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BATTERED CHILDREN WHO KILL: DEVELOPING AN APPROPRIATE LEGAL RESPONSE

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I. INTRODUCTION

One seldom associates childhood with violence, much less murder, but the frightening reality is that children in American society are increasingly both the victims and perpetrators of violent crime. One explanation of this reality is that violence is often learned from within the family structure, and sometimes children visit their anger upon those who taught it to them.[1] Parricide,[2] although still rare, has increased in recent years. In fact, in 1993, parricides accounted for 306 of the 23,271 murders and nonnegligent manslaughters reported in the United States.[3] The killing of one's abusive parent presents to the criminal justice system the difficult dilemma of deciding whether or not such a killing can ever be justified or excused. This Note will explore the ramifications of expanding as well as refusing to expand traditional self-defense frameworks to include the battered child who kills an abusive parent and will conclude by making a policy suggestion which allows the courts to remain true to their dual responsibilities of providing justice to the individual as well as to society as a whole.

Traditionally, self-defense arguments have been narrowly limited in their scope and application,[4] yet modern times have

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1. "There is a high correlation between adolescents witnessing abuse and adolescents committing violent offenses." Gail Goodman & Mindy Rosenberg, *The Child Witness to Family Violence: Clinical and Legal Considerations, in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 97, 99-102 (Daniel J. Sonkin ed., 1987).

2. Throughout this Note, "parricide" will be defined as "the act of killing one's father or mother." The Random House Dictionary of the English Language 1413 (2d ed. 1987).

3. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 334 (Kathleen Maguire et al. eds., 1994).

4. Killing in self-defense was one of the first recognized exceptions in English law to the rule that the taking of a life is always culpable. Cynthia Gillespie argues that the "earliest reported cases [of self-defense] date from the

seen the advent of innovative and unprecedented defense theories which some have dubbed "abuse excuses."[5] These strategies attempt to exculpate the actor based on his or her inclusion in a specific category such as abused spouses or abused children. Proponents of abuse-based defenses argue that the accused should be allowed to present evidence of abuse and expert testimony explaining the effects of that abuse in an attempt to show that the killing was either justifiable or excusable.[6] Expert testimony is said to be necessary to show that the actor actually had a reasonable belief in imminent threat of death or serious bodily harm. If the actor proves a valid self-defense argument, then no punishment can be justified.[7]

Critics of abuse-based defenses argue that abused persons who kill their abusers do not, and should not, fit into any legally justifiable framework of homicide defense.[8] Critics contend that expanding traditional models of self-defense to include abused persons who kill their abusers will grossly distort the aims of self-defense as a justification and encourage self-help rather than resort to the criminal justice system.[9]

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early 1200s. Although the law of self-defense has evolved over some nine centuries, its basic parameters were established very early and have changed remarkably little." CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE 31 (1981).

5. In his most recent book, Law Professor Alan Dershowitz defines the "abuse excuse" as "the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation." ALAN M. DERSHOWITZ, THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES AND EVASIONS OF RESPONSIBILITY 3 (1994).

6. *See generally* GILLESPIE, *supra* note 4, at 159 (arguing that testimony about Battered Woman Syndrome helps a jury understand otherwise puzzling aspects of a defendant's actions particularly on the reasonableness of those actions); PAUL A. MONES, WHEN A CHILD KILLS: ABUSED CHILDREN WHO KILL THEIR PARENTS 276 (1991) (explaining that expert testimony is necessary to illustrate the effects of battering on children); LENORE E. WALKER, TERRIFYING LOVE 267 (1989) (concluding that a qualified expert witness is the only person able to explain the psychological reality of battered women justifies their actions).

7. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.7(a) (2d ed. 1986) [hereinafter LAFAVE & SCOTT].

8. In State v. Stewart, the Kansas Supreme Court ruled that it was error to give a self-defense instruction where a wife, who had suffered a long and documented history of abuse at the hands of her spouse, shot and killed her sleeping husband. In its decision, the court noted that it must "hold that when a battered woman kills her sleeping spouse when there is no imminent danger, the killing is not reasonably necessary and a self-defense instruction may not be given. To hold otherwise . . . would in effect allow the execution of the abuser for past or future acts and conduct." 763 P.2d 572, 579 (Kan. 1988).

9. The Wyoming Supreme Court refused to allow a self-defense instruction in Jahnke v. State where a fifteen-year-old boy killed his abusive father. The court concluded that "[t]o permit capital punishment to be

With these competing concerns in mind, the criminal justice system[10] is presently challenged to categorize correctly killings of the abuser by the abused as either justified, excused, mitigated or wholly culpable.[11] This task is complicated by the fact that courts must deal not only with the fatal act of violence by the child but also with the often undocumented and grotesque acts of violence which allegedly precipitated the fatal event. Against this backdrop of complicated family ties and hidden violence,[12] courts must balance the competing concerns of the criminal justice system. First, because the relationship between culpability and punishment is the legitimizing factor in the criminal justice system, the charge brought against the youthful offender should accurately mirror the culpability of his or her act. Typically, the charges filed in parricide cases range from first-degree murder to voluntary manslaughter.[13] A few courts have gone so far as to allow testimony of abuse suffered by the actor at the hands of the deceased and expert testimony regarding the effects of Battered Child Syndrome (BCS)[14] to lead to a self-defense argument and to ultimate acquittal.[15] The confusion of the courts in dealing with the battered child who kills is further evidenced by the disparity in sentencing imposed by courts of different jurisdictions after a guilty verdict is reached in a parricide case. Some courts show no leniency to the youthful offenders, sentencing them to terms of imprisonment comparable to that of their adult coun-

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imposed upon the subjective conclusion of the [abused] individual that prior acts and conduct of the deceased justified the killing would amount to a leap into the abyss of anarchy." 682 P.2d 991, 997 (Wyo. 1984).

10. Here, the criminal justice system is understood to include police, law-making bodies and the criminal courts.

11. This Note will focus specifically on the case of the abused child who kills an abusive parent in a non-confrontational setting as the majority of parricides occur in this context. *See* Susan C. Smith, *Abused Children Who Kill Abusive Parents*, 42 CATH. U. L. REV. 141, 144 n.18 (1992) (asserting that most parricides occur in non-confrontational settings).

12. "Another characteristic of the family that accounts partially for the high level of conflict is family privacy. Privacy insulates conflicts within the family from both social controls and social supports that can serve to reduce or resolve the conflict." Murray A. Strauss, *Physical Violence in American Families, in* ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE (Dean D. Knudsen & JoAnn L. Miller eds., 1991).

13. Annotation, *Admissibility of Evidence of Battered Child Syndrome on Issue of Self-Defense*, 22 A.L.R.5th 787 (1994).

14. In this Note, Battered Child Syndrome will refer to the cumulative series of acts of violence or intimidation upon a child at the hands of one or both parents.

15. *See infra* notes 115-25 and accompanying text.

terparts, while other courts show considerable compassion by ordering no jail time and hefty community service hours.[16]

In discussing whether or not courts should allow evidence of parental abuse and expert testimony explaining the effects of that abuse in parricide cases, this Note will look at parricide against the backdrop of competing concerns and responsibilities of the criminal justice system in fairly adjudicating the legal consequences of any taking of human life. First, this Note will look at the social history of both parricide and child abuse and specifically at their different evolutions. Second, it will discuss the inability of the traditional self-defense framework to aid the battered child who kills. Next, it will examine the arguments put forth by critics, compromisers, and proponents of expanding the doctrine of self-defense to include the battered child who kills by examining relevant case studies which illustrate each argument. Fourth, this Note will examine Battered Woman Syndrome and legislation by the state of Texas as possible foundations for expansion and reform of traditional self-defense. Next, it will look at disparities in sentences that those convicted of parricide receive as further evidence of reform. Finally, this Note will conclude by making a policy suggestion which affords the child actor a criminal trial which will accurately reflect the culpability of his or her act of violence.

II. PARRICIDE & CHILD ABUSE: DIVERGENT SOCIAL HISTORIES

Historically, the killing of one's parent has perhaps been met with more shock and horror than any other type of homicide.[17] Parricide finds its earliest condemnation in religious tradition. The Bible clearly and repeatedly advises that a child is to obey and respect the parent.[18] The importance of this com-

16. *See infra* notes 160-63 and accompanying text.

17. Janice Schuetz, chronicler of the popular nineteenth century parricide trial of Lizzie Borden, noted that "the fascination [with parricide] continues even today." The twentieth century fascination with this nineteenth century parricide is evidenced by the fact that the small town of Fall River, Massachusetts (site of the murders), held a centennial anniversary of the crime in the summer of 1992. JANICE SCHUETZ, THE LOGIC OF WOMEN ON TRIAL 62 (1984). The sensationalism and public interest surrounding Erik and Lyle Menendez, two brothers accused of murdering their parents in 1989, attests to the continued awe with which modern society reacts to an alleged parricide. *See generally* John Johnson & Ronald L. Soble, *The Menendez Brothers: Jose Menendez Gave His Sons Everything, Maybe Even a Motive for Murder*, L.A. TIMES, July 22, 1990, (Magazine), at 6 (explaining the details of the crime and the arrests of the two brothers).

18. "Honour your father and your mother so that you may live long in the land that Yahweh your God is giving you." *Exodus* 20:12 (New Jerusalem Bible).

mandment was reflected in ancient Hebrew law which excluded parricides from any possible legal excuse:

> Anyone who by violence causes a death must be put to death. If, however, he has not planned to do it but it comes from God by his hand, he can take refuge in a place which I shall appoint . . . . Anyone who strikes father or mother will be put to death.[19]

The Code of Hammurabi, the first known codification of written law, similarly provided harsher punishment for offenses committed against a parent by a child. Written in approximately 2250 B.C., the code provided that, "if a son strike his father, they shall cut off his fingers."[20]

Roman law similarly imposed harsher sanctions for parricide than any other type of murder. According to Roman law, a person who murdered his or her parent was to be "scourged till they bled, sewed up in a sack with a dog, cock, viper, and ape, and thrown into a sea or river."[21] It was also not uncommon for parricides to be burned alive or to be devoured by wild animals in the amphitheater.[22] One commentator noted that, "Solon refused to make any law [punishing parricides], lest he should by forbidding it teach the people that it was possible."[23]

Although English law proscribed no greater penalty for parricide than for any other type of homicide, Blackstone suggested that it should. In his Commentaries on the Law, Blackstone addresses the subject of parricide by first describing the punishment handed down in Roman times. He then points out that Solon had no law against parricide because he believed "it impossible that any one should be guilty of so unnatural a barbarity" and that the Persians, according to Herodotus, "adjudged all persons who killed their reputed parents to be bastards."[24] Blackstone then states that the English law is lacking and suggests that "we must account for the omission of an exemplary punishment for this crime in our English laws, which treat it no otherwise than as simple murder, unless the child was also the servant of his parent."[25]

In literature, those who have undertaken the task of stirring the human spirit have chosen parricide as the backdrop upon

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19. *Exodus* 21:12-16 (New Jerusalem Bible).
20. ROBERT FRANCIS HARPER, THE CODE OF HAMMURABI 73 (1904).
21. MACKENZIE, ROMAN LAW 402 (1876).
22. *Id.*
23. *Id.*
24. THOMAS M. COOLEY, COMMENTARIES ON THE LAWS OF ENGLAND OF SIR WILLIAM BLACKSTONE 203 (1899).
25. *Id.*

which to teach their most profound messages. Sophocles penned perhaps the most famous of all literary parricides in the tragic story of Oedipus Tyrannus. Oedipus, albeit unknowingly, committed parricide when he killed his father Laius. Upon realizing the nature of his crime, Oedipus denounces himself and asks, "Am I not by nature a villain? Am I not totally impure?"[26] He later characterizes the parricide as "having killed whom it was my duty never,"[27] and himself as "the monstrous destruction, the most accursed, and most god-detested of human kind."[28]

Modern American society has similarly voiced its condemnation of parricide in its punishment of the crime, admitting that "[f]or centuries and in a number of societies the murder of one's own parents or grandparents — parricide — has been condemned and punished with more severity than other homicides."[29]

In contrast to the rarity and social condemnation of parricide is the commonness and social ignorance of child abuse. Historically, violence within the family was just that - within the family. Because the law has and continues today to recognize the privilege of a parent to inflict punishment upon a child,[30] there was never a need for the common law to extend self-defense doctrine to the child who reacted against the privilege. In other words, there was no defense for a child who reacted against a beating inflicted by a parent who acted within the scope of the privilege. Yet, the recipient of the same beating at the hands of a stranger was the victim of a battery and entitled to respond with like force and be protected by the law of self-defense.

As society has become more aware of the commonness of child abuse,[31] some frightening statistics have been revealed. Child abuse has always been considered one of the most severely underreported crimes so that for each reported incident of abuse, there may be several more which are undocumented. Despite suspected underreporting, in 1992 there were an estimated 2,936,000 reported instances of abuse in the United

26. THEODORE ALOIS BUCKLEY, THE TRAGEDIES OF SOPHOCLES 30 (1871).

27. *Id.* at 43.

28. *Id.* at 47.

29. Flanagan v. State, 810 P.2d 759, 766 (Nev. 1991) (Springer, J., dissenting).

30. LAFAVE & SCOTT, *supra* note 7, § 5.6(a).

31. A 1993 survey conducted by the Bureau of Justice Statistics asked Americans the question, "Compared to when you were growing up do you think that child abuse has gotten better or worse, or remained about the same?" 75% of those surveyed responded that they believed the incidence of child abuse had worsened, 20% believed it remained the same and 4% thought it had improved. BUREAU OF JUSTICE STATISTICS, *supra* note 3, at 216.

States.[32] Even more gruesome is the number of children who die as a result of abuse suffered at the hands of a parent.[33]

Despite these statistics, society continues to react with disbelief when the unthinkable, a parricide, occurs. The truth of this assertion was illustrated over a century ago when Lizzie Borden was tried for the murders of her parents Andrew and Abbey. Lizzie, a thirty-two-year-old college educated woman, lived with her sixty-four-year-old mother and seventy-two-year-old father in Fall River, a small city in southeastern Massachusetts.[34] The gruesome axe murders of Lizzie's prominent parents drew national attention. Despite strong physical evidence linking Lizzie to the murders and an inheritance of half-a-million dollars due to Lizzie upon the death of both of her parents, the jury found her not guilty.[35] Her only conviction comes in the form of the playground rhyme which immortalizes the event:

Lizzie Borden took an axe
And gave her mother forty whacks;
When she saw what she had done,
She gave her father forty-one.[36]

It is against this backdrop of historic parental privilege and traditional abhorrence of parricide that the slow acceptance of Battered Child Syndrome as a defense to homicide must be considered. Only with an understanding of the many factors against which such a defense runs counter can one comprehend the struggle of achieving both social and judicial acceptance of a defense for the battered child who kills.

III. MORAL CULPABILITY, THE LAW OF SELF-DEFENSE & THE BATTERED CHILD

A just government rests on the consent of the governed.[37] Thanks to a useful fiction, each person is assumed to assent to be governed by the laws of his society with the expectation that

32. NAT'L CENTER ON CHILD ABUSE PREVENTION RESEARCH, CURRENT TRENDS IN CHILD ABUSE REPORTING AND FATALITIES 4 (1993).

33. The National Center on Child Abuse Prevention Research reported that there were 1,176 confirmed child abuse and neglect related fatalities in 1991. *Id.* at 15.

34. SCHUETZ, *supra* note 17, at 61-62.

35. *Id.* at 62.

36. M. JEANNE PETERSEN ET AL., LIZZIE BORDEN: A CASE BOOK at vii (1980).

37. The Declaration of Independence provides that, "governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it." VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, THE AMERICAN BEGINNINGS 9 (1961).

others will abide by the same laws and that those who do not will be punished.[38] A further legitimizing feature of just government is that only those who are deserving of punishment will be punished. Punishment is imposed upon only those who are culpable for their acts, and that punishment is imposed to a degree commensurate with that culpability.[39]

Shrouded for years behind the heavy veils of family silence and social ignorance, the battered child is slowly emerging as one who presents a serious dilemma to the criminal justice system. The case of the battered child who kills an abusive parent comes before the court in the enigmatic form of a violent murderer hidden beneath a facade of youth and innocence. As stated above, the law has not contemplated a specific defense which would excuse a child who murders an abusive parent.[40] In fact, traditional self-defense theories presuppose that two adult males are involved in the conflict.[41] Self-defense theories have

38. Locke postulates that "Man being born, as has been proved, with a title to perfect freedom, and an uncontrolled enjoyment of all of the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power, not only to preserve his property, that is, his life, liberty and estate, against the injuries and attempts of other men; but to judge of, and punish the breaches of that law in others . . . . But, because no political society can be, nor subsist, without having in itself the power to preserve the property, and . . . punish the offenses of all those of that society." JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 46 (1980).

39. In his article, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, Peter Arenella notes the difference between *mala in se* and *mala prohibita* offenses. "Mala in se crimes refer to conduct that is inherently wrong: behavior that breaches community moral norms independent of its illegality. Legal commentators distinguish between these mala in se offenses (e.g., murder, rape, arson, larceny, and assault) and public welfare offenses that proscribe mala prohibita behavior: acts or ommissions that are wrong only because they have been proscribed by law to promote our social welfare. Unlike mala in se crimes that require proof of the offender's moral culpability, public welfare crimes usually do not require proof that the offender deserves to be punished for his transgression." 39 UCLA L. REV. 1511, 1513 n.3 (1992).

40. George Fletcher explains the difference between self-defense as a justification and an excuse by stating that "claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor." GEORGE FLETCHER, RETHINKING CRIMINAL LAW 759 (1978).

41. The Kansas Supreme Court admitted that "the traditional concept of self-defense has posited one-time conflicts between persons of somewhat equal size and strength. When the defendant is a victim of long-term domestic violence, such as a battered spouse, such traditional concepts may not apply." State v. Stewart, 763 P.2d 572, 577 (Kan. 1988). The Washington Supreme Court also acknowledged this discrepancy in the law and ruled that it was error

been slow to expand beyond this implicit scenario to embrace the realities of family violence.

Although self-defense was "one of the first exceptions to the Anglo-Saxon idea that the taking of a life is culpable regardless of the circumstances," its "basic parameters were established very early and have changed remarkably little."[42] One reason that self-defense theories have been slow to expand is that life is the most highly venerated and protected right in society.[43] As a result, legally justifiable homicides have been carefully limited to instances of self-defense,[44] defense of another,[45] defense of one's own habitation,[46] capital punishment,[47] killing in war,[48] and some killings by police.[49] These exceptions have been narrowly carved out in an attempt to protect the sanctity of human life and discourage self-help and personal vengeance.

Abuse-based defenses such as Battered Child Syndrome challenge this system of personal responsibility by seeking to shift responsibility for a criminal act from the individual to an event or aspect of his or her environment. This shift requires the law to abandon its credo that "the punishment should fit the crime" and accept the belief that "the punishment should fit the crimi-

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to give the standard self-defense instruction in the case of a woman who killed a male aggressor because it left "the jury with the impression that the objective standard to be applied is that applicable to an altercation between two men." State v. Wanrow, 559 P.2d 548, 559 (Wash. 1977). The court feared that the standard instruction might violate the defendant's right to equal protection of the law and stated that the woman "was entitled to have the jury consider her actions in light of her own perceptions of the situation, including those perceptions which were the product of our country's 'long and unfortunate history of sex discrimination.' Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual handicaps which are the product of sex discrimination." *Id.*

42. GILLESPIE, *supra* note 4, at 31.

43. Thomas Jefferson wrote in the Declaration of Independence that "all men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty & the pursuit of happiness; that to secure these rights governments are instituted among men." VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, *supra* note 38, at 9. "The right to life and personal security is not only sacred . . . it is inalienable." 40 AM. JUR. 2D *Homicide* § 111 (1968 & 1994 Supp.).

44. LAFAVE & SCOTT, *supra* note 7, § 5.7.

45. *Id.* § 5.8.

46. *Id.* § 5.9(b).

47. *Id.* § 5.5(a).

48. *Id.* § 5.5(c).

49. *Id.* § 5.10.

nal."[50] These attempts to shift responsibility have been met with judicial skepticism and social suspicion, yet they present legitimate challenges to the law's responsibility to punish only those who are culpable for their acts and only to the extent of their culpability. The challenge for the criminal justice system is to promulgate rules and standards that protect individual rights by promoting personal responsibility while still providing the abused child who kills a fair trial that properly assesses his or her culpability.

IV. Traditional Self-Defense Theories Applied to the Battered Child Who Kills

Traditionally, self-defense has been available as an affirmative defense when one who is not the aggressor in an encounter uses:

> [A] reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid the danger.[51]

Given this definition, a case of perfect self-defense would involve an aggressor threatening serious bodily harm or death to his victim and an intended victim's use of force reasonably necessary to avoid the harm. Justice Holmes put forth the classic expression of self-defense in *Brown v. United States*.[52] In *Brown*, the defendant was convicted of second degree murder for shooting an aggressor who was assaulting him with a knife at the time of the fatal shooting. In overturning the conviction, Justice Holmes explained:

> In order to excuse or to justify the taking of a human life, it must appear that the killing was reasonably necessary to protect other interests which for good reasons the law regards as more important, under all of the circumstances, than the continued existence of the life in question . . . . In so far as self-defense is concerned, the normal case of

50. Again, one must consider that in some cases, such as certain battered children, the defendant is not a criminal, and therefore no punishment is proper. Arenella accurately describes the tension between deciding whether or not punishment is deserved when he posits, "[s]ome view moral blame as deserved even when the actor's breach of morality can be attributed to factors beyond his meaningful control. In contrast to such visions, the liberal paradigm requires actors to have some form of knowledge, reason, and control of their actions before they can be fairly blamed for what they have done." Arenella, *supra* note 40, at 1517.

51. LaFave & Scott, *supra* note 7, § 5.7(a).

52. 256 U.S. 335 (1921).

> another interest is the life of a person other than the one killed. If the protection of that life makes necessary the homicide in question, there can be no doubt that the law must excuse or justify the killing.[53]

Justice Holmes commented on the issue of reasonableness by advising that "detached reflection cannot be demanded in the presence of an uplifted knife . . . . It is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than not kill him."[54]

Based on Justice Holmes' explanation of self-defense, the actor must have reasonably believed that he was in imminent danger.[55] Based on typical facts, it is clear why battered children who kill their abusive parents in non-confrontational settings do not fit within the framework of traditional self-defense. The danger posed to the child at the moment of the killing will often appear to be neither imminent nor reasonable to the average person; but to the child involved in a long and continued cycle of abuse at the hands of a parent, the constant and ongoing threat of abuse may make the child believe that the killing of his or her parent is indeed necessary to ward off imminent death or great bodily harm.[56]

A. *Reasonable Belief as a Requisite to a Self-Defense Instruction*

The battered child lives in a world which is strikingly different from his or her non-abused counterparts. As a result, the

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53. *Id.* at 340.

54. *Id.* at 343.

55. For purposes of this Note, "imminent" will be understood to encompass both "imminent" and "immediate." Although the words arguably have different legal significance with regard to temporal proximity of danger, "[n]o significant difference exists between imminent and immediate jurisdictions in the rate of complaints on appeal that the trial judge refused to give any instruction on the question of self-defense." Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 414 n.121 (1991). The difference between imminent and immediate is a choice "between a requirement that the jury focus on the circumstances, including past events, surrounding the defendant's action, and a requirement that the focus be limited to the particular instant of the defendant's action." *Id.* at 414.

56. In the analogous family abuse situation of the battered wife, studies suggest that an abused individual becomes familiar with nuances in the abuser's behavior which will signal a beating. "Subtle motions or threats that might not signify danger to an outsider or to the trier of fact acquire added meaning for a battered woman whose survival depends on an intimate knowledge of her assailant." 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, 634 (1980).

child's perceptions of normal family relationships become skewed. With specific regard to the self-defense strategy, the child's perception of "reasonable belief" is formed in response to years of oppressive and violent abuse. Traditional self-defense theories fail to take into account the years of abuse. By looking at only the homicidal event and it alone, the court denies the battered child who kills in a non-confrontational setting the opportunity to explain the reasonableness of the act. In many situations, the abused child has picked up on a signal or subtlety in the abuser's behavior that threatens a beating. In the analogous familial abuse situation of the battered woman, it has been observed that the abused "may reasonably believe that their lives are at risk because of changes in style of assault, or because the abuser says something that, in the past, has signalled great danger."[57] The failure of social service agencies to intervene and the unwillingness of family members to report the abuse also contribute to the abused person's reasonable belief that his or her life is in danger.[58]

Given the frequent absence of an outward act that causes reasonable belief in imminent harm, Battered Child Syndrome, as a defense, requires that the law accept an alternative form of "reasonableness" founded in the subjective beliefs and fears of the abused child, including past abuse at the hands of the deceased.

B. *Imminent Danger as a Requisite to a Self-Defense Instruction*

Because history of abuse and threat of violence are often the precipitating causes of the killing rather than one specific act of

57. Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227, 230 (1986).

58. In DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989), the United States Supreme Court affirmed a Seventh Circuit decision holding that the Department of Social Services' failure to remove a child from the custody of an abusive father did not violate the child's rights under the substantive component of the Due Process clause. In that case, Randy DeShaney was awarded custody of his one-year-old son, Joshua, in 1980. During the next four years, the local emergency room reported several incidents of suspected child abuse against Joshua to the county department of social services. Although the incidents were recorded, the department allowed Joshua's father to retain custody. In 1984, Randy DeShaney beat his four-year-old son so severely that he fell into a coma and sustained permanent brain damage. *Id.* at 193. Despite the almost constant abuse throughout the four years Joshua lived with his father, none of the family members reported it. DeShaney's second wife did not report the abuse until she initiated divorce proceedings in January 1982. DeShaney's live-in girlfriend did not report any incidents of abuse during her entire stay in the DeShaney home.

violence, "imminent" and "immediate"[59] do not apply to battered children who kill in non-confrontational settings. Traditional self-defense theories presuppose an outwardly violent act against which the person claiming self-defense is acting at the moment of the killing. In fact, traditional self-defense demands an outward act.[60]

Many of the same reasons that explain the "reasonableness" of the battered child's perceptions explain the child's belief in "imminence" of harm. Again, the battered child believes that a beating is imminent because something in the abuser's actions or words has signalled a beating in the past. In other cases, the regularity and frequency of the attacks over a continued and sustained period of years has led the child to conclude that the beatings will continue with the same certainty. In either case, the battered child needs to present testimony explaining what events formed his or her perception of "imminence" in order to mount a successful self-defense claim.

C. *Expert Testimony Is Necessary to Prove a Battered Child's Self-Defense Argument*

At trial, the battered child needs the aid of expert testimony to show that past abuse and the threat of future abuse caused him or her to form a "reasonable belief" of "imminent harm" at the moment of the killing. Because the mental state of an abused child is significantly different from his or her non-abused counterparts, a jury will likely need expert testimony to explain the differences between their own experiences and the experience of an abused child.[61]

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59. Many jurisdictions use the word "immediate" rather than "imminent" in their respective laws. This Note will criticize both terms as inappropriate and too narrow to embrace the battered child.

60. Blackman, *supra* note 58, at 230 (asserting that " 'classic' self-defensive action is embodied in male stranger-to-stranger assault").

61. "In situations where there is a lack of empathic care and experience of abuse and neglect, the symbiotic phase is highly distorted. Care is oriented much more toward the whims and convenience of caretakers, with less appropriate response to the child. In this situation, it is impossible for the child to develop any sense that the world or the people in it in any way reliably respond to his own needs. Hence, he cannot develop basic trust, but, on the other hand, will view the world with some degree of doubt and suspicion . . . . It is not surprising, therefore, that as a result of these experiences in childhood, we see adults who are somewhat socially isolated and have a great deal of difficulty in reaching out to others for help and assistance. They have no basic trust and have some fear that the very people to whom they will look for help will be the ones most likely to attack. They also feel their own deepest needs have never been and never will be fully satisfied. There is a low sense of self-esteem and some degree of chronic, low-grade, depressive feeling." Brandt

Dr. Ray E. Helfer explains the perceptions of a battered child by asking one to

> consider what happens when touching hurts, *most of the time*; smells about the house bring on very negative feelings, *most of the time*; mom's eyes show the threat of a swat; when the child listens to mom and dad talk, he becomes afraid, once the messages he hears are threats, screams, and anger. Over and over, day after day, the child is bombarded with negative sensory messages, messages that truly force the senses to 'shut down.' The child learns that it is far safer not to listen, not to look, and not to be touched, for when these senses are used, he hurts much more often than he feels good.[62]

As a result of this type of abuse, the "child's senses become 'muted,' and used only when absolutely necessary."[63] Not only is communication more difficult for abused children, it may seem to them to be futile because children "reared in abuse have had their senses trained in such a way that to use them for receiving or transmitting positive messages is not part of their communication systems."[64]

Holmes' famous statement that "detached reflection cannot be demanded in the presence of an uplifted knife" illustrates the Court's traditional approach to the reasonableness standard.[65] What courts have failed to acknowledge is that, to a battered child, a low tone or a subtle glance may be the equivalent of an uplifted knife; this reality is what the outside juror does not, and cannot, know without the aid of expert testimony.

Because most courts have not acknowledged the theory behind abuse-based defenses — that is, that both reasonableness and imminence of great bodily harm may be formed *and evoked* in response to a history of abuse — courts have not allowed both expert testimony and a self-defense instruction where there is no objective evidence of imminence of harm. The Kansas Supreme Court decision in *State v. Stewart* illustrates the futility of admitting expert testimony on the effects of abuse but then stopping short of allowing such testimony to support a self-defense instruction. In *Stewart*, the trial court heard evidence of abuse and the

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Steele, *Psychodynamic Factors in Child Abuse, in* THE BATTERED CHILD 57 (C. Henry Kempe & Ray E. Helfer eds., 1980).

62. Ray E. Helfer, *Developmental Deficits Which Limit Interpersonal Skills, in* THE BATTERED CHILD 38 (C. Henry Kempe & Ray E. Helfer eds., 1980).

63. *Id.*

64. *Id.*

65. Brown v. United States, 256 U.S. 335, 343 (1921).

psychologist's expert opinion that the defendant was suffering from Battered Woman Syndrome or post-traumatic stress syndrome at the time of the killing and gave a self-defense instruction to the jury.[66] On appeal, after an acquittal, the Supreme Court stated that "[i]n order to instruct a jury on self-defense, there must be some showing of an imminent threat or a confrontational circumstance involving an overt act by an aggressor. There is no exception to this requirement where the defendant has suffered long-term domestic abuse and the victim is the abuser."[67]

The Kansas Supreme Court held that the trial court's self-defense instruction was improperly given where there was no objective evidence showing reasonable belief in imminent danger of death or serious bodily injury.[68] Specifically, the court disapproved of the trial court's self-defense instruction, which provided:

> Where the battered woman syndrome is an issue in the case, the standard for reasonableness concerning an accused's belief in asserting self-defense is not an objective, but a subjective standard. The jury must determine, from the viewpoint of defendant's mental state, whether defendant's belief in the need to defend herself was reasonable.[69]

In finding error in the trial court's self-defense instruction, the Supreme Court upheld the admission of expert testimony on the issue of reasonableness but refused to allow that evidence to lead to a self-defense instruction. In doing so, the Kansas Supreme Court acknowledged the fact that expert testimony is instrumental in showing "reasonableness" and "imminence" of the battered person's perceptions yet severely limited the effectiveness of its admission by not allowing it to lead to a self-defense instruction.

Because a child is often reacting to familiar signals of abuse rather than to blatant acts of hostility, a child's violent response may seem unwarranted and unreasonable to the outside observer.[70] In fact, to the supposedly reasonable juror, the act may seem to be nothing other than premeditated murder. For these reasons, traditional notions of self-defense do not afford many battered children an adequate defense.

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66. State v. Stewart, 763 P.2d 572, 574-76 (Kan. 1988).

67. *Id.* at 577.

68. *Id.* at 579.

69. *Id.*

70. Children of abuse become able to detect subtleties in abuser's behavior which act as signals that abuse is imminent or possible. *See* Shelley Post, *Adolescent Parricide in Abusive Families*, 61 CHILD WELFARE 445 (1982).

Only through an expert's explanation to the jury of the effects of abuse on the mind of the actor can the jury be educated in a way which will allow them to evaluate fairly the accused's culpability. Because "the perceptions and responses of a battered person can be understood only within the context of [his or] her unique situation," the battered person must be allowed to testify to past abuse, and the expert must be allowed to explain the effects of that abuse at the time of the killing.[71] Ultimately, the decision of guilt or innocence remains with the trier of fact. The use of expert testimony simply bridges an otherwise insurmountable gap in experience which effectively precludes any appeal to a self-defense argument by battered persons who kill in non-confrontational settings.

V. THE STATUS QUO, COMPROMISE & CHANGE: *WHIPPLE*, *JAHNKE*, & *JANES*

In response to abuse-based defenses has come a wealth of academic and judicial responses which decry, modify and support their implementation.

A. *The Status Quo:* Whipple - *Excluding Battered Children from the Self-Defense Argument*

1. The Case

The Indiana Supreme Court decision in *Whipple v. State*[72] illustrates the denial of a self-defense instruction to a battered child because of strict adherence to traditional definitions of "imminent" and "necessity." In *Whipple*, seventeen-year-old Dale and his younger sister agreed that they would kill their abusive parents. For the entirety of his life, Dale suffered abuse at the hands of both parents and was beaten for things such as having candy bars in his bedroom.[73] On the evening of January 1, 1985, Dale asked his mother to accompany him to the garage and, once there, he struck her with an ax several times in the back of the head. Dale then proceeded to his parents' bedroom where he killed his father with the same ax.

At trial, Dale sought to introduce testimony relating the years of abuse he had endured at the hands of both parents in an attempt to prove a self-defense theory premised on the contention that he lived in "an ongoing atmosphere of imminent dan-

71. JoElle Anne Moreno, *Killing Daddy*, 137 U. PA. L. REV. 1281, 1290 (1989).

72. 523 N.E.2d 1363 (Ind. 1988).

73. *Id.* at 1365.

ger of serious bodily harm and fear of death."[74] Although the trial court allowed the jury to hear evidence of abuse, it rejected Dale's request for a self-defense instruction based on his failure to show "imminence" of harm. The Indiana Supreme Court stated that even "assuming, *arguendo*, that defendant honestly and in good faith believed the killings were necessary to prevent subsequent serious bodily injury from imminent use of unlawful force, we nevertheless find untenable the contention such subjective perceptions were *objectively* reasonable."[75] In fact, the Indiana Supreme Court denied that this type of killing in a non-confrontational setting could ever be justified as self-defense pointing out that:

> [T]he absence of imminent or impending danger . . . as evidenced by the remoteness in time between the murder of the victims and the last physical abuse inflicted upon either defendant or his sister, and by the fact the father was asleep and the mother was in a non-threatening disposition on the night of the killings, precludes the successful assertion of the defense of self or defense of others as a matter of law.[76]

The Indiana Supreme Court opted to adhere to the traditional definition of self-defense and to fit the victims of domestic abuse within its strictures. The court addressed the issue of abuse stating:

> We are cognizant of the tragedy experienced by the victims of battering relationships and all too frequent failure of social and law enforcement institutions to provide timely aid, comfort, and assistance to such victims. However, we are inescapably confronted here with conduct constituting the statutory offense of murder. The crimes cannot be condoned or excused . . . .[77]

As a result of strict adherence to the definition of "imminence," Dale was found guilty but mentally ill of both murders and sentenced to concurrent sentences of thirty and forty years imprisonment.

2. *Whipple*: Critical Response

Professor Alan Dershowitz has echoed the sentiments of the Indiana Supreme Court in *Whipple* by enumerating the dangers

74. *Id.* at 1366.
75. *Id.* at 1367.
76. *Id.*
77. *Id.*

of what he has termed the "abuse excuse."[78] In his book, *The Abuse Excuse: And Other Cop-outs, Sob Stories, and Evasions of Responsibility*, Dershowitz includes Battered Child Syndrome in a double digit list of defenses[79] which place "the victim - who is usually dead and incapable of defending himself - on trial"[80] which will lead to "invitation[s] to lawlessness."[81]

Dershowitz cites the case of Lyle and Erik Menendez to discredit the validity of the battered child defense in parricide cases. Dubbing it the "paradigm of the abusive and successful employment of the abuse excuse,"[82] Dershowitz decries the eighteen and twenty-one-year-old Menendez brothers who killed their parents in their Beverly Hills mansion on August 20, 1989 in a seemingly premeditated fashion as " 'preventive' execution[er]s."[83] Despite evidence that the brothers planned the murders and had several means of escape available to them, the trial resulted in a hung jury after testimony that they had been sexually abused by their parents.[84] Dershowitz asserts that outcomes such as this "endanger our collective safety by legitimating a sense of vigilantism that reflects our frustration over the apparent inability of law enforcement to reduce the rampant violence that engulfs us."[85]

Other critics fear that so-called abuse excuses will weaken notions of personal responsibility, increase lawlessness by instituting vigilantism and lessen the effectiveness of legitimate defenses in appropriate cases.[86] Others fear that such defenses will protect the individual only by sacrificing the whole so that "individual freedoms [will] outweigh the welfare of society."[87]

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78. Dershowitz defines the "abuse excuse" as "the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation." DERSHOWITZ, *supra* note 5, at 3.

79. The defenses which Dershowitz include in his book range from "Black Rage" and "Adopted Child" Syndromes to "Chronic Lateness" and "Football Widow" Syndromes. *Id.* at 321-41.

80. *Id.* at 19.

81. *Id.* at 42.

82. *Id.* at 21.

83. *Id.* at 24.

84. It is important to note that the judge in the Menendez trials did not instruct the jury on self-defense. Given the ages of the defendants and the means of escape available to them, the judge only instructed the jury on imperfect self-defense, which requires "an *un*reasonable belief that their lives were in imminent danger." *Id.* at 22 (emphasis in original).

85. *Id.* at 4.

86. James H. Andrews, *I May be a Murderer, But It's Not My Fault*, THE CHRISTIAN SCI. MONITOR, Sept. 19, 1994, at 13.

87. Scott Montgomery, *Call us . . . Irresponsible: It has Gone from 'The Buck Stops Here' to the Menendez Brothers*, EVERYDAY MAG., Dec. 26, 1994, at 6E.

The frustration of these critics can be understood in a case such as Menendez, where the physical evidence of a homicide as well as the voluntary confessions of the killers are presented and a hung jury results. Such an outcome goes directly against the sanctity of human life in civilized society so that the rage and disgust evoked by a hung jury is easily understood. While in many respects the Menendez case may be considered an aberration, it is not the existence of the defense which caused the injustice, rather it is the jury's application of it. In fact, abuse-based defenses seek to present all of the relevant information to the jury so that reasonableness and imminence may be properly determined. These defenses do not exculpate an entire class of murderers simply because they were abused by their victims, nor do they give abused persons a free "license to kill and maim"[88] as Dershowitz would have one believe. But because, as the Menendez case illustrates, juries can abandon the dictates of the law and embrace the emotion of a case, laws entitling a defendant to a self-defense instruction must be carefully defined in order to afford the abused person a fair trial and also to remain true to the policy goals behind the self-defense justification.

B. *Compromise:* Jahnke - *Manslaughter as an Inadequate Response*

1. The Case

On November 16, 1982, sixteen-year-old Richard Jahnke used a shotgun to shoot and kill his father as he entered the family home.[89] Earlier that day, Richard had engaged in a violent altercation with his father who regularly beat him, his mother, and sister. The trial court allowed Richard to present evidence documenting a long history of abuse at the hands of his father and instructed the jury on the issue of self-defense but refused to admit evidence on the issue of "reasonableness." The court conceded that although "our reading of the record leaves us skeptical with respect to the validity of the defense of self-defense under these circumstances, [ ] the testimony of the appellant that he acted in self-defense is sufficient to justify the instruction."[90] But, the trial court's self-defense instruction became almost meaningless when the court refused to allow the defendant to present expert testimony regarding the defendant's reasonable belief in imminent harm. The supreme court concluded:

88. DERSHOWITZ, *supra* note 5, at 3.
89. Jahnke v. State, 682 P.2d 991, 991 (Wyo. 1984).
90. *Id.* at 1002.

> Absent a showing of the circumstances involving an actual or threatened assault by the deceased upon the appellant, the reasonableness of the appellant's conduct at the time was not an issue in the case, and the trial court at the time it made its ruling, properly excluded the hearsay testimony sought to be elicited from the forensic psychiatrist.[91]

As a result, Richard was convicted of voluntary manslaughter and sentenced to five to fifteen years imprisonment. The rulings and sentence of the trial court were upheld by the Wyoming Supreme Court. The effect of the court's ruling was to forbid Jahnke from presenting evidence of his violent history with his father in order to show the reasonableness of his fear of imminent death or bodily harm - evidence which is needed to mount an effective self-defense argument.[92]

A careful comparison of the majority and dissenting opinions in *Jahnke* illustrates the competing concerns that face courts dealing with parricide cases; it also illustrates judicial approaches to dealing with the evidence. In arriving at the conclusion that evidence of past abuse could not be presented in order to prove the traditional requirements of self-defense, Justice Thomas, writing for the majority, assumes the cautious legal high ground. Beginning with the premise that life is the law's most highly protected interest, Justice Thomas proceeds by first distinguishing the battered child defense from traditional theories of self-defense and, second, by warning of the innumerable debilitating consequences which would assuredly result if the self-defense exception were expanded to include abuse-based defenses such as battered child syndrome.

Justice Thomas describes the differences between Richard Jahnke's battered child defense and traditional self-defense as "patent."[93] In distinguishing the two defenses, Justice Thomas first points out that self-defense arises in response to an "immi-

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91. *Id.* at 1007.

92. The Wyoming Supreme Court refused to allow a self-defense instruction because there was no imminence of harm to the defendant where the defendant was waiting for his victim to return home. Other courts have read the imminence requirement more broadly in cases of domestic abuse. In *State v. Norman*, the North Carolina Court of Appeals held that it was reversible error to fail to instruct on self-defense where the defendant shot her sleeping husband after a long history of abuse and repeated incidents of abuse on the day of the fatal shooting. In its discussion of imminence, the court found that although the victim's last abusive act towards his wife was not concurrent with the defendant's fatal act, the victim's nap was "but a momentary hiatus in a continuous reign of terror." 366 S.E.2d 586, 592 (N.C. Ct. App. 1988), *rev'd*, 378 S.E.2d 8 (N.C. 1989).

93. *Jahnke*, 682 P.2d at 996.

nent" danger while Jahnke's response amounted to a calculated attack as evidenced by the fact that he concealed weapons throughout the family home, armed his younger sister, and lay in wait for his father's return.

Justice Thomas next demands that self-defense be applied only in "circumstances involving a confrontation."[94] By pointing to the requirement that, at the time the defendant kills his abuser, there be an "overt act or acts by the deceased, which would induce a reasonable person to fear that his life was in danger,"[95] Justice Thomas emphasizes that at the time of the attack, Jahnke's father did nothing more than attempt to enter his home. The majority likens Jahnke's acts to premeditation more than self-defense. Justice Thomas' initial discussion of the differences between the two defenses namely, traditional self-defense and Battered Child Syndrome self-defense, places Jahnke's argument clearly outside the realm of traditional self-defense.

Justice Thomas continues by warning of the inevitable dangers of adopting Battered Child Syndrome as a justification for the taking of a human life, positing that if judicial recognition of an abuse-based defense were given, there is reason to fear that the number of individuals seeking to justify their murderous actions upon similar lines would increase exponentially. The court avoids this feared outcome by refusing to admit the expert forensic psychiatrist's testimony because it had not "been presented any evidence of any court's acceptance of the science of the battered child, [and of] what can be predicted from the battered child."[96]

In affirming the trial court's decision to exclude the testimony of the forensic psychiatrist, Justice Thomas looks to the importance of the reasonable person standard and its foundation in a shared common experience. He states that although many "seem to be prepared to espouse the notion that a victim of abuse is entitled to kill the abuser, that special justification defense is antithetical to the mores of modern civilized society."[97] Implicit in this statement is the notion that if juries acquit victims who kill their abusers, juries are betraying their duty to society. By relieving the actor of culpability, the jury allows the actor to assume the role of both judge and jury. The actor circumvents the entire rule of law by being able to decide what amount of abuse must be endured before he or she is allowed to exact fatal

94. *Id.* at 997.
95. *Id.*
96. *Id.* at 1004.
97. *Id.* at 997.

retribution from the abuser. This is what leads Justice Thomas to conclude that expansion of the self-defense justification would "amount to a leap into the abyss of anarchy."[98]

This is where the majority and the dissent most significantly depart in their philosophies. The majority professes a belief in a law based in common experience as a means of ensuring fairness to all. Conversely, Justice Rose writing for the dissent insists that members of the jury must be informed of conditions existing beyond the ken of their common experience because the abused has been treated in such a way as to take him or her outside of the realm of that common experience.[99] Because of this shift from the shared common experience of the majority into the realm of the unshared individual experience of the abused, the dissent argues that the jury is in need of special instruction on the mental state of an abused person.[100] This shift is necessary in order to ensure the abused a fair trial that could not otherwise be obtained if he or she were judged by the standards of a world in which abuse is not the norm or has never been experienced.[101]

In contrast to the legal rigidity of Justice Thomas' majority opinion, Justice Rose embarks upon an impassioned dissent by describing the deceased as a "cruel, ill-tempered, insensitive man [who] roams, gun in hand, through his years of family life as a

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98. *Id.*

99. Justice Rose asks, "how could this young boy structure an understandable defense when—even though the record discloses that since age two he had been bullied, battered, frightened and emotionally traumatized—he was, nevertheless, denied the opportunity to have explained to his jury how abused people reasonably handle their fears and anxieties—what their apprehensions are—how, in the dark moments of their aloneness, they perceive the imminence of danger—and how, in response, they undertake to assert their right of self-defense?" *Id.* at 1012 (Rose, J., dissenting).

100. Justice Rose argues that, "since the issue of self-defense in the unusual behavioral circumstances of this case is a subject which is cloaked in the abstract mysteries of professional knowledge, the jury, deprived of an expert's explanation of how battered people perceive and respond to imminence of danger, could not be expected to and did not understand and quantify the impact and residuals of the years and years of battering which had been the lifelong fate of Richard Jahnke." *Id.* at 1012.

101. Justice Rose concludes that, "[d]enied this opportunity [to present expert testimony], the appellant was forced to submit his case to the jury with what consequently present itself as a ridiculous, unbelievable, outrageous defense .... How could any jury be receptive to such a defense on an informed basis if its members are not to be permitted to hear from those who understand how brutalized people—otherwise 'reasonable' in all respects—entertain what, for them, is a belief that they are in imminent danger from which there is no escape and how they, with their embattled psyche, responsively behave?" *Id.* at 1013.

battering bully."[102] This description sets the stage for a fiery opinion written in an attempt to illustrate just how ill-equipped a jury without the aid of expert testimony is to deal with the issue of reasonableness in situations of abuse. Justice Rose notes that for Richard Jahnke between "the ages of four and 12, there was seldom a day without some sort of punishment by his father . . . . He would be beaten for such things as not cleaning the basement the right way—for walking along with his mouth open—for spending too much time polishing his ROTC uniform."[103] Justice Rose lists these things in an attempt to elicit a response of shock and horror from the reader and to emphasize that such brutality is surely outside the realm of common experience. Justice Rose relies on this horror to substantiate his claims that a jury cannot fairly evaluate an abused defendant based upon traditional notions of self-defense defined in terms of the "reasonable person." A jury of individuals who are shocked by such physical abuse is less competent to judge the reasonableness of the actions of one who has spent his or her life enduring that abuse than individuals who are familiar with the effects of abuse. The dissent urges that because the abused person is in a constant state of "imminent danger," members of the jury cannot comprehend "how abused people reasonably handle their fears and anxieties."[104] Justice Rose explains that the unusual behavioral circumstances cause abuse cases to be

> cloaked in the abstract mysteries of professional knowledge, [so that] the jury, deprived of an expert's explanation of how battered people perceive and respond to imminence of danger, could not be expected to and did not understand and quantify the impact and residuals of the years and years of battering . . . the jury could, therefore, not know—or be expected to know—whether [the] acts, at the time and place in question were, those of the reasonable person similarly situated for whom the law of self-defense provides comfort.[105]

The dissent's willingness to expand the definition of reasonable belief to encompass the mental state of a chronically abused child living in constant fear of harm evidences its attempt to afford to the abused individual the same fairness that the jury system affords to all other accused persons. The dissent urged that in

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102. *Id.* at 1011.
103. *Id.* at 1026.
104. *Id.* at 1012.
105. *Id.*

> normal circumstances, these are the things that jurors can fathom for themselves. However, when the beatings of fourteen years have—or may have—caused the accused to harbor types of fear, anxiety and apprehension with which the nonbrutalized juror is unfamiliar and which result in the taking of unusual defensive measures which, in the ordinary circumstances, might be thought about as premature, excessive or lacking in escape efforts by those who are uninformed about the fear and anxiety that permeate the world of the brutalized—then expert testimony is necessary to explain the battered-person syndrome and the way these people respond.[106]

The dissent would admit testimony of abuse and expert testimony explaining the effects of that abuse because its admission is "central to the viability of [the defendant's] plea of self-defense."[107] The dissent did not propose a change in the language of the standard self-defense instruction, rather it suggested that the language of the existing instruction would include some battered children who kill abusive parents if expert testimony regarding reasonableness is admitted. The dissent explained that testimony regarding the defendant's abuse and its effects is necessary because that testimony might answer

> the question which asks whether [the abused], at the time and place when he shot and killed his father, reasonably believed it was necessary to use deadly force to prevent imminent danger or great bodily harm to himself and his sister. It is also necessary to recount the beating testimony for the purpose of evaluating the necessity and admissibility of expert psychiatric testimony to show whether the mental and physical mistreatment [the abused] suffered made it reasonable for him — under all relevant circumstances — to behave as he did.[108]

By informing the jury of the mental condition of the abused child, the dissent would narrow the gap in experience between the jury members and the abused in an attempt to ensure the accused a fair trial based in common knowledge, if not common experience.

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106. *Id.* at 1018.
107. *Id.*
108. *Id.*

2. *Jahnke*: Critical Response

In her article, *Abused Children Who Kill Abusive Parents*, Susan C. Smith argues that manslaughter is the appropriate legal response to battered children who kill. Smith maintains that:

> [V]oluntary manslaughter, rather than self-defense, is the appropriate legal response to the killings [because] . . . voluntary manslaughter recognizes both crimes in the context in which they occur: categorizing the abuse as a mitigating circumstance, while at the same time preserving the intent of the self-defense doctrine by stressing the sanctity of human life and discouraging self-help.[109]

This approach accepts that no imminence exists when the battered child kills and thus evidence of abuse should serve only as a mitigating factor used to reduce a murder charge to the lesser offense of manslaughter.[110] Smith concludes by pointing to the case of Richard Jahnke as an appropriate response to an act of parricide in a non-confrontational setting.

Smith's central premise is that evidence of abuse is better suited to act as a mitigator than as proof of self-defense. The Indiana Supreme Court noted that the "voluntary manslaughter statute creates an affirmative defense of sudden heat akin to self-defense. The latter is, if successful, a complete defense while the defense of sudden heat is only a partial defense because it reduces the seriousness of the crime from the murder felony to a class B felony."[111] A representative manslaughter statute provides: "A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter. The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder . . . to voluntary manslaughter."[112] Manslaughter is an inappropriate charge against a battered child who kills an abusive parent in a non-confrontational setting for many of the same reasons that traditional self-defense pleas are unavailable to them. Specifically, manslaughter statutes have implicit "reasonableness" and "imminence" requirements built into the case law definition of "sudden heat."

In *Wollum v. State*, the Indiana Supreme Court discussed the role of the reasonableness requirement by explaining that "[f]or

109. Smith, *supra* note 11, at 160-61.

110. "By allowing testimony to place battered children within the purview of the self-defense doctrine when no imminent harm is present, the goals of the doctrine itself, society, and the criminal justice system are ill-served." *Id.* at 176.

111. Palmer v. State, 425 N.E.2d 640, 644 (Ind. 1981).

112. IND. CODE ANN. § 35-42-1-3 (Burns 1994).

a charge of murder to be reduced to voluntary manslaughter, however, the defendant must have acted in reaction to a provocation which might have caused *an ordinary person* to act rashly, in sudden passion, and without due deliberation."[113] The court also discussed the imminence requirement of the manslaughter statute which requires close temporal proximity between the advent of the defendant's ire and the actual killing.[114] Therefore, the battered child who kills in a non-confrontational setting will encounter the same, if not greater, obstacles in trying to fit within the framework of manslaughter that he or she encounters in claiming self-defense.

C. *Change:* Janes - *Accepting Battered Children's Syndrome as a Defense*

1. The Case

In *State v. Janes*,[115] sixteen-year-old Andrew Janes announced his intention to shoot his stepfather Walter Jaloveckas several hours before the killing actually occurred. Andrew smoked marijuana and drank alcohol in the hours before he shot his stepfather twice in the head as he entered the family home. On the basis of these facts and no more, it is not difficult to understand why a jury convicted Andrew of second degree murder. But, it is important to note that the trial court refused to admit evidence regarding Andrew's past abuse at the hands of his stepfather, ruling that "in the absence of evidence showing that Andy was in fact in imminent danger at the time of the shooting, there was an insufficient factual basis to support giving an instruction regarding self-defense."[116]

On appeal, the Washington Court of Appeals opted for a different approach. The Court of Appeals held that a "defendant is entitled to have his theory of the case submitted to the jury under appropriate instructions when the theory is supported by sufficient evidence."[117] The court continued by setting a very low threshold for "sufficient evidence" stating that "self-defense is

113. 380 N.E.2d 82, 87 (Ind. 1978) (emphasis added).

114. In *Weaver v. State*, the Indiana Supreme Court rejected the defendant's request for a manslaughter instruction because the defendant killed the victim one day after overhearing the victim's plan to murder the defendant's brother. The court refused to give the instruction because the evidence could not show that the defendant was acting in sudden heat. 583 N.E.2d 136, 142 (Ind. 1991).

115. 822 P.2d 1238 (Wash. Ct. App. 1992), *aff'd*, 850 P.2d 495 (Wash. 1993).

116. *Id.*

117. *Id.*

properly raised if the defendant produces 'any evidence' tending to show self-defense."[118] The most important aspect of the court's decision was in its interpretation of the imminence prong of the Washington State self-defense statute.[119] The court concluded that "while the 'imminent danger' prong requires the jury to find that the victim honestly and reasonably believed that the aggressor intended to inflict serious bodily injury in the near future, there need be no evidence of an actual physical assault to demonstrate the immediacy of danger."[120] Instead, the court ruled that only, "[s]ome evidence of aggressive or threatening behavior, gestures, or communication by the victim is typically required to show that the defendant's belief that he or she was in imminent danger of great bodily harm was reasonable."[121] This interpretation of imminence hallmarks an unprecedented break from traditional self-defense thinking.

By allowing the jury to consider all of the evidence which could have affected the actor's perceptions at the time of the killing and by employing only a subjective standard to evaluate imminence,[122] the court acknowledged the validity of Battered Child Syndrome as equal to that of the Battered Woman Syndrome. In deciding whether or not evidence of Battered Child Syndrome is admissible, the appellate court instructed the trial court to use the same two-part test it uses in cases of Battered Woman Syndrome. First, it must ask, "(1) whether scientific understanding of the battered child syndrome is sufficiently developed so as to be generally admissible, and (2) whether the expert testimony offered would have been helpful to the trier of fact in the context of this case."[123] In answering these questions, the court admitted that although, "no Washington case has yet recognized the 'battered child syndrome' in this context, the pertinent literature indicates that there is a sufficient scientific basis to justify extending the battered woman syndrome to analogous situations affecting children."[124]

After deciding that Battered Child Syndrome passed the test for admissibility in *Janes,* the court reversed the conviction and remanded for further proceedings consistent with its rulings. In doing so, the court pointed out that because "children are both objectively and subjectively more vulnerable to the effects of vio-

118. *Id.* (quoting State v. Adams, 641 P.2d 1207 (Wash. Ct. App. 1982)).
119. *See* WASH. CRIM. CODE § 9A.16.050 (West 1988 & Supp. 1995).
120. *Janes,* 822 P.2d at 1241.
121. *Id.* at 1242.
122. *Id.*
123. *Id.*
124. *Id.*

lence than are adults . . . the rationale underlying the admissibility of testimony regarding the battered woman syndrome is at least as compelling, if not more so, when applied to children."[125] In this one opinion, the Washington Court of Appeals gave a voice to children that had been silenced not only in their homes but also in the courtrooms.

2. *Janes*: Critical Response

Two of the commentators cited by the Court of Appeals in its *Janes* opinion are JoElle Anne Moreno and Paul A. Mones. Moreno analyzes Battered Child Syndrome in her Article, *Killing Daddy*[126] by comparing it to the analogous Battered Woman Syndrome. She begins by arguing that "the perceptions and responses of a battered person can be understood only within the context of her unique situation."[127] In examining the traditional constraints of self-defense theories, she concludes that they work to the exclusion of the battered child primarily because they are premised upon "male, stranger-to-stranger assault"[128] and therefore fail to "account for familiarity and heightened awareness."[129] In her conclusion, Moreno calls for the type of judicial recognition of the shortcomings of traditional self-defense that occurred in *Janes*.

Paul A. Mones, a defense attorney who specializes in representing children who kill their parents, argues for a Battered Child Syndrome defense in a slightly different manner in his book, *When a Child Kills*.[130] In contrast to Moreno who argues for a Battered Child Syndrome defense by comparison to Battered Woman Syndrome, Mones explains the syndrome by illuminating the uniqueness of the abused child. Mones asserts from his experience as a juvenile advocate that abused children experience the same natural inclination as nonabused children to remain attached to the parent despite the battering incident.[131] In order to escape, the battered child must not only overcome this natural inclination but also must get someone to believe the story, prove the abuse, and leave the situation. For adults, these are often difficult tasks; for children, they can be all but impossible. Mones explains that:

125. *Id.* at 1243.
126. Moreno, *supra* note 72, at 1290.
127. *Id.* at 1290.
128. *Id.* at 1285.
129. *Id.* at 1286.
130. MONES, *supra* note 6.
131. *Id.* at 37.

> Going against the parent is difficult for even a normal, well-adjusted child. When the vow of silence is reinforced by threats . . . it becomes virtually impossible for the child to risk speaking out. Even assuming the child has the Herculean strength to overcome these barriers, there is a very real possibility that no one will believe his story. All children learn early that the words of adults carry far more weight than their own.[132]

Given the unique situation of the battered child, Mones posits that although "murdering a parent is not an acceptable solution to child abuse; it is a solution forced upon the child" so that "victims of child abuse are entitled to do anything necessary to free themselves from their tyranny."[133] Mones ruins his case by this wildly overblown rhetoric.

While Mones believes that victims of child abuse are entitled to do anything to escape, the law cannot tolerate vigilante murder. Yet because child abuse, the severity of which may suggest to a child that murder is the only means of escape, is a reality which continues to exist, the law cannot continue to ignore the plight of those who are subjected to it. Simply because battered children were not adequately considered when traditional self-defense theory was formulated does not mean that they should be forever excluded from it. The solution to these two irreconcilable approaches to an adequate defense for battered children who kill lies in a compromise between the two extremes of denial of a self-defense instruction to a battered child and free reign to the victim of abuse who kills. This compromise must be sought through the continued expansion of the foundations which have already been laid.

VI. Foundations for Expansion and Acceptance

The shortcomings of traditional self-defense as applied to victims of domestic abuse has been noted and addressed in the analogous situation of the battered wife. At present, a majority of states allow evidence of Battered Woman Syndrome (BWS) either to mitigate a murder charge to manslaughter or to act as a full affirmative defense,[134] but only one state has allowed similar evidence of Battered Child Syndrome to act as a full affirmative

132. *Id.*

133. *Id.* at 392.

134. James O. Pearson, Annotation, *Admissibility of Expert Opinion Testimony on Battered Wife or Battered Woman Syndrome*, 18 A.L.R. 4th 1153 (1982 & Supp. 1994).

defense.[135] Other states have responded by enacting specific legislation to deal with admission of evidence of Battered Child Syndrome in the self-defense context.[136]

A. *Battered Woman Syndrome - Recognition and Acceptance*

In 1977, Dr. Lenore Walker was the first person successfully to present expert testimony on the symptoms and effects of Battered Woman Syndrome as a defense to homicide.[137] Walker, the leading expert on the subject of Battered Woman Syndrome, explains the battering situation as a "Cycle of Violence" which is comprised of three phases: the tension building phase; the acute battering incident; and the tranquil/loving phase.[138] During the tension-building phase, "[a]ny unexpected circumstance that arises may catalyze a sudden escalation of violence, an explosion."[139] In order to ward off a major explosion, the woman submits to lesser forms of abuse such as verbal insults and slaps, yet "the effect it has on exacerbating her already-established psychological terror cannot be stressed enough."[140] During the acute battering phase, the violence escalates to uncontrollable rage and brutality. During this violent phase, the woman may feel detached and "psychologically trapped."[141] Walker explains that the woman does not leave or attempt escape because "her batterer is in nearly all cases much stronger than her physically, and she knows from past experience that it is futile to fight him."[142] It is during the final tranquil phase that "the battered woman is most thoroughly victimized psychologically."[143] Walker suggests that the tranquil phase is the most victimizing because the batterer and his victim become dependent on one another - he for her forgiveness and she for his caring behavior. Walker argues that "underneath the grim cycle of tension, violence, and forgive-

135. In *State v. Janes*, the Washington Court of Appeals became the first court in the United States to allow Battered Child Syndrome to act as a full affirmative defense. *See supra* notes 115-124 and accompanying text.

136. The Texas legislature recently enacted a statute which allows the defendant to present evidence of past familial violence if the defendant is pursuing a self-defense instruction. *See* TEX. PENAL CODE ANN. § 19.06 (West Supp. 1993). I discuss this statute in Section V, B *infra* note 154. *See also* ARIZ. STAT. ANN. § 13-415 (West Supp. 1995); KY. STAT. ANN. § 503.010(3) (Baldwin Supp. 1992).

137. WALKER, *supra* note 6, at 303-04.

138. *Id.* at 42.

139. *Id.* at 43.

140. *Id.*

141. *Id.* at 44.

142. *Id.*

143. *Id.* at 45.

ness that makes their love truly terrifying, each partner may believe that death is preferable to separation."[144]

Going through this "cycle of violence," the individual learns helplessness. The effect of learned helplessness is that "[b]attered women don't attempt to leave the battering situation, even when it may seem to outsiders that escape is possible, because they cannot predict their own safety; they believe that nothing they or anyone else does will alter their terrible circumstances."[145] Once in the cycle of "learned helplessness,"[146] a person:

> [W]ill be more likely to respond to that situation with coping responses rather than by trying to escape . . . the truth of facts of a situation turn out to be less important than the individual's set of beliefs or perceptions concerning the situation.

With regard to traditional definitions of imminence and reasonableness, it is important to understand, Walker says, that battered women come to know the subtleties of the abuser's actions and tones of voice and come to identify those nuances with an impending beating. "Their interpretation of the emotions expressed by his nonverbal body language provide as much important information as does his verbal message. Women also use their prior knowledge or history of a situation in order to assign meaning to an event."[147]

Because the woman knows that a battering incident may soon be visited upon her because of a familiar look, tone, or other nonverbal action, her response to a seemingly harmless nonverbal action may seem wholly unreasonable to an uninformed jury. If the jury has no context in which to place the act, it cannot properly judge the woman's act as reasonable or unreasonable. The above factors constitute much of the reason that a majority of states have accepted evidence of Battered Woman Syndrome in criminal trials.

In *State v. Kelly,* the New Jersey Supreme Court enumerated the reasons which justified the court's acceptance of Battered Woman Syndrome as an affirmative defense stating that it had:

> gained general acceptance as a scientific doctrine within the professional community [and] public policy considerations complement these traditional modes for determining whether a particular subject matter is reliable and within

144. *Id.*
145. *Id.* at 50.
146. *Id.*
147. *Id.*

> the purview of expert knowledge. An emerging public policy acknowledges the battered women's syndrome. Psychiatrists, psychologists, and social scientists, as well as the legal and law enforcement community, have begun to come to grips with the forces that generate and perpetuate familial and domestic violence.[148]

Can it be rationally argued that battered children do not fit into this framework as much as battered women? In fact, the *Janes* court observed that because "children are both objectively and subjectively more vulnerable to the effects of violence than are adults, . . . the rationale underlying the admissibility of testimony regarding the battered woman syndrome is at least as compelling, if not more so, when applied to children."[149]

Other reasons cited for the battered woman's inability to escape the battering situation include the fact that the woman may have sought outside help, but was frustrated by the police's or community's inadequate response to the situation. The woman may have "tried to leave but was forced to stay . . . may have been physically barred from leaving or physically forced to return . . . 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."[150] All of these reasons lend validity to the claim of Battered Woman Syndrome that the failure of outside forces to intervene help create the belief that the woman is truly trapped and that, in order to escape the violence, she must also resort to violence. These reasons apply as much, and indeed more, to the battered child. Most children do not have the financial or psychological maturity to leave home, nor do they know of the resources available to help them. Even if a child does seek help, his or her pleas will often go unheard.[151] Likewise, children are especially suspectable to economic and familial dependence given their young age and limited options.

There is no legitimate reason for the judiciary's slow acceptance of Battered Child Syndrome when compared to Battered Woman Syndrome. In *State v. Janes*, the court admitted as much when it pointed out "the Battered Women's Syndrome and the Battered Child Syndrome constitute a single psychological disorder for purposes of expert testimony . . . . The differences

148. *Id.* at 256.

149. 478 A.2d 364, 388 (N.J. 1984).

150. State v. Janes, 822 P.2d 1238, 1243 (Wash. Ct. App. 1993), *aff'd*, 850 P.2d 495 (Wash. 1993).

151. David L. Faigman, *Discerning Justice When Battered Women Kill*, 39 HAST. L. J. 207, 211 (1987).

between the groups are negligible."[152] The *Janes* court went further to note that children may present an even more compelling argument for application of the doctrine in that "children are both objectively and subjectively more vulnerable to the effects of violence than are adults."[153] Children

> have virtually no independent ability to support themselves, thus preventing them from escaping the abusive atmosphere. Further, unlike an adult who may come into a battering relationship with at least some basis on which to make comparisons between current and past experiences, a child has no such equivalent life experience on which to draw to put the battering into perspective. There is therefore every reason to believe that a child's entire world view and sense of self may be conditioned by reaction to that abuse.[154]

The reality remains that given the seeming judicial acceptance of the psychological and legal validity of Battered Woman Syndrome, there are few, if any, defensible reasons not to extend similar consideration to the battered child.

B. *Legislatively Enacted Proposals for Reform*

In 1993, the Texas legislature adopted a criminal statute which allowed broad admissibility of evidence regarding domestic violence in prosecutions for criminal homicide. Texas Penal Code section 19.06 provides:

> (a) In all prosecutions for murder or voluntary manslaughter, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.[155]

The statute further provides that if a defendant raises self-defense as a justification that he or she is entitled to offer:

> (1) relevant evidence that the defendant had been the victim of acts of family violence committed by the deceased . . . and (2) relevant expert testimony regarding the condi-

152. CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN 98 (1991).

153. *Janes*, 822 P.2d at 1240.

154. *Id.* at 1243.

155. TEX. PENAL CODE ANN. § 19.06 (West Supp. 1993).

> tion of the mind of the defendant at the time of the offense, including those relevant facts and circumstances relating to family violence that are the basis of the expert's testimony.[156]

Apparently, only one case was decided under section 19.06. The case involved seventeen-year-old Donna Weisner who used the statute to give testimony that her father had beaten her into unconsciousness, thrown logs at her and handcuffed her to a chair.[157] Donna shot her father six times after he "had his hands out and he looked like he was going to choke [her]."[158] Donna was subsequently acquitted of the murder charge. What is exceptionally noteworthy about this case is that no expert testimony was presented, Donna simply told the jury about the past abuse. Although the Texas legislature deleted section 19.06 from its penal code after the Weisner decision,[159] the same language has been reenacted in Article 38.36 of the Texas Code of Criminal Procedure.[160]

VII. SENTENCING - FURTHER EVIDENCE OF JUDICIAL CONFUSION & ANOTHER REASON FOR CHANGE

Courts have approached the difficult task of sentencing the battered child who kills against the backdrop of traditional goals of punishment. Competing concerns about whether treatment and rehabilitation or retribution and deterrence should be emphasized have caused courts to hand out widely disparate sentences to parricide offenders.

In 1982, Richard Jahnke shot and killed his father for which he was later convicted of voluntary manslaughter.[161] Two weeks later in northern Florida, seventeen-year-old George Burns, Jr. shot his father six times in the back. At trial, it was revealed that both youths were victims of years of mental and physical abuse at the hands of their fathers and both were convicted of their crimes. The divergence in their stories occurs at the sentencing stage.

In 1983, George Burns, Jr. was given fifteen years probation and released while Richard Jahnke was sentenced to five to fif-

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156. *Id.*

157. *Id.*

158. Michael K. Molitor, *The "Battered Child Syndrome" as Self-Defense Evidence in Parricide Cases: Recent Developments and A Possible Approach*, 40 WAYNE L. REV. 237, 250 (1993).

159. *Id.* at 251 n.83.

160. 19.06 deleted by Acts 1993, 73d. Leg., ch. 900, 1.01, eff. Sept. 1, 1994.

161. TEX. CODE CRIM. PROC. ANN. art. 38.36 (West Supp. 1995).

teen years in prison. The words of the sentencing judges are illustrative of the competing concerns of the judiciary in sentencing parricide offenders. Circuit Judge L. Page Haddock told Burns that "I do not want you to think in any way that what you have done has been condoned by society. [But] I believe that the chain of violence and abuse that led you to this end were brought about by your father's actions rather than by yours."[162] In striking contrast, District Judge Paul Liamos advised, "I'm sure we all have compassion for Richard Jahnke. [But] regardless of the circumstances . . . no one should be permitted to act a prosecutor, jury, judge, court of appeal and executioner without being called upon to account to society."[163]

Another case which illustrates this frustration is that of Joeri DeBeer who was convicted of manslaughter after he killed his abusive legal guardian. Joeri was sentenced to three years probation after the sentencing judge explained "he felt confident that DeBeer knew the killing was wrong and would not pose a danger to society."[164] If parricides committed by abused children were typical homicides, there would not be this great disparity in sentencing. The fact that one teenager can be sentenced to years in prison while another is given only probation attests to the fact that judges are finding ways to work around the present state of self-defense law.

VIII. CONCLUSION

Traditional theories of self-defense presume two strangers, one who is attacking and another who is responding to the attack. While the majority of homicides committed in self-defense do fall into this framework, there exists an entire class of homicides committed by the victims of domestic violence who fall outside of it. Lawmakers did not so much rationally choose to exclude this group of individuals from the framework as they did not acknowledge their existence at the time of the law's formation. A combination of social and historical factors have combined to hide the severity and commonness of child abuse for decades. Now, as the mask of child abuse is being slowly dismantled by agencies and advocates designed to thwart it, the frightening realities which pervade the lives of many of America's children have been revealed.

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162. *See supra* notes 88-107 and accompanying text.

163. Barry Siegel, *When Tortured Children Strike Back*, 7 UPDATE ON LAW-RELATED EDUC., at 8 (Fall 1983).

164. *Id.*

The current challenge confronting the criminal justice system is to deal properly with these realities when the battered child enters the criminal justice system as the accused rather than the victim. Science has recognized the validity of Battered Child Syndrome and its effects. Given this general recognition by the scientific community, the legal community must do its part to acknowledge this group. In remaining true to its task, the law must seek to judge fairly those who come within its rule. The question currently confronting the legislatures and the courts is what is the most appropriate and just legal response to battered children who kill.

Critics contend that acceptance of Battered Child Syndrome as evidence of self-defense represents an "abdication of responsibility by individuals, families, groups, and even nations."[165] But this inquiry presumes its answer. That is, critics presume the question to be "Is this defendant a member of a group (here, battered children) such that inclusion in the group excuses the actor from punishment?" In reality, inclusion in the particular group does not excuse the actor, it simply makes available to the jury the needed information and fair standards by which to judge his or her acts. Thus, the question is "Is this defendant a member of a group (battered children) such that his or her actions must be evaluated in light of relevant expert testimony?" In this way, safeguards are still in place to guide the jury's decision.[166]

The admission of evidence of a history of abuse as well as expert testimony explaining the effects of that abuse is essential to a fair trial for the abused child who kills. The admission of such testimony does not ensure the battered child an acquittal as there is no reason to believe that juries will abandon their general horror and disdain of homicide. Rather, the testimony is admitted so that the jury can accurately measure the actor's culpability in the particular circumstances. Without this testimony, the jury cannot adequately decide whether an action was reasonable or unreasonable. Similarly, without knowing the history of abuse which led to the killing, the jury cannot fairly assess the imminence of the harm. Given that these two terms are essential to the successful employment of any self-defense argument, courts should allow the evidence in and trust juries to follow the instructions given to them.

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165. DERSHOWITZ, *supra* note 5, at 4.

166. JoElle Moreno points out that "[a]llowing these defendants to develop their claim of self-defense merely affirms their right to fair legal treatment. It does not grant them additional privileges, nor does it, or can it, compensate them for what they have already lost." Moreno, *supra* note 72, at 1307.

Because there is the danger that a jury may choose to focus more on the testimony of abuse rather than on the killing, the rules governing admission of testimony must be narrowly tailored so that evidence of abuse is properly used by the jury. The jury should always remember that it is considering the homicide committed by the child and not the past sins of the abusive parent.

Legislative proposals such as the statute enacted in Texas go a long way in achieving this goal. By allowing evidence of domestic abuse in homicide prosecutions, this statute provides the jury with the information that it needs to assess properly the state of mind of the actor at the time of the killing. Both the Texas and the California legislatures have made strides towards providing a fair trial to a child who kills in response to abuse at the hands of a parent. Texas stops short of recognizing the validity of Battered Child Syndrome while California refuses to extend its codification of Battered Woman's Syndrome to include the battered child. Similarly, while the Washington Supreme Court recognized the validity of Battered Child Syndrome in *Janes*, the legislature has not enacted a bill which codifies the views expressed in that opinion. Accordingly, this Note finds its conclusion in the following proposed statute:

> (a) In all prosecutions for murder where the defendant was a juvenile at the time the crime was committed, the state or the defendant shall be allowed to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased.
>
> (b) If the defendant raises a self-defense justification, the defendant shall be permitted to offer:
>
> > (1) relevant evidence that the defendant had been the victim of family abuse at the hands of the deceased; and
> >
> > (2) relevant expert testimony regarding the defendant's state of mind at the time of the killing, including the relevant facts and circumstances of family violence that are the basis of the expert's opinion.
> >
> > > (a) The foundation shall be sufficient for admission of this expert testimony if the party seeking to introduce the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on battered child syndrome shall not be considered a new scientific technique whose reliability is unproven.
> > >
> > > (b) This expert testimony may include the physical, emotional, or mental effects of abuse upon

> the beliefs, perceptions, or behavior of victims of child abuse.
> (c) For the purposes of this section, "juvenile" is defined as any person under eighteen (18) years of age.
> (d) For purposes of this section, "abuse" is defined as intentionally or recklessly causing or attempting to cause bodily injury, or sexual assault, or to place a person in reasonable apprehension of imminent serious bodily harm or death.
> (e) For purposes of this section, "family abuse" is abuse perpetrated against the juvenile by a parent, guardian or other primary caregiver.[167]

In cases where sufficient evidence of Battered Child Syndrome has been admitted, the trial court should, in appropriate cases instruct the jury on self-defense. A possible self-defense instruction would provide:

> Where the Battered Child Syndrome is an issue in this case, the standard for reasonableness concerning an accused's belief in asserting self-defense is not an objective, but a subjective standard. You must determine, from the viewpoint of a reasonable person with the defendant's history, whether defendant's belief in the need to defend himself or herself was reasonable.
>
> Where the Battered Child Syndrome is an issue in this case, the standard for reasonableness concerning an accused's belief in imminent danger of serious bodily harm or death is both objective and subjective. You must determine, from the viewpoint of a reasonable person with the defendant's history, whether defendant's belief in imminent danger of serious bodily harm or death was reasonable.

The evidentiary standard and the jury instruction proposed above should not be implemented in cases where the child had an opportunity to leave the abusive environment nor where there is insufficient evidence of serious abuse at the hands of the victim. This proposed evidentiary standard and jury instruction are not meant to dismantle traditional self-defense so that battered children may exact their own brand of fatalistic revenge upon parents who have abused them. The proposals are instead

167. Adapted from TEX. CODE CRIM. PROC. ANN. art. 38.36 (West Supp. 1995) and CAL. EVID. CODE ANN. § 1107 (Deering 1995).

offered in an attempt to allow juries to hear and understand all of the relevant evidence and testimony necessary to bring about a just result. If implemented correctly, these proposals will not promote injustice by undermining the validity of the self-defense argument, but instead will bring about justice where there was none before.