

# THE GENDERED NATURE OF THE BATTERED WOMAN SYNDROME: WHY GENDER NEUTRALITY DOES NOT MEAN EQUALITY

GENA RACHEL HATCHER\*

## INTRODUCTION

After years of physical violence and psychological abuse, marked by several attempts to leave her husband that failed when he found her and forced her to return, Judy Norman shot her husband while he slept.<sup>1</sup> In a violent marriage racked by beatings that had only increased in severity and frequency, culminating in the initiation of divorce proceedings, the filing of several restraining orders, and a death threat, Sherrie Lynn Allery shot her husband while he lay on the couch.<sup>2</sup> At the trials of both of these women, their jurors inevitably wondered why these women didn't just leave: Why did Judy Norman remain in a violent relationship? Why did Sherry Lynn Allery not seek outside assistance before resorting to such force? Why did these women truly believe *this time* the danger was imminent, though so many times before they had not left, and had not acted, and yet had survived?<sup>3</sup>

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\* Senior Articles Editor, *NYU Annual Survey of American Law* 2002–2003. J.D. Candidate, New York University School of Law, 2003; B.A., Amherst College, 2000. The author would like to thank Julie Goldscheid, Martin Hamilton, David Lenzi, Rebecca Musil and Sandra Park.

1. See *State v. Norman*, 378 S.E.2d 8, 9–11 (N.C. 1989). The court held that: [T]he evidence introduced in th[e] case would not support a finding that the defendant killed her husband due to a reasonable fear of imminent death or great bodily harm, as is required before a defendant is entitled to jury instructions concerning either perfect or imperfect self-defense. Therefore, the trial court properly declined to instruct the jury on the law relating to self-defense. *Id.* at 9.

2. See *State v. Allery*, 682 P.2d 312, 313, 316–17 (Wash. 1984) (reversing defendant's conviction, remanding for a new trial, and ordering that "[i]t is appropriate that the jury be given a professional explanation of the battering syndrome and its effects on the woman through the use of expert testimony").

3. See Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 202 (1986).

On first inspection by judges and juries alike, the traditional self-defense doctrine<sup>4</sup> seems not to apply. A traditional understanding of the elements of self-defense do not fit with a battered woman's experience in which imminence, reasonableness, proportionality, and attempts to retreat are much less apparent and much more case-specific. An ordinary juror may not grasp the aggressive nature of the particular incident under review without understanding its underlying pattern of violence.<sup>5</sup> For example, a battered woman may kill her spouse at a time when he is not actually physically attacking her, even in his sleep. In addition, because women are often smaller than men, she may have to use more force than a man might use in order to repel her batterer. A battered woman may not attempt to escape because she has tried before and he has found her, or because she knows that if she attempts to escape she or her children will almost certainly be killed.

Thus, in the 1970s, feminist theorists argued that the subordination of women and sexist presumptions were leading to inequalities and misconceptions in the responses of judges and juries to the self-defense pleas of battered women who killed.<sup>6</sup> Expert testimony was offered at trials to explain and defend women who had killed their batterers using the "rubric of battered woman syndrome."<sup>7</sup> The term served as shorthand for the growing body of scientific and clinical literature that described a condition similar to post-traumatic stress disorder.<sup>8</sup> The purpose of such testimony was to aid judge and jury in evaluating the self-defense claim of the battered woman. The testimony offered explanations to the questions posed above and illuminated why a battered woman behaving reasonably might behave differently than an unbattered man or woman, or

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4. Traditionally, a person claiming self-defense must show she had a reasonable belief that force was necessary to protect herself against an imminent threat of harm, she used proportionate or reasonable force in response, and used deadly force only as a last resort after attempts to retreat had failed. *See, e.g.*, BLACK'S LAW DICTIONARY 1359 (6th ed. 1990).

5. *See Witt v. State*, 892 P.2d 132, 138 (Wyo. 1995) (finding that "[t]he confrontational nature of an incident where a battered woman kills her abuser might only become apparent when viewed in the context of a pattern of violent behavior rather than as an isolated incident" (quoting *State v. Richardson*, 525 N.W.2d 378, 382 (Wis. Ct. App. 1994))).

6. Paula Finley Mangum, Note, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering*, 19 B.C. THIRD WORLD L.J. 593, 594 (1999) ("Feminist theory revealed the impact of oppression and unequal power [of women] and incorporated these understandings into an analysis of the dynamics of domestic violence.").

7. *Id.* at 595 (internal citation omitted).

8. *Id.* at 607.

even a battered man. In addition, the testimony highlighted why a battered woman's perception of imminence was at odds with a layperson's definition of the term. It also explained why a battered woman might respond with force that might seem excessive to a juror, yet was in fact proportional to the threat. Finally, it explained why a battered woman loses faith in the possibility of retreat.

More recently, courts and state legislatures have adjusted the scope of this expert testimony to focus on "Battering and Its Effects"—a gender-neutral standard that focuses on the psychological impact that battering patterns may have on a battered person.<sup>9</sup> The testimony is admissible to indicate that a defendant had the requisite state of mind to sustain a claim of self-defense despite the fact that, from a traditional self-defense perspective, the threat of harm was not "imminent" at the time of the homicide.<sup>10</sup> This expert testimony has been utilized in claims of self-defense by men, as well as by women.<sup>11</sup>

This Note will describe how recent trends toward enlarging the Battered Woman Syndrome into a new gender-neutral defense—"Battering and Its Effects"—are inconsistent with the policies, perspectives, and scientific and sociological evidence that led to the original acceptance of the Battered Woman Syndrome. Grounded in this foundation and context, the Note will then illustrate that the Battered Woman Syndrome includes explanations of battered women as women, reflecting their experience in society and the existence and effects of sexist stereotyping. The Note will argue that these explanations are left out of the current application of "Bat-

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9. See *infra* Part I. Note that "Battering and Its Effects" and the "Battered Person Syndrome" are terms used interchangeably; each is gender-neutral. There is no practical difference between the two. In the interest of consistency, this Note will refer only to "Battering and Its Effects," for the sole reason that it clarifies its focus in its name.

10. See *infra* Parts I, III.

11. See, e.g., *Bishop v. State*, 271 Ga. 291, 292–93 (1999) (holding that defendant who killed his wife would be entitled to an instruction on the battered person syndrome if, on retrial, he offered expert testimony to show that he was such a battered person); *People v. Colberg*, 701 N.Y.S.2d 608, 610–11 (County Ct. 1999) (holding that, in a case where defendant killed his adult son, expert testimony on the "gender neutral" battered person syndrome would be admitted); *Chester v. State*, 267 Ga. 9, 10–12 (1996) (acknowledging, in a case where defendant killed his girlfriend, the relevance of the "battered person" or "battered man" syndrome, but ultimately finding it inapplicable in this case); *Commonwealth v. Kacsmar*, 617 A.2d 725, 726 (Pa. Super. Ct. 1992) (holding that defendant who killed his brother was entitled to the admission of expert testimony on the battered person syndrome).

tering and Its Effects.” Finally, the Note will argue that if the gendered status of the Battered Woman Syndrome is maintained, it will continue to improve the understanding of battered women both as victims of battering *and* as women.

Part I will briefly address current law among the states with regard to the acceptance of the Battered Woman Syndrome and “Battering and Its Effects.” Part II will examine the origins of and reasoning behind the admission of expert testimony on the Battered Woman Syndrome, and discuss recent applications of such testimony. Part III will discuss the justifications offered both by courts and legal theorists that led to the gender-neutral formulation of the syndrome in many states. Part IV will argue that the Battered Woman Syndrome, rather than a gender-neutral syndrome, will further more effectively the goal of an individualized approach to self-defense, because the current application of the gender-neutral syndrome excludes important testimony reflecting the sexist stereotypes and juror misperceptions regarding a battered woman defendant which are crucial to her successful plea of self-defense. Part IV will also respond to the arguments offered for the gender-neutral application of the syndrome. Part V will propose a framework for re-embracing the Battered Woman Syndrome, while considering the implications for battered men.<sup>12</sup> Lastly, Part VI will argue that this proposal for the application of the Battered Woman Syndrome will symbolically further the development of equality between men and women.

## I.

### THE CURRENT STATE OF THE LAW

The Battered Woman Syndrome originally developed in reaction to the misapplication of the self-defense doctrine to battered women who had killed their spouses.<sup>13</sup> Without expert testimony

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12. This Note focuses on issues relating to the testimony to be offered by battered women who kill their batterers in self-defense. As indicated in Part V, the argument is applicable to all women, including lesbian women who kill their female partners. Other issues associated solely with domestic violence in lesbian and gay relationships raise numerous important questions beyond the scope of this paper.

13. See Mangum, *supra* note 6; ELIZABETH SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 117, 135 (2000) [hereinafter BATTERED WOMEN & FEMINIST LAWMAKING] (explaining that this “self-defense work has been premised on the view that the traditional boundaries and definitions of self-defense, as a form of justification, were sex biased and shaped by male experience”—that “[b]attered women defendants experience serious problems in meeting the judicial application of the standard of reasonableness and elements of the law of self-defense: the

on the Syndrome, the traditional self-defense doctrine was inadequate to explain how battered women actually had behaved reasonably in perceiving imminent danger and using deadly force against their batterers.<sup>14</sup> Frequently, a self-defense instruction was denied altogether.<sup>15</sup> After proffering expert testimony on the Syndrome, the defendant would be entitled to a jury instruction regarding how the testimony might affect the self-defense determination. For example, the Nevada Supreme Court recently found the following instruction to be the appropriate one where a defendant invoked Battered Woman Syndrome in her defense:

You have heard expert testimony concerning the effect of domestic violence on the beliefs, behavior, and perception of a woman who may be suffering from battered woman syndrome. The defendant asserts that she was suffering from battered woman syndrome at the time of the killing. This, in itself, is not a legal defense. However, if you believe that the defendant was suffering from battered woman syndrome, you may consider such evidence when determining the defendant's state of mind at the time of the killing and whether she acted in self-defense. You may also consider such evidence as to the defendant's credibility and the reasonableness of her belief that she was about to suffer imminent death or great bodily harm and the need to slay an aggressor.<sup>16</sup>

In *State v. Kelly*,<sup>17</sup> the first case in which expert testimony on the Battered Woman Syndrome was admitted, the judges offered this explanation for its admittance:

[E]xpert testimony [may be] offered to aid the jury in understanding the reasonableness of [the Defendant's] apprehension of imminent death or bodily injury. . . . [T]he expert testimony [is] offered to aid the trier of fact in understanding the evidence and determining a fact in issue. . . . The expert's testimony [is] not offered to show that the batterings so affected defendant's mental state that she could not tell right from wrong and perceive the moral qualities of the act. It [is]

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requirements of temporal proximity of the danger perceived by the defendant; the requirement of equal proportionality of force used by the defendant to that used against her by the batterer; and the duty to retreat").

14. See *State v. Norman*, 378 S.E.2d 8, 12 (N.C. 1989); *State v. Stewart*, 763 P.2d 572, 577 (Kan. 1988); see also Jeffrey B. Murdoch, *Is Imminence Really Necessity? Reconciling Traditional Self-Defense Doctrine with the Battered Women's Syndrome*, 20 N. ILL. U. L. REV. 191, 191-92 (2000).

15. See *Norman*, 378 S.E.2d at 9; *Stewart*, 763 P.2d at 578.

16. *Boykins v. State*, 995 P.2d 474, 479 (Nev. 2000).

17. *State v. Kelly*, 102 Wash.2d 188, 196 (1984).

offered to explain the reasonableness of her fear of imminent danger.<sup>18</sup>

Experts thus offer the Battered Woman Syndrome both as an explanation of the reasonableness of the defendant acting in self-defense and to counteract traditional myths and stereotypes regarding women and battered women specifically.<sup>19</sup> The testimony can educate the jury as to why a defendant who suffers from Battered Woman Syndrome may act differently than a non-battered person, and even than a battered man, and thereby provide a basis from which the jury can understand why the defendant perceived herself in imminent danger at the time she killed her spouse.<sup>20</sup> The Syndrome offers explanations of a battered woman's behavior by linking that behavior to the Syndrome's psychosocial elements. Battered women generally believe they are responsible for their batterer's violent behavior, and they believe their batterers are both capable of and likely to kill them.<sup>21</sup> They feel there is no escape, particularly because they may be found and hurt more seriously if they try, but also because women, and especially battered women, often lack the financial resources to survive on their own.<sup>22</sup> Lastly, battered women will often not tell their friends and family or seek help, either because they fear it will further enrage their spouse, or because they are embarrassed or discouraged by societal and familial pressures to make the relationship "work."<sup>23</sup>

Upon urging, courts began to frame the Syndrome in a gender-neutral fashion as Battering and Its Effects.<sup>24</sup> This urging came primarily from feminist advocates claiming that the gendered Battered Woman Syndrome enforced notions of battered women as weak or sick.<sup>25</sup> More recently, battered male defendants have attempted, and some have succeeded, to invoke expert testimony on

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18. *Id.* at 196, 198.

19. Mangum, *supra* note 6, at 604.

20. *See, e.g., Ibn-Tamas v. U.S.*, 407 A.2d 626, 633–34, 638 (D.D.C. 1979) (holding that expert testimony on the Battered Woman Syndrome would be admissible in the case of defendant who killed her husband, presuming that on remand the expert witness' studies and conclusions regarding battered women had attained general acceptance within the medical community).

21. Consider the discussion of the use of Battered Woman Syndrome in *id.* at 634 (discussing Dr. Lenore Walker's expert testimony on the Battered Woman Syndrome at trial).

22. *Id.*

23. *Id.*

24. *See generally infra* Part III.

25. *See, e.g., Erica Beecher-Monas, Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81, 124–25 (2001); Holly Maguigan, *Battered Women and Self Defense: Myths and Misconceptions in Current Reform Proposals*,

“Battering and Its Effects” in order to elucidate their own defenses. Many state courts have validated this practice and extended the Syndrome to men.<sup>26</sup> In *Chester v. State*, for example, the concurring opinion explained that the Battered Woman Syndrome is now the battered person syndrome, “in recognition of the fact that men, as well as women, can develop the syndrome.”<sup>27</sup> Courts have claimed that because Battering and Its Effects and its “indices virtually mirror ‘battered women’s syndrome,’ this evidence should not be just limited to women.”<sup>28</sup>

In the context of female defendants, courts have invoked this new gender-neutral formulation of Battering and Its Effects and have consequently strayed from some of the original considerations of pervasive sexism and subordination of women that were reflected in expert testimony on the Battered Woman Syndrome.<sup>29</sup> Evidence of prior acts of domestic violence and abuse has been admitted, as well as expert testimony regarding common patterns in abusive relationships, but without mention of the psychosocial considerations of the Battered Woman Syndrome-type.<sup>30</sup> This shift in focus and stated gender-neutrality has necessitated acceptance of revised jury instructions, for example:

A person is justified in using deadly force in self-defense if that person believed that use of deadly force was necessary to pro-

140 U. PA. L. REV. 379, 442–49 (1991); Mangum, *supra* note 6, at 605, 609; BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 134–35.

26. See, e.g., *Bishop v. State*, 271 Ga. 291 (1999); *People v. Colberg*, 701 N.Y.S.2d 608 (County Ct. 1999); *Chester v. State*, 267 Ga. 9 (1996); *Commonwealth v. Kacsmar*, 617 A.2d 725 (Pa. Super. Ct. 1992).

27. *Chester*, 267 Ga. at 18–19 (Hunstein, J., concurring).

28. *Colberg*, 701 N.Y.S.2d at 610.

29. See, e.g., *State v. Edwards*, 60 S.W.3d 602, 610–12 (Mo. Ct. App. 2001) (instructing the jury to consider elements of the battering relationship without mention of any sexism or subordination experienced by defendant, as a woman, that might have contributed to her perception of her behavior as reasonable); *State v. Pisciotto*, 968 S.W.2d 185, 190 (Mo. Ct. App. 1998) (emphasizing only the relevance of physical aspects of battering in making the self-defense determination).

30. See, e.g., *Boykins v. State*, 995 P.2d 474, 478 (Nev. 2000) (“In an action in a court of this state, if a party offers evidence of domestic abuse, testimony of an expert witness concerning the effects of such domestic abuse on the beliefs, behavior and perception of the person being abused shall be admissible as evidence.” (quoting OKLA. STAT. tit. 22 § 40.7 (2000))); *Springer v. Commonwealth*, 998 S.W.2d 439, 454 (Ky. 1999) (referring to the state statute which defines “domestic violence and abuse” as “physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple”).

tect herself from imminent danger of death or great bodily harm. Self-defense is a defense although the danger to life or personal security may not have been real, if a person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that she was in imminent danger of death or great bodily harm.<sup>31</sup>

Currently, states are divided as to whether they acknowledge and apply the Battered Woman Syndrome or the gender-neutral Battering and Its Effects. As of 2002, thirty states have adopted the gender-neutral Battering and Its Effects, and have thus excluded traditional gendered testimony on the Battered Woman Syndrome regarding the sexism, subordination, and stereotyping that may affect a battered woman defendant's perception of reasonableness. Of these thirty, twenty-seven have either explicit statutes adopting the gender-neutral formulation for self-defense cases, or case law recognizing the gender-neutral Battering and Its Effects in lieu of the Battered Woman Syndrome.<sup>32</sup> The other three states have ac-

31. *Boykins*, 995 P.2d at 478 (quoting the relevant Oklahoma instruction as reported in *Bechtel v. State*, 840 P.2d 1, 11 (Okla. Crim. App. 1992)).

32. Alabama, *Bonner v. State*, 740 So.2d 439 (Ala. Crim. App. 1998); Arizona, ARIZ. REV. ST. ANN. § 31-403 (West 2002) (in reference to petitions for clemency after conviction); Arkansas, *Baker v. State* 2000 WL 573222 (Ark. 2000); Florida, *Weiand v. State*, 732 So.2d 1044, 1057 n.16 (Fla. 1999); Hawaii, *State v. Cababag*, 850 P.2d 716, 721 (Haw. Ct. App. 1993) (referring to a battered housemate or battered spouse); Idaho, *State v. Varie*, 26 P.3d 31 (Id. 2001); Indiana, *Marley v. State*, 747 N.E.2d 1123, 1126-29 (Ind. 2001) (referring to the "effects of battery" explicitly), IND. CODE ANN. § 35-41-1-3.3(2) (West 1998); Kansas, *State v. Lumley*, 976 P.2d 486, 498 (Kan. 1999) ("Evidence of prior acts between a defendant and a victim are admissible . . . if the evidence is to establish the relationship between the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged. Cases have allowed prior conduct to be admitted into evidence where a family relationship existed." (quoting *State v. Taylor*, 234 Kan. 401, 673 (1983))); Kentucky, *Springer v. Commonwealth*, 998 S.W.2d 439 (Ky. 1999) (referring to testimony on prior acts of battering, including the Battered Woman Syndrome); Louisiana, LA. CODE EVID. ANN. art. 404(A)(2) (West 1995) (referring to expert testimony on battering in a familial or intimate relationship); Maryland, MD. CODE ANN., CTS. & JUD. PROC. § 10-96 (2002) (defining battered spouse syndrome, but explaining that this syndrome is also recognized as Battered Woman Syndrome); Massachusetts, *Commonwealth v. Crawford*, 706 N.E.2d 289, 294 (Mass. 1999) (discussing the effects of Post Traumatic Stress Disorder), MASS. GEN. LAWS ANN. ch. 233, § 23F (West 2000) (establishing admissibility of past abuse and testimony on the effects of abuse); Michigan, *People v. Wilson*, 487 N.W.2d 822 (Mich. Ct. App. 1992); Minnesota, *State v. Ritt*, 599 N.W.2d 802, 811 (Minn. 1999) (observing that expert testimony is useful to aid jury, ambiguous as to whether expert testimony is limited to Battered Woman Syndrome or is totally gender neutral); Missouri, *State v. Pisciotta*, 968 S.W.2d 185, 189 (Mo. App. 1998) (referring to Battered Spouse Syn-



knowledgeable “Battering and Its Effects” and have also applied it in a trial of a battered male defendant.<sup>33</sup> The remaining twenty states and the District of Columbia maintain use of testimony on the Battered Woman Syndrome and continue to include the traditional Battered Woman Syndrome elements of stereotyping and subordination of women in self-defense analysis.<sup>34</sup>

drome, but claiming the syndrome explains why a battered *woman* would not leave), MO. REV. STAT. § 563.033 (2000); Nebraska, *State v. Doremus*, 514 N.W.2d 649 (Neb. App. 1994) (tangentially acknowledging Battered Spouse Syndrome); Nevada, *Boykins*, 995 P.2d at 478 (Nev. 2000), NEV. REV. ST. § 48.061 (2001) (applying the effects of battering to a spouse, cohabitant, and persons related through blood or marriage); North Dakota, *Krank v. Krank*, 529 N.W.2d 844, 848 n.2 (N.D. 1995) (acknowledging Battered Spouse Syndrome); Oklahoma, OKLA. STAT. ANN. tit. 22, § 40.7 (West 1992) (allowing admission of effects of abuse); Oregon, *State v. Moore*, 695 P.2d 985 (Or. Ct. App. 1985) (recognizing Battered Spouse Syndrome); South Carolina, S.C. CODE ANN. §17-23-170 (West Supp. 2001) (Battered Spouse Syndrome); Texas, TEX. CODE CRIM. PROC. ANN. art. 38.36(b)(1) (Vernon 2001) (allowing the admission of effects of battering); Utah, UTAH CODE ANN. § 76-2-402(5)(e) (1999) (including testimony on patterns of abuse for all victims of ongoing abuse in relationships); Virginia, *Peoples v. Commonwealth*, 519 S.E.2d 382, 388 (Va. Ct. App. 1999) (mentioning that expert testimony on Defendant’s mind-state is allowed for self-defense, citing a Georgia decision holding that expert testimony on Battered Person Syndrome is admissible in murder cases); Washington, *State v. Riker*, 869 P.2d 43, 50 (Wash. 1994) (discussing Battered Person Syndrome); West Virginia, *State v. Smith*, 481 S.E.2d 747, 752 n.5 (W.Va. 1996) (referring to battered partners, battered spouses, and battered women); Wisconsin, *State v. Hampton*, 558 N.W.2d 884, 891 (Wis. Ct. App. 1996) (acknowledging Battered Spouse Syndrome).

33. Georgia, *Bishop v. State*, 271 Ga. 291 (1999), *Chester v. State*, 267 Ga. 9 (1996); New York, *Colberg*, 701 N.Y.S.2d at 610; Pennsylvania, *Commonwealth v. Kacsmar*, 617 A.2d 725 (Pa. Super. Ct. 1992).

34. Note that in many of these states, the most recent discussion of Battered Woman Syndrome in a self-defense context is at least five years old. Also note *infra* Part II, specifically notes 69–72 and accompanying text, for a more detailed discussion of some of these more recent cases. Alaska, *Russell v. State*, 934 P.2d 1335, 1342 (Alaska Ct. App. 1997) (acknowledging Battered Woman Syndrome); California, *People v. Williams*, 78 Cal. App. 4th 1118, 1128 (2000), CAL. EVID. CODE ANN. § 1107(a) (West Supp. 2002); Colorado, *People v. Yaklich*, 833 P.2d 758, 759–60 (Colo. Ct. App. 1991), *cf.* *People v. Garcia*, 28 P.3d 340, 347 n.5 (Colo. 2001) (acknowledging that this court has never addressed the admissibility of testimony on the Battered Woman Syndrome and deciding the case on other grounds); Connecticut, *State v. Vumback*, 791 A.2d 569, 580 (Conn. Ct. App. 2002); Delaware, *GE Capital Mortgage Servs., Inc. v. Benoit*, 1994 WL 164498 (Del. Super. 1994) (acknowledging Battered Woman Syndrome); District of Columbia, *Nixon v. U.S.*, 728 A.2d 582, 584 n.1 (D.C. 1999); Illinois, *People v. Evans*, 648 N.E.2d 964, 969 (Ill. App. Ct. 1995); Iowa, *State v. Nunn*, 356 N.W.2d 601, 604 (Iowa. Ct. App. 1984), *overruled on other grounds*, 636 N.W.2d (Iowa 2001) (recognizing Battered Woman Syndrome); Maine, *State v. Anaya*, 438 A.2d 892, 893 (Me. 1981); Mississippi, *May v. State*, 460 So. 2d 778, 784 (Miss. 1984) (affirming a self defense instruction on Battered Woman Syndrome); Montana, *State v. Hess*, 828 P.2d 382,

Battering and Its Effects is gender-neutral.<sup>35</sup> As discussed in Part III, it is distinct from the Battered Woman Syndrome because it focuses only on the effects of the battering and not on the socio-cultural oppression and stereotypes that are incorporated in the Battered Woman Syndrome and are exclusive to women.<sup>36</sup> The two doctrines thus both seek to answer the original questions—why she did not leave, why she could not seek outside assistance, why she felt danger was imminent, why she acted reasonably given the circumstances—but the Battered Women Syndrome offers more, and different, evidence in its analysis.

## II. THE FOUNDATIONS OF THE BATTERED WOMAN SYNDROME

To understand why expansion of the Battered Woman Syndrome into Battering and Its Effects erodes and weakens its ability to answer our original questions, we must first return to the origins of the Battered Woman Syndrome. As discussed above, admission of expert testimony on the Battered Woman Syndrome became an accepted practice to aid juries in understanding the self-defense pleas of battered women who killed their spouses.<sup>37</sup> The use of such expert testimony grew out of a need for courts and juries to understand how a battered woman's perception of imminence may

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385 (Mont. 1992); New Hampshire, *State v. Baker*, 424 A.2d 171, 173 (N.H. 1980); New Jersey, *State v. Gartland*, 694 A.2d 564, 573 (N.J. 1997) (invoking Battered Woman Syndrome but stating a rule that men could also take advantage: "Our courts have always admitted evidence of a victim's violent character as relevant to a claim of self-defense so long as the defendant had knowledge of the dangerous and violent character of the victim."); New Mexico, *State v. Vigil*, 794 P.2d 728 (N.M. 1990) (acknowledging Battered Woman Syndrome and also mentioning Post Traumatic Stress Disorder, though refusing to invoke either); North Carolina, *State v. Grant*, 470 S.E.2d 1 (N.C. 1996) (acknowledging Battered Woman Syndrome but refusing a special self-defense instruction); Ohio, *State v. Palmer*, 2001 WL 311916 (Ohio Ct. App. 2000), OHIO REV. STAT. ANN. § 2901.06 (West 1997 & Supp. 2002); Rhode Island, *McMaugh v. State*, 612 A.2d 725, 727 (R.I. 1992); South Dakota, *State v. Burtzlaff*, 493 N.W.2d 1 (S.D. 1992) (recognizing Battered Woman Syndrome, but finding that Defendant was not suffering from the syndrome); Tennessee, *State v. Furlough*, 797 S.W.2d 631 (Tenn. Crim. App. 1990); Vermont, *State v. Verrinder*, 161 Vt. 250 (Vt. 1993); Wyoming, *Witt v. State*, 892 P.2d 132 (Wyo. 1995), WYO. STAT. ANN. § 6-1-203 (Michie 2002).

35. See, e.g., *Smith v. State*, 268 Ga. 196, 198 n.3 (Ga. 1997) (acknowledging that evidence of the Battered Person Syndrome may be offered for men, as well as women).

36. See *infra* Parts II–IV.

37. See *supra* note 13 and accompanying text.

have been reasonable, given her particular set of experiences.<sup>38</sup> Courts used a strict and objective understanding of imminence. One court refused to offer jury instructions on self-defense for a battered woman who had killed her spouse, reasoning that:

[U]nder our law of self-defense, a defendant's subjective belief or what might be 'inevitable' at some indefinite point in the future does not equate to what she believes to be 'imminent' . . . testimony about such indefinite fears concerning what her sleeping husband might do at some time in the future did not tend to establish a fear—reasonable or otherwise—of *imminent death or great bodily harm* at the time of killing.<sup>39</sup>

Another court reversed a lower court decision to include the Battered Woman Syndrome in its self-defense instruction to the jury, reasoning that the "self-defense instruction improperly allowed the jury to determine the reasonableness of defendant's belief that she was in imminent danger from her individual subjective viewpoint rather than the viewpoint of a reasonable person in her circumstances"<sup>40</sup> and determining that notwithstanding the testimony on the Battered Woman Syndrome, the defendant was not in imminent danger close to the time of killing.

The foundation of the Battered Woman Syndrome included more than just the effects of the battering itself, but extended further into the defendant's mind-state to consider other experiences that contributed to the defendant's feelings of powerlessness.<sup>41</sup> Most importantly, it incorporated the defendant's experiences as a woman and was intended to combat inequalities for women before the law as well as in society.<sup>42</sup> Dr. Lenore Walker introduced the Battered Woman Syndrome in the psychological realm and in the legal arena, using "trauma theory together with the psychological understanding of feminist psychology, oppression, powerlessness, and intermittent reinforcement theories such as learned helplessness . . . to understand the psychological impact of physical, sexual, and serious psychological abuse of the battered woman."<sup>43</sup> Walker realized the need for recognition of the Syndrome in order to com-

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38. BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 135.

39. State v. Norman, 378 S.E.2d 8, 14 (N.C. 1989).

40. State v. Stewart, 763 P.2d 572, 574 (Kan. 1988).

41. See generally Wini Breines & Linda Gordon, *The New Scholarship on Family Violence*, 8 SIGNS 490 (1983).

42. See *id.*

43. Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 326-27 (1992) [hereinafter *Battered Women Syndrome and Self-Defense*].

bat the fact that studies indicated that certain aggressive actions when perpetrated by women would be traditionally viewed as abnormal, whereas they might be viewed as understandable when committed by men. An ordinary jury would therefore be less likely to understand how a female defendant had acted reasonably in killing her batterer.<sup>44</sup>

Scholars noted that an alternative to advocating admissibility of expert testimony on the Battered Woman's Syndrome would be for a female defendant to plead insanity; however, this practice would only enforce stereotypes about battered women and women more generally, in addition to being an inadequate explanation of the behaviors of these women.<sup>45</sup> One court explained in greater detail:

Self-defense and insanity raise very different concepts. In an insanity defense, the relevant inquiry is whether the mind of the accused was so affected or diseased at the time of the crime charged that he could not tell right from wrong and perceive moral qualities of his act . . . . In contrast, in a self-defense claim the appropriate inquiry is whether the defendant reasonably apprehended imminent death or bodily injury.<sup>46</sup>

This illustrates the importance of enfolding the Battered Woman Syndrome in the self-defense doctrine to explain how the battered woman's actions were reasonable, rather than blaming them on the affliction of "insanity."

The legal application of the Battered Woman Syndrome thus emerged upon this questioning of traditional self-defense requirements because of their potential sex-bias. The traditional views of self-defense, imminence, and reasonableness, did not contemplate the realities of a battered woman's experiences because "[t]raditional self-defense doctrine envisions a confrontation between male strangers. It holds that a person is justified in killing another in self-defense if a reasonable 'man' would have acted the

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44. See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 142-43 (1984).

45. See, e.g., Chimène I. Keitner, *Victim or Vamp? Images of Violent Women in the Criminal Justice System*, 11 COLUM. J. GENDER & L. 38, 74-75 (2002) (explaining the difference between an insanity defense and a self-defense plea based on the Battered Woman Syndrome and discussing how the Battered Woman Syndrome allows a jury to consider how the defendant acted in a "reasonable" way); see also BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 117-18 (noting that a successful insanity plea "most often results in institutionalization for an indefinite period of time," a clearly unappealing and unjust result for a battered woman who justifiably killed her batterer).

46. *Washington v. Kelly*, 685 P.2d 564, 571 (Wash. 1984).

same way.”<sup>47</sup> These traditional requirements proved problematic for battered women in large part because society has for so long believed that women ought to obey their husbands, having once regarded women as property of their husbands. A woman who kills her spouse would thus be automatically considered insane or inherently *unreasonable*.<sup>48</sup> Courts acknowledged that wife battering “is not a new phenomenon, having been recognized and justified since Old Testament times. It goes largely unreported, but is well documented.”<sup>49</sup> In addition, men are often physically stronger than women, so women may need to use more than proportional force—indeed, they may need to use deadly force—to successfully defend themselves. Thus, battered women are often compelled to kill their abusers in their sleep, when they are unaware and less likely to respond with equally deadly force.<sup>50</sup> Lastly, leaving their home and their abusers may not be a real option for women who have attempted to do so in the past and failed, or whose batterers have threatened to find and injure them regardless of the outside assistance they may secure.

Scholars linked the patterns, behaviors, and perceptions of battered women to their role as women in a society marked by male domination, coercion and violence. Scholars explained that these women were acting in the context of a moral order that put the pressures and responsibilities of family problems on women.<sup>51</sup> They found that legal, social, and medical agencies were often unsupportive and even condemning.<sup>52</sup> And they acknowledged that

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47. Hope Toffel, Note, *Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths about Battered People Who Kill Their Abusers, and the Argument for Extending Battering Syndrome Self-Defenses to All Victims of Domestic Violence*, 70 S. CAL. L. REV. 337, 358 (1996).

48. *Id.* at 358–59; accord Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 632–33 (1980) [hereinafter *Equal Rights to Trial for Women*]; see also, BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 118 (“A woman who kills her husband is viewed as inherently unreasonable because she is violating the norm of appropriate behavior for women.”).

49. *State v. Hundley*, 693 P.2d 475, 478 (Kan. 1985) (holding that the instruction on self-defense given to the jury at trial constituted reversible error, and remanding for use of an instruction tailored to the consideration of the Battered Woman Syndrome including an instruction requiring that the defendant’s conduct be found necessary to defend herself against imminent force, rather than immediate force).

50. Toffel, *supra* note 47, at 359.

51. See BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 113–14.

52. LENORE E. WALKER, *THE BATTERED WOMAN* 43 (1979) [hereinafter *THE BATTERED WOMAN*]. Walker acknowledged that, at least traditionally, even

frequent financial dependence on male spouses and other socio-economic realities either made it literally impossible for women to escape, or made it impossible for them to reasonably believe they could.<sup>53</sup> Dr. Walker concluded that “a sexist society facilitates, if not actually encourages, the beating of women . . . these women do not remain in the relationship because they basically like being beaten. They have difficulty leaving because of complex psychosocial reasons. Many stay because of economic, legal, and social dependence.”<sup>54</sup> She further suggested that a man’s “superior physical strength, and society’s message that a woman belongs to a man like property” may influence a woman’s self perception.<sup>55</sup> Feminists and proponents of the Battered Woman Syndrome thus linked the battering of women and their responses to “women’s subordination within society and to more general social problems of abuse of power and control.”<sup>56</sup> Psychologists traced the behaviors and perceptions of battered women to inherent differences between men and women and the way they are raised in society.<sup>57</sup> Accordingly, courts were urged to recognize that patterns of battering could not be viewed as a series of distinct events but had to be placed in their socio-economic context, a context characterized by both gender inequalities and stereotypes.<sup>58</sup>

Accepting the legal implications of the Battered Woman Syndrome required the validation of several crucial assumptions by the courts: “first, that women act in self-defense under different circumstances and in different ways than men; second, that the law of self-defense incorporates sex bias; and third, that sex-based stereotypes of women generally, and battered or raped women specifically, interfere with jurors’ determinations of women’s claims of self-defense.”<sup>59</sup> Courts recognized the need for the Battered Woman Syndrome to elucidate why battered women believed that death or serious bodily injury was imminent, not only because of the immediate effects of battering but also as a result of collective experience and history:

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“[p]sychologists tend to counsel [battered women] to keep the family together at any cost.” *Id.*

53. *See id.*

54. *Id.*

55. *Id.*

56. Elizabeth Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 527 (1992).

57. *See* ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 75–85 (1987).

58. Breines & Gordon, *supra* note 41, at 492.

59. BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 132.

Wife beating is steeped in the concept of marital privacy, and the belief that wives are the personal property of the husband. In Blackstone's Commentaries the theory of coverture was advanced, making punishment for mistreatment of a wife impossible since the husband and wife were considered one . . . . [T]raditional attitudes have made legal and actual recognition of wife beating's criminal nature slow in coming. Even after it is recognized as a crime, it is difficult to obtain even-handed enforcement. *The misconceptions have affected the battered woman's perception of herself and reduced the options available to her.*<sup>60</sup>

Indeed, at one time a wife killing her husband was regarded as a much more heinous crime than if he killed her, because in "throw[ing] off all subjection to the authority of her husband" she was considered to have committed treason.<sup>61</sup> Although this legal double standard has been eradicated, the sentiment no doubt lingers, at least to some degree.<sup>62</sup> This history cannot help but form a backdrop for both the experiences of women with respect to sexism and subordination and both the subconscious and conscious sentiments of jurors.

Thus, stereotypes about battered women in particular, and about women more generally, enhanced the argument in favor of expert testimony on the Battered Woman Syndrome to aid jurors. Early courts reasoned that it was "widely acknowledged that commonly held beliefs about battered women are subject to myths that ultimately place the blame for the battering on the battered victim. For example, battered women are generally considered to be masochists who derive pleasure from being abused."<sup>63</sup> Courts concluded that these myths would obscure a jury's determination of why a battered woman stayed in a battering relationship and how this decision and her following actions were reasonable; the Bat-

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60. State v. Hundley, 693 P.2d 475, 479 (Kan. 1985) (emphasis added).

61. BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 114.

62. See, e.g., Hundley, 693 P.2d at 479.

63. See, e.g., Commonwealth v. Stonehouse, 555 A.2d 772, 783 (Pa. 1989). As Elizabeth M. Schneider notes:

The equal-rights problem for battered women who kill has many sources: widespread views of women who act violently, particularly against intimates, as "monsters"; commonly held misconceptions about battered women (that they "ask for" or provoke the violence, for example); gender bias in the concept of reasonableness; societal misperceptions about self-defense and application of the legal standards of imminent danger and proportionality; and deeply held cultural attitudes that pathologize women generally and battered women particularly.

BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 113 .

tered Woman Syndrome was a helpful and necessary tool to combat these misconceptions.<sup>64</sup> These feelings are the result of a history of stereotyping and must be considered and understood, rather than ignored. Dr. Walker's concepts of the "cycle theory of violence,"<sup>65</sup> "learned helplessness,"<sup>66</sup> and "powerlessness,"<sup>67</sup> could be "used to explain why a battered woman remains in a relationship that is both psychologically and physically harmful" where a man or ordinary juror might not.<sup>68</sup>

Some courts that still use the Battered Woman Syndrome (as opposed to replacing it with Battering and Its Effects) have retained these original gendered considerations. Recent decisions that have admitted testimony on the gendered Battered Woman Syndrome have explained that such "expert testimony is useful to clarify and refute common myths and misconceptions about battered women,"<sup>69</sup> to attack "unstated stereotypic assumptions by explaining why the defendant stayed in the relationship, why she never sought help . . . or why she feared increased violence,"<sup>70</sup> and can "explain[ ] that a battered woman does not quit the relationship because she continues to love her abuser and feels that she is responsible for keeping the marriage together and rearing the children. . . [and that] members of the battered woman's own families

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64. See BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 112–15.

65. *Battered Women Syndrome and Self-Defense*, *supra* note 43, at 330. Walker's research discovered that a vast majority of battering relationships proceed in a particular pattern involving three phases in this repeating "cycle of violence": Phase 1 is a period of tension-building, phase 2 is the period of battering incidents, phase 3 is the period of reconciliation. In cases where the violence is more escalated, phase 3 disappears and "the woman never feels out of danger," aware that a battering incident, perhaps a fatal one, is inevitable. *Id.*

66. *Id.* at 330–32. Learned helplessness develops as a result of the cycle of violence—the woman begins to believe that nothing she does will have any effect on her safety and that leaving is therefore not a viable option. *Id.*

67. *Id.* at 326, 327 n.14.

68. See *Washington v. Kelly*, 685 P.2d 564, 571 (Wash. 1984) (discussing both "learned helplessness" and "isolation").

69. See, e.g., *State v. Gartland*, 694 A.2d 564, 573 (N.J. 1997) (reversing the conviction of a battered woman defendant, holding that in her claim of self-defense, the jury should have considered "the history of prior abuse in assessing the honesty and reasonableness of the defendant's belief in the need to use deadly force").

70. *People v. Yaklich*, 833 P.2d 758, 761 (Colo. Ct. App. 1991) (explaining that "jurors on their own or encouraged by the prosecution, may assume that the defendant stayed in the abusive relationship because the abuse was not serious or because she enjoyed it").



often feel she brings the abuse upon herself.”<sup>71</sup> Generally, these courts have acknowledged that the self-defense doctrine and its history are “derived from a male model.”<sup>72</sup> Women lead different, “gendered lives,” necessarily affected by sexism and cultural and historical subordination, and therefore kill in self-defense under different circumstances and in different ways.<sup>73</sup>

### III.

#### ARGUMENTS FOR BATTERING AND ITS EFFECTS

Scholars who advocated a gender-neutral formulation of testimony on battering did so based on the argument that a gender-neutral defense promotes equality of individuals before the law, and more generally in society. This academic argument will be discussed below in III-A. Those courts that have accepted the shift toward Battering and Its Effects as well as its applicability to male defendants have also focused on the psychological effects of battering which, they rightly declare, can be experienced by men as well as by women. They have allowed expert testimony regarding these effects on the defendant to aid the jury in making the reasonableness determination in the defendant’s self-defense plea. These arguments will be discussed below in III-B.

##### A. *Equality & Individualism—Avoiding the Reinforcement of Gender Stereotypes*

Scholars pushed for a gender-neutral standard in an effort to achieve facial, if not substantive, neutrality as well as to further an individualist approach to determining a defendant’s state of mind. Some scholars feared that acceptance of the gendered Battered Woman Syndrome would reinforce stereotypes about battered women and gender stereotypes more generally.<sup>74</sup> Critics of the Battered Woman Syndrome argued that the use of the syndrome encourages those presumptions about battered women that we hoped to combat by the use of the syndrome and that the focus on the defen-

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71. *State v. Furlough*, 797 S.W.2d 631, 650 (Tenn. Crim. App. 1990) (affirming the admissibility of expert testimony on the Battered Woman Syndrome and finding error in the trial court’s preventing the expert on Battered Woman Syndrome from testifying as to defendant’s perception of fear and imminence of danger at the time she killed her husband).

72. *See, e.g., Gartland*, 694 A.2d at 570.

73. BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 101, 133.

74. *See Beecher-Monas*, *supra* note 25, at 124–25; Maguigan, *supra* note 25, at 442–49.

dant's subjective mind-state "serves to disconnect the battering from the social and legal context in which it occurs":<sup>75</sup>

Like the word "handicaps" . . . "battered woman syndrome" carries with it stereotypes of individual incapacity and inferiority, which lawyers and judges may respond to precisely because they correspond to stereotypes of women that the lawyers and judges already internalize . . . . Thus the description of battered women's "different" experiences, although purely categorical in intent, carries with it the familiar baggage of female incapacity.<sup>76</sup>

The concern is that the Battered Woman Syndrome "focuses on the woman's defects, the woman as subject to this 'syndrome,'" and therefore does not justify or affirm her acts, but rather seeks to excuse them.<sup>77</sup>

Therefore, these scholars instead advocated creative use of the self-defense doctrine that would involve a more subjective, individualistic, or case-by-case approach, which, as reflected in the Model Penal Code, "looks at reasonableness from an individual's own perspective."<sup>78</sup> Without individualization, scholars argued, juries could be swayed by their stereotypical images of battered women. Yet, if a judge or jury discounts or ignores "the effects of the sex of the defendant and tries to equate her with a man, it places a burden on her that her male counterpart is not asked to bear."<sup>79</sup> One scholar claimed that a gender-neutral formulation could "equalize the position of male and female defendants by recognizing their differences."<sup>80</sup> But, in so claiming, she highlighted precisely the problem with a gender-neutral approach: the need for recognition of the differences between battered male and female defendants.<sup>81</sup>

### B. *The Shared Experience of Battering*

Based primarily on the arguments of feminists detailed above in Part III-A, many courts have adopted the gender-neutral formulation of a battering syndrome.<sup>82</sup> As mentioned in Part I, some of these courts have also recognized that men, as well as women, can

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75. Mangum, *supra* note 6, at 609.

76. BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 134–35.

77. *Id.* at 135–36.

78. *Equal Rights to Trial for Women*, *supra* note 48, at 640.

79. *Id.*

80. *Id.*

81. *See infra* Part IV.A.

82. *See supra* Part I.

experience the effects of battering. One court justified this recognition on the basis that:

there are myths about the victims of abuse [regardless of their gender] which can be dispelled by expert testimony. . . . [P]roper expert testimony could convince the jury to find that the abused defendant was isolated and at the point of the killing, was justified in believing that no one could help them solve their problem.<sup>83</sup>

In *Chester*, the court acknowledged Battering and Its Effects, explaining that a defendant who seeks to justify use of physical force with testimony on Battering and Its Effects must demonstrate the existence of a history of physical violence against him by the victim.<sup>84</sup> While the *Chester* court ultimately found that the defendant, who fatally shot his girlfriend, was not a battered person, the court suggested that had he experienced a pattern of battering, he would have been entitled to jury instructions on what the court termed “the Battered Man Syndrome.”<sup>85</sup> Similarly, in *Bishop v. State*, the court remanded the case to the trial court in order for the defendant, who had killed his wife, to make a prima facie showing that he did indeed suffer from the battered person syndrome thus entitling him to an appropriate charge to the jury.<sup>86</sup> The court held that testimony on the syndrome can “show that the defendant had a mental state necessary for the defense of justification although the actual threat of harm does *not* immediately precede the homicide.”<sup>87</sup> In *New York v. Colberg*, the court held that in the case where a man shot and killed his adult son, expert testimony on the “‘battered syndrome,’ as the medical community accepts such syndrome as gender neutral,” should not be limited to women.<sup>88</sup> In *Commonwealth of Pennsylvania v. Kacsmar*, the court recognized that

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83. *Commonwealth v. Kacsmar*, 617 A.2d 725, 732 (Pa. Super. Ct. 1992). The court found that defendant was entitled to the admission of expert testimony on the Battered Person Syndrome. *See id.*

84. *Chester v. State*, 267 Ga. 9, 11 (1996). “[W]hen a defendant relies upon the battered person syndrome to justify his use of physical force against a homicide victim, he must show that he previously was subjected to acts of actual or attempted violence committed by the victim.” *Id.*

85. *Id.* at 9–10. Defendant requested instructions including that “Mr. Chester honestly was trying to defend himself although his mate was not at the moment *physically attacking him*” and that expert testimony may explain why “a person suffering from the battered man syndrome would not leave his mate [and] would not inform the police or friends.” *Id.* at 10.

86. *Bishop v. State*, 271 Ga. 291, 292–93 (1999).

87. *Id.* at 292.

88. *People v. Colberg*, 701 N.Y.S.2d 608, 610 (County Ct. 1999).

the rule pertaining to “the battering syndrome” should be applied to men as well as women, in this case because the defendant’s experience with his batterer brother was similar to that endured by a battered wife, and held that expert testimony should have been admitted at trial.<sup>89</sup> More recently courts have noted that over the years “many experts and social scientists have replaced the term ‘battered woman syndrome’ with the term ‘Battering and Its Effects,’ in response to research focusing on the effects of battering on women, men, and children.”<sup>90</sup>

Arguments for Battering and Its Effects offered by legal scholars have also addressed this shared experience of battering: “In reality, the behavior of battered women does not differ from the behavior of men or children in life threatening situations. . . . [T]he behaviors are those that any reasonable person would develop if placed in the same situation.”<sup>91</sup> Notwithstanding their recognition that one reason for the acceptance of the Battered Woman Syndrome “stems from the notion that women are differently situated with respect to domestic violence,” some theorists claim that all battering relationships, regardless of gender, “create a power imbalance between the battered and the batterer” and that, therefore, a gender-neutral syndrome is appropriate.<sup>92</sup>

#### IV.

#### WHAT BATTERED WOMEN HAVE LOST

It is the very need for recognition of the differences between male and female defendants (a need acknowledged by feminist theorists)<sup>93</sup> that necessitates a self-defense practice consistent with the origins of the Battered Woman Syndrome. An individualized approach that relies on the gender-neutral Battering and Its Effects has not adequately fulfilled this need. In the application of Battering and Its Effects, the differences between men and women—particularly the gendered experiences of women as a result of sexism, subordination, and stereotypical juror misperceptions—have

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89. *Commonwealth v. Kacsma*, 617 A.2d 725, 731–32 (Pa. Super. Ct. 1992).

90. *Smith v. State*, 268 Ga. 196, 198 n.3 (Ga. 1997) (holding that defendant who killed her husband was entitled to a jury instruction on the Battered Person Syndrome and recognizing that, notwithstanding the fact that the defendant in this case was a woman, in certain circumstances, battered syndrome evidence may be offered to show that men could also develop the syndrome).

91. *See, e.g.*, Toffel, *supra* note 47, at 356.

92. *Id.* at 357, 359. For a response, see *infra* Part IV.

93. *See supra* Part III.A.

been lost.<sup>94</sup> Rather than recognizing the differences between men and women, a gender-neutral approach will take women back to pre-Battered Woman Syndrome time when a battered woman defendant was forced to defend herself against a male-dominated and male-centered perception of reasonableness and imminence. There are so many characteristics and experiences that remain exclusive to women (and thus battered women): the historical and societal sexism and subordination of women leading both to biased jury perceptions and tendencies of battered women to feel more “helpless” than battered men, the typical variance in size between men and women and their ability to defend themselves without using fatal force, and the continued (though equalizing) financial imbalance between men and women. A gender-neutral approach therefore will not appropriately educate the jury vis-à-vis the reasonableness of a battered woman’s response considering these characteristics. “Male jurors are [still] more likely to minimize the violence or blame the woman; women jurors are more likely to say ‘I wouldn’t let that happen to me.’”<sup>95</sup>

Battering and Its Effects represents dilution and backsliding in our ability to understand the actions of battered women. The psychosocial elements of the Battered Woman Syndrome are not represented by Battering and Its Effects, which necessarily only encapsulates the effects of the physical battering itself because men have not experienced the same societal and historical pressures, stereotypes, assumptions, and subordination as women. While it is true that battered men develop feelings of powerlessness,<sup>96</sup> the recognition of this feeling was not the sole (nor even necessarily the most important) element resulting in the acceptance of the Battered Woman Syndrome. Rather, it was the realization that sexist presumptions prevented battered women from achieving justice in their self-defense pleas.<sup>97</sup>

Societal stereotypes remain, despite the strides that have been made since the original adoption of the Battered Woman Syndrome. If we ignore this fact, we doom women to judgment racked by these stereotypes. Without addressing these concerns and realities, courts have stripped battered women of a means for explaining

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94. See, e.g., *State v. Varie*, 26 P.3d 31 (Id. 2001); *State v. Edwards*, 60 S.W.3d 602, 611–12 (Mo. Ct. App. 2001); *Boykins v. State*, 995 P.2d 474, 478 (Nev. 2000); *Springer v. Commonwealth*, 998 S.W.2d 439 (Ky. 1999); *State v. Pisciotto*, 968 S.W.2d 185, 189 (Mo. Ct. App. 1998).

95. BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 103.

96. See Toffel, *supra* note 47, at 359.

97. See *supra* Part II.

why they, particularly, have behaved reasonably in killing their batterer. Battering and Its Effects is not identical—by definition, the historical background of battered women, and women more generally, will not inform it. If these syndromes are “shorthand”<sup>98</sup> for referencing scientific and sociological research capable of justifying a battered person’s actions, then battered women are being short-changed—Battering and Its Effects strips them of the history that underpinned the logic and necessity of the Battered Woman Syndrome. Therefore, this expansion to gender-neutrality risks the return of pervasive sexism and bias to juries without the aid of expert testimony to counter such assumptions.

An excellent example of this shift and resulting limits on evidence offered to support a battered woman is the recent New York case in which a battered woman filed a civil suit to recover damages against her abusive husband.<sup>99</sup> The amicus brief filed in support of Hedda Nussbaum, the plaintiff, invoked Battering and Its Effects (or “the impact of battering”) and referenced the psychological effects of a battering relationship, but omitted information which might have put this battered woman in the socio-cultural context that likely contributed to her feelings and experiences.<sup>100</sup> Instead, the brief detailed the development of research on the psychological impact of battering and described plaintiff’s experiences of battering.<sup>101</sup> The brief likened the battering relationship to the dynamic between hostage and captor, and the treatment of the plaintiff to that of a political prisoner or a prisoner of war.<sup>102</sup> Within the confines of “the impact of battering” there was no space for a development of Ms. Nussbaum’s experience *as a woman* within her relationship or society. The brief might have been even more persuasive had it included information regarding societal or familial stereotypes and assumptions about how a loving and caring mother should respond to her husband that influenced her behaviors and her decision to remain with Steinberg for so many years despite abuse.

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98. Mangum, *supra* note 6, at 595.

99. Nussbaum v. Steinberg, 703 N.Y.S.2d 32 (N.Y. App. Div. 2000) (holding that the statute of limitations for plaintiff’s civil action had not expired, given plaintiff’s inability to function in society, due in part to Battering and Its Effects, which tolled the statute of limitations).

100. See Memorandum of Law of Amici Curiae Elizabeth Schneider et al. in Support of Respondent, at 21–27, Nussbaum v. Steinberg, 703 N.Y.S.2d 32 (N.Y. App. Div. 2000) (No. 23416-88).

101. *Id.* at 22–23.

102. *Id.* at 24.

For Hedda Nussbaum, the omission was not fatal to her case.<sup>103</sup> In other cases, the consequence of using Battering and Its Effects is more detrimental. For example, a jury convicted Christine Pisciotta of second-degree murder for killing her husband despite testimony offered on the battered spouse syndrome; the conviction was affirmed on appeal.<sup>104</sup> The appellate court agreed with the jury's finding that "[t]he evidence show[ed] overwhelmingly that, regardless of whether defendant was a battered spouse, she did not act in self-defense."<sup>105</sup> The opinion cites a Missouri statute that provides for evidence regarding the gender neutral syndrome and references evidence that might be relevant such as the fact that the defendant thought her spouse would kill her, that he had abused her in the past, and was attacking her when she killed him.<sup>106</sup> But the opinion did not make mention of the sort of societal pressures, subordination, and stereotypes that might also have influenced the defendant's behavior and supported the reasonability of her response in this instance. This evidence, had it been offered, might have convinced the jury that Christine Pisciotta was indeed acting in self-defense. Similarly, Lisa Marie Varie was convicted of second-degree murder for the killing of her husband and the conviction was affirmed.<sup>107</sup> Expert testimony was only offered on the subject of the character of domestic violence and the usual reaction of victims.<sup>108</sup> In addition, the court found that such reactions were common experiences within the understanding of an ordinary juror and therefore disallowed further testimony regarding this defendant's reactions.<sup>109</sup> This begs the question whether other considerations, such as the psychosocial elements included in testimony on the Battered Woman Syndrome, might have been beyond the knowledge of an ordinary juror and might have proved helpful to the self-defense plea of Ms. Varie.

*A. A Response to the Individualized Gender-Neutral Approach*

A major argument for the gender-neutral expansion of the Battered Woman Syndrome<sup>110</sup> is that an individualized approach does

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103. *Nussbaum*, 703 N.Y.S.2d 32 (basing its decision that the statute of limitations on her civil claim had not run primarily on evidence on Battering and Its Effects).

104. *State v. Pisciotta*, 968 S.W.2d 185 (Mo. Ct. App. 1998).

105. *Id.* at 190.

106. *Id.* at 189–90.

107. *State v. Varie*, 26 P.3d 31 (Id. 2001).

108. *Id.* at 37–38.

109. *Id.*

110. *See supra* Part III.

greater justice to women and that the Battered Woman Syndrome only perpetuates the perception of battered women as mentally unstable and enforces stereotypes of women as inferior or subordinate to men.<sup>111</sup> The feminist scholars who make this claim advocate a neutral standard paired with a more individualized approach to understanding a defendant's mental state when evaluating a claim of self-defense, whether that defendant is male or female.<sup>112</sup> This, they argue, would enhance equality more generally.<sup>113</sup> Such an individualized approach would include a full consideration of individual differences and capacities when determining whether a defendant should be found guilty. "Rather than focusing on the hypothetical reasonable man, individualization demands that the jury inquire into the individual defendant's characteristics and culpabilities. [This] . . . sex-neutral, individualized approach 'can equalize the positions of male and female defendants by recognizing their differences.'"<sup>114</sup>

While this result is indisputably the goal, the question is: Do we truly believe a sex-neutral approach in theory will lead to individual assessment in practice? The origins of the Battered Woman Syndrome indicate that expert testimony reflecting the history and traditional assumptions regarding the subordination and battering of women was necessary in order for juries to adequately understand women's responses.<sup>115</sup> Until sex stereotypes have been eviscerated, the need for a gendered view of self-defense pleas offered by battered women remains critical for a full understanding of their perceptions and actions.

The application of the Battered Woman Syndrome does not preclude an individualized approach; indeed it informs such an approach. Without the recognition of the Battered Woman Syndrome, an individualized approach would be rendered ineffective, in the absence of a primary component explaining the behavior of any battered woman. To accept and apply Battering and Its Effects rather than the Battered Woman Syndrome would take us back to an inquiry into a hypothetical person when considering whether an actual and particular battered *woman* behaved reasonably. As a re-

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111. See, e.g., *Equal Rights to Trial for Women*, *supra* note 48, at 640; Beecher-Monas, *supra* note 25, at 124-25; BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 134-35.

112. See, e.g., BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 114.

113. See, e.g., *Equal Rights to Trial for Women*, *supra* note 48, at 639-40.

114. Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 132 (1985) (internal quotations omitted).

115. See *supra* Part II.



sult of still-existing cultural norms and assumptions, the hypothetical person is likely to be a hypothetical *man*.

Further, the Battered Woman Syndrome was first accepted and continues to be useful as a means of understanding the effects of a constellation of societal stereotypes and prejudices. While it is true that this background carries with it stereotypes about women, it is these very stereotypes that influence and affect the perceptions and behaviors of women in these situations. To condemn an explanation of the effects of those stereotypes by claiming that the explanation perpetuates those stereotypes is to throw water on the smoke while the fire continues to rage; a gender-neutral standard does nothing to attack these stereotypes—it merely avoids them. Indeed the Battered Woman Syndrome does not remove the battering from its social and legal context, rather it seeks to incorporate that context fully.<sup>116</sup> As discussed in Part III, scholars argue that the Battered Woman Syndrome implies that women are weak and therefore susceptible to suffering from this psychological “syndrome.” But invoking Battering and Its Effects does nothing to change this perception. Indeed in a self-defense plea it is inevitable that we concentrate on the state of mind of the defendant. Thus, whether the defendant is affected by Battered Woman Syndrome or by Battering and Its Effects, it is appropriate to include such considerations.

As opposed to enhancing an inquiry into the particular individual’s context in society and in the battering relationship, the application of Battering and Its Effects would limit this inquiry. In order to recognize the differences between male and female defendants, we must understand why men and women may perceive situations differently and therefore behave in different ways. If our goal is to improve jury perception of the reasonableness of battered women, as well as to further equality more generally by understanding and appreciating the difference in experience, history, stereotypes, and resulting perception and behavior between women and men, adopting a gender-neutral approach will only take us further afield.

Scholars question whether, if we allow the experiences of battered women to be explained as different, these women and their experiences can ever be “incorporated into the traditional standard and understood as equally reasonable.”<sup>117</sup> But why do the exper-

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116. See *supra* Part II, specifically notes 51–53 and accompanying text; see also, Beecher-Monas, *supra* note 25, at 126–30, 132; Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1231–32 (1993).

117. BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 134.

iences of battered women need to be incorporated into a traditional approach that is inherently male? It seems eminently plausible that a battered woman's behavior will be entirely different than the behavior of any other person, but will nonetheless be "reasonable" when considered in light of the explanations offered by the Battered Woman Syndrome.

Essential to this individualized approach, in the case of a criminal defendant, is an adequate and complete account of why she perceived her behavior (the killing of her batterer) as not only reasonable, but necessary. The Battered Woman Syndrome need not be the only explanation offered for her behavior, but it is a straightforward and efficient way to educate a jury that considers both societal pressures<sup>118</sup> and stereotyping<sup>119</sup> as well as individual feelings and responses. Battering and Its Effects strips every battered woman of this explanation, leaving only explanations that are necessarily non-gendered and therefore incomplete. The goal is to accept the differences between men and women in order to achieve legal equality for battered women, and thus all women; the means toward that goal include the maintenance of an accepted psychosocial phenomenon that belongs to women exclusively by the very fact of being a woman.

*B. A Response to the Argument of Shared Experience of Battering and Its Effects*

As discussed in Part III, in addition to embracing the justifications offered by feminists scholars,<sup>120</sup> courts have also justified the use of Battering and Its Effects by explaining that men can experience the effects of battering just as women do.<sup>121</sup> Indeed, Dr. Walker herself recognized that "feelings of powerlessness by both men and women contribute to the cause and maintenance of vio-

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118. These societal pressures include all the elements discussed earlier which exist as a result of the historical subordination, discrimination, and categorizing of women. Such elements include the frequent physical differential between battered women and their batterers, the pressures of being a wife and holding a family together, the assumed inability of a woman to support herself and her children independently, as well as the legal baggage that originated with the doctrine of coverture and remains today in the perceptions of judges and juries. *See supra* Part II.

119. Stereotyping considerations include probable juror perceptions of women as subordinate to men, of battered women as masochists, and of women who kill, even in self-defense, as crazy. *See supra* Part II.

120. *See supra* Parts III.A and IV.A.

121. *See supra* Part III.B.

lent behavior.”<sup>122</sup> But she further noted that “although many men do indeed feel powerless in relation to control over their lives . . . *the very fact of being a woman*, more specifically a married woman, automatically creates a situation of powerlessness.”<sup>123</sup> Considering the dualistic foundation of the Battered Woman Syndrome—including both evidence of Battering and Its Effects as well as analysis of the perceptions and feelings of battered women as a result of being *women* in society—it is clear that a gender-neutral standard abstracts much of the original justification and value of the Battered Woman Syndrome.

Advocates of the gender-neutral standard “want[ ] the legal system to treat the battered woman defendant in a sex-neutral way, but [can only] explain[ ] her individual act of self-defense by putting it within the context of the experience of abuse she shares with other battered women.”<sup>124</sup> Her perceptions, actions and experiences as an individual woman are unavoidably connected to her experiences as a member of the “‘battered women’ group . . . [and they are] not sex-neutral: *they are sex specific, sex-linked, and sex-charged*.”<sup>125</sup> By accepting Battering and Its Effects, we thus eliminate the second function of the Battered Woman’s Syndrome: we exclude the analysis of the context of women in society and how the experiences of sexism, subordination and certain societal pressures and assumptions are reflected in the perceptions and behaviors of a battered woman.<sup>126</sup> It is essential that a jury recognize that “the accused did not act in a vacuum, but in conjunction with pervasive overlapping social interests. Not only must the perspective of the individual be presented as evidence, but the perspective must be explained in terms of the common experience of women in such situations.”<sup>127</sup>

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122. THE BATTERED WOMAN, *supra* note 52, at 51.

123. *Id.* (emphasis added).

124. Crocker, *supra* note 114, at 151.

125. *Id.* (emphasis added).

126. Consider the following:

Expert testimony about domestic violence is necessary and helpful because in order to understand the abusive relationship circumstances in which the accused found herself, two things are needed: the particular relationship facts and the social, political and economic contextual facts about domestic violence. . . . The social context testimony explains the common social, political and economic circumstances of battered women as a group.

Beecher-Monas, *supra* note 25, at 126–28.

127. *Id.* at 127.

## V.

## RECOMMENDATIONS &amp; FUTURE RESEARCH QUESTIONS

Courts must therefore reclaim the gendered use of the Battered Woman Syndrome for battered women. An expert should be able to offer traditional evidence and information about a battered woman defendant within the framework of the Battered Woman Syndrome that includes both the effects of battering on a defendant as well as the socio-cultural stereotypes and assumptions that play into the battered woman's perceptions.

An important corollary to this argument and an important question to be answered is the case of battered women in homosexual relationships. Many of the elements and explanations included in the Battered Woman Syndrome apply equally to all women, whether battered by a male or female spouse, such as historical discrimination and subordination, low self-esteem, and perceived or actual inability to support oneself in society without a partner. These feelings of powerlessness have been experienced by women as a group over time and can therefore be felt by each individual woman, regardless of sexual orientation, by the "very fact of being a woman."<sup>128</sup> Today many states exclude gay and lesbian relationships entirely from their domestic violence statutes, while others impose a "living together" requirement that excludes proportionately more lesbian victims than heterosexual ones.<sup>129</sup> Scholars rightly claim that the heterosexual background and application of the Battered Woman Syndrome is inadequate to address problems of same-sex domestic violence.<sup>130</sup> These issues, among others, undoubtedly complicate, or at least alter, the traditionally heterosexual analysis of battering and are beyond the scope of this Note. Nonetheless, the essential and subtler socio-cultural elements that are crucial to the understanding of a battered woman are undeniably applicable to lesbian women as well as heterosexual women.

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128. THE BATTERED WOMAN, *supra* note 52, at 51.

129. See Krisana M. Hodges, Comment, *Trouble in Paradise: Barriers to Addressing Domestic Violence in Lesbian Relationships*, 9 LAW & SEXUALITY 311, 314–20 (1999–2000).

130. See Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 327–28 (1999) (arguing that these issues cannot be explained in the same way by "reference to gender difference . . . or the private nature of family violence" and explaining that when dealing with same-sex domestic violence there are many different stereotypes and experiences that inform the experience of battering, power, and violence in the relationship).

On the other side of the gender line, battered men (both homosexual and heterosexual) could invoke testimony on Battering and Its Effects. The perceptions of the battered man could also be drawn out and explained by a showing of past violent acts committed by the victim against the defendant, a practice that is already included in traditional self-defense doctrine. Additionally, research may find characteristics exclusive to battered men (or to battered men of a particular sexual orientation or other identifiable social group) that affect their behavior or perceptions (such as feared stigma of being weak or of not living up to a societal expectation of “machismo”). Such research could be included and possibly developed into a particularized syndrome on which testimony could be offered. At this time, however, such a development remains hypothetical.

## VI. SYMBOLIC IMPLICATIONS

This argument can and should be fit into the context of a broader feminist theory: that in order to achieve equality, to reap the same benefits, women should not be expected to conform to a social and legal framework which traditionally does not contemplate female realities.<sup>131</sup> Assimilation to this framework, and to a gender-neutral model, will be problematic because this framework was instilled in society by male understandings, and thus “was ultimately translated in law and policy as inferiority, resulting in stigma and exclusion.”<sup>132</sup> This is why “when courts apply the purportedly neutral reasonable person standard where the male experience defines neutrality—but where consensus and commonality between men and women simply do not exist—the law systematically excludes women’s experiences and punishes women because they are not men.”<sup>133</sup>

Indeed, adopting a gender-neutral perspective of equality will only lead to a suppression of what it truly means to be a woman and ignore the differences between the sexes—“current ‘female behav-

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131. See BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 13, at 115 (“We now recognize that male physical violence is part of a larger framework of power and coercive control over women, which includes restriction of fundamental rights of freedom, choice and autonomy.”).

132. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 38 (1995).

133. CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 14 (2000).

ior' will gradually wither away."<sup>134</sup> One scholar commented that, "[t]he demand for parity, then, is defended as the demand for the recognition of the equivalent value of the feminine within sexual difference."<sup>135</sup> Another has argued that talking about equality for all of "humanity" has no value because women are not really "humans" within, at least, a legalistic definition of the term<sup>136</sup>—an example is how battered women are not adequately represented by the traditional self-defense standard. She insists that feminists must demand women's humanity and gain "acceptance of our difference."<sup>137</sup>

In a world in which gender is more than semantics, feminist legal theory cannot be gender neutral nor can it have as its goal equality in the traditional, formal, legal sense of that word. Feminist theory must be woman-centered, gendered by its very nature because it uses women's experiences as its raw building material. Since women live gendered lives in our culture, any analysis that begins with their experiences must of necessity be gendered. Addressing the real material consequences of women's gendered life experiences cannot be accomplished by a system that refuses to recognize gender as a relevant perspective, imposing "neutral" conclusions on women's circumstances.<sup>138</sup>

Scholars have argued that the law needs to indoctrinate a vocabulary through which we can voice our differences and understand their implications.<sup>139</sup> We have already created such a vocabulary for battered women who kill their spouses: the Battered Woman Syndrome.

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134. Note, *Toward a Redefinition of Sexual Equality*, 95 HARV. L. REV. 487, 488 (1981) (internal quotations omitted).

135. DRUCILLA CORNELL, *THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY, & SEXUAL HARASSMENT* 19 (1995).

136. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 211 (2000).

137. *Id.* at 212.

138. FINEMAN, *supra* note 132, at 62 n.41.

139. See, e.g., West, *supra* note 136, at 212.