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Nancy Wright

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The Case for Adopting the “Domestic Abuse Syndrome” for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers

By Nancy Wright

Introduction

Every year, millions of American women and children suffer domestic abuse at the hands of their partners, spouses, parents or guardians.¹ Every day, nearly 2,500 children are abused or neglected.² As many as 8.8 million children under the age of seventeen sustain severe physical abuse inflicted by their parents or guardians.³ Many of these battered children also suffer from sexual and psychological abuse.⁴ Some experts estimate that a child will be abused in some manner in America every ten seconds.⁵ Indeed, “an additional 3.3 million children are traumatized as indirect victims of domestic abuse, by witnessing the physical violence perpetrated against their siblings or between their parents.”⁶

Unfortunately, there has been a steady increase in the number of children who die from domestic abuse at the hands of their parents. In 1989, approximately 600 children were killed by their parents.⁷ By 1995, almost twice as many children (or 1,000 youngsters annually) died of domestic abuse.⁸ By 2004, there were almost 1,500 deaths annually from child abuse, an average of more than four children each day.⁹ Unfortunately, many experts believe that these shocking figures are conservative since death from parental abuse may be incorrectly diagnosed as accidental or as the result of sudden infant death syndrome.¹⁰

The incidence of domestic violence against women is also shockingly high. According to the Kansas Supreme Court in *State v. Hundley*, the physical abuse of women is “extremely widespread” with the court “estimating that it affects between four and forty million women.”¹¹ In fact, the American Medical Association estimates that “one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner during their lifetime.”¹²

Moreover, according to the Wyoming Supreme Court in *Witt v. State*, battered women frequently suffer other forms of abuse as well, such as “humiliation, denial of power, name calling, sexual abuse, threats of violence, and deprivation of food, sleep, heat, shelter and/or money.”¹³ In addition, 30% of domestic violence incidents involve the use of a weapon and the injuries that battered women receive are at least as severe as those suffered in 90% of violent felonies.¹⁴ In fact, each year approximately two million of these women suffer severe beatings at the hands of their spouses or partners.¹⁵ Unfortunately, over three women every day are murdered by their husbands;¹⁶ frequently experiencing “prolonged, brutal deaths after years of violence.”¹⁷

The women and children who are domestically abused by their spouses or parents are among the most marginalized members of American society, trapped in abusive relationships from which they can see no escape. They are often trapped by their abusers, who isolate them from family and friends who might otherwise provide them with assistance and support in leaving. They are frequently trapped by poverty, making retreat from the abusive situation a financial impossibility. And they are virtually always trapped by the unrelenting violence, which not only batters them physically but emotionally as well, making leaving the abusive situation a psychologically unrealistic option.

Faced with the inevitable prospect of escalating physical violence, often accompanied by sexual and psychological abuse,

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some of these women and children decide that the only escape from their imprisonment is to kill their abusers. Every year, almost 500 battered women murder their abusive spouses or partners.¹⁸ Although less frequent, studies show that about 2% of all homicides in the nation, or approximately 400 killings each year, are committed by children against their parents.¹⁹ Although not all of these homicides are committed by children who have suffered domestic violence, according to some estimates, more than 90% of the children who commit parricide have been abused by the parent.²⁰ In situations like these, the tables are turned, and it is the battered women or children who decide that the only way out of their agony is to kill their abusers.

When victims of domestic abuse are charged with the murder of their abusers, they frequently claim that they acted in self-defense. Attorneys for these victims of domestic abuse ask courts to admit expert testimony regarding various “syndromes” to describe the devastating psychological impact of a lifetime of severe physical, sexual and psychological violence, as part of the self-defense plea. These various syndromes, detailed below, are referred to collectively in this article as “domestic abuse syndrome” (or DAS) whether the victim is a battered woman or a battered child. Without the opportunity to present this expert testimony, victims of domestic abuse syndrome will not be able to demonstrate to the jury the reasonableness of their perceptions of imminent danger or the concomitant reasonableness of their use of lethal force to defend themselves. Unless all victims of domestic abuse syndrome are able to present this evidence, it is likely that their already broken lives will be completely shattered by a murder conviction, and they will once again find themselves trapped with no ability to escape; only this time it will be in a prison cell.

Overview of the Development of Self-Defense Pleas Based on Domestic Abuse Syndrome

Abused women were the first to successfully offer expert testimony regarding the psychological impact of domestic abuse through the “battered woman’s syndrome” (or BWS).²¹ Courts have, for the most part, been willing to admit expert testimony regarding battered woman’s syndrome²² and have expanded the syndrome to encompass not only women, but also men (more precisely known as “battered spouse syndrome” or “battered husband’s syndrome”).²³ More recently, the syndrome has been found to describe not only the impact of domestic abuse in heterosexual relationships, but also the effects of domestic abuse in lesbian and gay unions (which might be more precisely called “battered partners’ syndrome”).²⁴

Following the lead of attorneys offering expert testimony regarding the effects of domestic abuse on adult victims, lawyers representing children, who have killed their abusive parents, have tried to introduce expert testimony regarding the impact of domestic abuse on child victims as part of a self-defense plea.²⁵ In the case of physical abuse, attorneys have proffered expert testimony regarding “battered child syndrome” (or BCS) to describe the psychological effects on the child as part of a self-defense plea.²⁶ Medical evidence of BCS has long been admissible in dependency

hearings to remove children from abusive homes and in criminal trials to prosecute the abusive parents.²⁷ However, as used in those cases, BCS referred only to severe abuse of infants or very young children, usually under the age of five.²⁸ Use of the same term “battered child syndrome” as part of a self-defense plea for parricide is, therefore, clearly a misnomer and has led to considerable confusion, since obviously, very young children are not capable of killing their abusers. Thus, the psychological effects of physical, sexual and psychological abuse of children who are old enough to kill their abusers might more appropriately be termed “battered child syndrome of an older child.”

Whatever term is used, courts have been far more reluctant to allow expert testimony regarding the psychological effects of battering on children than on adults as part of a self-defense plea.²⁹ This reluctance is hard to understand since BWS (and its various iterations) and BCS of an older child are the functional and psychological equivalents of each other.³⁰ Therefore, there seems to be little basis for courts to deny battered children the right to present expert testimony regarding their abuse to help the jury understand why, like battered adults, abused children could be justified in killing their abusers based on self-defense. The same logic also supports the admission of expert testimony regarding the very similar psychological impact on children of intra-familial sexual abuse.³¹ Moreover, modern research has shown that children who are indirect victims of domestic abuse, by witnessing the physical or sexual abuse of their parent or siblings (which might be called “witness of abuse syndrome”) also suffer from the same psychological effects as direct victims.³² Although studies of the psychological effects of witnessing abuse are more limited, it seems clear that over time courts will also begin to admit expert testimony regarding this form of domestic abuse.

This article suggests that rather than being faced with this bewildering array of psychologically similar syndromes, expert testimony regarding the psychological impact on all victims of severe domestic violence should be encompassed under a single new term, the “domestic abuse syndrome” (DAS), and expert testimony regarding the psychological effects of DAS should be admissible as part of a self-defense plea when any of these adult or child victims of domestic violence kill their abusers. Although, for clarity, the article will discuss only women who are battered by their husbands or boyfriends in a heterosexual relationship when considering DAS as applied to adults, it is clear that the same analysis would also apply to men who are battered by their female spouses or girlfriends as well as to gays or lesbians who are battered by their partners. As the New York court noted in recognizing a “battered syndrome” in *People v. Colby*, where a father killed his adult son, “[i]f the claimed elements of being battered are the same regardless of the relationship between the parties or their gender then there is no reason to limit admissibility of expert testimony in a battered syndrome case to only women and children.”³³

Although this article recommends that expert testimony regarding all of these various victims of domestic violence be subsumed under the new rubric of “domestic abuse syndrome”, it should be clear that this suggestion is not an attempt to *increase* the number of syndromes. Rather it is an effort to *decrease* the number of syndromes by combining under one “term” all persons subject to the same psychological impact from domestic abuse. Instead of using numerous, confusing syndromes to describe battered adults and children, courts will be able to rely on only one syndrome to encompass all of the victims of severe domestic abuse. Combining all of the current syndromes into one will also help address the concerns of the Texas Court of Appeals in *Werner v. State*, regarding the proliferation “syndromes” proffered in an effort to explain, miti-

gate, justify or excuse a defendant’s criminal conduct.³⁴ In refusing to admit evidence of the “Holocaust Syndrome” to show the defendant’s state of mind, the *Werner* court warned: “Psychological imperfections affect everyone to one degree or another. Adroit defense counsel can construct these failings into pretexts to explain any type of unlawful behavior. No line can possibly be drawn on which syndromes are admissible.”³⁵ The *Werner* court expressed concern that so many syndromes have already been defined that soon an “Appellate Court Judge Syndrome will be identified.”³⁶ Creation of a single domestic abuse syndrome would decrease the number of separate syndromes that courts and juries grapple with when reaching a decision.

Article Overview

Part I of this article first demonstrates that both women and children who are victims of DAS suffer from the same types of domestic abuse, including physical, sexual and psychological maltreatment. Part I then delineates the marked similarities between the psychological impact of domestic abuse on an adult victim, based on battered woman’s syndrome, and domestic abuse on a child victim, based on battered child syndrome. Part I also describes the frequency and debilitating effects of poverty, suffered by many women and children who are victims of DAS. Part I concludes with the observation that the almost universal admissibility of expert testimony regarding domestic abuse based on battered woman’s syndrome should mandate that courts also admit expert testimony regarding battered child’s syndrome.

Part II explains that expert testimony regarding the psychological impact of DAS, whether offered by a woman as battered woman’s syndrome or by a child as battered child’s syndrome, meets the legal requirements for admissibility as part of a self-defense plea. In both cases the expert testimony is relevant and reliable. Moreover, the psychological effects of domestic abuse syndrome on both women and children are sufficiently beyond the common experience of the jury, such that expert testimony becomes necessary. The high probative value of testimony is not outweighed by any potential prejudicial effect on the jury.

Finally, Part III discusses necessary legal standards required for meaningful expert testimony in the self-defense pleas of both adult and child victims of domestic violence who kill their abusers in non-confrontational settings. It is essential that courts apply a hybrid (objective-subjective) standard in determining whether self-defense was reasonable so that the jury can fully consider the unique psychological perspective of a victim of DAS. Furthermore, it is crucial that trial courts apply a broad time frame in determining whether the threat of grievous harm was “imminent” or “immediate” so that the jury will be able to fully consider the unique ability of a victim of domestic violence to predict when future abuse will occur.

Admitting Expert Testimony Regarding The Domestic Abuse Syndrome As Part of a Self-Defense Plea For All Victims of Domestic Violence

OVERVIEW

The background of the development of battered woman’s syndrome and battered child syndrome, the key syndromes underlying domestic abuse syndrome, establishes that both women and children have historically been largely unprotected from the domestic violence they endured. Although some treatment of abused children was available in the late 1800s, it was only forty-five years ago that pediatricians came to realize that some infants and young children, who they thought were suffering horrendous injuries accident-

tally, were in fact being abused by parents or guardians and coined the term “battered child syndrome” to describe this type of physical abuse. It was only twenty-eight years ago that psychologist Lenore Walker coined the term battered woman’s syndrome to describe the characteristic psychological impact of prolonged domestic abuse on adult women.

The abuse suffered by both adult women and children, who are victims of DAS, can be divided into three main categories: physical injury, sexual abuse and psychological maltreatment. Whichever types of domestic violence are suffered by the abused women or children, the battering follows a cyclical pattern consisting of three phases: tension building, acute explosion and loving contrition. The psychological impact of domestic abuse is the same on all of the victims of DAS. Both women and children display “hypervigilance” in monitoring the abuse and “learned helplessness” in trying, usually unsuccessfully, to cope with the battering. Moreover, many of the women and children who are victims of DAS are impoverished, which exacerbates the psychological effects of their abuse.

Although both women and children sustain the same types of abuse, suffer virtually identical psychological effects from the battering, and are often similarly impoverished, most courts still do not allow expert testimony regarding BCS as part of a child’s self defense plea for parricide. Furthermore, the courts will not allow the testimony even though they do allow expert testimony regarding BWS as part of a women’s self defense plea when she kills her abusive husband or boyfriend. This almost incomprehensible legal anomaly must be rectified so that all victims of DAS have an equal opportunity to present expert testimony regarding their suffering as part of a self-defense plea.

The Similarities of the Domestic Abuse Suffered By Women and Children Victims of Domestic Abuse Syndrome

Domestic Abuse Suffered By Victims Of Battered Woman’s Syndrome: Historical Development of Battered Woman’s Syndrome

In *State v. Burtzloff* the South Dakota Supreme Court pointed out that “[h]istorically, women have been unprotected from violence by laws and custom.”³⁷ In reaching this conclusion, the court explained that, under English common law, the theory of coverture made it impossible for a man to be punished for mistreatment of his wife, since the husband and wife were considered to be a single legal entity.³⁸ The wife was considered to be the husband’s personal property and “wife beating was an accepted practice.”³⁹ The “Rule of Thumb” allowed a man to beat his wife as long as the implement he used was “no thicker than his thumb.”⁴⁰ Since she was a “chattel, or a servant, who owed her service to her master, her husband . . . she could not sue for any injuries sustained by her, as an individual.”⁴¹ Even in more modern times, “domestic violence was considered a family matter where law enforcement and the courts had no business.”⁴²

A major breakthrough in the understanding and treatment of female victims of domestic violence occurred in 1979, when psychologist Lenore Walker wrote her seminal book, *The Battered Woman*.⁴³ Dr. Walker coined the term “battered woman syndrome” to describe abusive adult relationships and the psychological effects of prolonged abuse on the victims.⁴⁴

Types of Domestic Abuse Suffered by Victims of Battered Woman’s Syndrome

According to Dr. Walker, a woman is a victim of battered woman’s syndrome (and would, therefore, be a victim of domestic Criminal Law Brief

abuse syndrome), if she has been subjected to either physical, sexual or serious psychological abuse, on at least two occasions, by a man with whom she has an intimate relationship.⁴⁵ Unfortunately, most victims of BWS are not subjected to just one of these types of abuse on just two occasions; rather, many battered women suffer from two or three of the categories of abuse delineated by Dr. Walker, often on multiple occasions.⁴⁶ For example, the wife in *State v. Koss* not only suffered psychological damage when her husband repeatedly threatened to kill her but also suffered physical injuries when her husband actually tried to kill her.⁴⁷ On one occasion her husband tried to smother her with a pillow and on another, he put a radio in the bathtub while she was taking a bath.⁴⁸ Ultimately, she killed him before he succeeded in killing her.⁴⁹ Similarly, in *Commonwealth v. Rodriguez*, Nelly Rodriguez suffered three types of abuse at the hands of her live-in boyfriend.⁵⁰ In addition to raping and psychologically abusing Nelly, her boyfriend slapped her; pulled her hair; bent her over a chair; “hit and punched her on many occasions; tried to strangle her with an extension cord; . . . punched her in the abdomen while she was pregnant with their son, in an attempt to induce an abortion; threw bleach in her face; and held a baseball bat to her head and threatened to kill her with it.”⁵¹ Ultimately, after suffering from continuous domestic abuse for over six years, Nelly stabbed her boyfriend to death during an argument.⁵²

Like Nelly Rodriguez, the wife in the case of *State v. Hennum* also suffered multiple episodes of horrendous physical violence, at the hands of her husband, throughout their thirteen year marriage.⁵³ For example, on one occasion, she suffered a punctured lung when her husband hit her in the ribs and on another occasion she suffered a broken nose and severe lacerations on her face after her husband hit her in the face with a beer bottle.⁵⁴ On another occasion, her husband kicked her with steel-toed boots, which caused the rupture, and subsequent removal of her spleen.⁵⁵ On the final day that he abused her, he pinned her to the floor with his hands on her throat, pulled out chunks of her hair, tore the door off of a closet and threw it at her, hurled a piece of firewood at her, tossed a car part at her and, when she tried to protect herself by hiding under the kitchen table, he grabbed a rocking chair and threw it at her, causing the chair to break.⁵⁶ That night, while he was sleeping, the wife shot her husband to death to end the abuse once and for all.⁵⁷

Unfortunately, abusive men not only batter their wives and girlfriends but often batter other family members as well. Child abuse is more likely to occur in families where there is domestic violence between the parents. In fact, caseworkers trained to screen for familial abuse, estimate that there is domestic violence among the parents in one half of the homes where a child is mistreated.⁵⁸ Other researchers have found that the presence of interspousal abuse foreshadows future child abuse because in almost three quarters of the homes where there is domestic violence among the parents, the children ultimately abuse their own children later in life.⁵⁹

The Idaho Supreme Court in *People v. Stuart* described a lethal combination of both spousal abuse and child abuse.⁶⁰ In *Stuart*, a battered woman’s abusive live-in boyfriend, Gene Stuart, ultimately beat her three year old son to death.⁶¹ Prior to the toddler’s death, Stuart had “a ten year-history of seemingly endless incidents of beatings, chokings, assaults, rapes and tortures, some at the point of a gun or knife, inflicted upon all the former wives, girlfriends and children whom [Stuart] was able to bring within his control.”⁶² Stuart’s first wife testified that, during their first three years of marriage, Stuart physically abused her more than thirty times, including choking her and striking her arms, head and back.⁶³ In

fact, Stuart often choked his victims into submission, including his own son by a former marriage “who was choked until the boy lapsed into unconsciousness.”⁶⁴ A rather bizarre, recent example of the same combination of domestic violence and child abuse occurred in October of 2006, when a woman’s physical fight with her boyfriend culminated with her “grabbing the couple’s one-month-old son by the legs and using him to clobber the boyfriend.”⁶⁵

Domestic Abuse Suffered By Victims Of Battered Child’s Syndrome: Historical Development of Battered Child’s Syndrome

Like battered women, battered children have only been legally protected from domestic violence in relatively recent times. Cases in early American law in which a child successfully alleged abuse by a parent or guardian are few and far between.⁶⁶ In fact, in 1875, a young girl named Mary Ellen was starved and severely beaten by her stepmother.⁶⁷ The abused child was placed under the protection of the Society for the Prevention of Cruelty to Animals because there were no facilities to care for her.⁶⁸ In arguing Mary Ellen’s case, the President of the Society pointed out: “The child is an animal. If there is no justice for it as a human being, it shall at least have the rights of the stray cur in the street. It shall not be abused.”⁶⁹ Mary Ellen’s case is regarded as the beginning of modern day treatment of child abuse and resulted in the founding of the New York Society for the Prevention of Cruelty to Children.⁷⁰

Even if children who were known to be abused by their parents might be entitled to some protection after the Mary Ellen case, the medical profession often wrongly concluded that the injuries of abused children had been sustained accidentally. Treating physicians were very slow initially to realize that the recurrent, multiple fractures sustained by some infants and small children were, in fact, inflicted by the children’s parents.⁷¹ The doctors usually attributed the fractures to the children being accident prone or suffering from some rare metabolic disorders rather than even considering the possibility that the children’s parents had deliberately caused the fractures.⁷²

In fact, it was not until 1962, that the term “battered child syndrome” was first coined by Pediatrician C. Henry Kempe to describe “a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent”.⁷³ Dr. Kempe cautioned physicians, who began using the term for diagnostic purposes, “to have a high initial level of suspicion of the diagnosis of the battered-child syndrome in instances of subdural hematoma, multiple unexplained fractures at different stages of healing, failure to thrive, when soft tissue swelling or skin bruising are present, or in any other situation where the degree and type of injury is at variance with the history given regarding its occurrence. . . .”⁷⁴ Infants and young children who sustain this type of life-threatening abuse would clearly fall within the parameters of the domestic abuse syndrome.

In addition to pediatricians relying on the term “battered child syndrome” for diagnostic purposes, prosecuting attorneys began to rely on expert testimony regarding the syndrome for evidentiary purposes in the criminal trials of abusive parents.⁷⁵ In 1971, the California Court of Appeals in *People v. Jackson* became the first appellate court to allow medical testimony regarding BCS as proof that a child’s injuries were not accidental.⁷⁶

The California court described the characteristics of BCS as follows:

1. The child is usually under three years of age;⁷⁷
2. There is evidence of bone injury at different times;

3. There are subdural hematomas with or without skull fractures;
4. There is a seriously injured child who does not have a history given that fits the injuries;
5. There is evidence of soft-tissue injury; and
6. There is evidence of neglect.

The injuries suffered by the thirteen month old boy in *Jackson*, were typical of BCS, including recent fractures of both his arms, ten broken ribs, second and third degree burns over 23% of his body, a distended abdomen and an injury to his liver.⁷⁹

The pediatrician who testified in the *Jackson* case opined that “it would take thousands of children to have the severity and number and degree of injuries that this child had over the span of time that he had by accidental means.”⁸⁰

Since *Jackson* was decided over thirty-five years ago, at least two circuit courts⁸¹ and thirty-three other state courts have followed California’s lead and admit expert testimony regarding BCS as prosecutorial evidence against child abusers.⁸² In addition, the United States Supreme Court, in *Estelle v. McGuire*, sustained the admissibility of expert testimony concerning BCS as evidence of prior injuries in the prosecution of a father for the death of his six-month-old daughter, *Tori McGuire*.⁸³ Like the injuries suffered by the infant in *Jackson*, the horrendous abuse suffered by *Tori*, were also typical of those suffered by a victim of BCS. An autopsy revealed that *Tori* had twenty-nine contusions on her abdomen, seventeen contusions on her chest, a lacerated large intestine, a split liver, a split pancreas, damage to her heart and lungs, rectal tearing and seven week old, partly healed fractures of several of her ribs.⁸⁴ *Tori*’s father claimed that she suffered the injuries from falling off of a couch.⁸⁵ In affirming the father’s conviction of second degree murder of *Tori*, the Court noted that “evidence demonstrating battered child syndrome help[ed] to prove that the child died at the hands of another and not by falling off a couch. . . it also tend[ed] to establish that the ‘other,’ whoever it may be, inflicted the injuries intentionally.”⁸⁶

Types Of Domestic Abuse Suffered By Victims Of Battered Child’s Syndrome

If victims of battered child’s syndrome survive and remain in the home of the abusive parent, the battering almost always continues. As they grow older, battered children suffer the same kind of injuries from their parents that an abused woman suffers at the hands of her abusive spouse; however, domestic abuse syndrome is relevant in both cases. For example, in *In re Appeal in Maricopa County*, the Arizona Appellate Court described how, like an adult victim of DAS, the typical battered child, is “subjected to horrific abuse, more than episodic or occasional, sustained repetitive terrorizing abuse over long periods of time.”⁸⁷ In *Maricopa County*, both twelve year old *K.T.* and her younger sister suffered “terrible and degrading physical and emotional abuse” throughout their lives until *K.T.* ultimately killed their abusive mother.⁸⁸ Moreover, like *Nelly Rodriguez*, who was raped by her live-in boyfriend, child victims of DAS also suffer from intra-familial sexual abuse. Almost one-half (46%) of all child rape is incestuous and 85% of all child sexual abuse is committed by a family member, relative or care provider.⁸⁹ Children who suffer from DAS, like *K.T.* and her sister, are at increased risk of having “delays in reaching developmental milestones,” often refuse “to attend school,” and suffer from “separation anxiety disorders.”⁹⁰ They are also at increased risk of developing health and behavioral problems as adults, including “smoking, alcoholism, drug abuse, eating disorders, severe obesity, depression, suicide, sexual promiscuity, and certain chronic dis-

eases.”⁹¹ In addition, they may suffer from “aggressive behaviors,” criminal activity, post-traumatic stress disorder, personality disorders, schizophrenia, and may inflict abuse on their own children and spouse.⁹²

In addition to physical or sexual abuse, many child victims of DAS also suffer from “psychological traumas”, including “sensory overload with light, sound, stench, aversive taste, itching, pain, or prevention of sleep.”⁹³ For example, in *Brodie v Summit County Children’s Services Board*, the father of eleven-year-old Tara Cook imprisoned his daughter in stairwells and closets and shackled her to the bathroom sink for almost one month, in addition to beating, burning, and starving her.⁹⁴ In *M.A. v. J.A.* the parents of a twelve-year-old boy confined the child in a three by four foot dog cage for two hours each week, during a period of two months, because he was expelled from his religion class.⁹⁵

The devastating impact that psychological abuse can have on child victims of DAS was described in a 1986 study where researchers found that children who were psychologically maltreated felt “unloved,” “unwanted” and “inferior” and displayed “low self-esteem” and a “negative view of the world.”⁹⁶ In addition to manifesting “aggressiveness [and] inadequate social behavior,”⁹⁷ as adolescents, they sometimes became truants or runaways or exhibited “destructive, depressed [or] suicidal” behavior.”⁹⁸

Children who are not direct victims of domestic violence frequently witness the abuse of their siblings or the battering of one parent by the other. According to a 2005 study conducted by the Children’s Defense Fund, as many as ten million children each year witness domestic violence.⁹⁹ In *In re Edward C.*, the California Appellate Court described how two un-abused brothers, aged six and nine, repeatedly “watched the vicious treatment of their [seven year old] sister” by their abusive father, who admonished them that “the beatings were on the command of the Lord.”¹⁰⁰

The court concluded that it was “difficult to conceive that the brothers could not be emotionally or psychologically scarred by witnessing the constant acts of cruelty upon their sister.”¹⁰¹

Unfortunately, there is increasing evidence that the California court in *Edward C.* was right. Even un-abused children who witness domestic violence will suffer from collateral damage, and experience the same psychological problems as children who are directly abused.¹⁰² Children who witness domestic violence exhibit the same confusion, guilt, anxiety, loss of self-esteem and depression as those who are direct victims.¹⁰³ Moreover, they also develop similar behavior problems, including nightmares, bedwetting, learning difficulties and eating disorders.¹⁰⁴ Like their abused siblings, child witnesses also can be aggressive, disobedient and display dysfunctional behavior.¹⁰⁵ Unfortunately, children who have witnessed domestic violence are also at a greater risk for substance abuse problems.¹⁰⁶

The Domestic Abuse Syndrome As Part of The Self-Defense Plea of Women and Children Who Are Charged With Killing Their Abusers

Overview of Self-Defense Pleas by Victims of Domestic Abuse Syndrome

When victims of DAS are prosecuted for killing their abusers, they frequently claim that they acted in self-defense. Self-defense, in the case of both battered women and battered children, is based on the principle that a person “who is unlawfully attacked by another and who has no opportunity to resort to the law for his defense, should be able to take reasonable steps to defend himself [or herself].”¹⁰⁷ A homicide committed in self-defense is classified as a “justifiable homicide” as opposed to an “excused homicide.”¹⁰⁸ Justification “declares the allegedly criminal act legal,” and therefore only requires “an objective evaluation of the criminal act.”¹⁰⁹

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On the other hand, “excuse admits the act’s criminality, but declares the criminal actor not to be worthy of blame,” and therefore, requires only “a subjective evaluation of the criminal actor’s *state of mind*.”¹¹⁰ Excuses for homicide include insanity, accident, sufficient provocation and an honest, but unreasonable belief in the need for self-defense.¹¹¹

Prior to the late 1970s, battered women who killed their abusers tended to rely on insanity to prove excuse for the homicide.¹¹² When a battered woman pled insanity she claimed that, because of her mental condition at the time of the murder, she was not guilty, either because she did not know what she was doing or because she did not know that she did anything wrong.¹¹³

The insanity defense was usually a “complete” defense, in the sense that the woman would not be legally responsible for the homicide.¹¹⁴ However, it soon became clear that insanity was not an appropriate defense in most cases involving self-defense by a battered woman. As the Oklahoma court noted in *Bechtel v. State*, “[b]ased upon our independent review of the available resources on the subject, we believe that the [battered woman] syndrome is a mixture of psychological and physiological symptoms, but is not a mental disease in the context of insanity.”¹¹⁵ Moreover, if battered women were acquitted based on insanity, they were often committed to mental institutions for indefinite periods of time.¹¹⁶ Because of this harsh result during the late 1970s, defense attorneys began to explore defending battered women charged with killing their abusers on the basis that their homicides were justified rather than excused.

Traditionally, a homicide is justifiable providing the defendant can “show reasonable ground[s] to apprehend a design to...do some great bodily injury,” and “imminent danger of such design being accomplished.”¹¹⁷ The circumstances surrounding the murder of a batterer by a DAS victim may, of course, satisfy these traditional requirements if the homicide occurs during an abusive attack. For example, in *State v. Lynch*, the Louisiana Supreme Court reversed the manslaughter conviction of a nineteen-year-old woman who shot her middle-aged husband while she was trying to retreat from his physical attack and after warning him three times that she was going to shoot.¹¹⁸ There is little doubt that her fear for her life was justified since her husband had previously beaten her twenty to thirty times, including hitting her so hard with a baseball bat that she was unable to walk for several weeks.¹¹⁹

More often, however, the murder of an abuser by a DAS victim occurs in a situation which does not conform to the usual self-defense model, such as when the homicide occurs between attacks while the batterer is passive or asleep. For example, in *State v. Gallegos*, the New Mexico Court of Appeal reversed a battered wife’s conviction of voluntary manslaughter where she shot and stabbed her husband while he was lying in bed after he had been drinking.¹²⁰ Earlier in the day, the husband had sexually abused her and threatened to kill her.¹²¹ Moreover, in the past, he had beaten her and thrown her against a wall, causing the premature birth of their second child.¹²²

Obviously, when a murder occurs in a non-confrontational setting, victims of domestic abuse often encounter formidable obstacles in proving that there were “reasonable grounds” for believing that they were in “imminent” danger. In *The Battered Woman*, Dr. Walker helped provide abused women with the objective proof they needed to justify their self-defense pleas in a non-confrontational setting.¹²³ In her book, Walker explained how the three stage pattern of domestic abuse allows the battered women to anticipate when physical violence is imminent.¹²⁴ Dr. Walker also described the psychological reactions of hypervigilance and the

learned helplessness manifested by battered women, which helps to explain why battered women may be objectively justified in killing their passive abusers.¹²⁵

When the term battered child syndrome is used to describe the permanent psychological effects of domestic violence, the effects are virtually identical to the psychological impact characteristically associated with BWS. The same three stage pattern of abuse, which is found in BWS, also occurs in the battered child syndrome. Additionally, the characteristics of hypervigilance and learned helplessness are also exhibited by children who are victims of DAS and helps explain why they might be objectively justified in killing their abusive parents.¹²⁶ The term battered child syndrome is currently used both as originally coined by Dr. Kempe, as a term describing the severe physical abuse of an infant or small child,¹²⁷ and as a term describing the psychological effects of prolonged abuse of an older child or adolescent, as part of a child's self-defense plea.¹²⁸ Although Dr. Kempe's term bears the same name, as the Maryland Appellate Court pointed out in *State v. Smullen*, his term "had nothing whatever to do with a self-defense argument by a parent-killing child, but focused entirely on identifying child abuse."¹²⁹ Nevertheless, the *Smullen* court commented that applying battered child syndrome as part of a self-defense plea in a parricide case did "not seem to be inconsistent" with the syndrome's original function. Dr. Kempe noted that the problems of a battered child did not involve just physical injury, "but that, except for children who were actually killed or endured permanent brain damage, 'the most devastating aspect of abuse and neglect is the permanent adverse effects on the developmental process and the child's emotional well-being.'"¹³⁰

The Basis for a Self-Defense Plea by All Victims of Domestic Abuse Syndrome Is the Same

Women and Children Who Are Victims of Domestic Abuse Syndrome Manifest the Same Three Stage Pattern of Abuse

Domestic abuse of both women and children typically occurs in "recurring patterns," consisting of three-stage cycles.¹³¹ Dr. Walker described the phases of these cycles, in the context of a battered woman, as follows:

The first phase is the 'tension-building' period. The second stage is the 'acute explosion' period when the abuse takes place. The third stage is the 'loving, contrition' period. It is during the tension-building period that the battered woman develops a heightened sensitivity to any kinds of cues of distress. Thus, because of her intimate knowledge of her batterer, the battered woman perceives danger faster and more accurately as she is more acutely aware that a new or escalated violent episode is about to occur.¹³²

Like a battered woman, a battered child develops "a heightened sensitivity" during the tension-building stage and is able to anticipate when an "acute explosion" phase is about to begin.¹³³

This helps explain why child-victims of abuse tend to kill most often during the tension-building stage because they lack the physical strength to defend themselves during the acute explosion stage when the abuse occurs.

Battered children often kill their abusive parents while the abusers are in apparently non-threatening situations, such as being asleep or incapacitated. The Minnesota Supreme Court noted in *State v. McLennan* that an attack on a parent by a child "does not occur at the time of the conflict; rather, it occurs when the child has the opportunity to attack."¹³⁴

Each of the three phases of abuse is characterized by specific behavior patterns on the part of the batterer. According to the

Smullen court, during the first tension-building phase, "minor incidents of physical, sexual or emotional abuse" occur and the "batterer begins to express hostility toward" the victim though he or she "is not severely abused".¹³⁵ The second acute explosion phase consists of "an acute battering incident, in which the batterer typically unleashes a barrage of verbal and physical aggression that can leave the [victim] severely shaken and injured."¹³⁶ During the last loving-contrition phase "the batterer apologizes, seeks forgiveness, and promises to change."¹³⁷ In *State v. Richardson*, an expert witness testified that the loving-contrition or honeymoon phase is "very seductive to the battered woman for staying in the abusive relationship."¹³⁸ The "apparent transformation of the abuser back into a loving partner. . . provides the positive reinforcement for remaining in the relationship."¹³⁹ In *Richardson*, the abusive husband's behavior during the loving contrition phase contrasted markedly with the acute explosion phase when he "kicked her, attempted to choke her and threatened to kill her."¹⁴⁰

It is also during the contrite phase of the violence cycle that battered women and children become hopeful that the abuse will cease. They pin their hopes on the profuse apologies and fervent promises, often accompanied by gifts. Ironically, this emotional attachment to the batterer also helps to explain why victims of domestic violence may not leave an abusive relationship.¹⁴¹ Unfortunately, their hopes are soon dashed, and rather than diminishing over time, the cycle of abuse often "gets more intense, more repetitive, more frequent and more violent and consequently more lethal."¹⁴²

Both Women and Children Victims of Domestic Abuse Syndrome Manifest the Same Psychological Characteristic of Hypervigilance

Dr. Walker explained how the "recurring patterns" of an abusive relationship allow a battered woman to "become expert at recognizing the warning signs of an impending assault from her partner."¹⁴³ This expertise, known as "hypervigilance," is displayed by both women and children who are victims of DAS. For example, hypervigilance in the context of a battered child was described by the Washington Court of Appeals in *State v. Janes* as "a heightened ability to discern preaggressive behavior in others . . . which would be almost imperceptible to one who was not abused."¹⁴⁴ According to the *Janes* court, even when very young, battered children, like battered women, "develop 'a very finely tuned antenna for impending violence [which] . . . picks up' low level cues that people who have not been traumatized would not see."¹⁴⁵ In the context of a battered woman, the California Supreme Court in *People v. Humphrey* described how "[r]emarks or gestures which are merely offensive or perhaps even meaningless to the general public may be understood by the abused individual as an affirmation of impending physical abuse."¹⁴⁶ The sign may be "'that look in his eye'; for others, it is the advent of heavy drinking, or heightened irrational jealousy."¹⁴⁷

An abuse victim's hypervigilance can act as an early warning system, enabling them to better protect themselves from abuse.¹⁴⁸ For example, in *People v. Sherman*, Randy Sherman, who was physically and psychologically abused by his father throughout his childhood, described how his father gave him the "'same menacing look'" when he was "'about to change into the Incredible Hulk,'" before whipping Randy with a belt or extension cord or beating him with a dog chain.¹⁴⁹

Legal commentators stress that "hypermonitoring" is the "key to the realization that child abuse victims learn how to tell when their parents are going to hurt them and that they are afraid even in the absence of confrontation."¹⁵⁰ The Washington Supreme

Court in *Janes*, explained the manifestations of this characteristic in battered children as follows:

Such a hypervigilant child is acutely aware of his or her environment and remains on the alert for any signs of danger, events to which the unabused child may not attend. The child's history of abusive encounters with his or her battering parent leads him or her to be overly cautious and to perceive danger in subtle changes in the parent's expressions or mannerisms. Such 'hypermonitoring' behavior . . . means the child becomes sensitized to these subtle changes and constantly 'monitors' the environment (particularly the abuser) for those signals which suggest danger is imminent.¹⁵¹

Both Women and Children Who Are Victims of Domestic Abuse Syndrome Manifest the Same Psychological Effect of Learned Helplessness: Battered Women Experience: The Psychological Characteristic of Learned Helplessness

Dr. Walker also described the psychological phenomenon of "learned helplessness" which aids in explaining why a battered woman does not leave her abuser and "why an apparently normal person loses his or her ability to predict how their actions will affect their safety."¹⁵² Dr. Walker explained that:

in applying the learned helplessness concept to battered women, the process of how the battered woman becomes victimized grows clearer. Repeated batterings, like electrical shocks (in animal experiments), diminish the woman's motivation to respond. She becomes passive. Secondly, her cognitive ability to perceive success is changed. She does not believe her response will result in a favorable outcome, whether or not it might. Next, having generalized her helplessness, the battered woman does not believe anything she does will alter the outcome. . . . Finally, her sense of emotional well-being becomes precarious. She is more prone to depression and anxiety.¹⁵³

As the Oklahoma Court of Criminal Appeal explained in *Bechtel*, "cultural characteristics of women influence the battered woman's belief that if she could only do something to help her abuser, then the bad part of him will go away" leading the woman "to develop coping skills rather than escape skills and [to] develop[] a 'psychological paralysis' and 'learned helplessness.'"¹⁵⁴ The "etiology of this aspect" was described by the *Smullen* court as follows:

"Through experience, the victim learns that when she attempts to defend herself -- by reaching out to others or trying to leave -- that she will be the victim of more severe violence. The batterer blames the abusive relationship on her inability to respond to his ever-increasing demands so that the most effective short-term method of reducing incidents of violence is to be more subservient."¹⁵⁵

Often battered women lack self-confidence and feel responsible for the abusive relationship.¹⁵⁶ In fact, "[c]ommon characteristics of battered women [include] low self-esteem, denial of anger and fear, feelings of guilt, social isolation, depression and the belief that no one can help them."¹⁵⁷

Although some battered women make efforts to stop or mitigate the abuse,¹⁵⁸ because of this learned helplessness many other "victims of repeated abuse will eventually abandon any efforts to leave the abusive situation."¹⁵⁹ For example, in *State v. Allery*, a battered wife stayed with her husband despite the fact that he "struck her on the head with a tire iron" causing her to be hospitalized and engaged in a "consistent pattern of physical abuse" includ-

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ing "periodic whippings, assaults with knives and numerous beatings from [his] fists throughout their marriage."¹⁶⁰ The Washington Supreme Court opined that a battered woman, like Mrs. Allery, who suffers from learned helplessness, "is psychologically locked into her situation due to economic dependence on the man, an abiding attachment to him, and the failure of the legal system to adequately respond to the problem."¹⁶¹ Similarly, in what the Kansas Supreme Court described in *Hundley* as

a textbook case of the battered wife,. . . Betty Hundley had survived her husband's brutal beatings for ten years. 'Her bones had been broken, her teeth knocked out and repeated bruises inflicted, but she did not leave him. She called the police occasionally but would continue to stay with Carl Hundley. The mystery, as in all battered wife cases, is why she remained after the beatings. . . . [T]here is no easy answer to why battered women stay with their abusive husbands. Quite likely emotional and financial dependency and fear are the primary reasons for remaining in the household. They feel incapable of reaching out for help and justifiably fear reprisals from their angry husbands if they leave or call the police. The abuse is so severe, for so long a time, and the threat of great bodily harm so constant, it creates a standard mental attitude in its victims.'¹⁶²

Battered Children Experience the Psychological Characteristic of Learned Helplessness

Battered children also display learned helplessness, thus sharing another key characteristic with battered women, which is relevant in a plea of self defense. In fact, as the Washington Supreme noted in *Janes*, "learned helplessness" is "especially severe" in children.¹⁶³ The psychological effects of the cumulative terror caused by a prolonged pattern of long term abuse represents "a profound kind of blow to how a person functions that is devastating to a child."¹⁶⁴ There is "every reason to believe that a child's entire world view and sense of self may be conditioned by reaction to that abuse."¹⁶⁵

Their reaction may lead children to feel that, not only their safety, but their very existence is threatened at all times, especially since they may perceive their abusive parents as "very powerful—perhaps omnipotent."¹⁶⁶ Overall, the world of battered children is permeated with a sense of powerlessness, fear, and anxiety.¹⁶⁷ The perceived hopelessness of their desperate situation results in a "pervasive sense of helplessness that results from feeling trapped in a situation from which they cannot escape."¹⁶⁸

Both Women and Children Who Are Victims of Domestic Abuse Syndrome Suffer From the Same Emotional Impediments to Their Ability to Leave Their Abusers

Battered Women Are Emotionally Unable To Leave Their Abusers

Domestic violence victims, after years of forced social isolation, may perceive no superior alternative than remaining with their abusers.¹⁶⁹ This result occurs when the woman's efforts to improve the relationship or extract herself from the situation prove futile, she learns she cannot escape the relationship because of her financial status or fear of retribution, and she abandons her efforts."¹⁷⁰ Most battered women have sought help unsuccessfully from police or other protective agencies. One study of women in Philadelphia, who died at the hands of their abusive spouses, estimated that 64% of the women were known by the police to have been physically abused before their deaths.¹⁷¹ In fact, some commentators suggest that, rather than suffering from learned helplessness

ness, battered women are survivors whose “help seeking efforts are largely unmet” and who most need “the resources and social support that would enable them to become more independent and leave the batterer.”¹⁷²

Another reason that women don’t leave abusive relationships is called “separation abuse,” meaning that the battered woman fears retaliation towards herself, her children, other family members, friends or even co-workers.¹⁷³ For example, in *Koss*, the battered wife testified that her abusive husband threatened to kill her children unless she dropped a domestic violence complaint she had filed against him.¹⁷⁴ Fears of retaliatory abuse appear to be well-founded since the most frequently and seriously battered women are those who are separated or divorced from their abusers.¹⁷⁵ Although only 10% of women are separated or divorced, they account for 75% of all victims of domestic violence and are fourteen times more likely to be battered than women who are still cohabiting.¹⁷⁶ Unfortunately, it is also accurate that, if the abuser is unable to locate the battered woman, he may seek revenge on other people who are important in her life.¹⁷⁷

A report from the National Institute of Justice explains how this type of evidence regarding learned helplessness and the other factors influencing a battered woman’s decision not to leave can assist a jury in understanding the abused woman’s perspective:

Understanding these and other obstacles to leaving or staying away from a battering relationship assists the fact finder in considering the context of a battered woman’s efforts to resist, escape, and cope with a violent relationship. Without an appreciation of this context, the fact finder’s deliberations may rest on faulty assumptions, for example, that a woman who remains in an alleged abusive relationship has exaggerated or lied about the fact of violence.¹⁷⁸

Battered Children Are Emotionally Unable To Leave Their Abusers

Unfortunately, abused children face even more significant obstacles to escaping from their abusive homes. Although the common expectation might be for the abused child to seek outside help, “there are compelling psychological reasons that make seeking and getting help the rare exception, not the norm.”¹⁷⁹ Paradoxically, despite the abuse, battered children frequently have strong emotional bonds with their abusive parents.¹⁸⁰ As the Washington Supreme Court noted in *Janes*: “Children are entirely dependent on the parent for emotional . . . support. They are extremely vulnerable and tend to place great trust in their parents. It’s not as easy for a child as it is for an adult to leave a troubled home.”¹⁸¹

It seems obvious that battered children also have far less practical ability and wherewithal to run away from the abusive home than battered women. Although some abused children do try to run away, they usually do not know any safe place where they can seek refuge.¹⁸² “Surviving on the streets is hardly a realistic alternative for youths with meager financial resources, limited education and few skills.”¹⁸³ Consequently, most of the children who do try to run away are ultimately picked up and returned to their abusive homes.¹⁸⁴

Like battered women, battered children also fear that running away will only result in greater abuse, not only to them, but to their other family members as well. Informing police or other authorities of the abuse is often avoided by abused children for the same reason. Unfortunately, like battered women, abused children who do report the violence to authorities often fail to receive the help they are so desperately seeking. As explained by the *Janes* court: “Oftentimes, abused children will have sought outside help

from authority figures...without gaining any satisfactory outcome.”¹⁸⁵ Evidence in the *Janes* case revealed that Washington’s Child Protective Services had been contacted at least three times by neighbors and school teachers of the abused child, Andrew *Janes*, because of the horrendous maltreatment Andrew endured from his mother’s live in boyfriend but that “no action was taken.”¹⁸⁶

The Washington Supreme Court in *Janes* also pointed out that “[o]ther persons within the family are unable to help because they frequently suffer abuse as well.”¹⁸⁷ For example, in the *Janes* case, both Andrew’s mother and brother also suffered physical abuse.¹⁸⁸ Moreover, most children are far more financially dependent on their parents than most battered women are on their spouses. As noted by the court of appeals: “Children do not reach the age of majority until they are 18 years of age Until then, they have virtually no independent ability to support themselves, thus preventing them from escaping the abusive atmosphere.”¹⁸⁹ Unlike most adults, most children are unable to support themselves on their own. The *Janes* court concluded that “[i]n the end, for the battered child, all doors of escape appear closed.”¹⁹⁰

The reasons why a battered child might ultimately resort to parricide are also understandable based on the psychological effects of prolonged abuse. As nationally known child abuse expert Leonard P. Edwards explained, if a “child believes there is no escape and that he or she will continue to be abused, the child may take desperate action. Some children run away from home. In a few cases a child may finally fight back by killing the abuser.”¹⁹¹ An example of a child finally fighting back by committing parricide occurred in *Maricopa County*.¹⁹² In that case, after “years of severe physical, psychological and emotional abuse and neglect, twelve year old K.T. shot her mother in the back of the head, while her mother was sleeping.”¹⁹³ Defense expert Dr. Frank Miller testified at K.T.’s trial that he had “only seen a few cases” in his career approaching “the heinous treatment” and “the terrible and degrading physical and emotional abuse suffered by [K.T.] and her younger sister.”¹⁹⁴ Dr. Miller commented that the “only ones that have exceeded that that I’ve seen are always postmortem of the child.”¹⁹⁵ He explained that K.T. lived in “constant fear of imminent irrational punishment” which had been “worsening in intensity and severity to the point of possible death, punctuated by the presence of a casket in the house in which, it was threatened by [the mother that] K.T. and her sister could find themselves.

This was underscored by the fact that both K.T. and her sister had been choked to the point of unconsciousness” by their “sadistic” mother.¹⁹⁶ K.T., and other people acting on her behalf, had “without success, sought help numerous times from state, police and school officials.”¹⁹⁷ In fact, “[w]ithin a week of the killing alone, there was one more contact with the police and three with the Arizona Department of Economic Security Child Protective Services.”¹⁹⁸ Dr. Miller compared K.T.’s “mental state” at the time she shot her mother as being like

a concentration camp victim “[l]iving in a state of terror.” He observed that such a mental state would cause someone to do an act otherwise violative of her own moral standards and that K.T. believed that, particularly given the lack of response from adult authorities from whom she repeatedly had sought help, shooting her mother was her only option to protect herself and her younger sister from further peril and death. K.T. felt especially helpless with regard to protecting her younger sister, whom she believed to be suicidal.¹⁹⁹

Both Women and Children Who Are Victims of Domestic Abuse

Domestic Abuse of both Women and Children Occurs More Frequently In Impoverished Families

Although domestic abuse syndrome cuts across socio-economic lines,²⁰⁰ it is clear that both domestic violence and child abuse occur more frequently in low income families.²⁰¹ In fact “[r]esearch makes it clear that poverty increases the risk of both domestic violence and child abuse and neglect.”²⁰²

According to a 2005 study by the Children’s Defense Fund, “[p]overty is the single best predictor of child abuse and neglect.”²⁰³

Unfortunately, as of 2004, there were approximately 37 million Americans living below the poverty line,²⁰⁴ including more than one out of every six American children.²⁰⁵ According to two national surveys, “violence toward children, especially severe violence, is more likely to occur in households with annual incomes below the poverty line.”²⁰⁶ Children who live in families with annual incomes of less than \$15,000 are twenty-two times more likely to be abused or neglected than children living in families with annual incomes of \$30,000 or more.²⁰⁷

Data also suggests that women living in households with lower annual incomes experience higher rates of domestic violence than more affluent women.²⁰⁸ For example, according to one study, during the period from 1993 until 1998, women living in households with annual incomes of less than \$7,500 were almost seven times more likely to suffer domestic violence than women living in households with an annual income of \$7,500 or more.²⁰⁹ Other studies have shown that 20% to 30% of women receiving welfare assistance suffered domestic violence within the past two years²¹⁰ and over 50% reported that they had been subjected to physical abuse by their male spouse or partner at some time in their adult lives.²¹¹ In one ten-city study of 777 homeless parents, the majority of whom were mothers, 22% said that they had left their homes because of domestic violence.²¹²

It should be noted that there is “considerable dispute” about whether this “disproportionate occurrence reflects greater surveillance of low-income families, or greater stresses of poverty or other factors.”²¹³ Some researchers have concluded that the increased prevalence of abuse among poor families “may be due to the stress of poverty itself, as it places greater pressure on parents to cope with the daily challenges of raising children.”²¹⁴

The stresses of juggling the demands of daily life with little income are likely to put a significant strain on a couple’s relationship, and these tensions may erupt into violence.²¹⁵ On the other hand, poor families may simply have more contact with service professional who report the abuse, like emergency room physicians in a public hospital, whereas middle- and upper-income families may have the wherewithal to conceal the abuse, such as by using private doctors at a private hospital.

There is no dispute, however, that the challenges faced by abusive families are likely to be “more difficult to cope with when they have fewer resources.”²¹⁶ The stress engendered by poverty sometimes leads to one or both of the parents developing depression, drug or alcohol dependencies or mental health disabilities.²¹⁷ For example, one study of welfare recipients demonstrated that women who were victims of domestic violence at some point in their lives suffered from drug and alcohol abuse, post traumatic stress disorder and physical health problems at higher rates than welfare recipients who had never been abused.²¹⁸ Another study, conducted only seven years ago, revealed that approximately 26% of the children residing in families with low incomes (defined as

families with incomes below 200% of the federal poverty threshold) lived with a mentally ill parent.²¹⁹ By comparison, only 10% to 11% of children residing in high income families lived with a mentally ill parent.²²⁰ Depression is also more prevalent among low income families.²²¹ The proportion of poor parents reporting depressive symptoms fluctuated between 10% and 13% between 1998 and 2003.²²² Coping with depression and trying to maintain low-wage work can “make it difficult for parents to adequately care for their children”.

Domestic Abuse Syndrome Victims from Impoverished Families Are Financially Unable To Leave Their Abusers

Obviously, poverty also has a devastating effect on the ability of all DAS victims to successfully escape from an abusive relationship. Lack of economic resources makes leaving very difficult for many abused women, especially those with children to support.²²³ Batterers frequently control all of the couple’s finances, and only the abusive spouse’s name may be on many or all of their accounts.²²⁴ If the battered woman has never had telephone, electric or gas services in her own name, she will need to give each of the utilities an initial deposit of as much as \$100.00. Although that may not seem like much, for a woman in extreme poverty, trying to live on about \$25.00 per day, it may well be money that she simply does not have. For domestic violence victims who live in poverty, even one deposit can be the difference between the battered woman and her children moving on to safety and self sufficiency or returning in defeat to the batterer. As an expert witness in the *Humphrey* case testified: “It really is the physical control of the woman through economics and through relative social isolation combined with the psychological techniques that makes her so dependent.”²²⁵ Unfortunately, resources to aid battered women in leaving abusive relationships and setting up independent households are “severely limited in most communities throughout the country.”²²⁶

Moreover, even if a woman does set up an independent household, her limited economic resources will likely have a major impact in enabling her to maintain her resolve to remain away from her abusive partner. One study of 800 women found that the most important factors for women making the decision whether or not to return to the abuser all involved financial concerns, including access to an independent income, child care and transportation.²²⁷ By comparison, only 16% of battered women who had their own income planned to return to their batterers.²²⁸

The inability of impoverished a woman to meet her monthly bills by herself often leaves the woman with no choice for herself and her children but to either go to a homeless shelter or return to her abuser. Shelters for victims of domestic violence are only meant to be short term and they are not designed to provide long-term housing. Many abused women who seek temporary refuge in emergency shelters, ultimately return to their spouses, in large part because they have no other source of income.²²⁹ Thus, it is not long before the battered woman and her children are once again faced with the Hobson’s choice of unrelenting poverty and homelessness or unrelenting abuse.

Because Domestic Abuse Syndrome Impacts Women And Children In Courts Should Also Admit Evidence of Battered Child’s Syndrome As Part Of A Child’s Self Defense Plea

Because battered woman’s syndrome and battered child’s syndrome of an older child, are the “functional and legal equivalent” of one another, it seems only logical that courts that admit expert testimony re BWS as part of a woman’s self-defense plea, should also admit expert testimony regarding BCS as part of a

child's self-defense plea.²³⁰ In upholding the admissibility of BCS as part of a child's self-defense plea for parricide, the *Janes* court concluded that the "battered woman syndrome and the battered child syndrome constitute a single psychological disorder for purposes of expert testimony. . . . The differences between the two groups are negligible."²³¹ In *Smullen*, the Maryland Appellate Court recognized that "application of [the battered child] syndrome to a self-defense argument in parricide cases would seem to be more a lateral extension of the battered spouse syndrome than a direct expansion of the battered child syndrome described by Dr. Kempe."²³²

The *Janes* court pointed out that "children are both objectively and subjectively more vulnerable to the effects of violence than are adults."²³³ Thus, "the rationale underlying the admissibility of testimony regarding the battered woman syndrome is at least as compelling, if not more so, when applied to children."²³⁴ As one legal commentator put it: "Courts are slowly recognizing that women and children should be treated similarly when they murder after years, or a lifetime, of family violence."²³⁵ The *Janes* court concluded: "Neither law nor logic suggests any reason to limit to women recognition of the impact a battering relationship may have on the victim's actions or perceptions."²³⁶

Nevertheless, although an increasing number of courts have found that expert testimony regarding the psychological impact of BWS is admissible on the issue of self defense, surprisingly few courts have found that similar expert testimony regarding BCS is also admissible.²³⁷ In the context of an abused woman, according to a 1996 report from the National Institute of Justice, expert testimony on "battering and its effects is admissible, at least to some degree, or has been admitted . . . , in each of the 50 states plus the District of Columbia."²³⁸ Over three-quarters of these states have admitted the testimony "to prove the defendant is a battered woman or that she 'suffers from battered woman syndrome.'"²³⁹ In addition, the report noted that twelve states have enacted statutes providing for the admissibility of expert testimony regarding battering.²⁴⁰ Half of these statutory provisions refer specifically to expert testimony on "battered woman syndrome"²⁴¹ or "battered spouse syndrome" while the other half use broader language, referring to the nature and effects of family violence on the beliefs, perceptions, and behaviors of the person being abused, which would encompass all victims of DAS.²⁴² In the federal judicial system, at least sixteen of the nineteen federal courts that have considered the issue have also admitted expert testimony on battering in at least some cases.²⁴³

On the other hand, in the context of an abused child, thus far, only two state supreme court decisions have admitted expert testimony regarding the psychological effects of BCS as part of the child's self-defense plea in a parricide case.²⁴⁴ In fact, it was not until 1993, over twenty years after the California Supreme Court first admitted evidence regarding BCS in the prosecution of an abusive parent in *Jackson*, that the Washington Supreme Court, with their decision in *State v. Janes*, became the first state supreme court to admit expert testimony regarding BCS for self-defense purposes where the abused child killed his abuser.²⁴⁵

In *Janes*, seventeen-year-old Andrew Janes had been subjected for over ten years to "chronic and enduring" physical abuse at the hands of Walter Jaloveckas, his mother's live-in boyfriend, which formed "an unrelenting pattern of episodic terror."²⁴⁶ For example, when he was nine years old, Andrew was caught shoplifting and was beaten by Walter with a belt, a wire hanger and a plastic piggy bank.²⁴⁷ Shortly thereafter, Walter hit Andrew in the mouth with a mop because the child had not wrung the mop out properly.²⁴⁸ A week before Andrew's tenth birthday, Walter used a

sledgehammer to smash Andrew's stereo.²⁴⁹ As a teenager, while Andrew was doing the dishes, Walter struck him without provocation or warning, knocking him unconscious.²⁵⁰ Andrew was also rendered unconscious when Walter hit him with a piece of firewood.²⁵¹ Walter also threatened Andrew throughout his childhood and adolescence with a litany of violent punishments: "Walter threatened to nail Andrew's hands to a tree, brand Andrew's forehead, and take Andrew away from his mother by sending him to a boy's home. Other threatened punishments included placing Andrew's fingers on the hot wood stove, breaking Andrew's fingers with a ball peen hammer, and wrapping a crowbar around Andrew's head."²⁵² Walter undoubtedly had the ability to seriously injure Andrew since on "one occasion, in the family's presence", Walter, who was an "occasional" drug dealer, "physically assaulted and threatened to kill [another] drug dealer."²⁵³ In admitting expert testimony regarding the domestic abuse of a child, the *Janes* court concluded that "[g]iven the close relationship between the battered woman and the battered child syndromes, the same reasons that justify admission of the former apply with equal force to the latter."²⁵⁴

It was not until five years after the *Janes* case, that the Ohio Supreme Court in *State v. Nemeth* became the second state supreme court to admit expert testimony regarding BCS as part of a self-defense plea in a parricide case.²⁵⁵ *Nemeth* involved the prosecution of sixteen-year-old Brian Nemeth for the murder of his abusive mother with a bow and arrow.²⁵⁶ Like Andrew Janes, Brian had suffered years of abuse at the hands of his alcoholic mother, including being hit with a stick, burned on his hand with a cigarette and cut on his side with a coat hanger.²⁵⁷ In the six months before her death, Brian's mother's drinking, and the abuse that went with it, escalated until it was a nightly occurrence.²⁵⁸ On the evening of her death, Brian spent most of the night in his bedroom with the door locked, listening to his mother cursing him and threatening to "beat his face in" and kill him.²⁵⁹ Finally, when Brian heard his mother walk away, he got his bow and arrows, found his mother lying on the couch, and shot her five times in the head and neck.²⁶⁰ The therapist who examined Brian diagnosed him as suffering from BCS and noted that he had "very compatible symptoms as do women in abusive relationships."²⁶¹ In finding the expert testimony regarding BCS to be admissible, the *Nemeth* court stated that such evidence would help to show that a child's behavior was "consistent with that of an abused child and would lend support to his testimony that he had been abused both generally and just prior to the killing."²⁶²

In the decade since the *Nemeth* case was decided, no other state supreme court has upheld the admissibility of expert testimony in a parricide case although the Minnesota Supreme Court indicated in *dicta* in *MacLennan* that such testimony might be allowed in an appropriate case.²⁶³ In *MacLennan*, seventeen year old Jason MacLennan was convicted of first degree murder in the shooting death of his father.²⁶⁴ On appeal, the Minnesota Supreme Court held that the lower court had not erred in excluding expert testimony regarding BCS since, although the evidence demonstrated a "tense relationship" between Jason and his father, it did not demonstrate the physical or sexual abuse which would "give rise to battered child syndrome."²⁶⁵ However, the Minnesota court opined that "[l]ike expert testimony on battered woman syndrome. . . expert testimony on battered child syndrome may help to explain a phenomenon not within the understanding of an ordinary lay person." The Court concluded that "relevant evidence that helps explain the characteristics possessed by children who have been battered and outlines the probable responses to traumatic events would be allowed."²⁶⁷

Expert Testimony Regarding the Psychological Effects of Domestic Abuse Syndrome Meets the Legal Requirements For Admissibility As Part of a Self-Defense Plea

Overview

In order for expert testimony regarding the psychological effects of domestic abuse syndrome to be admissible as part of a self defense plea, the testimony must meet several legal requirements. There is little doubt that expert testimony regarding the psychological effects of domestic abuse syndrome meets the threshold requirements that the evidence is both relevant and reliable regardless of whether the abuse victim is a woman or a child.²⁶⁸

The state of mind of the woman or child at the time they killed their abusers is clearly relevant and numerous cases have held that both battered woman's syndrome and battered child's syndrome meet the requisite level of reliability for admission.

In addition, in order to be admissible, expert testimony regarding the psychological effects of DAS on both women and children must be "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."²⁶⁹ Expert testimony regarding the psychological effects of domestic abuse syndrome clearly meets this threshold requirement as well. This type of evidence is sometimes referred to as "social framework testimony" since it provides "a social and psychological context in which the trier can understand and evaluate claims about the ultimate fact."²⁷⁰ Clearly, this "social framework" and the complex psychological characteristics exhibited by battered women and children, such as hypervigilance and learned helplessness, are beyond the knowledge of the ordinary lay person and the opinion of an expert would be of great assistance to the jury.

Finally, in order for expert testimony regarding the psychological effects of DAS on women and children to be admissible, it must also be determined that the probative value of the evidence is not substantially outweighed by its prejudicial effect.²⁷¹

There can be little doubt that the critical importance of allowing the jury to fully understand the abusive relationship and its psychological impact outweighs any potentially prejudicial animosity which the jury might feel towards the abuser. It is also clear that, rather than being a pretext to explain unlawful behavior, expert testimony regarding DAS would be offered to help the jury come to a full understanding of the factual and psychological context in which the homicide occurred, so that they can reach a fair and informed verdict.

Relevance Of Expert Testimony Regarding Domestic Abuse Syndrome

Expert testimony regarding the psychological effects of domestic abuse syndrome on both women and children is relevant because it "has a tendency in reason to prove or disprove [a] disputed fact of consequence to the determination of an action."²⁷² For example, in *State v. Hill*, the South Carolina Supreme Court reversed Sherry Hill's conviction for voluntary manslaughter in the shooting death of her live-in boyfriend, who verbally and physically abused her, holding that it was error not to admit expert testimony regarding battered woman's syndrome since such testimony "is relevant to the issue of self-defense."²⁷³

Similarly, in holding in *Nemeth* that expert testimony regarding battered child's syndrome "was relevant," the Ohio Supreme Court noted: "Evidence that would support a defendant's explanation of the events at issue and would provide evidence as to his possible state of mind at the time of the incident is clearly relevant to his or her defense."²⁷⁴ Obviously, expert testimony regarding DAS of both women and children would be proffered precisely to help the jury understand the psychiatric effects of battering on the abused defendant's state of mind at the time of the murder of the abuser. For example, the psychological effect of hypervigilance, which is manifested by both women and children who are victims of DAS, is "directly relevant in a self-defense context" since the ability of battered women and children to recognize the small changes in behavior that foreshadow abuse enables them to "sense the escalation in the frequency and intensity of the violence."²⁷⁵ Learned helplessness is also relevant in a self-defense context, as it offers an explanation as to why battered women and children simply do not leave the home and take some other actions against her abuser.²⁷⁶ In fact, according to the 1996 report from the National Institute of Justice, two-thirds of the states considered expert testimony regarding the effects of battering on the women to be relevant to determining why the defendant did not leave the battering relationship.²⁷⁷ Thus, there is unlikely to be any dispute that expert testimony regarding DAS is relevant.

Reliability Of Expert Testimony Regarding Domestic Abuse Syndrome

Expert testimony regarding domestic abuse syndrome of both women and children is also reliable. For example, in admitting expert testimony regarding battered woman's syndrome in the *Koss* case, the Ohio Supreme Court commented that the syndrome "has gained substantial scientific acceptance to warrant admissibility."²⁷⁸ Similarly, the Ohio Supreme Court in *Nemeth* made it clear that expert testimony regarding BCS was also reliable when the court stated that "the behavioral and psychological effects of prolonged child abuse on the child have been generally accepted in the medical and psychiatric communities and therefore unquestionably meet the requisite level of reliability for admission as the subject of expert testimony."²⁷⁹ Indeed, in holding that expert testimony regarding BCS was "both relevant and reliable"²⁸⁰ in proving self-defense in a non-confrontational parricide case, the *Nemeth* court commented that the case presented "precisely the kind of situation in which expert testimony is most necessary."²⁸¹

The Psychological Impact Of Domestic Abuse On Women Is Beyond The Common Experience Of The Jury

Numerous courts have held that expert testimony regarding BWS concerns a subject sufficiently "beyond the ken" of the jury that the opinion of an expert is necessary.²⁸² As the Minnesota Supreme Court explained in *MacLennan*: "[E]xpert testimony on battered woman syndrome can help jurors understand the interpersonal dynamics involved in abusive relationships, something with which many jurors are unfamiliar."²⁸³ Similarly, in *Humphrey*, the California Supreme Court agreed that "not only was expert testimony regarding BWS needed 'to explain a behavior pattern that might otherwise appear unreasonable to the average person' but it was also essential to explain how a battered person 'might think, react, or behave, it places the behavior in an understandable light.'"²⁸⁴ The court pointed out that expert testimony regarding BWS is "'aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge.'"²⁸⁵ In fact, according to the 1996 report from the National Institute of Justice, one-third of the states have "explicitly noted that the testimony is admissible to rebut common

myths and misperceptions about battered women.”²⁸⁶

In *Bechtel*, noting that “misconceptions regarding battered women abound,” the Oklahoma Court of Criminal Appeal, gave examples of several of these “common myths” including “beliefs that the women are masochistic and enjoy the beatings and that they intentionally provoke their husbands into fits of rage.”²⁸⁷

The *Bechtel* court concluded that, without expert testimony, it is, therefore, “more likely than not that the average juror will draw from his or her own experience or common myths, which may lead to a wholly incorrect conclusion.”²⁸⁸

Expert testimony regarding BWS also helps a jury to understand an abused woman’s hypermonitoring behavior which enables her to predict when domestic violence will occur. As the New Jersey Supreme Court in *State v. Kelly* explained: “Depending on its content, the expert’s testimony might [] enable the jury to find that the battered wife, because of the prior beatings, numerous beatings, as often as once a week, for seven years, from the day they were married to the day he died, is particularly able to predict accurately the likely extent of violence in any attack on her. That conclusion could significantly affect the jury’s evaluation of the reasonableness of defendant’s fear for her life.”²⁸⁹

Perhaps the most important area where the jury needs expert testimony to understand the battered woman’s situation is regarding her inability to leave the abusive relationship or to obtain help from other family members or from the authorities.

The *Koss* court explained how expert testimony regarding BWS helps “dispel the ordinary lay person’s perception that a woman in a battering relationship is free to leave at any time” and “would counter any ‘common sense’ conclusions by the jury that if the beatings were really that bad the woman would have left her husband much earlier.”²⁹⁰ The Washington Supreme Court in *Allery* pointed out that such expert testimony also helps a jury understand why a battered woman “would not inform police or friends and would fear more aggression against herself.”²⁹¹ Overall, the cumulative effect of expert testimony regarding the psychological impact of domestic violence assists the jury in determining whether the abused person’s acts “were those of the reasonable person similarly situated for whom the law of self-defense provides comfort.”²⁹²

The fact that it is the *psychological* effects rather than the *physical* effects of battering that makes expert testimony regarding DAS crucially necessary also explains why expert testimony regarding BWS is essential even if the defense has an opportunity to put on extensive testimony from other witnesses as to the abuse the woman endured from her deceased spouse. Although the other witnesses’ testimony may be sufficient to describe the *physical* abuse suffered by the battered woman, it is clear that the lay witnesses would not be able to explain the complex *psychological* impact of the battering.

The Psychological Impact Of Domestic Abuse Syndrome On Children Is Beyond The Common Experience Of The Jury

The reasons given by courts as to why the expert testimony regarding the psychological manifestations of BWS on a woman should be admitted to help the jury “place [her] behavior in an understandable light” are even more compelling when considering whether to admit evidence of BCS to explain the psychological effects of DAS on an abused child. As the Ohio Supreme Court in *Nemeth* explained that “it is difficult for the average person to understand the degree of helplessness an abused child may feel.”²⁹³

In *Janes*, the Washington Supreme Court admitted expert testimony regarding BCS explicitly to aid the jury in understanding a “little-known psychological problem”²⁹⁴ that is “beyond the average jury’s understanding.”²⁹⁵ The *Janes* court elaborated on the

necessity for the jury to hear expert testimony regarding BCS as follows:

Without the aid of expert testimony on the psychology of battered children, the jury will be unable to appreciate the manner in which the abused child differs from the un-abused child. Specifically, the jury will be uninformed as to the difference in the way battered children perceive things in their immediate surroundings and react to those perceptions.²⁹⁶

The unique perceptions of an abused child will also enable the jury to fully comprehend how a child would know that he or she was in danger of death or serious bodily injury, even if the child was not actively suffering abuse at the time the parricide occurred.

The court explained that

expert testimony regarding “hypervigilance” and “hyper-monitoring” help juries to fully comprehend that battered children are capable of detecting imminent harm more readily than un-abused children, who are less acutely aware of their environment... Hypervigilance enables a child to “notice a change in the usual pattern of abuse which would be almost imperceptible to one who has not been abused. This, in turn may suggest to the victim of abuse a level of immediate and acute danger very different from that perceived by one not continuously exposed to an abusive environment.”²⁹⁷

The child’s unique perception of danger may also help a jury to understand why the child might have a violent reaction to an ostensibly non-confrontational setting, even though the child has not reacted with violence in the past to confrontational settings.²⁹⁸

Very Few Jurors Have Been Battered Children

There are some legal experts who opine that, although expert testimony regarding battered woman’s syndrome is necessary to counter the common sense conclusion of jurors that a reasonable woman would have left the abusive situation, this need does not apply in the case of a battered child. The rationale for this view is that the vast majority of jurors have not been battered adults and, without the expert testimony, could not understand why a grown woman would choose to remain in an abusive situation, especially with the availability of support services. However, because every juror has been a child, who has been dependent on a parent or guardian to provide for their care, the inability of a child to leave his or her home is within the common experience of the jury and expert testimony regarding BCS is not required for the jury to fully understand the child’s situation.

This rationale misses some crucial aspects of why expert testimony is necessary to help jurors understand the perspective of a battered child. Even if lay jurors might have experienced and, therefore, might be able to understand the financial support that a child receives from his or her parents, this does not mean that expert testimony is not needed. Financial dependence is only a part of the explanation for why a battered child does not leave an abusive home. Expert testimony is needed to assist lay jurors in fully comprehending the strong psychological and emotional reasons that keep a battered child from seeking help or escaping from the abuser. This is also the reason why simply hearing extensive testimony from the child regarding the kinds of abuse that the child has suffered is not enough to understand the child’s perspective. It is not the fact that the child has been abused, or even the *physical effect* of that abuse, that expert testimony will help the jury understand. Rather, it is the *psychological effect* of the abuse that makes expert testimony necessary. As the Ohio Supreme Court explained in *Nemeth*, “[p]rolonged exposure to abuse results in feelings of pow-

erlessness, embarrassment, fear of reprisal, isolation, and low self-esteem....These effects often prevent a child from seeking help from third parties.”²⁹⁹ Although all jurors have been children, the vast majority of jurors have not been *abused* children and their common experience does not include knowledge of the psychological characteristics of a battered child.

Moreover, the fact that battered children grow up in an environment “wholly different from the safe and nurturing home depicted by traditional values and social expectations” seems to confirm that BCS is, fortunately, beyond the common experiences most jurors have encountered.³⁰⁰ Children who spend their formative years in unsafe, abusive homes often find it nearly impossible to develop any non-violent methods of problem solving. In *Janes*, the Washington Supreme Court explained that, “unlike an adult who may come into a battering relationship with at least some basis on which to make comparisons between current and past experiences, a child has no such equivalent life experience on which to draw to put the battering into perspective.”³⁰¹ Usually, such children have seen only violence used to solve problems in the home, and “[u]nlike the battered adult, [have] no outside context with which to compare the abusive reality.”³⁰² Because abused children are unaware of other problem-solving methods, they begin to pattern their behavior after that of their abusive parents. This effect of growing up in a violent environment may help the jury understand why abused children might resort to using violence against their abusers rather than leaving the abusive situation or reporting the abuse.³⁰³

Unfortunately, this effect also often results in battered children becoming violent youths and adults. A number of studies have shown a marked correlation between physical abuse as a child and violent behavior in youth and adulthood. For example, according to a 2005 study by the Children’s Defense Fund, abused and neglected children are up to six times as likely to engage in delinquent behavior as juveniles and up to three times as likely to be arrested as adults than non-abused and neglected children.³⁰⁴ Robert W. Ten Bensel has written that “studies have indicated a 100 percent correlation between [physical] child abuse and deviant behavior among violent juvenile delinquents, adults who had committed violent crimes and who were in San Quentin Prison, and all assassins and people who had attempted assassinations without success in the United States in the past 20 years.”³⁰⁵ According to another study, an abused child’s chances of becoming an abusive adult are “in some instances a thousand times greater than an un-abused child.”³⁰⁶

Very Few Battered Children Can Provide Corroborating Testimony Regarding Their Abuse

Expert testimony regarding battered child syndrome may also be necessary to establish that the abuse could have occurred without anyone outside of the immediate family knowing about it. Unlike a battered woman, who may be able to corroborate her physical abuse by the testimony of other witnesses, in most cases an abused child will not be able to provide any similar corroborating testimony. As the Utah court noted in *State v. Tanner*, “Where there is child abuse, there will invariably be secrecy. The great disparity of power and control between the abuser and the child assures that there will be little, if any, direct evidence.”³⁰⁷ The Ohio Supreme Court in *Nemeth* further explained:

The abusive parent...generally becomes adept at concealing the abuse from outsiders....The effects of abuse thereby diminish the likelihood that the defense will be able to present corroborating testimony of third parties.

Absent corroborating evidence, a trier of fact is likely to

believe that the abuse allegations are fabricated in response to the charges levied against the child-defendant.³⁰⁸

Indeed, the *Nemeth* court made it clear that “[i]t is the lack of corroborating evidence that makes expert testimony even more crucial” since the “defense needs expert testimony to refute the seemingly logical conclusion that serious abuse could not be taking place if no one outside the home was aware of it.”³⁰⁹

Compounding the problem is the fact that a battered child will frequently maintain the secrecy and remain silent about both the fact that the abuse is occurring and the identity of the perpetrator.³¹⁰ Battered children are often directly threatened by their abusers regarding the consequences of telling anyone about the abuse. “Abusers may tell children that if they ever tell anyone they will be beaten or killed or some other family member may be harmed.”³¹¹ Moreover, because of the abusers’ threats, “[e]ven when the abuse has been reported and social services and juvenile courts have become involved, the full extent of the abuse suffered by a child may be unknown because of these fears.”³¹²

Expert Testimony Regarding the Psychological Impact of Domestic Abuse Syndrome Has High Probative Value Which Is Not Outweighed By Any Prejudicial Effect

The Probative Value Of Expert Testimony Regarding The Psychological Impact Of Domestic Abuse Syndrome On Women

Since one of the requirements for the admission of expert testimony is that its probative value is not outweighed by its prejudicial effect, all of the courts that have admitted expert testimony regarding battered woman’s syndrome have had to either explicitly or implicitly reach this conclusion.³¹³ In fact, these courts have repeatedly recognized that expert testimony regarding BWS is essential since the “state of mind” of the defendant is a “critical issue” and the defendant’s actions need to be explained “in light of [her] knowledge concerning the victim.”³¹⁴ For that reason “[t]he victim’s reputation for violence, prior ‘assaults, and other circumstances [are] relevant to interpreting the attacker’s behavior.”³¹⁵ Such considerations “illuminate and reflect on the reasonableness of defendant’s perception of both the imminence of danger and the need to resist with the degree of force applied.”³¹⁶

The Probative Value Of Expert Testimony Regarding The Psychological Impact Of Domestic Abuse Syndrome On Children

Like expert testimony regarding the psychological impact of domestic abuse syndrome on battered women, similar evidence on behalf of battered children has high probative value and is not outweighed by any prejudicial effect. There are two main concerns regarding the potential prejudicial effects of expert testimony regarding the battered child syndrome. Neither of these concerns is sufficiently prejudicial that it should outweigh the high probative value of expert testimony regarding the psychological effects of DAS on children.

The first concern is that expert testimony regarding battered child’s syndrome will lead the jury to develop animosity towards the abusive parent, shifting the jury’s attention from the proper inquiry of whether the child was justified in killing the parent to the irrelevant issue of the parent’s relative worth as a mother or father. This concern was expressed by the Wyoming Supreme Court in refusing to admit expert testimony regarding battered child’s syndrome in *State v. Jahnke*.³¹⁷ In that case, from the time sixteen-year-old Richard Jahnke was a baby, his father beat him “regularly and unmercifully” until Richard ultimately shot his father to death.³¹⁸ In addition, the father also beat Richard’s sister

and his mother.³¹⁹ In discussing the evidence establishing that the “deceased father [was] a cruel, sadistic and abusive man”, the court commented that “[d]efense witnesses had a motive to make the deceased look like a bad man; they wanted to make the jury believe that [the] father deserved to be executed.”³²⁰ Thus the concern arises that the jury may rule on the improper basis of animosity towards the parent and sympathy towards the child.

Clearly, if this concern has any merit, it applies with equal force to battered woman’s syndrome and does not explain why a court that admits expert testimony regarding BWS would not admit expert testimony regarding BCS.³²¹ Moreover, in both cases, it seems cruelly ironic to essentially be arguing that, because a parent was so abusive that a jury may feel animosity towards the batterer, that evidence should be kept from the jury. It seems as though the court would be rewarding abusive parents for their bad conduct by keeping their behavior from the jury, while punishing the battered child by not giving the jury all of the information which might assist them in determining why the child might have been acting in self defense in killing the abusive parent.

Moreover, the results of a 1996 U.S. Department of Justice study of both state and federal cases involving battered women should help allay any potential concerns that admitting expert testimony regarding domestic abuse syndrome would mean that the abused women and children would not be convicted or that any convictions would be overturned on appeal. The study analyzed the state court appeals of 152 battered women who were convicted of killing their abusive partners.³²² On appeal, 63% of the convictions or sentences were affirmed.³²³ This result occurred even though expert testimony regarding BWS was admitted in 71% of the affirmances.³²⁴ Similarly, 75% of the appeals in federal court resulted in affirmances of the battered women’s convictions or sentences.³²⁵ The researchers considered these findings “strong evidence that, contrary to the contention of some critics, admitting expert testimony on battering and its effects, is not tantamount to an acquittal.”³²⁶ Although their study involved expert testimony regarding battered women, there seems to be little doubt that a similar study regarding expert testimony about battered child syndrome, would lead to the same results.

The second concern regarding the prejudicial effect of expert testimony regarding battered child’s syndrome is that the testimony will impermissibly infringe on the role of the jury in determining the child’s credibility.³²⁷ Some courts have opined that, if an expert testifies to the same facts as the abused child and explains them using technical terms like “learned helplessness” and “hypervigilance”, the child’s testimony may be bolstered and embellished with an “aura of special reliability and trustworthiness”³²⁸ making it more likely that the jury will believe the child.

The reasoning behind this concern seems circular and misguided. Part of the reason why courts allow expert testimony in the first place is precisely because experts have specialized knowledge which jurors can rely on to reach their verdicts. It is axiomatic to say that, because jurors might rely on the testimony, it should be excluded. If this was the case, then all expert testimony would either need to be excluded or the jury would need to be told not to rely on the testimony, in which case it would be hard to fathom why the testimony was admitted in the first place.

In addition, the jury can, and should, make an independent judgment regarding the credibility of the child. A number of cases have held that an expert may not vouch for the credibility of a witness, such as by testifying that a particular child is capable of telling, or is actually telling, the truth. For example, in ruling that expert testimony regarding BCS was admissible, the Ohio Supreme Court in *Nemeth* explicitly stated: “We have held that an expert

may not offer an opinion as to ‘the truth of a child’s statement. However, an expert may provide testimony that supports the truth of the *facts testified to* by the child, or which assists the fact finder in assessing the child’s veracity.”³²⁹ Consequently, most experts only testify about the parameters of the battered child syndrome rather than testifying as to whether a particular child’s testimony was credible. Thus, the effect of the expert testimony may “bolster” a child’s testimony to the extent that it makes the child’s familial situation not *unbelievable*; however, only the jury can determine whether a particular child’s story about his or her familial situation is believable.³³⁰

Developing Acceptable Legal Standards For Self-Defense Pleas By Victims of Domestic Abuse Syndrome

Overview

Killing in self-defense is permitted when there is “reasonable ground” to believe that great bodily injury or death is threatened and there is “imminent danger” of the threat “being accomplished.”³³¹ Thus, self defense requires that the defendant have an actual (or “genuine” or “honest”) belief of imminent danger of death or great bodily injury, that the defendant’s acts were necessary to prevent the harm and that “a reasonable person in the same circumstances would have had the same perception and done the same acts.”³³²

In the traditional confrontational setting, a majority of jurisdictions apply an objective standard of reasonableness in establishing justification for homicide and reject a purely subjective standard whether the defendant has been the prior victim of abuse by the decedent or not.³³³ In most cases involving DAS victims who kill their abusers in a confrontational setting, this standard of reasonableness is sufficient to assure that the battered women or children can establish a self defense plea.

However, in a *non-confrontational* setting, such as where the abusers are passive or asleep, a hybrid standard of reasonableness, which combines both a subjective prong and an objective prong, is essential to assure that the psychological effects of DAS can be properly considered by a jury. The subjective prong of the hybrid standard assures that the jury can understand the perception of DAS victims when evaluating whether they were justified in killing their abusers. The objective prong provides an external criterion against which the reasonableness of the defensive actions of DAS victims can be measured.

In addition, in a non-confrontational setting, the time frame in which DAS victims must fear grievous bodily harm in order to plead self defense must be broadly construed. The use of an expansive time frame enables the jury to consider the unique ability of DAS victims to anticipate severe attacks by their abusers when evaluating whether the danger from the abuser was immediate or imminent.

An Objective Standard of Reasonableness For Victims of Domestic Abuse Syndrome Who Claim Self-Defense In a Confrontational Context

In a traditional confrontational context, an objective standard of reasonableness is usually sufficient to assure that domestic abuse syndrome victims can establish their self-defense pleas. The California Supreme Court explained in *Humphrey* why expert testimony regarding BWS (and, by analogy, BCS) might *not* be necessary in this type of setting:

In many circumstances, BWS will be irrelevant to the question of objective reasonableness because the facts raise a traditional and therefore readily assessable self-defense claim, for example, when the victim threatens or approaches the defendant with a gun or knife or when the

two struggle over a weapon following a threat or other hostile act by the victim. In such “classic” confrontations, “[f]ear is a common human emotion within the understanding of a jury and hence expert psychiatric explanation is not necessary.”³³⁴

It is estimated that about 75% of the cases involving a battered woman killing her abusive spouse occur in a confrontational setting “where the [homicide] victim was usually the initial aggressor who provoked the final confrontation that ended up lethal.”³³⁵ In these cases, even if a court admits expert testimony regarding DAS, it would do so only to establish the woman or child’s *subjective honesty* in believing that he or she was in danger of grievous bodily harm at the time of the homicide.³³⁶ However, the court would not admit the expert testimony to establish the *objective reasonableness* of the woman or child’s defensive actions. As the North Dakota Supreme Court explained in *State v. Leidholm*, “an objective standard of reasonableness requires the factfinder to view the circumstances surrounding the accused at the time he used force from the standpoint of a hypothetical reasonable and prudent person.” Ordinarily, under such a view, the unique physical and psychological characteristics of the accused are not taken into consideration in judging the reasonableness of the accused’s belief.³³⁷

Using A Hybrid Standard of Reasonableness

Overview

Unlike battered women who frequently kill their abusive spouses in a confrontational setting, most battered children kill their abusive parents in non-confrontational settings. According to the Minnesota Supreme Court in *Smullen*:

[M]ost killings by abused children occur in non-confrontational settings . . . typically . . . when the parent is in his least defensible position, thus increasing the child’s chance of success. The circumstances of the killing, in fact, often suggest an ambush, with the parent sleeping, coming in the front door, watching TV, or cooking dinner with their back turned when attacked. Rarely is the parent ever killed while beating, or for that matter, yelling at the child.³³⁸

In cases involving victims of DAS who kill their abusers in a non-confrontational setting, there is a three way split of authority as to what standard of reasonableness should be applied. A majority of courts use the same objective standard of reasonableness, described above, that they would use if the killing occurred in a traditional confrontational setting.³³⁹ A few courts apply a purely subjective standard of reasonableness.³⁴⁰ The *Leidholm* court explained that under “the subjective standard the issue is not whether the circumstances attending the accused’s use of force would be sufficient to create in the mind of a reasonable and prudent person the belief that the use of force is necessary to protect himself against immediate unlawful harm, but rather whether the circumstances are sufficient to induce in *the accused* an honest and reasonable belief that he must use force to defend himself against imminent harm.”³⁴¹ In explaining the difference between a subjective and an objective test, the *Leidholm* court stated:

The significance of the difference in viewing circumstances from the standpoint of the “defendant alone” rather than from the standpoint of a “reasonably cautious person” is that the jury’s consideration of the unique physical and psychological characteristics of an accused allows the jury to judge the reasonableness of the accused’s actions against the accused’s subjective impressions of the need to use force rather than against those impressions which a jury determines that a hypothetical

reasonably cautious person would have under similar circumstances.”³⁴²

Finally, a more limited number of courts employ an objective-subjective “hybrid” standard of reasonableness, meaning that expert testimony regarding domestic abuse syndrome is admissible as part of the subjective circumstances in evaluating whether the battered woman or child was acting in an objectively reasonable manner, in other words whether a “reasonable and prudent [domestic abuse victim] would have believed serious bodily injury or death was imminent.”³⁴³ For example, in *Richardson*, a battered woman stabbed to death her boyfriend, who had beaten her and threatened to kill her throughout their relationship of several years.³⁴⁴ In reversing her conviction for second degree reckless homicide, the Wisconsin Appellate Court explained that the trial court should have used a hybrid standard of reasonableness since the “confrontational nature of an incident where a battered woman kills her abuser might only become apparent when viewed in the context of a pattern of violent behavior rather than an isolated incident.”³⁴⁵

Evaluating Whether The Women Or Children Were Acting In Objectively Reasonable Manners

There are valid reasons for imposing a hybrid standard, which incorporates both the subjective and the objective standards of reasonableness, to prove self-defense in a non-confrontational setting regarding both women and children who are victims of domestic abuse syndrome. As the *Leidholm* court noted, in a case where a severely battered woman stabbed her husband with a butcher knife while he slept: “[A] correct statement of the law of self-defense is one in which the court directs the jury to assume the physical and psychological properties peculiar to the accused . . . and then decide whether or not the particular circumstances surrounding the accused at the time [s]he used force were sufficient to create in [her] mind a sincere and reasonable belief that the use of force was necessary to protect [her]self from imminent and unlawful harm.”³⁴⁶

The South Dakota Supreme Court in *Burtzloff* further explained to a jury how it should apply the objective and subjective prongs of the hybrid standard in the context of battered women:

In the case wherein the “Battered Woman Syndrome” is raised, and if you in fact find that defendant is a battered woman, you are to look at the evidence presented through the eyes of a reasonable and prudent battered woman. If a reasonable and prudent battered woman would have believed serious bodily injury or death was imminent, then the killing was lawful. But, if you find that a reasonable and prudent battered woman would not have believed serious bodily injury or death imminent, then the killing was unlawful.³⁴⁷

The Washington Supreme Court in *Allery* further explained that a jury must evaluate “the justification of self-defense from the defendant’s point of view as conditions appeared to her at the time of the act . . . In no other way could the jury safely say what a reasonably prudent [woman] similarly situated would have done.”³⁴⁸

Similarly, in the case of an abused child, the expert testimony helps the jury understand the child’s perceptions and what the defendant, as a battered child, knows and perceives. As the Washington Supreme Court noted in adopting a hybrid standard in *Janes*: “By evaluating the evidence from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees, our approach to reasonableness incorporates both subjective and objective characteristics.”³⁴⁹ It is subjective in that the jury is entitled to “stand as nearly as practicable in the

shoes of [the] defendant, and from this point of view determine the character of the act.”³⁵⁰ The court explained that the subjective component ensures that the jury considers the child’s “actions in light of all the facts and circumstances known to the [child], even those substantially predating the killing.”³⁵¹ The objective portion allows the jury to “use this information in determining ‘what a reasonably prudent [child] similarly situated would have done.’”³⁵²

The Subjective Prong Enables A Jury To Consider Whether Victims Of Domestic Abuse Syndrome Were Justified In Killing Their Abusers

The subjective prong of the hybrid standard is essential to place the jury in the position of the DAS victim, so that the jury can “then properly assess the reasonableness of the defendant’s perceptions of imminence and danger.”³⁵³ Traditional self-defense law is premised on isolated encounters between two strangers; a situation where no history exists and no connection needs to be made between an abusive past and a violent response. However, this is not the situation where the defendant has a prolonged history of abuse by the decedent. An abusive family is by definition an *unreasonable* situation. Battered women have frequently suffered from years of abuse which resulted in the psychological effects detailed above. Battered children, who have often been abused since infancy, have never had the opportunity to develop the perspective of the “objectively reasonable person” because they have never experienced a “normal” person’s reaction to danger. Thus, they have no basis for understanding what a “reasonable” reaction to threats on their lives would be. “Because the abused child’s psyche has been altered by physical, sexual or emotional abuse, it is inappropriate to judge the child’s fear [solely] against the rational person standard.”³⁵⁴

Imposing a purely objective standard of reasonableness and refusing to admit the expert testimony regarding the subjective perspective of a victim of domestic abuse syndrome would thus mean that the jury would have to disregard this crucial evidence of years of abuse in the case of a battered woman or, perhaps, a lifetime of abuse in the case of a battered child.³⁵⁵ Rather than looking at the facts that occurred immediately prior to the killing with the same understanding as the battered woman or child, the jury would have to look at the same facts from the perspective of a detached reasonable person. This might make sense in the traditional situation where the defendant was, in fact, a detached person, and the only issue was whether the actions of that detached person were reasonable; however, it makes no sense where the defendant was anything but a detached person and where the actions of that person can only be fairly examined with the battered woman’s or child’s psychological background in mind.

Viewing the actions of the battered woman or child from this perspective “might enlighten the jury’s assessment of a reasonable person’s perceptions as well.”³⁵⁶ The Washington Supreme Court in *Janes* explained that, “by learning of the defendant’s perceptions and the circumstances surrounding the act, the jury is able to make the ‘critical determination of the degree of force which...a reasonable person in the same situation...seeing what he sees and knowing what he knows, then would believe to be necessary.’”³⁵⁷ Justice Rose, dissenting in *Jahnke* explained that,

[If a jury is]...deprived of an expert’s explanation of how battered people perceive and respond to the imminence of danger, [the jury] could not be expected to understand and quantify the impact and residuals of the years and years of battering which had been the lifelong fate of [the abused youth]. The jury could, therefore, not know - or be expected to know - whether his acts...were those of the

reasonable person similarly situated for whom the law of self-defense provides comfort.³⁵⁸

As the New Mexico Appellate Court explained in *Gallegos*: “The subjective perceptions of an individual, brutalized regularly by domestic violence are especially critical to the determination of whether her actions in purported self-defense were reasonable. . . . To require the battered person to await a blatant, deadly assault before she can act in defense of herself would not only ignore unpleasant reality, but would amount to sentencing her to ‘murder by installment.’”³⁵⁹

Thus, the admission of expert testimony to support the subjective reasonableness of defendant’s actions is not an attempt to establish what the *Jahnke* court called a “special justification for patricide” (or for killing an abusive spouse or partner).³⁶⁰ Rather, the evidence simply provides a framework for understanding why the abused person found it impossible to survive without killing.³⁶¹ This would not mean that any abuse victim who kills his or her abuser, no matter how irrational and unreasonable that act may have been, is justified. As the South Dakota Supreme Court made clear in *Burtzloff*, involving a battered woman who used a shotgun to kill her husband while he was sitting on the couch, a “battered spouse does not possess a license to kill the batterer...”³⁶² Rather, it remains for the jury to decide whether or not, as a battered person, the defendant behaved reasonably in the self-defense context.

The Purpose Of The Objective Prong

The objective prong of a hybrid standard “serves the crucial function” of providing the jury with an external criterion against which a battered person’s reasonableness can be measured.”³⁶³ This assures that the jury will assess the subjective perceptions and actions of victims of domestic abuse syndrome through the prism of an objective standard of reasonableness. As the Washington Supreme Court stated in *Janes*, “Without [such an objective standard], a jury would be forced to evaluate the defendant’s actions in the vacuum of the defendant’s own subjective perceptions. In essence, self-defense would always justify homicide so long as the defendant was true to his or her own internal beliefs.”³⁶⁴ Moreover, the court felt that applying “a purely subjective standard in all cases would give free reign to the short-tempered, the pugnacious, and the foolhardy who see threats of harm where the rest of us would not and who blind themselves to opportunities for escape that seem plainly available.”³⁶⁵

The objective portion of a hybrid standard also promotes the goals of the self-defense doctrine by protecting the sanctity of human life and limiting self-help.³⁶⁶ In *State v. Norman*, the North Carolina Supreme Court explained the need for an objective standard of reasonableness in the context of a battered wife: “The killing of another human being is the most extreme recourse to our inherent right of self-preservation and can be justified in law only by the utmost real or apparent necessity brought about by the decedent.”³⁶⁷ The goals of protecting human life and limiting self-help might be subverted if a purely subjective standard of reasonableness were applied. This concern was sufficiently important to the *Norman* court that it affirmed the voluntary manslaughter conviction of Judy Norman, a battered wife who killed her husband while he was sleeping, since there was no evidence that the wife “reasonably believed that she was confronted by a threat of imminent death or great bodily harm.”³⁶⁸ This decision was reached despite the wife’s twenty year history of physical and mental abuse at the hands of her husband.³⁶⁹ His physical abuse included “slapping [her], punching and kicking her, striking her with various objects . . . throwing glasses, beer bottles and other objects at her . . . putting his cigarettes out on her, breaking glass against her face and crushing

food on her face.”³⁷⁰ In terms of emotional abuse, because he did not work, he “forced her to make money by prostitution, and . . . made humor of that fact to family and friends, . . . on a few occasions made her eat pet food out of the pet’s bowls and bark like a dog, . . . made her sleep on the floor [and] deprived her of food.”³⁷¹

Similar concerns with promoting the goals of self defense led the Kansas Supreme Court in *State v. Stewart* to reject a purely subjective standard of reasonableness, despite the same kind of horrendous prior abuse as was evident in the *Norman* case, noting that to “hold otherwise would, in effect, allow the execution of the abuser for past or future acts or conduct.”³⁷² The Stewart case also involved a husband, with “a long history of abuse” of his wife and two stepdaughters, who was asleep when he was shot and killed by his battered wife. Like Judy Norman, Peggy Stewart was abused both physically and psychologically. For example, her husband “once kicked Peggy so violently in the chest and ribs that she required hospitalization.”³⁷³ On another occasion, he held a shotgun to Peggy’s head and threatened to kill her.³⁷⁴ Moreover, on one Thanksgiving, he “threw the turkey dinner to the floor, chased Peggy outside, grabbed her by the hair, rubbed her face in the dirt and then kicked and beat her.”³⁷⁵ Finally, he once ordered Peggy to kill and bury her twelve year old daughter.³⁷⁶ The objective portion of the hybrid standard assures that the killing of another human being will only be justified when it results from the “utmost real or apparent necessity.”³⁷⁷

A Broad Time Frame For Victims of Domestic Abuse Syndrome Who Claim Self Defense

Most justifiable homicide statutes include the terms “imminent” or “immediate” to describe the time frame in which the defendant must fear grievous bodily harm in order to claim self defense. At the present time, there is a split of authority as to whether justifiable homicide, in the context of a victim of DAS who kills his or her abuser, requires that the terms immediate or imminent be narrowly defined, as meaning something happening right away, or more broadly defined, as meaning something that might or is about to occur.³⁷⁸

Jurisdictions which define the terms narrowly refuse to permit self-defense instructions where a victim of domestic abuse syndrome kills his or her abuser during a pause in the violence, feeling that a narrow time frame best comports with the traditional policy that self-defense in a homicide case should only be allowed in the most dire circumstances.³⁷⁹ These courts opine that holding that the use of deadly force is justified by a danger of death or serious injury that is merely about to occur is equivalent to holding such force is justified even when it is not absolutely necessary.³⁸⁰ For example in *Langley v. State*, the Alabama Court of Criminal Appeals affirmed a wife’s conviction of second degree murder for shooting her drunken, abusive husband while he sat on a couch, despite the husband’s “cussing” her and demanding that she leave even if her “G__damned feet have to go first.”³⁸¹ In reaching this conclusion, the court noted that “[h]owever discreditable the victim’s conduct may have been on the occasion of his death, he did not by word or conduct pose immediate danger to the life or limb” of his wife.³⁸²

Even if the Alabama court was correct that the abused wife was not endangered *at that very moment*, what the court failed to recognize is abuse victims can recognize the signals from their abuser that mean they will be in danger *at the very next moment*.

As Justice Brown pointed out in his concurring opinion in *Humphrey*, “even if the woman kills her husband when he is only threatening her, rather than actually beating her, she knows from

past experience that he is not merely making idle comments but is fully capable of carrying out his threats. Thus, the battered woman may reasonably fear imminent danger from her husband when others unfamiliar with the history of abuse would not.”³⁸³ He concluded that, on “the basis of her experience, a battered woman may thus be ‘better able to predict the likely degree of violence in any particular battering incident’ and in turn may more precisely assess the measure and speed of force necessary to resist.”³⁸⁴ Justice Brown’s conclusion would be equally applicable even if the abuser was asleep or incapacitated. As previously noted, victims of domestic abuse syndrome “have a unique ability to predict when abusive behavior is imminent and may be able to recognize the subtle signs that usually precede a severe beating.”³⁸⁵

Once expert testimony is admitted to illuminate this characteristic of hypermonitoring, the jury will be able to understand how, even in an ostensibly non-confrontational situation, the DAS victim can honestly and reasonably believe that the abusive spouse or parent poses an imminent threat of grievous bodily harm.³⁸⁶ Understanding a domestic abuse syndrome victim’s “acute discriminatory powers,” would therefore give the jury a basis for recognizing how, at the time of the killing, the abuser’s violence had, “in the [DAS victim’s] mind, passed from the ‘normal’ and tolerable into the ‘abnormal’ and life threatening.”³⁸⁷ Use of a broader time frame is, thus, essential to enable the jury to consider the domestic abuse syndrome victim’s unique ability to anticipate that grievous harm from the abuser is, in fact, immediate or imminent.³⁸⁸

The Heightened State of Terror Of Victims Of Domestic Abuse Syndrome

The use of a broad time frame will also enable juries to consider the domestic abuse syndrome victim’s build up of terror and fear that DAS victims experience as a result of the prolonged history of abuse. For example, in *State v. Hundley*, Betty Hundley’s “build up of terror and fear” extended throughout her “tumultuous” ten year marriage to Carl Hundley.³⁸⁹ Over the years, Carl “knocked out several of [Betty’s] teeth, broke[] her nose at least five times and threatened to cut her eyeballs out and her head off.”³⁹⁰ He also “kicked Betty down the stairs on numerous occasions and had repeatedly broken her ribs.”³⁹¹ In addition, Carl prevented Betty, who was diabetic, from taking “her required dosage of insulin on numerous occasions by hiding it or diluting the insulin with water” causing Betty to go into diabetic coma on these occasions.³⁹² Approximately six weeks before his death, Carl knocked Betty down, kicked her and choked her into unconsciousness.³⁹³ When Betty moved out, Carl “started a pattern of constant harassment,” calling her “night and day to threaten her life and those of her family.”³⁹⁴ Ultimately, Carl broke down the door of the motel room where Betty was staying, choked her, raped her and threatened her life.³⁹⁵ When Betty pulled a gun out of her purse, and demanded that he leave, Carl “laughed tauntingly” and said “You are dead, bitch now!”³⁹⁶ As he turned his back to her to reach for a beer bottle, Betty shot him five times in the back.³⁹⁷ On appeal of her conviction for involuntary manslaughter in the death of her husband, the Kansas Supreme Court adopted a broader time frame and found reversible error in the trial court’s jury instruction that Betty’s claim of self-defense required that Carl’s use of unlawful force be “immediate” rather than “imminent.”³⁹⁸ The court concluded that “the use of the word ‘immediate’ in the instruction on self-defense places undue emphasis on the immediate action of the deceased, and obliterates the nature of the buildup of terror and fear which [has] been systematically created over a long period of time.”³⁹⁹ In fact, the court held that the entire ten year history of Betty’s abuse

by Carl was relevant in determining whether Betty reasonably feared abuse from Carl and the imminence of that danger.⁴⁰⁰

Similarly, in *Bechtel v. State*, the Oklahoma Court of Criminal Appeals applied a broad time frame in a case where a battered woman shot her drunken husband following an argument.⁴⁰¹ The shooting was preceded by at least twenty-three abusive incidents in which her husband “threw her into the windshield of his boat”, “pound[ed] her head on the ground, wall, door, cabinet or other available object” and grabbed her head by the hair and slammed her into the [car] window.”⁴⁰² In applying an expanded time frame, the *Bechtel* court explained: “The battered wife is constantly in a heightened state of terror because she is certain that one day her husband will kill her during the course of a beating Thus from the perspective of the battered wife, the danger is constantly immediate.”⁴⁰³

Indeed, the “confrontational nature of an incident where a battered woman kills her abuser might only become apparent when viewed in the context of a pattern of violent behavior rather than as an isolated incident.”⁴⁰⁴ As the *Bechtel* court made clear “the meaning of *imminent* must necessarily envelope the battered woman’s perceptions based on all the facts and circumstances of her relationship with the victim. . . . And so, the issue is not whether the danger was in *fact* imminent but whether, given the circumstances as she perceived them, the defendant’s *belief was reasonable that the danger was imminent*.”⁴⁰⁵

Indeed, the build-up of terror and fear, coupled with the ability of DAS victims to predict the future behavior of their abusers, may make a homicide justifiable even if it is committed after a prolonged interval between the active abuse and the killing. In *Janes*, the Washington Supreme Court made it clear that even if “the triggering behavior and the abusive episode are divided by time [that] does not necessarily negate the reasonableness of the defendant’s perception of imminent harm.”⁴⁰⁶ The *Janes* court explained that, to a battered child, “[e]ven an otherwise innocuous comment which occurred days before the homicide could be highly relevant when the evidence shows that such a comment inevitably signaled the beginning of an abusive episode.”⁴⁰⁷ Thus, when the defendant is a victim of DAS a broad definition of the time frame is essential to permit the jury to consider the ability of a battered person to anticipate grievous harm from the abuser in the future.⁴⁰⁸

Moreover, the jurisdictions that require a narrow time frame fail to recognize that it is only when the abuser is incapacitated that a battered person may have an opportunity to fight back. This is especially true of abused children, who are “generally unable to protect themselves during a confrontation, because of obvious physical and less apparent psychological reasons. If they are to be able to relieve themselves of their plight, the most inappropriate time may be during a beating.”⁴⁰⁹ It is only by using a broad time frame that a jury can consider a child’s history of abuse and the build-up of fear and terror that culminate in the need to commit parricide before the violence escalates and the child becomes the homicide victim.

The Oklahoma Supreme Court in *Bechtel* graphically explained the necessity of allowing a broad time frame in a non-confrontational context by analogizing the life of a victim of domestic abuse syndrome to the “classic hostage situation in that the battered [person] lives under long-term, life-threatening conditions in constant fear of another eruption of violence.”⁴¹⁰

The court described a scenario where the captor threatens to kill the hostage in three days, and the hostage is able to kill the captor on the first day when an opportunity arises.⁴¹¹ The court concluded that a “literal application of the requirement that the threat be imminent would prevent the hostage from using deadly force until the captor

is standing over him with a knife.”⁴¹² The court made it clear that the perspective of a hostage is similar to the perception of a battered person; in that “the next attack, which could be fatal or cause serious bodily harm, is imminent.”⁴¹³ To require battered women and children to wait for a deadly assault before they can act in self-defense would, indeed, amount to sentencing all victims of DAS to “murder by installment”⁴¹⁴ at the hands of their abusers.

Conclusion

The plight of a victim of domestic abuse syndrome, who is denied the opportunity to describe the devastating psychological impact of the battering they have endured by presenting expert testimony regarding domestic abuse syndrome, was poignantly described by Wyoming Supreme Court Justice Brown, specially concurring, in the *Jahnke* case:

Denied the explanatory assistance of a qualified expert witness, it is as though Richard Jahnke had not been permitted to defend himself at all. . . . [H]ow could this young boy structure an understandable defense when – even though the record discloses that since age two he had been bullied, battered, frightened and emotionally traumatized – he was, nevertheless, denied the opportunity to have explained to his jury how abused people reasonably handle their fears and anxieties – what their apprehensions are – how, in the dark moments of their aloneness, they perceive the imminence of danger – and how, in response, they undertake to assert their right of self-defense.⁴¹⁵

Richard Jahnke, and the other women and children whose tragic lives have been described above, have all been brutally abused by the very people who should have provided them with love and support – their mothers and fathers and spouses and boyfriends. Many of them have suffered their abuse in silence – afraid to confide in friends and family for fear of reprisals.

When they have tried to obtain the help they needed from police or child protection agencies, who should protect and assist them, they have often been rebuffed or worse, returned to their abusers.

As the Kansas Supreme Court noted in *Hundley*, “The horrible beatings they are subjected to brainwash them into believing there is nothing they can do. They live in constant fear of another eruption of violence. They become disturbed persons from the torture.”⁴¹⁶

Often living in poverty, and lacking any financial resources, most victims of domestic abuse syndrome come to feel that they are trapped into remaining with their abusers.

When in desperation, often after many years of abuse, they take matters into their own hands and kill their abusers, they are silenced victims once again if they are unable to get the expert help they need to present their stories and the psychological impact that a lifetime of abuse has had on them.

This final victimization can be prevented by allowing expert testimony regarding domestic abuse syndrome. Obviously, in the ideal world the battering would never have been allowed to escalate to the point where killing the abuser would appear to be the only way out to the abuse victim. In the ideal world, the war on poverty would be won and the abject poverty that makes leaving the abuser an economic impossibility for domestic violence victims would no longer exist. But these abused women and children do not live in an ideal world. At least, by allowing them to present expert testimony about their abuse, these victims of DAS can be provided with a just world, where the psychological impact of their years of suffering is considered and where they will receive the fair trial that every defendant deserves.

1 The abuse of a woman at the hands of her male spouse or boyfriend is also the most frequent situation in which allegations of physical abuse arise. In their book, Law Professors Clare Dalton and Elizabeth Schneider, comment that “[o]ne incontrovertible statistic is that more than 90% of heterosexual partner violence reported to and recorded by law-enforcement authorities is perpetrated by men.” CLARE DALTON & ELIZABETH SCHNEIDER, *BATTERED WOMEN AND THE LAW* 7 (Foundation Press 2001). Obviously, American men are also victims of domestic abuse; however, Dalton and Schneider note there are “consistent findings that men injure women at much higher rates than women injure men.” *Id.* In a May 2000 report, the U.S. Department of Justice stated that roughly 85% of reported victimizations by intimate partners were against women. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUST., NCJ-178247, SPECIAL REPORT: INTIMATE PARTNER VIOLENCE 2 (May 2000). According to one estimate, women are more than ten times more likely to be victimized by their male spouses or boyfriends. Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 No. 1 CLEARINGHOUSE REV. 383, 384 (1994). Because of the very low incidence of such abuse, and the limited research about its effects on the abused men, this article will focus on battered women.

However, research has revealed that episodes of abuse of a woman at the hands of her male spouse or boyfriend are more severe than abuse of a man at the hands of his female spouse or girlfriend. For example, according to the SPECIAL REPORT: INTIMATE PARTNER VIOLENCE 2, BUREAU OF JUST. STATISTICS, U.S. DEPT. OF JUSTICE REPORT, NCJ-178247 (May 2000) [hereinafter SPECIAL REPORT: INTIMATE PARTNER VIOLENCE], in 1994, 37% of women injured by an intimate were treated in an emergency room whereas only 5% of the men injured by an intimate were treated in an emergency room. SPECIAL REPORT: INTIMATE PARTNER VIOLENCE, *supra*, at 5. Similarly, women are killed by their male spouses or boyfriends at a much higher rate than men are killed by their female spouses or girlfriends. According to the report, in 1998, one-third of all female homicide victims in the United States were killed by their husbands or boyfriends; whereas only 4% of male victims were killed by their wives or girlfriends. *Id.* at 2. In 2004, nearly 1,200 women were killed by their male partners while less than 400 men were killed by their female partners. Frank Gelvo, *Domestic Violence Reaches Record Low*, SAN JOSE MERCURY NEWS, Mar. 11, 2007 at A7. Ironically, abusive men who kill their wives or girlfriends serve an average of only two to six years for the murders, whereas women who kill their abusive husbands or boyfriends serve an average of fifteen years. Zorza, *supra*, at 390.

2 See CHILDREN’S DEFENSE FUND, THE STATE OF AMERICA’S CHILDREN tbl.3-10 (Washington, D.C. 2005) (listing victims of child abuse by age group and maltreatment type).

3 See generally PAUL MONES, WHEN A CHILD KILLS 25-26 (citing a national study conducted in 1991 by sociologists, defining severe physical abuse as abuse that carries a high risk of serious injury or death and noting that the means of inflicting the abuse sometimes includes kicking, punching, beating, stabbing or shooting).

4 See U.S. DEP’T OF HEALTH & HUMAN SERV., ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILD MALTREATMENT (2005), available at <http://www.acf.hhs.gov>. (noting that approximately 7% of all abused children suffer serious psychological abuse while over 9% were sexually abused).

5 BILL DAVIS, CHILD ABUSE: A NATIONAL EPIDEMIC 11 (Caring Hearts Publishing, Inc. 2006), presented at Child Abuse Prevention Conference, Dallas, Texas (2006). Moreover, the economic costs of child abuse are staggering. Every year, approximately \$24 billion is spent on short term expenditures for law enforcement, courts and medical treatment of child abuse. S. FROMM, TOTAL ESTIMATED COSTS OF CHILD ABUSE AND NEGLECT IN THE UNITED STATES – STATISTICAL EVIDENCE (2001), available at www.preventchildabuse.org/learn_more/research_docs/cost_analysis.pdf. The long term costs of child abuse are even worse, totaling more than \$69 billion every year. *Id.*

6 Nancy Wright & Eric Wright, *SOS (Safeguard Our Survival): Understanding and Alleviating the Lethal Legacy of Survival-threatening Child Abuse*, 16 AM U. J. GENDER SOC. & POL’Y & L. 4, 4 (2007).

7 See MONES, *supra* note 3, at 32 (citing Federal Bureau of Investigation records); see also A.E. Waller et al., *Childhood Injury Deaths: National Analysis and Geographic Variations*, 79 AM. J. PUB. HEALTH 310, 310 (1989) (noting that, as of 1989, child abuse was the leading reason for injury-related deaths of babies under one year of age).

8 See U.S. DEP’T OF HEALTH & HUM. SERV., ADMINISTRATION ON CHILDREN, YOUTH & FAMILIES, CHILD MALTREATMENT 1995 available at <http://www.acf.hhs.gov/programs/cb/pubs/ncands/table10.htm> [hereinafter CHILD MALTREATMENT 1995] (victim data chart reporting 996 fatalities, with forty-five states reporting).

9 See U.S. DEP’T OF HEALTH & HUM. SERV., ADMINISTRATION ON CHILDREN, YOUTH & FAMILIES, CHILD MALTREATMENT 2004 65 (2004), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm04/cm04.pdf> [hereinafter CHILD MALTREATMENT 2004] (estimating that 1,490 children died due to child abuse, with almost one-third of

the fatalities attributed to neglect, and noting that more than 80% of these children were under 4 years of age); see also Karl Fisher, *Mother Arrested In Son’s Death*, SAN JOSE MERCURY NEWS, Oct. 31, 2006, at B1 (noting that federal statistics reveal that approximately 1,500 American children die each year from abuse or neglect and “most” are killed by their parents); see also U.S. DEPT HEALTH & HUM. SERV., ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILD MALTREATMENT 2003 77 & tbl.4-1(2003), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm03/cm2003.pdf> [hereinafter CHILD MALTREATMENT 2003] (showing that in 2003, almost one-half (43.6%) of the nearly 1,500 child abuse fatalities, had not reached their first birthday, and additionally that the sexes of the deceased children were almost evenly divided, with 51.7% of the victims being girls and 48.3% being boys). In 2004, about fifty-seven percent of the children who died were abused by only one of their parents, while over 18% suffered abuse at the hands of both of their parents). See CHILD MALTREATMENT 2004, *supra*, at 28 & fig.3-6 (stating that 38.8% of the children were abused only by their mother and 18.3% were abused only by their father).

10 See EUGENE M. LEWIT, CHILD INDICATORS: REPORTED CHILD ABUSE AND NEGLECT 4 (The Future CHILD of Children Summer/Fall 1994) 233-242 (1994) (noting that it is “generally accepted that deaths from maltreatment are underreported and that some deaths classified as the result of accident and sudden infant death syndrome might be reclassified as the result of child abuse if comprehensive investigations were more routinely conducted.”). A 1995 report by the U.S. Advisory Board on Child Abuse and Neglect concluded that a more realistic estimate was that about 2,000 children, or five youngsters every day, die from abuse. U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, A NATION’S SHAME: CHILD ABUSE AND NEGLECT IN THE UNITED STATES xxv (1995), available at <http://ican-ncfr.org/documents/Nations-Shame.pdf>. An additional 18,000 children become permanently disabled from near-fatal abuse and 142,000 suffer serious injuries. *Id.*; see also MONES, *supra* note 3, at 32 (citing the National Committee for the Prevention of Child Abuse and Neglect and estimating that the actual number of children killed by their parents or guardians may be as high as 5,000 deaths annually).

11 See State v. Hundley, 693 P.2d 475, 478 (Kan. 1985) (citing Note, *The Battered Wife’s Dilemma: To Kill Or To Be Killed*, 32 HASTINGS L.J. 895 (1981) (noting that the abuse was “well documented”).

12 AM. MED. ASS’N COUNCIL ON SCIENTIFIC AFFAIRS, VIOLENCE AGAINST WOMEN 7 (1991). A recent study had some encouraging news that criminal violence against intimate partners declined by nearly two-thirds from 1993 to 2005. Gelvo, *supra* note 1, at A7; see also, *Identification and Treatment of Spouse Abuse, Health and Mental Health Agency Roles*, Conference Proceedings, Long Island Jewish-Hillside Medical Center, New York, New York (November 21, 1980); Elaine Hilberman, *Overview: The Wife-Beater’s Wife Reconsidered*, 137 THE AM. J. OF PSYCHIATRY, NO. 11: 1336-1347 (1980); JENNIFER BAKER FLEMING, STOPPING WIFE ABUSE: A GUIDE TO THE EMOTIONAL, PSYCHOLOGICAL, AND LEGAL IMPLICATIONS FOR THE ABUSED WOMAN AND THOSE HELPING HER (1979); R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES, A CASE AGAINST THE PATRIARCHY (1979); ROGER LANGLEY & RICHARD LEVY, WIFE BEATING: THE SILENT CRISIS (1977); DEL MARTIN, BATTERED WIVES (1976).

13 See Witt v. State, 892 P.2d 132, 137-138 (Wyo. 1995) (affirming the conviction for voluntary manslaughter of a battered woman in the shooting death of her live-in boyfriend, who psychologically and physically abused her throughout their 2 year relationship); see also People v. Humphrey, 921 P.2d 1, 16, (Cal. 1996) (reversing the manslaughter conviction of a woman whose husband “beat her regularly. . . once threw a can of beer at her face, breaking her nose, [h]er dental plates hurt because [he] hit her so often, [h]e often kicked her, but usually hit her in the back of the head because, he told her, it ‘won’t leave bruises,’ [he] sometimes threatened to kill her, and [he] often said she ‘would live to regret it.’”).

14 Zorza, *supra* note 1, at 390 (noting that, although domestic abuse was involved in only 5% of all assaults that were reported, they accounted for 12% of the victims who suffered serious injury, 16% of the victims who required medical care and 18% of the victims who missed at least one day of work).

15 *Id.*

16 U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003). Statistics from the Federal Bureau of Investigation reveal that almost 9% of all homicide victims in the United States are killed by their spouses. James A. Mercy & Linda E. Saltzman, *Fatal Violence among Spouses in the United States*, 1976-1985, 79 AM. J. PUB. HEALTH 595 (1989).

17 See Zorza, *supra*, note 1, at 390 (citing a study of homicides in Philadelphia which revealed that one-fourth of the women died by means of their abusers’ hands, fists or feet).

18 JAMES ALLEN FOX & MARIANNE W. ZAWITZ, HOMICIDE TRENDS IN THE UNITED STATES: 2002 UPDATE (Bureau of Justice Statistics 2004) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/htus02.pdf>.

19 See CHARLES PATRICK EWING, FATAL FAMILIES: THE DYNAMICS OF INTRAFAMILIAL HOMICIDE 6 (1997) (noting that since 1976, between 1.5% and 2.5% of

all homicides in the United States have been parricides). The majority of these parricides are committed against their fathers by middle or upper class Caucasian males, aged sixteen to eighteen years. Susan C. Smith, *Abused Children Who Kill Abusive Parents: Moving Toward an Appropriate Legal Response*, 42 CATH. U. L. REV. 141, 153 (1992)); Jamie Heather Sacks, *A New Age of Understanding: Allowing Self-Defense Claims For Battered Children Who Kill Their Abusers*, 10 J. CONTEMP. HEALTH L. & POL'Y. 349, 358 (1994). Children who commit parricide were usually average to above-average students in school and typically had no prior history of delinquency or violence. See Smith, *supra*; Kathleen M. Heide, WHY KIDS KILL PARENTS: CHILD ABUSE AND HOMICIDE 154 (Sage ed. 1995).

20 Nancy Blogett, *Self-Defense: Parricide Defendants Cite Sexual Abuse as Justification*, AM. B. ASS'N. J. 36 (June 1, 1987). For the sake of convenience, the cases in this article are referred to by the term "parricide" or parent-killing, although the homicide victim is sometimes not a parent but instead is some other authority figure in the child's home, such as the mother's live-in boyfriend.

21 See *infra* notes 123-125 and accompanying text.

22 See *infra* notes 237-239 and accompanying text.

23 See, e.g., Werner v. State, 711 S.W.2d 639, 649 (Tex. Crim. App. 1986) (Teague, J., dissenting) (citing Steinmetz, THE BATTERED HUSBAND SYNDROME, VICTIMOLOGY, AN INTERNATIONAL JOURNAL (1977-1978) (noting that "The Battered Husband Syndrome" is one of the labels used by psychiatrists)).

24 It is beyond the scope of this article to discuss same-sex domestic violence in detail; however, it is clear that gays and lesbians also sometimes suffer domestic abuse from one another. See, e.g., Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming A Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 327 (1999) (citing a 1997 study by the National Coalition of Anti-Violence Programs which estimated that between 25% and 33% of same-sex relationships involve physical or psychological abuse and noting that this is comparable to estimates of the incidence of violence in opposite-sex relationships). In 1994, the California Legislature, recognizing the need to have a gender neutral domestic violence statute, made the so-called Spousal Abuse Statute applicable to gay men and lesbians by deleting the former requirement that cohabitants in an intimate relationship had to be "of the opposite sex." Spousal Abuse Statute, CAL. PEN. C. § 13701 (b) (West 1996); see also Crawford v. State, 404 A.3d 244, 246, 254 (Md. 1979) (reversing the conviction, based on the admission of potentially prejudicial recordings, where a woman stabbed her lesbian partner of six years sixty-five times with a kitchen knife due to the victim's excessive drinking, use of marijuana and interest in other women).

25 See *infra* at notes 126-28 and accompanying text.

26 See, e.g., State v. Janes, 850 P.2d 495, 500 (Wash. 1993) (admitting the expert testimony from clinical psychologists to support the defense's claim that prolonged child abuse impaired the defendant's capacity to premeditate the killing).

27 See *infra* at notes 75-77 and accompanying text.

28 See *infra* at notes 73-80 and accompanying text.

29 See *infra* at note 244 and accompanying text.

30 Technically the effect of such prolonged abuse of both adults and children is considered a psychological response to a more general anxiety-related psychiatric disorder known as post-traumatic stress disorder (PTSD). *Id.* PTSD is caused by traumatic events or "extreme stressors," such as chronic child abuse, which are "outside the normal range of human experience." *Janes*, 850 P.2d at 501. Although PTSD is classified as a mental disorder, "it is one of the few kinds of psychiatric disorders that is considered a normal response to an abnormal situation." *Id.* (quoting MONES, *supra* note 3, at 63).

31 See, e.g., Smith v. State, 688 P.2d 326, 327 (Nev. 1984) (affirming defendant's conviction of sexually assaulting his live-in girlfriend's six-year-old daughter and holding that the trial court did not err in admitting expert testimony regarding the dynamics of intra-familial child sexual abuse because the testimony "would assist the jury in understanding the superficially unusual behavior of the victim and her mother" in delaying reporting the abuse since the "young victim often feels guilty about testifying against someone she loves" and the mother "feels torn between her love for the child and her love for the father figure"); People v. Benjamin R., 481 N.Y.S.2d 827, 832 (N.Y. App. Div. 1984) (affirming defendant's conviction for sodomy and sexual abuse of his fourteen-year-old stepdaughter and holding that the trial court did not err in admitting expert testimony regarding intra-familial sexual abuse "to assist the jury in determining what effect should be given the victim's failure to make earlier disclosures" and that the expert testimony did not have "the effect of bolstering the victim's version of the events").

32 See *infra* at notes 99-103 and accompanying text.

33 New York v. Colberg, 701 N.Y.S.2d 608, 609, 611 (N.Y. App. Div. 1999); see also Smith v. State, 486 S.E.2d 819, 822 n.3 (Ga. 1997) (recognizing, in a case involving a battered woman, a "battered person syndrome" which might encompass the effects of battering on women, men and children).

34 Werner v. State, 711 S.W.2d 639, 644 (Tex. Crim. App. 1986) (Teague, J., dissenting).

35 *Cf. id.* (affirming defendant's murder conviction and holding that proffered testimony of a

psychiatrist that defendant, whose father and grandfather had been Holocaust survivors, showed some characteristics of Holocaust syndrome "was properly excluded as an impermissible attempt to broaden the right of self defense . . ."). In addition to some of the syndromes already discussed in this article, Justice Teague mentioned the existence of the following additional "syndromes": "The Familial Child Sexual Abuse Syndrome" (citing State v. Middleton, 657 P.2d 1215 (Or. 1983); "The Battle Fatigue Syndrome; 'The Viet Nam Post-Traumatic Stress Syndrome" (citing Miller v. State, 338 N.W.2d 673, 678 (S.D. 1983) (Henderson, J., dissenting) and State v. Felde, 422 So.2d 370 (La. 1982)); "The Policeman's Syndrome" (citing MARTIN BINDER, PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW (2nd ed. 1982); "The Post-Concussive Syndrome"; "The Whiplash Syndrome"; "The Low-Back Syndrome"; "The Lover's Syndrome"; "The Love Fear Syndrome" (citing People v. Terry, 466 P.2d 961 (Cal. 1970); "The Organic Delusional Syndrome" and "The Chronic Brain Syndrome" (citing Illinois v. Reed, 290 N.E.2d 612 (Ill. App. Ct. 1972)).

36 Werner, 711 S.W.2d at 649; see also, *Latest Religious Messages*, SAN JOSE MERCURY NEWS, Feb. 4, 2007, at A2 (discussing a 2006 report from the Church of England warning that the Church's "'feudal system' bureaucracy" was creating an "'irritable clergy syndrome'" caused by priests being bothered by "'having to be nice all the time to everyone, even when confronted with extremes of nastiness,' such as aggressive and neurotic parishioners").

37 State v. Burtzlaff, 493 N.W.2d 1, 12 (SD 1992) (noting that even the "Bible provides that a husband shall have dominion over his wife").

38 See 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 430, (Univ. of Chicago Press 1st ed. 1765) (declaring that by marriage, the husband and wife are "one person in law" such that the wife is "incorporated and consolidated into that of the husband").

39 Burtzlaff, 493 N.W.2d at 12 (citing Joy Hannel, Note, *Missouri Takes A Step Forward: The Status of "Battered Spouse Syndrome" in Missouri*, 56 MO. L. REV. 465, 468 (1991)).

40 *Id.*

41 *Id.*

42 *Id.*

43 LENORE WALKER, THE BATTERED WOMAN (Harper 1979).

44 *Id.*

45 *Id.*; see also People v. Aris, 264 Cal. Rptr. 167, 183 (Cal. Ct. App. 1989) (quoting Dr. Lenore E. Walker (describing BWS as "'a pattern of psychological symptoms that develop after somebody has lived in a battering relationship'")); Maryland v. Smullen, 844 A.2d 429, 440 (Md. 2004) (identifying a "battered woman" as "one 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"); State v. Kelly, 478 A.2d 364, 371 (N.J. 1984) (defining BWS as a "series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives").

46 See Kelly, 478 A.2d 364, 369, 379 (reversing the murder conviction of a woman whose seven year marriage was punctuated by "periodic and frequent beatings, sometimes as often as once a week" and accompanied by threats to kill her and "to cut off parts of her body if she tried to leave him"); People v. Torres, 488 N.Y.S.2d 358, 359, 362, 362 (N.Y. Sup. Ct. 1985) (battered woman shot her live-in boyfriend after suffering "prolonged physical and psychological maltreatment" over a ten year period consisting of her boyfriend's "frequent beatings" and menacing her with a knife and a pistol); People v. Emick, 418 N.Y.S.2d 552, 554, 557, 559 (N.Y. App. Div. 1984) (quoting Dr. Matilda Rice and describing incident where a woman's boyfriend physically abused her for one and a half years, including beating her with a bull-whip "while she was hog-tied", beating her on the head with a piece of wood, beating her head against a tree and "stab[ing] her foot with a pencil, which resulted in a visit to the hospital to remove part of the pencil"); State v. Moore, 695 P.2d 985, 985-988 (Or. Ct. App. 1982) (Newman, J., concurring) (woman shot her husband after suffering "long-standing physical, sexual, and psychological abuse by her husband including injecting her with illicit drugs against her will and threatening to sell her into prostitution in Mexico"); Commonwealth v. Stonehouse, 555 A.2d 772, 783-786 (Pa. 1989) (woman was physically and psychologically abused by her boyfriend); State v. Furlough, 797 S.W.2d 631, 637, 651 (Tenn. Ct. App. 1990) (abused woman killed her husband after he verbally and physically assaulted her, including at one time "attempt[ing] to smother her with a pillow and at another time plac[ing] a knife to her throat"); Fielder v. State, 756 S.W.2d 309, 311, 318 (Tex. Crim. App. 1988) (battered wife shot her husband who had physically and sado-masochistically abused her, including "piercing her genitals with a golden ring" and shackling her, which an expert witness said was within the "98th percentile for severity of battering husbands").

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

48 *Id.*

49 *Id.* at 976.

50 Commonwealth v. Rodriguez, 633 N.E.2d 1039, 1040 (Mass. 1994).

51 *Id.* at 1041.

52 *Id.* at 1042-1043.

53 State v. Hennum, 441 N.W.2d 793, 795 (Minn. 1989).

54 *Id.*

55 *Id.*

56 *Id.* at 795-796.

57 *Id.*

58 Rose Marie Penzerro, *Families Experiencing Domestic Violence and Child Abuse*, presented at the Prevent Child Abuse Conference, Feb. 20-21, 2006 (Dallas, Texas 2006).

59 “PLEASE KEEP ME SAFE” (Promise House 2006) (pamphlet presented at a presentation at the Prevent Child Abuse Conference, Feb. 20-21, 2006 (Dallas, Texas)).

60 State v. Stuart, 715 P.2d 833, 846 (Idaho 1986); *see also* State v. Furlough, 797 S.W.2d 631, 651 (Tenn. Ct. App. 1990) (husband who verbally and physically assaulted his wife also sexually molested his daughter).

61 *Stuart*, 715 P.2d at 846.

62 *Id.*

63 *Id.* (citing David Johnson, *Women Testify that Stuart Beat, Choked Them*, LEWISTON MORNING TRIB., Oct. 9, 1982, at 1A). When Stuart learned that his first wife was pregnant, he “bound her to the bed and beat her stomach with his fists and forced the handle of a spatula up her vagina in an attempt to abort her pregnancy.” *Stuart*, 715 P.2d at 876. Another particularly egregious incident occurred when she was recovering in the hospital from “a month-long coma.” *Id.* (noting that the former wife had been “run over and left on the road by an unknown driver while she was attempting to . . . hide from [Stuart] since he was just released from incarceration” due to her report to the police of Stuart’s abuse of her as well as burglary and auto thefts). Although Stuart was barred from the hospital because of his previous abuse, he entered “late at night” and “removed [his former wife’s] frail 86-pound body from her hospital bed, along with catheter, IV’s, and drainage bags, to the bathroom where he raped her.” *Id.* Another woman, who lived with Stuart for three months, told of one incident when “Stuart cut clothing off of her with a butcher knife. *Id.* “On another occasion . . . he tried to drown her in a lake [and] held her until her lungs began to fill with water, then he released her.” *Id.* (citing Johnson, *supra*, at 1A). Stuart’s second wife, Vicki Nelson, said that Stuart started beating her about three weeks after they were married and that the abuse became an “every-other day” occurrence. *Stuart*, 715 P.2d at 846 (quoting Vicki Nelson). She described one incident when she was pregnant and Stuart knocked her out. She awoke to find that she was tied in bed. *Id.* at 876. Stuart “covered her face with a pillow” and hit her in the abdomen. *Id.* When she passed out, he would remove the pillow, “revive her with a wet washcloth and repeat the abuse.” *Id.* On other occasions, Stuart “poked her in the chest with his finger, choked her, knocked her to the floor and struck her in the face with his fists [for] smoking, watching television or taking showers without him”. *Id.* In addition, Stuart once beat her because she had received a set of luggage for Christmas from her parents and once locked her two-year-old daughter in the bathroom for nine hours. *Id.*

64 *Id.* at 846.

65 SAN JOSE MERCURY NEWS, Jan. 28, 2007, at A2.

66 *See generally* ROBERT H. BREMNER, CHILDREN AND YOUTH IN AMERICA, A DOCUMENTARY HISTORY 123 n.63 (1970) (discussing two cases that were tried in 1675 and 1678 which resulted in the courts removing the abused children from parental homes).

67 *Id.*; *see also* Micheal D. Rosenbaum, To Break the Shell Without Scrambling the Egg: An Empirical Analysis of the Impact Of Intervention Into Violent Families, 9 STAN. L. & POL’Y REV. 409, 411 (1998).

68 Barbara R. Grumet, *The Plaintive Plaintiffs: The Victims of the Battered Child Syndrome*, 4 FAM. L.Q. 296 (1970).

69 ROBERT W. TEN BENSEL ET AL., CHILDREN IN A WORLD OF VIOLENCE: THE ROOTS OF CHILD MALTREATMENT IN THE BATTERED CHILD 3 (Mary Edna Helfer et al. eds., 5th ed. 1997) (quoting JACOB RIIS, CHILDREN OF THE POOR (1894)).

70 Rosenbaum, *supra* note 70, at 411.

71 *Id.*

72 *Id.*; *see also*, R. H. Brown et al., *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI-KENT L. REV. 45, 45-46 (1973).

73 C. Henry Kempe et al., *The Battered Child Syndrome*, 181 J. AM. MED. ASS’N. J. 17, 17-18 (1962). Dr. Kempe also surveyed seventy-seven District Attorneys who handled 447 reports of beaten children in one year, with 46% resulting in court action. *Id.* Unfortunately, forty-five of the children died of their injuries while 290 suffered permanent brain damage. *Id.*

74 *Id.*

75 The crucial necessity of allowing expert testimony regarding BCS in prosecuting the abuser was explained by the Minnesota Supreme Court in *Schleret v. State*, where a stepfather beat his three-year-old stepson to death, as follows:

Much of the evidence that can be gathered to show an instance of “battered child syndrome” is circumstantial. In allowing such evidence to support a conviction, this court has recognized that those felonious assaults are in a unique category. Most cases of felonious assault tend to occur in a single episode to which there are sometimes witnesses. By contrast, cases that involve “battered child syndrome”

occur in two or more episodes to which there are seldom any witnesses. In addition, they usually involve harm done by those who have a duty to protect the child. The harm often occurs when the child is in the exclusive control of a parent. Usually the child is too young or too intimidated to testify as to what happened and is easily manipulated on cross-examination. That [a] child . . . [does] not survive, strengthens, rather than diminishes, the law’s concern for the problems of prosecuting a defendant in a “battered child” case. As background, direct testimony of earlier episodes of harm done to the child is admissible. Crucial to identifying such cases are the discrepancies between the parent’s version of what happened to the child when the injuries occurred and the testimony of medical experts as to what could not have happened, or must have happened, to produce the injuries.

Schleret v. State, 311 N.W.2d 843, 844-845 (Minn. 1981).

76 *See* People v. Jackson, 18 Cal. App.3d 504, 508 (Cal. Ct. App. 1971) (holding that admitting into evidence the physician’s diagnosis that his thirteen month old son was a victim of BCS was not an “improper invasion of the province of the jury” and noting that “the diagnosis of ‘battered child syndrome’ has become an accepted medical diagnosis” and that “it has been recognized as a legally qualified diagnosis on the trial court level for some time”); *see also* Landeros v. Flood, 551 P.2d 389, 399 (Cal. 1976) (concluding that “the diagnosis of the ‘battered child syndrome’ has become an accepted medical diagnosis” but ruling that the trial court erred in sustaining the demurrer of defendant doctor and hospital as to whether defendants had a duty to recognize BCS, in a case involving an eleven-month-old infant who suffered a comminuted spiral fracture of her leg, a skull fracture, burns and multiple bruises over her entire back caused by her mother and her mother’s live-in boyfriend).

77 Children under the age of four still have the greatest risk of being severely injured or killed as a result of domestic abuse. In 2003, 79% of the fatalities from domestic abuse syndrome involved children under four, with infants under one accounting for 44% of the deaths. U.S. DEP’T OF HEALTH & HUMAN SERV., *supra* note 4.

78 *Jackson*, 95 Cal. Rpt. at 921.

79 *Id.*

80 *See id.* (quoting expert testimony from the child’s pediatrician).

81 *See, e.g.*, United States v. Bowers, 660 F.2d 527, 528-529 (5th Cir. 1981) (upholding the admission of expert testimony regarding BCS in affirming a mother’s conviction of cruelty to a child in the death of her two-and-a-half -year-old daughter); United States v. Boise, 916 F.2d 497, 504, fn. 16 (9th Cir. 1990) (rejecting the argument of a father, who had been convicted of second degree murder in the death of his six month old son, that even the *term* “battered child syndrome” should not have been permitted since it was unfairly prejudicial).

82 *See, e.g.*, Eslava v. State, 473 So. 2d 1143, 1147 (Ala. Crim. App. 1985) (holding that expert testimony was admissible to show that an infant fit the profile for BCS and received lethal non-accidental injuries, including a skull fracture, which were inflicted by his mother’s live-in boyfriend when he “intentionally, maliciously and willfully stomped the infant to death”); State v. Moyer, 727 P. 2d 31, 33 (Ariz. Ct. App.1986) (noting, in a case involving burns and a fractured skull inflicted by a stepfather on his twenty-one-month-old stepdaughter, that BCS has become an “accepted medical diagnosis” indicating that a “child of tender years” has not suffered certain types of injuries by accidental means, which when “coupled with additional proof that the injuries occurred while the child was entrusted to the defendant is sufficient for a verdict of guilty”); People v. Ellis, 589 P.2d 494, 495-496 (Colo. Ct. App. 1978) (upholding the admissibility of expert testimony of BCS in a case involving a four-year-old who, after sustaining several prior fractures, was beaten to death by his stepmother, finding that, “where . . . defendant’s theory of the case is that death was accidental, and where there is evidence of exclusive parental custody during the relevant period, evidence of past abuse is admissible to prove intent, and to disprove accident”); State v. Dumlaio, 491 A.2d 404, 410 (Conn. App. Ct 1985) (admitting expert testimony regarding BCS, where parents lethally battered their two year old daughter, and commenting that evidence of BCS, “coupled with other proof, such as a continuing opportunity to inflict the injuries may permit an inference not only that the injuries were not accidental but also that they were inflicted by one who regularly cares for the child”); State v. Screpesi, 611 A.2d 34, 39 (Del. Super. Ct. 1991) (holding that evidence of BCS was properly admitted and noting that BCS is an “accepted medical diagnosis” that a young child, like the seven week old infant in the case, “has suffered a certain type of injury intentionally rather than accidentally”); Albritton v. State, 221 So.2d 192, 194 (Fla. Dist. App. Ct. 1969) (upholding the trial court’s decision to admit evidence regarding BCS and the “gruesome and shocking” photographs of a sixteen-month-old toddler, who was beaten to death by her mother’s boyfriend); State v. Stuart, 715 P.2d 833, 870 (Idaho 1986) (stating that BCS was “judicially recognized in the State of Idaho”); People v. Platter, 421 N.E.2d 181, 184 (Ill. App. Ct. 1980) (upholding a pediatrician’s testimony that three year old Kristie Hubbard was a victim of BCS and affirming her mother’s boyfriend’s conviction of manslaughter in Kristie’s death from a massive bowel perforation); Bell v. Commonwealth, 684 S.W.2d 282, 283 (Ky. Ct. App. 1984) (finding no prejudicial error in admitting physicians’ opinions that an infant, who suffered a lethal subdural hematoma from his father’s beating, was a victim of

BCS and upholding the father's conviction of second degree manslaughter); State v. Nash, 446 So.2d 810, 812, 814 (La. Ct. App. 1984) (admitting testimony from a coroner that the fatal abdominal and head injuries and rib fractures suffered by a nineteen-month-old child inflicted by his mother's live-in boyfriend were indicative of BCS and noting that the boyfriend "had the only opportunity to harm the child, and his explanations of the manner in which the child was injured were shown to be false"); State v. Conlogue, 474 A.2d 167, 172-173 (Me. 1984) (noting the acceptance of BCS as a diagnosis in Maine and holding that, by excluding medical testimony of BCS, the trial court improperly denied defendant the opportunity to have the jury consider the credibility of the mother's recantation of her confession to the abuse); Duley v. State, 467 A.2d 776, 781 (Md. Ct. Spec. App. 1983) (quoting pathologist Dr. Brian D. Blackbourne (allowing evidence that two-month-old Michelle Duley, who died from her father's abuse, was a victim of BCS based on her "unreasonable injuries" including fractures and internal hemorrhaging from lethal shaking by her father)); Commonwealth v. Day, 569 N.E.2d 397, 400 (Mass. 1991) (noting that BCS "has come to be a well recognized medical diagnosis"); People v. Barnard, 286 N.W.2d 870, 871 (Mich. Ct. App. 1979) (holding that expert evidence regarding BCS was admissible since it is a "widely recognized medical diagnosis which indicates that a child has been injured by other than accidental means" and affirming the mother's boyfriend's conviction of second degree murder in the death of her two-year-old child); State v. Goblrish, 246 N.W.2d 12, 15 (Minn. 1976) (upholding admission of expert testimony regarding BCS, noting that "its use in this case was potentially no more prejudicial than the revolting nature of the infant's injuries themselves" and affirming the father's conviction of first degree manslaughter in the death of his two-month-old daughter); Aldridge v. State, 398 So.2d 1308, 1309, 1312 (Miss. 1981) (opining that BCS "should be considered in any child exhibiting evidence of possible trauma or neglect . . . or where there is a marked discrepancy between the clinical findings and the historical data as supplied by the parents and affirming the fifteen year sentence and convictions of both parents of felonious abuse and battery of their infant daughter); State v. Taylor, 515 P.2d 695, 703 (Mont. 1973) (finding that evidence regarding BCS is fully admissible as expert testimony); Blutsworth v. State, 646 P.2d 558, 558-559 (Nev. 1982) (noting that BCS is "an accepted diagnosis signifying serious and persistent physical abuse" and affirming the conviction of two-year-old Eric Johnson's stepfather of child abuse and second degree murder, as well as the conviction of the child's mother of child abuse); People v. Henson, 304 N.E.2d 358, 363-364 (N.Y. 1973) (noting that evidence of BCS "coupled with additional proof . . . that the injuries occurred while the child was in the sole custody of the parents would permit the jury to infer not only that the child's injuries were not accidental but that, in addition, they occurred at the culpable hands of its parents," and affirming the convictions of the parents of criminally negligent homicide in the death of their four-year-old son); State v. Wilkerson, 247 S.E.2d 905, 912, 919 (N.C. 1978) (noting that "all courts which have considered the question . . . have concluded that . . . expert medical testimony concerning the battered child syndrome . . . is properly admitted into evidence," and affirming a father's conviction of second degree murder in the beating death of his two-year-old son); *In re* R.W.B., 241 N.W.2d 546, 550, 555 (N.D. 1976) (upholding admissibility of BCS in terminating parents' rights where their son suffered eleven separate bone fractures of his arms and his legs during his first seven months of life); State v. Nemeth, 694 N.E.2d 1332, 1335 (Ohio 1998) (noting that BCS, as "the label for a set of physical symptoms that provide proof of child abuse," has been used "for over 30 years in this context . . . by the medical and legal community"); Ashford v. State, 603 P. 2d 1162, 1164-1165 (Okla. 1979) (upholding expert testimony from a pathologist regarding BCS being "a characteristic finding in children who have been mistreated in some way by another person," and upholding a mother's boyfriend's conviction of first degree manslaughter and forty year sentence in the beating death of her eight month old son); Commonwealth v. Rodgers, 528 A.2d 610, 615-616 (Pa. Super. Ct. 1987) (upholding testimony regarding BCS and affirming parents' convictions for involuntary manslaughter, and sentences of up to five years, in the death from malnutrition of their two-and-a-half-year-old daughter); State v. Durand, 465 A.2d 762, 763, 768 (R.I. 1983) (affirming a mother's conviction of manslaughter and sentence of fifteen years for the death of her four-month-old son from a subdural hematoma, and ruling that the jury could infer from expert testimony regarding "child abuse syndrome" that the infant's injuries were inflicted by his mother); State v. Lopez, 412 S.E.2d 390, 392 (S.C. 1991) (upholding the admissibility of expert testimony regarding BCS in a stepmother's conviction for murdering her three-year-old stepson and indicating that "such testimony may support an inference that the child's injuries were not sustained by accidental means"); State v. Best, 232 N.W.2d 447, 458 (S.D. 1975) (affirming a mother's conviction for second degree manslaughter in the beating death of her fourteen-month-old son and noting that the court had not found any case where expert medical testimony regarding BCS was rejected); Hawkins v. State, 555 S.W.2d 876, 876-878 (Tenn. Ct. App. 1977) (upholding expert testimony regarding BCS as well as photographs showing the healthy condition of two-and-a-half-year-old Laura before her death and the "pitiful condition of [her] maltreated body" shortly after her death due to prolonged beatings, causing a "gradual deterioration of [Laura's] health . . . over a lengthy period during which she literally bled to death from internal injuries that weakened her system," and affirming the convictions of her mother and her mother's live-in boyfriend of second degree murder with sentences of seventy-seven years and 199 years

respectively); Righi v. State, 689 S.W.2d 908, 909 (Tex. Ct. App. 1984) (allowing medical testimony that a child suffered from BCS and upholding the conviction and six year sentence of her mother for "intentionally and knowingly engaging in conduct causing [her daughter] serious physical deficiency & impairment"); State v. Tanner, 675 P.2d 539, 543-545 (Utah 1983) (noting that "[o]ur research shows that all courts which have addressed the question have affirmed the admission of expert medical testimony regarding the presence of the battered child syndrome" and holding that expert testimony regarding BCS was admissible because it was "not used broadly" but was "defined and applied" to the three-year-old victim of her mother's lethal abuse "with particularity"); State v. Janes, 850 P.2d 495, 502 n.6 (Wash. 1993) (noting that Washington courts admit evidence of BCS "for purposes of proving a physical pattern of child abuse"); State v. Johnson, 400 N.W.2d 502, 504, 507 (Wis. Ct. App. 1986) (upholding expert testimony regarding BCS in prosecutions involving child victims since "those felonious assaults are in a unique category" and affirming the manslaughter conviction of a man who was "like a second father" to the child he beat to death) and Goldade v. State, 674 P.2d 721, 727 (Wyo. 1984) (recognizing the acceptance of the term BCS and upholding the child abuse conviction and six month jail sentence of the mother of four-and-a-half-year-old battered child).

83 Estelle v. McGuire, 502 U.S. 62, 69 (1991).

84 *Id.*

85 *Id.*

86 *See id.* (noting that the "marked discrepancy between the clinical findings and historical data as supplied by the parents" also typifies BCS).

87 *In re* Appeal in Maricopa County, 893 P.2d 60, 63 (Ariz. Ct. App. 1994) (quoting expert testimony from Dr. Frank Miller). Based on a survey of dependency cases, one legal expert described the following types of physical abuse parents inflict on their older children as follows:

The reported cases tell us that in the name of discipline children are beaten with belts, electrical cords, sticks, coat hangers, bats, and studded weapons. They are locked in rooms without food or heat and forced to carry excrement or to eat urine-soaked food. They have plastic bags placed over their heads, are knocked into walls, are scalded, or immersed in freezing water....They are injured, they are scarred, and they die.

Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 481-482 (1988); *see also* People v. Anderson, 406 P.2d 43, 48 (Cal. 1965) (mother's live-in boyfriend lethally stabbed her ten year old daughter sixty times, including cutting her tongue and inflicting one wound which extended from the child's rectum through her vagina; Turner v. District of Columbia, 532 A.2d at 664-665 (father starved his five month old son to death).

88 *Maricopa County*, 893 P.2d at 63 (quoting expert testimony from Dr. Frank Miller).

89 *See* DAVIS, *supra* note 5, at 23 (noting additionally that one in three girls will be sexually violated during their lifetimes and that 95% of all child sexual abuse victims knew their abusers).

90 Bethea, *supra* note 61.

91 Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. PREVENTIVE MED. 245-258 (1998); Desmond K. Runyan et al., *Child Abuse and Neglect By Parents and Caregivers*, in WORLD REPORT ON VIOLENCE AND HEALTH 59-86 (Etienne Krug et al. eds., World Health Org. 2002).

92 P.L. Owens, *Domestic Violence: Impact On Psychiatric Medicine*, 1995 J.S. C. MED. ASSOC. 435-438 (1995); J.V. Becker et al., *Empirical Research on Child Abuse Treatment: Report by the Child Abuse and Neglect Treatment Working Group*, *American Psychological Association*, J. CLIN. CHILD PSYCHOL. 23-46 (1995).

93 *See* HANDBOOK OF CLINICAL CHILD PSYCHOLOGY 1220 (C. Eugene Walker & Michael C. Roberts eds., John Wiley & Sons 1983) (cited in State v. Nemeth, 694 N.E.2d 1332, 1339 (Ohio 1998) (noting that trauma can also be caused by "verbal overload with insults, accusations, and indoctrination"); *see also* People. v. Wade, 750 P.2d 794, 800, (Cal. 1988) (noting that the mother's live-in boyfriend, in addition to killing the mother's ten-year-old daughter and beating her other four young children, punished the children by making them take cold showers, stand on one foot for extended periods, and drink their own urine as well as a mixture of salt and milk, to induce vomiting); *see also* Nebgen v. State, 192 N.E.130, 131 (Ohio Ct. App. 1933) (where a deceased mother's former live-in boyfriend was convicted of willful torture in chaining her seven-year-old son naked to a bathtub with a dog collar during the day while the boyfriend was at work).

94 Brodie v. Summit Co. Child. Serv. Bd., 554 N.E.2d 1301, 1303 (Ohio 1990).

95 M.A. v. J.A., 781 S.W.2d 94, 95 (Mo. Ct. App. 1989).

96 GABARINO, GUTTMANN, & SEELEY, *THE PSYCHOLOGICALLY BATTERED CHILD*, 69 tbl.2 (1986) ("Components Involved in Identification of Psychological Maltreatment").

97 *Id.*

99 CHILDREN’S DEFENSE FUND, *supra* note 2; *see also*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE (2000) (estimating that, between 1993 and 1998, 43% of households where domestic violence occurred included children under twelve years of age); *see also* DAVID GIL, VIOLENCE AGAINST CHILDREN: PHYSICAL CHILD ABUSE IN THE UNITED STATES 122 (1970) (discussing an earlier study revealing that almost two-thirds of the other children residing in the home were present at the time the abuse of their sibling occurred). Moreover, in one study of 100 battered women, over half (54%) reported that their abuser had also either hurt or killed family pets and sixty-two of the women indicated that their children were present when the pet was abused. Frank R. Ascione, *Animal Abuse and Youth Violence*, JUVENILE JUSTICE BULLETIN (September 2001).

100 *In re* Edward C., 178 Cal. Rptr. 694, 704 (Cal. Ct. App. 1981).

101 *See id.* (noting that it is “reasonable to infer that continued exposure to the threat of physical force will inhibit the healthy emotional development necessary to a progression from childhood to independent manhood”).

102 CHILDREN’S DEFENSE FUND, *supra* note 2; *see also* H. Lien Bragg, *Child Protection in Families Experiencing Domestic Violence*, U.S. Dept. HHS/ACYF/Office of Child Abuse and Neglect: Washington, D.C. (2003); R.J. Magan, K., Conroy & A. Del Tufo, *Domestic Violence in Child Welfare Preventative Services: Results from An Intake Screening Questionnaire*, 22 CHILD & YOUTH SERV’S REV. 251-274 (2000); Audrey Mullender et al., CHILDREN’S PERSPECTIVES ON DOMESTIC VIOLENCE, LONDON (Sage 2002).

103 Penzerro, *supra* note 58.

104 *Id.* One study estimated that forty-five percent of A.D.H.D. children had been exposed to domestic violence. *See* “PLEASE KEEP ME SAFE,” *supra* note 59.

105 JENNY GOMEZ, THE RELATIONSHIP BETWEEN DOMESTIC VIOLENCE AND ADDICTION (The Betty Ford Center 2006), presented at the Prevent Child Abuse Conference, Dallas, Texas (2006).

106 *Id.*

107 R. LaFave & W. Scott Austin, CRIMINAL LAW § 5.7 (2d ed. 1986).

108 *See*, e.g., CAL. PENAL CODE §197 (West 2007) (noting that “[h]omicide is. . . justifiable when committed by any person. . . [w]hen resisting any attempt to murder any person, or to commit a felony, or do so some great bodily injury upon any person”).

109 People v. Aris, 264 Cal. Rptr. 167, 179 (Cal. Ct. App. 1989) (emphasis in original).

110 *Id.*

111 *Aris*, 264 Cal. Rptr. at 179 (citing CAL. PENAL CODE § 195 (West 2007) and PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 173, at 280 et seq. (1984)).

112 Smith, *supra* note 19, at 156.

113 DALTON & SCHNEIDER, *supra* note 1, at 236.

114 *Id.*

115 Bechtel v. State, 840 P. 2d 1, 7 (Okla. Crim. App. 1992); *see also* Hawthorne v. State, 408 So.2d 801 (Fla. Dist. Ct. App.), *rev. denied*, 412 So.2d 1361 (Fla. Ct. App. 1982) (noting that expert testimony regarding BWS was not offered to show “that the mental and physical mistreatment of [the abused wife by her husband] affected her mental state so that she could not be responsible for her actions; rather, the testimony would be offered to show that because she suffered from the syndrome, it was reasonable for her to have remained in the home and, at the pertinent time, to have believed that her life and the lives of her children were in imminent danger”).

116 Smith, *supra* note 19, at 156.

117 CAL. PENAL CODE § 208 (West 2007).

118 State v. Lynch, 436 So.2d 567, 568-569 (La. 1983).

119 *Id.*

120 State v Gallegos, 719 P.2d 1268, 1271-1272 (N.M. Ct. App. 1986); *accord* State v.

Leidholm, 334 N.W.2d 811, 814 (N.D. 1983) (reversing a murder conviction of an abused wife who killed her husband with a butcher knife as he slept after an evening of drinking and violence on the part of both parties).

121 Gallegos, 719 P.2d at 1271-1272.

122 *Id.*

123 WALKER, *supra* note 43.

124 *Id.*; *see also* *infra* notes 136-145 and accompanying text.

125 WALKER, *supra* note 43; *infra* at notes 152-168 and accompanying text; *see also* Commonwealth v. Stonehouse, 555 A.2d 772, 783-786 (Pa. 1989) (holding that expert testimony regarding BWS “is admissible as a basis for proving justification in the use of deadly force where the defendant has been shown to be a victim of psychological and physical abuse”).

126 *See* *infra* notes 132-150, 162-169 and accompanying text (noting that domestic violence follows particular patterns, including hypervigilance).

127 *See* *supra* note 73 and accompanying text.

128 *See* People v. Bautista, 2006 WL 3826667, *9 (Cal. App. 4 Dist. 2006) (quoting expert witness Dr. Nancy Kaser-Boyd (stating that BCS initially described “the physical and psycho-

logical symptoms of a child [who’s] been battered. . . . [b]ut, over the years it has come to include the psychological symptoms that come from being a battered child”).

129 Maryland v. Smullen, 844 A.2d 429, 445 (Md. 2004). In fact, some experts have tried to distinguish the two battered child syndromes by referring to the psychological effects of battering as the “child abuse syndrome” or by discussing it as a form of post traumatic stress disorder or acute stress disorder. State v. Nemeth, 694 N.E.2d 1332, 1335 (Ohio 1998) (citing DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424-431 (4 Ed. 1994) (“DSM-IV”).

130 Smullen, 844 A.2d at 447 (quoting Steven R. Hicks, Admissibility Of Expert Testimony On The Psychology Of The Battered Child, 11 L. & PSYCHOL. REV. 111 (Spring 1987) (citing R. Helfer & C. Kempe, HELPING THE BATTERED CHILD AND HIS FAMILY (1972))).

131 *See Gallegos*, 719 P.2d at 1271 (declaring “[i]ncidents of domestic violence tend to follow predictable patterns”).

132 WALKER, *supra* note 43; *see also* Emrick, 481 N.Y.S.2d at 558 (quoting expert testimony from Dr. Matilda Rice and describing BWS in a case where a woman shot her physically abusive live-in boyfriend while he was sleeping, as a “multi-stage form of familial ‘disease’” with stage one consisting of “verbal abuse and possibly minor physical abuse”, stage two involving “an escalation of physical abuse in degree and quantity” and stage three where the abuse “gets totally out of control”); Bechtel, 840 P.2d at 10 (quoting expert witness Dr. Lenore Walker (explaining the three phases of “The Cycle Theory” as consisting of the “‘tension-building’ period”, the “‘acute-explosion’ period” and the “‘loving, contrition’ period”)); Wirt, 892 P.2d at 136 (describing the “cycle of violence” as consisting of “three stages: a tension building stage in which the battered woman attempts to appease the batterer and prevent the abuse, the violent stage in which the abuse actually occurs, and the honeymoon stage in which the batterer apologizes and pleads for forgiveness, giving the battered woman hope the abuse will end”).

133 Janes, 850 P.2d at 502.

134 State v. MacLennan, 702 N.W.2d 219, 227 (Minn. 2005) (citing expert testimony by Clinical Psychiatrist Dr. Michael Arambula, who asserted that “the attack will usually involve excessive force because the child is unable to control his or her emotions”).

135 Smullen, 844 A.2d at 441 (citing Hope Toffel, Note, *Crazy Women, Unharmd Men, and Evil Children: Confronting the Myths About Battered People Who Kill Their Abusers, And The Argument For Extending Battering Syndrome Self-Defenses to All Victims Of Domestic Violence*, 70 S. CAL. L. REV. 337, 349 (1999) (citing WALKER, *supra* note 43, at 95)).

136 *Id.*

137 *Id.*

138 *See* State v. Richardson, 525 N.W.2d 378, 380 (Wis. Ct. App. 1994) (quoting expert testimony from a psychologist who specialized in treating battered women, reversing the battered woman’s conviction of second degree reckless homicide and remanding for a new trial).

139 Smullen, 844 A.2d at 441 (quoting WALKER, *supra* note 43, at 96).

140 Richardson, 525 N.W.2d at 380.

141 *See* Mary Ann Dutton, *Validity Of ‘Battered Woman’s Syndrome’ in Criminal Cases Involving Battered Women*, U.S. Dept. of Justice 1, 6-7 (1996) (asserting that battered women often remain in an abusive relationship because episodes of abuse may recur infrequently, over long periods of time).

142 *See* Richardson, 525 N.W.2d at 380 (quoting expert testimony that described the cycle of violence as “a three-stage circular process – a tension-building phase erupting into violence followed by a honeymoon stage where the batterer often apologizes and the victim forgives the batterer”).

143 WALKER, *supra*, note 43.

144 State v. Janes, 822 P.2d 1238, 1244, n.10 (Wash. Ct. App. 1992).

145 Janes, 850 P.2d at 502 (quoting Mones, *supra* note 3, at 63); *see also* Bautista, 2006 WL 3826667, at *9 (noting that “[c]hildren who live in an abusive home are watchful and vigilant about impending abuse or danger. They walk on egg shells, so to speak, just like battered women”).

146 Humphrey, 921 P.2d at 16, (quoting Gallegos, 719 P.2d at 1271).

147 *Id.* (quoting Banks v. State, 608 A.2d 1249, 1252 (Md. Ct. Spec. App. 1992).

148 *See*, e.g., Lenore Walker, *The Battered Woman Syndrome is a Psychological Consequence of Abuse*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 133, 139 (Richard J. Gelles & D.R. Loseke eds. 1993) [hereinafter Walker, *Psychological Consequence*].

149 People v. Sherman, 2002 WL 1506574, at *3 (Cal. App. 2 Dist. 2005). *See also*, Jahnke v. State, 682 P.2d 991, 1017 (Wyo. 1984) (sixteen year old Richard Jahnke, who had been beaten by his father for fourteen years, recognized his father’s “‘stomping’ as a preface to violence”).

150 John Scobey, *Self-Defense Parricide: Expert Psychiatric Testimony on The Battered Child Syndrome*, 13 HAM. J. PUB. L. & POL. 181 (1992).

151 Janes, 850 P.2d at 502.

152 Lenore E. A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L.ETHICS & PUB. POL’Y 321, 330 (1992) [hereinafter Walker, Battered Women

Syndrome].

153 WALKER, *supra* note 43, at 49-50; *see also*, Smith v. State, 277 S.E.2d 678, 680 (Ga. 1981) (noting that a battered woman’s “self-respect is usually very low and she believes she is a worthless person”); *Witt*, 892 P.2d at 136 (describing how a “battered woman eventually reaches a state of ‘learned helplessness’; her efforts to improve the relationship or extract herself from the situation prove futile, she learns she cannot escape the relationship because of her financial status or fear of retribution, and she abandons her efforts”); EDWARD GONDOLF & ELLEN FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 11, 12 (1988) (describing a battered woman as being “immobilized amidst the uncertainty of when abuse will occur” and feeling “that she has no control over her experience” so that “no matter what she does, she ‘gets it’ . . . The cage door is shut, so to speak, and the women have no apparent way out.”).

154 *Bechtel*, 840 P.2d at 10 (quoting Dr. Lenore Walker).

155 *Smullen*, 844 A.2d at 450 (quoting Erin Masson, *Admissibility of Expert or Opinion Evidence of Battered-Woman Syndrome on Issue of Self-Defense*, 58 ALR 5TH 749, 762-763 (1998)).

156 *Humphrey*, 921 P.2d at 3.

157 *Richardson*, 525 N.W.2d at 380.

158 *Humphrey*, 921 P.2d at 3 (quoting expert testimony from Dr. Lee Bowker (noting that battered women are “often inaccurately portrayed as ‘cardboard figures, paper-thin punching bags who merely absorb the violence but didn’t do anything about it” whereas, in fact, they attempt a variety of different strategies to alleviate their plight, including “hiding, running away, counter-violence, seeking the help of friends and family, going to a shelter, and contacting police”)).

159 *Richardson*, 525 N.W.2d at 380; *see also MacLennan*, 702 N.W.2d at 234 (noting that courts allow expert testimony regarding BWS “to dispel the common misconception that a normal or reasonable person would not remain in such an abusive relationship”); State v. Leaphart, 673 S.W.2d 870, 872 (Tenn. Crim. App. 1983) (describing how a spouse caught up in a cycle of domestic violence “may become helpless and be psychologically prevented from leaving the relationship”).

160 State v. Allery, 682 P.2d 312, 313, 316 (Wash. 1984).

161 *Id.* at 315.

162 *Hundley*, 693 P.2d at 478-479.

163 *Janes*, 850 P.2d at 502.

164 *Id.* at 500.

165 *Janes*, 822 P.2d at 1243 (citation omitted); *see also Bautista*, 2006 WL 3826667, at *9 (noting that the “primary effect of BCS is fear”).

166 INGER J. SAGATUN-EDWARDS & LEONARD P. EDWARDS, CHILD ABUSE AND THE LEGAL SYSTEM 247 (Wadsworth Group 1995). Co-author, Judge Leonard P. Edwards, noted that “[t]he times that abused women and children fear their abusers are not limited to immediately before and during beatings. Their fear of death or great bodily harm may persist throughout most of their daily life.” *Id.*

167 *Janes*, 850 P.2d at 503.

168 Sacks, *supra* note 19, at 355-356.

169 *See, e.g.,* WALKER, *supra* note 43, at 27-28; Herbert Silver, *Coping With An Abusive Relationship: I. How and Why Do Women Stay?*, 53 J. MARRIAGE & FAM. 311 (1991).

170 *Witt*, 892 P.2d at 137.

171 *Zorza*, *supra* note 1, at 390.

172 GONDOLF & FISHER, *supra* note 153, at 11.

173 Dutton, *supra* note 141, at 4; *see also* Smith, 277 S.E.2d at 680 (noting that a battered woman may fail to report abuse to “her family or friends out of fear that they might take action into their own hands and be injured and she would rather be hurt than endanger somebody else”).

174 *Koss*, 551 N.E.2d at 971.

175 *Zorza*, *supra* note 1, at 390.

176 *Id.*

177 Dutton, *supra* note 141, at 5.

178 *Id.* at 6.

179 *Janes*, 850 P.2d at 502 (quoting Mones, *supra* note 3, at 33).

180 *See, e.g.,* Lawrence Mayer, *Kids Who Kill Their Parents*, WASH. POST, MAY 13, 1984, at 15-16 (describing how a “tight bond, like that between master and slave, develops”).

181 *Janes*, 850 P.2d at 502-503; *see also* State v. Grewe, 813 P.2d 1238, 1248 (Wash. 1991) (noting that one aspect of children’s extreme vulnerability is their tendency to trust and that children are among the most vulnerable members of society due to their trusting nature”).

182 Heide, *supra* note 19, at 2.

183 *Id.*

184 *Id.*

185 *Janes*, 850 P.2d at 499-500.

186 *Id.* at 499.

187 *Id.* at 499-500.

188 *Id.* at 499 (noting that Walter, the mother’s boyfriend once choked Andrew’s brother).

189 *Janes*, 822 P.2d at 1243.

190 *Janes*, 850 P.2d at 502. In *Nemeth*, the Ohio Supreme Court noted that it had previously accepted expert testimony regarding BWS to “explain that the non-reporting of abuse and the failure to retreat from an allegedly abusive environment are not inconsistent with a claim of severe abuse.” *Nemeth*, 694 N.E.2d at 1337. The *Nemeth* court concluded that “[s]urely,” if it accepted “nonreporting and failure to retreat by adults, the reasons for such conduct are even more understandable when a child is the subject of abuse.” *Id.* at 1336-1337.

191 SAGATUN-EDWARDS & EDWARDS, *supra* note 166, at 246.

192 *Maricopa County*, 893 P.2d at 62.

193 *Id.*

194 *Id.* at 63 (quoting expert witness Dr. Frank Miller).

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.* Although K.T. was initially charged with first degree murder, the appellate court affirmed a finding by the juvenile court that she was guilty of the lesser-included offense of manslaughter because, as a victim of BCS, K.T. was in “a constant heat of passion [and] fear, believing that shooting her mother was her only option to protect herself and her sister.” *Id.* at 65-66 (Voss, J., concurring in part, dissenting in part).

200 Philip M. Drucker, *The Consequences of Poverty and Child Maltreatment on IQ Scores* (The Vincentian Center for Church and Society 2000), *available at* <http://www.vincenter.org/97/drucker.html>.

201 Jennifer Macomber, An Overview of Selected Data on Children in Vulnerable Families 1 (Urban Institute & Child Trends 2006); *see also* Richard J. Gelles, *Poverty And Violence Toward Children*, 35 AM. BEHAV. SCIENTIST 258-274 (1992) [hereinafter Gelles, *Poverty and Violence*]; P.K. Trickett, L.J. Aber, V. Cicchetti & D. Cicchetti, *Relationship of Socioeconomic Status to the Etiology and Developmental Sequelae of Physical Child Abuse*, 27 DEVELOPMENTAL PSYCHOL. 279-285 (1990) (noting that the “devastating problem of family poverty . . . has long been recognized as a core condition in child maltreatment”).

202 American Humane Association, *America’s Children: How Are They Doing?* 1 (Am. Humane Ass’n 2007).

203 CHILDREN’S DEFENSE FUND, *supra* note 2.

204 CHILDREN’S DEFENSE FUND, *supra* note 2.

205 *Id.* (noting that child poverty has increased by over 1.4 million since 2000).

Unfortunately, more than 840,000 of these children live in “extreme poverty,” a term describing families living at less than one-half of the poverty level, meaning that in 2004 these families had to get by on less than \$7,412.00 per year or \$20.00 per day. *Id.*

206 Gelles, *Poverty and Violence*, *supra* note 201, at 263.

207 CHILDREN’S DEFENSE FUND, *supra* note 2.

208 U.S. DEPT OF JUSTICE, *supra* note 16.

209 *Id.* (noting that 20 out of every 1,000 lower income women were abused while only 3 out of 1,000 upper income women suffered domestic abuse).

210 Eleanor Lyon, *Poverty, Welfare and Battered Women: What Does The Research Tell Us?* 3 (Minn. Center Against Violence & Abuse 1998), *available at* <http://www.mincava.umn.edu/documents/welfare/welfare.pdf>. For example, a Massachusetts study of 734 women receiving welfare found that almost two-thirds had suffered physical abuse from a male partner during their lives and almost 20% reported such abuse during the past year. M.A. Allard, R. Albelda, M.E. Colten and C. Cozena, *In Harm’s Way? Domestic Violence, AFDC Receipt and Welfare Reform in Massachusetts* (McCormack Institute 1997). Another study of 846 women receiving welfare in New Jersey found that almost 60% had experienced domestic violence in their lifetimes and 20% of those who were then in a relationship with a man reported being physically abused. C. Curcio, *The Passaic County Study of AFDC Recipients In A Welfare-To-Work Program* (Passaic County Board of Social Services 1997). Finally, a study of 290 Chicago welfare recipients revealed that almost 49% had suffered “severe aggression” (defined as “kicking, hitting, biting, beating, injuring, raping, and threatening with or using a weapon”) from their male partner and that almost 20% of those currently in a relationship had experienced “severe aggression” within the preceding year. S. Lloyd, *The Effects Of Domestic Violence On Women’s Employment* (Institute for Policy Research 1996).

211 Macomber, *supra* note 201 (noting that close to one-half of “all identified incidents of child abuse or neglect occur in families receiving welfare”).

212 Barbara Price, *Domestic Violence Traps Women and Children in Poverty* (New Jersey Coalition for Battered Women 2000) (citing a 1998 study conducted by Homes for the Homeless).

213 Macomber, *supra* note 201, at 1.

214 Joan I. Vondra, *Socioeconomic Considerations: The Family Economy*, in TROUBLED YOUTH, TROUBLED FAMILIES (J. Garbarino & Assoc., N.Y. eds, Aldine Publishing Co.

1986).

215 Macomber, *supra* note 201, at 1.

216 *Id.*

217 DEPARTMENT OF HEALTH & HUMAN SERVICES (DHHS), ADMINISTRATION ON CHILDREN, YOUTH, AND FAMILIES (ACF), EMERGING PRACTICES IN THE PREVENTION OF CHILD ABUSE & NEGLECT (Washington D.C. Government Printing Office 2003).

218 Jody Raphael, Taylor Institute & Richard M. Tolman, *Trapped By Poverty/Trapped By Abuse: New Evidence Documenting The Relationship Between Domestic Violence And Welfare* (University of Michigan 1997), available at <http://humanservices.ucdavis.edu/resource/uploadfiles/x%20Trapped%20by%20Poverty,%20Trapped%20by%20Abuse.pdf>.

219 Sharon Vandivere, Megan Gallagher & Kristen Anderson Moore, *Changes in Children's Well-Being and Family Environments*, 18 SNAPSHOTS OF AMERICA'S FAMILIES III (Urban Institute 2004).

220 *Id.*

221 Macomber, *supra* note 201, at 1.

222 Child Trends Data Bank 2005, *Parental Symptoms of Depression*, CHILDREN WITH LIMITATIONS, (Child Trends 2005).

223 *Humphrey*, 921 P.2d at 3 (noting that women may remain in the relationship due to “lack of money”).

224 Price, *supra* note 212.

225 *Humphrey*, 921 P.2d at 3 (quoting expert testimony from Dr. Lee Bowker).

226 Dutton, *supra* note 141, at 5.

227 GONDOLF & FISHER, *supra* note 153.

228 *Id.*

229 B.E. Aguirre, *Why Do They Return? Abused Wives in Shelters*, 30 J. NAT'L ASS'N SOC. WORKERS 350, 352 (1985).

230 *Janes*, 822 P.2d at 1243; *see also Nemeth*, 694 N.E.2d at 1340 (noting that the “psychiatric and legal communities have clearly accepted that despite any minor differences in the degree of power differentials between the batterer and the abused, the psychological effects of family violence are legally indistinguishable whether suffered by children or adults” and that “virtually every legal journal which discusses battered child syndrome as a defense to parricide notes its similarity to battered woman syndrome”); *Janes*, 850 P.2d at 502 (commenting that “[g]iven the close relationship between the battered woman and battered child syndromes, the same reasons that justify admission of the former apply with equal force to the latter”); *Jahnke*, 682 P.2d at 996 (noting that, “conceptually there is no reason to distinguish a child who is a victim of abuse” from “cases [that] deal with wives as victims of abuse”).

231 *Janes*, 850 P.2d at 502 (quoting Hicks, *supra* note 130, at 106); *see also Bautista*, 2006 WL 3826667, at *9 (quoting expert testimony from Dr. Nancy Kaser-Boyd (noting that “BCS is not distinct from battered woman’s syndrome -- ‘the symptoms are the same’”). The *Janes* court referred to several cases for support which involved, not battered children, but battered women. *Janes*, 850 P.2d at 501. The Washington Supreme Court explained: “While those cases deal with wives as victims of abuse, conceptually there is no reason to distinguish a child who is a victim of abuse.” *Id.* This perspective was echoed in the Washington Court of Appeal’s decision in *Janes*: “[T]here is sufficient scientific basis to justify extending the battered woman syndrome to analogous situations affecting children...Neither law nor logic suggests any reason to limit to women recognition of the impact a battering relationship may have on the victim’s actions or perceptions.” *Janes*, 822 P.2d at 1243; *see also Smullen*, 844 A.2d at 439-440 (rejecting the lower court’s finding that “trying to fit Battered Spouse Syndrome and Battered Child Syndrome into the framework of traditional self-defense analysis . . . is akin to trying to fit the proverbial square peg into a round hole” and noting that the syndromes “have become recognized, by some courts and in some of the literature, as kindred doctrines”).

232 *Smullen*, 844 A.2d at 446.

233 *Janes*, 822 P.2d at 1243 (citing *State v. Fisher*, 739 P.2d 683 (Wash. Sup. Ct. 1987) (noting that children are among the most vulnerable members of society”).

234 *Janes*, 822 P.2d at 1243. Indeed, according to Judge Leonard Edwards, “[m]any argue that such a ‘battered person defense’ may be equally if not more appropriate for abused children.” SAGATUN-EDWARDS & EDWARDS, *supra* note 166, at 247.

235 Sacks, *supra* note 19, at 351.

236 *Janes*, 822 P.2d at 1243.

237 *See, e.g., State v. Crabtree*, 805 P.2d 1, 2, 6 (Kan. 1991) (declining to “adopt a ‘battered child’ syndrome defense that would use the same language and justification used in adopting the battered wife syndrome defense”, noting that the abused child, Tommy Crabtree, had not been abused during the seven years preceding the shotgun slaying of his abusive stepfather although the stepfather continued to physically abuse Tommy’s mother and sexually abuse Tommy’s sister); *Jahnke*, 682 P.2d at 991 (holding that evidence of past physical abuse of

defendant and physical and sexual abuse of his sister and mother was not relevant in determining the reasonableness of the seventeen year old boy’s belief in his need for self-defense when he shot his abusive father as he was getting out of the family car); *see also* Robert Hegadorn, Clemency: Doing Justice To Incarcerated Battered Children, 55 J. MO. BAR 70, 71 (1999) (explaining that “[b]attered child syndrome has long been used to prosecute child abusers, but unlike the related phenomenon of battered woman syndrome, its acceptance as evidence demonstrating that a homicide defendant acted in self-defense is severely limited”); Reginald M. Parker, *When No One Hears Their Cries: Battered Child Syndrome as a Defense: State v. Janes*, 19 T. MARSHALL L. REV. 431, 435 (1994) (commenting that “courts have been unwilling to embrace the battered child syndrome as a defense”).

238 *See* Janet Parrish, *Trend Analysis: Expert Testimony On Battering And Its Effects In Criminal Cases (Highlights)*, in NATIONAL INSTITUTE OF JUSTICE, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS, U.S. DEPARTMENT OF JUSTICE ix, ix (noting that such testimony is “most readily accepted” in cases involving traditional self-defense); NATIONAL INSTITUTE OF JUSTICE, *supra*, at 5-6 (U.S. Dep’t of Just. 1996). The report was based on a study of state and federal court decisions, as well as state legislation. *See, e.g., Ex parte Cynthia Hill*, 507 So. 2d 558, 558 (Ala. 1987) (holding that “expert opinion testimony on battered wife syndrome may be admitted when proper predicate and foundation are laid”); *Humphrey*, 921 P.2d at 16 (admitting expert testimony regarding BWS based on CAL. EVID. CODE §§ 801 and 1107 and reversing the conviction for voluntary manslaughter, with an eight year sentence, of a woman who shot to death her abusive husband after he shot at her the night before his death); *People v. Hare*, 782 P.2d 831, 833-834 (Colo. Ct. App. 1989) (Dubofsky, J., dissenting) (affirming the manslaughter conviction of Amber Hare in the shooting death of her boyfriend, after he repeatedly threatened her “by placing a gun between her eyes and pulling the trigger” and noting that it was “a battered woman syndrome case” since she had been “repeatedly beaten, threatened and humiliated and intimidated” by him during the six months they had been together); *Hawthorne*, 470 So.2d at 773 (reversing the conviction of a battered wife who shot her husband to death and concluding that expert testimony regarding BWS would be admissible); *Smith*, 277 S.E.2d at 683 (overturning a woman’s conviction for voluntary manslaughter for shooting her live-in boyfriend following four years of physical abuse and finding that the trial court erred in not admitting expert testimony regarding BWS); *People v. Minnis*, 455 N.E.2d 209, 211, 214-215, 218 (Ill. App. Ct. 1983) (reversing a woman’s conviction of murder and 25 year sentence in the death of her husband and holding that the court erred in excluding evidence of BWS which would have indicated that the wife’s decision to dismember her husband’s body and put the parts in garbage bags, which she deposited in various dumpsters, was influenced by her emotional reaction to the shock of her situation, including the abuse she suffered at the hands of her husband, which involved choking her and pushing “her head into the toilet and repeatedly threaten[ing] her with death”); *State v. Nunn*, 356 N.W.2d 601, 603-604 (Iowa App. Ct. 1984) (allowing expert testimony regarding BWS); *State v. Stewart*, 763 P.2d 572, 582 (Kan. 1988) (allowing expert testimony regarding BWS and noting that “[m]ost courts which have addressed the issue are in accord”); *Commonwealth v. Rose*, 725 S.W.2d 588, 589, 591 (Ky. 1987) (in a case where a woman shot her husband of seven years, who had beaten and abused her on several occasions, the court noted “as a general proposition that evidence of BWS would be admissible after a proper foundation has been provided by evidence that this is a mental condition constituting a recognized scientific entity . . .” but refused to admit the testimony in this case since “the issue was not the admissibility of the subject matter, but the limitations placed by the trial court on the witness’ testimony”); *State v. Anaya*, 438 A.2d 892, 892-894 (Me. 1981) (citing *Ibn-Tamas v. U.S.*, 407 A.2d 626, 639 (D.C. App. 1979) (overturning the manslaughter conviction of woman who killed her live-in boyfriend by knifing him in the back because her life was “like a madhouse”, with the boyfriend pushing and kicking her during the five months they lived together and holding that expert testimony regarding BWS should have been admitted)); *Rodriguez*, 633 N.E.2d at 1042 (reversing a woman’s conviction of manslaughter for the stabbing death of her live-in boyfriend because the trial judge had refused to admit evidence of BWS or the long history of physical abuse endured by the defendant); *Hennum*, 441 N.W.2d at 798-799 (admitting expert testimony regarding BWS in a case where a physically abused woman shot her sleeping husband); *State v. Williams*, 787 S.W.2d 308, 309, 312 (Mo. App. Ct. 1990) (reversing the second degree murder conviction of a woman, who killed a man by running him over in her car while trying to kill her abusive boyfriend, who beat her between ten and seventeen times, kicked her in the stomach while she was pregnant and vandalized her apartment, and holding that expert testimony regarding BWS is not dependent on the woman’s marital status and that her “mental state for killing her intended victim is transferred to the ultimate victim”); *State v. Jackson*, 435 N.W.2d 893, 894-895 (Neb. 1989) (affirming a woman’s conviction of second degree murder in the stabbing death of her live-in boyfriend and upholding the defendant’s testimony that she was a victim of BWS since her boyfriend physically and emotionally abused her); *Kelly*, 478 A.2d at 368-369 (reversing a battered woman’s murder conviction in the stabbing death of her husband with a

pair of scissors after a “stormy” seven year marriage and finding that “the battered-woman’s syndrome is an appropriate subject for expert testimony”); *Gallegos*, 719 P.2d at 1274 (holding that the trial court should have admitted expert testimony regarding BWS and noting that “the term used to describe this condition could be no more inflammatory than its symptoms, and far less than its causes”); *Torres*, 488 N.Y.S.2d at 359, 362 (allowing expert testimony regarding BWS where a woman shot her live-in boyfriend while he was sitting in a chair after suffering from ten years of physical and psychological abuse); *Emick*, 418 N.Y.S.2d at 554, 557, 559 (quoting Dr. Matilda Rice) (reversing a woman’s conviction of first degree manslaughter in the shooting death of her sleeping boyfriend, who had been “physically abusing her for the past year and a half” and admitting expert testimony that she “displayed the classic signs of the battered wife syndrome, a multi-stage form of ‘familial disease’ and that her situation was at ‘the worst end of stage 3’”); *State v. Norman*, 378 S.E.2d 8, 19 (N.C. 1989) (admitting expert testimony regarding BWS but affirming the voluntary manslaughter conviction of a battered woman who shot her husband to death to prevent future abuse); *Leidholm*, 334 N.W.2d at 819 (admitting expert testimony regarding BWS and reversing the manslaughter conviction of a battered wife who stabbed her husband to death); *Bechtel*, 840 P.2d at 4-6, 8 (admitting expert testimony regarding BWS); *Koss*, 551 N.E.2d at 972 (overturning a woman’s conviction for voluntary manslaughter and finding that the trial court erred in 326 *Id.* (observing that after interviewing judges, prosecutors and defense attorneys concerning the impact of expert testimony in criminal trials, the researchers concluded that such evidence has “increased recognition of the broader problem of domestic violence and that its introduction can assist judges and juries to better understand the issues and/or dispel myths and stereotypes related to battered women”). *Id.*

327 *See, e.g.*, *Davis v. State*, 527 So.2d 962, 963 (Fla. Dist. Ct. App. 1988) (finding that the trial court erred in admitting “validating” testimony from a clinical psychologist that, according to his validity scale, a fourteen-year-old abused child was “being frank” in her testimony that she was molested by her father and finding that the psychologist was “invading the province of the jury”). In *People v. Cruickshank*, (citing a case involving the shooting of a sexually abusive father by his seventeen-year-old daughter) the New York Supreme Court held that admitting expert testimony regarding rape trauma syndrome immediately after the defendant testified about prior sexual abuse by her father, would have been “improper bolstering testimony.” *People v. Cruickshank*, 484 N.Y.S.2d 328, 335 (N.Y. Sup. Ct. 1985). Recounting that the court went on to state that it is “within the sole province of the jury to pass on credibility and, where the purpose of the expert witness is to bolster the testimony of another witness by explaining that his version of the facts is believable, such expert testimony is improper.” *Id.*; *see also* *Wheat v. State*, 527 A.2d 269, 270 (Del. 1987) (reversing defendants first degree rape conviction involving his ten-year-old stepdaughter and, although admitting expert testimony in “the area of intrafamilial child abuse,” noting that, to the extent that expert testimony regarding abused children attempts to quantify the veracity of a particular witness it is unacceptable, as was the case here where the “expert witness was permitted to evaluate the complainant’s credibility in terms of statistical probabilities”).

328 *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973).

329 *Nemeth*, 694 N.E.2d at 1336 (quoting *Stowers*, 690 N.E.2d at 883 (emphasis in original)); *see also* *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985) (analyzing a case involving a missionary, operating a crisis center, who molested the five year old son and seven year old daughter of a woman who lived with him temporarily, the court reversed expert testimony that “these particular children in this particular case could be believed” since the jury “in effect was impermissibly being asked to accept an expert’s determination that these particular witnesses were truthful”); *State v. Moran*, 728 P.2d 248, 265 (Ariz. 1986) (reversing a father’s conviction of child molestation and sexual abuse involving his daughter, who he had been sexually molesting since she was five years old and noting that “[p]sychologists and psychiatrists are not, and do not claim to be, experts at discerning truth [since] [p]sychiatrists are trained to accept facts provided by their patients not to act as judges of patients’ credibility”).

330 *See, e.g.*, *MacLennan*, 702 N.W.2d at 236 (noting that experts may “testify about characteristics possessed by the defendant that are consistent with those found in someone suffering from battered child syndrome” but “experts may not testify to the ultimate fact that the particular defendant suffers from battered child syndrome” thus, preserving the court’s “interest in allowing the jury to serve as fact finders, with the role of determining whether a particular defendant suffers from battered child syndrome, and does not allow that role to be usurped by experts”).

331 *Humphrey*, 921 P.2d at 13 (Brown, J., concurring) (quoting CAL. PENAL. CODE § 197 (West 2007)).

332 *Id.* at 13-14 (quoting *Aris*, 264 Cal.Rptr. at 175).

333 LaFave & Scott, *supra* note 157, at 58; *see also* *Langley v. State*, 373 So. 2d 1267, 1272 (Ala. Crim. App. 1979) (affirming a woman’s second degree murder conviction in the death of her husband, the court held that the husband’s “previous violence, real or threatened, will not excuse an intentional homicide” rather, the “conduct of the victim that would justify the exercise of the right of self-defense must be such as would manifest to the mind of a reasonable

person a present intention to kill him or do him great bodily harm”); *Stewart*, 763 P.2d at 577 (“A reasonable belief implies both an honest belief and the existence of facts which would persuade a reasonable person to that belief.”); *Kelly*, 478 A.2d at 374 (“Honesty alone . . . does not suffice. A defendant claiming the privilege of self-defense must also establish that her belief in the necessity to use force was reasonable”); *Norman*, 378 S.E.2d at 13-16 (stating that defendant’s belief that the use of deadly force was necessary must have created such a belief in the mind of “a person of ordinary firmness”).

334 *Humphrey*, 921 P.2d at 16 (quoting *State v. Griffiths*, 610 P.2d 522, 524 (Idaho 1980), *rev’d on other grounds*, *State v. LePage*, 630 P.2d 674, 683, 692 (Idaho 1981)). The *Humphrey* court further explained that “[j]ustification does not depend upon the existence of actual danger but rather depends upon appearances; it is sufficient that the circumstances be such that a reasonable person would be placed in fear for his safety and that the defendant acted out of that fear.” *Humphrey*, 921 P.2d at 14 (quoting *People v. Clark*, 181 Cal. Rptr. 682, 686 (Cal. App. 3 Dist. 1982)). Even if the defendant is mistaken in his assessment of the circumstances, “he is nevertheless entitled to the defense” if his mistake is reasonable. *Humphrey*, 921 P.2d at 14. Thus, the “objective component is not measured by an abstract standard of reasonableness but one based on the defendant’s perception of imminent harm or death.” *Humphrey*, 921 P.2d at 14. To quote U.S. Supreme Court Justice Holmes, “Detached reflection cannot be demanded in the presence of an uplifted knife.” *Brown v. United States*, 256 U.S. 335, 342-343 (1921) (reversing the second degree murder conviction where defendant shot a man who had twice assaulted the defendant with a knife, had threatened that “the next time, one of them would go off in a black box” and was coming toward defendant with a knife on the night he was killed).

335 *Smullen*, 844 A.2d at 447-448.

336 *See, e.g.*, *Koss*, 551 N.E.2d at 974 (admitting expert testimony “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”); *Hawthorne*, 408 So. 2d at 807 (admitting expert testimony solely to help the jury determine whether the defendant honestly believed she was in imminent danger).

337 *Leidholm*, 334 N.W.2d at 817; *see also* *Witt*, 892 P.2d at 138 (finding that expert testimony regarding BWS is not admissible on the ultimate issue of the defendant’s state of mind at the time the crime was committed).

338 *Smullen*, 844 A.2d at 443 (internal citations omitted) (quoting Mones, *supra* note 3, at 14). The *Smullen* court noted that, especially with adolescents, “a particularly disturbing characteristic of these homicides,” referred to by the police as the “‘overkill factor,’” is that the parent is rarely “killed with a single clean shot; most often the child will shoot, club, or stab the parent numerous times.” *See also* *MacLennan*, 702 N.W. 2d at 227 (citing Clinical Psychiatrist Dr. Michael Arambula (noting that “the attack will usually involve excessive force because the child is unable to control his or her emotions”)); Paul A. Mones, *Parricide: Opening A Window Through The Defense Of Teens Who Kill*, 7 STAN. L. & POL’Y REV. 61, 63 (1995-1996). Obviously, there are also numerous cases in which a battered woman kills her abusive spouse or boyfriend in a non-confrontational setting. *See, e.g.*, *Torres*, 488 N.Y.S.2d 359 (summarizing that a woman physically and psychologically for ten years shot her live-in boyfriend while he was sitting in a chair); *Emick*, 418 N.Y.S.2d at 554 (describing how a woman physically abused for eighteen months shot her sleeping boyfriend).

339 *Leidholm*, 334 N.W.2d at 817.

340 *State v. Wanrow*, 559 P.2d 548 (Wash. 1977) (landmark case containing the first judicial recognition of a subjective standard of self-defense for battered women on trial for killing their abusers). In *Wanrow*, the Washington Supreme Court ruled that a battered woman defendant “is entitled to have the jury consider her actions in the light of her own perceptions of the situation.” *Id.* at 567; *see also* *Torres*, 488 N.Y.S.2d at 360 (rejecting the purely objective standard of reasonableness and embracing the subjective test, noting: “The standard for the evaluation of the reasonableness of the defendant’s belief and conduct is not what the ordinary prudent man would have believed. . . [but] rather whether the defendant’s subjective belief as to the imminence and seriousness of the danger was reasonable”); *Koss*, 551 N.E.2d at 973 (“Ohio has adopted a subjective test in determining whether a particular defendant properly acted in self-defense”); *Leidholm*, 334 N.W.2d at 817-818 (affirming use of a subjective standard and noting that “the finder of fact must view the circumstances from the standpoint of the accused to determine if they are sufficient to create in the accused’s mind an honest and reasonable belief that the use of force is necessary to protect himself from imminent harm”).

341 *Leidholm*, 334 N.W.2d at 817 (emphasis in original).

342 *Id.* at 818 (citations omitted).

343 *Burtzlaff*, 493 N.W.2d at 9; *see also* *Humphrey*, 921 P.2d at 10-11 (noting that “evidence of battered woman’s syndrome is generally relevant to the reasonableness, as well as the subjective existence, of defendant’s belief in the need to defend, and, to the extent it is relevant, the jury may consider it in deciding both questions”); *Stewart*, 763 P.2d at 577 (noting that BWS was “relevant to a determination of the reasonableness of defendant’s perception of danger” and acquitting an abused wife of first degree murder of her sleeping husband, based on a “really grave lethal situation”); *Bechtel*, 840 P.2d at 11-12 (noting that Oklahoma’s “standard

[of reasonableness] is a hybrid, combining both the objective and subjective standards” since “the fact finder should assume the viewpoint and circumstances of the defendant in assessing the reasonableness of [the defendant’s] belief, i.e., subjective [and] also requires the defendant’s viewpoint to be that of a reasonable person, in similar circumstances and with the same perceptions, i.e., objective”); *Smullen*, 844 A.2d at 251 (noting that the BCS “when applied in a proper setting can. . . support both the subjective honesty of the defendant’s perception of imminent harm and the objective reasonableness of such a perception”); *Kelly*, 478 A.2d at 364 (noting that expert testimony regarding BWS was admissible “as relevant to the honesty and reasonableness of defendant’s belief that deadly force was necessary to protect her against death or serious bodily harm.”); *Gallegos*, 719 P.2d at 1270 (commenting that “ours is a hybrid test, combining both, the subjective and the objective standards: whether the defendant perceived an immediate threat and whether the reasonable person, in similar circumstances, also would have acted in self-defense). A hybrid standard has also been adopted by statute in Texas. See TEX. CODE CRIM. PROC. ANN. art. 38.36 (Vernon 1995) (“In a prosecution for murder, if a defendant raises as a defense a justification . . . the defendant, in order to establish the defendant’s reasonable belief that use of force or deadly force was immediately necessary, shall be permitted to offer: (1) relevant evidence that the defendant had been the victim of acts of family violence committed by the deceased . . . and (2) relevant expert testimony regarding the condition of the mind of the defendant at the time of the offense, including those relevant facts and circumstances relating to family violence that are the basis of the expert’s opinion”).

344 *Richardson*, 525 N.W.2d at 380.

355 *Id.* at 382.

356 *Leidholm*, 334 N.W.2d at 818. Dispelling any possible confusion on the part of a jury, the court, if requested by the prosecuting attorney, might want to follow the suggestion of the California Supreme Court in *Humphrey* and clarify that:

in assessing reasonableness, the question is whether a reasonable person in the defendant’s circumstances would have perceived a threat of imminent injury or death, and not whether killing the abuser was reasonable in the sense of being an understandable response to ongoing abuse; and that, therefore, in making that assessment, the jury may not consider evidence merely showing that an abused person’s use of force against the abuser is understandable....The ultimate judgment of reasonableness is solely for the jury.

Humphrey, 921 P.2d at 10 (noting the “[e]vidence merely showing that a person’s use of deadly force is scientifically explainable or empirically common does not, in itself, show it was objectively reasonable”).

347 *Burtzlaff*, 493 N.W.2d at 9.

348 *Allery*, 682 P.2d at 314-316 (noting that to “effectively present the situation perceived by the defendant, and the reasonableness of her fear, the defense has the option to explain her feelings to enable the jury to overcome the stereotyped impressions about women who remain in abusive relationships”).

349 *Janes*, 850 P.2d at 504.

350 *Id.* at 504 (quoting *Wanrow*, 559 P.2d at 563).

351 *Id.*

352 *Id.*

353 *Id.* at 505.

354 *Scobey*, *supra* note 150, at 181.

355 In many cases, if a purely objective standard were applied, the expert testimony would be nullified since battering victims frequently do *not* kill their batterers at a time when there appeared to be a need for self defense. *Id.* This is in spite of the fact that actions taken in self-defense by a victim of domestic abuse syndrome may be quite reasonable even though “the traditional elements are not obvious or apparent.” *Id.*

356 *Humphrey*, 921 P.2d at 15 (Brown, J., concurring). In his concurring opinion in *Humphrey*, Justice Brown (recognizing a “clear nexus between the phenomenon of hypervigilance and the objective component of self-defense, i.e., reasonable fear of imminent injury or death and the perceived need to react with the speed and force used”). *Id.* (Brown, J., concurring). Justice Brown pointed out that, “[u]nder settled principles, if the victim’s threats caused the defendant ‘to fear greater peril than she would have had otherwise, [the jury may] take such facts into consideration in determining whether defendant acted in a manner which a reasonable person would act in protecting his or her own life or bodily safety.’” *Id.* (quoting *Moore*, 275 P.2d at 499 (reversing an abused wife’s manslaughter conviction in the shooting death of her estranged husband due to the trial court’s error in refusing defendant’s request for an instruction “on the influence of antecedent threats” on the “vital matter of self defense”)). Justice Brown concluded that when “antecedent threats have accompanied a recurring cycle of escalating abuse, their relevance to the reasonableness of the defendant’s fear of imminent and more serious violence is manifest.” *Humphrey*, 921 P.2d at 15 (Brown, J. concurring).

357 *Janes*, 850 P.2d at 504-505 (quoting *Wanrow*, 559 P.2d at 552).

358 *Jahnke*, 682 P.2d at 1012 (Rose, J., dissenting); see also *Stonehouse*, 555 A.2d at 781 (noting that where “there has been physical abuse over a long period of time, the circumstances

which assist the court in determining the reasonableness of a defendant’s fear of death or serious injury at the time of a killing include the defendant’s familiarity with the victim’s behavior in the past”).

359 *Gallegos*, 719 P.2d at (quoting Patricia Eber, *The Battered Wife’s Dilemma: To Kill or to be Killed*, 32 HASTINGS L.J. 895 (1981) (noting that “[v]ictims of a battering relationship live in a hopeless vacuum of ‘cumulative terror’”)).

360 *Jahnke*, 682 P.2d at 993 (Rose, J., dissenting).

361 Joelle Anne Moreno, Comment, *Killing Daddy: Developing a Self-Defense Strategy for the Abused Child*, 137 U. PA. L. REV. 1281, 1287 (1989).

362 *Burtzlaff*, 493 N.W.2d at 12 (Wuest, J., concurring in part and dissenting in part) (commenting that he didn’t “know anyone who claims he or she does” have such a license).

363 *Janes*, 850 P.2d at 505; see also, Nunn, 356 N.W.2d at 603-604 (affirming a wife’s conviction of second degree murder in the stabbing death of her live-in boyfriend, who had threatened to kill her on the day he died, and noting that, despite expert testimony regarding BWS, the jury could have properly concluded that her fear that she was in danger was not reasonable since the “argument had ended several minutes before the stabbing [and] the victim was not armed at the time”).

364 *Janes*, 850 P.2d at 505.

365 *Id.* This concern was part of the reason why the Wyoming Supreme Court applied an objective standard in *Jahnke*. In that case, sixteen year old Richard Jahnke had been physically abused since the age of two by his father. *Jahnke*, 682 P.2d at 995. Following a violent altercation, his father left the house stating, “I don’t know how but I’m going to get rid of you”. *Id.* at 995. Claiming that he subjectively feared for his life, the abused teenager set up several “backup” guns in the house and then waited in the garage for his father’s return. *Id.* When his father entered the garage, Richard shot him four times with a shotgun. *Id.* At trial, Richard claimed self-defense in the murder of his father, but was convicted of voluntary manslaughter. *Jahnke*, 682 P.2d at 994. On appeal, the Wyoming Supreme Court upheld the trial court’s verdict and stated: “It is difficult enough to justify capital punishment as an appropriate response of society to criminal acts even after the circumstances have been carefully evaluated by a number of people. To permit capital punishment to be imposed upon the subjective conclusion of the individual that prior acts and conduct of the deceased justified the killing would amount to a leap into the abyss of anarchy.” *Jahnke*, 682 P.2d at 977.

366 *Smith*, *supra* note 19, at 159; see also *Jahnke*, 682 P.2d at 997 (noting that any claim of a defense of special justification allowing victims of abuse to kill abusers is “antithetical to the mores of modern civilized society”); *Norman*, 378 S.E.2d at 13-15 (stating that “[t]he law does not sanction the use of deadly force to repel simple assaults”).

367 *Norman*, 378 S.E.2d at 13 (reiterating the court’s holding which states that the defendant’s sense of self-preservation is what drives a homicidal response to domestic abuse.)

368 *Id.*

369 *Norman*, 378 S.E.2d at 10.

370 *Id.*

371 *Id.*

372 *Stewart*, 243 Kan. at 640, 648-649, 763 P.2d at 575, 579, 583; see also *Aris*, 264 Cal. Rptr. at 179 (commenting that applying this concept can be difficult because of “our sympathy for the plight of a battered woman and disgust for the batterer”; however, “it is fundamental to our concept of law that there be no discrimination against sinners and saints solely on moral grounds”).

373 *Stewart*, 763 P.2d at 574,

374 *Id.* 579.

375 *Id.* at 575.

376 *Id.* at 574.

377 *Norman*, 378 S.E.2d at 13.

378 BLACK’S LAW DICTIONARY 675-676 (5th ed. 1979) (defining “immediate” as “present; at once; without delay; not deferred by any interval of time. In this sense, the word, without any very precise signification, denotes that action is or must be taken either instantly or without any considerable loss of time”). The Law Dictionary defines “imminent” as “near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous” and “imminent danger.” *Id.* In relation to homicide in self-defense, the Law Dictionary defines “imminent” as meaning “immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law. Or, as otherwise defined, such an appearance of threatened and impending injury as would put a reasonable and prudent man to his instant defense.” *Id.*

379 See, e.g., *Whipple v. State*, 523 N.E.2d 1363, 1367 (Ind. 1988) (upholding the conviction of seventeen year old Dale Whipple for the murder of his non-threatening mother and sleeping father, despite the fact that the parents had subjected both children to physical and mental abuse throughout their lives, because any “threat of harm to Dale or his sister was too temporally remote to be ‘imminent’ for the purpose of self-defense or defense of others”); see also

Aris, 215 Cal.App.3d at 1184 (holding that a battered woman did not face immediate peril when she shot her sleeping husband and therefore the self-defense instruction was not justified); *Stewart*, 763 P.2d at 572 (finding self-defense instruction inappropriate because there was nothing leading the battered wife to conclude that she would “immediately” suffer death or great bodily injury at the time that she killed her sleeping husband despite her husband’s physical and sexual abuse of her and of her twelve-year-old daughter); *Kelly*, 97 N.J. at 197 (stating in the context of a battered wife that force must be “immediately necessary” to justify self defense); *Norman*, 324 N.C. at 255 (rejecting self-defense instruction because the battered woman was not faced with instantaneous choice of killing or being killed when she shot her sleeping husband in the back of the head after years of abuse); *Commonwealth v. Grove*, 526 A.2d 369, 371, 373 (Pa. Super. Ct. 1987) (noting that the defendant-wife attempted “to cloud this issue with a semantical smokescreen regarding the alleged differences between the time frames encompassed by the terms” and indicating that, although the husband’s twenty-two year “history of spousal abuse is certainly a factor to be considered in determining whether an accused’s alleged fear of imminent death or serious bodily injury is genuine and reasonable, it does not alter the requirement that the threat of death or serious bodily injury be imminent on the present occasion and finding that the victim was not threatening in any manner; rather, it is undisputed that he was drunk and asleep” when his wife shot him in the back, “tied his legs, poured gasoline about his body and ignited it”); *Leaphart*, 673 S.W.2d at 872-873 (quoting *Draper v. State*, 63 Tenn. 246, 251 (1984) (noting that “[t]o make a claim of self-defense . . . the accused must establish that danger of death or serious bodily harm was ‘imminent and impending, manifested by some words or overt acts at the time clearly indicative of a present purpose to do injury’” and holding that there was no error in denying a self-defense instruction to a battered woman who watched two men she had hired while they beat her abusive husband to death with a baseball bat and then “helped them stuff [her husband’s] bloody corpse into the trunk of his red MG automobile”); *Jahnke*, 682 P.2d at 1009 (refusing self-defense instruction because there was no evidence that Richard Jahnke was “under either actual or threatened assault by his father” at the time Richard shot him as his father entered the garage). As the California Appellate Court noted in *Aris*: “Any civilized system of law recognizes the supreme value of human life, and excuses or justifies its taking only in cases of apparent absolute necessity.” *Aris*, 215 Cal. App. 3d at 1188. Abusers are “entitled to the same protection of their lives by the law afforded to everyone.” *Id.* at 1189. For example, in *Norman*, the North Carolina Supreme Court refused to expand the time frame in a case where a woman had suffered years of abuse at the hands of her husband. *Norman*, 378 S.E.2d at 9-11. On the day of the homicide, the husband beat his wife all day and then threatened to kill her if she left him. *Id.* That night, the wife shot her husband once in the chest and twice in the head as he slept. *Id.* In upholding the trial court’s refusal to instruct the jury regarding self-defense, the court concluded that there was no “immediate danger” and the defendant “was not faced with an instantaneous choice between killing her husband or being killed or seriously injured.” *Id.* The Kansas Supreme Court in *Stewart*, reached a similar conclusion in a case where the defendant’s husband physically, sexually and psychologically abused both the defendant and her 12 year old daughter. *Stewart*, 763 P.2d at 577-78. On the day of the murder, the husband threatened his wife and sexually abused her. *Id.* That night, the defendant shot him in the head as he slept. *Id.* In concluding that the battered woman was not entitled to a self defense instruction, the court in *Stewart* commented:

[I]n order to instruct a jury on self-defense, there must be some showing of an imminent threat or a confrontational circumstance involving an overt act by the aggressor. There is no exception to this requirement where the defendant has suffered long-term domestic abuse where the victim is the abuser. In such cases, the issue is not whether the defendant believes homicide is the solution to past or future problems with the batterer, but rather whether circumstances surrounding the killing were sufficient to create a reasonable belief in the defendant that the use of deadly force was necessary. . . . A battered woman cannot reasonably fear life-threatening danger from her sleeping spouse. *Id.*

381 *Langley*, 373 So.2d 1271.

382 *Id.* As the Pennsylvania Court of Appeal held in a case in which an abused wife killed her abusive husband as he lay sleeping: “Assuming that [the wife] was genuinely and reasonably afraid of her husband, the fact remains that whatever danger he presented was not imminent on the present occasion as he lay sleeping.” *Grove*, 526 A.2d at 373 (emphasis in original).

383 *Humphrey*, 921 P.2d at 15 (Brown, J., concurring) (citing Kit Kinports, *Defending Battered Women’s Self-Defense Claims*, 67 OR. L. REV. 393, 423-424 (1988) (citations omitted)). Justice Brown further pointed out a battered woman is also “‘attuned to her abuser’s pattern of attacks, she learns to recognize subtle gestures or threats that distinguish the severity of attacks and that lead her to believe a particular attack will seriously threaten her survival.’” *Humphrey*, 921 P.2d at 16 (Brown, J., concurring) (quoting *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1582 (1993) (citation omitted)).

384 *Id.* at 16 (Brown, J., concurring) (quoting Ewing, *supra* note 19, at 55, and citing *Aris*,

264 Cal. Rptr. at 167); *see also Allery*, 682 P.2d 313 (holding that expert testimony regarding BWS “is admissible to show the defendant’s fear of imminent danger at the time of the shooting”).

385 *Humphrey*, 921 P.2d at 15 (Brown, J., concurring); *see also Gallegos*, 719 P.2d at 1271 (explaining that “remarks or gestures which are merely offensive or perhaps even meaningless to the general public may be understood by the abused individual as an affirmation of impending physical abuse”).

386 *See, e.g., Stewart*, 763 P.2d at 582 (allowing expert testimony regarding BWS “to prove the reasonableness of the defendant’s belief she was in imminent danger”); *Koss*, 551 N.E.2d at 973 (holding that “[e]xpert testimony regarding the battered woman syndrome can be admitted to help the jury . . . determine whether the defendant had reasonable grounds for an honest belief that she was in imminent danger when considering the issue of self-defense”).

387 *Humphrey*, 921 P.2d at 15 (quoting *Torres*, 488 N.Y.S.2d at 362.)

388 *See, e.g., Gallegos*, 719 P.2d at 1274 (holding that an abused wife who shot and stabbed her battering husband while he was lying in bed was entitled to an instruction on self-defense); *Leidholm*, 334 N.W.2d at 819 (noting that since North Dakota’s self defense statute requires imminent not immediate threat, a self-defense instruction was required where a battered woman stabbed to death her sleeping husband); *Allery*, 682 P.2d at 316 (finding that a self-defense instruction was proper when a battered wife shot her husband while he was lying on the couch, even though no violent act immediately preceded the shooting).

389 *Hundley*, 693 P.2d at 475.

390 *Id.*

391 *Id.*

392 *Id.* at 476.

393 *Id.*

394 *Id.*

395 *Id.*

396 *Id.*

397 *Id.*

398 *Id.* at 479.

399 *Id.* at 467-469 (holding that the entire ten year history of abuse of the defendant by her husband was relevant in determining whether she reasonably feared abuse from her husband and how imminent the danger was).

400 *Id.* at 467-469.

401 *Bechtel*, 840 P.2d at 8.

402 *Id.*

403 *Id.* at 12, fn. 12 (quoting Eber, *supra* note 359, at 895).

404 *Richardson*, 525 N.W.2d at 382.

405 *Bechtel*, 840 P.2d at 12 (emphasis in original).

406 *Janes*, 850 P.2d at 506.

407 *Id.*

408 Phyllis Crocker, *The Meaning of Equality for Battered Women who Kill Men in Self-Defense*, 8 HARV. WOMEN’S L.J. 121, 141 (1985) (“[R]epeated abuse can so heighten a battered woman’s fear and her awareness of her husband’s physical capabilities that she considers him as dangerous asleep as awake, as dangerous before an attack as during one.”).

409 *Scobey*, *supra* note 150, at 183.

410 *Bechtel*, 840 P.2d at 12.

411 *Id.* at 11-12.

412 *Id.* at 12 (citing LaFave & Scott, *supra* note 107, at 58).

413 *Id.*; *see also Hundley*, 693 P.2d at 479 (applying a similar analogy, stating that “[b]attered women are terror-stricken people whose mental state is distorted and bears a marked resemblance to that of a hostage or a prisoner of war”).

414 *Gallegos*, 719 P.2d at 1271 (quoting Eber, *supra* note 364, at 320 (drawing similarities between the victims of a hostage situation and the victims of domestic abuse)).

415 *Jahnke*, 682 P.2d at 1011.

416 *Hundley*, 693 P.2d at 479 (explaining the mental state of victims of abuse).

Nancy Wright is a Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School.