Discerning Justice When Battered Women Kill

David L. Faigman
Review Essay

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Reviewed by DAVID L. FAIGMAN*

With his book Battered Women Who Kill, Professor Charles Ewing adds a new view to the already effervescent literature debating the proper legal response to women who, after years of suffering abuse, kill their abusers.1 Typically, battered women defendants claim self-defense, even though the killings frequently occur under circumstances that do not fit

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the classical self-defense paradigm. In many cases, battered women use deadly force on their abusers in apparent disproportion to any immediate threat, or when no apparent immediate threat is present. Yet, upon reading descriptions of the circumstances of these cases, the killings often appear justified or, at least, excusable. Nonetheless, the doctrine excludes these women defendants from its restricted scope. Ewing argues that the severe circumstances of violent relationships pose a dire physical and psychological threat to women that may justify their killing their mates. *Battered Women Who Kill* undertakes the formidable task of reshaping self-defense doctrine in order to bring it into conformity with this belief.

Reformers who write about battered women who kill face a sizeable challenge: how to reconceptualize the contours of self-defense doctrine to encompass the situation of the battered woman defendant without stretching the doctrine beyond recognition. At the present time, the dominant strategy is to try to avoid this problem entirely by showing how the situation of the battered woman who kills really does fit into the traditional self-defense framework. Proponents of this strategy usually proffer expert testimony on the "battered woman syndrome" to support a defendant's claim that she reasonably feared imminent serious harm or death on the occasion in question. Ewing rejects the use of battered


3. Professor Fletcher has explained the distinction between justification and excuse as follows: "A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a conceded wrongful act." G. FLETCHER, RETHINKING CRIMINAL LAW 759 (1978). The line between justification and excuse in the law of self-defense is not a very clear one, however. See Fletcher, The Right and the Reasonable, 98 HARV. L. REV. 949, 956 n.37-38 (1985) (discussing difference in self defense as justification and as excuse); Greenawalt, The Perplexing Borders of Justification and Excuse, 84 COLUM. L. REV. 1897, 1927 (1984) ("[T]he central distinction between justification and excuse is between warranted action and unwarranted action for which the actor is not to blame."). The issue whether battered women who kill and claim self-defense do so as an excuse or as a justification has been the subject of some comment. See Rosen, The Excuse of Self-Defense: Correcting A Historical Accident On Behalf of Battered Women Who Kill, 36 AM. U.L. REV. 11, 45-55 (1986) (arguing that self-defense developed originally as an "excuse" rather than as a justification, and that the "battered women defense" is more consistent with this traditional use); Comment, The Defense of Battered Women Who Kill, 135 U. PA. L. REV. 427, 439-44 (1987) (finding the battered woman syndrome to be consistent with a defense of temporary insanity). As the title of his book indicates, Ewing firmly believes justification rather than excuse forms the foundation of battered women defendants' claims of self-defense. It may be that most battered women who kill in self-defense should be in part justified and in part excused for their action. See infra note 64, and accompanying text.

4. The theory of "battered woman syndrome" is based on the clinical research of Lenore
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woman syndrome evidence, principally because he does not believe it is sufficiently effective (pp. 55-56) and proposes an altogether different scheme for evaluating battered women defendants' claims of self-defense. Ewing posits a truly novel, and some will find unrealistic, solution to the problem of battered women who kill. He advances what he calls "psychological self-defense" in his stated effort to enable more battered women defendants to gain acquittals (pp. 78-79). In so doing, he attempts a fundamental reconceptualization of self-defense by reinterpreting the imminence and proportionality requirements of existing self-defense doctrine. His attempt, and ultimately his failure, to develop a viable alternative tells us much about the conceptual and practical difficulty of defending battered women who kill.

This Review begins in the same fashion that Ewing and many other writers in this area begin, with a discussion of the circumstances that lead some battered women to kill. Rather than select a case study as Ewing does, however, I attempt to juxtapose the "typical pattern" reportedly found in these cases with existing self-defense doctrine in an effort to explore the values inherent in the justified use of deadly force in self-defense. Ewing argues, and most commentators who have considered the question agree, that existing self-defense doctrine does not adequately comprehend the situation of battered women who kill in self-defense. In part II, I consider the current generally accepted solution to this problem—the battered woman syndrome—and Ewing's reasons for disfavoring it. In part III, I outline and comment upon Ewing's proposed alternative of "psychological self-defense." Invoking several psychoanalytic principles, Ewing posits that women subjected to, and threatened with, repeated physical abuse that never poses an imminent serious or deadly physical harm may be justified in using deadly force to avert the "extremely serious psychological injury" threatened by the abuse. In the final section, I review briefly the scientific basis for Ewing's ideas and then return to the issue introduced in the first section regarding the underlying justification for the action of battered women who kill.

I. Traditional Self-Defense and Battered Women Who Kill: The Common Ground

The doctrine of self-defense embodies much of the American mythology of rugged individualism. Indeed, the four elements of self-defense doctrine very well could have been lifted from the script of a John Ford Western. The Noble western figure walking down the dusty street shoots down the outlaw only if he himself faces imminent danger of the same fate. Surely no valorous cowboy draws when not confronted by the first element of self-defense, imminent harm. Similarly, the second element of self-defense is met since no self-respecting (i.e., reasonable) movie hero would use a gun when the outlaw is unarmed; a fair fight requires a proportional response. The third element of self-defense is easily satisfied by the movie hero, since, by definition, he is never the aggressor. The final element, however, the duty to retreat, presents some difficulty. Western heros rarely retreat, most often going out of their way to face outlaws' threats. But even this element ultimately does not interfere with our believing that the Western hero was justified in killing. Often the hero refrains from fighting until the end of the picture; and by this time, like the proverbial wall to which the reasonable man should retreat, the audience expects nothing less than that the hero "defend" what is right.

The battered woman, it seems, is far removed from the Western

5. See generally Crocker, supra note 1, at 126 (demonstrating sex bias in the self-defense reasonable man standard); Schneider, Equal Rights, supra note 1, at 636 (same).
7. In describing the typical western movie gunfighter who kills in "self-defense," I do not assert that these fictitious figures act reasonably or would be acquitted under existing self-defense doctrine if prosecuted; nor do I intend to vouch for the historical accuracy of the films that depict the life and times of these heralded individuals. In fact, few Westerns are, or attempt to be, historically accurate. See J. TUSKA, THE AMERICAN WEST IN FILM: CRITICAL APPROACHES TO THE WESTERN 3-15 (1985) (criticizing representative sample of western films for historical inaccuracies); WESTERN MOVIES (W.T. Pilkington & D. Graham, eds. 1979) (collection of essays discussing the western film as classical myth). Also, the prosecutability of real western gunfighters in those times of lawlessness surely is a more complex question than I describe. My only purpose in using the Western as a metaphor of the battered woman's plight is the "myth" that they portray, and in particular, with the perception of what actions may be viewed as necessary or reasonable to defend oneself. See Graham, High Noon (1952), in WESTERN MOVIES, supra, at 52 ("if one is going to appreciate rather than dogmatize about Westerns [one must] realize that they are about ideas of the past (and present), rather than accurate reproductions of the past").
9. Id.
10. Id. at 394-95.
11. Id. at 395.
12. See Comment, Dwelling Defense Law in Missouri: In Search of Castles, 50 UMKC L. REV. 64, 66 (1981); see also infra note 55 and accompanying text.
hero who not only avoids prosecution at the film’s conclusion, but is ap-
plauded by the townsfolk, if not the audience, as he rides into the sunset. But in reality, how different are battered women who kill from the West-
ern movie stereotype? Western movies, after all, in many ways reflect the
values that most people would consider important to a determination of
when the use of force is justified. In fact, most authors sympathetic to
battered women who kill, and Professor Ewing follows suit, describe in
detail the many different contexts in which intimate violence results in
the death of the abuser (pp. 99-142). The purpose for including these
descriptions obviously lies in the belief that, if viewed in proper context,
battered women who kill will be seen to have acted reasonably and justifi-
ably. The battered woman’s story may be more complex than the con-
trived plots of most movie Westerns, but the reasonableness of her killing
still depends on basic precepts of what is just.

According to the one hundred cases Ewing summarizes in the ap-
pendix to his book, the “typical” battered woman who kills has suffered
years of severe abuse at the hands of her husband or “lover” before she
responds with the fatal blow.14 The battered woman may have sought
outside help, but was frustrated by the police’s or community’s inade-
quate response to the situation.15 The woman may have tried to leave,
but was forced to stay, perhaps by threats of further abuse.16 In some
cases the battered woman may have been physically barred from leaving
or physically forced to return (p. 117); in still other cases, the woman
may have been economically dependent on the batterer, or may have had
no family or friends in the area to which to turn for help.17

13. See L. WALKER (1979), supra note 4, at 80.
14. See, e.g., Meeks v. Bergen, 749 F.2d 322 (6th Cir. 1984) (defendant claimed to have
been beaten by her common-law husband throughout her 10-year relationship with him);
Smith v. State, 247 Ga. 612, 277 S.E.2d 678 (1981) (defendant claimed to have suffered beat-
ings for the six years that she dated and lived with victim).
15. See generally L. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN
CRIMINAL JUSTICE RESPONSE 41 (1981) (empirical evaluation of criminal justice response to
wife assault); Dutton, The Criminal Justice Response to Wife Assault, 11 L. & HUM. BEH. 189
(1987) (same); Finesmith, Police Response to Battered Women: A Critique and Proposals for
Reform, 14 SETON HALL L. REV. 74 (1983) (discussing police guidelines for intervention in
domestic violence).
16. See, e.g., Fielder v. State, 683 S.W.2d 565, 593 (Tex. 1985) (batterer told wife “there
wasn’t anything or any place on this earth” that she could ever go where he wouldn’t find her);
State v. Smith, 247 Ga. 612, 613, 277 S.E.2d 678, 679 (1981) (defendant stated that she “was
scared to quit seeing the victim because he threatened her”).
17. Research conducted by Professors Kalmuss and Straus indicates:
The primary group of women who tolerate severe violence are those highest in
objective dependency [i.e., economic dependency]. For such women it is not a ques-
tion of necessary motivation to overcome the obstacles keeping them in abusive mar-
rriages, because, in a sense, the obstacles for them are insurmountable. They have
virtually no alternatives to their marriages and, therefore, “must” tolerate the condi-
tions of those marriages.
Kalmuss & Straus, Wife’s Marital Dependency and Wife Abuse, 44 J. MARRIAGE & FAM. 277,
Confronted with escalating abuse, and with no way out, battered women sometimes resort to self-help. But often the battered woman does not confront the batterer on his own terms, unlike the Western hero who draws only when drawn upon. Instead, the battered woman anticipates the abuse she knows too well, and responds before the potentially fatal blow is raised; or she responds after an abusive incident, in order to stave off a recurrence which might result in her death. In addition, the woman, often smaller and not socialized into the male "art" of violence, uses a gun or a knife when the batterer approaches unarmed. The battered woman does not wait for the abuse to begin and uses a weapon when not threatened with a weapon because she cannot defend herself at another time, or in another way. The woman's lethal action does not fit within the narrow confines of self-defense doctrine, nonetheless it appears justified because under the circumstances it was a reasonable and warranted response for which she cannot be blamed.

The central message of Ewing's book is that the existing doctrine of self-defense frustrates any straightforward application of this intuitive "sense of justice" to battered women who kill. Throughout the book he rejects the mechanical application of the four elements of the existing doctrine because it prevents any complete understanding of the battered woman's situation. He also criticizes battered woman syndrome advocates for failing to explain the "reasonableness" of the woman's action, that is, for failing to challenge self-defense doctrine directly. In contrast, Ewing purports to recast the doctrine itself, to bring it into line with what he considers justifiable lethal responses to continued abuse.

Instead of relying on the fact-finder's intuition or common sense that battered women may sometimes be justified in killing their abusers, Ewing constructs a complicated psychological explanation for their actions. Unfortunately, this psychological approach mirrors the approach of the battered woman syndrome theorists whom he criticizes, in that he shrinks from confronting the doctrine squarely. Ewing skirts serious exploration of the "justness" of the battered woman defendant's conduct by substituting a psychoanalytic proxy for this analysis. Courts, however, tend to view such psychological theorizing as creating exemptions from the existing rule rather than, as they should, challenges to the rule itself. They are viewed as "battered women defenses." Certainly, there are

284-85 (1982); see also Strube & Barbour, The Decision to Leave an Abusive Relationship: Economic Dependence and Psychological Commitment, 45 J. MARRIAGE & FAM. 785 (1983) (concluding that economic dependence contributes significantly to a woman's decision to remain in an abusive relationship).

18. See MacKinnon, Toward Feminist Jurisprudence, 34 STAN. L. REV. 703, 732 (1982) ("Women thus perceive the need and do need to resort to deadly force, [and] are more threatened than a similarly situated man, largely because they are less able to care for themselves than they would be if they were trained the way men are trained.").

19. Ewing rejects the notion that there should be a separate "battered woman defense"
practical reasons for shying away from frontal attacks on current doctrine; but until advocates for battered women defendants confront the self-defense doctrine directly, their line of defense will remain flawed.

II. "Exempting" Battered Women From the Rule of Self-Defense

The simple elegance of traditional self-defense doctrine, and the reason why courts fear giving it up, lie in its ability to discriminate between cases. It is a foothold on a slope as slippery as they come in the law. Yet the simplicity of the traditional self-defense doctrine is its fatal flaw. The doctrine paints reality in broad and distorted strokes. Few cases truly fit the narrow confines of the doctrine, but many more fit its underlying policy. Yet courts can not help but recognize the injustice of the doctrine as it sometimes is applied. In order to mend constant rifts in the paradigm, courts have resorted to stop-gap measures or narrowly drawn exemptions instead of dealing with the breaches themselves. Such measures can only be short-term solutions, however, for while they may appease certain groups, they do not address the problem at its core.

By far the most preferred exemption from the strict application of self-defense doctrine in cases where women kill their abusers is Lenore Walker's clinical research on the "battered woman syndrome." As the many articles and books on this topic demonstrate, no one can discuss the plight of battered women without giving some consideration to this research (pp. 51-60). Walker's theory consists of basically two parts. The core of her work lies in what she terms the cycle theory of violence. She believes abusive relationships develop a fixed pattern or cycle: The abuse begins with a phase of increasing tension, which erupts into a severe battering incident, which, in turn, is followed by the abuser's apolo-
gies and promises that it will not happen again.\textsuperscript{22} Despite the abuser's "loving contrition" expressed during the third phase, the abuse eventually recurs in the same cyclical fashion. Because the abuse takes on an identifiable pattern, the abused woman becomes able to predict severe battering incidents.\textsuperscript{23} Consequently, the woman comes to "constantly fear" imminent harm, since the extreme violence of the second phase is predictable and inevitable.\textsuperscript{24}

The theory of "learned helplessness" comprises the second component of Walker's syndrome theory.\textsuperscript{25} Borrowing from Martin Seligman's experimental research,\textsuperscript{26} Walker hypothesizes that women subjected to prolonged abuse come to learn that they are helpless to control the violence and become depressed and withdrawn to their fate.\textsuperscript{27} This learned helplessness, she believes, explains why some women do not flee the long-standing violent relationship.\textsuperscript{28}

Ewing observes that while most courts accept the admissibility of battered woman syndrome testimony, this evidence does not appear to be very helpful in gaining acquittals. Ewing found that out of the 100 cases he surveyed, experts testified to the syndrome in twenty-six cases; but that out of these twenty-six cases, seventeen resulted in the battered woman defendant being convicted of murder, manslaughter, or reckless homicide (p. 55). From this, Ewing surmises that this evidence "has not proved to be a legal panacea for battered women who kill their batterers and claim self-defense" (p. 55). The failing of this research, Ewing asserts, is its inability to offer an "explanation of the reasonableness of the woman's ultimate homicidal act" (p. 55).\textsuperscript{29}

\begin{itemize}
\item[\textsuperscript{22}] L. WALKER (1984), supra note 4, at 95-96; L. WALKER (1979), supra note 4, at 55-70.
\item[\textsuperscript{23}] See Note, Wife's Dilemma, supra note 1, at 928.
\item[\textsuperscript{24}] See Case Comment, Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?, 2 LAW & HUM. BEHAV. 133, 156-60 (1978); Buda & Butler, supra note 4, at 375.
\item[\textsuperscript{25}] See L. WALKER (1984), supra note 4, at 86.
\item[\textsuperscript{26}] In a seminal set of studies, Seligman and his colleagues subjected laboratory dogs to electrical shocks from which they could not escape. After initial attempts at escape proved futile, the dogs grew more passive as they "learned" they were "helpless." Subsequently, the experimenters placed these "learned helpless" dogs into a situation from which other dogs that had not received the earlier training readily escaped. The learned helpless dogs, however, generally failed to escape from the new escapable situation. See Seligman, Maier & Greer, Alleviation of Learned Helplessness in the Dog, 73 J. ABNORMAL PSYCHOLOGY 256 (1968).
\item[\textsuperscript{27}] Applying the concept of learned helplessness to battered women, Walker explained that "the women's experiences . . . of their attempts to control the violence would, over time, produce learned helplessness and depression as the 'repeated batterings, like electrical shocks, diminish the woman's motivation to respond.'" L. WALKER (1984), supra note 4, at 87 (quoting L. WALKER (1979), supra note 4, at 49).
\item[\textsuperscript{28}] L. WALKER (1984), supra note 4, at 86.
\item[\textsuperscript{29}] Professor Schneider has registered a similar criticism, stating that "[t]he critical defense problem in representing battered women who kill and assert self-defense is how to ex-
The syndrome theory, as Ewing appreciates, smoothly glosses over its inability to specify what provokes the "ultimate homicidal act." According to the theory, the woman defends herself against the abuse that is sure to come. The "reasonableness" of this action comes from the cyclical nature of the violence. The regularity of the abuse causes the battered woman to constantly fear for her life. While adopting the proposition that "constant fear" justifies self-defensive action at any time eliminates a major obstacle in the imminence requirement, the justness of a battered woman's homicidal action remains obscure. Moreover, the theory's characterization of battered women as passive and "learned helpless" further obfuscates why some battered women kill. Syndrome theorists' use of learned helplessness creates a dilemma for the battered woman who kills and claims self-defense: "[F]rom a theoretical perspective one would predict that if battered women suffered from learned helplessness they would not assert control over their environment; certainly, one would not predict such a positive assertion of control as killing the batterer."

Notwithstanding the syndrome theory's apparent failure to shed light on the reasonableness of the woman's action, it has been overwhelmingly endorsed by the legal community. Part of the reason for this fact comes from its adoption of the very framework—classical self-defense doctrine—for which it is intended to be used. It is no coincidence that the theory fully parallels the defense. Indeed, the very genius of the syndrome theory lies in its avoidance of any reconceptualization of self-defense doctrine: Courts need not reject the doctrine to admit expert testimony on the battered woman syndrome. Recently, however, commentators have begun to question the validity as well as the wisdom of plain the woman's action as reasonable." Schneider, Expert Testimony, supra note 1, at 199. The battered woman syndrome conveys the "context" in which the woman acted, but not the reason for it. Id.; see also Note, The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent, 72 VA. L. REV. 619, 646 (1986) (authored by David L. Faigman) ("some explanation may be needed where a woman who has endured years of abuse suddenly strikes out in apparent revenge or with little provocation; the defense must show what triggered the deadly attack").

30. See, e.g., Buda & Butler, supra note 4, at 375 ("A battered wife's perception of the imminence of . . . danger may reasonably encompass every moment in the presence of her frequently violent husband.").

31. Walker, Battered Women, supra note 4, at 1179 ("Self-defense laws . . . require the perception of danger to be imminent and have not recognized the reasonableness of prediction of imminence based on a history of repeated violence.").

32. Of course, if the abuse follows an identifiable pattern, this fact is highly relevant to the battered woman's defense. See infra note 62 and accompanying text. Although battered woman syndrome theory's use of the concept of a "cycle of violence" appears to make this evidence relevant for the same reasons, the actual research on the cycle theory does not support this inference. See Note, supra note 29, at 636-40.

33. Note, supra note 29, at 641.

34. See id. at 619.
employing battered woman syndrome theory to defend battered women who kill.

First, as I have elaborated elsewhere, the research data do not support the conclusions of the researchers, or the theory's erstwhile advocates. Walker's empirical validation of her cycle and learned helplessness theories suffers from innumerable logical and methodological errors. Walker's conclusions do not follow from the research methodology she employed and receive no support from the data she reports. No more than informed conjecture, Walker's conclusions have little probative force; and any value they may have is significantly outweighed by the danger of jury misuse or confusion.

More important than the empirical failings, perhaps, is the severe criticism the theory has drawn for characterizing abused women as helpless and incapacitated. Professor Elizabeth Schneider, for example, argues that expert testimony on battered woman syndrome depicts "battered women as helpless victims and fail[s] to describe the complexity and reasonableness of why battered women act." Schneider finds that these expert opinions are reflected in court opinions on "battered woman syndrome that resonate with familiar stereotypes of female incapacity." For Schneider, the defect lies in the doctrine of self-defense itself and its inherent sexual bias. Specifically, she objects to the traditional doctrine's stereotyped view that the only reasonable use of deadly force comes in response to an imminent serious or deadly attack. As discussed above, this predominantly male perspective of self-defense does not take into account alternative, but still reasonable, responses to serious physical threats that women sometimes must use. In the long run, Schneider believes, using battered woman syndrome evidence simply substitutes one stereotype for another and does not promote the enlightened path the law should be following in this area.

Although Ewing agrees that syndrome evidence tends to stereotype battered woman defendants, he does not blame the theory for this result. Syndrome evidence only appears to depict aspects of the battered wo-

35. Id.
36. See id. at 636-43.
37. Id.
38. Because Walker's "cycle of violence" and "learned helplessness" theories have not been demonstrated to be valid or reliable, expert testimony on these matters is irrelevant to the courtroom defense of battered women. See generally Gianelli, The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later, 80 COLUM. L. REV. 1197, 1235 (1980) ("The probative value of scientific evidence . . . is connected inextricably to its reliability; if the technique is not reliable, evidence derived from the technique is not relevant.").
39. Schneider, Expert Testimony, supra note 1, at 199.
40. Id.
41. Schneider, Equal Rights, supra note 1, at 636; see also Crocker, supra note 1, at 144 ("under [the reasonable] man standard, the defendant must explain why her act of self-defense does not resemble a man's").
man's behavior as unreasonable because the doctrine is conceived too narrowly. Too narrowly, however, not because it contemplates only the events immediately preceding a woman's homicidal act, but because of its "equal consequences" requirement (p. 59). Ewing categorically rejects the existing doctrine's insistence that victims await the raising of the deadly blow, and that even then they may only respond in kind. But Ewing goes much further. He argues that a battered woman's use of deadly force may be reasonable even though she did not anticipate any "deadly" attack (p. 59).

III. Physical Abuse and Psychological Harm

Ewing seeks to correct the narrowness of existing self-defense doctrine by rejecting the existing doctrine's "eye for an eye and tooth for a tooth" reasoning. For Ewing there are consequences of battering relationships as bad or worse than death that may justify killing. The word "self" in self-defense takes on an expanded meaning under his view: "[T]here is more to 'self' than mere physical being or bodily integrity" (p. 62). He states the crux of his argument in the following passage:

As commonly understood outside the law, "self" encompasses not only the physical aspects of being but also those psychological functions, attributes, processes, and dimensions of experience that give meaning and value to physical existence. If "self" is viewed from this broader and more commonly accepted perspective, it would seem that many, perhaps even most, battered women who kill their batterers do so in self-defense. They kill to prevent their batterers from seriously damaging, if not destroying, psychological aspects of the self which give meaning and value to their lives. In short, they kill in psychological self-defense (p. 62).

Ewing contemplates an expansion of the meanings of both "self" and "defense," thereby effectively removing the main obstacles to battered women defendants' claims of self-defense: the proportionality and imminence requirements. The imminence requirement has been under attack for some time, especially by advocates of the battered woman syndrome. But some courts also have frowned upon too strict an application of imminence, finding that smaller and weaker women defendants should not be condemned for defending themselves at their only opportunity. The unique element of Ewing's proposal comes from his repudia-

42. See, e.g., Comment, supra note 4, at 493-94 ("Although she may not be receiving an actual physical attack at the time [of her self-defense action], she nevertheless believes that her life is in imminent danger."); Note, Wife's Dilemma, supra note 1, at 929 ("[I]t makes little sense for the law to excuse the wife's killing if it occurs while she is being beaten, but to find her guilty of murder if she kills during a temporary respite between beatings.").

43. See, e.g., State v. Wanrow, 88 Wash. 2d 221, 240, 559 P.2d 548, 59 (1977). In a case not involving a battered woman, the Wanrow court found the individual circumstances of the
tion of the proportionality requirement. He rejects the use of the prospect of serious "physical harm" or "physical death" as the only rationale supporting the defensive use of deadly force. Battered women, he believes, and presumably all victims similarly situated, may act reasonably if they use deadly force to avert "extremely serious psychological injury" or, in other words, "psychological death." Ewing constructs his theory of psychological self-defense from principles articulated in the disciplines of self psychology, psychopathology, victimology, and the psychology of terrorism.

Ewing places particular emphasis on the existential philosophies of R. D. Laing and Heinz Kohut (pp. 63-66). He believes the abuse the battered woman suffers creates the threat of a psychological condition Laing described as "ontological insecurity." The "ontologically insecure person," according to Laing, "may feel more unreal than real; in a literal sense, more dead than alive; precariously differentiated from the rest of the world, so that his identity and autonomy are always in question." Kohut traces a parallel course of thought with his notion of "disintegration anxiety," which he describes as "an intense and pervasive anxiety [t]he core [of which] is the anticipation of the breakup of the self." The symptoms of disintegration anxiety include "severe frag-

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44. Ewing recognizes that his proposal would provide a defense to other defendants and cites battered children who kill their battering parents as one possible example (p. 79). But are the psychological consequences of battering different for adults than for children? Unfortunately, he does not answer this question, or otherwise address the many other issues raised by the prospect of applying psychological self-defense to other populations.

45. Ewing defines "extremely serious psychological injury" as "gross and enduring impairment of one's psychological functioning which significantly limits the meaning and value of one's physical existence" (p. 79).

46. R.D. LAING, THE DIVIDED SELF 39-43 (1970); see C. ROGERS, CLIENT-CENTERED THERAPY: ITS CURRENT PRACTICE, IMPLICATIONS AND THEORY 510-17 (1951); C. ROGERS, ON BECOMING A PERSON 184-96 (1961); see generally EXISTENTIAL PSYCHOLOGY (R. May ed. 1969) (discussing existential definitions of "self").

47. R.D. LAING, supra note 46, at 42.

mentation, serious loss of initiative, profound drop in self-esteem, [and a] sense of utter meaningless[ness].”

Ewing also draws upon the work of researchers studying crime victims (i.e., victimologists) and terrorism to try to better grasp the threat confronting battered women (pp. 70-75). In particular, he cites the work of Symonds, a psychiatrist, who identified three phases “all” victims experience during and after a crime of violence. During the crime, victims “initially respond with shock and disbelief,” which quickly gives way to the terror of the situation; in the third phase, following the crime, the victim reportedly has “circular bouts of apathy, anger, resignation, irritability, ‘constipated’ rage, insomnia, startle reactions, and replay of the traumatic events through dreams, fantasies and nightmares.” The repetition of abuse, Ewing explains, exacerbates the victimization of battered women since they repeatedly suffer the symptoms of Symonds’ third phase. The resulting psychological injury contributes to the battered woman’s “ontological insecurity” and her fear of the “breakup of the self” (p. 72).

Finally, Ewing turns to the field of psychopathology for the observation that severe and repeated batterings often lead to extreme depression, and, in some cases, suicidal tendencies (pp. 66-70). Research has consistently demonstrated a relationship between depression and suicidal intent. This fact, together with the teachings of existential psychology, victimology and the psychology of terrorism convey a dire message: The constant threat of abuse, and the repeated realization of that threat, cause “most battered women [to] eventually experience a turning point when the violence or abuse done to them comes to be felt as a basic threat, whether to their physical or social self, or both” (pp. 64-65). At this “turning point,” faced with the “disintegration” of her “self,” the battered woman must make a choice; if leaving the relationship is not possible, and often it is not, the woman can either kill herself or kill her...
abuser. Under these circumstances, Ewing asserts, "their homicidal acts are clearly instances of self-defense" (p. 76).

If one accepts the belief that domestic abuse threatens the abused with a psychological state equal to death, the step to sanctioning a defense of the "psychological self" is a small one indeed. Psychological death being equal to physical death, the threat of either justifies defensive action. But Ewing argues that even if psychological death only approximates actual death, which of course it must, most jurisdictions allow deadly force to be used in contexts where no truly deadly threat is present, but other essentially psychological interests, are threatened. Most jurisdictions, for example, allow the use of deadly force to avoid kidnapping or rape, and in many jurisdictions deadly force may be used to repel unlawful intruders from entering one's home (pp. 80-83). Although kidnapping, rape, and defense of one's "castle" all involve physical threats, the bodily threat in these examples does not alone justify the use of force. Also at stake in these examples are such psychological interests as bodily integrity, autonomy, and the "feeling of security" in one's home. Similarly, although a physical threat obviously exists for battered women, Ewing finds the greater threat in the devastating psychological fate resulting from repeated, although not necessarily deadly, abuse (p. 76).

Ewing convincingly demonstrates that his theory of psychological self-defense is essentially consistent with the basic policies underlying the existing doctrine. Yet, those not agreeing with his premise regarding the clinical dangers of violent relationships, and few should, are prone to overlook the value of his book. This is unfortunate, since it contains an important lesson. As presently stated, however, couched solely in terms of a woman's right to defend her psychological integrity, Ewing loses the inherent force of his argument. The power of his argument comes from the common-sense premise that a person subjected to repeated physical abuse, from which escape is impossible and help from others unavailable, may be justified in resorting to self-help. Existing self-defense doctrine is insufficient simply because it does not accord with common sense. Ewing's remedy fails due to his abandonment of the common sense he used to reveal the flaws in the existing doctrine, and, moreover, in his adop-

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55. The paradigmatic case of self-defense would be the defendant who, having retreated until her back was against the wall, killed her attacker while fending off a deadly blow. See 2 WHARTON'S CRIMINAL LAW § 126, at 131-32 (C. Torcia 14th ed. 1979) (the wall is "reached in a figurative sense when further retreat would increase the danger to defendant's life"). Ewing employs the "retreat to the wall" metaphor to explain the battered woman's plight:

The batterer has, in effect, pushed the woman's "back to the wall." Unable to escape the battering relationship, her options are extremely limited: she can kill herself, kill the batterer, or resign herself to a fate sometimes not much better than physical death. Under such extreme circumstances—which admittedly do not occur in every battering relationship—the "instinct of self-preservation" leaves the battered woman with little in the way of true choice (p. 80).
tion of clinical legerdemain in its stead. After discarding the rigid and ritualistic original doctrine and dismissing its most heralded substitute, Ewing disappointingly embraces just another formalistic ritual.

IV. Applying Clinical Patches to the Doctrine of Self-Defense

Throughout my reading of Ewing's book, two related questions repeatedly occurred to me: First, what is the scientific basis for his proposal?; and second, what are the reasons behind applying a purportedly sophisticated clinical solution to the problem of women's self-defense? As for the first question, I do not doubt Ewing's sincerity in forwarding a psycho-solution to an area of the law obviously in need of creative suggestions. The psychological concepts he embraces, however, are far from the mainstream of either clinical or research circles of psychology, and, I assume, will have even less acceptance in the legal circles to which they are aimed. But if his psychological theorizations are not compelling, what lies behind the perceived need to construct an elaborate theory to defend battered women when they claim simply that their actions were justified? The need for a complex theory of the "psychological self" is not altogether obvious if the basis for the battered woman's defense is that she acted reasonably under the circumstances. In this section, I briefly explore the scientific basis for the present proposal, leaving deeper analysis to future writers. The elaborateness of Ewing's suggested reform, however, raises intriguing questions regarding the defense of battered women who kill, as well as the doctrine of self-defense in general.

A. Lack of a Scientific Basis for the "Self"

Ewing is the first commentator to conceptually link the psychoanalytic view of "self," and more particularly the notion of "psychological injury," to battered women defendants. Although standing alone in

56. The existential psychology of Laing, and Kohut's view of the self, stem from the psychodynamic theories of Sigmund Freud. To say this, however, perhaps overstates the weight these ideas carry in psychology today, since to some extent most of modern psychology owes an intellectual debt to Freud. In the twentieth century, psychology has fractured into many camps, all of which can be generally characterized as either research-based or analytical, with Kohut and Laing falling somewhere amongst the hundreds of theorists in the latter category. Kohut and Laing would be rejected out of hand by research psychologists because they make no attempt to validate their theories experimentally. As for the analytical camp, it is impossible to gauge the number of adherents these theorists enjoy. Neither "ontological insecurity" nor "disintegration anxiety," however, are included in the DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) (DSM III), which is the American Psychiatric Association's official taxonomy of mental illnesses.

57. In the book, Ewing discusses the observations of Professors Johnson and Ferraro who describe what they call the battered woman's "victimized self":

The victimized self is a complex mixture of feelings and thoughts based on the individual's overriding feeling of having been violated, exploited, or wronged by another person or persons. It develops when an individual feels a fundamental threat to his
accepting the validity of this observation, he suggests that expert testimony should be admitted to help the fact finder understand the psychological threat confronting the battered woman. Assuming experts can be found willing to testify to this idea (probably a safe assumption) Ewing nowhere explains what form this testimony should take. Nor, remarkably, does he mention either the Frye test,\(^58\) or the Federal Rules of Evidence,\(^59\) as possible bars to the admissibility of this evidence. This omission is troubling, since no scientific data exist to support his clinical premise of "ontological insecurity" or, more importantly, any relationship between "ontological insecurity" and physical abuse.

Ewing asserts that the expert testimony forwarded under his proposal is at least as valid as that now accepted in cases involving such issues as insanity and diminished capacity (p. 94). This argument hardly sounds a ringing endorsement, nor is it particularly accurate. While psychological diagnoses used to determine "sanity" have a checkered history,\(^60\) for the most part they at least are "generally accepted" by a significant segment of the clinical community. Ewing has not demonstrated that ontological insecurity or the "disintegration of the self" are generally recognized diagnoses that support a claim of psychological infirmity. Even if so recognized, however, Ewing does not use them in this way. He contends that the threat of these infirmities justifies the use of deadly force. The expert would not be expected to testify that the battered woman defendant suffered from a psychological injury, only that

or her very being or existence. The actions or situations people interpret as fundamental threats are varied. Some women feel deeply threatened by verbal assaults, while others may come close to death regularly without feeling themselves to be victims.

Johnson & Ferraro, supra note 54. Ewing both deepens this concept, by attaching it to the theories of Laing and Kohut, and extends it, by arguing that a woman may be justified in killing in order to avoid threatened psychological despair (pp. 64-65).

\(^{58}\) In the seminal case of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the Court of Appeals for the District of Columbia explained the "general acceptance" test as follows: Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

\(^{59}\) See Fed. R. Evid. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.").

she could have, or did, reasonably fear such injury prior to killing the batterer. Without some scientific basis for believing that physical abuse causes severe psychological disability, expert testimony cannot assist the trier of fact to understand more than the obvious: Psychological injury accompanies physical abuse. Whether such "psychological injury" justifies homicide in a particular case is an altogether different question that cannot be answered by expert testimony.

B. The "Need" for Psychological Theories

The very creation of the concept of psychological self-defense, an overly complicated and sure to be controversial theory, raises the question of what lies behind the perceived need for such an endeavor in the first place. The answer may be gleaned by considering the unusual popularity of the scientifically flawed, albeit sophisticatedly packaged, theory of battered woman syndrome. Courts have moved quickly to admit syndrome theory in cases where battered women are homicide defendants to assist jurors in understanding what they routinely are called upon to determine in other cases without expert help: the reasonableness of the defendant's actions. Experts also testify to facts that ordinarily are inadmissible in self-defense cases. The reason behind this ready acceptance, beyond the strong feelings these cases engender, appears to be the fact that courts recognize that the doctrine of self-defense applies imperfectly to battered women defendants. By admitting expert testimony on the battered woman syndrome, however, the law of self-defense need not change. With a clinical solution to the problem of battered women defendants, the law itself remains unchallenged. The "liberalization" of self-defense doctrine can thus be cabined to particular, very sympathetic situations by allowing expert testimony to effectively nullify the harshness of the traditional doctrine.

But Ewing sweeps more broadly than simply creating an exemption for battered women under the existing doctrine; he tries to redefine entirely the parameters for the justifiable use of physical force to defend one's "self." Nonetheless, by arguing psychological self-defense Ewing sidesteps a frontal assault on existing doctrine almost as nimbly as syndrome theorists. Implicit in many battered women cases, though few writers in this area confront the issue, is whether abuse that does not

61. See supra note 4 and accompanying text.
62. Compare State v. Kelly, 97 N.J. 178, 202, 478 A.2d 364, 375 (1984) (expert could testify to the battered woman syndrome and the defendant's history of abuse in order to aid the jury "in determining whether, under the circumstances, a reasonable person would have believed there was imminent danger to her life") with State v. Bess, 53 N.J. 10, 16, 247 A.2d 669, 672 (1968) ("[j]ustification for a killing in self-defense... depends on the jury's determination of what they think a reasonable man would have done under the circumstances. This objective test, rather than a subjective exploration of [the defendant's] psyche has been the standard for justifiable homicide consistently applied in this state.").
threaten "serious bodily harm or death" can ever justify the use of deadly force. In the vast majority of reported cases, battered women kill under circumstances where the deadly threat is not readily apparent, or where it appears that she killed not out of fear for her life, but to stop the constant abuse. Thus, the battered woman's lethal response appears unreasonable on its face because it is disproportionate to the immediate harm. The radicalness of Ewing's book comes from the suggestion that killings under these circumstances may still be justified.63 Unfortunately, by invoking this psychoanalytic artifice, Ewing obfuscates the terms of the debate.

Although the patterns of familial violence vary considerably and in many ways cannot be fully appreciated from outside the relationship, the crucial issue whether the defendant's lethal action was reasonable should turn on basic notions of justice. As Professor Greenawalt noted succinctly, "justified action is morally proper action."64 But by adopting the expression "extremely serious psychological injury," Ewing converts battered women defendants' conduct into an abstraction: They kill to avoid the "breakup of the self" or out of a fear of a "regression to psychosis." The widely varying circumstances of battering relationships do not obviously conform to such simple description, however, and Ewing cites absolutely no data to support his observation. Consequently, Ewing fails to identify for the reader the parameters of the suggested defense. We do not know, for example, whether all battered women are threatened with psychological injury or none are. Furthermore, since Ewing conducted no field research, we do not even know whether battered women who kill would cite a fear of psychological harm as a factor in the homicide.

Ewing's principal criticism of the battered woman syndrome is that it fails to explain "the reasonableness of the woman's homicidal act" (p. 55).65 Ewing purports to surmount this difficulty with his explanation that a battered woman defends against the threatened psychological injury. Granting for the moment that some battered women face a "turning point" when they decide to avert psychological death and kill their batterers, how does a jury or psychiatrist determine that this point was reached in a particular case? Significantly, although Ewing summarizes scores of battered women defendant cases, he does not apply his proposal to particular situations to show how it might apply in some cases but not in others. He makes no attempt whatsoever to provide specific criteria to enable a fact-finder to discern when one battered woman kills justly and another kills unjustly.

63. In a classic understatement, Ewing notes that "this theory of psychological self-defense may seem rather abstract, overly speculative, and perhaps even radical, particularly to those accustomed to thinking of self-defense in traditional legal terms" (pp. 62-63).
64. Greenawalt, supra note 3, at 1903.
65. See supra note 29 and accompanying text.
The one hundred cases Ewing describes illustrate starkly that domestic violence assumes many forms; and as Ewing acknowledges, not all of them should be terminated with the death of the batterer. The difficulty of these cases lies in identifying what combined sets of circumstances justify a woman's decision to respond to abuse with deadly force. Consider, for example, a hypothetical defendant who claims that her husband got drunk every Friday night after work and that he invariably came home afterwards and beat her. This pattern continued for some time, and although she had tried to obtain help from police and friends, all efforts had proved unavailing. Recently, her husband's drinking had intensified, and the violence increased until one Friday night she was beaten quite severely. The following Friday, her husband walked through the door drunk, and before he said or did anything she shot and killed him. Under classical legal doctrine, this action would not be considered self-defense, though most people would probably agree that she acted reasonably, and in "self-defense."

The pattern of violence in this hypothetical is readily apparent, rendering her prediction of harm seemingly sound. The threat of harm in this case was, for all intents and purposes, "imminent," and in all likelihood serious and potentially fatal. But what if she had used the same "defensive" force on Thursday, when her husband came home sober? Or what if she had not been "severely" beaten the previous Friday night (or ever) and did not fear serious bodily harm or death, but lashed back with deadly force because of the constant physical abuse and her fear that it would continue? Because the circumstances of battered women cases vary so widely, static clinical generalizations fail to capture the essence of the battered woman defendant's "decision" to kill. In assessing blame-worthiness, traditional questions of imminence and proportionality remain important, but the overriding question of reasonableness must depend on the entirety of the woman's situation and whether her action was a necessary response to the abuse.

The challenge for battered women defendants and their advocates lies in explaining the actual reasonableness of the particular conduct in question; and the challenge for courts lies in understanding the battered woman's plight within a societal context in which her options may be few. As in the hypothetical above, the use of deadly force, although departing from traditional notions of self-defense, in some cases may be readily understood as justified. Where the pattern of violence is unambiguous, and the woman's unique position in the relationship allows her to recognize and predict her tormentor's violence, the justness of her defensive action is obvious. Other fact patterns present more difficult questions, however, and in some cases the battered woman may have been
only partially justified in using deadly force. In still other cases the defendant may have acted unreasonably under the circumstances, or for a motive other than self-defense.

Pigeonholing battered women cases into “syndromes” and “psychological harms” belies the complexity and difficulty of discerning justice when battered women kill. A wide variety of circumstances contribute to lethal responses to abuse, and clinical descriptions operate to mask the difficult variability of these cases. In fact, these clinical approaches, while effective in the short term, may themselves impede substantial progress for women and the law. Although both Walker’s battered woman syndrome and Ewing’s psychological self-defense purport to portray battered women as justified in killing, they frame their arguments in psychological terms that convey just the opposite impression. A battered woman’s claim that she was justified in killing depends simply (and, at the same time, complexly) on the viability of the claim itself.

The problem of battered women who kill challenges the very foundation of existing self-defense doctrine. In particular, the existing doctrine’s myopic vision of the justifiable use of force—a vision informed exclusively by male stereotypes of reasonableness—must be reexamined. While imminence and proportionality should remain important factors in assessing the justified use of force, they cannot alone constitute the complete inquiry into the justness of the battered woman defendant’s action. A flexible application of the traditional doctrine is needed in order to allow the fact-finder to understand the exigent circumstances that force some battered women to kill. For this solution to work, the trier of fact must be permitted to understand the reasons why the perception of imminent harm and the range of reasonable proportionate responses might be different for women than for men. In most cases, the battered woman defendant’s introduction into evidence of her particular experiences and social reality will enable the fact-finder to determine the reasonableness of her conduct. In some cases, however, fact-finders may not be able to understand fully the forces that culminated in a particular battered woman defendant’s killing. In particular, juries may not fully appreciate why the woman did not simply leave the violence. In those cases where reliable social science research can assist the trier on this issue and other similar issues, it should certainly be admitted.

66. See generally, Note, Imperfect Self-Defense, supra note 1, at 623 (analyzing the difficulty of fulfilling the proportionality requirement when a battered wife shoots her husband).

67. Research findings could be communicated to the jury either through the traditional avenue of expert testimony or through the trial court’s instructions to the jury. See Walker & Monahan, Social Frameworks: A New Use of Social Science in Law, 73 VA. L. REV. 559, 592-98 (1987) (advocating briefing trial courts on social science research, and then having courts communicate reliable research findings to juries).
Conclusion

Professor Ewing adds a novel view to the exceedingly complex and emotionally charged questions associated with battered women who kill. His notion of psychological self-defense challenges the reader to rethink traditional notions of both “self” and “defense.” By interpreting through a psychoanalytic looking glass what it means to defend the self, Ewing argues that the term should encompass more than just physical well-being. Thus Ewing redefines the doctrine’s classical requirement that a defendant who claims self-defense have responded *proportionally* and only to an *imminent* harm. Unfortunately, the psychological concepts advanced in the book cloud the real terms of the debate. The subtitle of the book is “Psychological Self-Defense as Legal Justification.” Ewing expends too great an effort expounding the battered woman’s “psychological self,” and too little time explaining the justness of her action.

Nonetheless, the value of Ewing’s book should not be understated, for it forces us to expand our idea of the defense of the self, as well as our understanding of the complexity and severity of the battered woman’s situation. Battered women defendants present the courts, and indeed all of society, with an inordinately complex problem that, at best, traditional self-defense doctrine handles imperfectly. Ewing’s book, though it fails in its aim to reformulate self-defense doctrine, puts forward many important questions and provides significant insights into the condition of battered women. Moreover, Ewing’s basic message is sound: When battered women kill and claim self-defense, fact-finders must be allowed to consider all of the relevant circumstances predating the killing. This evidence is needed, however, not so that the jury can consider whether the battered woman feared the “disintegration of the self,” but simply to determine whether she acted reasonably under the circumstances.