonly made statements about battered women and domestic violence are considered false. See *id.* (highlighting various myths and asserting that "[e]ach of these statements is false—a common misconception about wife abuse.").

120. People who are unaware of the research concerning battered women and the root causes of domestic violence are not the only ones to espouse such myths. As one researcher noted, "the researcher in the field soon becomes acquainted with common myths and stereotypes subscribed to by many in the general population, the helping agencies, and the criminal justice system." Pagelow, *supra* note 109, at 54.

Researcher Mary Daley Pagelow outlines and explores some myths and stereotypes about battered women, and compares them to actual data:

- (1) "These are pathological individuals"
  - (A) Masochistic women
  - (B) Weak women
  - (C) Batterer is "sick"
  - (D) Recidivists—the women "seek out" the batterers
- (2) "But what did she do to provoke him?"
  - (A) Justified force: He is a victim of nagging
  - (B) Battered women must somehow be at fault
- (3) "Why did she stay?"
  - (A) Why complain now? (revenge-seeking)
  - (B) What did she "get out of" the relationship?
  - (C) Trade-off for "meal ticket"
- (4) "But they never press charges"
  - (A) Frustrations of the criminal justice system
  - (B) Weak-willed women do not follow through
- (5) "The problem is restricted to the lower classes."

*Id.* Despite the fact that the myths are widely held, most have been found to be incorrect empirically. According to Pagelow, "Based on quantitative survey data supplemented by qualitative data that enriches understanding, the investigator finds these popular assumptions are generally untrue." *Id.* at 87.

The fact that many myths receive "popularity and public acceptance serves to victimize the victims further by stigmatizing them or helping to keep them locked in their violent relationships." *Id.* at 88.

121. See *infra* note 208 (listing state court cases that have allowed evidence of battered woman syndrome); see also *supra* note 103 (citing to New York City's recent adoption of a police strategy to help break the cycle of domestic violence). Judicial reforms include recent decisions holding police departments liable for inadequate protection of battered women. See, e.g., *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527 (D. Conn. 1984). In *Thurman*, the plaintiffs, a battered woman and her son, brought an action in federal court pursuant to 42 U.S.C. §§ 1983, 1985, 1986, and 1988, as well as the Fifth, Ninth, and Fourteenth Amendments to the Constitution, alleging that their constitutional rights were violated by the nonfeasance or malfeasance of various official duties by the defendant police force. *Id.* at 1524.

122. Unfortunately, even the increased awareness is limited. The public's perception of the issue comes directly from high profile media cases involving severe abuse such as Hedda Nussbaum or Tracey Thurman. See, e.g., *Thurman*, 595 F. Supp. at 1524-26; see also *People v. Steinberg*, 595 N.E.2d 845, 848 (N.Y. 1992), *aff'g*, 170



an understanding of the psychology of battered women has not necessarily followed.

### B. *Psychological Explanations of the Effect of Prolonged Abuse on Battered Women*

The need to understand the psychological responses to battering is heightened as society becomes more aware of the prevalence of domestic violence. Recent studies regarding the pervasiveness of domestic violence in America suggest that between four million and six million incidents of domestic violence against women occur each year.<sup>123</sup> According to a study by the Federal Bureau of Investigation,

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A.D.2d 50 (N.Y. App. Div. 1991) (upholding defendant's conviction for manslaughter in the death of his adopted daughter Lisa Steinberg). Less severe cases of abuse also result in psychological phenomena, but are less widely acknowledged.

123. *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 117 (1990) (testimony of Angela Browne, Ph.D.); see also sources cited *supra* note 104.

In the introduction to the 1979 book, *Battered Women*, Donna Moore lists a series of statistical data collected from around the country. While acknowledging that "the data are haphazard," she summarizes selected data "as an indication of the scope of battering" in this country. Donna M. Moore, *Editor's Introduction: An Overview of the Problem*, in *Battered Women* 7, 13-14 (Donna M. Moore ed., 1979). The data are as follows:

Kansas City, Missouri, 1976. The Police Department revealed that 90% of the city's family homicides had been preceded by at least one call to the Police Department, and in 50% of those cases the police had been called five or more times.

Washtenaw County, Michigan. Thirty-five percent of all assault cases are wife assault.

Dade County, Florida. Over a nine-month period, 1,000 cases of battered women were handled.

Montgomery County, Maryland. The Wife Assault Task Force handled 650 incidents during its first year of operation.

Michigan. One county reported 42.4% of all assault complaints in a five-month period were wife assault.

Brooklyn Legal Services, 1976. Fifty-seven percent of the women filing for divorce complained of physical assaults for approximately four years before seeking divorce.

Cleveland, Ohio, 1971. Thirty-seven percent of females filing for divorce complained of physical abuse when filing.

Marvin E. Wolfgang studied 588 cases of criminal homicide in 1958 and concluded that 87% of all female victims were slain by males and 84% of female offenders slew males. The predominant reasons for such murders were sex, love, and family matters. Wolfgang stated that slayings with excessive degrees of violence predominate in the home and are most likely to involve a spousal relationship in which the wife is the victim of the husband's brutal beating.

Donald T. Lunde reported in *Psychology Today* in 1975 that approximately 40% of homicides in the United States are spouses killing spouses.

Nationwide estimates predict that up to 60% of American families will experience interspousal violence during the course of a relationship.

The latest study by Straus et al. found violence in 28% of all American families. Lenore Walker estimates that violence occurs between 50% of all American marital partners.

a woman is beaten every eighteen seconds.<sup>124</sup> The Surgeon General maintains that domestic violence is the leading cause of injury to women within certain age brackets.<sup>125</sup> Many commentators suggest that more women in the United States are injured by their husbands or boyfriends than are injured by rape, muggings, and car accidents combined.<sup>126</sup>

There are numerous psychological and sociological studies documenting the effect of persistent abuse on the victims of domestic violence.<sup>127</sup> The theory most frequently relied upon in criminal cases is Dr. Lenore E. Walker's "battered woman syndrome."<sup>128</sup> Dr. Walker theorizes that many battered women suffer from distinct psychological and behavioral symptoms as a result of relationships in which they are subjected to physical, psychological, or sexual abuse over a prolonged

Nationwide, the FBI estimates that wife abuse occurs three times as frequently as sexual assault, and they further estimate that it is reported less than 10% of the time. This would mean that wife abuse occurs approximately every 18 seconds somewhere in the United States.

*Id.* (citations omitted).

124. *Id.* at 14.

125. *Developments in the Law—Legal Responses to Domestic Violence*, 106 Harv. L. Rev., 1498, 1501 (1993) (citing Antonia C. Novello, *From the Surgeon General, U.S. Public Health Service*, 267 JAMA 3132, 3132 & n.4 (1992)) ("[A] recent study found violence to be the 'leading cause of injuries to women ages 15 through 44 years.'").

126. Nancy Gibbs, *'Til Death Do Us Part*, Time, Jan. 18, 1993, at 38, 41 (discussing the pervasiveness of domestic violence as well as battered women's lack of choices and the public and prosecutorial resistance to legal and social reform).

127. See *infra* part IV.B (describing an alternative theory of the psychological effects of domestic violence). See generally Sharon A. Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA Women's L.J. 191 (1991) (redefining the battered woman syndrome to take into account women's diverse cultural distinctions); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191 (1993) (redefining the battered woman syndrome due, in part, to the fact that battered women have diverse psychological realities that can not be limited to one particular profile); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991) (discussing "battering as a struggle for power and control and show[ing] how legal analysis can help reveal the control issue by naming separation assault and building litigation strategies to redefine the issue of separation"); Elizabeth M. Schneider, *Hearing Women Not Being Heard: On Carol Gilligan's Getting Civilized and the Complexity of Voice*, 63 Fordham L. Rev. 33, 34 (1994) ("I have explored the difficulties that the concept of 'battered woman syndrome' poses because it is misheard or misunderstood 'as reinforcing stereotypes of women as passive, sick, powerless and victimized.'" (citation omitted)).

128. See generally *The Battered Woman*, *supra* note 7 (describing Dr. Walker's theory); *The Battered Woman Syndrome*, *supra* note 8 (same).

The battered woman syndrome is arguably the most widely recognized theory in the context of a battered woman's criminal trial because it provides a viable explanation to accompany her claim of self-defense. See *infra* part II.B.1 (outlining why battered women act in certain ways as a result of prolonged abuse); see also *supra* note 19 (discussing the requisite standard to support a claim of self-defense). It is important to recognize that there are other viable explanations of the behavior and state of mind of battered women which can also be relevant to certain legal assertions. One such theory is the survivor theory. See discussion *infra* part IV.B.

period of time.<sup>129</sup> For example, the *Diagnostic & Statistical Manual of Mental Disorders IV* acknowledges that domestic battering may trigger symptoms of post-traumatic stress disorder.<sup>130</sup> Such acknowledgement is consistent with Dr. Walker's findings according to the battered woman syndrome.

### 1. Components of the Battered Woman Syndrome

There are two distinct elements to the battered woman syndrome: first, the abusive relationship follows a cycle of violence;<sup>131</sup> and, second, the victim exhibits symptoms of a phenomenon known as "learned helplessness."<sup>132</sup> According to the syndrome, the term "battered woman" describes a woman who suffers violence at the hand of her partner, yet remains in the relationship despite repeated incidents of abuse.<sup>133</sup> While the battered woman syndrome outlines the common characteristics shared by battered women, the theory does not assert that distinct character traits exist in women before the abuse occurs that make certain women prone to such abuse.<sup>134</sup> Rather, it is impossible to predict who may or may not become a battered woman

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129. Terrifying Love, *supra* note 8, at 42-47; The Battered Woman Syndrome, *supra* note 8, at 95-97; see also Susan Murphy, *Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome*, 25 Colum. J.L. & Soc. Probs. 277, 295 (1992) (summarizing the dynamics of Dr. Walker's "battered woman syndrome").

130. American Psychiatric Association, *The Diagnostic & Statistical Manual of Mental Disorders* 425 (4th ed. 1994). The *Diagnostic & Statistical Manual of Mental Disorders* is a compilation by the American Psychiatric Association of symptoms of a wide range of recognized psychological disorders. See also *Bechtel v. State*, 840 P.2d 1, 6-7 (Okla. Crim. App. 1992) (recognizing battered woman syndrome as an implied sub-category of Post-traumatic Stress Disorder in the *Diagnostic & Statistical Manual of Mental Disorders III*).

131. Terrifying Love, *supra* note 8, at 42.

132. *Id.* at 50-51.

133. Lenore E. Walker, *Battered Women and Learned Helplessness, in Women and the Law* 601, 601 (Mary Joe Frug ed., 1992). As one commentator explains, battered women are not distinctly recognizable as such:

The "typical" battered woman is not an uneducated woman living in poverty. Rather, battered women are found in all age groups, races, income levels, and educational backgrounds. The similarities are found in their values and attitudes. They usually have a poor self-image and low self-esteem. Battered women often state that they feel at fault for not being able to stop their batterer's behavior and blame themselves for their failing relationship with the batterer. Unfortunately, guilt and shame often prevent them from seeking outside help.

Jeanne-Marie Bates, Comment, *Expert Testimony on the Battered Woman Syndrome in Maryland*, 50 Md. L. Rev. 920, 925-26 (1991) (citations omitted); see *supra* note 3 (defining battered women as used in this Note).

134. The Battered Woman, *supra* note 7, at 58. Dr. Walker describes the distinction between women who have been battered and those who have not: "Most women in a sexist society experience similar battering incidents. The difference between most women and battered women is that the battered woman is more prone to the learned helplessness syndrome; she has learned that she is powerless to prevent [further violence]." *Id.*

in the future, and any woman has the potential to become a battered woman should she find herself in a relationship with an abusive partner.<sup>135</sup>

The term "battered woman syndrome" refers to a psychological explanation of the process of victimization of battered women. Dr. Walker, who first introduced the syndrome in her 1979 book, *The Battered Woman*, defines the battered woman syndrome as a discernible pattern of psychological and behavioral symptoms observed in women living in abusive relationships.<sup>136</sup> The author posits that, after prolonged spousal abuse, a battered woman has a psychological inability to leave the abusive relationship with the batterer; the "rationale is the construct of learned helplessness."<sup>137</sup>

135. Such an assertion is understandably difficult for many women who have never been victims of domestic violence to comprehend or believe. See Deborah Ann Klis, *Reforms to Criminal Defense Instructions: New Patterned Jury Instructions Which Account for the Experience of the Battered Woman Who Kills Her Battering Mate*, 24 Golden Gate U. L. Rev. 131, 133-37 (1994) (citing both a California and a New Jersey case that each discussed expert testimony on the battered woman syndrome). According to one definition of a battered woman:

Battered women include wives or women in any form of an intimate relationship. In order to be classified as a battered woman, the couple must go through the battering cycle at least twice. If the woman remains in the relationship after the second incident, she is defined as a battered woman.

*Id.* at 137; see also *The Battered Woman*, *supra* note 7, at xv (defining a battered woman as a woman who is "repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men."). But see Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work On Woman-Abuse*, 67 N.Y.U. L. Rev. 520, 530 (1992). Schneider states:

First, in contrast with other descriptions of harm to women, "battered woman" describes the victim and focuses on her qualities. A woman is—or is not—a "battered woman." The phrase is reductive in that it totally defines the life experience of the particular woman: a "battered woman" is nothing more than a "battered woman."

*Id.*

136. Terrifying Love, *supra* note 8, at 4. Dr. Walker developed her theory of battered woman syndrome through research funded by the National Institutes of Mental Health and conducted at the Battered Woman Research Center in Denver, Colorado. *Id.* at 8. Her research involved interviews with 400 battered women who had experienced 1600 battering incidents. See *infra* note 138 (discussing Dr. Walker's research).

137. Walker, *supra* note 133, at 601. See discussion *infra* part II.B.1.b.

Learned helplessness is a theory that was first developed by experimental psychologist Martin Seligman in experiments with dogs and other animals. The Battered Woman, *supra* note 7, at 45-46. Dr. Walker describes Seligman's research in the following way:

Seligman and his researchers placed dogs in cages and administered electrical shocks at random and varied intervals. These dogs quickly learned that no matter what response they made, they could not control the shock. . . . When nothing they did stopped the shocks, the dogs ceased any further voluntary activity and became compliant, passive, and submissive.

*Id.* at 46.

a. *Cycle of Violence*

Dr. Walker discovered a three phase "cycle of violence" in many of the cases of the battered women she studied.<sup>138</sup> The distinct phases include a period of tension building and an "acute battering incident" followed by a "calm loving respite" or honeymoon period.<sup>139</sup> The distinct phases she observed varied in length and intensity depending on the individuals involved.<sup>140</sup>

The initial tension building phase includes verbal abuse and minor battering incidents.<sup>141</sup> Minor incidents include slaps, pinches, and verbal and psychological abuse.<sup>142</sup> During this phase, the woman typically tries to pacify her abuser by using calming techniques that have proven successful in the past.<sup>143</sup> She may try to be especially kind, or merely attempt to keep out of the batterer's way.<sup>144</sup> The woman's primary objective during the tension building phase is to prevent the escalation of violence.<sup>145</sup> Because the woman appears passive during this stage, the batterer is not forced to control his behavior and his abusiveness is reinforced.<sup>146</sup>

The second phase begins when the violence and verbal abuse erupt into an acute battering incident. This phase is "characterized by the uncontrollable discharge of the tensions that have built up during phase one."<sup>147</sup> It is during this stage in the cycle that women are sub-

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138. The Battered Woman, *supra* note 7, at 55. Dr. Walker stated that her original research did not conclude that battering was constant in abusive relationships, but neither was the violence as random as people believed. "Rather, there was a definite pattern seen in two-thirds of the 1,600 battering incidents reported by the 400 women interviewed for the research study." Walker, *Syndrome and Self-Defense*, *supra* note 8, at 330 (footnotes omitted); see also Charles J. Aron, *In Defense of Battered Women Is Justice Blind? The Federal Justice System Often Ignores a Woman's Troubled Past*, Hum. Rts., Fall 1993, at 14, 14 (section of Individual Rights and Responsibilities of the American Bar Association). Dr. Walker is quoted in the article:

[N]early half of the women currently in prisons across the country have been battered and "committed the crime for which they are being punished to avoid further beating. Forging checks to pay his bills, stealing food or other items that he denied the children, selling drugs to keep his supply filled, hurting someone else so he didn't hurt her, were all acts committed under the control of the batterer's threat of or actual violence."

*Id.*

139. The Battered Woman, *supra* note 7, at 55.

140. *Id.*

141. *Id.* at 56.

142. *Terrifying Love*, *supra* note 8, at 42.

143. The Battered Woman, *supra* note 7, at 56; see also *infra* notes 290-99 and accompanying text (explaining the sort of coping behavior described by Dr. Walker in the context of a woman's continuous attempts to survive in the face of severe abuse, rather than as exhibiting traits of learned helplessness).

144. *Terrifying Love*, *supra* note 8, at 42.

145. *Id.* at 43.

146. See *id.* Dr. Walker describes a woman's desire to prevent escalating violence as a "double-edged sword." While she may delay more severe violence, her passivity is interpreted to legitimize the batterer's belief that he has the right to hit her. *Id.*

147. The Battered Woman, *supra* note 7, at 59.

jected to brutal violence and suffer the most severe injuries.<sup>148</sup> If a woman is killed by her batterer, it will generally happen during this phase of violence.<sup>149</sup> Phase two incidents usually last from two to twenty-four hours.<sup>150</sup> The violence during this phase is described as unpredictable, yet inevitable.<sup>151</sup> From the woman's perspective, phase two is a time of constant fear and sense of danger.<sup>152</sup> Most women are aware that their batterer's violence is uncontrollable, and believe that any attempt to reason with him would be futile.<sup>153</sup> Thus, many women try to protect themselves and mitigate the abuse by not resisting the batterer's violence.<sup>154</sup>

The third phase involves a tranquil period of loving contrition in which the batterer exhibits apologetic and conciliatory behavior.<sup>155</sup> He is affectionate and tends to act in ways that resemble his attitude when the couple first met and fell in love.<sup>156</sup> The woman experiences a sense of relief, often believing his promise that he will "never do it again."<sup>157</sup> This stage of the cycle is particularly invidious because the batterer, acting like a model husband, fools both the outside world

148. See *id.* at 59-65. Although many women are seriously injured during this phase, they often wait days to seek medical treatment. *Id.* at 63. Some do not seek help at all. *Id.* at 64.

149. See *Terrifying Love*, *supra* note 8, at 43. It is the above pattern of violence that defense attorney Johnnie L. Cochran Jr. stated Dr. Walker did not find in the relationship between O.J. Simpson and Nicole Brown Simpson. See *supra* note 38 (discussing Cochran's opening statement).

150. *The Battered Woman*, *supra* note 7, at 60.

151. *Id.* at 60-61.

152. See *id.* at 60.

153. *Id.* at 62.

154. *Terrifying Love*, *supra* note 8, at 44. In her original study, Dr. Walker reports that many women stated that they would often attempt to provoke an acute battering incident. Dr. Walker explains that "[w]hen this occurs, the couple usually has been involved in battering behavior for a long period of time. The woman often senses that the period of inevitability is very close, and she cannot tolerate her terror, her anger, or anxiety any longer." *The Battered Woman*, *supra* note 7, at 60. The woman is also aware that the next phase of calm will follow the acute battering incident. *Id.*

To note, not all battered women respond by remaining passive during this phase of violence. As is evidenced by the reliance on the battered woman syndrome in the prosecution of women for killing their abusive partners, the theory is applicable to those women as well. See *infra* note 208 (listing court cases where battered woman syndrome evidence has been ruled admissible).

155. *Terrifying Love*, *supra* note 8, at 44. Batterers often promise they will never be violent again and beg for forgiveness. *Id.* Women frequently convince themselves that this time he has truly changed. *Id.* at 45; see also *The Battered Woman*, *supra* note 7, at 65-70.

156. *Terrifying Love*, *supra* note 8, at 45. Understandably, many batterers are viewed by those who know them as model husbands—making it all the more difficult for battered women to break free of the continued brutality.

The fact that, at this stage, batterers do act like doting husbands, and not like violent abusers, argues against an expert's proclamation that a defendant-batterer does not fit the profile of an abusive husband. See *infra* part IV.C (discussing the need for psychological research on men who batter).

157. *Terrifying Love*, *supra* note 8, at 45.

and his wife into believing that he has changed. According to experts, while the woman is relieved that the abuse has abated, "It is in this phase of loving contrition that the battered woman is most thoroughly victimized psychologically."<sup>158</sup> Inevitably, the psychological abuse intensifies, and the cycle of violence recurs.<sup>159</sup>

Dr. Walker theorizes<sup>160</sup> that the cyclical nature of battering may explain why a battered woman does not simply leave her abuser: "Understanding this cycle is very important if we are to learn how to stop or prevent battering incidents. This cycle also helps explain how battered women become victimized, how they fall into learned helplessness behavior,<sup>161</sup> and why they do not attempt to escape."<sup>162</sup> Often the woman is genuinely convinced her mate will change his abusive behavior.<sup>163</sup> Typically, he does not.<sup>164</sup> Regardless of whether she believes him, a woman's response to the cycle of violence varies. The responses of battered women range from silence to denial to demoralization and degradation.<sup>165</sup> The latter response is more likely to occur after many cycles, as the woman realizes she has once again been fooled by her batterer into believing he will change.<sup>166</sup>

158. *Id.* Specifically, Dr. Walker explains that women and their batterers become extremely emotionally dependent upon one another. Both may perceive death as preferable to separation. Moreover, many women do not leave because they feel that they are ultimately responsible for their batterer's stability. The women's assessment of their significance to the batterer is not unfounded. In one study cited by Dr. Walker, 10% of the batterers committed suicide after the women finally left. *Id.*

159. *See supra* note 3 and accompanying text (suggesting that in order to be classified as a battered woman, the couple must go through the battering cycle at least twice).

160. Although Dr. Walker was the first to formulate the battered woman syndrome, many authors have written on and attempted to expound upon the syndrome. *See discussion infra* note 167 (listing various works on the phenomenon of battering); *see also* Allard, *supra* note 127 (offering a redefinition of the battered woman syndrome); Dutton, *supra* note 127 (same).

161. *See infra* part II.B.1.b (discussing the phenomenon of learned helplessness).

162. The Battered Woman, *supra* note 7, at 55.

163. *See id.* at 67. "The battered woman wants to believe that she will no longer have to suffer abuse." *Id.* In order to allow herself to believe the batterer will change, the "battered woman chooses to believe that the behavior she sees during phase three signifies what her man is really like." *Id.* at 68.

164. *See id.* at 55-67. "Battered women are not constantly being abused, nor is their abuse inflicted at totally random times. One of the most striking discoveries in the interviews was of a *definite battering cycle . . .*" *Id.* at 55 (emphasis added).

165. *See generally id.* at 55-70 (describing various responses to prolonged abuse). Many women minimize the extent of their injuries. *Id.* at 63; *see also* Karil S. Klingbeil & Vicki D. Boyd, *Emergency Room Intervention: Detection, Assessment, and Treatment, in Battered Women and Their Families* 7, 9 (Albert R. Roberts ed., 1984) (discussing how battered women remember and report abuse as being less severe and less frequent than actually experienced).

166. The Battered Woman, *supra* note 7, at 69. "If she has been through several cycles already, the knowledge that she has traded her psychological and physical safety for this temporary dream state adds to her self-hatred and embarrassment." *Id.*

Constant subjection to chronic abuse permanently affects the psyche of the victim.<sup>167</sup> Different theories of human behavior attempt to explain precisely why battered women do not leave abusive relationships.<sup>168</sup> Some researchers believe that women do not leave because they perceive escape as impossible: they cannot safely predict their behavior's effect on their batterer.<sup>169</sup> Others blame society's ineptitude in providing help to battered women as a force that keeps women in the battering relationships for a prolonged period.<sup>170</sup> Still others fault a sexist society as the facilitator of abuse against women.<sup>171</sup> These theorists argue that domestic violence will not cease until it becomes truly socially unacceptable.<sup>172</sup> As one commentator noted, "[domestic violence] will not become socially unacceptable until the entire society is committed to real equality for women, and sexism is universally understood to be the name of a dangerous social disease that poisons individual relationships as well as the quality of

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167. There are numerous books on the phenomenon of battering. See, e.g., Angela Browne, *When Battered Women Kill* (1987); *Battered Women* (Donna M. Moore ed., 1976); Pagelow, *supra* note 109; *The Battered Woman Syndrome*, *supra* note 8; *Women's Self-Defense Cases: Theory and Practice* (Elizabeth Bochnak ed., 1981). See generally Nathan A. Rosen, *Battered Wives: A Comprehensive Annotated Bibliography of Articles, Books and Statutes in the United States of America* (1988) (listing and briefly describing numerous works on the subject of domestic violence); Carolyn F. Wilson, *Violence Against Women: An Annotated Bibliography* (1981) (same).

168. See *infra* part IV.B; *The Battered Woman*, *supra* note 7; Stark, *supra* note 112, at 975-76 (arguing that the battered woman syndrome provides an "inaccurate, reductionist, and potentially demeaning representation of woman battering" and offering an alternative framework that "emphasizes the batterer's pattern of coercion and control rather than his violent acts or their effect on victim psychology").

169. See *supra* part II.B (discussing the battered woman syndrome).

170. See *infra* part IV.B (discussing the survivor theory).

171. See generally Martin, *supra* note 87 (discussing the battered woman syndrome in socio-political terms). Scholars theorize regarding why women stay in abusive relationships:

[Martin's] research indicates . . . that these women do not remain in the relationship because they basically like being beaten. They have difficulty leaving because of complex psychosocial reasons. Many stay because of economic, legal, and social dependence. Others are afraid to leave because they have no safe place to go. Police, courts, hospitals, and social service agencies do not offer them adequate protection. Psychologists tend to counsel them to keep the family together at any cost, which often turns out to be their mental health and sometimes their lives.

*The Battered Woman*, *supra* note 7, at 43 (discussing Del Martin's research findings).

172. Fleming, *supra* note 108, at 228. According to some scholars:

The feminist analysis of wife beating is, at heart, a critique of patriarchy. The central argument is that the brutalization of an individual wife by an individual husband is not an individual or "family" problem. It is simply one manifestation of the system of male domination of women that has existed historically and cross-culturally. Societal tolerance of wife beating is a reflection of patriarchal norms that, more generally, support male dominance in marriage. Traditional marriage, in turn, is a central element of patriarchal society.

Straus & Gelles, *supra* note 105, at 384.



life in the community."<sup>173</sup> Keeping the ultimate goal in mind, a first step to eradicating violence against women is to attempt to understand the behavior of battered women, and work to remove the stigma of abnormality from battered women.<sup>174</sup> Understanding the behavior of battered women is vital for the battered woman who is being judged in a legal context. By moving the perception of a battered woman's responses within a range of reasonable behavior, a jury may better view a defendant battered woman as justified in her actions.<sup>175</sup>

#### b. *Learned Helplessness*

The learned helplessness<sup>176</sup> theory comprises the second component of Dr. Walker's battered woman syndrome.<sup>177</sup> Based on social learning and cognitive and motivational theoretical principles, the theory explains the psychological paralysis that perpetuates a battered woman's status as victim.<sup>178</sup> Dr. Walker did not create the theory of learned helplessness; rather, she adapted the research findings of experimental psychologist Martin Seligman to the realm of battered women.<sup>179</sup> Dr. Seligman's theory has three basic factors: "information about what will happen; thinking or cognitive representation about what will happen (learning, expectation, belief, perception); and behavior toward what does happen."<sup>180</sup>

Dr. Seligman developed the theory of learned helplessness<sup>181</sup> after a series of experiments where he inflicted repetitious, unavoidable electrical shocks to caged dogs.<sup>182</sup> When the dogs were unable to avoid the shock despite every attempt to escape, they eventually became passive and stopped trying to resist—instead becoming complacent to

173. Fleming, *supra* note 108, at 228.

174. See *supra* part II.A (discussing myths about battered women and misconceptions regarding why battered women do not leave abusive relationships after the first violent episode).

175. See, e.g., *State v. Kelly*, 478 A.2d 364, 375-77 (N.J. 1984) (ruling that evidence on the battered woman syndrome can be helpful to a jury in determining whether the battered woman acted reasonably).

176. See generally Martin E.P. Seligman, *Helplessness: On Depression, Development, and Death* 75-106 (1975) (describing the symptoms, cures, and preventions of the learned helplessness model of depression).

177. See *The Battered Woman*, *supra* note 7, at 43.

178. See *id.* at 47.

179. *Id.* at 45-54.

180. *Id.* at 47. Dr. Walker points out that "[i]t is the second or cognitive representation component where the faulty expectation that response and outcome are independent occurs. This is the point at which cognitive, motivational, and emotional disturbances originate." *Id.*

181. See discussion *supra* note 137.

182. *Id.* at 45-46; Seligman, *supra* note 176, at 23-28. Dr. Seligman also performed similar tests on cats, fish, and rats. *Id.* at 28-31. While the rats were slower to show signs of passivity after inescapable shock treatment, they did show signs of helplessness when the response called for was somewhat unnatural and required "deliberate" performance. *Id.* at 29.

the discomfort.<sup>183</sup> Even when the dogs were later taught to avoid the shocks by moving to the other side of the cage, the dogs "remained passive, refused to leave, and did not avoid the shock."<sup>184</sup>

Dr. Walker posits that learned helplessness occurs in a domestic violence situation when a battered woman cannot predict her own safety because, regardless of her conduct, she is faced with the batterer's random and unpredictable abusive behavior.<sup>185</sup> Learned helplessness forces battered women to choose "behavioral responses that will have the highest predictability of an effect within the known, or familiar, situation; they avoid responses—like escape, for instance—that launch them into the unknown."<sup>186</sup> Dr. Walker adapted Seligman's theory to her study of battered women, using it to explain why women do not leave battering relationships:<sup>187</sup>

Once we believe we cannot control what happens to us, it is difficult to believe we can ever influence it, even if later we experience a favorable outcome. This concept is important for understanding why battered women do not attempt to free themselves from a battering relationship. Once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, 'helpless.'<sup>188</sup>

183. See *The Battered Woman*, *supra* note 7, at 46. "Similar experiments have been performed on other species, including cats, fish, rodents, birds, and primates and humans, with the same kind of results." *Id.*

184. *Id.*

185. See *id.* at 48 ("Women who have learned to expect battering as a way of life have learned that they cannot influence its occurrence.").

Dr. Walker lists seven factors that occur during a battering relationship that are associated with the development of learned helplessness:

1. A pattern of violence, particularly the occurrence of the Cycle of Violence . . . [coupled with the] observable escalation in frequency and severity of the abuse . . . .
2. Sexual abuse of the woman.
3. Jealousy, overpossessiveness, intrusiveness of the batterer, and isolation of the woman.
4. Threats to hurt or kill the woman.
5. Psychological torture [including verbal degradation, denial of powers, isolation, monopolizing perceptions, occasional indulgences, hypnosis, threats to kill, induced debility, drugs or alcohol].
6. Violence correlates (including the woman knowing about the man's violence against others, including children, animals, pets, or inanimate objects).
7. Alcohol or drug abuse by the man or woman.

Terrifying Love, *supra* note 8, at 52.

186. Terrifying Love, *supra* note 8, at 50-51. Dr. Walker also explains that a battered woman is often at the gravest risk of death or serious injury when she does attempt to leave. According to statistics, the risk of homicide is 75% higher if a woman attempts to leave her batterer. Joan M. Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 Iowa L. Rev. 553, 582 n.33 (1991) (citation omitted).

187. *The Battered Woman*, *supra* note 7, at 47.

188. *Id.* As one commentator explains:

To understand learned helplessness, one must focus on an individual's beliefs regarding the situation [he or she is] in. As in the case of [post-traumatic

The sense of utter defenselessness caused by sporadic brutality, mingled with attempted tenderness, ultimately prevents the victim from leaving her abuser.

The perception of powerlessness to escape the violence is reinforced by social stereotypes: premiums are placed on the appearance of a happy family<sup>189</sup> and women are often counseled to keep the family together at any cost.<sup>190</sup> Women who want to leave their abusive mates may lack the financial resources to do so.<sup>191</sup> The batterer's superior physical strength may add to a woman's perception of him as all-powerful.<sup>192</sup> Dr. Walker asserts that "[c]ultural conditions, marriage laws, economic realities, physical inferiority—all these teach women that they have no direct control over the circumstances of their lives."<sup>193</sup> Thus, when victims of domestic violence endure unprovoked, repetitious violence, coupled with social pressures and expectations, severe emotional and motivational deficits result; and, the abuse continues.

### c. *Reversing Learned Helplessness in Battered Women*

If a woman falls victim to learned helplessness, can the cycle of violence be stopped and learned helplessness be reversed? Dr. Walker claims it can.<sup>194</sup> She states that "[a] first step would seem to be to

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stress disorder,] if a person believes [he or she does] not have control over a situation, he [or she] will be more likely to respond with coping responses rather than by trying to escape. As applied to a battered woman, she does not attempt to leave because she cannot predict her own safety; she believes that nothing can be done, by her or by anyone else, which will change her situation. A battered woman is unable to predict the consequences of her actions, because there is no relationship between her conduct and the frequency of abuse inflicted on her. It is this "learned helplessness" [that] prevents a battered woman from leaving the battering relationship, even though it may appear to outsiders that the battered woman could do so safely.

Scott G. Baker, Note, *Deaf Justice?: Battered Women Unjustly Imprisoned Prior to the Enactment of Evidence Code Section 1107*, 24 Golden Gate U. L. Rev. 99, 103-04 n.20 (1993) (citing Lenore E. Walker, *Terrifying Love* 48-51 (1989)).

189. See Dowd, *supra* note 70, at 569 (discussing traditional female stereotypes and how they help perpetuate violence against women).

190. See *supra* note 171 (citing Del Martin's research findings).

191. See *The Battered Woman*, *supra* note 7, at 52. See generally Robert H. Cohen, *Pay-Equity: A Child of the 80s Grows Up*, 63 Fordham L. Rev. 1461 (1995) (discussing wage disparities between men and women).

192. *The Battered Woman*, *supra* note 7, at 52.

193. *Id.* As Dr. Walker asserts:

Although [women] are not subjected to electrical shocks as the dogs in the experiments were, they are subjected to both parental and institutional conditioning that restricts their alternatives and shelters them from the consequences of any disapproved alternatives. Perhaps battered women, like the dogs who learn that their behavior is unrelated to their subsequent welfare, have lost their ability to respond effectively.

*Id.*

194. See *id.* at 53-54. Carrying forward the analogy to Dr. Seligman's original research, Dr. Walker states:

persuade the battered woman to leave the battering relationship or persuade the batterer to leave."<sup>195</sup> Second, the woman needs to be counseled to learn that she is capable of controlling her own life.<sup>196</sup> Dr. Walker asserts that, "[w]omen must be able to believe that their behavior will affect what happens to them. Counseling or psychotherapy can teach women to control their own lives and to be able to erase that kind of victim potential."<sup>197</sup> Unfortunately, many women never find the power to escape the violent relationship, and those who do often resort to deadly violence—finding themselves embroiled in a legal battle and fighting to explain their behavior as reasonable in light of the abuse they endure.<sup>198</sup>

### III. THE USE OF THE BATTERED WOMAN SYNDROME IN COURTS

In the last decade, the psychological profile known as the battered woman syndrome has found its way into the nation's courtrooms.<sup>199</sup> Presently, all fifty states have allowed battered woman syndrome evidence to be admitted in court,<sup>200</sup> and many states have specific evidentiary rules to cover the admissibility of expert testimony on the battered woman syndrome.<sup>201</sup> This part explores the various ways

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Turning back to the animal studies, we see that the dogs could only be taught to overcome their passivity by being dragged repeatedly out of the punishing situation and shown how to avoid the shock. Just as the dogs have helped us understand why battered women do not leave their violent situations voluntarily, perhaps they can also suggest ways the women can reverse being battered.

*Id.* at 53.

Dr. Seligman's more recent work illustrates a link between an attitude of optimism and the avoidance of symptoms of learned helplessness. He postulates that when someone remains optimistic she can ultimately reverse or even inoculate herself against the development of learned helplessness. See generally Martin E.P. Seligman, *Learned Optimism* (1990) (asserting that learned helplessness is reversible).

195. *The Battered Woman*, *supra* note 7, at 53.

196. *Id.* at 54.

197. *Id.* Dr. Walker points to the vital importance of gaining self esteem and feelings of competence in women if they are to overcome learned helplessness. *Id.*

198. See *infra* part III.A (discussing a battered woman's reliance on the battered woman syndrome when she is on trial for murder and claims self-defense).

199. The first case to admit expert testimony on battered woman syndrome was *Ibn-Tamas v. United States*, 407 A.2d 626, 630-31 (D.C. 1979), *aff'd*, 455 A.2d 893 (D.C. 1983). Although remanded, the case remained influential in other jurisdictions.

200. For examples of cases where courts have admitted evidence regarding the battered woman syndrome, see *infra* note 208. Courts have admitted such evidence under different bases, including statutory mandate, constitutional reasons, and case law.

201. See, e.g., Cal. Evid. Code § 1107 (West 1991 & Supp. 1995). According to California law:

In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.

that battered woman syndrome evidence has been relied upon in legal disputes.<sup>202</sup> Most frequently, battered woman syndrome evidence is introduced by a battered woman who is on trial for killing her abuser and who is asserting a claim of self-defense. She relies on such evidence to elucidate her mental state prior to the homicide. Recently, battered woman syndrome evidence has also been used in various other contexts by victims of domestic violence. As described in this part, however, such evidence can at times undermine a battered woman's particular claim. This part concludes with a discussion and factual illustration of how defendant-batterers have begun to rely on battered woman syndrome evidence to bolster their claims of innocence in trials for the abuse or murder of their wives.

#### A. *Reliance on Battered Woman Syndrome by Victims of Domestic Violence*

State criminal justice systems allow parties to admit expert testimony on the battered woman syndrome in numerous contexts. Most often, battered woman syndrome evidence is introduced in the context of a murder trial where the defendant claims she was a battered woman and acted in self-defense<sup>203</sup> when she killed her batterer.<sup>204</sup> Procedurally, evidence regarding the battered woman syndrome is introduced through the testimony of an expert witness.<sup>205</sup> The battered

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*Id.*; see also Ohio. Rev. Code Ann. § 2901.06 (Baldwin 1990) (recognizing that the battered woman syndrome is "currently a matter of commonly accepted scientific knowledge" and is not within the general understanding of the public, thus, it is admissible in the form of expert testimony "as evidence to establish the requisite belief of an imminent danger" when a defendant has plead self-defense); Md. Code Ann., Cts. & Jud. Proc. § 10-916 (1995) (allowing evidence of the battered woman syndrome, otherwise referred to as the battered spouse syndrome, "for the purpose of explaining the defendant's motive or state of mind, or both, at the time of the commission of the alleged offense"); Wyo. Stat. § 6-1-203 (1993 & Supp. 1995) (permitting the introduction of evidence that the defendant was suffering from the battered woman syndrome "to establish the necessary requisite belief of an imminent danger of death or great bodily harm as an element of the affirmative defense, to justify the person's use of force").

202. A discussion of the complex evidentiary issues involved in admitting expert testimony on the battered woman syndrome is beyond the scope of this Note. For a detailed analysis of such issues see Schroeder, *supra* note 186; see also Scott G. Baker, Note, *Deaf Justice?: Battered Women Unjustly Imprisoned Prior to the Enactment of Evidence Code Section 1107*, 24 Golden Gate U.L. Rev. 99 (1994); Margaret M. Prendergast, *Evidence—The Admissibility of Expert Testimony on Battered Woman Syndrome Under the Federal Rules of Evidence—Arcoren v. United States*, 929 F.2d 1235 (8th Cir.), cert. denied, 112 S.Ct. 312 (1991), 65 Temp. L. Rev. 341 (1992).

203. Generally, a claim of self-defense requires that the defendant establish that her conduct was subjectively reasonable. See *supra* note 19 (discussing the standard for the justification of self-defense).

204. See generally Walker, *Syndrome and Self-Defense*, *supra* note 8 (discussing the use of expert testimony on the battered woman syndrome in conjunction with a woman's claim of self-defense).

205. *Id.* at 321. In the context of a criminal trial, the battered woman syndrome is not used as "character evidence." Rather, it is offered through expert testimony to

woman introduces such evidence in order to assist the trier of fact in determining whether, as a victim of cyclical abuse, the defendant acted out of a reasonable belief that she was in imminent danger of death or grave bodily harm.<sup>206</sup> At least one court has required the admission of expert testimony on the battered woman syndrome in order to ensure that the battered woman received her constitutional right to a fair trial.<sup>207</sup> The recent trend is to admit expert testimony regarding the battered woman syndrome because it is helpful to the jury so that they can better comprehend the lives of battered women<sup>208</sup> and it is not

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help the trier of fact understand the state of mind of the battered woman. Character evidence is inadmissible in most contexts if used to show that a defendant likely acted in conformity with a certain character trait. *See, e.g.*, Fed. R. Evid. 404(a) ("Evidence of a person's character . . . is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . ."). There is an exception to the general rule that character evidence is inadmissible to show propensity to act a certain way in a criminal trial. The exception is sometimes referred to as the "Rule of Mercy" and gives a criminal defendant the opportunity to introduce evidence of good character traits inconsistent with the charged conduct, as long as those traits are probative. If the defendant chooses to avail himself of the Rule of Mercy, the prosecution is permitted to rebut such evidence with negative character traits. *See, e.g.*, Fed. R. Evid. 404(a)(1) (prohibiting the introduction of character evidence except "Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same").

Battered woman syndrome evidence does not provide evidence of the character of a woman, rather it shows psychological effects of domestic abuse. Evidence of prior acts of abuse, similarly do not violate the prohibition of character evidence so long as they are introduced for a limited purpose and are not used to infer that the defendant-batterer acted in conformity with those prior acts by committing the charged act. As the Federal Rules of Evidence illustrate:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

Fed. R. Evid. 404(b).

206. *See, e.g.*, *State v. Kelly*, 478 A.2d 364, 375 (N.J. 1984) (allowing expert testimony on battered woman syndrome to bolster a defendant's testimony); *State v. Anaya*, 438 A.2d 892, 894 (Me. 1981) (stating that expert testimony might explain the defendant's perceptions and behavior at the time of the killing).

207. *See, e.g.*, *Commonwealth v. Stonehouse*, 555 A.2d 772, 781 (Pa. 1989) (ruling that testimony on the battered woman syndrome is vital to a battered woman's claim of self-defense and, therefore, trial counsel was ineffective by not proffering evidence on the theory).

208. *See, e.g.*, *People v. Aris*, 215 Cal. App. 3d 1178, 1189 (Ct. App. 1989) (admitting evidence of battered woman syndrome to establish the defendant's state of mind regarding her perception of danger, imminence, and force necessary to protect herself); *Ibn-Tamas v. United States*, 407 A.2d 626, 632 (D.C. 1979), *aff'd*, 455 A.2d 893, 894 (D.C. 1983) (stating that the admission of battered woman syndrome is within a trial judge's discretion and not, per se, admissible as a matter of law); *Terry v. State*, 467 So. 2d 761, 763-64 (Fla. Dist. Ct. App. 1985) (allowing evidence of battered woman syndrome to support defendant's claim of self-defense); *Smith v. State*, 277 S.E.2d 678, 683 (Ga. 1981) (permitting testimony regarding battered woman syndrome to prove self-defense); *People v. Minnis*, 455 N.E.2d 209, 217-18 (Ill. App. Ct. 1983) (allowing evidence of battered woman syndrome to assist the jury in understanding why the defendant dismembered the victim's body); *State v. Hundley*, 693

prejudicial.<sup>209</sup> Once treated with hostility and skepticism,<sup>210</sup> the bat-

P.2d 475, 479 (Kan. 1985) (admitting evidence of battered woman syndrome to prove the nature and effect of wife beating on the mental state of the defendant); State v. Anaya, 438 A.2d 892, 894 (Me. 1981) (admitting testimony regarding battered woman syndrome to explain a defendant's "perceptions and behavior at the time of the killing"); State v. Hennum, 441 N.W.2d 793, 798 (Minn. 1989) (allowing expert testimony regarding battered woman syndrome because the syndrome is not within the understanding of an ordinary lay person); May v. State, 460 So. 2d 778, 785 (Miss. 1984) (holding that evidence of battered woman syndrome is admissible because it has important informational and explanatory power which must be accommodated by the law); State v. Baker, 424 A.2d 171, 173 (N.H. 1980) (holding battered woman syndrome testimony admissible when the husband is the defendant charged with attempted murder of his wife); State v. Kelly, 478 A.2d 364, 375-77 (N.J. 1984) (finding testimony of battered woman syndrome relevant to honesty and reasonableness of the defendant's belief, to explain her state of mind, and to bolster her self-defense claim); State v. Gallegos, 719 P.2d 1268, 1274 (N.M. Ct. App. 1986) (affirming admissibility of battered woman syndrome testimony and recognizing the general acceptance of battered woman syndrome in the field of psychology); People v. Torres, 488 N.Y.S.2d 358, 362 (Crim. Ct. 1985) (admitting testimony of battered woman syndrome to counter the jury's common sense conclusion that a reasonable person would have left the abusive relationship); State v. Leidholm, 334 N.W.2d 811, 819-20 (N.D. 1983) (admitting evidence of battered woman syndrome to support a self-defense claim, not as a separate defense in itself); State v. Koss, 551 N.E.2d 970, 974-75 (Ohio 1990) (stating that when evidence establishes the defendant as a battered woman, and when an expert is qualified to testify regarding battered woman syndrome, expert testimony concerning battered woman syndrome is admissible to "assist the trier of fact in determining whether the defendant acted out of an honest belief that she was in imminent danger of death or great bodily harm and that the use of such force was her only means of escape"); State v. Furlough, 797 S.W.2d 631, 651 (Tenn. Crim. App. 1990) (allowing testimony on battered woman syndrome to establish "the defendant's perception of fear and imminence of danger at the time [she] killed her husband"); Fielder v. State, 756 S.W.2d 309, 319-20 (Tex. Crim. App. 1988) (stating that the prosecutor must imply that the defendant was not fearful at the time of the incident before expert testimony regarding battered woman syndrome will be admissible to help establish a defendant's fear or apprehension of danger at the time of the killing); State v. Ciskie, 751 P.2d 1165, 1173 (Wash. 1988) (en banc) (allowing testimony regarding battered woman syndrome to explain a delay in reporting abuse and the failure to leave an abusive environment); State v. Allery, 682 P.2d 312, 316 (Wash. 1984) (en banc) (admitting evidence of battered woman syndrome to explain the defendant's perception of threat and the reasonableness of the force employed in self-defense); State v. Steele, 359 S.E.2d 558, 564-65 (W. Va. 1987) (admitting testimony regarding battered woman syndrome to explain the psychological basis for the syndrome and to show that the defendant fit the syndrome); State v. Felton, 329 N.W.2d 161, 170 (Wis. 1983) (holding that trial counsel was ineffective because instead of utilizing battered woman syndrome to aid in a heat-of-passion manslaughter defense, he relied solely on a traditional self-defense argument).

209. According to the Federal Rules of Evidence, and mirrored in most state rules of evidence, relevant evidence will not be admitted if, *inter alia*, "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." Fed. R. Evid. 403. The California Evidence Code has a similar standard for admission of relevant evidence. According to the state rule: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Cal. Evid. Code § 352 (West 1966).

210. See *supra* notes 92-96 and accompanying text (discussing the problems battered woman had before courts admitted evidence on the battered woman syndrome).

tered woman syndrome now is viewed as highly probative in determining whether a battered woman's conduct is consistent with her claim of self-defense.<sup>211</sup>

Battered woman syndrome evidence has been introduced by victims of domestic violence in other contexts as well. In each of the following examples, expert testimony on the battered woman syndrome is relevant because it helps to explain the state of mind of the battered woman defendant. Some jurisdictions have allowed testimony about the battered woman syndrome in parole hearings and in pleas for clemency.<sup>212</sup> The basis for allowing such evidence is that the battered woman defendant was not permitted to rely on expert testimony regarding the battered woman syndrome at her original trial and is subsequently afforded the opportunity to explain her behavior in the context of the syndrome.<sup>213</sup> Battered women have relied on the battered woman syndrome to explain their involvement by coercion with a violent co-defendant in homicides or other crimes against strangers.<sup>214</sup> In that scenario, the woman may argue that she was powerless to refuse her batterer's demand that she participate in the crime.<sup>215</sup> Charged with child abuse or "murder by omission" because of her inability to protect her child from her husband, a woman in an abusive relationship may attempt to rely on evidence of the battered woman syndrome to explain her inaction.<sup>216</sup> Such testimony can help explain why she was unable to act rationally and prevent the abuse of her children by her batterer.<sup>217</sup>

Women have also attempted to use evidence that they have been battered in custody disputes, arguing that the batterer-father does not deserve custody in light of his abusive behavior toward the mother of

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211. See *State v. Kelly*, 478 A.2d 364, 375-77 (N.J. 1984) (finding testimony of battered woman syndrome relevant to defendant's claim of self-defense); Murphy, *supra* note 129, at 292-300 (discussing how battered woman syndrome evidence helps the jury understand a victim's state of mind).

212. See Mary E. Greenwald & Mary-Ellen Manning, *When Mercy Seasons Justice: Commutation for Battered Women Who Kill*, Boston B.J., Mar./Apr. 1994, at 3-4 (outlining and discussing Massachusetts Governor Weld's amendment to the commutation guidelines).

213. *Id.* at 12.

214. Walker, *Syndrome and Self-Defense*, *supra* note 8, at 322. "Crimes involving money and property such as embezzlement, forgery, burglary, robbery and those that are drug related may well have been committed by a woman at the demand of her batterer." *Id.*

215. See *id.*

216. *Id.* But see *infra* text accompanying parts III.B, III.C (discussing the improper use of the battered woman syndrome).

217. See, e.g., *In the Matter of Glenn G.*, 587 N.Y.S.2d 464, 469 (Fam. Ct. 1992) (describing how the mother of a child who had been sexually abused by his father relied on expert testimony on the battered woman syndrome in her trial for child abuse to explain that according to the syndrome, battering causes "a breaking down of a woman's self confidence and self respect to a point where she no longer knows if she is crazy or not" (quoting expert witness in the case)).



the children.<sup>218</sup> Currently, one victim of domestic violence is relying on the battered woman syndrome to persuade a court to toll the statute of limitations to bring a civil suit against her batterer.<sup>219</sup> In such context, the battered woman is relying on the theory to explain her state of mind during and immediately after the years of abuse, and why she was, therefore, incapable of filing a timely civil claim.

Even though each of the above scenarios involves different specific legal issues, battered women have relied on battered woman syndrome evidence to substantiate their distinct claims by providing a psychological context to examine their behavior. As Dr. Walker explains,

The common thread between these seemingly disparate cases is testimony about the psychological knowledge concerning the dynamics of an abusive relationship and its psychological impact on the woman's state of mind to help meet the legal standard of self-defense or duress which might not be otherwise met if the history of abuse was not known.<sup>220</sup>

In each of the above instances where battered woman syndrome evidence has been proffered, the victim's state of mind is at issue, thus forming a common thread that justifies reliance on the theory.<sup>221</sup>

### B. *Evidence of Battered Woman Syndrome Often Hinders a Victim's Claim*

As a result of the broader acceptance of expert testimony on the battered woman syndrome in the legal arena, such evidence has increasingly been admitted in various contexts, sometimes in ways that misapply the syndrome and betray the experiences of battered women. Furthermore, evidence regarding the battered woman syndrome does not consistently benefit a victim of domestic violence. Often, a

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218. See Eleanor B. Alter, *Custody, Visitation, and Domestic Violence: Law, Practice, and Procedure in New York 3* (Family Law Unit, Brooklyn Legal Services Corp. B., Nov. 5, 1994) (discussing domestic violence as a factor in child custody disputes) (on file with the *Fordham Law Review*); see also Marjory D. Fields, *The Impact of Spouse Abuse on Children and its Relevance in Custody and Visitation Decisions in New York State*, 3 Cornell J.L. & Pub. Pol'y 221 (1994) (surveying the substantial body of scientific research relevant to the effects of wife abuse on children and cataloging how New York courts have addressed the issue); Gary Spencer, *Child Abuse Linked to Battered Women*, N.Y. L.J., Nov. 3, 1988, at 2 (discussing a report by the Special Committee on Women in the Courts and their recommendation "that when there are children in the home of a battered spouse or live-in partner, police should make 'a further investigation of their circumstances'").

219. See Memorandum of Law *Amici Curiae* in Support of Plaintiff at 15-25, *Nussbaum v. Steinberg*, (N.Y. Sup. Ct.) (No. 23416/88) (not yet submitted, on file with the *Fordham Law Review*).

220. Walker, *Syndrome and Self-Defense*, *supra* note 8, at 323 (discussing in a *Journal on Ethics and Public Policy* the various uses of the battered woman syndrome in courtrooms).

221. See *supra* text accompanying notes 212-17, 219.

battered woman does not view herself as a passive victim, nor does she want to present herself as such to the court.<sup>222</sup> Nonetheless, because the battered woman syndrome is the most often judicially recognized theory on the psychological impact of domestic abuse, many women find themselves relying on a theory that does not significantly further their particular case.

As a result, women have lost custody of their children because of the claim that they suffer from learned helplessness according to the battered woman syndrome.<sup>223</sup> The opposing counsel argues that because a woman is helpless in the context of her relationship with her husband, she must, therefore, not be a good parent and it would not be in the best interest of her children to remain in her custody. The court reasons that if a woman is helpless to assure her own safety, she must be similarly incapable of assuring the safety of her children.<sup>224</sup> As one commentator noted:

In recent years, expert witnesses on battered-woman syndrome have shown up in divorce and child-custody cases . . . testifying for the battering dad. They "diagnose" the syndrome in the battered

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222. See Jones, *supra* note 7, at 15A (asserting that "battered women today usually don't think of themselves as helpless victims").

223. See Ann Jones, *Children of a Lesser Mom: Women Who Fail to Save their Kids from Abusive Men may be Guilty of Neglect. But the Courts are Calling it Murder*, *Lear's*, May 1993, at 30, 32 (discussing cases where women have been held criminally liable for the death of their children at the hands of an abusive husband and arguing that the battered woman syndrome does not bolster the women's claims).

224. *Id.* at 32. Condemning the courts for the way they treat battered women—in part, blaming the broad reliance on the battered woman syndrome, Ann Jones states:

Many years ago, feminist psychologists introduced the battered-woman's syndrome to explain to juries the helpless state of mind of a battered woman who sees no way out but to kill the man who batters her. Now the state uses expert witnesses on battered-woman's syndrome to testify against the battered women, arguing that the syndrome makes them helpless, dependent, and unfit *mothers*. Blamed for being battered, charged with crimes the batterer committed, women lose their children because of their "malady."

*Id.*

Some courts have relied on the battered woman syndrome when declining to convict a "passive" mother for the abuse of her children. The syndrome evidence, however, does not provide the mother with a complete justification for her seeming inability to protect her children. As one New York court noted:

This court is in accord with those who have recognized that Battered Woman's Syndrome is a condition which seriously impairs the will and the judgment of the victim. The abused should not be branded as abuser. Respondent mother in the case at bar clearly did not condone the sexual abuse of the children by the respondent father, but rather, due to her affliction with Battered Woman's Syndrome, was powerless to stop it. She cannot be said to have "allowed" the abuse within the meaning of Family Court Act § 1012 (e) (iii). Accordingly, the child abuse charges against the respondent mother herein are dismissed. The neglect statute, however, imposes strict liability. As respondent mother's actions were manifestly inadequate to protect the children from the father's ongoing abuse, of which she was well aware, a *finding of neglect must be entered against her*.

Matter of Glenn G., 587 N.Y.S.2d 464, 470 (Fam. Ct. 1992) (emphasis added).

mother. The court labels her unfit. And the kids go to the batterer, who is seen (despite his "temper") as another regular guy victimized by what [O.J. Simpson's defense attorney Johnnie] Cochran likes to call "a rocky marriage."<sup>225</sup>

Such reasoning is not founded in the research supporting the battered woman syndrome<sup>226</sup> and represents an imprecise use of the theory by drawing an inference that is not necessarily logical. The fact that a woman is helpless as a result of the particular dynamics of her abusive relationship does not indicate that she is an unfit parent or helpless in other aspects of her life.

An inherent obstacle to universal reliance on Dr. Walker's three-stage normative model arises when the pattern of domestic violence in a given situation does not mirror her categorical explanation. Specifically, in cases traditionally associated with the use of battered woman syndrome evidence—when a battered woman uses the theory to bolster her claim of self-defense—prosecutors may attempt to impeach an expert's testimony by claiming that an individual relationship does not trace the predictions of the battered woman syndrome.<sup>227</sup> In such cases, a victim of domestic violence who is now on trial as a criminal defendant is confronted with evidence that the violence immediately preceding the homicide was no different than any other episode of violence between the parties. The woman who has fought back and killed her batterer is challenged to articulate what was unique or different about the final cycle of abuse that caused her to use deadly force against her batterer. Often, she is unable to do so, and her self-defense claim is undermined.<sup>228</sup>

The fact that a woman may not appear passive and helpless, that the specific pattern of abuse in a given case did not follow the three distinct phases, or that the batterer did not exhibit behavior consistent with a cycle of violence, should not be dispositive of whether she was seriously abused.<sup>229</sup> The battered woman syndrome does not purport

225. Jones, *supra* note 7, at 15A.

226. See *infra* part IV (discussing the illogical and improper use of the battered woman syndrome to provide evidence about a batterer).

227. See *supra* notes 26-27, 29-32 and accompanying text.

228. The prosecutor's logic is as follows: if there is a cycle of violence and the defendant has been through repetitions of that cycle without believing she would die, why was it reasonable for her to perceive an imminent threat of death during this particular cycle of violence?

229. It is on this basis that Dr. Walker was planning to testify on behalf of O.J. Simpson. In his opening statements to the jury in the O.J. Simpson trial, defense attorney Johnnie Cochran Jr. asserted:

[W]hen [defense witness Lenore] Walker comes and testifies to you, she will talk about the fact that life-threatening violence usually precedes a homicide incident and she does not find that in this case . . . . The level of violence in this case and the pattern is atypical . . . of those relationships where a lethal incident often occurs.

*Rush to Judgment*, *supra* note 38, at A14 (transcribing portions of Cochran's opening statement).

to describe every battered woman or every battering relationship. In fact, only two-thirds of the women Dr. Walker interviewed for her original research described relationships that followed the three-phase cycle of violence.<sup>230</sup>

Challenging a battered woman's case because her character does not mirror the symptoms outlined in the battered woman syndrome is inappropriate. The battered woman syndrome is not a diagnostic tool.<sup>231</sup> Research concerning the battered woman syndrome stems from the underlying assumption that battering has already occurred.<sup>232</sup> From such premise, Dr. Walker developed the syndrome to explain victims' behavior.<sup>233</sup> The battered woman syndrome does not detect whether battering has occurred, and should not be used for that purpose in court. For purposes of psychological treatment it does not matter whether a woman was in fact battered or the precise extent of the abuse, but in a criminal context such a determination is crucial. Courts must be clear that expert testimony on the battered woman syndrome is helpful to explain behavior, but does not displace objective evidence of abuse.<sup>234</sup>

Despite the above criticism and apparent shortcomings of the use and misapplication of Dr. Walker's theory, the battered woman syndrome is the only judicially recognized theory regarding the psychological impact of prolonged spousal abuse to date. As such, a battered woman who wants to introduce expert testimony that specifically targets her unique situation, and explains shared symptoms among battered women as a group, must rely on the battered woman syndrome and attempt to show that she exhibits symptoms consistent with the theory.<sup>235</sup>

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230. See *supra* note 138.

231. A diagnostic tool would be used to diagnose a victim; that is, to help detect when abuse has occurred. The battered woman syndrome, however, was not developed as a diagnostic aid. Rather, the theory underlying the battered woman syndrome was developed to explain the behavior of women known to have been battered. See generally *The Battered Woman*, *supra* note 7 (describing the cycle of violence in abusive relationships); *The Battered Woman Syndrome*, *supra* note 8 (same); Schroeder, *supra* note 186, at 575 ("An opinion that the victim suffers from the battered woman syndrome should be inadmissible because the syndrome was not developed as a diagnostic tool."); see also Boxall, *supra* note 11, at A1, A31 ("Reduced to its essence, battered woman syndrome is not a physician's diagnosis but an advocate's invention. It means: Blame the deceased." (quoting the dean of McGeorge Law School discussing the battered woman syndrome)).

232. See *The Battered Woman Syndrome*, *supra* note 8, at ix-xi (developing theories about the battered woman syndrome by drawing conclusions from known cases of battering).

233. See *id.*

234. See *supra* note 209 (discussing the limited admissibility of evidence regarding incidents of prior bad acts according to the Federal Rules of Evidence).

235. See *infra* part IV.B (describing an alternative theory regarding why battered women often act in certain distinct ways).

C. *Defendant-Batterers' Use of Battered Woman Syndrome Evidence to Bolster Their Claims of Innocence*

The most distorted application of battered woman syndrome evidence occurs when the batterer himself tries to use it in his own defense.<sup>236</sup> This is precisely how O.J. Simpson's defense team had planned to use Dr. Walker's testimony; to bolster his defense by asserting that his relationship with his ex-wife, Nicole Brown Simpson, at the time of her death, did not fit within the confines of the battered woman syndrome.<sup>237</sup> In other words, O.J. Simpson does not fit the profile, according to the leading expert on the battered woman syndrome, of a batterer who would kill his wife.<sup>238</sup>

The research relied upon in the development of the battered woman syndrome, however, did not involve specific determinations about what sort of batterer would likely kill his victim.<sup>239</sup> Relying on the theory to bolster a claim that the defendant-batterer is innocent based on findings about the psychological state of a battered woman invites the jury to ignore other factual evidence presented at trial. Nonetheless, prior to being dropped from the defense's witness list, Dr. Walker indicated that her testimony would involve her determination that O.J. Simpson does not have an anti-social personality disorder, whereas people who commit homicide usually do.<sup>240</sup>

In a sense, the prosecution in the Simpson case created an opening for the defense to make the above argument by attempting to portray the homicide in the framework of an abusive relationship without using expert testimony to place prior acts of abuse in a proper psychological context.<sup>241</sup> Without expert testimony, jurors are left to consider the prior acts of abuse in the context of the usual myths about abusive relationships.<sup>242</sup> The prosecution proffered evidence of specific instances of the defendant's prior abuse of Nicole Brown Simpson. The prosecution, however, failed to support its theory with expert testimony to explain that the battered woman syndrome is a

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236. This Note does not argue, however, that men accused of battering should not be able to use battered woman syndrome evidence at trial. Rather, this Note advocates for the proper and limited use of the theory by all parties.

237. See *supra* notes 30-31, 38-40 and accompanying text.

238. See *supra* text accompanying note 38.

239. See *supra* note 138 (describing Dr. Walker's research when developing the theory of the battered woman syndrome).

240. McCarthy, *supra* note 5, at A4, A22.

241. See Larry Reibstein, *And Now the Trial*, Newsweek, Jan. 23, 1995, at 44 (chronicling the alleged incidents of the prior abuse of Nicole Brown Simpson by O.J. Simpson and discussing the forthcoming opening statements). See generally *People v. Simpson*, No. BA097211, 1995 WL 36094 (Cal. Super. Ct. Jan. 31, 1995) (official transcript of opening statement by Ms. Clark) (setting forth the witnesses who will testify about prior abuse, but not discussing any plan to rely on an expert witness on the battered woman syndrome).

242. See *supra* part II.A.

therapeutic analysis, not a prognosis with inevitable and necessary symptoms.

The Simpson case provides a classic example of the potential for misuse of the battered woman syndrome in the context of the prosecution of a batterer for the murder or assault of his mate.<sup>243</sup> While the prosecutor in such a case may rely on evidence of previous assaults and an ongoing battering relationship in order to prove motive, intent or identity,<sup>244</sup> and perhaps to clarify the actions of the victim as typical of many battered women, such evidence does not always benefit the prosecutor's case. If the facts of a given case are arguably inconsistent with the cycle of violence or the theory of learned helplessness, defendant-batterers may attempt to use evidence of the battered woman syndrome to undermine the prosecution's evidence of prior abuse.

In the above context, the defense might attempt to minimize the evidence of specific incidents of abuse by offering expert testimony about general characteristics often observed in an abusive relationship but arguably absent in the specific case. Such attempt shifts the focus away from factual accounts of battering incidents to viewing the battered woman syndrome as a predictor. Such an argument, however, relies on inverted logic and is an improper use of the battered woman syndrome. Extrapolating from evidence relating to the state of mind of a victim to determine the actions of a defendant-batterer is illogical and irrelevant.<sup>245</sup>

Dr. Walker's proposed premise for concluding that O.J. Simpson does not exhibit traits of a batterer who would cross the line to homicide also moves dangerously into the realm of providing opinion testimony on the ultimate issue<sup>246</sup> of whether a defendant-batterer is a killer.<sup>247</sup> In the end, the jury must decide the defendant-batterer's culpability according to all the evidence it has heard.

Furthermore, in the past, when Dr. Walker has discussed men who batter, she has done so without targeting them as suffering from a

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243. For an insightful opinion regarding when battered woman syndrome evidence should be admissible in this context, see Schroeder, *supra* note 186, at 553.

244. See *supra* note 205 (discussing the limited grounds and procedure for introducing character evidence).

245. See *infra* part IV.A.

246. See *supra* notes 35-36 and accompanying text (discussing the proper use of expert testimony).

247. Many battered women's advocates responded to Dr. Walker's determination that O.J. Simpson does not have an antisocial personality disorder by emphasizing that such a determination is wholly irrelevant. As one critic of Dr. Walker's purported determinations about Simpson stressed: "So what? . . . Most of the men who batter or kill don't have antisocial personality disorder." Bass, *supra* note 29, at 8; see also McCarthy, *supra* note 5, at A22. ("I don't know of any research that says that. I don't know what her research is based on." (quoting the director of a treatment program for batterers)).

psychological disorder.<sup>248</sup> Rather, Dr. Walker outlined the profile of a batterer as portrayed by his victim as follows: (1) low self-esteem; (2) adheres to all the myths about battering relationships; (3) is a traditionalist, believing in male supremacy and the stereotyped masculine sex role in the family; (4) blames others for his actions; (5) pathologically jealous; (6) presents a dual personality; (7) has severe stress reactions, during which he uses drinking and wife battering to cope; (8) frequently uses sex as an act of aggression to enhance self-esteem in view of waning virility—may be bisexual; (9) does not believe his violent behavior should have negative consequences.<sup>249</sup> The fact that Dr. Walker has asked battered women to discuss character traits of their batterers does not indicate that she is a qualified expert on men who batter.<sup>250</sup>

Although Dr. Walker will no longer testify in the Simpson case, the notion of having an expert on battered women testify for a defendant-batterer in response to a prosecutor's introduction of specific incidents of battering involving the victim and the defendant requires that courts take a careful look at the basis for admitting such testimony. Courts should reject as irrelevant a defendant's argument that he should not be found guilty if the particular relationship's abuse pattern does not fall squarely within the bounds of the battered woman syndrome.<sup>251</sup>

Courts should reject the use of the battered woman syndrome where, as above, the victim's state of mind is not at issue and where an expert, who arguably is not an expert on men who batter, nonetheless attempts to use the battered woman syndrome to render an opinion on the actions of a particular defendant-batterer.<sup>252</sup> Courts must be prepared to assess adequately those situations where a defendant-batterer is on trial for assault or murder of his victim, and the defense tries to use the battered woman syndrome as a tool.

#### D. Case Study: *A Defendant-Batterer's Reliance on a Battered Woman Syndrome Expert*

Another concern facing the courts when a defendant-batterer attempts to rely on expert testimony regarding the battered woman syndrome is the relative weight that will be afforded to an expert's testimony. Even before the Simpson case, Dr. Walker testified as an expert on the battered woman syndrome on behalf of a defendant-batterer on trial for murder. Critics of Dr. Walker argue that because

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248. See generally discussion *infra* part IV.C (calling for further research on men who batter).

249. The Battered Woman, *supra* note 7, at 36; see also Pagelow, *supra* note 109, at 89-108 (describing typical character traits of both victims and abusers).

250. See discussion *infra* part IV.A.2.

251. See *infra* notes 311-12 and accompanying text (discussing characteristics of batterers).

252. See *infra* part IV.A.

Dr. Walker is known for her pioneering work as an advocate for battered women, jurors are likely to be significantly influenced by her impressive credentials when she testifies as an expert for a batterer.<sup>253</sup> Such criticism of Dr. Walker's participation in a trial as an expert for an accused batterer highlights the danger of allowing improper reliance on expert testimony on the battered woman syndrome.

Recently, Dr. Walker testified as an expert for George Samuel Wade at his Fort Lauderdale trial for the murder of his ex-lover, Suzanne Emerick. Dr. Walker's testimony included a statement that she believed the defendant-batterer<sup>254</sup> was insane.<sup>255</sup> After the jurors declined to convict the defendant of first degree murder, instead convicting him of the lesser charge of manslaughter, Wade's attorney was quoted as saying: "There's no question the jury loved [Dr. Walker], because I spoke to the jurors after the trial. . . . She was a star in every respect."<sup>256</sup>

The Florida media closely followed the Wade trial, recounting details of both the murder and the impact of Dr. Walker's presence as an expert witness for the defendant-batterer:

In September 1992 . . . Wade . . . choked Emerick to death, shoved her limp body into a Toyota, strapped her in with a seat belt, put sunglasses on her face and drove around looking for a place to set her body afire, police say. The couple's 16-month-old daughter, Rachel, was in the back seat.

After Walker spent two days on the stand in Wade's defense, jurors on Jan. 27, 1994 convicted Wade of manslaughter. He had been charged with first degree murder.

"After a day in that courtroom with Lenore Walker, we just sat there and cried," said the victim's father.<sup>257</sup>

It seemed bitterly ironic to the victim's family that Dr. Walker, an advocate for battered women, would testify on behalf of their daughter's killer.

Wade had confessed to the police, saying that after an argument over visitation with the couple's daughter, "I had enough of her and I decided to kill her . . . . I put my hands around her throat and choked her until she was dead."<sup>258</sup> When Wade was examined by experts before trial, however, he gave a different account of what had tran-

253. See *supra* notes 6-15 and accompanying text (outlining Dr. Walker's accomplishments as an advocate for battered women).

254. Greene, *supra* note 28, at 5A ("Two years before the killing, Wade had revealed earlier abuse in his diary, 'I've put her through more hell, pain and total humiliation than anyone can imagine and still she stays . . . . Just yesterday, I almost choked her to death.'").

255. *Id.* (quoting the victim's mother as recoiling in disgust when she heard Dr. Walker testify that the defendant was insane).

256. *Id.* (quoting Wade's defense attorney).

257. *Id.*

258. *Id.* (quoting the defendant's confession).



spired on the night Emerick died. He insisted that Emerick was swinging her arms violently during an argument and he merely lunged out and caught her by the neck, telling her to stop it and not knowing that she was dead until, after 10 or 15 seconds, her arms went limp.<sup>259</sup> He said he put her in the car in order to drive her to the hospital, but he couldn't find the hospital.<sup>260</sup> Dr. Walker apparently believed this version of events. She explained her opinion of the facts of the case<sup>261</sup> to reporters after the trial: "It's very clear that he didn't believe she was dead. And he believed he was taking her to the hospital . . . I think [the killing] was an accident, or at the most I think it was manslaughter . . . This was an argument they were having. . . . She was not savagely killed."<sup>262</sup>

Advocates for battered women who followed the murder trial are convinced that Dr. Walker's testimony had a strong impact on the verdict in the case.<sup>263</sup> "Many believe Walker's testimony was the key to winning Wade leniency."<sup>264</sup> Wade is tentatively scheduled to be released from prison in April of 2000.<sup>265</sup> Poignantly, just one year before her death, Susan Emerick had borrowed Dr. Walker's book, *The Battered Woman Syndrome*, from the library where her mother worked.<sup>266</sup>

#### IV. COURTS MUST GUARD AGAINST THE IMPROPER USE OF THE BATTERED WOMAN SYNDROME IN THE PROSECUTION OF A BATTERER

Courts must reject on relevancy grounds the introduction of battered woman syndrome evidence where the dispositive issues at a par-

259. *Id.*

260. *Id.*

261. As discussed earlier, expert witnesses are not allowed to give opinions as to the state of mind of a criminal defendant. *See supra* notes 35-36 and accompanying text.

262. Greene, *supra* note 28, at 5A (alteration in original) (quoting Dr. Walker).

263. While the above account does not include details of Dr. Walker's precise testimony at trial, it highlights the undue impact an expert on the battered woman syndrome can have when testifying on behalf of a defendant-batterer. As explained above, this Note does not advocate that a defendant-batterer should not have access to expert witnesses. Nor does it state that Dr. Walker, or any expert on the battered woman syndrome, should never testify on behalf of a defendant-batterer. Rather, this Note questions the proper and relevant use of battered woman syndrome evidence, particularly when the defendant-batterer's state of mind is at issue in a particular trial, not the victim's. *See* discussion *infra* part IV.A.1. Furthermore, this Note challenges the qualifications of an expert on the battered woman syndrome testifying to facts regarding men who batter, an area arguably outside his or her realm of expertise. *See* discussion *infra* part IV.A.2. Judges exercising the gate-keeping function inherent in admissibility determinations must carefully consider both the expert's credentials and the relevance of battered woman syndrome evidence.

264. Greene, *supra* note 28, at 5A.

265. *Id.* For suggestions regarding how to avoid a defendant-batterer's reliance on the battered woman syndrome to bolster his defense, see *infra* part IV.

266. Greene, *supra* note 28, at 5A.

ticular trial do not relate to the battered woman's mental state. This part argues that in deciding whether to admit expert testimony on the battered woman syndrome, courts must guard against allowing experts on battered women to testify about particulars regarding men who batter. This part also outlines an alternative theory of the psychological impact of prolonged spousal abuse, and advocates increased reliance on its conclusions. Finally, this part calls for further research on a batterer's psychological profile as a precursor to consideration of when such a profile might be relevant to a criminal case.

### A. *Battered Woman Syndrome Does Not Provide a Profile of Men Who Batter*

As a threshold matter, when a defendant-batterer claims not to fit the profile of a man who batters or of a batterer who would likely kill his victim, courts should reject the introduction of expert testimony on the battered woman syndrome on grounds of relevance. The battered woman syndrome does not purport to describe characteristics of men who batter,<sup>267</sup> nor does it purport to describe every battering relationship.<sup>268</sup>

#### 1. Battered Woman Syndrome Explains Psychological Symptoms Often Observed in Victims of Domestic Violence

The battered woman syndrome relates only to the psychological symptoms of *victims* of domestic violence.<sup>269</sup> It does not, however, provide legally significant information about a defendant-batterer's state of mind. Dr. Walker, in her leading work on battered women, developed her theory after studies involving interviews with women—not men.<sup>270</sup> Arguably, getting information about batterers from their victims is not the most effective method of scientific analysis. Any attempt to utilize data about batterers from the information discernible from the battered woman syndrome misuses a theory developed to understand why women stay in abusive relationships.<sup>271</sup>

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267. See The Battered Woman, *supra* note 7, at 43 (“[A] psychological rationale will be developed to explain why the *battered woman* becomes a victim in the first place and how the process of victimization is perpetuated to the point of psychological paralysis.” (emphasis added)).

268. Walker, *Syndrome and Self-Defense*, *supra* note 8, at 330 (“[T]here was a definite pattern seen in *two-thirds* of the 1,600 battering incidents reported by the 400 women interviewed for the research study.” (emphasis added)).

269. Lenore E. Walker, *How Battering Happens and How To Stop It*, in *Battered Women 59-64* (Donna Moore ed., 1979) (describing how she used information gathered from interviews with battered women to develop the battered woman syndrome).

270. See discussion *supra* note 138 (describing Dr. Walker's research which included interviews with 400 women).

271. See Walker, *supra* note 269, at 63. Dr. Walker explicitly states, “From my research I have developed a psychological rationale regarding why the battered woman becomes a victim . . . .” *Id.*

In the context of a criminal case, courts must not allow expert witnesses to testify as to the innocence or guilt of the defendant. Allowing an expert to attempt to remove the defendant-batterer from the profile of men likely to commit a homicide gives undue weight to opinion testimony.<sup>272</sup> It is within the province of the jury to weigh all the objective evidence when determining whether a defendant has been proven guilty beyond a reasonable doubt.<sup>273</sup> Opining that a particular defendant-batterer does not exhibit traits typical of a murderer should not obfuscate the other facts presented—whether it is DNA evidence, eyewitness testimony, or prior incidents of abuse.<sup>274</sup>

Even though the battered woman syndrome has proved helpful in illuminating the lives of battered women in certain contexts, it must not be relied on in an improper and expansive way. One unanticipated result of using the battered woman syndrome in the prosecution of a defendant-batterer is that it can shift the focus away from the defendant and his actions to the victim and her psyche. In addition to challenging the relevancy of battered woman syndrome evidence in the criminal prosecution of a defendant-batterer, another way to avoid allowing battered woman syndrome evidence to become a tool for batterers is to shift the focus of the psychological evidence at trial away from the victim and her psychological state. Prosecutors must not attempt to prove a defendant's guilt of the crime at issue by relying exclusively on expert testimony on the battered woman syndrome to explain why the battered woman fell prey to the batterer and acted in seemingly abnormal ways. While such evidence, coupled with evidence of prior incidents of violence, may be relevant to show the defendant's motive, intent, or a pattern of abuse,<sup>275</sup> the victim's psychological state is not the ultimate issue for the jury to decide.

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272. As discussed, in a criminal trial an expert is prohibited from giving her opinion regarding the requisite mental state of the defendant. See *supra* notes 35-36 and accompanying text.

273. It is not the role of an expert witness testifying on the battered woman syndrome to make a determination regarding the credibility of the battered woman. Rather, the expert's role at trial is to provide for the jury a possible explanation for the behavior of the battered woman defendant. See *State v. Stringer*, No. 94-155, 1995 Mont. LEXIS 121, at \*19, (Mont. Jan. 26, 1995) ("It is also important to re-emphasize that the expert may not testify to or comment upon the credibility of the witness.").

274. Arguably, such testimony would be unduly prejudicial—allowing the jury to base its decision on improper grounds. Courts must strictly apply the standards of Federal Rule of Evidence 403 to avoid such a result. See *supra* note 209 (discussing Federal Rule of Evidence 403).

275. Some states, such as California, statutorily allow the admission of evidence of prior crimes or bad acts. For example, California Evidence Code section 1101(b) states, in pertinent part:

Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ) other than his or her disposition to commit such an act.

Furthermore, broad reliance on battered woman syndrome evidence facilitates the defendant-batterer's ability to minimize his prior abusive behavior. As Dr. Walker herself has indicated, "I believe that all of the work I have done in trying to measure battered woman syndrome and trying to present it in legal cases cannot tell us alone whether [a batterer] could have killed . . . ." <sup>276</sup> Dr. Walker is correct in her assertion that expert testimony alone is insufficient to indicate whether a batterer killed his spouse. It is only useful, perhaps, to help jurors understand the psychological context of prior abuse. If courts limit the admissibility of battered woman syndrome evidence and guard against the improper application of the theory, <sup>277</sup> Dr. Walker's concerns that her syndrome may be used inappropriately to convict a batterer will be allayed. <sup>278</sup> Even in the absence of expert testimony on the battered woman syndrome, however, the prosecutor may permissibly focus on the fact that the defendant battered the victim in the past. The prosecutor can rely on evidence of prior crimes or prior bad acts—as in any other criminal case—to show motive, intent, or identity. <sup>279</sup>

## 2. Experts on Battered Women Are Not Qualified To Testify as Experts on Men Who Batter

Potential experts can be subject to challenges to their qualifications. <sup>280</sup> Experts on battered women lack the requisite expertise to be qualified to testify on men who batter. As such, an expert should not be allowed to testify about a particular batterer when her knowledge is based on research regarding battered women. For example, Dr. Walker herself has admitted to having done no research on men who batter. <sup>281</sup> Her only conclusions regarding men who batter stem from

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Cal. Evid. Code § 1101(b) (West 1966 & Supp. 1995). The Federal Rules have a similar restriction on the permissible use of character evidence. The Rules state:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. R. Evid. 404(b).

276. Boxall, *supra* note 11, at A30 (quoting Lenore Walker).

277. See discussion *supra* part IV.A.

278. See *supra* text accompanying note 29.

279. See *supra* note 275 (discussing California's Evidence Code).

280. See *supra* note 35 (discussing the admissibility of expert testimony); see also *Humble v. State*, 652 So. 2d 1213, 1213-14 (Fla. Dist. Ct. App. 1995) (holding that a woman who had seventeen "years experience working in the field of domestic violence, operating shelters and domestic-violence programs, and ha[d] attended and taught numerous workshops on spouse abuse, . . . [but had] no formal education in the field of mental health" was therefore, "unqualified to explain the [battered woman] syndrome to the jury").

281. Bass, *supra* note 29, at 8. "At a press conference . . . Walker acknowledged that she has done no research on men who batter. But she said that she . . . [was]

battered women's portrayals of batterers—certainly not the most objective source of information.<sup>282</sup> Yet she held herself out as an expert qualified to testify that certain batterers do not fit the profile of a man who would likely kill his victim—either because he does not exhibit “the kind of antisocial personal disorders that we sometimes see,”<sup>283</sup> or because his behavior does not comport with her three-phase model.<sup>284</sup> Ironically, Dr. Walker has previously asserted in her writings that men who batter tend not to exhibit personality traits consistent with a psychological disorder,<sup>285</sup> claiming “[batterers] tend *not* to be stereotypical of a criminal or psychopath.”<sup>286</sup> Critics forcefully challenge Dr. Walker's ability to make an assessment regarding men who batter.<sup>287</sup>

Courts should require any expert witness whose research has focused on battered women to explain how the purported expert can assert that a defendant does not fit the profile of a batterer, despite the fact that the literature generally concludes that a batterer is not distinctly recognizable as such. Dr. Walker once asserted:

[Batterers] are not necessarily mentally ill people. They come from all walks of life; they hold good positions in the community; they serve on our courts, in our police agencies, in our mental health institutions; they are our psychologists, as well as our lawyers, judges, and legislators. This makes it not only difficult to recognize a batterer but often difficult to believe when you meet him.<sup>288</sup>

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familiar with the research literature on violent men and would be consulting other specialists before the trial.” *Id.*

282. See *supra* text accompanying notes 249-50.

283. Greene, *supra* note 28, at 1A. Dr. Walker explained that her testimony in the Simpson trial will assert that “[t]he pattern of abuse in this case is not the typical kind that results in a homicide. . . . There's no evidence of life-threatening behavior throughout the relationship. And there's no evidence of the kind of antisocial personal disorders that we sometimes see.” *Id.*

284. See *supra* text accompanying note 38 (describing Dr. Walker's determination that in an abusive relationship escalating life-threatening behavior typically precedes a homicide).

285. See *infra* text accompanying notes 311-12 (profiling some common characteristics of men who batter).

286. Walker, *supra* note 269, at 62.

287. See, e.g., Bass, *supra* note 29, at 8 (noting criticism of Dr. Walker's role in the Simpson trial by Richard J. Gelles, director of the family violence research program at the University of Rhode Island); Jones, *supra* note 7, at 15A (describing how courts have twisted the battered woman syndrome to benefit batterers' claims). Dr. Walker's critics do not claim that no expert exists who is qualified to testify regarding common characteristics of men who batter their spouses. Rather, they question her experience with such research: “If she develops a psychological profile of O.J., to what is she going to compare it? She, of all the domestic violence experts in the country, is the least experienced in analyzing data from men who batter.” Bass, *supra* note 29, at 8 (quoting a critic of Dr. Walker's participation as an expert for O.J. Simpson).

288. *Id.*

Courts should not allow an expert on battered women to testify about areas beyond the scope of her expertise. In the context of a trial of a defendant-batterer, battered woman syndrome evidence is irrelevant to the actions of the defendant.

B. *Prosecutors Should Rely on Other Psychological Theories of the Effects of Prolonged Abuse*

The battered woman syndrome, a description of how an otherwise normal person responds to chronic abuse or traumatic stress, is only one of a number of theories that describes the responses of victims of domestic violence.<sup>289</sup> Assuming that courts do not reject completely a defendant-batterer's use of the battered woman syndrome to support his claim, prosecutors' reliance on alternative psychological theories might provide a more balanced explanation of a battered woman's behavior. If a defendant-batterer is able to label his victim's actions as inconsistent with expected behavior under the battered woman syndrome, prosecutors should use expert testimony based on other viable psychological interpretations of the conduct of battered women in order to explain the conduct of the victim.

One such theory available to prosecutors is the "survivor theory."<sup>290</sup> The survivor theory directly challenges the conclusions of the battered woman syndrome.<sup>291</sup> This alternative characterization of battered wo-

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289. See, e.g., Allard, *supra* note 127 (offering an alternative theory regarding the effect of domestic violence on the victim); Dutton, *supra* note 127 (same).

290. Gondolf & Fisher, *supra* note 106, at 17-18.

291. Gondolf and Fisher include in their book a table outlining the distinctions between explaining battered women's behavior as symptoms suffered as a result of learned helplessness or, in the alternative, as behavior explained under the survivor hypothesis. They state:

Learned Helplessness

1. Severe abuse fosters a sense of helplessness in the victim. Abuse as a child and the neglect of help sources intensifies this helplessness. The battered woman is consequently severely victimized.
2. The victim experiences low self-esteem, self-blame, guilt, and depression. The only way to feel some sense of control over what is otherwise an unpredictable environment is to think that "if I change my ways, things will get better." But the abuse continues.
3. The victim eventually becomes psychologically paralyzed. She fails to seek help for herself and may even appear passive before the beatings. When she does contact a help source, she is very tentative about receiving help and is likely to return to the batterer despite advice or opportunity to leave.
4. This vulnerability and indecisiveness prolongs the violence and may contribute to its intensification. Some observers argue that this tendency may reflect an underlying masochism in the battered woman. The woman may feel that she deserves to be beaten and accepts it as a fulfillment of her expectations.
5. Battered women as victims need primarily psychological counseling to treat their low self-esteem, depression, and masochism. Cognitive therapy that addresses attributions of blame for the abuse may also be particularly effective in motivating the victim.

men describes them as "active survivors rather than helpless victims. . . . [B]attered women remain in abusive situations not because they have been passive but because they have tried to escape with no avail."<sup>292</sup> The survivor theory "contradicts the assumptions of learned helplessness: Battered women increase their helpseeking in the face of increased violence, rather than decrease helpseeking as learned helplessness would suggest."<sup>293</sup> The fundamental assumption of the theory is that women seek help in direct proportion to the realization that they are in danger.<sup>294</sup> The activities used in their effort to survive are characterized as "heroically assertive and persistent."<sup>295</sup>

By redefining the symptoms observed in battered women, the survivor theory focuses on the reasons why most women survive abusive relationships.<sup>296</sup> Empirical studies used to substantiate the hypothesis

#### Survivor Hypothesis

1. Severe abuse prompts innovative coping strategies from battered women and efforts to seek help. Previous abuse and neglect by help sources lead women to try other help sources and strategies to lessen the abuse. The battered woman, in this light, is a "survivor."
2. The survivor may experience anxiety or uncertainty over the prospects of leaving the batterer. The lack of options, know-how, and finances raise fears about trying to escape the batterer. The battered woman may therefore attempt to change the batterer instead of attempting to leave.
3. The survivor actively seeks help from a variety of informal and formal help sources. There is most often inadequate or piecemeal helpgiving that leaves the woman little alternative but to return to the batterer. The help-seeking continues, however.
4. The failure of help sources to intervene in a comprehensive and decisive fashion allows abuse to continue and escalate. The inadequacy of help sources may be attributed to a kind of learned helplessness experienced in many community services. Service providers feel too overwhelmed and limited in their resources to be effective and therefore do not try as hard as they might.
5. Battered women as survivors of abuse need, most of all, access to resources that would enable them to escape the batterer. Community services need to be coordinated to assure the needed allocation of resources and integrated to assure long-term comprehensive intervention.

*Id.* at 12.

292. *Id.* at 17.

293. *Id.* at 17-18. The authors contend that "helpseeking is likely to increase as wife abuse, child abuse, and the batterer's antisocial behavior (substance abuse, general violence, and arrests) increase." *Id.* at 18.

294. *Id.* The survivor tendency in women is explained by looking at a number of scientific and sociological findings: anthropological arguments that "females have an instinctual tendency to attempt to preserve life" rooted in physiological distinctions that allow them to bear children; feminist assertions that women have a greater appreciation for human life, in part, because their bodies are more linked with "nature"; and sociological explanations of women's tendency to cling to life as a result of socialization, which "ascribe[s] to women [roles] as domestic servants." *Id.* at 19-20.

295. *Id.* at 18.

296. *Id.* at 21-22. As Gondolf and Fisher explain:

This is not to deny the observations of shelter workers that some battered women do experience severe low self-esteem, guilt, self-blame, depression, vulnerability, and futility—all of which are identified with learned helplessness. Some battered women may even appear to act carelessly and provoca-

that battered women are fundamentally survivors include Dr. Walker's own research.<sup>297</sup> As asserted by scholars espousing the survivor theory, Dr. Walker discovered "that the women in [one] sample were not necessarily beaten into submissiveness; rather, helpseeking increased as the positive reinforcements within the relationship decreased and the costs of the relationship in terms of abusiveness and injury increased."<sup>298</sup> It is imperative for prosecutors and judges to realize that the same data relied on by Dr. Walker in developing the battered woman syndrome have provided support for an antithetical rationale—the survivor theory.<sup>299</sup>

If a defendant attempts to portray a particular battered woman as someone who did not act in accordance with the battered woman syndrome, prosecutors should be willing to offer evidence of other theories that better describe her actions. The defendant's effort to show that his victim was not passive or helpless will be rendered futile if, for example, a victim can assert that her behavior falls squarely within the contours of the survivor theory. The survivor theory should not be viewed as a replacement for the battered woman syndrome. Instead, as with other legal strategies, an attorney should rely on all available studies that potentially support his or her client's case. To date, however, the practical application of this theory in the courtroom is untested.<sup>300</sup>

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tively at times, as the proponents of masochism argue. *But cast in another light, these "symptoms" take on a different meaning, as well as a different proportion.*

*Id.* at 21 (emphasis added).

297. *Id.* at 18. According to Gondolf and Fisher, "[p]erhaps the most significant of these empirical works is Walker's *The Battered Women's Syndrome* (1984), designed to verify the author's original learned helplessness and 'cycle of violence' theorization." *Id.*

298. *Id.*

299. Gondolf and Fisher refer to Dr. Walker's work to support their theory that women seek help in proportion to their perception of danger. They state that as Dr. Walker's results illustrate:

As the violence escalated, so did the probability that the battered women would seek help. While only 14 percent sought help after the first battering incident, 22 percent did after the second, 31 percent after one of the worst, and 49 percent sought help after the last incident. About one-quarter of the women left temporarily immediately after each battering incident, although these were not necessarily the same women each time.

*Id.* (citing generally to *The Battered Woman Syndrome*, *supra* note 8, at 26).

300. Before the survivor theory can achieve wide spread judicial acceptance, it will have to meet the Supreme Court standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2796-98 (1993). In *Daubert*, the Court outlined various factors trial judges must look to when deciding whether certain scientific evidence can be introduced at trial as scientific knowledge offered by an expert. The factors include whether the theory has been tested; whether it has been subject to peer review and publication; what its rate of error is; whether scientific protocols govern the test; and whether the theory has received general acceptance in the scientific community. None of the factors is dispositive. *See also* Fed. R. Evid. 702 (governing the admissibility of expert testimony and allowing "scientific, technical, or other spe-



As discussed above, the battered woman syndrome is a helpful tool when explaining why a battered woman felt compelled to use deadly force to defend her life.<sup>301</sup> The theory is used most often in such a context, and can help to dispel disparaging myths that juries may have regarding battered women.<sup>302</sup> The battered woman syndrome emphasizes the helplessness of a battered woman, therefore complementing the theory of self-defense and helping the jury understand why killing her batterer was a reasonable option. But in certain contexts, the survivor theory may better support a battered woman's claims and may provide a more consistent portrayal of the reality of the battered woman's life. Such contexts include: when she clearly does not fit within the parameters of the battered woman syndrome and does not exhibit traits of learned helplessness; when she is trying to assert that she is a capable parent deserving of custody of her children; and when her batterer is on trial and attempting to scrutinize their relationship as distinct from the "typical" battering cycle. In such cases, it would be beneficial and more accurate for a battered woman to portray herself as a woman determined and able to survive even in the face of brutal treatment by her batterer.<sup>303</sup>

The survivor theory may be most illuminating for a prosecutor in the context of the prosecution of a defendant-batterer for a homicide. As discussed above, a defendant-batterer may try to argue that a particular battered woman does not fit the profile of a woman suffering from the battered woman syndrome. He may argue that because she was not passive or helpless, she must not suffer from the battered woman syndrome, and therefore he did not abuse or murder her. If a prosecutor, relying on the psychological explanation of the survivor theory, instead places a battering relationship in the survivor context, it becomes difficult for a defendant-batterer to use such a description to his advantage. The survivor theory provides an alternative psycho-

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cialized knowledge [if it] will assist the trier of fact to understand the evidence or to determine a fact in issue").

In conjunction with the *Daubert* test, trial judges must weigh the risk of confusing the jury because of the appearance of an expert who arguably is given heightened credit for what he or she testifies to. According to the Federal Rules of Evidence, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

301. See *supra* part III.A.

302. See *supra* part II.A.

303. A battered woman on trial for killing her husband and claiming self-defense who does not want to portray herself as suffering from learned helplessness could also rely on the survivor theory. Consistent with her plea, she could argue that her only means of survival at the point she fought back against her abuser was to use deadly force. According to the survivor theory, a battered woman is resourceful and adopts survival techniques in response to her immediate needs. A battered woman could logically rely on such theory to support her plea of self-defense. See *supra* text accompanying notes 290-99 (outlining the survivor theory).

logical context for juries to examine facts, and thus makes it more difficult for defendant-batterers to misuse the battered woman syndrome.

Despite the existence of numerous theories analyzing why battered women act in certain ways,<sup>304</sup> the battered woman syndrome is the most accepted theory in the legal arena. At least one commentator believes that the legal community unduly rushed to rely on the theory, which proved helpful to explain a battered woman's conduct, in an effort to appear committed to the cause of protecting victims of domestic violence.<sup>305</sup> She points out that the theory is not a diagnostic tool<sup>306</sup> but rather a psychological explanation of reactions to abuse—coming from the underlying premise that abuse has occurred.<sup>307</sup> Others have properly noted that evidence of the battered woman syndrome is most relevant in a limited context: to aid jurors in assessing a self-defense claim of a battered woman who has killed her batterer after prolonged abuse.<sup>308</sup> Regardless of how Dr. Walker's theory has been used in the past, it is important for attorneys, judges, and others in the legal system to regard the battered woman syndrome in the proper context—one theory among many.

### C. *Further Research Must Be Conducted Regarding Men Who Batter*

While there are different theories explaining why battered women act in certain distinct ways, little research has been done on men who batter. Most researchers conclude that batterers do not come from generalized social or economic groups.<sup>309</sup> As one researcher points out, "Battering occurs in all social groupings. It crosses all racial, ethnic, socioeconomic, religious, age and geographic boundaries."<sup>310</sup> Any expert who purports to testify to the state of mind of a defendant-batterer must have expertise on men who batter. Because of the lack of research on men who batter, however, it remains unclear how information about batterers could be used in a criminal case. Such expert testimony clearly would have to be relevant to the overall case and pertinent to the defendant-batterer's state of mind.

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304. See sources listed *supra* note 127.

305. Jones, *supra* note 7, at 15A.

306. See *supra* note 231 and accompanying text.

307. See Jones, *supra* note 7, at 15A.

308. See, e.g., Patton, *supra* note 111, at 10 (discussing the need for expert testimony in domestic violence cases to assure that the trier of fact understands the psychological symptoms of battered women).

309. Nancy Hutchings, *The Violent Family: Victimization of Women, Children and Elders* 73 (1988).

310. *Id.*

While there is not a universal personality profile of men who batter, some researchers have identified certain recurring characteristics.<sup>311</sup> Some personality traits associated with batterers include: insecurity, traditionally reflected in extreme jealousy; poor verbal communication skills, especially in relation to expressing emotions; domineering, evidenced by demanding control over most aspects of his marriage; dual personality, characterized by an ability to be charming to others yet cruel to his wife; adherence to traditional sex-role models; lack of assertiveness in other areas of life causing aggression to become "bottled up;" dependency needs, illustrated by making extraordinary efforts to get his wife to return if she leaves him; and contradictory personality traits.<sup>312</sup>

Generally, such evidence would be inadmissible "profile" evidence.<sup>313</sup> As more research is conducted on the psyche and characteristics of men who batter, however, litigators may find appropriate uses of such data offered by the prosecution or the defense that would fit within evidentiary restrictions. Furthermore, with additional research, a core group of experts specializing in research on men who batter will emerge. The introduction of such findings might, in an appropriate evidentiary context, help keep the jury's attention focused on evidence relevant to the crime at issue, thus preventing the batterer from attempting to base his claim of innocence on evidence related to the victim's psychological characteristics. The mere fact that the battered woman syndrome theorizes about the psychological trauma of domestic violence does not indicate that such evidence is relevant in all criminal contexts.

### CONCLUSION

Battered woman syndrome evidence can be helpful as a means to educate juries about why battered women seem to act in illogical and abnormal ways. The battered woman syndrome, however, does not precisely describe every battering relationship,<sup>314</sup> nor is it the only psychological explanation of why battered women respond to abuse in certain distinct ways.<sup>315</sup> Broad reliance on expert testimony regarding

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311. Hofeller, *supra* note 49, at 83 ("Because domestic violence is so widespread, it is unlikely that there is one 'personality type' which is characteristic of all violent men. Nevertheless, it is still possible to identify some common factors.").

312. *Id.* at 83-87; *see also supra* text accompanying notes 309-12 (discussing some common traits of men who batter).

313. *See, e.g.,* United States v. Gil, 58 F.3d 1414, 1422 (9th Cir. 1995) (denouncing in a drug courier prosecution the use of "profile evidence as substantive evidence of a defendant's innocence or guilt" (citations omitted)). Following such prohibition of "profile evidence," a prosecutor in the trial of a defendant-batterer would not be permitted to introduce evidence regarding the profile of men who batter as substantive evidence of the defendant-batterer's innocence or guilt.

314. *See supra* note 138.

315. *See* discussion *supra* part IV.B.

the battered woman syndrome outside its proper context is not helpful to a jury. In fact, such evidence may be misleading. For example, a batterer may attempt to distinguish his relationship with the victim from the patterns of the battered woman syndrome to create doubt in the jury regarding the extent or existence of the alleged abuse. The fact that a battered woman's experience does not mirror the model of the battered woman syndrome, however, does not indicate that she was not abused.<sup>316</sup>

The most potentially damaging use of the battered woman syndrome is the improper reliance on the theory by a defendant-batterer on trial for murdering his wife. A theory developed to explain the psyche of a particular group of women does not translate into appropriate evidence relating to the actions of an accused batterer. By considering relevance and the proper use of expert testimony, courts can ensure that battered woman syndrome evidence is used accurately and in a way that is faithful to its theoretical and psychological basis.

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316. See discussion *supra* part III.C.