Nonconfrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuse

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NOTES


I. INTRODUCTION

Parricide, the killing of one’s mother or father, accounts for a mere two percent of all homicides, yet is a particularly disturbing crime. While some of these killings can be attributed solely to greed or psychosis, a startling ninety percent are cases in which a child ends years of severe and relentless abuse by killing an abusive parent, typically in a nonconfrontational situation. The spec-

1. PAUL A. MONES, WHEN A CHILD KILLS 6 (1991) (noting that since 1976, “when the F.B.I. began to tabulate homicides according to the relationship between victim and offender, patricide [killing of one’s father] and matricide [killing of one’s mother] have accounted for between 1.5 to 2.5 percent of all homicides, which means three to four hundred cases each year in the United States.”).

2. See id. at 15 (noting the insignificant number of parricides committed by “malevolent, greedy” children or psychotic children); Lois Timnick, Fatal Means for Children to End Abuse, LOS ANGELES TIMES, Aug. 31, 1986, at 1 (quoting nationally known expert on violence Dr. Shervert Frazier as stating that only a fraction of those who commit parricide are psychotic or sociopathic). But cf. Barbara Yost, Battered Child Defense Abused in Beverly Hills Murder Case, PHOENIX GAZETTE, Oct. 1, 1993, at A13 (suggesting that Lyle and Erik Menendez, recently on trial for killing both their allegedly abusive parents, actually killed to gain a $14 million inheritance).

3. Susan C. Smith, Comment, Abused Children Who Kill Abusive Parents: Moving Toward an Appropriate Legal Response, 42 CATH. U. L. REV. 141, 152-53 (1992). More than three-fourths of the victims are abusive fathers. Two thirds of the killers are physically abused sons, while the remainder are daughters who have typically been sexually as well as physically abused. Timnick, supra note 2, at 1.

4. For the purposes of this Note, “nonconfrontational situation” refers to a situation in which the victim is in an objectively nonthreatening position when killed. This definition
ter of an abused child\textsuperscript{5} killing his parent evokes a morass of feel-
ings. Initially there is horror at the brutal, deliberate slaying of the
parent and an urge to punish the child who has violated both soci-
etal norms and the most sacred prohibition in the criminal law. How-
ever, there is also disgust at the severity of abuse suffered by
the child, anger at the parent who inflicted the abuse, and pity for
both. Finally, there is deep discomfort that society was unable or
perhaps unwilling to prevent both the crime of child abuse and the
crime of parricide.

These conflicting feelings are exacerbated by the increasing
likelihood that the child will claim that the killing was legally
justified and seek acquittal by pleading self-defense, despite the
fact that the killing occurred in a nonconfrontational situation. This
trend toward pleading self-defense is modeled after self-defense
claims by battered women. It is premised on battered child syn-
drome: expert testimony is used to meet the legal elements of self-
defense by explaining the child’s perceptions at the time of the
killing.

This Note argues that using the battered child syndrome to
establish the elements of self-defense in nonconfrontational killings
in effect creates a wholly subjective standard of self-defense, unac-
ceptably undermining the important societal policies served by a
narrow self-defense doctrine. This Note suggests that while an
affirmative defense based on the unique psychological
characteristics of the battered child is inherently inconsistent with
the theory of self-defense as a justification, it is appropriate within

\textsuperscript{5} The use of the term “child” is not intended in any way to distinguish between
those defendants treated under a limited jurisdiction juvenile court system and those treat-
ed within the regular criminal justice system. No arbitrary age limitation is implied, and
whether an individual should be a battered child for the purposes of the criminal law may
depend largely on the circumstances. The term “child” in this Note thus encompasses a
range of defendants from the minimum legal age of criminal responsibility, through juve-
niles, to those who have reached the age of majority. For example, a 21-year-old who
lives at home and is emotionally and financially dependent on an abusive parent may be
considered a battered child for purposes of this discussion, although legally of adult age.

\textsuperscript{1} MONES, supra note 1, at 14 (stating that parricides “typically occur when the parent is in his least
defensible position, thus increasing the child’s chance of success . . . . Rarely is the parent ever killed while
beating, or for that matter, yelling at the child.”); Mavis J. Van Sambeek, \textit{Parricide as Self-Defense, 7 Law & Ineq. J.} 87, 90 (1988) (noting that most parricides do not fit the
classic self-defense situation); Jon D. Hull, \textit{Brutal Treatment, Vicious Deeds, TIME, Oct.}
19, 1987, at 68 (noting that the typical modus operandi of parricide is “several shots to
the back of the head of a sleeping parent”).
the framework of excuse, which emphasizes the subjective circumstances of a particular defendant. This Note then discusses several options for a partial excuse based on battered child syndrome, all of which would reduce the child’s culpability for a nonconfrontational killing from murder to manslaughter. Finally, this Note examines the premises of the juvenile court system: reduced moral culpability, antecedent causes of criminal behavior, and rehabilitation, and proposes that the recognition of a partial excuse be accompanied by sentencing based on the unique applicability of these principles to the battered child defendant.

II. BACKGROUND

A. Traditional Self-Defense

The doctrine of self-defense 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.”6 In order to further the strong state interest in maximizing protection for all human life,7 several strict requirements must be met before a killing will be deemed justified8 as self-defense. First, the defendant must have acted with an objectively reasonable belief9 that it was necessary

6. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.7(a), at 454 (2d ed. 1986).
8. If a killing is justified under the law, it is not a crime at all. Thus, a successful self-defense claim entitles the actor to acquittal of all charges of homicide. See HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 113-14 (1968) (stating that justifiable killing is treated as noncriminal and is conduct that we applaud).
9. The overwhelming majority of states apply an objective standard in judging whether the actor’s belief in the necessity of force was reasonable. See John F. Wagner, Jr., Annotation, Standard for Determination of Reasonableness of Criminal Defendant’s Belief, for Purposes of Self-Defense Claim, That Physical Force is Necessary - Modern Cases, 73 A.L.R. 4th 993, 997 (1989). However, this standard generally contains a subjective component which allows consideration of a defendant’s individual circumstances in judging the reasonableness of his or her actions. Commonly considered are the defendant’s physical condition, prior violent acts committed by the assailant and the defendant’s awareness of those prior acts. SLOAN, supra note 7, at 32. The standard is often described as that of a reasonable person in the defendant’s situation. Id. at 36.

A few states, however, apply a strictly subjective test for self-defense, and “battered woman’s defense” has been particularly successful in these states. See State v. Leidholm, 334 N.W.2d 811, 818 (N.D. 1983) stating that the standard is not what a reasonably cautious person would have done under the circumstances; instead, the jury must view the accused’s actions from the “standpoint of a person whose mental and physical characteris-
to use force. In addition, the defendant must have reasonably believed that the danger of death or serious bodily harm was imminent, or "immediately forthcoming," at the moment he killed his assailant. Finally, the use of deadly force must be proportional to the harm threatened.

B. Battered Woman Syndrome and Self-Defense

Given these stringent requirements, it seems counter-intuitive to suggest that a killing which occurs while the victim is asleep, watching television, or otherwise passive is justified as self-defense. Yet, abused women have had surprising success in many jurisdictions admitting expert testimony concerning battered woman syndrome to support their claims of self-defense despite the

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10. See LaFave & Scott, supra note 6, § 5.7(c), at 457-58. There is little support for the proposition that an honest but unreasonable belief in the need to use force will be justified as self-defense. The Model Penal Code § 3.04(1) (1974), however, advocates this subjective standard. See LaFave & Scott, supra note 6, § 5.7(c), at 457.

11. Imminence is a temporal requirement that the attack or threat of harm or danger be so sudden that the actor has time for no other option but the use of protective force. See Sloan, supra note 7, at 54. Thus, the threat of future harm is never sufficient to justify self-defense. Id. at 8. "If the threatened violence is scheduled to arrive in the more distant future, there may be avenues open to the defendant to prevent it other than to kill or injure the prospective attacker; but this is not so where the attack is imminent." LaFave & Scott, supra note 6, § 5.7(d), at 458.


13. Generally, the requirement that deadly force can only be used to defend against deadly force "precludes the use of a deadly weapon against an unarmed assailant." LaFave & Scott, supra note 6, § 5.7(b), at 456 (quoting Jennifer Marsh, Note, 54 Wash. L. Rev. 221, 228 (1978)). However, account must be taken of the respective size and gender of the assailant and defendant, as well as any past violent conduct by the assailant, so that in some circumstances, a defendant may be justified in using deadly force against an unarmed attacker. Id. at 456-57.

14. Battered Woman Syndrome, a term coined by Dr. Lenore Walker, describes a complex set of emotional and psychological characteristics and behavioral patterns common to women who are in an ongoing abusive relationship. Mira Mihajlovich, Comment, Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense, 62 Ind. L.J. 1253, 1257 (1987). An expert witness testifying about the syndrome typically begins with an explanation of the battering cycle, which consists of three stages: the tension-building phase in which minor abusive episodes occur, but both husband and wife make efforts to prevent the escalation of violence; the acute battering
nonconfrontational nature of the killings. The primary purpose\textsuperscript{15} of such testimony is to explain the way in which the battered woman syndrome alters the woman's perceptions, in order to demonstrate the reasonableness of her actions at the time of the killing.\textsuperscript{16}

Typically, expert testimony is offered to explain the escalating nature of the cycle of domestic violence, in which the abuse becomes increasingly frequent and severe as the battering stage becomes longer and the contrition stage shorter over time.\textsuperscript{17} This phase in which explosive violence occurs; followed by a contrition phase in which the batterer asks for forgiveness, beginning a period of relative calm. See Lenore E. Walker, The Battered Woman Syndrome 95-104 (1984) (giving statistical support for the existence of the three cycles). Once this cycle of violence repeats itself twice, the woman is considered a battered woman. Id. at 203.

15. One incidental purpose of expert testimony may be to increase the battered woman's credibility by answering the question foremost in the jury's mind, "Why didn't she just leave?" See Charles P. Ewing, Battered Women Who Kill 52 (1987). Testimony describing the many environmental obstacles faced by the battered woman, such as a lack of financial resources, social isolation, and ineffective police assistance, restraining orders and other judicial responses to spousal abuse, may be effective. See id. at 13-16. But see Don Dutton & Susan L. Painter, Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse, 6 Victimology: An Int. J. 139, 145 (1983) (citing a study showing that whether a battered woman left her abuser or not depended on the internal dynamics of the relationship rather than the presence or absence of various environmental obstacles). In addition, testimony concerning the psychological reasons for the woman's failure to leave is crucial. Such reasons include extreme depression and a phenomenon called learned helplessness in which "battered women find themselves in life situations where they are repeatedly exposed to painful stimuli (beatings, psychological torment, or sexual abuse) over which they have no control and from which there is no readily apparent avenue of escape . . . . Not surprisingly, these women learn to respond to such "un-controllability" with classic symptoms of learned helplessness." Ewing, supra, at 20-21. In addition, traumatic bonding, the formation of a strong emotional attachment to the abuser where positive feelings for the individual exist despite the intermittent abuse, may psychologically prevent the woman from leaving the relationship. See Dutton & Painter, supra, at 146-47.

16. Commentators categorically deny advocating a separate "battered women" or "battered child" defense, largely due to perceived equal protection difficulties. See Michael Dowd, Dispelling the Myths about the "Battered Woman's Defense": Towards a New Understanding, 19 Fordham Urb. L.J. 567, 572 (1992) (suggesting that the creation of a separate battered woman's self-defense theory poses equal protection problems since it provides women with a defense not available to men); Walter W. Steele, Jr. & Christine W. Sigman, Reexamining the Doctrine of Self-Defense to Accommodate Battered Women, 18 Am. J. Crim. L. 169, 181-82 (1991) (stating that the development of a "battered women defense" could result in equal protection challenge since it singles out battered women as a group to be treated differently than others who plead self-defense). See also Cynthia K. Gillespie, Justifiable Homicide: Battered Women, Self-Defense and the Law 159 (1989) (stating that battered women do not have legal rights that others do not; the mere fact that a woman is abused is never special justification). But see Lenore E.A. Walker, Battered Woman Syndrome and Self-Defense, 6 Notre Dame J.L. Ethics & Pub. Pol'y 321, 322 (1992) (referring to acceptance in numerous state courts of what became "known as the battered woman self-defense").

17. See Diana J. Ensign, Note, Links Between the Battered Woman Syndrome and the
testimony, coupled with the defendant's own description of her particular history of abuse, is offered to show a reasonable belief in the need to use deadly force on that particular occasion. More importantly, the expert testimony describes the psychological effects of battered woman syndrome on the perceptions and behavior of the defendant, focusing on the high arousal symptoms typically experienced. As one expert describes the effect, "[t]he woman is prepared to fight and her preparedness is augmented by physical and neurochemical changes. She becomes hypervigilant to cues of potential danger, recognizes the little things that signal an impending incident... This testimony thus seeks to explain the reasonableness of the defendant's perception that the danger of serious bodily harm or death was imminent, despite the fact that the abusive spouse was, for example, asleep at the time of the alleged self-defense.

Presently, a majority of states allow the introduction of expert testimony concerning battered woman syndrome to help the defendant demonstrate the elements of an affirmative defense of self-defense. The admissibility of syndrome testimony has been premised on the reliability of the scientific research concerning the syndrome and its effects on battered women. In addition, syndrome testimony aids in explaining to the jury the unique situation of the battered woman defendant and enables the jury to evaluate the reasonableness of her actions in the context of self-defense.


18. Id.
20. Id.
21. See generally James O. Pearson, Jr., Annotation, Admissibility of Expert or Opinion Testimony on Battered Wife or Battered Woman Syndrome, 18 A.L.R. 4th 1153, 1154 (1982) (analyzing decisions of courts either discussing or deciding the issue of whether expert testimony is admissible to establish the battered women syndrome).
22. States applying the Federal Rules of Evidence have consistently allowed expert testimony on battered woman syndrome where the defendant claims self-defense. The standard for admissibility under Rule 702 is whether the "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702. Under this liberal standard, courts have routinely admitted syndrome testimony to help the jury evaluate the battered woman's unique self-defense claim. Steven R. Hicks, Note, Admissibility of Expert Testimony on the Psychology of the Battered Child, 11 LAW & PSYCHOL. REV. 103, 123 (1987).

In the recent case Daubert v. Merrell Dow Pharmaceutical, Inc., 113 S. Ct. 2786, 2795 (1993), the Supreme Court clarified the requirements of Rule 702 concerning scientific evidence, stating that the Rule demands that expert testimony rest on a reliable scien-
C. Battered Child Syndrome and Self-Defense

Encouraged by the success of battered women in raising self-defense claims and getting battered woman syndrome testimony admitted, advocates for parricide defendants sought to admit similar testimony concerning the psychological impact of child abuse on

tific foundation and be relevant to the case at hand. According to the Court, factors to consider in this flexible inquiry include whether a theory or technique can be and has been tested, whether it has been subjected to peer review, the known or potential rate of error of the technique, as well as any general acceptance in the relevant scientific community. It appears that the admissibility of battered woman syndrome testimony in states which follow Rule 702 is unaffected by the Daubert decision, which merely clarifies the liberal approach of the Federal Rules. Id.

Even under more stringent standards, the majority of state courts have admitted battered woman syndrome testimony to support self-defense claims. For example, some states still apply the Frye test of admissibility, under which the standard for determining the reliability of scientific evidence is general acceptance within the relevant scientific community. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). Most courts applying this standard have held that battered woman syndrome is acknowledged and accepted by practitioners and professors in the fields of psychology and psychiatry, and is thus sufficiently reliable to be admitted. See Ensign, supra note 17, at 1635 (stating that because of extensive research which has been done on the battered woman syndrome, most states recognize its existence). Further, some jurisdictions follow the Dyas test, an extension of Frye principles, which requires that: (1) the subject matter is beyond the ken of the average layperson; (2) the witness has sufficient skill, knowledge or experience in the field so that his or her opinion will assist the trier of fact; and (3) the state of pertinent scientific knowledge permits a reasonable opinion to be asserted by an expert. Dyas v. United States, 376 A.2d 827, 832 (D.C. Cir. 1972), cert. denied, 434 U.S. 973 (1977). Most courts applying the Dyas standard have held that battered woman syndrome testimony meets all three criteria for admissability. See Hicks, supra, at 127-29 (courts that have followed the Dyas test have allowed battered woman syndrome expert testimony to be admissible). But see Mihajlovich, supra note 14, at 1266-67 (arguing that the link between repeated past abuse and future abuse does not require expert testimony because, “[m]ost jurors understand that previous violent encounters alter present perceptions.”).

Several states have gone further and codified the admissibility of battered woman syndrome when self-defense is at issue. For example, Ohio Revised Code section 2901.06(B) states:

If a person is charged with an offense involving the use of force against another and the person, as a defense to the offense charged, raises the affirmative defense of self-defense, the person may introduce expert testimony of the “battered woman syndrome” and expert testimony that the person suffered from that syndrome as evidence to establish the requisite belief of an imminent danger of death or great bodily harm that is necessary, as an element of the affirmative defense, to justify the person’s use of the force in question.

Ohio REV. CODE ANN. § 2901.06(B) (Anderson 1992); accord MO. ANN. STAT. § 563.033 (Vernon Supp. 1994) (providing procedures for a court-appointed psychiatrist to examine the defendant); WYO. STAT. § 6-1-203 (Supp. 1994) (defining battered woman syndrome as a subset of post-traumatic stress disorder and providing for the introduction of syndrome testimony to help establish the elements of self-defense).
these defendants’ emotions, perceptions, and behavior. 23
“[A]lthough there is a huge body of research on the psychological characteristics of children who are abused, that information has not been processed and articulated in the form of a psychological syndrome as has the battered woman syndrome.” 24 Since the psychological characteristics of abused children are virtually identical to those of abused women, 25 advocates have adopted for the analogous term “battered child syndrome” 26 to describe the complex set of characteristics common to children who are victims of chronic abuse.

Patterning their strategy after that of battered women defendants, battered children accused of killing abusive parents have increasingly sought to introduce expert testimony on battered child syndrome to help establish the reasonableness of their actions in the context of self-defense. While testimony concerning the nature of the battering cycle 27 and the psychology of traumatic bonding 28 are relevant to understanding child abuse, expert testimony

23. See Dowd, supra note 16, at 572-73 (clarifying the theory of battered woman syndrome and learned helplessness); Mihajlovich, supra note 14, at 1257 (admitting that the development of battered woman syndrome and the use of expert testimony has paved the way for claiming self-defense in nonconfrontational situations).

24. Hicks, supra note 22, at 140.

25. Id. at 106.

26. Whereas battered woman syndrome focuses solely on the psychological aspects of abuse, it should be noted that the term “battered child syndrome,” coined by Dr. Henry Kempe, originated as “a medical diagnosis describing a pattern of serious and otherwise unexplained manifestations of physical abuse.” See Michael S. Orfinger, Battered Child Syndrome: Evidence of Prior Acts in Disguise, 41 U. FLA. L. REV. 345, 346 (1989). Thus, the traditional evidentiary purpose of battered child syndrome testimony was its use in criminal prosecutions for child abuse or homicide to establish that a child’s injuries were not accidental, but rather deliberately inflicted. 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT § 3.5, at 145 (2d ed. 1992).

The admissibility of battered child syndrome as a medical diagnosis for the purpose of showing nonaccidental injury is universally accepted. See id. § 4.17, at 258 (noting that courts will take judicial notice that battered child syndrome is accepted by the medical community). See generally Milton Roberts, Annotation, Admissibility of Expert Medical Testimony on Battered Child Syndrome, 98 A.L.R. 3d 306 (1980) (analyzing state and federal court decisions allowing medical testimony that the abused child suffered from battered child syndrome).

27. Like spousal abuse, child abuse is characterized by its cyclical nature. The abuse typically occurs periodically or intermittently, with the time between bouts of violence likely to be characterized by more normal and acceptable social behaviors, including permissive and friendly contact. See Dutton & Painter, supra note 15, at 148.

28. For a discussion of traumatic bonding between the child and his abuser, see MONES, supra note 1, at 33 (discussing the psychological attachment of children to their care givers); Dutton & Painter, supra note 15, at 147 (describing the psychological effect of the extreme imbalance of power between the abusive parent and the child).
concerning battered child syndrome has focused almost entirely on the way in which abuse impacts upon the child’s perceptions, as manifested through a general psychological disorder known as post-traumatic stress disorder (PTSD). Post-traumatic stress disorder is an anxiety-related disorder which develops in response to a psychologically distressing event that is outside the range of normal human experience, such as chronic and severe child abuse.

When the battered child kills in a nonconfrontational situation, expert testimony concerning PTSD typically focuses on the way in which the child’s perceptions are affected by two sets of symptoms, hypervigilence and other symptoms of increased arousal, and retraumatization. Expert testimony concerning the impact of

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29. This narrow focus likely emerged for two different but equally important strategic reasons. First, given the financial, legal, and emotional dependence of the typical battered child on his or her parent, the jury is unlikely to require expert testimony offering a psychological explanation why the defendant did not leave the abusive relationship, unlike in the typical battered woman case. In addition, because battered children are even more likely than battered women to kill an abuser in a nonconfrontational situation, an explanation of the child’s perceptions is crucial to establishing reasonable necessity and imminence of harm.

30. The relationship between “battered child syndrome” as that term is used by advocates and the general psychological disorder PTSD is not always clear. Both battered woman syndrome and battered child syndrome are sometimes defined as subsets of the larger disorder of PTSD. See WYO. STAT. § 6-1-203(a) (Supp. 1994); Walker, supra note 16, at 323-24 (defining battered women syndrome as a subset of PTSD). Alternatively, battered child syndrome is sometimes characterized as referring to the psychological effects of abuse-induced PTSD in children. See, e.g., State v. Janes, 850 P.2d 495, 498 (Wash. 1993) (reviewing expert witness findings that children suffering from PTSD were chronically abused).


33. Increased arousal symptoms, not present before the trauma, are indicated by at least two of the following:

1. difficulty falling or staying asleep
2. irritability or outbursts of anger
3. difficulty concentrating
4. hypervigilance
5. exaggerated startle response
6. physiologic reactivity when exposed to events that symbolize or resemble an aspect of the traumatic event.


34. Retraumatization occurs as the victim persistently re-experiences the initial traumatic event in at least one of the following ways:
these symptoms helps to explain why the child reasonably believed that the danger of serious bodily harm or death was imminent, making the use of deadly force necessary, despite the fact that the killing occurred in a nonconfrontational situation.\textsuperscript{35}

Battered children have thus argued that courts should admit battered child syndrome testimony by analogy to battered women syndrome testimony for the purpose of showing the reasonableness of the child's actions and establishing the elements of self-defense.\textsuperscript{36} Judicial acceptance of this reasoning is illustrated by the seminal decision \textit{State v. Janes},\textsuperscript{37} in which the Washington Su-

\begin{itemize}
  \item[(1)] recurrent and intrusive distressing recollections of the event
  \item[(2)] recurrent distressing dreams of the event
  \item[(3)] sudden acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and disassociative flashback episodes)
  \item[(4)] intense psychological distress at exposure to events that symbolize or resemble an aspect of the traumatic event.
\end{itemize}

\textit{Id.} at 250 (diagnostic criteria for post-traumatic stress disorder).

35. One advocate notes that because battered children are susceptible to retraumatization, "initial extreme responses to abuse . . . become overgeneralized and may occur in situations in which there is no objective danger. What emerges is an extremely hypervigilant, anxious and guarded child." Gries, \textit{supra} note 32, at *2 (publication page references not available). As the leading advocate for parricide defendants noted:

\begin{quote}
[a] child who kills the typically physically or sexually abusive parent is responding to not one or two incidents, but a series of hundreds, maybe thousands of assaults over that child's life. And while every assault may not be life-threatening, it is the cumulative effect of the routinized attacks that is integral to understanding a child's perceptions.
\end{quote}

\textit{Mones}, \textit{supra} note 1, at 62.

36. \textit{See} Hicks, \textit{supra} note 22, at 106, 129 (listing the requirements for allowing expert testimony to be admissible using the \textit{Dyas} criteria).

37. 850 P.2d 495 (Wash. 1993). The 17-year old defendant in \textit{Janes} was originally convicted of second-degree murder for shooting his physically and emotionally abusive stepfather. \textit{Id.} at 500. The defendant had requested a self-defense instruction based on the sequence of events that led up to the killing. The night before the killing, the stepfather yelled at defendant's mother while defendant was upstairs in his room. The sequence of events that led up to the killing. The night before the killing, the stepfather yelled at defendant's mother while defendant was upstairs in his room. The stepfather then stuck his head in the defendant's room and spoke to him in a "low tone" that was "usually reserved for threats", although the defendant could not recall what his stepfather had actually said. \textit{Id.} at 496. The next morning when the defendant woke, his stepfather had already gone to work, but his mother mentioned that his stepfather was still mad. \textit{Id.}

That afternoon, the defendant announced to several friends that he intended to kill his stepfather. He then loaded a shotgun and a nine millimeter pistol, drank some whiskey, and smoked some marijuana. \textit{Id.} at 496-97. When his stepfather returned home from work, the defendant shot him with the pistol as he came through the front door. \textit{Id.} at 497. The trial court denied the requested instruction, stating that the events relied on were "too remote and insufficiently aggressive to justify a self-defense instruction." \textit{Id.} at 498. The trial court did, however, allow testimony concerning the history of severe abuse and expert testimony concerning post-traumatic stress disorder in support of a diminished ca-
The Supreme Court concluded that expert testimony concerning battered child syndrome is generally admissible in order to “aid the jury in evaluating the manner in which a battered child perceives the imminence of danger and his or her tendency to use deadly force to repel that danger.”\footnote{Janes, 850 P.2d at 502 (quoting Steven R. Hicks, Admissibility of Expert Testimony on the Psychology of the Battered Child, 11 LAW & PSYCHOL. REV. 103, 123 (1987)).} Several other recent cases espousing this view may signal a trend toward admissibility based largely on judicial acceptance of battered woman syndrome.\footnote{See State v. Gachot, 609 So. 2d 269 (La. Ct. App. 1992) (noting that the state allows evidence of battered child syndrome in connection with self-defense), cert. denied, 114 S. Ct. 478 (1993); Commonwealth v. Kacsmar, 617 A.2d 725 (Pa. Super. Ct. 1992) (holding that the trial court improperly excluded evidence on "battered person syndrome" where defendant claimed self-defense in the shooting of his allegedly abusive brother); Jahnke v. State, 682 P.2d 991, 1018 (Wyo. 1984) (Rose, J. dissenting) (declaring that psychiatric battered person testimony should be admitted to inform the jury of the psychological factors affecting the parricide defendant's actions). See also CAL. EVID. CODE § 1107 (West Supp. 1994) (effective Jan. 1, 1994) (declaring admissible testimony regarding the "physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence"); Fern Shen, Coalition Urges State to Pass Tougher Domestic Abuse Law, WASH. POST, Jan. 27, 1994, at Md.1 (describing a legislative proposal in Maryland which would allow the introduction of battered child syndrome evidence to show self-defense in parricide cases).}

However, the use of battered child syndrome testimony to establish self-defense in nonconfrontational killings has not been without controversy. In \textit{Jahnke v. State},\footnote{682 P.2d 991 (Wyo. 1984). The 16-year old defendant in \textit{Jahnke} was convicted of voluntary manslaughter for shooting his physically abusive father. \textit{Id.} at 994. Earlier in the day, the defendant and his father were involved in a "violent altercation," and the defendant was warned not to be there when the father returned home later that evening.} the Wyoming Supreme
Court refused to admit psychiatric testimony concerning battered child syndrome on the grounds that:

[the] record contained no evidence that the appellant was under either actual or threatened assault by his father at the time of the shooting. Reliance upon the justification of self-defense requires a showing of an actual or threatened imminent attack by the deceased . . . . Absent a showing of the circumstances involving an actual or threatened assault by the deceased upon the appellant, the reasonableness of appellant's conduct at the time was not an issue in the case, and the trial court . . . properly excluded the [expert] testimony . . . .

Essentially, the court rejected what it viewed as a general attempt by defendants to "secure the recognition of a special defense in a homicide case for victims of family abuse." 

III. ANALYSIS

As increasing numbers of parricide defendants seek to justify their acts with the aid of expert psychological testimony, the issue of whether a child who kills an abusive parent in a nonconfrontational situation should be permitted to claim self-defense remains controversial. There are powerful policy reasons for precluding...
the introduction of battered child syndrome testimony and denying a self-defense instruction when a child kills an abusive parent in a patently nonconfrontational situation.

A. The Transformation of Self-Defense from an Objective to Subjective Standard

The use of battered child syndrome to support self-defense in effect transforms the standard of self-defense from objective to subjective, in most cases defeating both the deliberate statutory enactment and the underlying purposes of the narrow self-defense doctrine itself.

1. The Objective Standard Generally

The prevalence of an objective standard, represented by the reasonable person in tort law as well as in criminal law, serves the crucial function of imposing a community standard of behavior on all individuals for the protection and benefit of both the individual himself and society at large. Thus, "[t]he concept of 'reasonableness' effectively establishes the boundary between an acceptable exercise of individual freedom and an unacceptable interference with the rights of others." In order to achieve this social balance, the objective standard is grounded in external criteria. These external criteria are capable of neutral application to all

by defense attorneys to claim self-defense based on battered child syndrome). For a strange case of murder for hire, see Lois Timnick & Paul Feldman, Son Acquitted of Trying to Murder Abusive Father, L.A. TIMES, Oct. 11, 1986, at 1, describing the case of Sociz Junatov, a 17-year-old acquitted of the attempted murder of his physically and sexually abusive father. A drifter, hired by Junatov, had tried unsuccessfully to kill the father by stabbing him on one occasion and injecting him with battery acid on another. Junatov was arrested after offering an undercover police officer money to shoot his father. His defense introduced psychiatric testimony that he was a battered child and pled self-defense to the attempted murder charges. Despite the fact that the case involved a murder for hire in which the defendant was not even present at the time of the use of force, Junatov was acquitted on the grounds of self-defense. Id.

For a recent extension of the concept of battered child syndrome, see Jolayne Houtz, A Case of Battered Person Syndrome?, SEATTLE TIMES, Feb. 3, 1994, at A14, describing the case of a student accused of killing his allegedly sexually abusive former teacher, who plans to use expert testimony concerning "battered person syndrome" as a justification for the killing.

45. See 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 16.2, at 389 (2d ed. 1986) ("[T]he reasonably prudent person . . . is capable of making mistakes and errors in judgment . . . but only to the extent that any such shortcoming embodies the normal standard of community behavior.").

individuals, so that each member of the community is held equally to one standard of conduct: that of a reasonable person.\textsuperscript{47}

2. The Objective Standard and Self-Defense

The criminal law operates by prohibiting and punishing conduct that is deemed to harm society as a whole. The law of homicide, reflecting the societal consensus that life is valuable and violence undesirable, thus prohibits the killing of another human being. If, however, under the circumstances, conduct generally prohibited as harmful is in fact beneficial to society, the law may recognize an exception. It may deem that act justified, with the result that no crime has occurred and therefore, no punishment is necessary. The doctrine of self-defense represents one such exception to the general prohibition against homicide. A killing in self-defense is justified because the benefit gained by affirming the defendant's rights to life and protection against aggression outweighs the harm caused by the death of the aggressor, producing a net benefit to society.

The use of an objective standard in determining the elements of self-defense is crucial precisely because of the nature of the doctrine as an exception to the general proposition that the killing of another is harmful to society and deserves punishment. Since the purpose of the criminal law is to enforce an external standard of behavior for the protection of the community,\textsuperscript{48} the determination that a particular killing is beneficial to society and should be exempted from punishment obviously must be made by the community at large, with reference to overriding societal values and beliefs, not by the individual actor, with reference to his or her own values and beliefs.\textsuperscript{49} Thus, the analysis of self-defense must focus on the presence of external circumstances which can be identified neutrally and applied to all claims rather than on the presence of factors

\textsuperscript{47} Id. at 330 (stating that to be effectively objective, the concept of reasonableness must refuse to differentiate among and between individuals or groups). See also Harper, supra note 45, at 391 (noting that the reasonable person standard judges all people equally).

\textsuperscript{48} Justice Holmes noted that external standards of liability are even more necessary in the criminal law than the in civil law because it is criminal law “which aims more directly than any other at establishing standards of conduct.” Dolores A. Donovan & Stephanie M. Wildman, Is the Reasonable Man Obsolete? A Critical Perspective in Self-Defense and Provocation, 14 Loy. L.A. L. Rev. 435, 456 n.117 (1981) (quoting Oliver W. Holmes, The Common Law 50 (38th ed. 1945)).

\textsuperscript{49} See Rosen, Excuse of Self-Defense, supra note 12, at 18 (stating that all justification defenses “identify objectively determinable external circumstances that render otherwise criminal acts acceptable to society.”).
specific to the individual actor. The requirement that the defendant objectively and reasonably believes the imminence of the harm and that deadly force is necessary ensures that only those acts which, by reference to some overriding consensus, truly benefit society are encouraged rather than criminalized. 50

3. Battered Child Syndrome and Objective Self-Defense

As a psychological disorder, battered child syndrome is an inherently subjective phenomenon which cannot be included in an objective analysis of the necessity of action and imminence of harm required to support a claim of self-defense. In applying a reasonableness standard, the attributes of the individual are abstracted into those of an average member of society. 51 While a defendant's physical attributes may be included in the calculus of a reasonable person, 52 mental and emotional characteristics, including clinically recognized psychological disorder symptoms, are not. 53 Thus, in the case of a battered child defendant, his lesser height, weight, and physical strength should be considered in judging the reasonableness of the killing, but his unique perceptions as affected by battered child syndrome should not.

Admittedly, the standard for self-defense in states utilizing an objective test is not wholly devoid of subjective considerations. The objective test considers how an "ordinary, intelligent, and prudent" person in the defendant's situation would react to deter-

50. Thus, the objective standard embodies "society's need for an average of conduct to protect the general welfare." Donovan & Wildman, supra note 48, at 457.

51. See HARPER, supra note 45, § 16.2, at 389 (stating that the reasonable person represents the average of the community in terms of foresight, caution, courage, judgment, and self-control).

52. See id. § 16.7, at 421 (stating that a physically handicapped person is held to the standard of a reasonable person suffering from that handicap); WILLIAM L. PROSSER & W. PAGE KEETON, ON THE LAW OF TORTS § 32, at 175-77 (5th ed. 1984) (noting that physical attributes such as blindness, lameness, or infirmities of old age, are included in the reasonable person standard); George E. Dix, Justification: Self-Defense, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 946, 948 (Stanford H. Kadish ed., 1983) (stating that the reasonable man includes defendant's attributes of size, age, and strength).

53. See State v. Leidholm, 334 N.W.2d 811, 817 (N.D. 1983) (discussing the objective standard for self defense and noting that ordinarily, "the unique . . . psychological characteristics of the accused are not taken into consideration in judging the reasonableness of the accused's belief."); HARPER, supra note 45, § 16.7, at 431 n.31 (stating that mental diseases and disorders, as classified by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders [DSM-III], are not considered). Battered child syndrome is sometimes defined as a subset of PTSD, which is included in DSM-III as a mental disorder. See supra note 30 and accompanying text.
mine if the defendant’s self-defense claim was reasonable. For the purpose of this inquiry, the “situation” may include the defendant’s prior knowledge of the victim’s propensities for violence, as well as the victim’s actual history of abuse itself. Although the concept of the defendant’s situation does introduce an element of subjectiveness into the inquiry, it should not extend to encompass the defendant’s psychological and emotional characteristics. To do so would be crossing the line into the law of those few states utilizing a wholly subjective standard for self-defense.

In such states, “an accused’s actions are to be viewed from the standpoint of a person whose mental and physical characteristics are like the accused’s and who sees what the accused sees and knows what the accused knows.” This standard clearly would incorporate the perceptual irregularities caused by battered child syndrome, because it would “allow[] 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.” Consideration of battered child syndrome and its effect on the defendant’s perceptions is consistent with the subjective standard even in a nonconfrontational situation because the jury only has to believe that the defendant suffered from the syndrome and believe his testimony that his perceptions were affected in such a way as to make the harm imminent and the killing necessary.

Incorporating the defendant’s altered perceptions into the objective standard, however, proves inherently inconsistent. In the case of a nonconfrontational killing, despite expert testimony explaining how battered child syndrome affects an individual’s perceptions, the jury has no meaningful way to determine whether a particular

54. Martin, supra note 40, at 883 n.50.
55. See Donovan & Wildman, supra note 48, at 444 (stating that prior threats by the victim can be included in the defendant’s circumstances); Dix, supra note 52, at 947-48 (noting that the assailant’s reputation for danger and violence is part of the circumstances to be considered).
56. See Rosen, Excuse of Self-Defense, supra note 12, at 21 (asserting that considering the actor’s psychological makeup is inconsistent with self-defense as a justification defined by external standards).
57. Leidholm, 334 N.W.2d at 818. See also Martin, supra note 40, at 891 (noting that under a wholly subjective standard, the defendant’s state of mind is critical and the jury must place itself in the shoes of the defendant, given that only an honest belief in the need to use deadly force is required to establish self-defense).
58. Leidholm, 334 N.W.2d at 818.
battered child defendant's belief in the imminence of danger and necessity of deadly force was reasonable. The inquiry is too subjective and specific to an individual defendant to impose an external standard.\(^5\) At best, the jury can listen to the expert testimony and believe the defendant's version of what he perceived and what he believed were the implications. However, this reduces the objective standard to one which is wholly subjective.\(^6\)

Finally, even disregarding the fact that the source of the defendant's perceptions is a subjective psychological phenomenon, the actual effect of the syndrome on the defendant's perceptions must be considered. "The battered [child] by "feeling isolated and afraid, may respond more quickly and intensely if acting in self-

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5. Cf. Unikel, \textit{supra} note 46, at 367 (criticizing the use of a "reasonable woman" standard on the grounds that the concept of reasonableness relies on prevailing social norms, within the common knowledge of every citizen, and men are inherently unable to judge the female perspective, even with the aid of expert testimony about how a woman might feel or react).

6. For example, consider the nonconfrontational self-defense claim of an individual male defendant who claims to have psychic abilities. Assume that expert testimony can be given establishing that the particular defendant is in fact psychic and describing the effect of psychic ability on one's perceptions. The defendant claims that because he foresaw with absolute certainty that a person standing next to him was about to raise her arm and stab him, he shot that person first in order to protect himself. Can the defendant's act of self-defense be judged by whether a reasonable person who is psychic would have thought that danger was imminent?

Further, consider a nonconfrontational killing where the defendant claims to have hallucinated that the person standing next to him had a raised knife and was about to attack him. Clearly, this defendant's act would not be judged under the standard of a reasonable person having a hallucination. The psychological condition of hallucination and the condition of being psychic are simply too subjective and internal to be considered part of the objective evaluation of the defendants' situation.

On one level, it is perfectly reasonable for a person having that hallucination to believe it is necessary to act in self-defense. However, such reasonableness stems from the unique psychological characteristics of that individual defendant, not from any external societal standard. Absent these unique psychological processes and perceptions, whether psychic ability or hallucination, the defendant's action would be inherently unreasonable to all members of society. Thus, the case of the hallucinating defendant is dealt with under a different aspect of the law, the law of excuse, which focuses on the subjective state of mind of the defendant, rather than imposing an external, objective test.

Likewise, the altered perceptions caused by battered child syndrome are themselves considered to be a reasonable response to an abnormal situation. \textit{Mones, supra} note 1, at 63. The killing of a sleeping parent, albeit an abusive one, is inherently unreasonable under the standards of imminent harm and absolute necessity, absent the unique psychological effects of the syndrome. \textit{Id. See generally} Mihajlovich, \textit{supra} note 14, at 1277 (stating that "[t]he danger is that what mental health experts define as a 'reasonable' survival skill developed by the battered [defendant] is not 'reasonable' in the legal sense."). Thus, battered child syndrome is simply too subjective to be included in an objective self-defense inquiry.
Moreover "the child may be even quicker to perceive danger and overestimate the danger once perceived." The child's "initial extreme responses to abuse . . . become overgeneralized and may occur in situations in which there is no objective danger. What emerges is an extremely hypervigilent, anxious and guarded child." Just as society does not allow a person to claim self-defense simply because he is extremely nervous or cowardly, it should not allow a battered child to do so simply because he is hypervigilant. Whether the source of the perceptual defect is merely a personal idiosyncracy or the result of a clinical syndrome, the result should be the same. As one commentator noted, "at some point, incorporating the individual's personal characteristics into the reasonable person standard risks changing that standard from an objective one to a wholly subjective one." This, in turn, erodes the protection of life established by a societally determined standard of conduct. In nonconfrontational situations, to consider the unique psychological effects of battered child syndrome on the defendant's perceptions impermissibly allows a subjective, internal standard to displace the objective, external standard of self-defense currently enacted in most jurisdictions.

61. Hicks, supra note 22, at 126.
62. Id.
63. Gries, supra note 32, at 287.
64. Unikel, supra note 46, at 371 n.287.
65. An interesting subsidiary issue is the significance of jury nullification when self-defense claims are allowed in nonconfrontational situations. Jury nullification has been defined as the "power to ignore a strict interpretation of the law when mitigating circumstances justify a more lenient approach." Jon M. Van Dyke, Jury Trial, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 932, 939-40 (Sanford H. Kadish ed., 1983). Allowing self-defense claims in nonconfrontational killings poses a substantial risk of jury nullification because jurors are faced with the inherent incompatibility between the child's plea of justification, based on his subjective perceptions, and the legal mandate to apply an objective standard when evaluating self-defense. Recognizing that the child's act does not meet the requirement of objective imminence, the jury may focus on the history of severe abuse and the expert testimony, and apply a wholly subjective standard despite instructions that the defendant's act must have been reasonable to justify an acquittal. Mihajlovich, supra note 14, at 1274-75 (discussing juries that acquit battered women on an "accident theory of self-defense"); Richard A. Rosen, On Self-Defense, Imminence, and Women Who Kill Their Batterers, 71 N.C. L. REV. 371, 410 n.102 (1993) [hereinafter Rosen, Imminence] (listing sources showing empirical data that jury nullification is common in nonconfrontational killings by battered women). See Chris Lavin, Shifting Rules of Self-Defense, St. PETERSBURG TIMES, May 8, 1989, at 1B (comment by Charles Ewing, professor of law and psychology at University of Buffalo, that "where you get acquittals in these domestic cases, it isn't where the juries have faithfully adhered to the law. It's usually where they believe the victim and ignore the law.").

Some scholars view jury nullification under these circumstances as the implicit soci-
B. The Dangers of Subjective Self-Defense

Beyond circumventing the statutory requirements in the overwhelming majority of states, the use of a de facto subjective standard through the introduction of battered child syndrome testimony unacceptably expands the doctrine of self-defense. This expansion would infringe on the premise of our criminal law system that the preservation of life is an important value and that the taking of a life will be exempt from criminality and punishment only in a narrow, societal-determined set of circumstances.

et al approval of a subjective standard of self-defense, at least in cases involving domestic violence. As Van Dyke notes, jury nullification "serves as an important safety valve and keeps the law in touch with strongly felt community values." Van Dyke, supra, at 940. See also Rosen, Imminence, supra at 410-11 (suggesting that such jury nullifications signal that "the present law of self-defense has been outstripped by society's changing morality."); Laurie J. Taylor, Comment, Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense, 33 UCLA L. REV. 1679, 1705 n.139 (1986) (noting that juries occasionally recognize that traditional self-defense requirements are "unfair" for battered women, and acquit the female defendant).

However, to the extent that society deems it wise to allow a subjective standard of self-defense, this is properly accomplished through the legislature rather than through individual jury verdicts. There is value in having juries respect and adhere to the law. Jury nullification in cases of nonconfrontational killings undermines the societal policies served by a narrow, objective self-defense doctrine as codified in the overwhelming majority of states. Moreover, it undermines the legitimacy of individual verdicts as jurors after the fact reveal to the public that acquittals were based on sympathy, not law. See, e.g., Timnick & Feldman, supra note 44, at 1, 31 (quoting a juror at a parricide trial as stating that because the evidence of abuse was so "overwhelming," the jury had to acquit. The juror declared, "[i]t's not something you can find precedent for, so we had to set our own.").

Ultimately, jury nullification reveals the inherent conflict between the battered child’s act and the law of self-defense. The jury’s desire to achieve a just result and exercise leniency can be better achieved by precluding a self-defense instruction in nonconfrontational cases and instructing the jury on partial excuses and the law of manslaughter. A similar result sometimes occurs through a compromise verdict, a variation of jury nullification, in cases where the jury has been instructed on self-defense. See, e.g., Mones, supra note 1, at 111. Mones described a case that involved the trial of a 16-year-old boy who admitted to shooting his abusive father and hiding the bullet-ridden body under a boat dock. Id. at 84. After the trial, defense attorneys learned that "the jury was evenly split: six for murder one and six for acquittal. The former were disturbed by the disposal of the body and Michael’s efforts to cover his tracks. The other six were equally firmly convinced that Mike had acted purely in self-defense." Id. at 111. The result was a compromise verdict of involuntary manslaughter. Legally, this verdict means that the jury found that the boy did not intend to kill his father, and that the death was the result of negligent disregard for the consequences of his actions. Id. While this result may be just, it is legally absurd given the facts of the case. A preclusion of self-defense and instruction on partial excuses, coupled with mitigation at sentencing, achieves a just result within the letter of the law.
1. Nonconfrontational Situations and Self-Defense: The Outcome

The use of battered child syndrome in nonconfrontational situations effectively eliminates the objective imminence requirement. This allows an acquittal based upon the child's subjective belief that the history of abuse, coupled with his unique perceptions at the time of the killing, produced danger of imminent serious bodily harm, necessitating his drastic actions. The results contradict the basic premise underlying the doctrine of self-defense: in order to "harmonize the principle that killings in self-defense are justified with the principle that human life is the highest value protected by the law, the range of defensive conduct that will be justified must be narrowly circumscribed." This goal is accomplished primarily through the imposition of an objective imminence requirement, which places an external restraint on the use of protective force, reflecting the high value that society places on human life.

Two situations involving battered child syndrome testimony must be distinguished. For example, in the ordinary confrontational situation, although the parent may not yet be in the act of physically striking or otherwise abusing the child, there may be sufficient external, objective evidence of a threat of harm, such as the relative physical positions of the parent and child or threatening words spoken by the parent to the child, to support a claim of self-defense. Under these circumstances, a battered child can be "so terrorized by years of sexual, physical and emotional abuse that he or she genuinely reads menace into a look, a gesture, an ambiguous word that an outsider might not consider a dire threat." In that case, expert testimony is relevant to the child's reasonable belief of imminent danger and should be admissible to support a self-defense claim. Because there is external evidence to be considered in tandem with the defendant's unique perceptions, it is possible to conclude that the defendant's belief in imminent danger of serious harm is reasonable.

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66. Rosen, Excuse of Self-Defense, supra note 12, at 27. See also SLOAN, supra note 7, at 51 (asserting that because society has a strong interest in the preservation of all human life and in minimizing violence, the taking of another's life will be justified only when the necessity of the killing relates to the specific instance at hand, rather than a general, less temporal necessity).

67. See Martin, supra note 40, at 884 n.53 (stating that imminence reflects a societal valuation of life and citing cases involving nonconfrontational killings where self-defense claims were rejected because they lacked reasonable imminence).

68. George J. Church, Sons and Murderers, TIME, Oct. 4, 1993, at 68, 68.
bodily injury or death was objectively reasonable, thus meeting society’s standards to claim a right of self-defense.

However, in a nonconfrontational situation, such as where a battered child kills a sleeping parent, no external evidence of imminent danger supports the requisite reasonableness of the defendant’s belief in impending harm. Expert testimony concerning the child’s hypervigilance and constant state of terror may explain why the child subjectively believed that it was necessary to kill at a moment when the chance of successfully averting future abuse was maximized.69 It does not, however, establish that the danger of

69. There is some debate as to whether the law should, in fact, allow battered individuals to strike defensively at the best possible moment. Some commentators argue that justice requires that a strict imminence requirement be eliminated in domestic violence cases based on the unique psychological characteristics of the defendant as a battered person. See, e.g., Rosen, Imminence, supra note 65, at 405 (suggesting that the court could give jury instructions allowing women a possible exception to the imminent danger requirement when certain criteria are met). A few commentators appear to go even further, suggesting that society should recognize justification for the killing simply because society itself has failed to stop the abuse. See, e.g., Elizabeth M. Schneider et al., Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault, in WOMEN’S SELF-DEFENSE CASES 1, 8 (Elizabeth Bochnak ed., 1981) (stating that “[w]omen’s need to protect themselves must be understood in the context of the failure of the judicial and law enforcement authorities to protect abused women”). However, allowing self-defense without an imminence requirement is the equivalent of surreptitiously enacting a general necessity defense where the legislature has declined to do so.

A “necessity” defense refers to any defense where the defendant was justified in committing what would otherwise be a criminal act because under the circumstances, the act was necessary, or produces some societal benefit by avoiding an even greater harm. See generally LAFAVE & SCOTT, supra note 6, § 5.4(a)-(d), at 441-49 (summarizing necessity and related defenses). Thus, the doctrine of self-defense is one subset of the general law of necessity which has attained relatively fixed rules. Id. § 5.4(b), at 443. Traditionally, the defense of “necessity” applied only where the justifying circumstances or pressure to act came from the physical forces of nature, as distinguished from circumstances or pressure involving other human beings. The latter were categorized within the defenses of duress or self-defense. Id. § 5.4(a), at 441. However, the use of the term “necessity defense” in this Note refers to both sources.

Under a general necessity defense, the battered child’s killing of an abusive parent in a nonconfrontational situation would be justified if it were reasonably necessary under the circumstances in order to prevent serious bodily injury or death, regardless of whether injury was imminent on that particular occasion. While the concept of general necessity eliminates the problems of distortion of the doctrine of self-defense, it repudiates to some extent the underlying principle on which that doctrine is based: that the criminal law should justify the killing of one human being by another only under very limited circumstances. Thus, allowing a general necessity defense to nonconfrontational killings does not address the problems of self-help and retaliation in domestic situations. Cf. Rosen, Imminence, supra note 65, at 404-05 (suggesting that the jury be instructed that in order to be justified, the defendant must not have acted out of revenge or spite, and that the force was necessary to prevent harm). It does, however, represent a more honest approach to how the criminal law responds when a battered child kills his abuser. Since any general
serious bodily harm or death was objectively imminent, and thus legally necessary.70

Accepting that a battered child defendant can, by virtue of a history of abuse, reasonably perceive danger before an actual incident of abuse occurs does not necessarily extend to accepting that his or her decision to kill in a nonconfrontational situation is reasonable. Absent external evidence, all that is left is for the jury to either believe or disbelieve that the defendant in fact perceived imminent harm from a sleeping person. It is impossible for the jury to impose any meaningful objective criteria on the defendant's reaction to his own subjective perceptions. Thus, a societal determination that the particular killing was absolutely necessary, and on balance beneficial to society and deserving of exemption from punishment, is lost.

necessity justification must be based on a societal consensus that the plight of the battered child, for example, constitutes the extreme circumstances in which a killing may be said to be necessary, and in some sense beneficial to society in avoiding a greater harm, it should not be created surreptitiously by the courts under the rubric of a self-defense analysis, but instead should be the subject of legislation. See Joshua Dressler, Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits, 62 S. CAL. L. REV. 1331, 1374 (1989) (expressing the opinion that justifications are properly defined by legislatures rather than by the court or jury).

Significantly, there has been little acceptance in most jurisdictions for a general defense based on necessity. Id. Moreover, only a few jurisdictions have adopted what Sanford Kadish refers to as a "necessity-coercion" defense. Sanford H. Kadish, Excusing Crime, 75 CAL. L. REV. 257, 272 (1987). This defense would generalize the principles underlying duress to acquit a defendant who acted under a coercive predicament in which a person of average fortitude would have had his will broken and would act as the defendant did. Id. Such a defense, if adopted, could apply not only to "the shipwrecked castaways who kill, reasonably concluding that there is no other way to survive, or a prisoner who escapes in the reasonable belief that it is the only way to avoid repeated sexual assaults and threats of violence[,]" id. (footnotes omitted), but to the battered child trapped in an abusive household as well. Kadish suggests the lack of acceptance of such a general defense is due to the fear that it "would open nearly every prosecution to the claim that even reasonable and lawful persons would have done the same in the defendant's circumstances, and that this burden, with its potential for delay and jury mistakes, is too great for the criminal justice system to bear." Id. at 274. In addition, such a general defense ill serves the deterrence function of the criminal law, id., as well as the underlying tenet that society has important interests in preserving all human life and minimizing violence.

70. See Rosen, Imminence, supra note 65, at 375 (commenting on one justice's treatment of a self-defense claim by a battered woman who killed her sleeping husband: "The attempt by the dissent to wrestle the facts of this case into the confines of the imminence requirement, while understandable and perhaps even laudable, was unpersuasive."). Concluding that the killing of an abuser in a nonconfrontational situation can never be legally imminent, Rosen advocates the elimination of an imminence requirement for battered women, to allow a self-defense claim where killing was reasonably necessary. Id. at 404-06.
The distinction is simply one of line-drawing; society may not require that the child wait until the attack is actually underway, but surely it requires that the aggressor be conscious at the time of the killing. Psychological characteristics of a battered child may expand the temporal measure of imminence further from the moment the parent raises his fist, based on a subtle change in the parent's manner or expression,71 or a particularly dangerous look, that signals an imminent beating. But given the strong value society places on human life, those psychological factors should not expand imminence to when that parent is sleeping, even if he or she has threatened to beat the child upon awakening.72 However, the use of syndrome testimony leads to exactly such a result, since there are no objective, external constraints on the imminence of the harm sought to be averted. Thus, the necessity of the killing is determined solely by the credibility of the defendant's testimony concerning his or her unique perception of that harm.

71. See Hicks, supra note 22, at 104.
72. Professor Paul Robinson posits the following example:

Consider X who is being held captive by Y and can only escape by use of deadly force. Y has informed X that X will be executed on the 10th day of captivity. Can X kill Y in defense on the 7th or 8th day? Or must he wait until day 10? One might require X to wait until the last moment, to give aggressor Y as much time as possible to change his mind before he becomes subject to the justified use of deadly force. One might alternatively argue that deadly force is as necessary on the 1st day as it is on the 10th day and that X should not be required to wait and risk being killed on the 8th day; Y, after all, is the aggressor.

Paul H. Robinson, Criminal Law Defenses: A Systematic Analysis, 82 COLUM. L. REV. 199, 217 n.70 (1982). Robinson recognizes that because the law of self-defense requires an imminent harm, X may not legally use deadly force against Y until day 10. Id. The plight of X may be compared to that of the battered child. It may seem absurd to, in effect, require the child to wait by the sleeping abuser's bed to shoot only when the abuser begins to rise to deliver the promised beating. However, the law does not bestow upon any person the right to act in self-defense merely when it maximizes his chance of success. It must balance the individual's right to protect himself against competing societal values of the preservation of all life and the deterrence of vigilantism. But see LAFAVE & SCOTT, supra note 6, at 458 n.37 (citing Robinson as saying that self-protective response should be allowed even if danger not imminent); Rosen, Imminence, supra note 65, at 378, 394 (stating that for a battered woman, killing her sleeping husband was the only option that would truly guarantee her safety, and suggesting that the law should not require her to attempt less effective options).
2. Nonconfrontational Situations and Subjective Self-Defense: Implications

The introduction of battered child syndrome testimony and the resultant subjective standard of self-defense has disturbing consequences for the premise that because preservation of human life is an important value, the taking of a life will be exempt from criminality and punishment only in a limited, societally determined set of circumstances. Removing the external, objective restraints imposed by the the imminence of harm required to support a claim of self-defense defeats several interwoven policies that are the foundation of a narrow self-defense doctrine: the prevention of preemptive strikes, self-help, and retaliatory killings. Only by excluding battered child syndrome testimony and maintaining the integrity of an objective standard of imminence can society be sure that self-defense claims in nonconfrontational situations are rooted in necessity rather than retribution.

a. Subjective self-defense and the preemptive strike

First, the use of battered child syndrome testimony in nonconfrontational situations condones the very preemptive strike that a narrow, objective imminence requirement is designed to prevent. As George Fletcher explains:

In the case of a preemptive strike, the defender calculates that the enemy is planning an attack or surely is likely to attack in the future, and therefore it is wiser to strike first than to wait until the actual aggression... [Preemptive strikes] are illegal because they are not based on a visible manifestation of aggression; they are grounded in a prediction of how the feared enemy is likely to behave in the future.73

A reasonable imminence requirement ensures that self-defense claims will be allowed only when the danger of serious harm is immediately forthcoming; in other words, when there is no time for any option other than the use of force.74 The removal of this ex-

74. See Rosen, Excuse of Self-Defense, supra note 12, at 51 n.219 (stating that the imminence requirement limits self-defense to situations in which the need to choose between the aggressor's life or the defender's right is absolutely certain).
ternal constraint by applying the de facto subjective standard inherent in syndrome testimony allows the defendant to disguise preemptive strikes as self-defense.

The danger of preemptive strikes is particularly acute in the unique situation of the battered child. Allowing self-defense claims based only on subjective imminence permits the battered child caught in a cycle of abuse to kill his or her abuser at any time in anticipation of the near-certain abuse that will occur in the future and then claim justification.

This result is disconcerting because society should not advocate the preemptive strike as a solution to domestic violence problems. Society should not deprive an individual of the protection of the self-defense doctrine simply because he or she happens to suffer violence at the hands of a family member rather than a stranger. However, neither should it sanction killing unless the defendant is confronted with a critical, objectively reasonable imminent confrontation. The failure to adhere to a strict standard of imminence implicit in the introduction of testimony about the child's distorted perceptions results in a dangerous condonation of the preemptive strike.

b. Subjective imminence and self-help

The use of battered child syndrome testimony, and the de facto subjective standard that accompanies it, opens the door to the type of self-help that a narrow and objective self-defense doctrine

75. See Walker, supra note 16, at 95.
76. Cf. Mihajlovich, supra note 14, at 1273 (raising a similar objection in the context of battered women killing abusers in nonconfrontational situations and arguing that the application of self-defense to these cases “violates the existing criminal law by seeking to avoid the requirement of imminent presence of death or great bodily harm and substituting certainty of future harm plus inadequacies of legitimate alternatives rationale, thereby bestowing on the abused . . . the unique right to destroy her tormentor at her own discretion.”). But cf. Rosen, Imminence, supra note 65, at 387 (advocating the total elimination of an imminence requirement for battered women’s self-defense claims as long as killing was “necessary”).
77. But see Daniel D. Polsby, Suppressing Domestic Violence with Law Reforms, 83 J. CRIM. L. & CRIMINOLOGY 250, 252-53 (suggesting that since law enforcement policies are ineffective to deter spousal abuse, relaxing the imminence requirement (thus decreasing the cost of self-help for victims) should be considered as a strategy to reduce the amount of intra-familial violence).
78. See Jahnke v. State, 682 P.2d 991, 996 (Wyo. 1984) (decrying the effort to establish as a “special defense” that one who is a victim of “family abuse is justified in killing the abuser”).
79. Professor Rosen notes:
One commentator articulates the rationale for discouraging self-help as follows:

Society has a powerful interest in carefully circumscribing the situations in which citizens are permitted to protect themselves. The American criminal justice system must delicately balance the citizen’s right to safety with the system’s commitment to maintaining a stable, predictable society that punishes only after due process, thus preventing vigilante law enforcement.

Critics have argued that allowing self-defense claims in nonconfrontational situations will give rise to a rash of vigilante-style killings of slumbering abusers, or even worse, slayings of nonabusive parents by rebellious or greedy children who then falsely claim abuse in order to avoid criminal sanction. However, it

There are a number of reasons why self-help is contrary to the interests of modern society. Reliance on self-help tends to diminish respect for the rule of law. Self-help in the form of self-defense carries the additional problem of increasing the quantum of violence in an already violent society. More troublesome is the possibility that the more widespread self-help becomes, the more often innocent people may be killed erroneously.

Rosen, Excuse of Self-Defense, supra note 12, at 52 (footnotes omitted).


81. See, e.g., Smith, supra note 3, at 159 & nn. 121-22 (describing fears of “an open season on men”). See also Thomas R. Hersh, Do the Menendez Brothers Reside in Many of Us?, L.A. TIMES, Dec. 24, 1993, at B7 (discussing the parricide trial of the Menendez brothers as setting a precedent for a revolution of vigilantism in which “children bypass laws meant to protect them in order to figure out and execute their own justice.”).

82. The controversial parricide trial of Erik and Lyle Menendez has ignited public debate over whether claims of justification based on abuse can be trusted. Many commentators have suggested that the brothers, who admitted to brutally killing both parents, exploited public sympathy for a battered child syndrome defense in order to escape punishment for the premeditated, greed-motivated killings. See Yost, supra note 2, at A13. Critics point to evidence suggesting that the Menendez killings were in fact motivated by a $14 million inheritance. Critics also assert that the claims of self-defense raised at trial, based on alleged emotional and sexual abuse, were fraudulent. Such evidence includes the nonconfrontational nature of the killings (the brothers burst into the room where parents were watching television and killed them with 15 shotgun blasts, including two contact shots, one from the gun pressed against the back of the father’s head and one from the gun pressed against the mother’s cheek), the brothers’ initial denial of involvement (they claimed to have arrived home and discovered the bodies, calling 911, but later admitted to the killings), and their $700,000 shopping spree using insurance proceeds shortly after the killings. Church, supra note 68, at 68-69. Prosecutors also point, as evidence of premeditation, to a screenplay written by Erik several months before the killings about a rich son killing his parents for the money, and the fact that two days prior to the killings, the brothers drove to San Diego and bought two 12-gauge shotguns in a sporting goods store.
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is doubtful that a battered child who kills a parent even in a nonconfrontational situation does so on the basis of a rational calculation of the defenses that will be available to him at trial. Rather, he acts on the basis of a perceived necessity to end the abuse or at an emotional and psychological breaking point. Perhaps the real danger lies not in an increased barrage of nonconfrontational killings as self-help before the fact, but in the characterization of these killings as self-defense after the fact, by attorneys seeking a beneficial defense strategy.

c. Subjective imminence and retaliation

Finally, allowing self-defense claims in nonconfrontational killings where there is no external evidence of the imminence of the harm clouds the distinction between self-defense and retaliation. In the typical self-defense killing, the defendant patently acts out of fear for his life and under the necessity of the moment. However, in the case of a battered child, there is always the risk that the present killing is not a response to the danger of imminent harm, but rather, revenge for past harm suffered.83


The brothers, however, sobbed on the witness stand recounting numerous incidents of alleged sexual and emotional abuse by both parents, and introduced expert testimony by a psychologist, a psychiatrist, and professors in nursing, psychology, and social work to support their claim that they are battered children. See Alan Abrahamson, Lyle Menendez Case Ends in a Mistrial, L.A. TIMES, Jan. 29, 1994, at A1. The defendants claimed that they shot their parents only because they feared the parents were about to kill them, based on a series of arguments with the parents beginning five days before the killings. Id.

Judge Weisberg refused an instruction on self-defense, giving the two juries a choice of verdicts ranging from first-degree murder to involuntary manslaughter. However, both cases ended in mistrials, with jurors “hopelessly polarized over whether Lyle and Erik Menendez were cold blooded killers or long-suffering victims of abuse.” Id.

83. See FLETCHER, supra note 73, at 22 (stating that a “standard maneuver” in battered woman cases is to shift the focus from past abuse to a fear of future violence so that “[k]illing the husband while he is asleep then comes into focus as an arguably legitimate defensive response rather than an illegitimate act of vengeance for past wrongs.”); Mihajlovich, supra note 14, at 1269 (noting that domestic defenses such as those for battered women and battered children broaden the range of circumstances in which a life can be legally taken without criminal sanction, thus allowing retaliation to be cloaked in self-defense). In his analysis of the self-defense trial of Bernhard Goetz, the New York “subway vigilante” who opened gunfire on four black youths who approached him and asked for five dollars, Fletcher argues that juries may not adhere to the strict legal requirements of self-defense precisely because they believe retaliation is appropriate in a
This is not to say that anger is not a legitimate emotion which may be experienced concurrently with fear and the necessity to kill on the present occasion. Even in the traditional self-defense situation, it seems natural that the defendant would experience anger at his assailant, not only for the initial aggression, but for placing the defendant in a situation where he is forced to kill in order to save himself. However, when the necessity of the act can be objectively ascertained with reference to external evidence, society is able to deem the killing justified, assured that the anger is only secondary and not the actual impetus behind the act. A strict requirement of objective imminence thus ensures that killings deemed justified are in fact motivated by an externally ascertainable necessity, rather than by some other, less socially acceptable motive.

This accords with the fundamental tenet of criminal law that the victim of crime has no individual interest in personally ensuring that his attacker is punished, because in a civilized society, punishment may be meted out only by official agencies in accordance with the law.

When the battered child kills a sleeping parent, however, there is no immediate confrontation to assure us that anger and revenge are not the primary force behind the killing. Only the child's own declaration and testimony concerning his or her subjective perceptions establishes that the act was necessary. Thus, without an objective imminence requirement, it becomes impossible to distinguish particular instance. Fletcher, supra, at 27. He notes that "[t]erms like imminence, necessity, and proportionality take on differing connotations, depending on the theory in which they are anchored." Id. Under a theory of self-defense as a form of just punishment, the individual acts in place of the state in inflicting on wrongdoers their just deserts. Id. at 28. Accordingly, imminence and necessity requirements are loosened, and the line between legitimate defense, retaliation, and preemptive strike is blurred. "An actual, unavoidable attack is simply not important to [a jury] whose thinking is geared to the punitive theory. What counts is the justice of the response, given the generally evil character of the aggressor." Id. at 29. This rationale could easily apply in the self-defense claim of a battered child who killed an abusive parent.

84. See Schneider, supra note 69, at 25-27 (stating that rage as a partial motivation does not preclude a battered woman's self-defense claim when presented in the context of other emotions felt at the time of the killing, such as terror, panic, shame, and humiliation).

85. But see id. at 27 (stating that when there is there any evidence of rage by the battered woman defendant, prosecutors routinely request retaliation instructions in order to defeat a self-defense claim).

86. See Jahnke v. State, 682 P.2d 991, 997 (Wyo. 1984) (noting that the objective imminence requirement ensures that defendant acted out of necessity, not in the spirit of revenge).

87. Sloan, supra note 7, at 49.
between acts of necessity and retaliation.

Allowing a self-defense claim based on battered child syndrome transforms an objective, external standard of self-defense into a de facto subjective standard, distorting and undermining the doctrine's underlying policies. Because the jury can gauge the necessity of the defendant's act only by the credibility of testimony describing the defendant's subjective perceptions, this standard encourages preemptive strikes, self-help, and retaliation disguised as self-defense in dealing with domestic violence. Thus, in nonconfrontational killings, a claim of self-defense by the battered child should be precluded as a matter of law, regardless of a proffer of expert testimony to support the claim.

Beyond defeating the underlying purposes of the narrow self-defense doctrine, consideration of a defendant's battered child syndrome is inconsistent with the larger theoretical framework of justification in the criminal law. An examination of the theoretical differences between justifications and excuses reveals that consideration of a psychological defect, such as battered child syndrome, while inappropriate in the context of a justification such as self-defense, fully comports with the theoretical framework of excuse. Thus, a partial or total excuse of the killing based on an analysis of the subjective state of mind and moral culpability of the battered child, coupled with mitigation at the sentencing stage of the criminal process, appropriately allows society to focus on the actor rather than the act and exercise compassion for the battered child without undermining the purposes of the narrow self-defense doctrine.

C. The Incompatibility of Using Battered Child Syndrome Within a Framework of Justification

First, consideration of the fact that a particular defendant suffers from a psychological defect such as battered child syndrome is inconsistent with the theoretical framework of justification. All

88. The extent to which distinguishing between justification and excuse is important continues to be a matter of some debate. For the view that such distinctions are not merely academic, but rather, are an important reflection of society's values through the criminal law, see generally PACKER, supra note 8; Kent Greenawalt, The Perplexing Borders of Justification and Excuse, 84 Colum. L. Rev. 1897, 1927 (1984); Kadish, supra note 69; Michael S. Moore, Causation and the Excuses, 73 Cal. L. Rev. 1091 (1985); Robinson, supra note 72. But see Rosen, Imminence, supra note 65, at 407-09 (expressing the view that, as a practical matter, the distinction between justification and excuse makes no difference).
justifications rest on a balancing of interests, and ultimately, on society's judgment that the benefit of the justified conduct outweighs the harm.\textsuperscript{89} An act that is justified is thus "excepted from the normal prohibitions of the criminal law"\textsuperscript{90} precisely because it is conduct that "we applaud, or at least do not actively seek to discourage."\textsuperscript{91} Thus, a claim of justification must always be grounded in the value of the act itself, rather than in the characteristics of the actor.

Introducing a defendant's subjective perceptions through testimony concerning battered child syndrome necessarily distorts the balancing of interests required in justification, undervaluing society's interests. Viewed through the perspective of the defendant, the benefit of an act will always outweigh the harm, although objectively, the act cannot be said to be conduct that society wants to encourage as beneficial. In order for an act to be justified, and thus exempt from the criminal law, the norm by which the value of the act is judged must be that of society as a whole, not that of the individual.\textsuperscript{92} "To hold . . . that the actor's own experiences and psychological makeup should be considered in determining whether an act is justified is entirely inconsistent with the theory that a justified act is either beneficial or not harmful to society."\textsuperscript{93}

Moreover, because a claim of justification arises from an act which, when done under objectively determinable circumstances,\textsuperscript{94} provides a net benefit to society, the justification is necessarily universal.\textsuperscript{95} Once an act is deemed justified, any person in the same externally defined situation is entitled to do a like act and invoke a claim of justification,\textsuperscript{96} since that act will always benefit


\textsuperscript{90} Rosen, \textit{Excuse of Self-Defense}, \textit{supra} note 12, at 21.

\textsuperscript{91} \textit{PACKER, supra} note 8, at 113.

\textsuperscript{92} It is, of course, possible for society as a whole to make a value judgment that it is, in fact, beneficial to allow subjective self-defense. Society would thus allow individuals to make decisions on an ad hoc basis that a particular killing is necessary and thus beneficial. However, given the detrimental effects of such a regime, and the general pattern of justifications in the criminal law, it seems both unlikely that society would permit this substitution of judgment and unwise for it do so. See \textit{supra} notes 74-87 and accompanying text.

\textsuperscript{93} Rosen, \textit{Excuse of Self-Defense}, \textit{supra} note 12, at 21.

\textsuperscript{94} See \textit{id.} at 18.

\textsuperscript{95} See Fletcher, \textit{Excuse}, \textit{supra} note 89, at 727.

\textsuperscript{96} Thus, Fletcher discusses claims of justifications as creating legal rules: "If a court should justify, say, the shooting of a stray dog to protect children in the neighborhood, it
society by outweighing a greater harm or furthering a greater social interest. However, the example of a child who kills an abusive parent while that parent is sleeping illustrates the inherent incompatibility between the theory of justification as generalizable and the consideration of subjective characteristics.

Before going to sleep, the abusive parent strikes the child and threatens to resume the abuse when he awakes. Expert testimony reveals that the child suffers from battered child syndrome and is hypervigilant and experiencing general terror. Because of the severity of the assault and the manner of the parent’s threats, the child perceives the need to act in self-defense before the parent awakens. If the law deems the child not culpable for this act, it cannot be because the act itself is justified. Surely another individual in precisely the same external circumstances, having been hit and threatened by a parent prior to sleep, would not similarly be deemed not culpable for killing the sleeping parent if that actor did not suffer from battered child syndrome. Thus, if the killing is nonculpable, it is not the externally defined circumstances that make it so, as in the theory of justification, but rather, the individual, subjective characteristics of the actor. Because justifications “rest on norms, directed to the public at large, that create exceptions to the prohibitions of the criminal law,” they cannot be based on subjective characteristics that are not present in the typical member of society.

Thus, the consideration of a defendant’s battered child syndrome is inconsistent with the premise of justification which deems conduct noncriminal based solely on the utility of the act to society. This premise disregards the identity of the individual actor and generalizes the result to the public at large.

would in effect generate a new rule of law. Should the same circumstances recur, actors in the future could rely upon the decision, and guide their conduct accordingly.” George P. Fletcher, The Individualization of Excusing Conditions, 47 S. CAL. L. REV. 1269, 1304 (1974) [hereinafter Fletcher, Individualization]. See also Greenawalt, supra note 88, at 1901 (stating that the labeling of justifications in the criminal code is an “educative force” that “promotes in citizens proper views about how to make difficult choices”). Excuses, however, do not have this effect. “If someone relies upon the expectation of an excuse in violating the law . . . his very reliance creates a good argument against excusing him for the violation. The expectation of an excuse conflicts with the supposed involuntaryness of excused conduct.” Fletcher, Excuse, supra note 89, at 728.

97. Robinson, supra note 72, at 219.
98. Fletcher, Excuse, supra note 89, at 728.
D. The Appropriateness of Using Battered Child Syndrome in the Framework of Excuse

Unlike justifications, excuses do not focus on the act itself and deem it noncriminal because of a net benefit to society. The determination that an act is excused occurs only after a defendant has committed an act that is unquestionably harmful to society and prohibited by the criminal law. Thus, excuses focus on the individual actor and whether he can be deemed morally blameworthy for his criminal act. The excuse inquiry rests on a recognition that a particular defendant may not be fully culpable for his crime because he committed the act under pressures or circumstances which render it less than morally voluntary.

In determining whether it would be unjust to punish a particular actor, either at all or at a certain level of severity, excuses make an essentially subjective inquiry, examining the unique personal characteristics and attributes of a particular defendant. If these sources of pressure, whether internal or external, overwhelmed the defendant’s free will so as to make him less than fully culpable for his crime, his act, although deplored by society, will be excused. Excuses thus ask “whether the actor could fairly have resisted the pressure impelling him toward the act, and whether the actor is accountable for the circumstances generating the pressure.”

This inquiry is highly suited to the introduction of evidence that a particular defendant suffers from battered child syndrome. In a nonconfrontational killing, the battered child may have been

99. See id. at 727-28 (noting that justifications rest on a balancing of societal interests, but excuses do not. Thus, an act which inflicts harm far greater than that threatened to the actor may be excused).
100. See Rosen, Excuse of Self-Defense, supra note 12, at 22.
101. See Fletcher, Excuse, supra note 89, at 726 (discussing the retributive theory of punishment which requires that an actor be punished only if he is personally accountable for violating the law); Rosen, Excuse of Self-Defense, supra note 12, at 22 (stating that excuses apply when the defendant’s criminal act is “substantially more attributable to coercive influences than to free will”).
102. See Packer, supra note 8, at 114 (discussing instances where it would be intuitively wrong to punish an actor for a breach of some positive rule of criminal law).
103. See Greenawalt, supra note 88, at 1915.
104. See Fletcher, Excuse, supra note 89, at 726. Internal pressures may include the defendant’s psychological condition and the effects of drugs or alcohol. Id. External pressures may include coercion by a third party, natural circumstances, and other environmental factors. Id.
105. Id. at 726.
overwhelmed by both internal pressures, such as the psychological
effects of the syndrome, and external pressures, such as a threaten-
ing environment and the lack of alternatives, for which he is not responsible. Thus, unlike a claim of justification, a claim of
excuse, grounded in the subjective characteristics uniquely influenc-
ing a particular defendant’s act and based on society’s compassion
for an individual overwhelmed by extreme pressures or circum-
cstances, is consistent with the consideration of battered child
syndrome. Within the framework of excuse it is appropriate to
focus on the defendant’s subjective perceptions and the extreme
circumstances in order to conclude that an individual child is less
than fully culpable for the killing.

Further, unlike a justified act, an excused act is never general-
izable; it does not entitle others to act likewise because it focuses
on the culpability of an individual actor, rather than on the utility
to society of the act itself. Because excuses arise from the
unique pressures and circumstances that make a particular
defendant’s act not morally voluntary and thus not culpable, they
are necessarily “personal and limited to the specific individual.”
Thus, by considering a defendant’s battered child syndrome in the
context of excuse, it is possible to mitigate the punishment of a
particular defendant without encouraging similar unacceptable acts
by others.

The theory of excuse is derived from norms “directed not to
the public, but rather to legal officials, judges, and juries, who

106. See Martin, supra note 40, at 893 (citing a judicial opinion which states that the
defendant’s actions in killing her husband resulted from “internal and external coercive
pressures, for which she was not responsible but which were created by her social reality
as a battered woman”).

107. See Fletcher, Individualization, supra note 96, at 1280 (noting that necessity is not
a form of justification but a form of excuse); Fletcher, Excuse, supra note 89, at 727
(noting that excuses express tolerance for human weakness).

108. See also Robinson, supra note 72, at 242 (listing defects in perception as one basis for a claim of excuse due to a
lack of free choice by the defendant).

109. See Moore, supra note 88, at 1096.

110. Fletcher, Excuse, supra note 89, at 727. Thus, Fletcher notes that excuses “do not
modify the applicable legal rule; they relate to the subsidiary question whether a particular
individual can be held accountable for violating a rule that remains intact.” Fletcher, Indi-
vidualization, supra note 96, at 1304.

111. See Martin, supra note 40, at 892-93 (citing a judicial opinion classifying a
defendant’s battered woman syndrome as an excuse and stating that a woman who does
not suffer from the syndrome but killed in similar circumstances as the defendant would
be culpable).
assess the accountability of those who unjustifiably violate the law.” It allows society to express its belief in the criminality of the battered child’s act while still recognizing the extreme forces that led the child to act and providing compassion and individual justice to the actor.

E. Total and Partial Excuses Incorporating Battered Child Syndrome

Although expert testimony concerning battered child syndrome to support legal self-defense is unacceptable in nonconfrontational killings, it is nonetheless highly relevant to the criminal law’s treatment of these killings. The fact that the killing of the abusive parent is not self-defense does not mean that it is punishable as murder. In nonconfrontational killings, the proper focus of battered child syndrome testimony should be on the history of abuse and its resultant psychological effects on the defendant as either a total or partial excuse for the killing.

1. An Extreme Outcome: The Use of Batted Child Syndrome to Support a Plea of Insanity as a Total Excuse

The most obvious foundation for a subjective psychologically-based excuse is the paradigm of legal insanity. In some extreme cases, it is possible that a battered child suffering from severe post-traumatic stress disorder may be able to utilize an insanity defense. Such a defense is premised on the fact that the defendant suffers from some mental disease or defect which prevents him or her from either rationally comprehending the nature or consequences of an act, or from freely choosing that act. Therefore, the defendant is not considered an autonomous moral agent for the purposes of the criminal law, and cannot be held culpable for his or her act. The insanity defense is thus a complete excuse based on a retroactive determination that the defendant, due to his or her subjective psychological state at the time of the offense, was incapable of forming any criminal mens rea.

112. Fletcher, Excuse, supra note 89, at 728.
a. Battered child syndrome and legal insanity

The battered child may meet the standard for legal insanity in those jurisdictions applying the stricter M'Naughten test, as post-traumatic stress syndrome has been held to qualify as a "disease of the mind" under this standard. It should be noted, however, that such cases typically involve chronic PTSD in its most severe form, with extreme symptoms involving hallucinations, reality delusions, and dissociative reactions with episodes...
of depersonalization and/or derealization. During such a dissociative reaction, the individual lacks the "substantial capacity either to appreciate the criminality of their conduct or to conform their conduct to the requirements of [the] law." Thus, a battered child who kills an abusive parent while suffering from severe PTSD may be legally insane if the symptoms prevented the child from understanding the consequences of the act or from controlling his or her actions.

The battered child may meet the standard for legal insanity more easily in those jurisdictions utilizing the American Law Institute test, which states that an individual is not responsible for his criminal conduct if "at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." This standard is broader than the M'Naughten test because it includes not only cognitive, but volitional defects as well. Thus, it is possible that a battered child who kills an abusive parent may meet this standard, despite the fact that the child was aware of the criminality and moral

Davidson, supra note 115, at 425-27 (describing various cases). As Dr. Scrignar notes, "[a]ny similarity between the traumatic scene and the scene of the crime helps to explain a flashback and a dissociative episode during which an irrational criminal act may have been committed." Scrignar, supra note 117, at 153. Conceivably a battered child who re-lives a previous episode of abuse or torture through a flashback or hallucination and, believing he or she is presently in danger from the abuser, kills a sleeping parent could also raise an insanity defense.

119. Scrignar, supra note 117, at 149-50. Symptoms of such a dissociative reaction involve "an alteration in the perception or experience of the self so that the usual sense of one's own reality is temporarily lost or changed . . . . The sensation of self-estrangement makes patients feel 'mechanical' and not in complete control of their actions." Id. at 149. According to DSM-III-R, independent predisposing factors for dissociative reaction are "fatigue, recovery from substance intoxication, hypnosis, meditation, physical pain, anxiety, depression, and severe stress." Id. at 150. Significantly, abused children are likely to experience the last four of these factors on a regular basis.

120. Id. at 152.

121. Sendor, supra note 113, at 1387 (quoting Model Penal Code § 4.01). A substantial minority of jurisdictions have adopted this test. See Davidson, supra note 115, at 423 n.67. For cases successfully raising a PTSD defense under the ALI standard, see id. at 426.

122. See Sendor, supra note 113, at 1387. The stated purpose of this standard is to "excuse defendants who, because of mental illness, cannot be deterred by penal sanctions." Id. The drafters emphasized that the test applies not only to sudden acts, but to planned acts as well. Significantly, the "substantial capacity" standard, although requiring a great mental impairment, does not require a total mental impairment. Id. at 1388. The battered child who kills an abusive parent in a nonconfrontational situation while suffering from post-traumatic stress disorder may thus meet this standard.
wrongness of the act, if the effects of the PTSD rendered the child unable to refrain from killing.

Regardless of which test a particular jurisdiction applies, in order to maintain an insanity defense the battered child must necessarily introduce expert psychiatric testimony to prove that he or she suffered from post-traumatic stress disorder at the time of the killing. The role of the expert includes establishing a diagnosis of PTSD, explaining the trauma of abuse and its effect on the child’s perceptions and sense of reality, establishing a connection between the PTSD and the child’s state of mind at the time of the killing, and offering an opinion as to the defendant’s state of mind at that time. As with any psychiatric defense, there exists the possibility of fraudulent claims; however, the diagnostic criteria of PTSD are sufficiently developed to enable courts to prevent most abuse of the defense.

b. Insanity and the post-acquittal outcome

For the battered child who successfully raises an insanity defense, there is the troubling issue of precisely what the post-acquittal outcome will be. Although there is no criminal culpability for the act, commitment to a mental institution typically follows. Commitment is designed to incapacitate the acquittee for the protection of society, and presumably to provide some sort of treatment for the underlying mental disease or defect. Forced incarceration is imposed because the acquitted child has committed what would ordinarily be a serious criminal offense. Although commitment to an institution furthers the purpose of the criminal law by ensuring that there will be no further offenses by that particular actor, it is neither intended nor considered to be criminal punishment because “it is not imposed to express community condemnation of the acquittee’s original offense.”

The procedure surrounding commitment varies significantly among jurisdictions. Because a substantial amount of time has typically lapsed since trial, the majority of jurisdictions require a hearing to determine the acquittee’s present condition before

123. See SCRIGNAR, supra note 117, at 153.
125. See PACKER, supra note 8, at 134.
126. Id.
127. James Ellis suggests that by the conclusion of the trial, an acquittee’s mental ill-
mandating commitment. The test may require a showing that the acquittee is presently insane, a showing that he or she is presently dangerous, or in some jurisdictions, both. Other jurisdictions, however, have statutes mandating automatic commitment upon acquittal by reason of insanity. Once commitment has been imposed, release may be difficult to obtain. The opportunity for a release hearing may arise automatically at periodic intervals, or may arise only upon petition by the acquittee or by an appropriate representative, such as an official of the confining institution. The decision to grant release is made by the court, and, in the great majority of jurisdictions, the burden of proof remains with the acquittee. Thus, while in some extreme cases the battered child may successfully assert a total insanity defense, the post-acquittal outcome may still be undesirable.

c. The need to eschew the extremes of insanity and self-defense and explore the intermediate range of culpability

Unfortunately, advocates of battered defendants have a tendency to circumscribe the options concerning culpability to polar extremes may have subsided either naturally or due to interim treatment. See James W. Ellis, The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws, 35 CATH. U. L. REV. 961, 970 (1986) (discussing the effectiveness and practicality of current provisions and reform proposals for the insanity defense). Alternatively, the acquittee may still be mentally ill but no longer dangerous. Id.

128. See LAFAVE & SCOTT, supra note 6, § 4.6, at 360.

129. Id. The burden of proof is most often on the State, but in some jurisdictions, it may be on the acquittee. The standard is usually clear and convincing evidence of insanity and/or dangerousness, but some jurisdictions require only a preponderance of the evidence. Id. § 4.6, at 361.

130. LAFAVE & SCOTT, supra note 6, § 4.6, at 360. In Jones v. United States, 463 U.S. 354, 354 (1983), for example, the Supreme Court upheld a District of Columbia statute which mandated an automatic fifty-day post-acquittal confinement followed by an opportunity for a release hearing at which the acquittee must bear the burden of proof of establishing that he is not dangerous. The District also imposes the burden of proof on the defendant at trial to establish insanity at the time of the offense by a preponderance of the evidence. See also Ellis, supra note 127, at 972 n.53 (critiquing the Supreme Court's decision in Jones).

131. Many scholars posit that because acquittal by reason of insanity results in a deprivation of liberty for an indefinite period of time, the acquittee may be incarcerated in a mental institution for a longer "sentence" than he may have served in prison had he been found culpable. See Robitscher, supra note 114, at 35.

132. See LAFAVE & SCOTT, supra note 6, § 4.6(c), at 365-68 (explaining mechanisms for release from commitment).

133. Id. § 4.6(c), at 366-68. The actual standard of proof varies between clear and convincing evidence and a preponderance of the evidence. Id. § 4.6(c), at 368.
tremes: insanity on the one hand, in which case the killing is totally excused, and justified self-defense on the other, in which case no crime has occurred. Given the undesirability of legal insanity, with its accompanying civil commitment\(^\text{134}\) and social stigma,\(^\text{135}\) advocates have steadfastly refused to acknowledge post-traumatic stress syndrome as a mental disorder.\(^\text{136}\) Instead, they have attempted, within the context of justified self-defense, to characterize certain symptoms of the disorder, such as hypervigilence, as normal and reasonable responses\(^\text{137}\) to domestic violence. In nonconfrontational killings, however, where a self-defense claim is not a viable option and a plea of insanity may have drastic consequences for the battered child defendant, the intermediate range of culpability must not be discounted.\(^\text{138}\)

\(^\text{134.}\) See Schneider, supra note 69, at 29 (asserting that an impaired mental state defense should be used only as a last resort because of the possible legal consequences concerning mandatory commitment); Gillespie, supra note 16, at 25 (stating that an insanity defense could land a battered woman in a mental institution for a far longer time and under worse conditions than if she were sent to prison). See also supra notes 109-17 and accompanying text.

\(^\text{135.}\) See Schneider, supra note 69, at 29 (noting that in the past, women who killed were considered “disturbed”, and discussing the social implications for battered women who use an impaired mental state defense); Gillespie, supra note 16, at 25 (asserting that a battered woman who kills her abuser may be inappropriately labeled crazy). But see Robitscher, supra note 114, at 45 (noting that although there is stigma in being labeled mentally ill or insane, there is also stigma in being labeled a criminal). Obviously, no one suffering from any type of mental disorder or disease deserves to be blamed or stigmatized. Because of the unique causal link between the experience of being abused or otherwise traumatized and suffering from PTSD, however, the battered child may run a lesser risk of being blamed or stigmatized for a mental disorder. See Frank M. Ochberg, Post-Traumatic Therapy and Victims of Violence, in POST-TRAUMATIC THERAPY AND VICTIMS OF VIOLENCE 1, 4 (Frank M. Ochberg ed., 1988) (urging that although PTSD is a mental disorder, “being a victim . . . of human cruelty is not the equivalent of being mentally ill”); Walker, supra note 16, at 323 (discussing abuse as causing the development of battered woman syndrome).

\(^\text{136.}\) See DIANA S. EVERSTINE & LOUIS EVERSTINE, THE TRAUMA RESPONSE 10 (1993), (defining “disorder” as “the medical conception of a pathological state”).

\(^\text{137.}\) See, e.g., Dowd, supra note 16, at 577-78 (asserting that the use of the word “syndrome” results in the incorrect labeling of battered women as abnormal, and suggesting that battered woman syndrome is a normal response to the situation of a woman in a dysfunctional relationship). Developing symptoms of PTSD may be a normal psychological response for those suffering severe abuse, however this does not make it a normal psychological state in the sense that the average member of society is assumed to posses that state of mind. See also supra notes 51-63 and accompanying text (discussing battered person syndrome and objective reasonableness under the criminal law).

\(^\text{138.}\) See, e.g., All Those Years of Misery . . . Didn’t Justify This Killing, UPI, Sept. 7, 1983, (LEXIS, Nexis Library, UPI File) (comment by the attorney of parricide defendant Richard Jahnke that his client was not mentally deficient but, because he was a battered child, he was not reacting to things in the way a nonbattered person would, and that
A partial excuse can effectively acknowledge that, although the battered child’s act is not justified, and although the child is not legally insane and consequently devoid of all responsibility for the act, his or her culpability for the death of an abusive parent is lessened by the effects of post-traumatic stress disorder on his or her state of mind at the time of the killing. Partial excuse more accurately reflects the legal reality of the child’s act than does either self-defense or insanity. At the same time, partial excuse avoids the extreme outcome associated with legal insanity: acquittal accompanied by civil commitment.

2. Reducing the Offense to Voluntary Manslaughter Through a Partial Excuse Based on Battered Child Syndrome

A partial excuse based on battered child syndrome would result in the conviction of a crime less serious than murder, reflecting the defendant’s reduced culpability.\139\ In all jurisdictions, a nonconfrontational killing by a battered child may qualify as voluntary manslaughter.\140\ Voluntary manslaughter generally is defined as an intentional homicide committed under extenuating circumstances which serve to mitigate the killing.\141\ The killing is thus partially excused because of the subjective pressures or unique circumstances under which the particular defendant acted. The criminal law has several available mechanisms through which it can recognize the extenuating circumstances surrounding the battered child’s act.

\139\ It should be noted that a partial excuse based on the psychological effects of battered child syndrome would not totally exempt the defendant from punishment, as would acquittal by self-defense. Neither would it automatically provide treatment in the manner that a total excuse of insanity, accompanied by civil commitment, presumably would. Where the battered child is partially excused and convicted of a lesser crime, punishment commensurate to the defendant’s responsibility is imposed, although treatment can and should be a crucial component of society’s response. See infra notes 236-44 and accompanying text.

\140\ See also Mihajlovich, supra note 14, at 1278 (advocating manslaughter as a responsible plea for battered women who kill in nonconfrontational situations); Smith, supra note 3, at 160-61 & n.131 (discussing manslaughter as a “middle ground” between acquittal by self-defense and conviction of first degree murder that recognizes a history of abuse while preserving the intent of strict self-defense doctrine).

\141\ LAFAVE & SCOTT, supra note 6, § 7.10, at 653.
a. Partial excuses focusing solely on the defendant’s subjective characteristics and state of mind

i) Imperfect self-defense

Some jurisdictions recognize a claim of imperfect self-defense where the defendant acted under an honest, albeit unreasonable, belief that the use of deadly force was necessary. The defendant’s defect in perception, which caused him genuinely to believe in the need to use force, is an internal pressure resulting in an act which cannot be deemed completely morally voluntary. Thus, by focusing on the defendant’s subjective perceptions, imperfect self-defense functions as a partial excuse which reduces the defendant’s culpability from murder to voluntary manslaughter.

In the case of a battered child who kills a sleeping abuser, imperfect self-defense allows society to acknowledge that, although the danger was not reasonably imminent entitling the defendant to an acquittal by self-defense, neither was the killing murder because the child acted under a genuine belief that the act was necessary for self-protection. The introduction of expert testimony concerning battered child syndrome is thus relevant to proving the defendant’s honest belief that the nonconfrontational killing was necessary based on the history of abuse, the child’s hypervigilance, and the pervasive terror of his or her environment.

142. See id. § 5.7(i), at 463 (explaining the distinction jurisdictions make between proper self-defense and “imperfect” self-defense).

143. Id. See also Walker, supra note 16, at 324 (stating that an honest but unreasonable perception may be used as a mitigating factor to lower a battered woman’s criminal responsibility); Mihajlovich, supra note 14, at 1280 n.157 (discussing the option of imperfect self-defense to reduce the charge in a nonconfrontational killing from murder to manslaughter to avoid encouraging retaliatory killing); Smith, supra note 3, at 159 n.125 (noting how different jurisdictions use imperfect self-defense as mitigation). The Model Penal Code provides an alternative approach which determines culpability for criminal behavior based on the degree of recklessness or negligence involved. If the defendant were reckless in forming an unreasonable belief that the use of force was necessary, he or she would be guilty of manslaughter. If, however, the defendant were merely negligent in forming that unreasonable belief, he or she would be guilty only of negligent homicide. See Dix, supra note 52, at 952 (referring to MODEL PENAL CODE § 3.09(2)).

144. In the controversial Menendez parricide case, Judge Stanley Weisberg ruled that, as a matter of California law, the facts did not meet the standard for perfect self-defense entitling the defendants to an acquittal. Jerry Adler, Killing as a Cry for Help, NEWSWEEK, Dec. 20, 1993, at 103-04. Weisberg did, however, instruct the jury on the theory of imperfect self-defense, which, if believed, would mitigate the brothers’ guilt. Id.

145. See, e.g., Creash, supra note 80, at 636-37 (asserting that an imperfect self-defense
self-defense is thus one appropriate way in which syndrome testimony can be used justly to illustrate the link between the killing and the battered child's unique situation and subjective psychological state.\(^{146}\)

**ii) Diminished capacity**

In some cases, battered child syndrome testimony may support a partial excuse of diminished capacity which focuses not on the mitigating circumstances of the act, but rather on the actor's inability to form the requisite mens rea for the offense charged.\(^{147}\) Diminished capacity recognizes that because the defendant suffered from some abnormal mental condition not rising to the level of legal insanity,\(^{148}\) he or she lacked the capacity to act with a certain mental state. Thus, the defendant's culpability for the killing is lessened and he or she should be convicted only of a reduced offense.\(^{149}\) Typically, this involves evidence that a defendant, be-

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146. See Taylor, supra note 65, at 1707-09 (describing imperfect self-defense as focusing on the actor rather than the rightness of the act, in the manner of an excuse).

147. See Sendor, supra note 113, at 1371-72 (stating that insanity and other excuses are used to negate criminal responsibility by showing that the person did not truly choose his or her course of conduct). This partial excuse is sometimes referred to as diminished responsibility. LAFAVE \& SCOTT, supra note 6, § 4.7, at 368. Some scholars appear to use the two terms interchangeably. See, e.g., Robitscher, supra note 114, at 28 (referring to "diminished capacity" and two sentences later to "diminished responsibility" without making any distinction). But see Sendor, supra note 113, at 1430-31 (distinguishing between diminished capacity, which involves a defendant's inability to form a specific mens rea, and diminished responsibility, which involves the defendant's inability to act according to the law). For purposes of this Note, the two doctrines will be discussed separately.

148. Some jurisdictions do not allow any evidence of mental abnormality short of legal insanity. See, e.g., State v. Gachot, 609 So. 2d 269, 276-78 (La. Ct. App. 1992) (stating that the defendant could not present evidence of allegedly severe mental abuse by his parents, the murder victims, absent a plea of not guilty by reason of insanity, since the state does not recognize the diminished capacity doctrine), cert. denied, 114 S. Ct. 478 (1993).

149. LAFAVE \& SCOTT, supra note 6, § 4.7(b), at 370. See also Sendor, supra note 113, at 1431 (stating that mitigating defenses, such as diminished capacity, appropriately find the defendant less culpable than others who commit similar acts). The doctrine of diminished capacity, as well as the doctrine of insanity itself, continues to be controversial. Proponents argue that justice requires consideration of any factor, including mental abnormality, that allows the defendant to rebut an essential element of the prosecution's case, i.e., mens rea, and that fairness requires that the law recognize the effect of mental conditions less than insanity on a defendant's culpability. See Robitscher, supra note 114, at 27
cause of his or her mental condition, could not act with the pre-meditation or deliberation\textsuperscript{150} required for first degree murder.\textsuperscript{151} However, in some jurisdictions, diminished capacity may be used in the initial charging decision to negate the existence of malice aforethought, resulting in a charge of manslaughter.\textsuperscript{152} Expert testimony concerning the psychological effects of chronic abuse, and in particular, the effects of post-traumatic stress disorder, can support the battered child's claim of diminished capacity.\textsuperscript{153}

\textbf{iii) Diminished responsibility}

Alternatively, battered child syndrome may support a claim of diminished responsibility, which focuses on the defendant's inability to guide his or her conduct according to relevant moral and legal factors.\textsuperscript{154} Thus, the doctrine of diminished responsibility

\textsuperscript{150} Deliberation refers to the cool mind that is capable of advance consideration of the killing. LAFAVE & Scott, supra note 6, § 4.7(b)(1).

\textsuperscript{151} Id. In jurisdictions which distinguish between degrees of murder, diminished responsibility would reduce first-degree murder to second-degree murder. Smith, supra note 3, at 159 n.125. In those jurisdictions which do not distinguish between degrees of murder, murder would be reduced to voluntary manslaughter. Id.

\textsuperscript{152} See LAFAVE & Scott, supra note 6, § 4.7(b), at 369-70 (discussing the use of diminished capacity in reducing a charge from murder to manslaughter).

\textsuperscript{153} See Mihajlovich, supra note 14, at 1280-81 (noting that diminished mental capacity is sometimes considered an attribute of battered woman syndrome, and suggesting that a battered woman may argue that due to years of abuse, she is psychologically incapable of fully and completely considering her actions, preventing her from forming the necessary intent for murder). See also Davidson, supra note 115, at 424-25 (noting that evidence of post-traumatic stress syndrome may frustrate the prosecutor's attempt to prove sufficient mens rea or specific intent). For a recent case involving diminished capacity and post-traumatic stress syndrome, see State v. Janes, 850 P.2d 495, 499-500 (Wash. 1993), in which the trial court allowed testimony concerning post-traumatic stress disorder as the basis of a diminished capacity instruction. The defendant, who killed his abusive stepfather, was found guilty of only second-degree murder and given a reduced sentence of 120 months from a standard range of 165 to 219 months. Id. at 500 & n.4. For the appellate court's discussion of battered child syndrome as it relates to a claim of self-defense, see supra notes 37-38 and accompanying text.

\textsuperscript{154} Sendor, supra note 113, at 1431. See also Robitscher, supra note 114, at 28 (not-
recognizes that mental conditions less severe than those which qualify as legal insanity can impact upon the defendant's cognitive or volitional capacities in a manner that necessarily bears on criminal culpability. Paul Mones suggests that diminished responsibility may be an appropriate plea for some battered children. He notes that severe abuse may affect a child's ability to tell right from wrong, so that the killing of an abusive parent occurs "under a pall of fear" in which the child "couldn't do anything but defend [himself]." 155

3. Provocation as a Partial Excuse

Reduced culpability of the battered child may also be achieved through the doctrines of provocation and extreme emotional disturbance. These doctrines emphasize subjective pressures and yet require an objective response. They recognize that in extenuating circumstances, an intentional killing should be classified as manslaughter rather than murder.

a. Mitigation based on subjective pressures and circumstances

Extenuating circumstances arise by virtue of the subjective internal and external pressures experienced by the defendant at the moment of the killing. In common law jurisdictions, culpability for the act is mitigated if the defendant acted in a state of passion aroused by some provocation that caused the loss of normal self-control. 156 Thus, the battered child may argue that the severe and chronic abuse inflicted by the parent provoked retaliation with deadly force. Alternatively, in Model Penal Code jurisdictions, culpability is mitigated if the defendant's act was "committed under the influence of extreme mental or emotional disturbance." 157 The

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156. See LAFAVE & SCOTT, supra note 6, § 7.10(a), at 653 (stating that although the killing of another person often amounts to murder, a killing while in the heat of passion amounts only to manslaughter).
157. LAFAVE & SCOTT, supra note 6, § 7.10(b), at 660 (quoting MODEL PENAL CODE § 201.3). The notion of an extreme mental or emotional disturbance seems consistent with statements by both commentators and defendants themselves that the killing occurred when, no longer able to withstand the abuse, the child reached a psychological "breaking point." See Patricia Callahan, When a Child Kills a Parent, Does Abuse Forgive the Act?, CHI. TRIB., June 17, 1993, at 1 (quoting the comment of Joy Byers, associate communications director for the National Committee to Prevent Child Abuse, that "children inter-
emotional disturbance typically is rage, but it may also be fright or terror. The battered child who kills his or her abuser would likely experience both rage and terror at the moment of the killing. In order for a defendant's culpability to be mitigated, however, the act also must meet a temporal requirement under both the provocation doctrine and the Model Penal Code formulation. The defendant must thus show that at the time of the killing he or she was in fact still experiencing either the provocation or extreme emotional disturbance and had not yet "cooled off."

b. The objective component

Although the doctrines of provocation and extreme emotional disturbance allow mitigation of a killing based on the subjective pressures faced by an individual defendant, they also impose secondary objective requirements. These requirements reflect community values as to what degree of human weakness is understandable and thus deserving of leniency. Thus, the defendant must show not only that he or she lost self-control, but that given the nature of the provocation experienced, losing control was a reasonable reaction. In virtually all jurisdictions, the parent's physical or sexual abuse of the child would clearly constitute a reasonable provocation supporting the battered child's claim. Alternatively,
under the Model Penal Code, the defendant must show that there is a “reasonable explanation or excuse” for the extreme mental or emotional disturbance experienced at the time of the killing.\textsuperscript{164} The reasonableness of the mental or emotional disturbance is “determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”\textsuperscript{165} The rage and terror experienced by the battered child are surely reasonable given both the history of abuse itself, and its psychological impact on the child.\textsuperscript{166} Battered child syndrome testimony, with its emphasis on the chaotic environment in which the child lives and the psychological effects on the child, is thus relevant to show the reasonableness of an extreme mental or emotional disturbance.

In addition to establishing the pressures existing at the time of the killing, the defendant also must establish the reasonableness of the timing of his or her response to those pressures. Thus, the battered child must show that it was reasonable to still be provoked or be under the influence of an extreme disturbance at the time of the killing, and not yet have “cooled off.” What constitutes a reasonable “cooling time” usually depends on the nature of the provocation or emotional disturbance and on the circumstances surrounding its occurrence.\textsuperscript{167}
The battered child defendant may introduce testimony concerning battered child syndrome to show that he or she had not yet cooled off, despite the fact that the killing occurred in a nonconfrontational situation. For support the child defendant can point to constant retraumatization through dreams, flashbacks, and other triggering experiences, in addition to the environment of constant terror in which battered children live. Indeed, LaFave and Scott posit that even where a defendant’s initial passion has subsided, any new event or occurrence which rekindles that passion should allow the cooling-off period to be renewed. Thus, a killing may be partially excused and the defendant’s culpability mitigated through the doctrine of provocation which recognizes the reasonable external pressures under which the individual battered child defendant acted. Alternatively, the killing may be partially excused as committed under the internal pressure of a reasonably explained extreme mental or emotional disturbance. In either case, the defendant can utilize expert testimony concerning battered child syndrome to show that he acted under extenuating circumstances which should mitigate the killing.

When a battered child kills his abuser in a nonconfrontational situation, the criminal law should admit evidence demonstrating the history of abuse and expert testimony concerning battered child syndrome to partially excuse the killing based on the child’s subjective psychological state of mind. This results in a societal recognition that although the killing was wrong, the child is deserving of compassion and individual justice in how the criminal law views his act.

F. Mitigation at the Dispositional or Sentencing Stage: Recognizing Lessened Culpability and Aiding Rehabilitation

However, the same circumstances that shaped the law’s determination of the nature of the child’s act should also shape its

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168. See Taylor, supra note 65, at 1715-19 (discussing cumulative terror and cumulative rage and arguing that “when affronts to physical safety occur repeatedly, the law should recognize that they need not be forgotten over time”). But see MONES, supra note 1, at 61 (describing the difficulties posed by cooling time in nonconfrontational killings, and stating that where an abusive parent had been asleep at least four hours before he was killed, “we could hardly argue that [the father] provoked his son into a murderous rage”). Reasonable cooling time may be more difficult to show where manslaughter is framed as provocation rather than as extreme emotional disturbance.

169. LAFAVE & SCOTT, supra note 6, § 7.10(d), at 662.
ultimate disposition of the actor. Society must therefore consider the history of abuse and its resultant psychological impact on the battered child in determining the appropriate punishment for the killing. The juvenile court system, which is premised on reduced moral culpability, antecedent causes of criminal behavior, and rehabilitation, rather than retribution, is an appropriate model on which to base disposition of the battered child convicted of voluntary manslaughter.

1. The Premises of the Juvenile Court System: Reduced Moral Culpability Resulting in Rehabilitation as the Focus of the Disposition

The creation of a separate juvenile court system was based on the belief that because children are not as morally and cognitively developed as adults, they cannot be held accountable for criminal acts in the same manner as adults. Equally as important was the belief that criminal behavior by children should be viewed primarily as a symptom of underlying problems which should be treated to deter future deviance, thus benefiting both the individual and society. Consequently, rather than focusing on the criminal act per se, the juvenile court would concern itself with the physiological, social, and environmental forces that caused the child's actions. This would require delving into the juvenile's upbringing, history, and the circumstances surrounding the criminal act. Thus, a separate juvenile court was largely premised on the belief that crime committed by children was a social pathology which, like a disease, could be diagnosed and treated before it

170. A full discussion of the theoretical and practical operations of the juvenile court system is beyond the scope of this Note. This Note assumes that the underlying principles on which the juvenile system was originally based are valid and appropriate as a model for the disposition of battered children, without addressing whether the juvenile system currently functions effectively to meet those principles. For a discussion advocating the elimination of a separate juvenile system, see generally Janet E. Ainsworth, Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court, 69 N.C. L. Rev. 1083 (1991) (questioning both the theoretical legitimacy of a separate juvenile court and arguing that the present juvenile system fails to adequately protect the juvenile's constitutional rights in criminal proceedings).
171. See id. at 1097.
172. Id.
173. Id.
174. See Hon. Gordon A. Martin, Jr., The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?, 25 CONN. L. REV. 57, 60 (1992) (discussing the need to analyze external influences on juveniles who commit crime and differentiating them from adults in the context of rehabilitation).
worsened.\textsuperscript{175}

Given these premises, the juvenile court model necessarily emphasizes and legitimizes very different theories of punishment\textsuperscript{176} than does the adult criminal justice system. Increasingly, the adult criminal justice system has focused on an assessment of the social harm caused by the offender's act, resulting in the emergence of retribution\textsuperscript{177} and restraint\textsuperscript{178} as the dominant theories of punishment.\textsuperscript{179} Conversely, the juvenile court model focuses not on the offender's act itself or on the harm caused, but on an assessment of the antecedent causes of that act.\textsuperscript{180} Because children are believed to be less morally and cognitively developed than adults, it is inappropriate to impose retributive punishment\textsuperscript{181} on them.\textsuperscript{182} Moreover, restraint is appropriate for the child offender only insofar as it is necessary to further what emerges as the primary goal of punishment: rehabilitation.\textsuperscript{183} Since the crime

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\item \textsuperscript{175} Id.
\item \textsuperscript{176} There are six widely cited theories of punishment: prevention (specific deterrence), restraint (incapacitation), rehabilitation, deterrence, education, and retribution. See generally LAFAVE & SCOTT, supra note 6, § 1.5(a), at 23-26.
\item \textsuperscript{177} Retribution is based on the belief that justice requires that one who has caused harm to others must be made to suffer himself. Id. § 1.5(a)(6), at 26. Also known as the revenge or retaliation theory, retribution is considered to be the oldest theory of punishment. Id. § 1.5(a)(6), at 25. Unlike deterrence or rehabilitation, which justify punishment by its beneficial and desirable consequences, punishment based on retribution is morally acceptable simply because the criminal deserves it. See David Dolinko, Three Mistakes of Retributivism, 39 UCLA L. REV. 1623, 1626 (1992) (arguing that the retributive theory is inherently flawed). Once widely discredited by scholars as a permissible moral theory on which to base punishment under a civilized system of criminal law, id. at 1623, retribution as a "just deserts" model of punishment appears to be regaining acceptance, particularly with the general public, as evidenced by the increasing popularity of determinate sentences and the abolition of parole. See LAFAVE & SCOTT, supra note 6, § 1.5(b), at 28-29.
\item \textsuperscript{178} Restraint as a theory of punishment focuses on protecting society from further harm by isolating, through incarceration or execution, the offender who is deemed dangerous because of past criminal conduct. See LAFAVE & SCOTT, supra note 6, § 1.5(a)(2), at 23. This theory may also be called incapacitation, isolation, or disablement. Id.
\item \textsuperscript{179} See Ainsworth, supra note 170, at 1105 (discussing the shift from the rehabilitation of juveniles to the incarceration of juveniles).
\item \textsuperscript{180} See LAFAVE & SCOTT, supra note 6, § 1.5(a)(3), at 24 (noting that rehabilitation seeks to identify and treat those factors that contribute to criminal behavior).
\item \textsuperscript{181} Retributive punishment necessarily assumes free moral choice on the part of the offender. Since man is responsible for his actions, when he chooses one that violates societal laws, he should receive his just deserts. See Packer, supra note 8, at 9-10, 37. Thus, if the child is not yet a free moral actor, he or she is in some way less than fully responsible for choosing a criminal act, so that just deserts cannot apply.
\item \textsuperscript{182} See Ainsworth, supra note 170, at 1097 (noting that juvenile courts were designed to cure rather than to punish because juveniles were not as morally responsible as adults).
\item \textsuperscript{183} Rehabilitation, also called correction or reformation, inflicts punishment in the form
committed serves only as an indicator of the individual child's underlying problems, the punishment for that crime must focus on the type and degree of rehabilitative treatment that can most effectively ameliorate those problems.

2. The Premises of the Juvenile Court System and the Battered Child Defendant

While the premises of the juvenile court system remain debatable as a general proposition, they apply with great force in the case of the battered child, making the juvenile court model an appropriate one on which to base the sentencing of the battered child defendant.

a. The lesser culpability of the battered child

Regardless of whether children in general are inherently less responsible for their actions than adults by virtue of their age, the battered child defendant's culpability for the act of killing an abusive parent is in fact lessened. The same psychological disorder that served as a partial excuse for the act renders the battered child a less than wholly autonomous moral agent, and thus less deserving of punishment.

Moreover, as LaFave and Scott point out, "[t]he rehabilitation theory rests upon the belief that human behavior is the product of of treatment, so that the offender will not commit further crimes upon return to society. See LAFAVE & SCOTT, supra note 6, § 1.5(a)(3), at 24. LaFave & Scott suggest that rehabilitation is not really punishment at all, "as the emphasis is away from making [the offender] suffer and in the direction of making his life better and more pleasant." Id. However, rehabilitation is a form of punishment insofar as society uses compulsion to attain it. As one scholar has commented:

Whatever is done to people against their inclination will probably appear to them to be an evil. They may face it with resignation or rebellion, but they will nonetheless perceive it as an evil. Although they may prefer probation or psychological therapy... to more severe measures, their ultimate preference would be to be let alone entirely.

PACKER, supra note 8, at 32. Moreover, like the theory of prevention, which seeks to prevent recidivism by imposing an unpleasant experience on the individual offender, the primary purpose of rehabilitation is to change the offender's behavior in order to benefit and protect society. See LAFAVE & SCOTT, supra note 6, § 1.5(a)(1), at 23. Since the good to the offender as an individual is merely incidental, rehabilitation is intended by society more as punishment than as benevolence.

184. See PACKER, supra note 8, at 25. One primary distinction between rehabilitation as punishment and other theories of punishment is that under rehabilitation, the focus is on the individual rather than on the specific criminal act itself. Id.
antecedent causes, [and] that these causes can be identified.\textsuperscript{185} Where the criminal act is the killing of an abusive parent by a battered child, an inextricable link between the history of severe, chronic abuse in the home and the act of the deliberate killing of the abuser seems undeniable.\textsuperscript{186} In addition, the typical profile of the battered child defendant\textsuperscript{187} suggests that the killing is an extreme response to extreme circumstances, rather than a reflection of an inherently deviant, violent or criminal personality.\textsuperscript{188} Thus, it is appropriate for society to treat the history of abuse and its resultant psychological impact on the battered child as antecedent causes of parricide which reduce the child’s ultimate culpability for the act, and to emphasize rehabilitation rather than retribution as the primary goal in punishing the battered child.

b. The battered child’s need and potential for rehabilitation

Some would argue cynically that once the abusive parent is dead, the child’s problems are solved so that treatment becomes irrelevant. Such an argument, by taking an overly narrow view of recidivism, both ignores the reality of the psychological devastation

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  \item \textsuperscript{185} LAFAVE \& SCOTT, supra note 6, § 1.5(a)(3), at 24.
  \item \textsuperscript{186} See Van Sambeek, supra note 4, at 89 (criticizing the legal community for ignoring the relationship between child abuse and parricide); Joelle A. Moreno, Comment, \textit{Killing Daddy: Developing a Self-Defense Strategy for the Abused Child}, 137 U. PA. L. REV. 1281, 1295 (1989) (noting the direct causal connection between abuse and the killing of a parent); Smith, supra note 3, at 142 (stating that the connection between child abuse and the killing of an abusive parent is difficult to refute). The fact that only a small percentage of all abused children kill their abusers does not weaken the validity of abuse as an antecedent cause of parricide in any particular case. It is estimated that over one million children suffer abuse or neglect annually. See Smith, supra note 3, at 141. Yet, only a few hundred children each year kill an abusive parent. See MONES, supra note 1, at 6. According to what little research exists, a child’s reaction to abuse depends on such factors as “the nature, duration, and gravity of abuse, and the individual’s emotional makeup.” Id. at 39.
  \item \textsuperscript{187} The majority of children who kill abusive parents “do not have a history of violent lawlessness. If they have ever been arrested, it has usually been for a victimless, property-oriented crime such as shoplifting, vandalism, or theft.” MONES, supra note 1, at 86. It is estimated that less than 10% of parricide defendants have any criminal record. Hull, supra note 4, at 68. Moreover, they do not have the usual characteristics associated with juvenile delinquency, and are more likely to fit a suicidal profile than a homicidal one. Van Sambeek, supra note 4, at 104. Their personality is typically described as submissive and peaceful, rather than aggressive. Smith, supra note 3, at 153. See also Callahan, supra note 157, at 1 (describing parricide defendants as “particularly obedient, respectful and intelligent”).
  \item \textsuperscript{188} See Van Sambeek, supra note 4, at 91 (stating that parricides are often erroneously portrayed “as evidence of increasingly violent youth”).
\end{itemize}
caused by child abuse and underestimates the societal interest in rehabilitation. Clearly, once the abuse itself comes to an end the child will experience physical safety for perhaps for the first time in his or her life.\textsuperscript{189} Unfortunately, however, for the majority of battered children, victimization does not end with the actual abuse, but instead extends into short and long-term effects.\textsuperscript{190} Research has shown that for victims of child abuse, the greatest damage comes not from physical injuries, which quickly heal, but from the psychological scars of being a victim.\textsuperscript{191} The major psychological effects of child abuse include an inability to empathize with fellow human beings,\textsuperscript{192} low self-esteem,\textsuperscript{193} depression,\textsuperscript{194} masochistic and self-destructive behavior,\textsuperscript{195} as well as lack of trust,\textsuperscript{196} social isolation,\textsuperscript{197} and generalized hostility and aggression.\textsuperscript{198}

Moreover, for the battered child who suffers from PTSD, the psychopathological symptoms persist long after the abuse ceases to occur.\textsuperscript{199} The child may continue to suffer from severe phobic

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\item[189.]
See Smith, supra note 3, at 155 (noting that after killing an abusive parent, the child experiences a sense of freedom and safety).
\item[190.]
See RONALD B. FLOWERS, CHILDREN AND CRIMINALITY: THE CHILD AS VICTIM AND PERPETRATOR 95 (1986) (observing that the after effects of victimization of children often have the most effect on the child’s welfare and ability to reach their optimum capabilities).
\item[191.]
See, e.g., Hicks, supra note 22, at 111 (citing Dr. Kempe, the researcher who coined the phrase “battered child syndrome”, as stating that the most devastating aspect of child abuse is the permanent adverse effects on the child’s emotional and psychological well-being).
\item[192.]
See Gries, supra note 32, at 288 (citing a report that abused children are less able than nonabused children to identify other people’s feelings).
\item[193.]
Id.
\item[194.]
Id.
\item[195.]
FLOWERS, supra note 190, at 98.
\item[196.]
Id.
\item[197.]
Id.
\item[198.]
See Gries, supra note 32, at 288-89 (stating that abused children’s inability to identify with people’s feelings can be manifested by overly aggressive behavior). The long-term effects of abuse on any individual child depends on a variety of factors. See MONES, supra note 1, at 39 (stating that the reactions to abuse depend on such factors as the type, severity, and length of the abuse as well as the child’s emotional makeup). As one writer commented:

\begin{quote}
Some abuse victims are able to lead functional lives while still coping with the common problems of intense rage, low self-esteem, anxiety, and depression . . . . Others, however, are crippled for life, suffering from drug and alcohol dependency or developing a range of chronic psychiatric disorders including dissociation, post-traumatic stress, borderline personality, and multiple personality.
\end{quote}

Id.
\item[199.]
See generally SCRIGNAR, supra note 117 (discussing causes and effects of post-
\end{enumerate}
\end{footnotesize}
anxiety, hyperactivity, vigilance, episodes of terror or panic, nightmares, and fatigue. In a small number of severe cases, the child may also experience psychotic-like symptoms such as dissociative reaction, depersonalization, and hallucination. Thus, insofar as society is concerned with compassion and benevolence for its youngest offenders, and seeks to help victims of abuse live productive and healthy lives, the battered child defendant clearly requires rehabilitative treatment in order to heal the psychological scars of abuse.

c. Society's interest in rehabilitating the battered child

More important for the purposes of the criminal law, however, is the likelihood that the psychological devastation suffered by the battered child will impact upon society through resultant deviance and criminality. To the extent that the killing of an abusive parent was an extreme response to extreme circumstances, it seems unlikely that the battered child defendant poses a danger to society in the sense of a propensity to commit another homicide. However, this prediction represents an imprudently narrow view of recidivism. Substantial evidence supporting a correlation between both child abuse and juvenile delinquency and between child abuse and future domestic violence, suggests that society retains a significant interest in rehabilitating the battered child in order to prevent future criminal behavior.


201. See id. at 149. For a discussion of post-traumatic stress disorder as the basis of legal insanity, see supra notes 114-23 and accompanying text.

202. See Van Sambeek, supra note 4, at 104-05 (stating that abused children generally are not recidivists, because once the abuse has ended, a child is unlikely to kill again).

203. See generally EXPLORING THE RELATIONSHIP BETWEEN CHILD ABUSE AND DELINQUENCY (Robert J. Hunner & Yvonne E. Walker eds., 1981) (discussing various findings and reasons for the correlation between child abuse and juvenile delinquency); FLOWERS, supra note 190, at 101 (citing several studies that reveal a link between child abuse and juvenile delinquency). For the relationship between child abuse and domestic violence, see infra notes 204-06 and accompanying text.
i) Rehabilitation to protect society: the link between battered children, future domestic violence, and juvenile delinquency

Much has been noted about the inter-generational nature of domestic violence, particularly child abuse, so that “[i]t has become almost cliche to note that the abused child of today will become the abusive parent of tomorrow.” 204 Indeed, numerous researchers have established a connection between being a victim of abuse as a child and involvement in violent relationships as an adult. 205 As Paul Mones notes:

The most insidious effect of abuse is that it dramatically increases the likelihood that the victim-child will become a victim-spouse or worse, a child abuser. The trauma of abuse so distorts a child’s conception of family that the abnormal supplants the normal, establishing abusive parenting as appropriate. . . . The pernicious lesson of child abuse is that confrontation and violence are acceptable ways to solve problems. 206

Insofar as the prevention of child and spousal abuse is an important goal, it serves the interests of society and the criminal law to make rehabilitation the focus of punishment when dealing with a battered child who has killed an abusive parent. 207

204. Hicks, supra note 22, at 122.
205. See Dutton & Painter, supra note 15, at 142 (stating that children often learn aggressive behavior from parents). See also John A. Brown, Some Etiological Factors and Treatment Considerations in Child Abuse, in EXPLORING THE RELATIONSHIP BETWEEN CHILD ABUSE AND DELINQUENCY 34, 34 (Robert J. Hunner & Yvonne E. Walker eds., 1981) (stating that research indicates that most abusive parents were victims of child abuse); Adriane A. Haeuser et al., Policy and Program Implications In The Child Delinquency Correlation, in EXPLORING THE RELATIONSHIP BETWEEN CHILD ABUSE AND DELINQUENCY 11, 20 (Robert J. Hunner & Yvonne E. Walker eds., 1981) (noting that basic training for violence occurs “through parent-child interaction and day-to-day family life”); Harold P. Martin, The Consequences of Being Abused and Neglected: How the Child Fares, in THE BATTERED CHILD 347, 353-55 (C. Henry Kempe & Ray E. Helfer eds., 3d ed. 1980) (noting that children who have been abused face a “tremendously increased risk” of themselves being abusive parents and/or spouses); Moreno, supra note 186, at 1301 n.146 (citing sources indicating that one-third of victims of child abuse become abusers); FLOWERS, supra note 190, at 95 (citing a study finding that 75% of sexually abusing parents were themselves sexually abused as children).
206. MONES, supra note 1, at 39.
207. See Smith, supra note 3, at 170 (stating that society has an interest in the long-
Moreover, beyond the prevention of domestic violence, rehabilitation may also serve to prevent juvenile delinquency or adult criminal activity by the battered child. Researchers have consistently reported a connection between victimization as a child and both juvenile delinquency and adult criminality. Thus, viewing the act of killing an abusive parent as a manifestation of the underlying pathology caused by the psychological trauma of abuse, and focusing on rehabilitative treatment has potentially substantial benefits in protecting society from future domestic violence, juvenile delinquency and crime.

ii) The relative futility of alternative theories of punishment

While rehabilitation appears to be appropriate in the situation of the battered child defendant, inevitably some will argue that it is impermissible to allow rehabilitation to displace other theories of punishment such as deterrence, restraint, and retribution. These commentators also will insist that incarceration, rather than treatment, should be society's primary response. However, as applied to the battered child defendant, these alternative theories of punishment lack merit and are relatively futile in serving society's best interest.

First, punishment as deterrence has always been recognized

208. See RUTH S. KEMPE & C. HENRY KEMPE, CHILD ABUSE 42 (1978) (describing the strong link between child abuse and subsequent delinquency and violent criminal behavior, and citing a study in which 84% of adolescents brought to a juvenile detention center for the first time had been abused before the age of six and 94% had been abused within the prior 18 months); Brown, supra note 205, at 35 (stating that "abnormal or defective family relationships are more prevalent among families of delinquent children than among families of comparable children who do not become delinquent"); FLOWERS, supra note 190, at 101 (citing a study in which 82% of adolescent offenders were found to have a history of abuse and neglect); Elizabeth M. Timberlake, Child Abuse and Externalize Aggression: Preventing a Delinquent Life Style, in EXPLORING THE RELATIONSHIP BETWEEN CHILD ABUSE AND DELINQUENCY 43, 44 (Robert J. Hunner & Yvonne E. Walker eds., 1981) (noting that abused children incorporate patterns of overt aggression in their dealings with society); Geri M. Redden, Children Are Not Resilient, ST LOUIS POST-DISPATCH, Sept. 16, 1993, at 7B (citing 1992 F.B.I. statistic that 89% of violent criminals come from violent homes).

209. Under the theory of deterrence, or general prevention, the suffering of the individual offender serves to deter others from committing crime, "lest they suffer the same unfortunate fate." LAFAVE & SCOTT, supra note 6, § 1.5(a)(4), at 24. It is often said that the primary purpose of the criminal law should be "to inhibit antisocial conduct by as-
as important method of protecting society through crime prevention.\textsuperscript{210} Incarceration of the battered child defendant, however, is unlikely to serve the goal of deterring other abused children from killing their abusers,\textsuperscript{211} simply because such children do not decide to kill based on a rational assessment of the costs and benefits of the act.\textsuperscript{212} Instead, the battered child kills an abusive parent under completely irrational circumstances while under the influence of fear and terror, honestly believing that the act is necessary for self-protection.\textsuperscript{213} The child may be at a psychological breaking point, feeling unable to withstand further abuse,\textsuperscript{214} experiencing extreme rage,\textsuperscript{215} or suffering under the influence of severe psychological symptoms caused by post-traumatic stress disorder.\textsuperscript{216}
Moreover, even if battered children were to pause and reflect upon the possibility of incarceration as a result of the killing, it seems unlikely, given what they have already suffered, that such punishment would deter their desperate acts. As one scholar has noted, "[d]eterrence does not threaten those whose lot in life is already miserable beyond the point of hope." Thus, incarceration in the name of deterrence is of questionable efficacy, and cannot serve as a valid objection to rehabilitation as the focus of punishment of the battered child defendant.

Second, because the killing of an abusive parent was an extreme response to extreme circumstances, it is unlikely that the battered child defendant poses the danger to society of committing another homicide. Thus, incarceration seems unnecessary as either a specific deterrent, to discourage future acts of killing through an unpleasant experience, or as a means of restraint in order to protect society from future harm.

Finally, although incarceration is unnecessary to protect the public and ineffective to promote deterrence, there remains the argument that the battered child should be imprisoned simply as a matter of retribution. While the battered child defendant certainly must bear some responsibility for his or her criminal act, the rationale for making retribution the focus of disposition is weak. As noted before, children are generally considered to be less mor-

217. See Smith, supra note 3, at 171 n.212 (suggesting that battered children have "suffered unpleasant experiences for most of their lives," stating that although confined to prison, battered children defendants felt safer and more free than they were at home, and noting that one described prison as comparable to home life).

218. Packer, supra note 8, at 45. See also Andenaes, supra note 212, at 594 (asserting that those on the margin of society have less to lose by conviction than those well integrated into the social fabric).

219. See Moreno, supra note 186, at 1298 (quoting a judge at the sentencing of a battered child defendant as saying that the child "knew that the killing was wrong and would not pose a danger to society."); Smith, supra note 3, at 171 n.213 (suggesting that "blindly restraining, incarcerating, or isolating abused children who kill abusive parents typically will not further the goal of protecting the general public").

220. See supra note 202 and accompanying text (explaining that abused children are unlikely to be recidivists).

221. See, for example, Jahnke v. State, 682 P.2d 991 (Wyo. 1984), where the court denied probation to a battered child convicted of voluntary manslaughter for killing his abusive father. The court apparently based its decision primarily on retributive considerations, declaring, "for the purposes of recognizing and supporting society's law, for its protection, for discouraging other persons from committing acts similar to yours, and to satisfy the need to trust in public justice as opposed to private justice, the court has decided against probation." Id. at 1009 (quoting the trial court).
ally responsible for their acts than adults. Moreover, the extreme circumstances and psychological attributes of the battered child make it inappropriate to impose retribution as if there were full moral culpability. Finally, to the extent that justice requires that the battered child be punished to atone to society for the wrong committed, a loss of liberty short of total incarceration may achieve this end. The public often takes a "vengeful interest" when a child commits a serious crime, insisting that anything less than a long, retributive prison sentence is "coddling" young criminals. However, as one judge aptly noted, "[i]t is not a question of what may be perceived as 'hard' or 'soft' on crime, but rather what will work in society's best interest." In light of the relative futility of alternative theories of punishment and the battered child's need and potential for treatment, rehabilitation rather than retribution is in society's best interest.

222. See supra note 171 and accompanying text.
223. This is particularly true where the battered child defendant suffers from diminished capacity or perhaps even legal insanity as a result of post-traumatic stress disorder. Because one who suffers from a mental disease or defect is not considered to be a free moral agent, retribution, which is based on moral culpability, is precluded. See supra notes 147-55 and accompanying text (discussing diminished capacity and diminished responsibility).
224. See Fletcher, Excuse, supra note 89, at 726 (disscussing the retributive rationale of excuses and noting that if it is unfair to expect an individual to avoid a criminal act, by resisting the internal or external pressures in a situation, then it is unjust to punish that actor for yielding to the pressures leading to the act).
225. See Campbell, supra note 209, § 7, at 31-32 (noting the rationale behind retribution and the need for punishment of offenders to restore social order). But see Van Sambeek, supra note 4, at 106 (arguing that children who have suffered through years of abuse have already paid in advance for the crime of parricide, so society should not make them endure further punishment).
226. Martin, supra note 174, at 83.
227. See generally Ainsworth, supra note 170, for a discussion of the shift away from a rehabilitative model toward a punitive model of the juvenile court.
228. Martin, supra note 174, at 65.
229. Insofar as rehabilitation of the battered child is important to society, incarceration appears to be incompatible with that goal. It is widely acknowledged that for both adult and juvenile offenders, prison is the least ideal and often an unavoidable setting for effective rehabilitation. See Campbell, supra note 209, § 8, at 38-41. Moreover, for the battered child, a prison sentence is likely to be "counterproductive, as well as physically and emotionally dangerous." Smith, supra note 3, at 173 n.221 (citing People v. Cruickshank, 484 N.Y.S.2d 328, 338 (N.Y. App. Div. 1985)).
IV. MITIGATION IN THE DISPOSITION AND SENTENCING OF THE BATTERED CHILD

Given the reduced moral culpability of the battered child and the history of abuse and its resultant psychological impact as antecedent causes of the act of killing an abusive parent, the disposition of the battered child defendant may appropriately be grounded in the principles of the juvenile court system. Thus, a partial excuse of the killing should be accompanied by sentencing focused on individualized rehabilitative treatment for the protection of society and the benefit of the battered child.

A. Juvenile Court Jurisdiction

Presumably, those defendants who are fortunate to be young enough to fall under the jurisdiction of the juvenile court have the opportunity to receive the "careful, compassionate [and] individualized treatment" on which a separate juvenile system was premised. Unfortunately, a great many battered children who have killed abusive parents are transferred out of the juvenile system into the world of adult criminal justice, either by judicial discretion or under statutory mandate. Thus, rehabilitation

230. It is important to note, however, that the maximum age defining juvenile court jurisdiction varies among the states. Moreover, many battered children, as defined for purposes of this Note, will simply be too old to benefit from juvenile court jurisdiction. See supra note 5.

231. Ainsworth, supra note 170, at 1113 (quoting In re Gault, 387 U.S. 1, 18 (1967)).

232. Paul Mones argues that battered child defendants should always be treated within the rehabilitative context of the juvenile court system, noting that the juvenile court traditionally bears responsibility for abused and neglected children:

The basic legal theory is that if the child is abused, if he commits murder, the abuse itself is something which can place the child in a category that is uniquely that of a juvenile. That is, the child who is abused and kills is basically a delinquent who can be treated as an abused child. . . . We urge that [such a child] not be treated as an adult in criminal court . . .

MORRIS, supra note 155, at 148.

233. Juvenile courts have the discretionary ability to waive their jurisdiction over a particular offender, thus transferring jurisdiction to the adult criminal justice system. Ainsworth, supra note 170, at 1109. Traditionally, the juvenile court judge could only waive jurisdiction if he or she determined that the offender would not be amenable to rehabilitation under the juvenile system. Id. Now, however, judges typically have the authority to consider not only amenability to treatment, but the dangerousness of the accused juvenile as well. Martin, supra note 174, at 70. According to Judge Martin, criteria for amenability to treatment may include the success or failure of any previous attempts at rehabilitation, the potential for rehabilitation through available juvenile procedures, services and facilities for rehabilitation, as well as the child's mental condition, maturity, and
for the majority of battered child defendants must occur within in the context of the adult criminal justice system.235

B. Mitigation and Individualization within the Adult Criminal Justice System

Most of the mechanisms by which rehabilitation is achieved in the juvenile court system may also be available in the adult system through the discretion of the sentencing judge. The disposition of the battered child defendant should involve punishment commensurate with the child's culpability, emphasizing rehabilitative treatment in a disposition short of total incarceration where appropriate.

1. Focus on Treatment

In some jurisdictions, this goal can be accomplished by granting the battered child "youth offender" status for sentencing purposes, which then places the child under a less punitive sentencing scheme with considerably more opportunity for rehabilitative sophistication. Id. The criteria for dangerousness include consideration of the child's prior record of delinquency, the nature and circumstances of the present alleged offense, probable cause that the accused juvenile did in fact committed the charged offense, and public safety concerns. Id.

Although the typical battered child defendant is amenable to treatment, has no prior record, and poses little danger to the public, attorney Paul Mones notes: "In all my experience . . . I have only seen a handful of parricide cases where the child remained in juvenile court. In the eyes of the average judge . . . the act of killing a parent is itself sufficient to require a child's transfer to adult court." MONES, supra note 1, at 89. Moreover, prosecutors frequently oppose allowing parricide defendants to be tried in juvenile court if they can possibly prosecute them as adults. See MORRIS, supra note 155, at 159.

234. Approximately half of all states have enacted judicial waiver statutes which mandate transfer of juvenile offenders accused of enumerated serious crimes. Ainsworth, supra note 170, at 1111. In these jurisdictions, the battered child accused of killing his abuser will automatically be tried as an adult, since homicide invariably appears as an enumerated offense. Id.

235. See, for example, Jahnke v. State, 682 P.2d 991, 994 (Wyo. 1984), in which the 16-year old defendant, accused of killing his abusive father, sought transfer to the juvenile court. After a two-day hearing in which psychiatric evidence and personal testimony was introduced to establish the severe mental and physical abuse suffered by the defendant at the hands of his father, the court denied the motion for transfer.

236. "The term 'youth offender' in sentencing statutes generally designates a person who is older than a 'juvenile' but younger than an 'adult.'" CAMPBELL, supra note 209, § 37, at 126. The rehabilitation-based substantive sentencing provisions of the Federal Youth Corrections Act, for example, apply automatically to all offenders under the age of 22 at the time of conviction. Id. In addition, another federal statute, the Young Adult Offenders Act, allows the judge, at his discretion, to apply the Federal Youth Corrections Act to any offender between the ages of 22 and 26. Id.

237. The relative leniency of youthful offender sentencing is evident in State v. Cruickshank, 484 N.Y.S.2d 328 (N.Y. App. Div. 1985), a case involving the first degree
tation and individual treatment. Devising an individual treatment program for the battered child defendant will necessarily depend on careful evaluation by the court under the guidance of psychiatric and social work professionals. In general, however, treatment for the battered child should focus primarily on the amelioration of the psychological consequences of child abuse and breaking the cycle of violence.

Most battered children can benefit from individual psychiatric treatment, which should focus on general themes such as "a search for meaning in the experience [of abuse], an attempt to regain mastery over the event in particular and over [the child's own] life more generally, and an effort to enhance [the child's] self-esteem." Further, group therapy and peer counseling involving other child or adolescent victims of abuse may provide desperately needed emotional support. Finally, behavior modification may succeed in eliminating socially unacceptable behavior patterns, particularly the use of violence as a problem-solving mechanism. It should also be recognized that a battered child defendant suffering from post-traumatic stress disorder may require treatment specifically geared toward eliminating those psychopathological symptoms. Recently, there has been a significant disillusionment
with the efficacy of rehabilitation, both in the juvenile and adult criminal justice systems.\textsuperscript{243} However, evidence suggests that most battered child defendants are amenable to treatment and are able to adjust well to become productive, law-abiding members of society.\textsuperscript{244}

2. Alternatives to Incarceration

In addition to focusing on mandatory treatment, sentencing the battered child defendant in the adult criminal justice system should whenever possible include a punitive disposition short of total incarceration. As previously discussed, incarcerating these defendants fails to serve the goals of the criminal justice system, while impeding the rehabilitation which can benefit both society and the individual. The typical battered child defendant is an ideal candidate for probation\textsuperscript{245} due to his potential for successful treatment.

109-13, 118-22. Finally, in more severe cases, intensive psychiatric therapy and medication may be necessary. See id. at 113-14 (cautioning against immediate or prolonged use when other methods are available).

\textsuperscript{243} See Ainsworth, supra note 170, at 1104-05 (explaining that the failure of recidivism to wane caused a general conclusion that the criminal justice system does not rehabilitate criminals). See also CAMPBELL, supra note 209, § 8, at 36, 40-41 (citing recidivism statistics as a chief argument against rehabilitation, and noting that judicial dissatisfaction with the rehabilitative ideal is surfacing); PACKER, supra note 8, at 56 (stating that the criminal justice system does not know how to effectively rehabilitate offenders within the limits of available resources); Richard D. Schwartz, Rehabilitation, in ENCYCLOPEDIA OF CRIME AND JUSTICE 1364, 1370-72 (Sandford H. Kadish ed., 1983) (discussing the difficulties of evaluating rehabilitative success).

\textsuperscript{244} Smith, supra note 3, at 155 n.95. That battered child defendants require and can benefit from treatment is supported by many commentators and judges. See id. at 171-72 n.214 (citing sentencing judge as stating that based on the evidence, rehabilitation for a parricide defendant seems likely to succeed). Many even assert that a battered child is better off being convicted than acquitted, since conviction is accompanied by the possibility of treatment. See MONES, supra note 1, at 70 (describing a parricide defendant and noting that acquittal would not make his life “peaches and cream” because the boy was traumatized, lacked support from family and friends, and could not afford desperately needed psychological counseling); see MORRIS, supra note 155, at 175 (hypothesizing that a judge who found a sexually abused parricide defendant guilty in order to ensure that she would get treatment); Chapin Wright, Straight A’s, Guilty Verdict, NEWSDAY, Dec. 17, 1990, at 4 (citing the attorney for a battered child convicted of manslaughter as stating that if his client had been acquitted, she would not have been able to afford psychological counseling).

\textsuperscript{245} According to the United States Supreme Court, the purpose of probation is:

\begin{quote}

to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuses this opportunity.
\end{quote}
and general nondangerousness to the public. Probation would allow the child to serve the sentence while remaining in the community conditionally, subject to a prison term for noncompliance with the conditions of release. Mandatory psychological counseling or psychiatric treatment, domestic violence education, and community service as conditions of probation, as well as strict supervision by a probation officer, can effectively serve the goal of rehabilitation while ensuring that the battered child accepts responsibility for his or her criminal act.

A final option to be considered is the use of pre-trial diversion which would allow the battered child to avoid prosecution and formal entanglement with the criminal justice system in exchange for voluntarily submitting to a "strict regime" of rehabilitation. Under the pre-trial diversion process, there is no ad-

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246. The Model Penal Code, for example, contains an implied presumption of probation unless the court "is of the opinion that [the defendant's] imprisonment is necessary for the protection of the public." Id. § 17, at 75 (citing MODEL PENAL CODE § 7.01).

247. Id. § 11, at 51-53.

248. See CAMPBELL, supra note 209, § 21, at 74 (listing permissible affirmative probationary conditions). In some cases, residential treatment in a program for victims of abuse may be appropriate. In most cases, psychiatric treatment should be on an outpatient basis, although in severe cases where more intensive therapy is necessary or dangerousness is an issue, institutional commitment may be ordered. See TERENCE MOORE & TONY WILKINSON, YOUTH COURT: A GUIDE TO THE LAW AND PRACTICE 96 (1992) (explaining guidelines for psychiatric treatment).

249. Community service requires the offender to perform a specified number of hours of unpaid work for the benefit of the community, under the supervision of a probation officer. See MOORE & WILKINSON, supra note 248, at 90.

250. See Smith, supra note 3, at 174-76 (discussing cases in which parricide defendants were given "creative, yet positive sentences," including suspended prison sentences, probation, counseling and therapy, and community work).

251. See CAMPBELL, supra note 209, § 104, at 335. See also Joan Mullen, Pretrial Diversion, in ENCYCLOPEDIA OF CRIME AND JUSTICE 1184, 1185 (Sanford H. Kadish ed., 1983) (describing an ideal of diversion as a system where "participants would avoid the stigma of criminal prosecution and receive a variety of helping services that would enhance their community adjustment and decrease recidivism.").

252. CAMPBELL, supra note 209, at 337.

253. Several states utilize diversion programs to deal with the specific problem of substance abuse-related crimes. See FLA. STAT. ANN. § 39.0475 (West Supp. 1994) (creating a pretrial delinquency intervention program enabling those accused of purchase or possession drug offenses to enter a substance abuse education and treatment program, which if successfully completed, will allow the court to dismiss the drug charges). See also OHIO REV. CODE ANN. § 2925.11(G)(2) (Baldwin 1992) (allowing chapter 2925 drug offense violators who have pled guilty prior to trial to enter a residential drug abuse treatment program, on conditional probation, in lieu of imprisonment). Other states have diversion programs aimed solely at juveniles. See, e.g., COLO. REV. STAT. §§ 19-2.5-101 to 107
mission or formal determination of the battered child's responsibility for the killing. Instead, prosecution is either forgiven or suspended and a treatment program instituted. Upon successful completion of all conditions of the diversion, the charges against the child would be dismissed; however, if any condition is violated, or the treatment deemed "unsuccessful", the prosecutorial process may be reinstated. Thus, diversion may be an appropriate option for the battered child defendant, sparing him or her the trauma of the criminal justice system and the stigma of a conviction, while ensuring successful rehabilitation for the benefit of both the child and society.

V. CONCLUSION

When an abused child kills his or her sleeping abuser, any attempt to claim self-defense based on the introduction of battered child syndrome testimony must fail. The narrow doctrine of objective self-defense is intended to justify only those killings which, by reference to external evidence and societal-determined values, can be adjudged absolutely necessary and thus beneficial to society. The use of expert psychological testimony to support a claim of self-defense transforms the standard of justification from objective

(1993) (authorizing "community-based alternatives to the formal court system" for juveniles taken into custody once for any felony and at least twice for any misdemeanor); VT. STAT. ANN. tit. 3, § 163 (1958) (authorizing the development of a juvenile court diversion project in which participants could voluntarily select a diversion contract and have their records expunged two years after successful completion of program).


255. CAMPBELL, supra note 209, § 104, at 336. The diversion decision may be made by the police, prosecutor, probation office, or court depending on at which stage of the criminal justice process the option is raised. Id.

256. See Granley, supra note 254, at 159. See also CAMPBELL, supra note 209, § 104, at 337 (stating that unsuccessful participation in diversionary program may negatively affect the sentencing judge when charges are reinstated).

257. For a recent Oklahoma case involving a similar process as applied to parricide defendants within the juvenile court system, see Brothers Get Off Easily in Killing Dad, CLEVELAND PLAIN DEALER, Sept. 15, 1993, at A9. Two brothers, ages 15 and 12, pleaded no contest to charges of first-degree manslaughter for killing their sleeping father after years of severe physical abuse. Id. Under the agreement, their case will not be formally decided until April 7, 1996, at which time if they have broken no other laws, the charges will be dismissed. Id. The brothers were placed in "therapeutic foster homes" where they receive counseling. Id. See also Quan, supra note 44.
to wholly subjective, resulting in a norm upon which no meaningful external checks can be imposed. This result unacceptably undermines the societal policies protected by a narrow self-defense doctrine, opening the door to the justification of preemptive strikes, self-help, and retaliation.

However, expert testimony concerning the history of abuse and its psychological impact on the battered child defendant is not irrelevant to society’s disposition of the nonconfrontational killing of an abuser. Battered child syndrome can form an appropriate basis of mitigation of the child’s culpability within the framework of excuse, which focuses on the unique characteristics and circumstances of the individual defendant. Several partial excuses can serve to reduce the killing from murder to the lesser offense of voluntary manslaughter. A partial excuse should be coupled with a sentencing based on the principles of the juvenile court system: reduced moral responsibility, antecedent causes of criminal behavior, and rehabilitation for the protection of society. In this way society can effectively condemn a killing that was not justified, while still recognizing the inextricable link between the history of abuse, its resultant psychological impact and the act of killing the abuser. Such a response will also provide compassion and individual justice to the battered child defendant.

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