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BATTERED WOMEN AND SELF-DEFENSE: MYTHS AND MISCONCEPTIONS IN CURRENT REFORM PROPOSALS

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INTRODUCTION

A widespread perception exists that contemporary criminal law doctrine cannot accommodate the self-defense claims of battered women who kill abusive men. That perception dominates not only the media, but also current reform discussions both in scholarly literature and in many state legislatures. In response to the dominant belief that traditional self-defense doctrine is inapplicable

to these cases, proposals for radical redefinition of various elements of self-defense jurisprudence have been advanced.[1] This Article demonstrates that the belief is wrong and that proposed redefinitions of legal rules will provide neither the necessary nor the sufficient condition for changing the courtroom climate in which battered women's homicide cases are tried.

The impetus in current reform efforts toward redefinition of substantive criminal law and of evidentiary rules comes from two related, and incorrect, assumptions. The first incorrect assumption is that jury verdicts convicting battered women result from the "fact" that most battered women do not kill in circumstances traditionally defined as "confrontations,"[2] but rather that they kill during a lull in the violence, or when the man is asleep, or by hiring someone else to kill him. For many legal scholars this assumption appears to be derived from a review of appellate decisions involving battered women.[3] None of these scholars, however, has conducted a systematic survey of those decisions as a means of testing the assumption. This Article presents the findings of such a survey, and the appellate decisions do not support the commonly encountered assertion that most battered women kill in nonconfrontational situations.[4]

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[1] For scholarly proposals favoring such redefinition, see *infra* notes 80-92 and accompanying text. Ten legislatures have considered legislation aimed at redefining the rules governing trials of battered women accused of homicide. For legislative changes, both enacted and proposed, see *infra* notes 224-26, 234-38 & 257-91 and accompanying text. For commentary on media portrayals of battered women who kill, see *infra* note 9 and accompanying text.

[2] In this Article, "confrontation" describes a fact pattern that would entitle a defendant to a self-defense instruction under the law of most jurisdictions. A confrontational case is one where the defendant killed her spouse or lover and where evidence (disputed or not) was offered at trial that (1) he had behaved in a way that she interpreted as posing an imminent threat of death or serious bodily injury to her, (2) she did not provoke his behavior by unlawful actions and was not the initial aggressor, (3) she violated no duty to retreat, and (4) the force she used was proportional to the threat she perceived. A nonconfrontational case is defined in this Article as a killing that occurred under one of the following circumstances: (1) the man was asleep; (2) the man was awake, but the woman was the initial aggressor on the particular occasion; or (3) the woman hired or persuaded someone else to kill the man. *See infra* notes 34-43 and accompanying text.

[3] For a description of the literature that is premised on this factual assumption, see *infra* notes 22-31 and accompanying text.

[4] For a description of the methodology of the survey, see *infra* Appendix I. For a summary of this Article's conclusions from the survey data, see *infra* note 12. For a more detailed analysis, see *infra* notes 63-66 and accompanying text.

The reformers' second incorrect assumption is that existing doctrine is defined in a narrow and male-identified fashion to encompass one-time-only and time-bounded encounters between men of roughly equal size and strength. Using these assumptions, critics argue that the law by definition refuses to take into account the social context of a battered-woman defendant's act, even in those cases that involve traditionally defined confrontations. In the legal literature the basis of this assumption is, again, the body of opinions issued on appeals from homicide convictions.[5] A survey of those opinions, however, does not support the view that existing definitions exclude consideration of social context.[6]

Proceeding from these two unsupported and incorrect empirical assumptions, most proponents of reform are asking the wrong question. They ask not whether, but how substantive and evidentiary law should be redefined to guarantee the fair-trial rights of battered women who kill, and they describe "fair trials" either not at all or as those that result in not guilty verdicts. I will suggest that the proper inquiry requires a definition of fair trial that is not outcome-oriented and a careful evaluation of the appropriate definition's substantive-law, evidentiary-rule, and procedural-provision determinants. Reformers must decide carefully what is broken before setting out to make repairs.

Fair trials should be defined as those in which a defendant is able to put her case fully before the finder of fact, to "get to the jury" both the evidence of the social context of her action and legal instructions on the relevance of that context to her claim of entitlement to act in self-defense.[7] My conclusion, after review of the cases from that perspective, is that the most common impediments to fair trials for battered women are the result not of the structure or content of existing law but of its application by trial judges.

In a way, the failings of many current reformers are similar to those which they often attribute to the criminal law. Authors and

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[5] For a description of the literature that proceeds from this premise, see *infra* notes 80-92 & 104 and accompanying text.

[6] For a detailed survey addressing four substantive-law and two evidentiary-law definitions, as well as their interrelationship in the context of self-defense jurisprudence, see *infra* notes 105-85 and accompanying text. For a summary of that survey, see *infra* Table. *See also infra* notes 229-38 and accompanying text (explaining the perils of a separate standard of reasonableness for battered women).

[7] For a discussion of the reasons underlying this definition of fair trial, see *infra* notes 93-95 and accompanying text.

legislators criticize legal definitions for refusing to take "context" into account.[8] The reformers themselves, however, have failed to look at context, both the factual context of most battered women's cases and the legal context in which they are tried. This Article begins with an examination of the factual context and challenges the assumption that most battered women are convicted because they kill in circumstances that do not involve a traditionally defined imminent threat of death or serious bodily harm. That assumption has led to the dominant portrayal of the typical battered-woman homicide defendant as a vigilante who strikes back at the only available moment, during a respite from attacks, often when the man is asleep. Many images from outside the appellate opinions reinforce this picture. A commentator recently described the image by contrasting it with others:

> Killing in self-defense is a fundamental right for men and nations. . . .
>
> But when women kill their husbands because they are afraid for their lives and those of their children, it's considered shocking—and criminal. According to the popular myth, a wan, mousy wife suddenly loses it and kills the hapless guy in his sleep. Or she hires a friend to blow him away and stuffs his body in a garbage can. It's all very weird and female.[9]

Much current scholarship, although it purports to be derived from an analysis of appellate opinions, seems in fact to be premised upon an uncritical acceptance of the popular portrayal of a battered woman who kills. It is a compelling stereotype. It is inaccurate. It is not supported either by empirical work in other disciplines or by appellate opinions.

The work of sociologists and criminologists demonstrates, even with the most conservative reading of representative empirical studies, that over seventy percent of all battered women who kill do so when faced with either an ongoing attack or the imminent threat of death or serious bodily injury; and some studies suggest that the figure may be closer to ninety percent.[10] These estimates are

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[8] *See infra* notes 91 & 130 (citing criticisms of male-dominated legal standards of reasonableness).

[9] Abigail Trafford, *Why Battered Women Kill: Self-Defense, Not Revenge, Is Often the Motive*, WASH. POST, Feb. 26, 1991, Health (Magazine), at 6. For a collection of press accounts from the past 200 years describing some nonconfrontation killings which may have fed the "popular myth," see ANN JONES, WOMEN WHO KILL (1980).

[10] For a discussion of their studies and conclusions, see *infra* notes 68-77 and accompanying text.

consistent with the results of this Article's analysis of appeals from battered women's homicide convictions, a sample that is likely to contain an overrepresentation of nonconfrontation cases:[11] at least three-quarters of the cases involve confrontations.[12] Part I of this Article therefore concludes that most homicide convictions of battered women do not result from the fact that circumstances of the killings were outside the traditional definition of self-defense.

In Part II of this Article, I will criticize the second incorrect assumption—which similarly dominates current scholarship and legislative efforts—that existing legal definitions are insufficient to accommodate the self-defense claims of battered women, even those who kill during confrontational situations. It is true that the law of self-defense has developed in a context in which the overwhelming majority of defendants were men. It is not true, however, that the law by definition ignores the context of a woman defendant's actions.

In the area of substantive law, most scholars focus on four aspects of self-defense jurisprudence: the definitions of the standard for measuring the reasonableness of the defendant's actions, of the temporal proximity of danger facing the defendant, of the proportionality of force used to meet the threatened harm, and of the defendant's duty to retreat. These factors are not in fact generally defined in a way that excludes consideration of the circumstances in which battered women kill.[13] In most jurisdictions, the standard of reasonableness against which the necessity of a defendant's act is measured explicitly includes consideration of the characteristics and history of the defendant on trial; her acts are measured in light of her own perceptions and experience. The definition of the required temporal proximity of that harm is, again in most jurisdictions, broader than the particular instant of the defendant's action; the definition includes its context—the circumstances surrounding the action, including past events. Only a

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[11] For a description of the bases of the conclusion that appellate opinions contain a disproportionate percentage of nonconfrontation cases, see *infra* notes 58-59 and accompanying text.

[12] In 75% of the opinions, the facts at trial met the confrontation definition. Five percent of the opinions contained too little factual discussion to permit categorization. The remaining 20% involved nonconfrontational situations (8% were sleeping-man cases, 4% were cases in which the defendant hired or persuaded someone else to commit the homicide, and 8% involved undisputed evidence that the defendant was the initial aggressor). *See infra* notes 63-66 and accompanying text.

[13] For an analysis of each of these factors and of their interrelationship, see *infra* notes 105-42 and accompanying text.

minority of jurisdictions impose a duty to retreat, if safe retreat is possible, before using deadly defensive force, and most of that minority exempt a person attacked in her home from the duty to retreat. No jurisdiction has a *per se* rule prohibiting use of a weapon against an unarmed attacker; rather, the proportionality of force is measured on a case-by-case basis, taking into consideration the relative sizes, ages, and physical conditions of the decedent and defendant, as well as any history of violence between them.

A similar pattern exists in the law of evidence, which is the focus of legislative reform efforts. The existing evidentiary law in every jurisdiction provides that testimony about a defendant's history of abuse by the decedent is admissible.[14] Expert testimony regarding the effects of a history of abuse, usually in the form of testimony about the "battered woman syndrome,"[15] is admissible in the overwhelming majority of the states whose appellate courts have addressed the question. In all but two of these states, the testimony has been ruled admissible on the basis of existing evidentiary provisions, without the necessity of special legislation.[16]

To say that existing definitions can accommodate the self-defense claims of battered women and can provide for their evaluation in the relevant social context is not to say that trial courts apply those definitions when the defendants are battered women. Thus, Part II will also address the disparate application of existing standards. It concludes that, to the extent that there is a problem in getting to the jury, it is generally the result not of definitions, but of the application of the law at the trial level. That conclusion is supported by the disparity between reversal rates in these cases and in other homicides. Forty percent of the battered women's convictions were reversed on the ground of trial errors. Only 16% of the reversals were because of errors dealing with expert testimo-

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[14] For a discussion of the principle which requires, in jurisdictions that define broadly the temporal proximity of harm, that the jury be instructed that a person who has suffered past violence from an attacker is justified in reacting more quickly and more harshly than a stranger in the same factual circumstances, see *infra* note 122 and accompanying text.

[15] Some current statutes and proposed legislation refer to "battered person syndrome." *See infra* text accompanying notes 263-64.

[16] *See infra* Table. The threshold-showings that a defendant must make before history-of-abuse and battered-woman-syndrome testimony are received vary according to a state's substantive-law choices about social context. The threshold-showing requirements are generally lower in the majority of jurisdictions that include a subjective analysis in the reasonableness test and a liberal definition of the temporal proximity of danger. *See infra* notes 154-66 & 176-80 and accompanying text.

ny. The rest were reversed on the basis of the same errors (in roughly the same proportion) as in other homicides, where the reversal rate was only 8.5%.[17] The conclusion is reinforced by the tone of the reversal opinions, many of which explicitly criticize trial courts for failing to apply to these defendants long-standing principles developed in the context of a jurisdiction's rulings on appeals involving male appellants. It is further corroborated by the appellate opinions from the jurisdictions that have adopted special substantive-law standards to measure the necessity of the defendant's act against a "reasonable battered woman" definition. In those states, there are both trial and appellate judges who, despite the redefinition of reasonableness, apply that definition in a way that precludes defendants from getting to the jury.[18]

In Part III of this Article, which addresses areas where the reform is actually needed, I will begin by describing the operation of procedural rules (the crucial importance of which is ignored by most commentators) that set the standards by which trial judges are to measure the defendant's evidence for the purpose of determining whether she is entitled to any self-defense instruction at all. When the rules are defined in a way that entitles judges to make credibility judgments as part of their assessment of the sufficiency of the defense evidence, they often have the effect of encouraging disparate application of self-defense standards and of permitting directed verdicts of guilt in battered women's cases.[19]

Finally, having concluded that the problem is neither that most cases arise from nonconfrontational situations nor that substantive and evidentiary law is defined too narrowly, but rather is the result of disparate application of existing standards, I criticize reform proposals that ignore that reality. I will specifically criticize those proposals that create special substantive-law standards for battered-women defendants or evidentiary rules aimed specifically at battered-woman-syndrome expert testimony.[20] I will offer sugges-

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[17] For a discussion of the data on overall homicide and felony reversal rates, drawn from a recent study by the National Center for the Study of State Courts, see *infra* notes 188-93 and accompanying text.

[18] For an analysis of these opinions, see *infra* notes 234-38 and accompanying text.

[19] For a description of the rules governing the quantity and quality of evidence required before a defendant is entitled to any jury instruction on self-defense, see *infra* notes 212-18 and accompanying text.

[20] For an analysis of the substantive-law proposals, see *infra* notes 224-32 and accompanying text. For an examination of the proposed evidence code reforms, see *infra* notes 257-78 and accompanying text.

tions for a method of analyzing each jurisdiction's choices in substantive, evidentiary, and procedural areas, for deciding whether redefinition is necessary, and for creating new definitions.[21]

The conclusion, drawn from this Article's analysis of the existing context of self-defense jurisprudence and of the shortcomings of most current proposals for change, is that reform efforts should be aimed at guaranteeing battered women defendants access to generally applicable fair-trial determinants. New definitions should be created only when the whole context of the jurisdiction's self-defense law makes clear they are necessary, and in those instances the redefinitions should not be geared specifically to battered women as a separate class of defendants.

I. EMPIRICAL CRITICISM OF THE ASSUMPTION THAT MOST HOMICIDES BY BATTERED WOMEN INVOLVE NONCONFRONTATIONAL SITUATIONS

A. *The Assumptions of Legal Scholars*

Much current legal scholarship is premised on, or accepts uncritically, the assumption that the majority of battered women defendants kill in nonconfrontational situations that would not raise a traditionally defined self-defense claim, that sleeping-man and other lull-in-the-violence cases are the norm.[22] In most of this

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[21] For a description of the suggested analytical framework, see *infra* text accompanying note 210. My specific suggestions for reform of substantive and evidentiary law follow immediately after the discussion of current proposals in each area. *See infra* notes 239-56 and accompanying text (discussing substantive-law proposals); *infra* notes 280-92 and accompanying text (discussing evidentiary-law proposals). There are no current proposals for reform of the rules that govern whether a defendant gets to the jury on her claim. My proposed procedural reforms are discussed *infra* notes 212-22 and accompanying text.

[22] *See, e.g.*, CHARLES P. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 34 (1987) (noting that two-thirds of all cases reviewed, largely from press accounts, involved nonconfrontational killings); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 139 (1985) (asserting that the majority of appellate opinions addressing admissibility of expert testimony arose from nontraditional confrontation cases); Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 409 (1988) ("The battered woman who kills her husband often does so in a non-confrontational setting.") (citing EWING, *supra*, at 34, and Crocker, *supra*, at 139-40); David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases* 66 OR. L. REV. 19, 49 (1987) ("Typically, when the woman strikes back, she is not in what most people would consider immediate danger at the time she killed her abuser."); Rocco C. Cipparone, Jr., Comment, *The Defense of Battered Women Who Kill* 135 U. PA.

scholarship, this "fact" is asserted without any empirical support or is based on an unsystematic review of cases.[23] This assumption provides the impetus for suggestions for radical redefinition of self-defense jurisprudence.[24] One author suggests legislation that

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L. REV. 427, 436 (1987) ("If, as often occurs, a woman has killed her batterer during a lull in the beatings—such as when he is asleep or when he had his back turned—a claim of self-defense is likely to be unsuccessful." (footnotes omitted)); David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent* 72 VA. L. REV. 619, 621 (1986) ("Frequently, however, a battered woman kills her mate after an attack has ended or at some time when, seemingly, no immediate threat is present."); Jill S. Talbot, Note, *Is "Psychological Self-Defense" A Solution to the Problem of Defending Battered Women Who Kill?* 45 WASH. & LEE L. REV. 1527, 1528-29 (1988) ("Although some women who kill their spouses in the midst of battering incidents can show an imminent threat of serious injury or death, many battered women kill their spouses during a lull in the violence, perhaps even when their spouses are asleep.").

[23] *See* Cathryn J. Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 43 (1986). Rosen states:

> [A] doctrinaire insistence on treatment of the battered woman's defense [sic] as a justification is unnecessary and may be fatal to widespread and successful use of the battered woman's defense [sic]. Most battered woman's defense [sic] cases involve situations in which the defendant was not, in fact, in imminent danger of death or serious bodily harm at her victim's hands.

Id. No authority exists for this quite incorrect assertion aside from a series of string cites to selected nonconfrontation cases. *See id.* at 13-14 nn.13-16.

[24] The assumption's uncritical acceptance also appears in the writings of scholars who do not endorse redefinition for the purpose of creating special standards for women. For example, one author addressing problems of proof in battered women's homicide cases noted:

> When a battered woman does fight back, she often does so during a respite in the beatings, and she often uses force which would appear excessive when considered only in light of the immediate situation. For example, in a number of cases a woman has killed her husband while he was sleeping, and several women have even set their sleeping husbands afire.

Jimmie E. Tinsley, *Criminal Law: The Battered Woman Defense*, *in* 34 AM. JUR. 2D *Proof of Facts* § 1, at 8 (1983) (footnotes omitted). Another has stated:

> Homicides committed by battered women frequently occur with a time lag, while the man is asleep or while his back is turned. Typically, the man beats the woman, sometimes threatening to kill her, until he passes out or falls asleep. Fearing that when he awakes he will beat her more severely or act on his threat, she attacks him while he sleeps.

Elizabeth M. Schneider, *Self-Defense Work for Battered Women*, *in* WOMEN AND THE LAW ch. 9A, § 9A.02[2][d][iii], at 9A-11 (Carol H. Lefcourt ed., 1987) (footnote omitted); *see also* 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) [hereinafter Schneider, *Equal Rights*] (noting that homicides by battered women "frequently" occur after a time lag, while the victim is unaware). *But see* CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW at viii-ix (1989) (concluding, on the basis of a sample of two hundred "stories" drawn from appellate

would codify a "psychological theory of self-defense" to remedy what he perceives to be the injustice of applying traditional standards of self-defense to battered women, most of whom he believes to have acted in nonconfrontational circumstances.[25] Another author asserts that because most battered women kill in nonconfrontational situations, the appropriate legal approach to defending them is to argue excuse (that factors peculiar to the actor prevent a judgment of criminal responsibility, even though her act was a crime) rather than self-defense or justification (that the act was lawful and not a crime).[26] One proposes a "reasonable battered woman" standard,[27] while others argue for a "reasonable woman" (rather than a "reasonable man" or "reasonable person") justification standard.[28]

Although these authors describe both "confrontational" and "nonconfrontational" situations, most do not take particular care in their definitions. To some, a confrontation is an on-going attack and nothing less.[29] To others, a battered woman lives in a con-

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opinions and other sources, that nonconfrontation cases are "not quite as common" as the confrontation ones, while failing to systematically break the cases down into the two categories).

[25] *See* EWING, *supra* note 22, at 77-94. Ewing's proposal has received considerable criticism. *See* Stephen J. Morse, *The Misbegotten Marriage of Soft Psychology and Bad Law: Psychological Self-Defense as a Justification*, 14 L. & HUM. BEHAV. 595, 618 (1990) (criticizing Ewing's proposal partially on the grounds that it would provide incentives to solve social problems with violence; and suggesting that the solution lies in aggressive use of the tools already available to the criminal justice system); Talbot, *supra* note 22 (criticizing Ewing's proposal as formalistic and complicated, and noting that it still fails to prove battered woman defendant's act was reasonable); *cf.* Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 118 n.40 (1990) (characterizing Ewing's survey as revealing "a surprisingly high percentage of killings in the non-confrontational settings," but noting that his sample, in which only one-third of the cases were confrontational, does not purport to be representative).

[26] *See* Rosen, *supra* note 23, at 45-56.

[27] Kinports, *supra* note 22, at 415; *see also* Nancy Fiora-Gormally, Case/Comment, *Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?*, 2 L. & HUM. BEHAV. 133, 164 (1978) (arguing for both a "reasonable battered woman" standard and a "reasonable woman" standard).

[28] *See* Crocker, *supra* note 22, at 150; Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 573, 588 (1988). Crocker bases her argument on finding a majority of nonconfrontation cases in a thirty-five case sample of appellate opinions. *See* Crocker, *supra* note 22, at 145 n.106. Mather bases her argument on a review of appellate opinions in which she makes no attempt to separate confrontational from nonconfrontational cases. Mather, *supra*, at 562-571. From her review, however, she generalizes that "[a] woman will usually not be able to defend herself during an actual attack." *Id.* at 567.

[29] Many seem to believe that the current law of self-defense requires an actual

stant confrontation, which puts her in a state of imminent deadly attack regardless of the abuser's actions at the time of the killing.[30] To date, no legal writer has actually tested the assumption that most cases arise from nonconfrontational situations by using the confrontation definition employed in most jurisdictions as a measure in a systematic survey of battered women's self-defense cases.[31]

B. *An Analysis of the Appellate Opinions*

To test the factual assumption of most legal scholars that the typical battered woman's homicide case involves a nonconfrontational situation, I analyzed appellate opinions, which constitute the same sample[32] on which most of the authors have relied.[33]

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ongoing attack instigated by the decedent and does not permit the use of deadly defensive force to meet the threat of an imminent serious attack. *See, e.g.*, Crocker, *supra* note 22, at 138-39 (separating battered women's self-defense cases "into two categories: non-traditional confrontation cases, in which the battered woman kills either in anticipation of or following a physical attack; and traditional confrontation cases, in which she kills while being physically attacked."); Kinports, *supra* note 22, at 394 n.6 (explaining that she does not address cases "where battered women kill their husbands during a beating" and characterizes those cases as resembling "classic cases of self-defense"); Kathee R. Brewer, Note, *Missouri's New Law on "Battered Spouse Syndrome:" A Moral Victory, a Partial Solution*, 33 ST. LOUIS U. L.J. 227, 231 n.39 (1988) (relying on Crocker, *supra* note 22, at 142-43, for the assertion that "[i]n a classic self-defense situation, also referred to as a traditional confrontation case, the woman kills while actually being attacked"); Cipparone, *supra* note 22, at 434-36 (asserting that the utility of a self-defense claim is limited to the relatively narrow range of facts where a woman killed her batterer during an "acute battering incident"). *But see* Sarah C. Madison, Comment, *A Critique and Proposed Solution to the Adverse Examination Problem Raised by Battered Woman Syndrome Testimony in* State v. Hennum, 74 MINN. L. REV. 1023, 1029 (1990) (more accurately describing a "typical" self-defense situation as one where the "batterer lunges at her or physically threatens her with death or serious bodily harm").

[30] *See, e.g.*, GILLESPIE, *supra* note 24, at 68 (stating that in battered women's cases, "it is not at all an exaggeration to say that the threat of death or serious injury is *always* imminent"); Crocker, *supra* note 22, at 139-140 (arguing for recognition that a confrontation exists in cases where "the abuser has verbally threatened the defendant, but not yet actually struck her; where the physical violence appears to have stopped, but the defendant continues to feel terrified and kills her husband when he reappears; and where the woman kills her husband while he is asleep or when his back is turned." (footnote omitted)).

[31] One scholar who does not share the assumption that most cases are nonconfrontational concludes, without quantifying the cases in her sample, that the confrontation cases are slightly more common than nonconfrontation ones. *See* GILLESPIE, *supra* note 24, at xii-xiii.

[32] I evaluated each of the opinions on which other scholars relied and conducted a search, *see infra* notes 44-66 and accompanying text, that retrieved additional cases.

[33] *See supra* notes 22-31 and accompanying text. Some authors relied on sources

"Confrontation" is used here to describe a fact pattern that would entitle a defendant to a self-defense instruction under the law of most jurisdictions.[34] A case is defined as a confrontational battered woman's homicide[35] if the defendant killed her spouse or lover and at trial evidence (disputed or not) was offered on the record and discussed on appeal (whether or not ruled admissible by the trial judge) that (1) he had abused her in the past,[36] (2) on the occasion of the homicide he behaved in a way that, according to her testimony, she interpreted[37] as posing an imminent[38] threat of

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in addition to appellate battered woman homicide cases. *See* EWING, *supra* note 22, (sample includes newspaper articles); GILLESPIE, *supra* note 24 (sample includes women defendants charged with various non-homicidal violent acts against men and with homicides of men who were not their partners).

[34] The elements of the justification of self-defense are, generally, that a defendant may use *physical force* when and to the extent that he or she reasonably believes necessary to prevent the imminent (or immediate) use of unlawful physical force against the defendant. A defendant may not use physical force in self-defense if he or she provoked the encounter by unlawful conduct or was the initial aggressor. *See* 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.7 (1986).

Most jurisdictions impose additional requirements that must be satisfied before the use of *deadly physical force* is justified to repel an attack. The defendant must reasonably believe that the attacker is using or is about to use deadly physical force. Some jurisdictions require that, before resorting to deadly force, the defendant retreat from the encounter, if safe retreat is possible. Most of those jurisdictions exempt a defendant who is attacked in his or her home from the retreat requirement. *See id.* § 5.7(f).

[35] "Homicide" cases for purposes of this Article are those in which the defendant was charged with any degree of non-negligent killing.

[36] The term "history of abuse" is used throughout the Article to refer to the decedent's physical violence against the defendant. "Mutual history of abuse" is used to describe situations where there was evidence that both parties initiated past violence. If the record only contained evidence of abuse in which the defendant attacked the decedent, or if the record indicated no offer of evidence of history of abuse, the case was not classified as a battered-woman case. For a discussion of the standards for admissibility of history-of-abuse evidence, see *infra* notes 154-60 and accompanying text. "History of other violence," in contrast, is a term used to describe evidence of violence directed against third persons by the decedent. For a discussion of the standards governing the admissibility of history-of-other-violence evidence, see *infra* notes 161-66 and accompanying text.

[37] I did not attempt to judge the reasonableness of her interpretation or belief that she was faced with danger requiring the use of deadly, defensive force. Rather, I identified cases in which the reasonableness of that belief would have been a question put to the jury in most jurisdictions. *See infra* notes 94-95 and accompanying text.

[38] The question of the closeness in time of the threatened harm to the defendant's act is defined in this Article as the temporal proximity of danger. For discussion of the states' choices between "imminence" and "immediacy" as the definition of the required temporal proximity, see *infra* notes 118-28 and accompanying text.

death or serious bodily injury[39] to her, (3) she did not provoke[40] his behavior by unlawful actions and was not the initial aggressor,[41] (4) she violated no duty to retreat,[42] and (5) the force she used was proportional to the threat she perceived.[43] A nonconfrontational case, on the other hand, is defined as a killing that occurred while either (1) the man was asleep, (2) the man was awake, but the woman was the initial aggressor on the particular occasion, or (3) the woman hired or persuaded someone else to kill the man.

The search[44] sought to identify all appeals from convictions in battered women's homicide cases in which a claim of self-defense

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[39] *See, e.g.*, N.Y. PENAL LAW § 10.00(10) (McKinney 1991) ("'Serious physical injury' means physical injury that creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."). For a collection of cases defining "serious bodily harm," see Kinports, *supra* note 22, at 432 n.164.

[40] "Provoke" is used throughout this Article to describe the self-defense requirement of most states that the defendant did not seek out the encounter and, by his or her own unlawful conduct, provoke the attack. *See, e.g.*, N.Y. PENAL LAW § 35.15 (McKinney 1991) (denying justification for use of defensive physical force where defendant provoked the attack and was the initial aggressor). This use of "provoke" should not be confused with either the common criminal law use of the term "provocation" to describe unlawful actions of the *decedent*, which may warrant the reduction of a charge of murder to heat-of-passion manslaughter, *see, e.g.*, State v. Felton, 329 N.W.2d 161, 172-73 (Wis. 1983) (discussing history of abuse and battering on day of killing as provocation by the decedent), or the use of the term that is common in the battered woman context to describe what the defendant did to "deserve" prior beatings, *see, e.g.*, People v. Ciervo, 506 N.Y.S.2d 462, 464 (N.Y. App. Div. 1986) (prohibiting prosecution use of a defendant's prior bad acts to prove what she had done to provoke her husband into beating her, but permitting the prosecution's use of such evidence to prove motive, impeach the defendant's credibility, and rebut her claim that she was "a victim of 'battered woman's syndrome'"). For discussion of the discredited theory that battered women typically provoke the violence directed at them, see Kinports, *supra* note 22, at 434-35; Mather, *supra* note 28, at 551 & nn.43-45.

[41] The requirement, that the defendant cannot be the "initial aggressor," is usually the same as the requirement that she not provoke the encounter. It is also characterized in some states as the requirement that the defendant be "free from fault." *See, e.g.*, Collier v. State, 275 So. 2d 364, 367 (Ala. Crim. App. 1973) (outlining the elements of self-defense as the requirements that the defendant not provoke the attack; that there must be impending peril to life, or great bodily harm; and that there must be no reasonable way to escape without exacerbating the danger).

[42] For a discussion of the duty to retreat, and of the exceptions to the duty, see *infra* notes 136-42 and accompanying text.

[43] The proportional-force requirement is that a defendant may use only that force necessary to repel the ongoing or threatened attack. *See infra* notes 129-35 and accompanying text.

[44] The methodology of the search and of the use of a computer program to analyze the opinions is described *infra* Appendix I.

had been raised at trial. Specifically, the search was aimed at appellate opinions[45] issued in cases where (1) the defendant was a woman, (2) the defendant was accused of killing her spouse or lover,[46] (3) there was evidence of a history of abuse[47] of the woman by the man, (4) the defendant claimed to have acted in self-defense,[48] and (5) the defendant was convicted. No attempt was made to decide whether in fact the defendant in each case acted in self-defense.[49]

The cases meeting the above requirements were put into the confrontation category only when the following factors existed: (1) the man was awake; (2) he behaved in a way that the woman interpreted[50] as posing an imminent or immediate threat of death or serious injury to her; and (3) there was evidence that she did not provoke his behavior by unlawful conduct and was not the initial aggressor. A case was classified as confrontational if there was evidence (disputed or not) of record for *each* element of the definition.[51] The same principle of selection was employed in the

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[45] These were both reported and unreported opinions that reached the merits of the claimed trial errors. For a description of the cases and of the methodology of their identification, see *infra* Appendix I.A.

[46] This study's sample is drawn from those cases involving men and women in intimate heterosexual relationships, and includes present and former spouses, both legal and common-law, as well as present and former intimates who may or may not have lived together. Because this Article responds to proposals for legal redefinition raised in the context of battered women killing abusive male partners, the few reported opinions whose facts indicated that an abusive same sex partner was killed by an abused gay man or lesbian were analyzed separately for comparison purposes, but excluded from the main sample. For authority supporting the position that heterosexual women comprise the overwhelming majority of victims of partner violence, see Kinports, *supra* note 22, at 393 n.2. For a discussion of lesbian and gay battering, see Nancy Hammond, *Lesbian Victims and the Reluctance to Identify Abuse*, *in* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING 190, 191-96 (Kerry Lobel ed., 1986), and authorities collected in Crocker, *supra* note 22, at 122 n.6. *See generally* Elizabeth M. Schneider, Materials for Battered Women and the Law (1991) (unpublished manuscript, on file with the author) (providing a list of background sources on lesbian and gay battering) .

[47] For a definition of "history of abuse," see *supra* note 36.

[48] This sample includes cases involving only self-defense claims as well as cases involving self-defense claims and alternative defenses (most commonly insanity, accident, and heat-of-passion provocation).

[49] *See supra* note 34 & 37.

[50] *See supra* note 37 and accompanying text.

[51] This Article's requirement of evidence for each element of the definition is a more rigorous standard than that which I will argue should govern an evaluation of the sufficiency of the evidence for determining whether a self-defense instruction is warranted. *See infra* notes 219-33 and accompanying text. This stricter definition of confrontational cases was adopted so that any error from ambiguity would result in

nonconfrontation category: if the facts of record established that the man was asleep at the time of the killing or that the woman had persuaded someone else to kill him, the case was classified as nonconfrontational. Similarly, if the record contained undisputed evidence[52] that the defendant was the initial aggressor, the case was put in the nonconfrontation category, even if the killing occurred during an ongoing, face-to-face struggle.[53]

The focus of this study on appellate decisions raises the possibility of two types of distortion, neither of which poses a problem for criticizing the conclusions drawn by other scholars from the same sample, but each of which suggests the need for caution before extrapolating the conclusions from the sample to the entire universe of battered women's cases.[54] First, the sample excludes cases that were resolved by guilty pleas.[55] Second, it excludes cases in which the prosecution dismissed the charges before trial,[56] as well as cases in which the defendants were acquitted after trial.[57] It is hard to assess the degree of distortion

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overinclusion of cases in the nonconfrontation category.

[52] Where the evidence on this point was in dispute, a case was put in the confrontation category only if the evidence offered by the defendant, in the context of other record evidence, met this Article's confrontation requirements.

[53] These latter cases certainly involved "confrontations" in the colloquial sense. They are excluded from my definition because the defendant's status as the initial aggressor removed her from the category of cases in which a defendant would be entitled to a self-defense instruction in *most* states. In some of these initial-aggressor cases, as in other nonconfrontation cases, the juries were in fact instructed on self-defense. *See infra* note 214.

[54] Sociologists and criminologists recognize the need for a comprehensive survey of all battered women's cases and of design proposals for such a survey. *See infra* note 69.

[55] The exclusion of guilty pleas from the sample may partially explain why only a small minority of battered women's homicide cases are reflected in appellate decisions. *See infra* note 77.

[56] *See, e.g.*, HENRY P. LUNDSGAARDE, MURDER IN SPACE CITY: A CULTURAL ANALYSIS OF HOUSTON HOMICIDE PATTERNS 63 (1977) (noting that, of the 15 cases of women arrested for killing their husbands in Houston in 1969, the grand jury declined to indict in nine, and the police department did not file charges in one and dismissed another); Christine E. Rasche, Characteristics of Mate-Homicides: A Comparison to Wolfgang, Presentation at the Annual Meeting of the Academy of Criminal Justice Sciences 21 (Apr. 5, 1988) (transcript on file with author) (noting, from an analysis of mate homicides in a Florida county between 1980 and 1986, that "women were more likely to have their cases dropped [by prosecutors] than were men," and for many of those cases "the prosecutor's determination was that the killing was a case of self-defense").

[57] Rarely can the prosecution seek appellate review in criminal cases that result in acquittals. One exception to this prohibition is found in Kansas, where appeals by the prosecution on reserved questions of law are permitted. In such cases, the

in the confrontation/nonconfrontation breakdown resulting from the omission of guilty pleas due to the wide variety of factors that incline the prosecution and the defense to reach a non-trial disposition.[58] The probable distortion from the exclusion of dismissals and acquittals, however, is easier to assess. These cases are likely to have included an over-representation of confrontation cases, while those leading to convictions are likely to have included an over-representation of nonconfrontation cases.[59] The sample of appellate decisions, therefore, is likely to include a greater percentage of nonconfrontation cases than occurs in the total number of arrests.

Two hundred twenty-three cases were identified as meeting the definition established for battered women's homicide cases.[60] These cases generated a total of 270 opinions.[61] The incidents, rather than the opinions, were used as the base for this portion of the Article's analysis.[62]

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appellate resolution of the legal question has no effect on the defendant who was acquitted. *See, e.g.*, State v. Stewart, 763 P.2d 572, 578-79 (Kan. 1988) (holding that the trial court erred in giving a self-defense instruction in a sleeping-man case, because evidence failed to satisfy the objective prong of that state's "reasonably prudent battered wife" standard of reasonableness).

[58] These factors include the strength of the prosecution's case (which may incline the defendant, but not the prosecutor, toward a plea), the strength of the defendant's challenges to the case (which may incline the prosecutor, but not the defendant, toward a plea), and the defendant's perception of her ability, by pleading, to minimize her exposure to incarceration, regardless of the likelihood of success at trial. This latter consideration, common to all defendants, is often most significant for defendants with family obligations. In some instances, a battered woman's incentive to plead guilty, according to one survey of trial counsel and experts, may stem from her desire to avoid testifying about the decedent's abuse of her in front of her children and/or his family. *See* Telephone Interview with Sue Osthoff, Executive Director of the National Clearinghouse for the Defense of Battered Women (July 22, 1991).

[59] This common-sense conclusion is supported by the study described in Diane R. Follingstad et al., *Factors Predicting Verdicts in Cases Where Battered Women Kill Their Husbands*, 13 L. & HUM. BEHAV. 253, 265 (1989).

[60] For a description of the criteria used in this study, see *supra* notes 45-53 and accompanying text and *infra* Appendix I.A. For a list of all cases analyzed, see Mainfile (computer manuscript on file with the author) described *infra* Appendix II.A.

[61] In some cases there were opinions from both the intermediate and the highest courts regarding the same conviction. In others, there were successive opinions following reversals of convictions, retrials, and appeals from subsequent convictions. *See* Mainfile, *supra* note 60.

[62] For the allocation of cases into the confrontation and nonconfrontation categories, see Confrontation/Nonconfrontation (computer manuscript on file with the author) described *infra* Appendix II.B.

Of the 223 incidents comprising the base, 75% involve confrontations.[63] Twenty percent are nonconfrontational cases (4% "contract killings,"[64] 8% sleeping-man cases, and 8% defendant as initial aggressor during a lull in the violence).[65] In the remaining 5%, the appellate opinions did not include a discussion of the incident facts introduced at trial.[66] As the breakdown indicates, the appellate opinions do not support the conclusion that most battered women kill during nonconfrontational situations.

C. *The Conclusions of Scholars in Other Disciplines*

Current work by scholars in other disciplines is consistent with the conclusion that most battered women who kill do so during confrontations. It is estimated that each year in the United States approximately 500 women kill their spouses.[67] Most female homicide defendants had been battered by the men whom they killed.[68] Studies by sociologists, criminologists, and social psychol-

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[63] *See* Confrontation (computer manuscript on file with the author) described *infra* Appendix II.B.1.

[64] These were cases in which the defendant hired or persuaded a third person to commit the homicide.

[65] *See* Nonconfrontation (computer manuscript on file with the author) described *infra* Appendix II.B.2.

[66] *See* Question (computer manuscript on file with the author) described *infra* Appendix II.B.3.

[67] According to the FBI, the number of husbands killed by wives was 516 in 1989 and 475 in 1988. *See* Telephone Interview with Jim Burch, Information Specialist, Department of Justice Bureau of Justice Statistics (Nov. 29, 1991). These figures do not include the number of "boyfriends" and other nonmarital partners killed by women. Their inclusion is likely to bring the total number to about 750 per year in recent years. *See* Trafford, *supra* note 9. These recent spouse-homicide figures may suggest a reversal of a trend noted by earlier studies. The number of women arrested for murder or non-negligent manslaughter (of partners and others) decreased steadily from 1977 to 1986. *See* Peggy S. Plass & Murray A. Straus, Intra-Family Homicide in the United States: Incidence, Trends, and Differences by Region, Race, and Gender, Presentation at the Third National Family Violence Research Conference 5-7 (July 6, 1987) (transcript on file with author); *see also* Kinports, *supra* note 22, at 442 n.214 (noting that the percentage of women arrested for homicide decreased slightly between 1970 and 1979 (citing EILEEN B. LEONARD, WOMEN, CRIME, AND SOCIETY: A CRITIQUE OF THEORETICAL CRIMINOLOGY 28-32 (1982)). Between 1979 and 1984, the number of male partners killed by women decreased by over 25% percent. *See* Angela Browne & Kirk R. Williams, *Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 L. & SOC'Y REV. 75, 80 (1989) (citing Angela Browne & Robert L. Flewelling, Women as Victims or Perpetrators of Homicide, Presentation at the Annual Meeting of the American Society of Criminology (Oct. 29-Nov. 1, 1986)).

[68] *See* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 143 (1987); GILLESPIE, *supra* note 24, at xii; JANE TOTMAN, THE MURDERESS: A PSYCHOSOCIAL STUDY OF

ogists have shown that the vast majority of homicides by women of their partners occur during confrontations.[69] These scholars often do not use the term "confrontation." Most describe cases involving ongoing attacks by the decedents as ones resulting from "victim precipitation," a term first used by Marvin Wolfgang to describe killings in which the victim was the first to use physical force against the slayer.[70] "Victim precipitation" is a narrower category than the class of cases meeting the legal requirements for a self-defense instruction, since an event is only classified as victim precipitated if the decedent was first to use actual physical force. It is, however, also potentially a broader concept because the force directed at the defendant need not amount to a deadly attack by the victim.[71]

CRIMINAL HOMICIDE 48 (1978); George W. Bernard et al., *Til Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 271, 274 (1982); Browne & Williams, *supra* note 67, at 77 (construing PETER D. CHIMBOS, MARITAL VIOLENCE: A STUDY OF INTERSPOUSAL HOMICIDE (1978), and A. E. Daniel & P. W. Harris, *Female Homicide Offenders Referred for Pre-trial Psychiatric Examination: A Descriptive Study*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 261 (1982)); Nancy C. Jurik & Russ Winn, *Gender and Homicide: A Comparison of Men and Women Who Kill*, 5 VIOLENCE & VICTIMS 227, 234 (1990); *see also* Schulhofer, *supra* note 25, at 128 (explaining that most battered women who kill reported calling the police at least five times before the lethal incident).

[69] The studies do not separate battered women from other women defendants. The rate of confrontations for the separate category of battered women who kill has not been analyzed. *See infra* notes 72-77 and accompanying text; *see also* Daniel G. Saunders, *When Battered Women Use Violence: Husband-Abuse or Self-Defense?* 1 VICTIMS & VIOLENCE 47, 50-51 (1986) (noting that "[n]o study could be found that questioned the frequencies with which battered women used self-defensive violence or that detailed the sequence of events when both partners were violent in a single episode"). Nothing in the current scholarship suggests that the confrontation rate will be lower in battered women's homicide cases, but the analysis of those data has yet to be conducted. Angela Browne, author of *When Battered Women Kill*, estimates that at least 70% of battered women homicide defendants kill during confrontations. *See* Telephone Interview with Angela Browne (June 1, 1991). Roland Maiuro, editor of *Violence and Victims*, estimates that the rate of confrontational killings by battered women is "over two-thirds." *See* Telephone Interview with Roland Maiuro (July 1, 1991).

[70] *See* MARVIN E. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 252 (1958); *see also* Ann Goetting, *Patterns of Homicide Among Women*, 3 J. INTERPERSONAL VIOLENCE 3, 11-12 (1988) (explaining and applying Wolfgang's definition of "victim precipitation").

[71] The law of self-defense permits the use of deadly defensive force to repel either an ongoing or an imminent attack that threatens the defendant with death or serious bodily injury. *See supra* note 34. Compare Wolfgang's definition:

> The term *victim-precipitated* is applied to those criminal homicides in which the victim is a direct, positive precipitator in the crime. The role of the victim is characterized by his having been the first in the homicide drama to use physical force directed against his subsequent slayer. The victim-precipitated cases are those in which the victim was the first to show and

Even with this different definition the numbers of male-precipitated homicides by women partners are startling. One study of homicides by women against husbands in Detroit between 1982 and 1983 found that 71% of these cases were victim precipitated, in contrast to general homicide populations in which the victim-precipitation rate is between 22% and 37.9%.[72] Another study, based on a six-city "random sample" survey of female homicide offenders, found that 83.7% of killings by women of their mates were the result of victim precipitation.[73] Still another resulted in the finding that only 12% of all homicides by women were clearly nonconfrontational.[74] Both the scholarship based on the national statistics compiled by the FBI and the studies based on more local samples conclude that most women who kill their partners do so in confrontational situations.[75]

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use a deadly weapon, to strike a blow in an altercation—in short, the first to commence the interplay of resort to physical violence.

WOLFGANG, *supra* note 70, at 252. The term "criminal homicide" was used by Wolfgang to exclude those cases initially classified by the police as accidental deaths and killings in self-defense. Many sociologists follow Wolfgang's example and exclude from their statistics noncriminal homicides, including self-defense cases; the percentage of victim precipitation in homicides by women might well be higher if researchers were to include cases that they characterize as noncriminal. *See, e.g.*, James A. Mercy & Linda E. Saltzman, *Fatal Violence Among Spouses in the United States, 1976-85*, 79 AM. J. PUB. HEALTH 595, 596 (1989) (noting that 95% of "justifiable homicides," or killings in self-defense, between spouses, were wives killing husbands).

[72] *See* Ann Goetting, *Homicidal Wives: A Profile*, 8 J. FAM. ISSUES 332, 337 (1987).

[73] *See* Coramae R. Mann, *Getting Even? Women Who Kill in Domestic Encounters*, 5 JUST. Q. 33, 36 (1988).

[74] *See* Nancy C. Jurik & Peter Gregware, *A Method for Murder: The Study of Homicides by Women*, 4 PERSP. ON SOC. PROBS. (forthcoming 1992) (manuscript at 24, on file with author) (specifically finding in their regional sample that, in only 12% of all homicides by women, "the homicide was not immediately precipitated by an argument or violent conflict with the victim"). Of homicides in which women killed husbands or lovers, almost half involved ongoing attacks by the decedent; the other half involved situations ranging from physically threatening moves by the decedent at the time of the killing, to decedent's having beaten defendant earlier in the day. *See id.* at 18.

[75] One study based on national statistics was reported by Cazenave and Zahn. Relying on data compiled by the FBI, they reported a likely 93% confrontation rate. Only 7% of male-victim intimate homicides in the national sample were woman offender precipitated. They drew their data from reports of homicides between heterosexual intimates including present and former spouses, both licensed and common-law, as well as those between men and women in intimate relationships who may or may not have cohabited. Their approach is similar to that used in this Article. *See* Noel A. Cazenave & Margaret A. Zahn, Women, Murder and Male Domination: Police Reports of Domestic Homicide in Chicago and Philadelphia, Presentation at the American Society of Criminology Annual Banquet (Oct. 31, 1986) (transcript on file with author). Mercy and Saltzman, in contrast, relied on a sample drawn solely from spousal homicides. *See* Mercy & Saltzman, *supra* note 71, at 595.

These studies represent very interesting preliminary work, but current available national data on homicides by battered women are incomplete. There are no statistical studies that address all of the following factors: (1) the number of women in the United States who kill, (2) of those, the percentage who kill spouses or lovers, (3) of those, the percentage who claim to have been battered by the decedent, and (4) of those, the percentage who claim to have acted in self-defense.[76] Also missing from the existing data are statistics on outcomes of arrests in cases in which battered women killed partners and claimed self- defense: of the arrests, how many are prosecuted and in how many are prosecutions withdrawn; of the prosecutions, how many result in guilty pleas and how many in trials; and, of the trials, how many end in convictions.[77]

Scholars who based their work on local samples include WOLFGANG, *supra* note 70. Cazenave and Zahn interpreted Wolfgang's study as showing that 85% of the cases involved husband-victim precipitation. *See* Cazenave & Zahn, *supra*, at 2. Christine Rasche, who studied mate homicides in one Florida county between 1980 and 1986, found that in 52% of cases where women killed male intimates, the homicide occurred during an ongoing attack. An additional 20% involved women responding to verbal threats. *See* Rasche, *supra* note 56, at 19-20. Another Florida study, based on an analysis of court ordered psychiatric interviews of defendants charged with killing common-law or legal spouses, concluded that 73% of the women killed in victim-precipitated encounters. *See* Bernard et al., *supra* note 68, at 271, 274. Another study, by Jurik and Winn, analyzing data drawn from presentence reports prepared by probation officers in all intersexual murders or non-negligent homicides in an Arizona County between 1979 and 1984, found that of the cases where the precipitating incidents were known, 92% of the killings by women of men involved "interpersonal conflicts" with their victims, ranging from arguments to physical fights as precipitating incidents. *See* Jurik & Winn, *supra* note 68, at 230-31, 233. Their study concluded that, "[f]ar from the stereotype of women killing an impaired victim," only 20% of the victims were impaired (defined as drunk, ill, or asleep), and that in almost 75% of the impaired victim cases, the victim was aggressive and/or defensive rather than helpless. *See id.* at 237.

[76] For an explanation of this deficit in the empirical research, see Mercy & Saltzman, *supra* note 71, at 595; Plass & Straus, *supra* note 67, at 3; *see also* Goetting, *supra* note 70, at 16 (discussing the need for an analysis that includes each of these factors and proposing a model for such an analysis).

[77] One thing is clear, but not explained by the current state of statistical literature: only a small minority of arrests are reflected in the appellate decisions.

An interesting problem, beyond the scope of this Article, is analysis of the question why so few arrests are reflected in the appellate decisions. I have five hypotheses, the first four of which are not inconsistent with the generally held view that battered-women homicide defendants are convicted after trial at roughly the same rate as are defendants in other homicides, whose conviction rate (75-80%) is consistent with that of serious felonies generally. *See* Cazenave & Zahn, *supra* note 75, at 3. They are: (1) a disproportionate (to the general run of homicide cases) percentage of these cases result in guilty pleas; (2) a similarly disproportionate number are tried to judges sitting without juries (pursuant to a practice known to the

The current preliminary conclusions of social scientists are consistent with this Article's analysis of the appellate opinion sample and its conclusion that the sample does not support the assertion that most battered women homicide defendants kill in nonconfrontational situations. Thus, the legal scholars' assumption is wrong: the problems that battered women homicide defendants face at trial do not result from their typically killing during a lull in the violence.

II. EMPIRICAL CRITICISM OF THE ASSUMPTION THAT SELF-DEFENSE JURISPRUDENCE IS DEFINED TOO NARROWLY TO TAKE INTO ACCOUNT THE CONTEXT IN WHICH BATTERED WOMEN KILL

A second erroneous assumption of much current legal scholarship is that existing criminal law, as a matter of definition, precludes fair trials for battered women because it excludes consideration of the context in which women, especially battered women, raise claims of self-defense (even those battered women who act in confrontational situations—whatever proportion various scholars believe them to be of all battered women tried for homicide).[78] Relying on this perception, many scholars propose radical redefinition of criminal law doctrine.[79] In this Part of the Article, I will first describe

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defense bar as "slow guilty pleas," where the trial judge is expected to convict of some charge below the top count in the indictment in a case where the prosecutor would not bargain, and where the defendant, in exchange, is expected not to appeal); (3) the cases that go to jury trial are tried by defense lawyers who do not put on the record or preserve for appeal the issues that would enable a researcher to identify them as battered women's self-defense cases; (4) even where these issues are identified, defendants in these cases do not appeal with the same frequency as do other convicted defendants. *See, e.g.*, GILLESPIE, *supra* note 24, at x (stating that women "commonly" do not appeal their convictions). The fifth hypothesis is that a disproportionate number are tried to verdicts of not guilty compared with the general population of homicide defendants.

[78] *But see* Kinports, *supra* note 22, at 441 (asserting that nonconfrontational defendants can establish all of the elements of the self-defense claim).

[79] In so doing, although they cite Professor Elizabeth Schneider, a leading theorist on self-defense for battered women, they ignore the real significance of her work. *See, e.g.*, Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 212-20 (1986) [hereinafter Schneider, *Describing and Changing*] (stating that expert testimony for female defendants may present dilemmas for feminist theory); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 648-52 (1986) (explaining that a rights discourse is a necessary aspect of any political and legal strategy for change); Schneider, *Equal Rights*, *supra* note 24, at 636-38 (developing a theory of sex bias for application in a homicide case involving a woman defendant). Her scholarly work is grounded in her experience as

current literature. I will then offer a definition of "fair trial," and use that definition as a basis for analyzing scholars' claims in four substantive law areas: (1) the definition of reasonableness against which is measured the defendant's belief in the necessity of using deadly force; (2) the definition, either "immediate" or "imminent," of the temporal proximity of the danger facing the defendant; (3) the standard for evaluating the proportionality of the force employed; and (4) the existence *vel non* of a duty to retreat and of exceptions to the duty. Against the same measure, two evidentiary issues are examined: (1) rules defining the choice of standards for admissibility, scope, and purpose of evidence of the defendant's social context, including evidence of the history of abuse (the decedent's battering of the defendant in the past), any history of other violence (the decedent's past violence toward third persons), as well as expert testimony on the effects of the history of abuse; and (2) the instructions given a jury regarding the relevance of social context evidence to a self-defense claim.

A. *The Assumption of Legal Scholars*

Much current literature is premised on the assumption that bad outcomes in battered women's homicide cases are the result of legal definitions that prevent the possibility of fair trials.[80] Scholars

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an appellate litigator. The great accomplishment of the early "women's self-defense" litigation strategy of which she and others were the architects in the 1970s was forcing the recognition that criminal law, developed almost entirely in the context of male defendants, was sufficiently flexible to accommodate the claims that women who killed men acted reasonably.

For example, the Washington Supreme Court decision in State v. Wanrow, 559 P.2d 548 (Wash. 1977) (en banc), is remarkable not because it created a separate, woman-identified standard of reasonableness, but because it held that the generally applicable standard necessarily included the perspective of women and the context of their acts and did so drawing explicitly on that court's own precedents involving male appellants. *See infra* notes 106, 109, 124 & 132 and accompanying text. The enduring value of Schneider's litigation and scholarship is in the clarity of its insistence that a general discussion of "reasonableness" in criminal law should include the perspective of women.

[80] *See, e.g.*, Crocker, *supra* note 22, at 123, 126 ("The traditional doctrine of self-defense is based on the experiences of men; it neither contemplates nor acknowledges those acts of self-defense by women that are reasonable, but different from men's .... The male experience permeates both the elements of the defense and the standards of reasonableness."); Fiora-Gormally, *supra* note 27, at 158 (arguing that "a [self-defense] standard is inappropriate if it will permit self-defense only where the battered-wife defendant responds in a manner foreign to her acculturation ... requiring that the battered-wife respond in a 'manly' manner"); Mather, *supra* note 28, at 569 ("[A] male viewpoint permeates the law of self-defense. The common law

assert that the elements of self-defense are designed narrowly to apply to male-identified situations involving one-time-only and time-bounded encounters.[81] Like the assumption that most cases are nonconfrontational, this assumption is drawn from a limited review of appellate opinions. As is the case with the definition of "confrontation" in current literature,[82] many scholars are imprecise in defining the goal of their proposed legal redefinitions.[83]

Believing that verdicts against battered women are the result of the law's definitions, many scholars propose new definitions. One argues that battered women's self-defense claims should be treated as excuses rather than as justifications.[84] Most, however, propose their redefinitions within self-defense doctrine. One argues for a "reasonable battered woman" standard[85] while others argue for "a reasonable woman" standard.[86] Some proposals contemplate expansion of the definition of "imminence"[87] or its elimination

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of self-defense developed (and the modern law continues with) a concept of self-defense that is based on male notions of a 'fair fight,' of courageousness and cowardice, and of danger and immediacy of harm."); Tinsley, *supra* note 24, § 4, at 16 (noting that "[t]he imminent danger and necessary force requirements have been developed in the context of a single, violent encounter between two men" and that such a "stereotypical model" is inappropriate for battered woman defendants); *see also* Laura E. Reece, *Women's Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 U.C.L.A. WOMEN'S L.J. 53, 55 (1991) ("The most serious problem female criminal defendants encounter is the law itself. '[L]aw made by men, for men, and amassed down through history on their behalf, codifies masculine bias and systematically discriminates against women by ignoring the woman's point of view.'" (quoting JONES, *supra* note 9, at 311)).

[81] *See* Schulhofer, *supra* note 25, at 127.

[82] *See supra* notes 29-31 and accompanying text.

[83] Most authors define their goals generally in terms of "justice" or "acquittals." *See, e.g.*, Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 52-53 (arguing for expanding reform efforts beyond "the limited, albeit important [goal] of gaining acquittal for battered women who kill"); Rosen, *supra* note 23, at 17 (proposing that self-defense be classified as an excuse rather than as a justification since such a redefinition "will result in more justice for battered women who kill"); Schulhofer, *supra* note 25, at 129 (proposing a self-defense standard that "should be adequate to produce acquittal in those cases involving both truly serious abuse and tangible barriers to flight"). This Article's proposal is that the goal of any legal redefinition must be limited to guaranteeing a "fair trial." *See infra* text accompanying notes 93-95.

[84] *See* Rosen, *supra* note 23, at 18-24.

[85] *See* Kinports, *supra* note 22, at 416.

[86] *See* Crocker, *supra* note 22, at 152 ("[A] new construct of self-defense is needed, not only for battered women, but for all women."); Mather, *supra* note 28, at 573.

[87] *See, e.g.*, EWING, *supra* note 22, at 77 (proposing to protect "perhaps the majority of battered homicide defendants, who kill not to avert an imminent threat of death or serious physical injury but rather to protect themselves from the infliction

altogether.[88] Still other commentators urge elimination of the duty to retreat in states that apply it to attacks by cotenants or guests occurring in the defendant's home.[89] Others argue against the proportional force requirement.[90] Still others presume the need for special standards governing admission of evidence.[91]

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of extremely serious psychological injury"); Fiora-Gormally, *supra* note 27, at 154 (arguing that "[t]o require that [a battered woman] react only under the immediate threat of danger is to ignore the essential physical and psychological makeup of a 'reasonable', 'adjusted' and 'feminine' woman"); Rosen, *supra* note 23, at 34 (arguing that current definitions of imminence, which require "consideration of only the circumstances immediately surrounding the killing . . . necessarily defeat the woman's claim"); Talbot, *supra* note 22, at 1545 (stating a "partial solution to the problem of battered women who kill would be for the courts to interpret more broadly the imminence requirement of the traditional doctrine of self-defense"); *see also* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991). For a discussion of Professor Mahoney's proposal, which is grounded in existing doctrine, see *infra* note 244.

[88] *See, e.g.*, Schulhofer, *supra* note 25, at 127 (arguing against a separate standard of reasonableness for battered women, and urging instead that in those cases "the traditional insistence on a literally 'imminent' infliction of great bodily harm must be abandoned outright" because the correct inquiry is the necessity of the battered woman's action rather than "imminence *per se*"); Sarah B. Vandenbraak, Note, *Limits on the Use of Defensive Force to Prevent Intramarital Assaults*, 10 RUT.-CAM. L.J. 643, 658 (1979) (proposing a flexible standard having no imminence limitation).

[89] *See, e.g.*, GILLESPIE, *supra* note 24, at 187-88 (arguing that those few states applying this exception to the duty are especially unfair to women defendants); Littleton, *supra* note 83, at 36 (arguing that the danger of attempting to leave the abusive situation "makes a mockery of the standard self-defense analysis regarding 'duty to retreat'"). *But see* Schulhofer, *supra* note 25, at 129 (arguing in favor of enlarging the duty to retreat beyond the immediate occasion, to encompass a general obligation to leave the abusive relationship, or undergo a shift in burdens at a trial on the question of the reasonableness of the use of deadly force: "Many women do successfully escape from abusive mates. Those who instead resort to deadly force should have to prove the concrete circumstances that prevented them from doing likewise."(footnote omitted)).

[90] Those who do so misstate the rule. *See, e.g.*, Crocker, *supra* note 22, at 126 (noting that, in some jurisdictions, that "'[e]qual' force is interpreted to mean either 'like' or 'same' force"); Mather, *supra* note 28, at 587 (asserting that "the rule that a woman may not use a weapon against an unarmed male assailant is absurd and arbitrary").

[91] These scholars, at least in this area of their commentary, seem to believe that the creation of a general factual model of the battered woman who kills is necessary to set a standard against which the act of a battered woman defendant is to be measured. *See* Kinports, *supra* note 22, at 451-53 (suggesting that a jury should hear evidence of, and be instructed to compare the actions of the defendant on trial to, the facts of other cases involving battered women homicide defendants); Littleton, *supra* note 83, at 37 (arguing that "the focus on the personal, interior, subjective nature of the belief [that escape is impossible] without considering its class-wide, external, statistical rationality, denies the defense to those individual women who have not yet been beaten 'enough'"); Rosen, *supra* 23, at 38-39 (arguing from a very different perspective for a change in the rules of evidence governing self-defense

These proposals derive from the assumption that legal definitions exclude consideration of the context of battered women's actions and are therefore responsible for bad outcomes at their trials. Ironically, these suggestions for redefinitions are similarly beset with contextual difficulties. Their proponents have either failed to place them in the context of the interrelationship of proposals in one area with the operation of standards in another,[92] or have failed to ground them in a realistic analysis of the law's current definitions. An analysis of the appellate opinions from an interrelational perspective demonstrates that most battered women are not convicted as the result of the criminal law's inability, as a matter of definition, to accommodate their self-defense claims. Thus, the assumptions which underlie most proposals for redefinition are not empirically supportable.

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trials of battered women in order to accommodate case-specific evidence of the context in which other battered women have acted). *But see* Sharon A. Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 U.C.L.A. WOMEN'S L.J. 191, 193-98 (1991) (arguing that battered-woman-syndrome testimony incorporates a stereotype of a "good," "normal" battered woman and that Black women, inevitably classified by jurors as "other" because they do not fit the mold, do not benefit from testimony that reinforces this white-identified stereotype). Allard calls for creation of a battered woman model that incorporates race and class factors in an "intersectional analysis." *See id.*

Professors Donovan and Wildman, who criticize the existing definitions of reasonableness on the ground that they exclude "not only women, but also members of other minority groups with distinct socioeconomic characteristics setting them apart from mainstream middle class America," assume, without discussion, that their proposed reformulation of evidence instructions will be adequate because "[t]he rules of evidence relating to relevance will have already [by the time of instructions] determined what evidence is permitted in the case. Any evidence relating to the accused's social reality should be viewed as relevant." Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 436-37, 467 n.170 (1981).

[92] For example, all of the proposed redefinitions, except that proposed by EWING, *supra* note 22, at 90, ignore the operation of procedural rules that permit a judge to decide whether the defendant's case warrants a self-defense instruction. *See, e.g.*, Kinports, *supra* note 22, at 454-57 (assuming implicitly that a defendant will be entitled to jury instructions under the redefined standard of reasonableness proposed by the author). For a discussion of the crucial importance of these rules to a fair trial, see *infra* text accompanying notes 212-18.

Some scholars also ignore the relationship between legal instructions and the rules governing admission of evidence. *See, e.g.*, Donovan & Wildman, *supra* note 91, at 467 n.170 (assuming that contextual evidence will automatically be covered in jury instructions).

B. *Analysis of the Opinions on Appeal from Battered Women's Homicide Convictions*

Many scholars err in assuming that proposed redefinitions will lead to good outcomes. The predictors of not-guilty verdicts are many and varied.[93] Few are susceptible to change through legal redefinition. Those few are included in this Article's definition of the term "fair trial". The question whether a battered-woman defendant can be fairly tried is here equated with the question of whether she is able to "get to the jury"[94] on the self-defense issue. Getting to the jury involves more than simply getting an instruction on self-defense. It includes (1) the content of the instruction on substantive criminal law definitions of the elements of self-defense, (2) the admissibility of evidence about the context of the defendant's act and the instructions to the jury on the relevance of the evidence, and (3) the procedural rules defining the quantity and quality of evidence a defendant must produce to be entitled to a self-defense instruction.[95]

This part of the Article criticizes the assumption that appellate opinions demonstrate that the law's definitions are so male-identified as to exclude the self-defense claims of battered women who kill men.[96] Its focus is on the operation of those definitions in the context of battered women's cases.[97] As was the case in

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[93] They include the interplay of sex, race, and class bias in the courtroom, prevailing attitudes about family violence in the community from which the pool of potential jurors is drawn, the quality of the lawyering on each side, and the resources available in the form of money, expert witnesses, trial consultants, and investigators. For analyses of the specific impact of these factors on trials of battered women who kill, see WOMEN'S SELF-DEFENSE CASES: THEORY AND PRACTICE (Elizabeth Bochnak et al. eds., 1981); Charles P. Ewing & Moss Aubrey, *Battered Women and Public Opinion: Some Realities about the Myths*, 2 J. FAM. VIOLENCE 257 (1987); Follingstad et al., *supra* note 59.

[94] Ninety-six percent of the trials that led to the appellate opinions analyzed were jury rather than bench trials. *See* Jury/Bench (computer manuscript on file with the author) described *infra* Appendix.II.C. For the purposes of this Article, however, "getting to the jury" includes bench trials, where the finder of fact is a judge.

[95] The substantive and evidentiary issues are addressed in this part of the Article. For a discussion of the impact of procedural rules, see *infra* text accompanying notes 212-23.

[96] In the last section of this part, I will argue that the appropriate focus is on judicial application of existing definitions. *See infra* text accompanying notes 186-209.

[97] This Article is not a primer on the law of self-defense. Discussion of a state's choice in any of the definitional areas will be limited to that choice's demonstrated relevance in the appellate review of convictions of battered-woman defendants. A state's decisions in other homicide cases or in battered women's cases involving charges other than homicide will be discussed only when necessary to provide context

Part I's criticism of the factual assumption that most incidents do not involve confrontational situations, the sample analyzed is the body of appellate opinions from which scholars have drawn their conclusions.[98]

Any evaluation of whether the law needs redefinition should proceed from the recognition that, in fact, the criminal law does not generally assume the one-time and time-bounded encounter that many scholars believe is the foundation of its male-identified definitions. Rather, the law's definitions have developed to reflect the reality that the most common homicide case is one in which the parties have a history with each other. Crime statistics for the last three decades demonstrate that, in the great majority of homicides, the parties were at least acquaintances.[99] Homicides among friends and acquaintances are more common than those in any other category.[100] The second most frequent type is stranger, followed by family homicides.[101] The frequency of homicides

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for the analysis of the application of its rules to battered women's homicide cases.

[98] I evaluated each of the opinions on which other scholars relied, and conducted a search, *see supra* notes 44-48, which resulted in the retrieval of additional cases. These opinions are in some instances the sources, and in others the interpretations, of the substantive law definitions and of the evidentiary and procedural rules that lower courts, at least in theory, must follow. The opinions of both intermediate and highest appellate courts were analyzed. The decisions of both types of tribunals provide information about the definitions and rules that appellate judges want trial courts to employ. These opinions do not offer a complete picture of what actually transpires at the trial level, in part because of the small percentage of trial verdicts in these cases that lead to identifiable opinions on appeal. *See supra* note 77.

[99] This pattern was true when most of the analyzed cases were decided. *See, e.g.*, Margaret A. Zahn & Philip C. Sagi, *Stranger Homicides in Nine American Cities*, 78 J. CRIM. L. & CRIMINOLOGY 377, 383 (1987) (finding that 76% of homicides were committed by family member or acquaintance in cities studied in 1978). For an analysis of the possibility of a change in the pattern in the 1980s, see *F.B.I. Report Confirms Sharp Rise in Violent Crime*, N.Y. TIMES, Aug. 6, 1990, at A10 (quoting Professor Gerald Caplan as stating that 85-90% of all murders are now committed by strangers). *See generally Symposium on Stranger Violence*, 78 J. CRIM. L. & CRIMINOLOGY 223 (1987) (discussing various perspectives on violence among strangers in the 1980s).

[100] *See* Goetting, *supra* note 70, at 8 ("Most reported killings in this country occur between persons who have had some prior relationship. Between 1980 and 1985 only 13.3% to 17.6% of homicides involved persons unknown to one another." (citation omitted)); Christine S. Sellers & Margaret A. Zahn, Offense Histories of Four Types of Homicide Offenders, Presentation at the Annual Meeting of the Academy of Criminal Justice Sciences 4 (Mar. 1989) (unpublished manuscript, on file with author).

[101] For a description of the change in homicide patterns, see Plass & Straus, *supra* note 67, at 5. The authors note that during the period 1976-84, stranger murders occurred at less than half the rate of acquaintance murders. *See id.* Furthermore, over that period, the rate of family homicides decreased while stranger homicides increased, resulting in family murders occurring at the lowest rate, which was slightly

among persons known to each other is reflected in existing substantive criminal law definitions[102] and in evidentiary rules.[103]

Scholars who advocate change in certain aspects of self-defense jurisprudence, which they identify as definitionally inflexible, often recognize definitional flexibility in other aspects. They ignore, however, the interrelationship of those areas and fail to assess the impact of their proposals for redefinition on the rest of existing law.[104] This part of the Article examines the definitional context in which battered women's homicide cases are tried.

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lower than the stranger murder rate. *See id.*

[102] For discussions of this reality in the specific substantive-law definitions of reasonableness, imminence, proportionality of force, and the duty to retreat, see *infra* notes 105-42 and accompanying text.

[103] For instance, the current evidentiary law of every state permits evidence of the history of abuse between the parties. *See* Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1436 (1990). In 1956 this evidentiary principle was applied to a battered woman's homicide conviction in an opinion reversing a trial court's exclusion of evidence of a history of abuse and of the decedent's reputation for other violence:

> [T]he law recognizes the well-established fact in human experience that the known reputation or character of an assailant as to violence and turbulence has a very material bearing on the degree and nature of the apprehension of danger on the part of a person assaulted; also that one who is turbulent and violent may the more readily provoke or assume the aggressive [sic] in an encounter. Hence, as bearing on these issues, where a proper foundation has been laid, it is conclusively established in almost all jurisdictions that evidence of the turbulent and dangerous character of the victim of an assault or homicide is admissible.

People v. Yokum, 302 P.2d 406, 416 (Cal. Ct. App. 1956) (quoting Annotation, *Admissibility of Evidence as to Other's Character or Reputation for Turbulence on Question of Self-Defense by One Charged with Assault or Homicide*, 64 A.L.R. 1029, 1030 (1930)).

For discussion of the interrelation of substantive-law choices and the standards governing admissibility of and instructions regarding that evidence, see *infra* notes 154-160 and accompanying text.

[104] *See, e.g.*, Crocker, *supra* note 22, at 123-37, 144-50 (analyzing, correctly, the flexibility of most substantive law definitions, but inaccurately concluding that the reasonableness standard is rigidly male-identified); Kinports, *supra* note 22, at 415-20 (confusing evidentiary rulings on expert testimony with substantive-law rulings recognizing a "reasonably prudent battered woman" standard; thus, inaccurately assessing the traditional reasonableness standard and the likely impact of her proposal that defendant's reasonableness be measured against killings by other battered women, but accurately assessing the impact of flexibility in definitions of proportional force, retreat, and imminence); Littleton, *supra* note 83, at 84 (confusing the trial issue of individual culpability with an assessment of "class-wide reality," and incorrectly equating an inability to escape the batterer with an inability to retreat on

1. Substantive Law

a. *The Choice of Reasonableness Standards*

The choice of the reasonableness standard determines the content of what the jury is told about assessing the necessity of a defendant's action. In objective jurisdictions, the jury is told to measure the defendant's belief in the necessity of using defensive deadly force against a generic standard of reasonableness. In all other jurisdictions, which constitute the majority, the jury is instructed to use a standard that includes—to degrees that vary little among these combination subjective-and-objective jurisdictions—the defendant's individual subjective[105] point of view.[106]

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occasion of killing, but generally providing an accurate overview of other issues); Mather, *supra* note 28, at 565-74 (noting, accurately, the flexibility in imminence and retreat standards, but incorrectly assuming rigidity in the reasonableness standard and confusing the definition of proportional-force rule with its application); Schulhofer, *supra* note 25, at 116-30 (providing an accurate overview and a thoughtful, context-based proposal for elimination of the imminence requirement from the general requirement of necessity, but confusing the duty to retreat on occasion of killing with a failure to leave the abusive relationship, and proposing to shift the burden of proof on that issue to the defendant).

[105] The term "subjective" plays two roles in the definition of the evaluation of a defendant's belief. First, all jurisdictions require that the defendant have a subjective, actual, and honest belief in the necessity of using deadly defensive force. The second use of the term "subjective" is involved in the determination of the reasonableness of that actual and honest belief. In objective jurisdictions, reasonableness is measured against the standard of a hypothetical generic reasonable person (or man). *See, e.g.*, *infra* note 113 (describing objective standard in Georgia). In other jurisdictions, there is a subjective portion of the reasonableness test, which places the hypothetical reasonable person in the situation of and having the information available to and the experience and perceptions of the defendant on trial. *See, e.g.*, *infra* note 113 (describing subjective standard in Ohio). The majority standard is one that combines subjective and objective tests of reasonableness. *See* Schneider, *Describing and Changing*, *supra* note 79, at 219; *see also* Crocker, *supra* note 22, at 125 (correctly describing the majority test as requiring reference to the defendant's individual circumstances, but nonetheless labeling the test "an objective standard").

[106] For the purposes of this Article, the cases analyzed were divided into four categories of reasonableness standards: objective, subjective, combination of objective and subjective, and reasonably prudent battered woman. *See infra* Appendix I.B.2. The reasonable prudent battered woman, the subjective, and the combined subjective and objective tests of reasonableness differ from the purely objective test in their common focus on the characteristics of the individual defendant on trial. In theory, they differ in the extent to which emphasis is placed on the specific characteristics of the person charged. *See* Kinports, *supra* note 22, at 409-11. In actual operation, their emphases on characteristics differ very little, and they are much more like each other and, similarly, different from the purely objective test. *See* Schneider, *Describing and Changing*, *supra* note 79, at 220. In Washington, for example, where the language of State v. Wanrow, 559 P.2d 548 (Wash. 1977) (en banc), appears to establish a

The combined nature of the standard actually used by a majority of the states is sometimes obscured by the label a state's highest court has attached to it. For instance, the highest court of New York characterized a standard that used a combination of subjective and objective analyses as "objective."[107] The New York court's "objective" test has two parts and takes social context into account: first, the jury must decide whether the defendant actually and honestly believed in the necessity of using deadly defensive force; second, the jury must decide whether a reasonable person in the defendant's circumstances, including his or her history with the decedent and his or her perceptions, would so believe.[108] This "objective" test is not appreciably different from a test characterized as "subjective" by the Supreme Court of Washington in *State v. Wanrow*.[109] The "reasonably prudent battered woman" standard,

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completely subjective standard, *see infra* note 109, the test retains an objective component. *See* State v. Walker, 700 P.2d 1168, 1171 (Wash. App. 1985) (affirming an assault conviction and holding that the defendant's evidence of her subjective belief that she was in peril fell "woefully short" of establishing a reasonable perception of imminent danger). Because the significant division is between objective and all other jurisdictions, the Table that summarizes the various states' standards as they are reflected in opinions on battered women's appeals contains only two categories of reasonableness: "O" (the objective jurisdictions) and "C" (the jurisdictions that include to some degree a subjective inquiry in the standard). *See infra* Table.

[107] *See* People v. Goetz, 497 N.E.2d 41, 52 (N.Y. 1986) (holding through interlocutory pretrial ruling that an "objective" assessment of reasonableness includes consideration of the male defendant's background and character).

[108] The jury instructions given at the Bernhard Goetz trial, excerpted below, were consistent with the Court of Appeals's ruling:

> What then is a reasonable belief? A determination of reasonableness must be based upon the circumstances facing the defendant or his situation, such in [sic] terms encompass more than the physical movements of the potential assailant . . . . These terms include any relevant knowledge the defendant had about that person or persons; they also necessarily bring in the physical attributes of a person's involvement including the defendant [sic].
>
> Furthermore, the defendant's circumstances encompass any prior experiences he had, which would provide a reasonable basis for belief that another person's intentions were to injure him or that the use of deadly force was necessary under the circumstances.
>
> A person may be said to reasonably believe that deadly physical force is about to be used against him, if a reasonable person in his shoes, that is, in the same circumstances and situation that he faced, would so believe. In other words, in this case you must scrutinize the reasonableness of any belief the defendant claims to have had by reference to a hypothetical reasonable person who was [in the incident circumstances] and who faced the exact situation which confronted the defendant.

Trial Record at 9218-19, People v. Goetz (transcript on file with author).

[109] 559 P.2d 548 (Wash. 1977) (en banc). The Washington Supreme Court

proposed by one scholar[110] and apparently adopted in three jurisdictions,[111] provides a definition that incorporates an objec-

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approved the following language (which has variations in gender resulting from the court's alternately quoting from its own precedents involving men and suggesting language applicable to a female defendant):

> [The disapproved instruction at Wanrow's trial] incorrectly limited the jury's consideration of acts and circumstances pertinent to respondent's perception of the alleged threat to her person.
>
> . . . On the contrary, the justification of self-defense is to be evaluated in light of *all* the facts and circumstances known to the defendant, including those known substantially before the killing.
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> . . . .
>
> . . . "All of these facts and circumstances should have been placed before the jury, to the end that they could put themselves in the place of the appellant, get the point of view which he had at the time of the tragedy, and view the conduct of the [deceased] with all its pertinent sidelights as the appellant was warranted in viewing it. In no other way could the jury safely say what a reasonably prudent man similarly situated would have done."
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> . . . .
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> . . . [This information is necessary for the jury to determine the] "degree of force which...a reasonable person in the same situation...seeing what [she] sees and knowing what [she] knows, then would believe to be necessary."

Id. at 555-57 (citations omitted) (quoting State v. Tribett, 132 P. 875, 877 (Wash. 1913) and State v. Dunning, 506 P.2d 321, 322, (Wash. Ct. App. 1973)).

[110] *See* Kinports, *supra* note 22, at 416.

[111] No state appellate court has approved the use of battered-woman-syndrome testimony to create a completely separate defense. In three states, appellate courts have created or endorsed the creation of a separate standard of reasonableness to be applied in the context of self-defense or related jurisprudence. The Supreme Court of Kansas has endorsed a separate standard of reasonableness squarely in the context of self-defense. *See* State v. Stewart, 763 P.2d 572, 579 (Kan. 1988); State v. Hundley, 693 P.2d 475, 477 (Kan. 1985). The Supreme Court of Wisconsin has endorsed such a standard in the context of assessing the reasonableness of a perception of provocation by the decedent that would warrant a verdict of manslaughter rather than murder. *See* State v. Felton, 329 N.W.2d 161, 173 (Wis. 1983).

An intermediate appellate court in Missouri has interpreted that state's special legislation permitting expert testimony on battered woman syndrome, *see* MO. REV. STAT. § 563.033 (1988), *amended by* MO. ANN. STAT § 563.033 (Vernon Supp. 1991), as creating a separate standard of reasonableness for battered women. *See* State v. Williams, 787 S.W.2d 308, 312-13 (Mo. Ct. App. 1990) (reversing conviction where trial judge excluded expert testimony on the theory that the defendant was not entitled to the benefit of a statute governing admissibility of "battered spouse syndrome," and further stating that the operation of the evidentiary statute created a "reasonable battered woman" standard of reasonableness); *see also* State v. Clay, No. 41069, 1989 Mo. App. LEXIS 1386, at *8 (Sept. 26, 1989) (affirming homicide conviction of defendant's husband's lover, and upholding refusal to allow expert testimony where there was no claim that the defendant acted in self-defense).

In 1989, a plurality opinion of the Supreme Court of Pennsylvania appeared to endorse a separate standard of reasonableness. *See* Commonwealth v. Stonehouse, 555 A.2d 772, 784 (Pa. 1989). Recently, however, in the course of reversing a

tive component, and does not differ significantly from the combined standard currently in use in the majority of jurisdictions.[112]

A reasonableness standard's outcome-determinative impact on the content of a self-defense instruction is obvious.[113] The choice

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battered woman's conviction, that court issued four separate opinions, none endorsing the *Stonehouse* suggestion of a separate standard. *See* Commonwealth v. Dillon, No. 123, 1991 Pa. LEXIS 234 (Oct. 31, 1991) (comprising: a majority opinion, signed by four of seven justices, reversing because of exclusion of decedent's prior violence; two concurring opinions, each signed by three justices, each in support of reversal on the additional ground of exclusion of battered-woman-syndrome testimony, each disavowing a separate defense, and finding that the generally applicable standard of reasonableness accommodated the self-defense claim of a battered woman; and one concurrence signed by three justices on the specific ground that no separate defense was necessary).

Professor Kinports lists additional state courts (Florida, New Jersey, New Mexico, New York, North Dakota, Texas, and Washington) that she characterizes as in agreement that the reasonableness standard is that of the "reasonable battered woman." *See* Kinports, *supra* note 22, at 416 & n.88. Her error is the result of confusing the definition of the reasonableness standard with those jurisdictions' rulings on other instruction issues and on the scope and relevance of expert testimony on the battered woman syndrome.

[112] *See, e.g.*, *Stewart*, 763 P.2d at 579 (holding that no self-defense instruction should be given in a sleeping-man case, applying a "reasonably prudent battered wife" formulation to the "objective" part of its reasonableness test, and determining that the generally applicable "subjective" portion of the test measures the sincerity and honesty of a defendant's belief); *Felton*, 329 N.W.2d at 173 (determining that its own precedents required the conclusion that the objective portion of that state's combined standard for measurement of the provocation by the decedent, which warrants reduction of murder to manslaughter, "may be satisfied by considering the situation of an ordinary person who is a battered spouse"). *Compare Stonehouse*, 555 A.2d at 784 (plurality opinion) (ruling that expert testimony serves to guide the jury in weighing other evidence "in light of how the reasonably prudent *battered woman* would have perceived and reacted to [the decedent's] behavior") *with* Commonwealth v. Ely, 578 A.2d 540, 542 (Pa. Super. Ct. 1990) (noting that even under the *Stonehouse* plurality standard the new definition goes only to the measurement of the perception of imminence).

[113] Compare the definition of the measurements employed in an objective jurisdiction, "[It is not the law that] the fears of a coward would justify homicide. . . . [The defendant's perceptions must be measured against those] of a reasonable man; reasonably courageous—reasonably self-possessed," Teal v. State, 22 Ga. 75, 84 (1857), with that of a subjective jurisdiction,

> [G]uilt is personal, and . . . the conduct of any individual is to be measured by that individual's equipment mentally and physically. He may act in self-defense, not only when a reasonable person would so act, but when one with the particular qualities that the individual himself has would so do. A nervous, timid, easily frightened individual is not measured by the same standard that a stronger, calmer, and braver man might be.

Nelson v. State, 181 N.E. 448, 449 (Ohio Ct. App. 1932). Both *Teal* and *Nelson* involved male appellants. For an analysis of the proposals for redefinition of the reasonableness standard and of the likelihood that those proposals without changes in other aspects of self-defense jurisprudence, will lead to better outcomes in

of reasonableness standards is a factor in the likelihood of getting *any* instruction on self-defense, but is not, by itself, determinative of that issue.[114] The inclusion of a subjective part of a reasonableness test does seem related to the likelihood that a jurisdiction's courts will prefer the use of the feminine gender in instructions in trials where the defendants are women.[115]

The choice of the definition of reasonableness does influence rulings on admissibility of evidence of the social context in which the defendant acted[116] and instructions regarding the significance of that evidence. It is not the sole determinant of those questions, however, and the more significant impact is from the jurisdiction's definition of the temporal proximity of danger.[117]

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nonconfrontation cases, see *infra* notes 227-38 and accompanying text.

[114] On this most basic get-to-the-jury issue, getting any instruction at all, analysis of the opinions demonstrates that the impact of the reasonableness standard that is chosen is effectively negligible. In appellate cases containing a discussion of the reasonableness standard, no significant difference exists between the objective and the combination jurisdictions in the frequency of complaints on appeal that no self-defense instruction was given at trial. *See* No Self-Defense Instruction (computer manuscript on file with the author) described *infra* Appendix II.D. Defendants in confrontation cases routinely get to the jury on that threshold question with the same regularity in jurisdictions on both sides of the divide between objective jurisdictions and those with some subjective component. *See id.* In nonconfrontation cases, there is a similar pattern: defendants fail to get self-defense instructions in the same percentages in both types of jurisdictions. *See id.*

The issue of simply getting some self-defense instruction is correlated more closely to a state's decision about the quantum and quality of the evidentiary showing necessary to entitle a defendant to an instruction than it is to the standard explained to the jury once an instruction is given. Most, but not all, of the highest standards occur in objective jurisdictions. *See infra* Table. The impediment to getting to the jury is the definition of that procedural rule. *See infra* notes 212-18 and accompanying text.

[115] Compare California's rule in People v. Bush, 148 Cal. Rptr. 430, 437 (Ct. App. 1978) (holding that "the jury was properly instructed that if defendant acted out of fear of death or great bodily harm and did only what a reasonable person would have done in his own defense, the homicide was justifiable") with State v. Bailey, 591 P.2d 1212, 1215 n.3 (Wash. Ct. App. 1979) (reversing an assault conviction and noting that "preferably, a woman defendant should be entitled to have jury instructions framed in the feminine gender in order to convey to the jury that they consider her actions in the light of her own perceptions and experience").

[116] The question here is the quantity and quality of other evidence that the defendant must produce as a condition precedent to the admissibility of social-context evidence (including history of abuse and other violence). The highest threshold-showing requirements are those in states that have *both* an objective reasonableness standard and a narrow definition of the temporal proximity of the threatened harm. *See infra* text accompanying notes 153-65.

[117] The narrow choice of definition occurs more frequently in objective than in other jurisdictions. For a discussion of the significance of these two definitions in combination, see *infra* text accompanying notes 153-65.

b. *The Definition of the Temporal Proximity of Danger Facing the Defendant–the Choice Between "Imminent" and "Immediate"*

Both objective jurisdictions and those with a subjective component of the definition of reasonableness condition the justification for use of deadly force upon a defendant's reasonable belief in either an imminent or an immediate threat of death or serious bodily injury.[118] The choice, stated simply, is 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. In this Article, the issue is analyzed as the requisite temporal proximity of the danger.[119]

In terms of getting to the jury, the choice between "imminence" and "immediacy" has several implications,[120] but not, standing alone, for the likelihood that a defendant will receive any self-defense instruction at all.[121] The choice of definition, by itself, is a significant indicator of the importance of the social context of a defendant's action.[122] It has an effect, but not in isolation from

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[118] For a breakdown of the states' definitional choices between imminency and immediacy, as they are reflected in battered women's homicide appeals, see *infra* Table. For another recent review, see LAFAVE & SCOTT, *supra* note 34, § 5.7(d).

[119] States are not consistent in their use of terms to reflect their choices. Most use the term "immediate" to reflect a preference for the narrower particular instant focus and "imminent" to denominate a broader surrounding circumstances focus. This pattern is not consistent with LAFAVE & SCOTT, *supra* note 34, § 5.7(d), who use the term "imminent" to mean the narrower definition. I have chosen to follow the pattern of usage in the majority of states. For an analysis of the Model Penal Code's role in the selection and confusion of the terms, see Peter D.W. Heberling, Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 931-32 (1975).

[120] Its impact on outcomes is the primary focus of the scholars who urge its enlargement or who propose the elimination of the requirement. For a criticism of their proposals, see *infra* text accompanying notes 244-48.

[121] No 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.

[122] In "imminent" jurisdictions, both those with objective and those with combined tests for reasonableness, evidence of history of abuse justifies a defendant's acting more swiftly than would a reasonable stranger facing the same situation. *See, e.g.*, People v. Bush, 148 Cal. Rptr. 430, 436-37 (Ct. App. 1978) (holding that the trial court should explain the significance of prior threats and that one who has received threats is justified in acting more quickly). California's reasonableness test is objective. *See infra* Table.

For similar instructions that flow from that principle, see State v. Hundley, 693 P.2d 475, 478 (Kan. 1985) ("[T]he question is whether the instruction allows the jury to consider 'all the evidence' or whether the use of the word 'immediate' rather than

other factors, on the receipt of social context evidence.[123] It primarily affects (1) the instructions given a jury regarding the significance of that evidence[124] and (2) the scope of expert testimony.

The first of these impacts relates to lay testimony on the decedent's violence toward the defendant or toward third persons. A battered woman defendant in an "imminent" jurisdiction is more likely than her counterpart in an "immediate" jurisdiction to get a jury instruction specifically on the relevance of the decedent's past violence.[125] This principle is the same for evidence of violence toward third persons and for evidence of violence toward the defendant. The instruction explains to the jurors that the evidence of the decedent's past violence should be considered as they evaluate the defendant's state of mind and the reasonableness of the defendant's perception that the decedent posed an imminent threat of death or serious bodily injury.[126]

'imminent' precludes the jury's consideration of the [evidence of] prior abuse [directed at the defendant by the decedent]".). The trial court in *Hundley* had ruled that the term "imminent" more accurately reflected that state's determination to have the jury focus on the context in which the defendant, a battered woman, acted. *See id.* at 478-79. The Kansas Supreme Court held that an instruction using the term "immediate" was reversible error, a result that was viewed by the court as following necessarily from its holdings in earlier cases not involving battered women:

> It is well settled in Kansas that when self-defense is asserted, evidence of the cruel and violent nature of the deceased toward the defendant is admissible, as it was in this case. The question is what instruction should accompany this evidence in order to charge the jury with the proper manner in which such evidence should be considered.

Id. at 477 (citation omitted). Kansas, an otherwise objective state, applies a "reasonably prudent battered woman" standard of reasonableness. *See infra* Table.

[123] Those states with both an objective reasonableness test and an "immediacy" definition of temporal proximity of danger are those that impose higher threshold-showing preconditions to the receipt of this evidence. *See infra* note 126 & text accompanying notes 127-28.

[124] For instance, the Washington Supreme Court held that an instruction using the term "immediate" impermissibly narrowed the focus of the jury's attention to the time immediately before the defendant's action: "'It is clear that the jury is entitled to consider *all* of the circumstances surrounding the incident in determining whether [the] defendant had reasonable grounds to believe grievous bodily harm was about to be inflicted.'" State v. Wanrow, 559 P.2d 548, 556 (Wash. 1977) (en banc) (quoting State v. Lewis, 491 P.2d 1062, 1064 (Wash. Ct. App. 1971)).

[125] For an example of the language that appellate courts have ruled should be employed, see *supra* note 122. A few "immediate" jurisdictions impose this requirement on trial judges. *See infra* Table.

[126] *See infra* Table. A corollary to the entitlement of an instruction on the relevance of the decedent's past violence is the principle that a prosecutor cannot argue in summation that such evidence is irrelevant to the question of self-defense.

The second correlation between the temporal proximity of danger definition and social context evidence concerns the scope of expert testimony on battered woman syndrome.[127] In some states, the testimony is received because it is deemed relevant for the evaluation of whether the defendant reasonably perceived the danger facing her to be imminent. When the danger is defined as immediate, however, a defendant is less likely to have the expert's evidence received for the specific purpose of assisting the jury to assess the reasonableness of her perception of the temporal proximity of danger.[128]

c. *Proportionality of Force Used to Meet Threatened Harm*

The requirement that a defendant use only the degree of force necessary to repel an ongoing or threatened attack is believed by some authors to work to the disadvantage of women defendants who use a weapon against a man who is armed only with his hands.[129] Their assumptions are that (1) the rule is the equivalent of a "like force" requirement, which allows a defendant to use a weapon only against an attacker who also has a weapon, and (2) such a rule by definition ignores the social reality of most women.[130] If the proportional force requirement of most jurisdictions operated in conformity with those assumptions, it would work to exclude the self-defense claims of most defendants whose cases are represented in the analyzed opinions.[131]

With regard to violence toward third persons, in some of the "imminent" jurisdictions and in a minority of "immediate" jurisdictions, the jurors are also instructed to consider the evidence in determining who was the initial aggressor in the fatal encounter. *See infra* Table.

[127] For a summary of the standards for allowing expert testimony and the scope and relevance of expert testimony, see *infra* Table.

[128] *See infra* Table. Generally, an expert's testimony is limited to the impact of the history of abuse on the formation of a defendant's belief that the danger was imminent (or immediate); the testimony may not include an opinion on whether the defendant's belief was reasonable. *See infra* note 182 and accompanying text.

[129] *See supra* note 90 and accompanying text.

[130] The term "social reality" is used by Crocker as part of her argument that generally applicable individualized standards of reasonableness will be insufficient to accommodate the claims of battered women defendants: "[T]he male experience permeates not only legal standards of conduct, but also the very definition of social reality." *See* Crocker, *supra* note 22, at 152. The concept as it relates to proportionality-of-force inquiries was explained by the Washington Supreme Court in State v. Wanrow, 559 P.2d 548 (Wash. 1977) (en banc). *See infra* note 132 and accompanying text.

[131] In only five percent of the opinions did the incident involve the decedent's use

In the overwhelming majority of jurisdictions, however, the rule does not prohibit resort to a weapon against an unarmed aggressor. One much-cited rejection of the weapon against weapon rule is found in *State v. Wanrow*.[132] At the time of that decision, there was at least one intermediate court, whose analysis was later rejected by other courts in the jurisdiction, that had held that the proportional force rule was a "like force" rule, which prohibited use of a

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of a weapon other than his hands. In each of the cases analyzed, the woman defendant used a weapon. Although a few defendants resorted to unusual weapons, including a car, a bedpost, and a kerosene heater, most of the defendants used guns (64% in the confrontation category and 63% in the nonconfrontational category) or cutting instruments (28% of the confrontation cases and 11% of the nonconfrontation cases). *See infra* Appendix I.B.1. These findings are similar to those of Mercy & Saltzman, *supra* note 71, at 596, 598. In their study, based on homicide data from the FBI for 1976 through 1985, firearms were used in 71.5% of spouse homicides, at similar rates for both wife and husband victims (71.0% of the wife victims and 72.2% of the husband victims). *See id.* at 596. They found, however, that over twice as many husband victims (24.7%, versus 12.1% of wife victims) were killed by cutting instruments, and only 1.6% of husband victims, versus 11.8% of wife victims, were bludgeoned to death. *See id.* These findings are also similar to national statistics for all homicides: "Between 1968 and 1978 the proportion of killings committed with firearms varied between 63% and 65.7%." Goetting, *supra* note 70, at 10-11.

Interestingly, Cazenave & Zahn came to somewhat different conclusions in their homicide study of Chicago and Philadelphia in 1978. They found much starker gender differences: "Male offenders are much more likely to use guns while females tend to use knives. Finally, only male offenders commit beating or strangulation homicides." Cazenave & Zahn, *supra* note 75, at 11.

[132] 559 P.2d 548 (Wash. 1977) (en banc). That case involved a woman defendant (not a battered woman) who shot an unarmed man whose reputation for aggression was known to her. The Washington Supreme Court, relying on its own precedents from cases in which both the defendants and the decedents were male, held that the level of force available to her had to be assessed under two social-context criteria: one specifically relevant to the facts on appeal and the other generally relevant to women confronting male aggression.

First, the court held that a jury should be allowed to consider evidence of the decedent's history of violence in determining whether the defendant's force was proportional to the threat she perceived:

> Under the law of this state, the jury should have been allowed to consider [information about the appellant's knowledge of the decedent's reputation for aggressive acts] in making the critical determination of the "degree of force which . . . a reasonable person in the same situation . . . seeing what [s]he sees and knowing what [s]he knows, then would believe to be necessary."

Id. at 557 (quoting State v. Dunning, 506 P.2d 321, 322 (Wash. Ct. App. 1973)).

Second, the court noted the social reasons underlying the necessity for the use of a weapon by a woman who is confronted with a male attacker: "In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons." *Id.* at 558.

weapon unless the attacker was also armed.[133] Most jurisdictions now reject the notion that the proportional force rule operates to forbid use of a weapon against an unarmed attacker. Some of these jurisdictions rejected the notion decades before *Wanrow* was decided.[134] The majority rule, applicable to both male and

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[133] *See, e.g.*, People v. Davis, 337 N.E.2d 256, 260 (Ill. App. Ct. 1975) ("A belief that the decedent, unarmed, might kill or greatly injure the defendant, while she had a loaded gun, was unreasonable.").

The *Davis* decision is, however, arguably at odds with the pronouncements of the state's highest court in People v. Smith, 88 N.E.2d 834 (Ill. 1949), which held that it is not necessary "that the deceased should have used against his slayer a deadly weapon to justify a killing in self-defense." *Id.* at 836. Furthermore, the *Davis* analysis has been rejected by other appellate courts in Illinois. For example, in a case decided three months after, but containing no reference to *Wanrow*, the court unequivocally rejected a like-force requirement and reversed the conviction of a battered woman who testified at trial that she shot the decedent in the midst of an ongoing attack: "It is a firmly established rule that the aggressor need not have a weapon to justify one's use of deadly force in self-defense." People v. Reeves, 362 N.E.2d 9, 13 (Ill. App. Ct. 1977); *see also* People v. Estes, 469 N.E.2d 275, 283 (Ill. App. Ct. 1984) (holding that "[w]here it is clear that the aggressor is capable of inflicting serious bodily harm and it appears that he intends to, then it is not necessary that the aggressor be armed for the defendant to employ deadly force in self-defense").

[134] In 1940, for example, the highest court in Tennessee reversed the conviction of a woman who shot her husband in the midst of an ongoing attack. The court noted that its decision on proportionality of force was based on its own earlier decisions that involved male defendants:

> [W]here there is so much disparity in the size and strength of the parties, particularly where, as in this case, the slayer is a woman, in fairness and justice to her, she should have the benefit of the rule announced by this court in [earlier cases] as follows:
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> > "Where great bodily violence is being inflicted, or threatened, upon a person, by one much stronger and heavier, with such determined energy that the person assaulted may reasonably apprehend death or great bodily injury, he is justifiable in using a deadly weapon upon his assailant. It makes no difference whether the bodily violence is being, or about to be, inflicted with a club, or a rock, or with the fists of an overpowering adversary of superior strength and size."

Kress v. State, 144 S.W.2d 735, 738 (Tenn. 1940) (citations omitted) (quoting Bitner v. State, 169 S.W. 565, 568 (Tenn. 1914)). A similar analysis led an intermediate appellate court in Oklahoma in 1954 to reverse a battered woman's conviction, on the ground that the trial court had erred when it instructed the jury that it was never reasonable to use a weapon to repel an unarmed assault. *See* Easterling v. State, 267 P.2d 185, 189 (Okla. Crim. App. 1954); *see also* People v. Moore, 275 P.2d 485, 494 (Cal. 1954) (reversing conviction of a woman who shot her unarmed husband, and holding that she did not use excessive force and that, in the context of the history of abuse, her action in arming herself with a gun given to her by a police officer for protection in anticipation of an attack did not make her the initial aggressor); Bennett v. State, 188 A.2d 142, 144 (Md. 1963) (reversing conviction of a battered woman who

female defendants, is that the reasonableness of a defendant's degree of force is decided on a case-by-case basis and that the use of a weapon against an unarmed attacker is not *per se* disproportionate.[135]

d. *Duty to Retreat*

In the course of some scholars' discussions of the definition of the duty to retreat, there is a tendency to blur the definition of the retreat rule with the question of whether the woman could have escaped the relationship.[136] Most appellate courts do not make this mistake, although some trial courts have. A survey of the cases analyzed shows that the duty to retreat was generally not the cause of bad trial outcomes and that, in most of those cases where it was outcome-determinative, it was the result of the rule's application rather than its definition.

Only a minority of jurisdictions have provisions that a defendant may not use deadly force unless he or she could not have retreated safely from the encounter.[137] Most jurisdictions that have that requirement exempt from the duty to retreat those defendants who are attacked in their homes.[138] In some of those exempting

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shot her husband on the grounds that excessive force was not used and anticipatory arming did not make the wife the initial aggressor).

[135] Only 10% of the cases analyzed presented a proportionality of force issue on appeal. *See infra* Appendix I.B.2. In none of these, except for the *Davis* case, *see supra* note 133, did an appellate court find the level of force *per se* unreasonable because the defendant used a weapon when not confronted with one. Sufficiency of the evidence was the issue on appeal in most of the cases addressing the proportional force question. Half of those convictions were affirmed, not because the use of a weapon was disproportionate, but because courts found that excessive force was manifested by the woman's continued use of the weapon once the decedent was disabled. *See, e.g.*, People v. Lucas, 324 P.2d 933, 936 (Cal. Dist. Ct. App. 1958) (holding that defendant's continued shooting of her disabled, unarmed husband while he was falling strongly weighed against a self-defense justification for the defendant); Hill v. State, 497 N.E.2d 1061, 1065 (Ind. 1986) (concluding that the degree of force exercised by the defendant was not justified because the defendant continued firing shots at her husband when he fell to the ground and was no longer a threat). For a discussion of the phenomenon that women use this type of "excessive force" much less frequently than men, see WOLFGANG, *supra* note 70, at 47, and Rasche, *supra* note 56, at 12.

[136] *See supra* note 89 and accompanying text.

[137] *See* LAFAVE & SCOTT, *supra* note 34, § 5.7, at 659; *see also* Mather, *supra* note 28, at 568 (noting that "the majority of jurisdictions hold that the innocent party has no duty to retreat"). *But see* GILLESPIE, *supra* note 24, at 187 (asserting that "about half of the states require a person to retreat, if possible, . . . before standing ground and fighting back").

[138] This exemption is a long-standing one in most jurisdictions that impose a duty

jurisdictions, however, the exemption does not apply if the attacker is a cohabitant[139] in the home or if the defendant was the initial aggressor;[140] the duty to retreat rule applies instead. In the cases in the sample, the most common location of a homicide was the defendant's home.[141] The duty to retreat was an issue in only a minority of the opinions analyzed.[142]

2. Evidentiary Rules

This Part of the Article will analyze existing standards governing the admissibility and scope of evidence regarding a defendant's social context,[143] and examine the relationship of those standards

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to retreat. See, for example, its description by Justice Benjamin Cardozo in an opinion reversing the conviction of a male appellant:

> It is not now, and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. . . . The rule is the same whether the attack proceeds from some other occupant or from an intruder. It was so adjudged in [an 1884 Alabama case]. 'Why,' it was there inquired, 'should one retreat from his own house, when assailed by a partner or cotenant, any more than when assailed by a stranger who is lawfully upon the premises? Whither shall he flee, and how far, and when may he be permitted to return?'

People v. Tomlins, 107 N.E. 496, 497-98 (N.Y. 1914) (citations omitted) (quoting Jones v. State, 76 Ala. 8, 16 (1884)). *See generally infra* text accompanying notes 254-56 (discussing battered women's deprivation of a fair trial in jurisdictions that impose a duty to retreat and do not provide an exemption for defendants attacked in their own homes).

[139] *See* Mather, *supra* note 28, at 569 n.195; *infra* note 255 and accompanying text.

[140] For an analysis of initial-aggressor cases, see Kinports, *supra* 22, at 434-37.

[141] In 73% of the confrontation cases, the incident was in the defendant's home: 56% occurred in a home shared with the decedent and 17% occurred in a place not shared by the decedent. In 3% of the opinions no location was specified. One case occurred in the decedent's home. The remaining 24% occurred in other locations. *See* Location (computer manuscript on file with the author) described *infra* Appendix II.E.

The defendant's home was the place of occurrence in 69% of the nonconfrontation cases. Sixty-one percent took place in a home that she shared with the man, and 8% occurred in her home not shared by him. Two cases took place in his home. The remaining 25% took place in a location other than the home of the defendant or decedent. *See id.*

[142] The retreat rule was an issue in 12% of all of the cases in the sample and was involved on appeal in 13% of the cases arising from incidents in the defendant's home. For discussion of reversals on the ground of improper application of the retreat rule, see *infra* note 202.

[143] The emphasis in this section is on social context evidence offered by the defendant in the form of testimony about the defendant's past violence toward her or toward third persons, and of expert testimony about the effects of the decedent's

to a jurisdiction's substantive law definitions of reasonableness and temporal proximity of danger.[144] Current evidentiary rules in the overwhelming majority of jurisdictions provide for the admission of social context evidence offered by a defendant.[145]

Roughly twelve years ago, when cases involving use of the term "battered woman" at trials first reached appellate courts,[146] two

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history of abuse against the defendant.

[144] The substantive-law definitions of the proportional force and retreat requirements do not correlate to evidentiary rulings. For that reason, these two factors are excluded from the Table.

[145] Evidence regarding the decedent's past violence toward the defendant ("history of abuse") and toward third persons ("history of other violence") is admissible in every jurisdiction. The variations among the states come in two areas: (1) the threshold showing required of a defendant as a condition precedent to the admission of the evidence, *see infra* notes 154-66 and accompanying text, and (2) the purposes for which the evidence is received, *see infra* notes 148-52 and accompanying text. The majority of states admit testimony on battered woman syndrome. *See infra* Table.

[146] Reported opinions on appeals of women homicide defendants who killed abusive partners and who claimed self-defense date back at least to 1902. *See infra* note 149 (discussing Williams v. State, 70 S.W. 756, 758 (Tex. Ct. App. 1902)). The use in trials of the term "battered woman" and the attempts to introduce expert testimony on battered woman syndrome both began in the late 1970s. *See* JULIE BLACKMAN, INTIMATE VIOLENCE: A STUDY OF INJUSTICE 205 (1989) (dating "the beginning of the use of testimony on the battered woman syndrome" at 1978); LENORE WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 302-27 (1989) (describing her testimony as an expert at trials dating back to 1977).

Appellate rulings on the admissibility of battered-woman-syndrome testimony followed closely thereafter. *See, e.g.*, Ibn-Tamas v. United States, 407 A.2d 626, 639 (D.C. 1979) (reversing ruling that proffered testimony by Dr. Lenore Walker was not beyond the ken of jurors, determining that such testimony would be "highly probative" and that, because the defendant's status as a battered wife "may have had a substantial bearing on her perceptions and behavior at the time of the killing, it was central to her claim of self-defense," and remanding for consideration of other bases for exclusion), *opinion after remand*, 455 A.2d 893, 896 (D.C. 1983) (upholding trial court's determination on remand that the defendant failed to establish the general acceptance in the scientific community of Dr. Walker's methodology). Other appellate opinions addressed the proffer of battered-woman-syndrome testimony at trials taking place in 1977 through 1980. *See* Smith v. State, 277 S.E.2d 678, 683 (Ga. 1981) (reversing trial court's exclusion of expert testimony based on its conclusion that the subject matter was within the ken of jurors: "We disagree and find that the expert's testimony explaining why a person suffering from battered woman's syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself, would be such conclusions that jurors could not ordinarily draw for themselves."); People v. Adams, 430 N.E.2d 267, 272 (Ill. App. Ct. 1981) (ruling that defense counsel's failure at trial to make an offer of proof constituted a waiver on appeal of the issue of exclusion of expert testimony, but reversing the conviction on other grounds); People v. White, 414 N.E.2d 196, 200 (Ill. App. Ct. 1980) (finding no error in exclusion of opinion of defendant's personal physician that "battered women 'tend to remain with their mates'"); State v. Anaya,

relevant rules of evidence were already in place. These rules developed in the context of the most common types of homicide cases—that is, cases in which the parties knew each other but were not involved in a history of family violence.[147] The first, applicable in all nonstranger homicide cases involving a claim of self-defense, relates to evidence of past violence directed by the decedent against the defendant.[148] Evidence of the "history of abuse" is offered in the form of testimony about violent actions against the defendant or about threats to commit acts of violence. This evidence is usually admitted on the theory that it is relevant to the defendant's state of mind and to the reasonableness of the fear of danger.[149] The second rule permits evidence of a decedent's violence toward persons other than the defendant. That evidence, which is here called the "history of other violence," has been admitted routinely to show the defendant's state of mind and the reasonableness of the perception of danger. When used as state-of-mind evidence, it is usually admitted in the form of reputation

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438 A.2d 892, 894 (Me. 1981) (following analysis of 1979 *Ibn-Tamas* opinion, and holding that exclusion of expert testimony was error and ordering new trial), *opinion after remand*, 456 A.2d 1255 (Me. 1983) (affirming conviction after second trial); People v. Powell, 424 N.Y.S.2d 626, 630-31 (N.Y. Crim. Ct. 1980) (denying motion for a new trial at trial level, and ruling that the proffered affidavit of Dr. Walker failed to establish that battered-woman-syndrome testimony was after-discovered evidence that could not have been offered at defendant's 1979 trial), *aff'd*, 442 N.Y.S.2d 645 (N.Y. App. Div. 1981); Burhle v. State, 627 P.2d 1374, 1378 (Wyo. 1981) (upholding exclusion of testimony proffered by Dr. Walker, and, following the analysis of the District of Columbia court in *Ibn-Tamas*, 407 A.2d 626, noting that "[i]n our holding here we are not saying that this type of expert testimony is not admissible; we are merely holding that the state of the art was not adequately demonstrated to the court, and because of inadequate foundation the proposed opinions would not aid the jury").

[147] *See supra* notes 99-103 and accompanying text.

[148] *See supra* note 103.

[149] In 1902, the Texas Court of Criminal Appeals applied this general rule to a battered woman's homicide case, and held that exclusion of evidence concerning the decedent's history of abuse was an error:

> [I]t is admissible for the defendant, having first established that he [sic] was assailed by the deceased, and in apparent danger, to prove that the deceased was a person of ferocity, brutality, vindictiveness, and of excessive strength; such evidence being offered for the purpose of showing either (1) that the defendant was acting in terror, and hence incapable of that specific malice necessary to constitute murder of the first degree; or (2) that he [sic] was in such apparent extremity as to make out a case of self-defense; or (3) that the deceased's purpose in encountering the defendant was deadly.

Williams v. State, 70 S.W. 756, 757-58 (Tex. Crim. App. 1902) (citations omitted); *see also infra* Table.

testimony known to the defendant, and occasionally in the form of testimony about the defendant's knowledge of the decedent's specific prior acts of violence.[150] In some jurisdictions, the history of other violence is admitted for an additional purpose—to show that the decedent was the aggressor in the fatal encounter with the defendant. Evidence of specific acts of violence, including convictions for violent crimes, is received in those latter jurisdictions.[151] In some instances, such evidence is admitted even where the defendant had no knowledge of the acts or convictions.[152]

The definitions contained in these rules are of general applicability and long standing. At least in theory they operate in battered women's trials as they do in "ordinary" homicide trials where a claim of self-defense is raised. No reason grounded in the structure or content of the rules would preclude this class of defendants from using trial testimony available to other defendants.[153]

a. *Implications of Choices of Standard of Reasonableness and of Definition of Temporal Proximity of Danger for Rules Regarding History-of-Abuse Evidence*

The threshold-showing requirements—the definition of the conditions precedent to receipt of evidence of history of abuse—fall into three main categories: (1) some jurisdictions require that the defendant must first offer prima-facie evidence, sometimes in the form of proof of an overt act by the decedent, that the decedent was the aggressor on the particular occasion;[154] (2) others have the less strict requirement that the defendant must first offer some evidence (less than would be required to make a prima-facie case) that the decedent was the aggressor; and (3) opinions in the

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[150] *See* MCCORMICK ON EVIDENCE § 193, at 571-72 & nn.2-3 (Edward W. Cleary et al. ed., 3d ed. 1984). For a recent review, in a case involving a male appellant, of authorities on admission of various forms of history-of-other-violence evidence, see State v. Waller, No. 73488, 1991 Mo. LEXIS 98, at *10 (Sept. 10, 1991).

[151] *See Waller*, 1991 Mo. LEXIS 98, at *10.

[152] *See id.*

[153] For an analysis of the disparate application of the rules providing for admission of social-context evidence, see *infra* notes 205-06 and accompanying text.

[154] *See, e.g.*, Williams v. State, 70 S.W. 756, 757-58 (Tex. Crim. App. 1902) (requiring a defendant to offer evidence of aggression by the decedent as a precondition to the court's admittance of evidence of the decedent's history of abuse). For an analysis of Louisiana's statutory elimination, applicable only in family violence cases, of the overt-act showing as a precondition to admission of history-of-abuse evidence, see *infra* note 291.

remaining jurisdictions have discussed no defined requirement except that the defendant must claim self-defense.[155]

Imposition of the most stringent requirement often puts a defendant (battered woman or not) with personal knowledge of the decedent's propensity for violence in what one scholar has labeled accurately a "catch-22 situation."[156] Such a defendant often seeks to introduce evidence of past violence in order to demonstrate the reasonableness of her belief that immediate or imminent harm was threatened on the occasion of the killing. She offers evidence of the context of her knowledge of the decedent in order to demonstrate that, within that context, the decedent's action, although short of an objectively apparent "overt act of aggression," was a signal that deadly violence was at hand. In states with the most stringent requirement, however, that evidence is precluded precisely because of the absence of an action that looks to an outsider like a traditional overt act.[157] The prima-facie or overt-act showing requirement is found most often, but not exclusively, in states with objective standards of reasonableness and with "immediate" as the definition of the temporal proximity of danger.[158]

In the intermediate-showing states, which require "some evidence," but where the quantum necessary is below the prima-facie level, there is no particular correlation between this requirement and their choices regarding the importance of context.[159] Those choices do correlate in the lowest-standard states, the majority of which have a combined reasonableness test and define the danger as imminent, rather than immediate.[160]

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[155] The threshold-showing requirements of the various states are summarized *infra* Table. The routine acceptance of the history-of-abuse evidence is reflected by the number of states where the opinions on battered women's appeals did not even contain a discussion of the threshold-showing requirement. *See infra* Table. All of the cases analyzed for this Article contained some reference to a history of abuse. *See supra* note 36 and accompanying text.

[156] *See* Mather, *supra* note 28, at 567. Unfortunately, Mather fails to carry through her perception to an analysis of the need for reforming not just the statutory definition of "imminent," but also the rules that create the impediments to the jury's receipt of the evidence of past violence.

[157] *See* Kinports, *supra* note 22, at 426 n.141; *see also id.* at 426-28 (advocating elimination of the overt-act requirement). In those jurisdictions that impose an overt-act threshold-showing requirement, the rules need redefinition. For a description of this Article's proposal, see *infra* note 291 and accompanying text.

[158] *See infra* Table.

[159] *See infra* Table.

[160] *See infra* Table.

b. *Implications of Choice of Reasonableness and of Temporal Proximity of Danger for Rules Regarding History-of-Other-Violence Evidence*

With regard to history of other violence, or evidence of the decedent's violence toward third persons, the threshold-showing requirements of the various jurisdictions fall into the same three categories that defined requirements for admission of history-of-abuse evidence.[161] The highest-showing states are usually the jurisdictions that require both objective reasonableness and immediate danger, and in only a few of those is history-of-other-violence evidence received for the purpose of proving that the decedent was the aggressor in the incident that led to his death.[162]

Most of the intermediate-showing states (which require "some" evidentiary showing) have a subjective component in the reasonableness test and define the danger as imminent.[163] While some of the intermediate-showing states permit a jury to consider history-of-other-violence evidence in its determination of who started the fight,[164] others do not.[165] The jurisdictions with the lowest or most flexible requirements are, like the intermediate-showing states, primarily those jurisdictions whose choices on reasonableness and definitions of danger take into account social context.[166]

c. *Expert Testimony on Effects of History of Abuse*

Like evidence of a history of abuse or a history of other violence, expert testimony on the battered woman syndrome[167]

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[161] *See supra* text accompanying notes 154-55.

[162] *See infra* Table.

[163] *See infra* Table.

[164] *See infra* Table.

[165] *See infra* Table.

[166] *See infra* Table.

[167] Dr. Julie Blackman describes the typical content of expert testimony regarding the battered woman syndrome thus:

> Typically referred to as testimony on the 'battered woman syndrome,' expert testimony about the psychology of battered women details those psychological traits that typify battered women and their perceptions of the potential dangerousness of the abuser's violence. The nature of expert testimony begins with a description of what studies have shown to be characteristic of battered women. . . . An important aspect of this portion of the testimony comes from the fact that research findings often go against prevailing misconceptions about battered women. Thus, misconceptions can be corrected. The concluding portion of expert testimony involves the presentation of information about the defendant herself and the extent to

is offered to show the trier of fact the context of a defendant's actions.[168] By the offer of battered-woman-syndrome expert

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which her experiences and reactions are consistent with what one would expect of a woman whose spouse or lover abused her.

BLACKMAN, *supra* note 146, at 190. For other descriptions of such expert testimony, see EWING, *supra* note 22, at 3, 51-60; LENORE E. WALKER, THE BATTERED WOMAN 221 (1979); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 14-18 (1984); WALKER, *supra* note 146, at 178-81; Mary Ann Douglas, *The Battered Woman Syndrome*, *in* DOMESTIC VIOLENCE ON TRIAL 39, 39-44 (Daniel Jay Sonkin ed., 1987); Roberta K. Thyfault, *Self-Defense: Battered Woman Syndrome on Trial*, *in* REPRESENTING . . . BATTERED WOMEN WHO KILL 30, 30-35 (Sara Lee Johann & Frank Osanka eds., 1989). For the status of the admissibility of battered-woman-syndrome testimony in the various states, see *infra* Table.

[168] The common purpose of both lay and expert testimony is reflected by the similarity of rules governing their admissibility. In many ways, however, lay and expert testimony on social context are dissimilar. Lay testimony on the decedent's violent propensities has long been admitted on the theory that jurors are capable of using the information to assess the reasonableness of the defendant's belief and actions. *See supra* notes 148-50 and accompanying text. Expert testimony has been received only recently, on the theory that jurors are not capable, without expert assistance, of assessing the impact on a defendant of the decedent's violent propensities when they have manifested themselves in the form of family violence. *See infra* note 185. These differences explain the early reluctance of some courts to require the admission of expert testimony. *See supra* note 146 (describing early decisions). The differences are the likely explanation for the continuing reluctance of a minority of courts. *See infra* notes 171-80 and accompanying text.

Some courts, the majority of which had already ruled that expert testimony is admissible when offered by a battered woman defendant, have confronted prosecutors' efforts to introduce battered-woman-syndrome testimony against men accused of assaulting or killing their wives or lovers. *See, e.g.*, Arcoren v. United States, 929 F.2d 1235, 1240-41 (8th Cir. 1991) (ruling that a prosecution's expert testimony was admissible to explain victim's recantation); State v. Baker, 424 A.2d 171, 173 (N.H. 1980) (affirming trial court's decision to admit victim's battered-woman-syndrome evidence to rebut defendant's insanity defense); State v. Frost, 577 A.2d 1282, 1287-88 (N.J. Super. Ct. App. Div. 1990) (holding that battered-woman-syndrome evidence was admissible to bolster the victim's credibility and noting that "[i]t would seem anomalous to allow a battered woman, where she is a criminal defendant, to offer this type of expert testimony in order to help the jury understand the actions she took, yet deny her that same opportunity when she is the complaining witness and/or victim and her abuser is the criminal defendant"); State v. Pargeon, No. CA-3582, 1991 WL 115983, at *1-*2 (Ohio Ct. App. June 10, 1991) (ruling that prosecution's use of expert testimony in case in chief "to prove that appellant's wife was a battered woman suffering from battered woman syndrome" was reversible error for two reasons: (1) the testimony served as evidence of appellant's prior bad acts and could support the impermissible inference that the defendant has a propensity to beat his wife, and that he therefore must have beaten her on the particular occasion; and (2) both an Ohio Supreme Court ruling and a subsequent Ohio statutory enactment limited admission of battered-woman-syndrome expert testimony to situations in which the defendant raises the affirmative defense of self-defense); State v. Ciskie, 751 P.2d 1165, 1170-73 (Wash. 1988) (en banc) (affirming trial court's decision to admit battered-woman-syndrome testimony to explain the victim's

testimony, a defendant does not assert her entitlement to a completely new defense.[169] Rather, she asserts her right to explain to the jury the effects of intimate violence and the relationship of its effects to her self-defense claim under existing self-defense law.[170]

i. The Relationship Between the States' Rulings on Admissibility of Battered-Woman-Syndrome Expert Testimony and their Rulings on Admissibility of Other Types of Context Evidence

A decade ago most states had no existing body of law, apart from the rules regarding evidence of a decedent's past violence, which assisted the appellate courts in evaluating early claims of

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reluctance to report abuses or end the abusive relationship).

[169] Some trial counsel have believed, incorrectly, that the issue of the admissibility of battered women syndrome is the same as the question of the creation of a new defense. *See, e.g.*, State v. Scott, Nos. K86-09-0161, K86-09-0162, 1989 Del. Super. LEXIS 291, at *3-*5 (July 19, 1989) (finding counsel ineffective for urging guilty plea, because of his belief in difficulty of proving the "battered woman's defense" and failure to recognize that the correct standard of self-defense was Delaware's generally applicable subjective test of reasonableness); State v. Jackson, 435 N.W.2d 893, 895, 897 (Neb. 1989) (affirming conviction where defendant and her counsel conceded lack of imminent danger and "defended solely on her allegation that she suffered from 'battered wife' syndrome"). No state has adopted a separate defense based solely on the admission of expert testimony.

Some states have, within the framework of self-defense analysis, adopted a separate standard for assessing the reasonableness of such a claim. *See supra* note 113. Those jurisdictions have been clear in their statements that the creation of a separate standard of reasonableness is not the equivalent of the recognition of a separate defense. *See, e.g.*, State v. Hodges, 716 P.2d 563, 570 (Kan. 1986) ("Evidence of the battered woman syndrome is not a defense to a murder charge. The evidence is introduced to help the jury understand why a battered woman is psychologically unable to leave the battering relationship and why she lives in a high anxiety of fear from the batterer. The evidence aids the jury in determining whether her fear and her claim of self-defense are reasonable."), *opinion after retrial*, 734 P.2d 1161 (Kan. 1987); *see also* State v. Stewart, 763 P.2d 572, 579 (Kan. 1988) (disapproving the *Hodges* formulation of the reasonableness standard for self-defense, and agreeing that the question is self-defense rather than a separate defense).

The overwhelming majority of the states where battered-woman-syndrome testimony is admitted apply generally applicable standards of reasonableness in battered women's homicide trials. *See infra* Table.

[170] Aside from its general relevance to the defendant's state of mind, and unlike the other types of context evidence, the purposes for admitting testimony on battered woman syndrome do not fall neatly into two or three categories. Rather, the various states have arrived at many different and often inconsistent rationales for its admission. The wide range is attributable, at least in part, to the novelty of using an expert to explain state of mind in a case not involving a mental status defense. *See infra* note 174 and accompanying text; *infra* Table.

error in the exclusion of battered-woman-syndrome evidence.[171] There were, to be sure, existing standards for the qualification of experts,[172] but the application of those standards assisted only in the most preliminary of inquiries.[173] The real question confronting the courts—the extent to which an expert could explain the battered woman syndrome and its relevance to a self-defense claim—could not be resolved by resort to a state's jurisprudence on insanity claims because, in most cases, the defendants claimed self-defense and asserted no mental status defense.[174] Nor could guidance be found in existing law on character evidence because expert testimony was not offered to prove a defendant's reputation for peaceable, law-abiding behavior in the past.[175]

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[171] *See supra* notes 146 & 168.

[172] For comparisons of the traditional and the more modern federal rules approaches concerning the receipt of battered-woman-syndrome testimony, see Crocker, *supra* note 22, at 137-43, and Mather, *supra* note 28, at 575.

[173] Most states that excluded battered-woman-syndrome testimony on the ground that the field was insufficiently developed, or that the proffered expert lacked the necessary qualifications, subsequently confronted head-on the question of whether to permit an expert to explain to the jury the operation of the syndrome and the syndrome's relevance to a defendant's claim of self-defense. *See, e.g.*, State v. Koss, 551 N.E.2d 970, 972-75 (Ohio 1991) (reversing a line of cases upholding the exclusion of battered-woman-syndrome testimony and reviewing the status of testimony admissibility in other states).

[174] Until recently, Louisiana required the assertion of a mental status defense as a precondition to the admission of testimony on "abused or battered wife syndrome." *See, e.g.*, State v. Edwards, 420 So. 2d 663, 677-78 (La. 1982) (finding no error in trial judge's refusal to allow psychiatric testimony to rebut evidence of specific intent where defendant had not plead not guilty by reason of insanity). The rule was changed by legislation aimed specifically at overturning the common-law requirement. *See infra* note 291. In Dyer v. Commonwealth, No. 90-SC-248-MR, 1991 Ky. LEXIS 150, at *19-*21 (Sept. 26, 1991), the Kentucky Supreme Court appears to have ruled that battered-woman-syndrome testimony describes a mental condition and can be offered only by a psychiatrist or clinical psychologist trained to make such diagnoses. Although *Dyer* involved an appeal from a conviction for child sex abuse, the Kentucky Supreme Court overruled Commonwealth v. Craig, 783 S.W.2d 387 (Ky. 1990), which held that battered-woman-syndrome testimony did not describe a mental condition, and that an expert could be properly qualified without being a psychiatrist or a clinical psychologist, and which in turn overruled Commonwealth v. Rose, 725 S.W.2d 588 (Ky.) (limiting the testimony of a registered nurse to a general description of the syndrome), *cert. denied*, 484 U.S. 838 (1987).

[175] *Compare* State v. Kelly, 685 P.2d 564, 567 (Wash. 1984) (en banc) (concluding that evidence of a defendant's alleged prior aggressive acts offered to rebut an expert's testimony on battered woman syndrome is inadmissible because the rebuttal evidence was designed to challenge a pertinent element of character, and expert testimony, in contrast, was "offered to explain the reasonableness of [the defendant's] apprehension of imminent danger," not her character) *with* People v. Ciervo, 506 N.Y.S.2d 462, 464 (App. Div. 1986) (permitting the prosecution to use evidence of the defendant's prior bad acts for the purposes of proving motive, impeaching the

The use of experts in battered women's homicide trials has presented a difficult conceptual problem beyond the questions whether the subject was fit for expert testimony and whether the proffered expert was qualified: courts are also required to decide how to define both the central relevance of the testimony and its permissible scope. The conceptual novelty of this problem has not caused wide variation in the states' threshold-showing requirements,[176] which are similar to the analogous requirements for admission of evidence on history of abuse and other violence.[177] The rule in some states is that a defendant may not offer otherwise admissible expert testimony before she has established *prima facie* by extrinsic evidence that she acted in self-defense and that she had suffered a history of abuse. Furthermore, sometimes the prima-facie case for self-defense can be made only with proof of an overt act of aggression by the decedent.[178] In other states, the condition precedent is the introduction by the defendant of "some evidence" of self-defense and of a history of abuse.[179] In the remainder of the states, the testimony has been admitted on a claim of self-defense, in the context of evidence of a history of abuse, without discussion of any requirement of a specified quantum of evidence in support of the claim.[180]

ii. Variations in Rulings Regarding Central Purpose, Relevance, and Scope of Battered-Woman-Syndrome Testimony

Even more than in their admissibility rulings, states vary in their approaches to the issue of the purpose, relevance, and scope of expert testimony once it is admitted at all. Minnesota, for example, permits only generic testimony to explain the phenomenon of battered woman syndrome and, therefore, exhibits the most

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defendant's credibility, and refuting the defendant's claim to be "a victim of 'battered woman's syndrome'").

[176] In cases involving battered women, after the court has determined that the subject is fit for expert testimony, and that the expert is qualified, the threshold-showing question is what evidence must the defendant adduce as a condition precedent to the expert's testimony.

[177] For a discussion of the threshold requirements for history of abuse and history other violence, see *supra* notes 154-60 and accompanying text. For a listing of threshold-showing requirements for lay and expert testimony on social context, see *infra* Table.

[178] *See infra* Table.

[179] *See infra* Table.

[180] *See infra* Table.

extreme policy of the admitting jurisdictions by limiting expert testimony to a general description only, without reference to the specific defendant on trial.[181] A few opinions appear to permit a battered-woman-syndrome expert to offer an opinion on the ultimate question whether, in fact, the battered woman defendant's act was reasonable.[182] Between the extremes are a variety of conclusions about relevance and scope.[183]

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[181] The Minnesota Supreme Court has limited the scope of expert testimony to a description of the syndrome and its characteristics and has specifically precluded testimony that a particular defendant actually experiences the syndrome. *See* State v. Hennum, 441 N.W.2d 793, 799 (Minn. 1989).

In Wisconsin, limitation to a general description was upheld in a ruling limited to the facts of the case on appeal. *See* State v. Landis, No. 86-0892-CR, at *4-*5 (Wis. Ct. App. Mar. 11, 1987) (LEXIS, States library, Wisc file) (affirming the trial court's decision to limit expert testimony to general characteristics of battered women, but refusing to admit specific testimony as to whether defendant fell into that category since the expert had limited contact with the defendant, had not diagnosed her, and had not been present when the defendant testified at trial).

Kentucky's generic-testimony limitation, defined in Commonwealth v. Rose, 725 S.W.2d 588 (Ky.), *cert. denied*, 484 U.S. 838 (1987), was overturned by Commonwealth v. Craig, 783 S.W.2d 387 (Ky. 1990). The decision in *Craig* was overruled in Dyer v. Commonwealth, No. 90-SC-248-MR, 1991 Ky. LEXIS 150, at *19-*21 (Sept. 26, 1991), but the generic-testimony limitation was not reinstated.

[182] *See, e.g.*, State v. Wilkins, 407 S.E.2d 670, 672-73 (S.C. Ct. App. 1991) (reversing on ground that trial court erred when it disallowed battered-woman-syndrome expert's "ultimate opinion" regarding defendant's actual belief, but no discussion of propriety of an expert opinion on the reasonableness of that belief). *Compare* Smith v. State, 277 S.E.2d 678, 683 (Ga. 1981) (holding that expert opinion testimony on issues to be decided by the jury, including the ultimate issue, is admissible when the conclusion is beyond the ken of the average person) *with* Pugh v. State, 401 S.E.2d 270, 272 (Ga. 1991) (finding no error in trial court's refusal to allow a battered-woman-syndrome expert to answer the ultimate question whether defendant shot her husband in self-defense, because it was not a question outside the ken of the average juror according to the test of *Smith*) *and* Mullis v. State, 282 S.E.2d 334, 337 (Ga. 1981) (finding no error in exclusion of battered-woman-syndrome testimony on the ultimate question of the reasonableness of the fears of the defendant, which could be comprehended by the average juror and therefore does not meet the test articulated in Smith).

Other states place specific limits on expert testimony in order to prevent presentation of opinions on the ultimate issue. *See, e.g.*, People v. Aris, 264 Cal. Rptr. 167, 180 (Ct. App. 1989) (stating that an expert's opinion about a defendant's mental state is admissible as long as the expert does not express an opinion on the ultimate issue of whether the defendant had the mental state required for the charged offense); State v. McClain, 591 A.2d 652, 657 (N.J. Super. App. Div. 1991) (holding that expert testimony is relevant only to the honesty of defendant's belief, not its objective reasonableness).

[183] Some decisions regarding relevance and scope, like states' rulings on the ultimate-opinion question, reflect courts' resort to existing evidentiary law on analogous questions. For instance, in jurisdictions that permit bolstering of the testimony of ordinary witnesses, a syndrome expert's testimony is received specifically

There are only two apparent correlations between a state's conclusions about the purpose of expert testimony and its definitions of the standard of reasonableness and of the temporal proximity of danger. First, states that define the harm threatened as imminent are more likely than those requiring immediacy to receive expert testimony on the theory that it is relevant to the jury's assessment of the reasonableness of the defendant's judgment about the proximity of the harm threatened.[184] The second apparent correlation is in the area of jury instructions. Jurisdictions that include a subjective inquiry in the reasonableness standard are slightly more likely than objective ones to require a special instruction on the significance of battered-woman-syndrome testimony or to include specific reference to the testimony in the jury charge on the reasonableness standard.[185]

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to bolster a defendant's testimony. *See, e.g.*, State v. Frost, 577 A.2d 1282, 1287 (N.J. Super. Ct. App. Div. 1990) (noting that expert testimony on battered woman syndrome is admissible to bolster a woman's credibility, both as a criminal defendant and as a complaining victim of assault). *See generally* Estrich, *supra* note 103, at 1435 (stating that, at a minimum, evidence of battered woman syndrome is relevant to the woman's credibility as a witness to overcome juror incredulity of her story); Mather, *supra* note 28, at 577 (noting admission of expert testimony on battered woman syndrome by some courts for the specific purpose of bolstering the woman's position and giving her credibility). In those jurisdictions which prohibit bolstering, courts deny either a general proffer of an expert or a proffered line of questions to the expert aimed at bolstering. *See, e.g.*, State v. Dannels, 734 P.2d 188, 193 (Mont. 1987) (holding irrelevant and inadmissible expert testimony proffered to buttress the credibility of the defendant's explanation for lying to investigators); *cf. In re* Nicole V., 518 N.E.2d 914, 917 (N.Y. 1988) (noting the exceptional circumstances of child abuse cases for purposes of admitting bolstering testimony). For the range of definitions of scope and relevance, see *infra* Table.

[184] Because states with a combined standard of reasonableness are more likely to have imminence than immediacy as the definition of temporal proximity of danger, the likelihood of the receipt of expert testimony for this purpose is greater in combination than in objective jurisdictions. *See supra* notes 126-28 and accompanying text; *infra* Table.

[185] Although the specific question of jury instructions on this aspect of expert testimony was not before the court, a concurring justice in Commonwealth v. Dillon, No. 123, 1991 Pa. LEXIS 234 (Oct 31, 1991), explained the relationship of the expert testimony to the jurors' evaluation of reasonableness:

> The danger of not presenting expert testimony in these cases is that the jury may well be predisposed to judge the actions and reactions of a woman in a position that they cannot hope to comprehend. In my view, many jurors who know nothing about battered women simply find the tales of abuse too incredible to believe and thus, refuse to keep an open mind about the rest of the evidence, being convinced that "no one would have put up with such abuse therefore it must not be true." The testimony of the expert is intended to refute some of the common prejudices against battered women, thus permitting the jury to have a better ability to judge the

C. *Alternative Explanations of Fair-Trial Problems Encountered by Battered Women Defendants*

To say that battered women are convicted, neither because they typically kill during a lull in the violence, nor because their self-defense claims are excluded as a matter of definition from traditional doctrine, is not to say that there are no impediments to fair trials in their homicide cases. A conclusion that legal definitions *can* accommodate their claims does not mean that, in fact, their cases are fairly tried. There is preliminary support for a conclusion that the getting-to-the-jury problems encountered by these defendants result generally from the application rather than from the structure and content of existing self-defense jurisprudence.

1. Comparison of Reversal Rates in Battered Women's Appeals with Those in Other Homicide and Felony Appeals

Of the base category of cases, 59% of the appeals resulted in affirmance of the conviction, 40% resulted in reversals, and 1% of the base were categorized as "other" than affirmances or reversals.[186] A 40% reversal rate[187] is substantially higher than the

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> evidence rationally, rather than judge it on the basis of an erroneous prejudice. Once the jury is educated by an expert about the battered woman syndrome, they are in a much better position to assess the facts before them.
>
> This Court has consistently held that in self-defense cases, the jury must decide whether the acts of the defendant are reasonable in *light of the way in which the defendant perceives the alleged danger.* It is only when the jury understands *how* the defendant perceives the alleged danger are they able to make a rational judgment about the defendant's actions. In a self-defense case in which the defendant is a battered woman, rationally understanding the way in which she perceives danger may not be "within the range of ordinary training, knowledge, intelligence and experience" of the jury.
>
> What may seem to be "reasonable fear of imminent bodily harm" to a person who is not subject to abuse may not correspond with the reasonable fear of someone who has been living with an abusive husband.

Id. at *23-*26 (Cappy, J., concurring) (citations and footnotes omitted).

[186] The terms "affirm" and "reverse" in this part of the Article are used to describe the ultimate disposition of the conviction. If a high court reversed an intermediate appellate court's reversal of a conviction, for instance, the decision is categorized as "affirmed" because the effect of the decision was to uphold the conviction. This Article defines as "reversals" only those cases in which appellants were discharged or granted new trials. Cases in which appellate relief was limited to reversal of one count with affirmance of another or to sentence reduction only were included as affirmances. "Other dispositions" consisted of, for example, prosecution appeals after acquittals. *See supra* note 57.

[187] The 40% reversal rate represents all of the cases analyzed, including

national average for homicide appeals. A recent study published by the National Center for State Courts concluded that only 8.5% of appeals result in discharge or the order of a new trial.[188] In that study, Chapper and Hanson found that the rates for disposition of homicide appeals were similar to those for appeals from other felony convictions.[189] They studied primarily intermediate courts (which make the final determination in most criminal appeals) and found that 79.4% of appeals resulted in affirmance of the convictions, 8.5% in reversals requiring dismissal of the charges or a remand for a new trial (1.9% in dismissal, 6.6% in an order for a new trial), 7.3% in sentence reduction or remands for resentencing, and 4.8% in reversal of some but not all counts on appeal.[190] The most frequent issues raised on appeals were rulings on admissibility of evidence (43%), sufficiency of the evidence (35%), and appropriateness of jury instructions (30%).[191] Although those bases for reversal were also the most frequent ones raised in battered women's appeals,[192] battered-women appellants' success rate was dramatically higher than that found in the Chapper and Hanson study.[193]

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confrontation, nonconfrontation, and those with too few facts to categorize. In the confrontation category, 52% of the convictions were affirmed, 47% were reversed, and 1% were otherwise resolved. Of the nonconfrontation convictions, 86% were affirmed, 12% were reversed, and 1% were other dispositions. *See* Affirmance and Reversal Rates (computer manuscript on file with the author) described *infra* Appendix II.F; *infra* note 193.

[188] *See* JOY A. CHAPPER & ROGER A. HANSON, NATIONAL CTR. FOR STATE COURTS, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS: FINAL REPORT 38 (1990).

[189] *See id.* at 37.

[190] *See id.* at 35. My analysis included both intermediate and high courts, and the 40% reversal rate reflects results in both. The reversal rate was 42% in the high courts and 38% in intermediate courts. *See* Affirmance and Reversal Rates, *supra* note 187.

[191] *See* CHAPPER & HANSON, *supra* note 188, at 32.

[192] Of the reversals in the battered women's appeals, only 16% were based on the trial court's exclusion or limitation of expert testimony on battered woman syndrome. Other evidentiary errors served as the basis for 32% of the reversals. Reversals on sufficiency-of-evidence grounds represented 10%, while reversals on the basis of errors in jury instructions accounted for 41%. *See* Error Coding (computer manuscript on file with the author). The Error Coding computer program combines the results of an opinion-by-opinion analysis with data produced by the information management program described in Appendices I and II.

[193] In the nonconfrontation category, the rates of affirmance (86%) and reversal (12%) conform much more closely to the findings of Chapper and Hanson's study than do those in the confrontation category. The much lower reversal rate for nonconfrontation than for confrontation cases lends support to the argument that in nonconfrontation cases fair trial problems result from legal definitions more than

It may be that the higher reversal rate for battered women is an indication that trial judges are refusing to apply long-standing principles of substantive, evidentiary, and procedural law to battered women's claims of self-defense and that their refusal accounts for the greater success rate on appeal in these cases.[194] Anecdotal evidence from appellate cases studied supports the preliminary hypothesis that many trial courts do not see battered women's cases as appropriate for the application of traditional self-defense jurisprudence and that appellate courts reverse because of their failure to apply existing law.[195]

2. Appellate Court Discussions

The appellate opinions that reversed convictions on the basis of "ordinary" errors,[196] those aside from exclusion or limitation of expert testimony, did so because trial courts failed to apply to battered women's cases established precedents that had been developed in cases involving male appellants. In some instances, the appellate opinions discussed the fact that trial judges seemed to assume that a battered woman defendant acted in conformity with

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from erroneous judicial applications of standards. Currently proposed redefinitions, however, are not likely to have the effect of increasing the possibility of fair trials for battered women defendants, whether "fair trials" are equated with getting to the jury or with good outcomes. *See infra* text accompanying notes 238, 246 & 294-95.

[194] On the other hand, it may be that the disparity does not reflect a higher rate of trial errors in battered women's cases than in other homicides and serious felonies; it may instead indicate a higher level of attention to those errors. There are at least three possible explanations for a higher reversal rate that are consistent with the assumption that there is no higher rate of trial-level error in battered women's cases than in other trials. First, trial lawyers may pay more attention in these cases and make better records. Second, appellate lawyers may pay more attention and frame the issues more clearly. Finally, it may be that appellate judges are more interested in battered women's appeals, see them as presenting novel questions, and therefore pay more attention to "ordinary" errors. The first two possible explanations, both involving the hypothesis that battered women get better trial and appellate representation than other defendants and appellants, seem unlikely. In the cases analyzed, 25% of the opinions affirming convictions involved discussion of trial and appellate counsel's waiver of issues through failure to preserve them for or pursue them on appeal. *See* Waiver (computer manuscript on file with author) described *infra* Appendix II.G. This is an area for further examination along the lines suggested *infra* note 195.

[195] A systematic evaluation of the significance of the higher reversal rate, which is beyond the scope of this Article, would be based on a study of selected jurisdictions over a fixed period of time and would compare the reasons for reversal in appeals from battered women's homicide convictions with those from other convictions for homicide.

[196] *See supra* text accompanying notes 191-92.

a vigilante stereotype rather than as an arguably reasonable person. An illustrative description of trial courts' refusal or inability to perceive the applicability of existing standards occurs in *State v. Branchal*,[197] where the trial judge refused to instruct on self-defense and excluded history-of-abuse evidence, commenting "that it did not want to condone spousal retaliation for past violence."[198] A specific instruction on vigilantism concerns was given by a trial judge in Washington: "A killing is not justified when made for the purpose of avenging insults, abuse or a previous assault which has ended . . . ."[199] An older example is *People v. Giacalone*,[200] where the Supreme Court of Michigan reversed the trial court's direction of a guilty verdict and, apparently in response the lower court's assessment of the evidence, noted that despite evidence of a long history of abuse, "the record does not show that she was revengeful . . . . Tears and sorrow seem to have been her portion."[201]

Most opinions did not set forth, either directly or implicitly, the comments accompanying the trial-level rulings. The reversing opinions typically are limited to recitals of the clear and long-standing precedents, ignored by the trial judges, on definitions of

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[197] 684 P.2d 1163 (N.M. Ct. App. 1984).

[198] *Id.* at 1167-68. The appellate court noted that the rule providing for admission of such evidence was almost a century old: "'If there is even slight evidence to indicate that the act of killing was done under a present, reasonable apprehension to himself of great bodily harm, prior threats should not be excluded.'" *Id.* at 1168 (quoting Thomason v. Territory, 13 P. 223, 226 (N.M. 1887)). The opinion contains the following summary of the excluded evidence:

> Th[e offer of proof by defense counsel] included incidents when the victim hit defendant with a board; broke out the windows in defendant's mother's house and threatened defendant with a knife; threw defendant's daughter into a pigpen with a grown pig; forced defendant to eat at gunpoint; shot at her with a high-powered rifle; and forced defendant to touch a dead rattlesnake by menacing her with a knife and a gun. The tendered evidence also included one instance when the defendant called the police for assistance but was told that nothing could be done and that the family must resolve their problems on their own. Other tendered evidence would have shown that the victim had a reputation for violence, particularly toward old people. Through a state police officer defendant would have shown that on one occasion the victim terrorized, beat, and robbed an elderly couple.

Id. at 1167.

[199] State v. Crigler, 598 P.2d 739, 741 (Wash. Ct. App. 1979). The instruction in *Crigler* constituted reversible error because it misstated both the state's "imminence" definition and the significance of history-of-abuse evidence.

[200] 217 N.W. 758 (Mich. 1928).

[201] *Id.* at 760.

duty to retreat,[202] temporal proximity of danger,[203] proportionality of force,[204] and of standards for admission of history-of-abuse evidence,[205] and for instructions on history of abuse.[206] The trial courts' refusals to apply established legal principles are

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[202] *See, e.g.*, Watkins v. State, 197 So. 2d 312, 313 (Fla. Dist. Ct. App. 1967) (relying on a 1929 precedent for entitlement to an instruction on the privilege of nonnecessity of retreat), *overruled by* Conner v. State, 361 So. 2d 774 (Fla. Dist. Ct. App. 1978), *cert. denied*, 368 So. 2d 1364 (Fla. 1979); People v. Lenkevich, 229 N.W.2d 298, 300 (Mich. 1975) (relying on a 1961 ruling that cited an 1860 case exempting people attacked at home from the duty to retreat); Commonwealth v. Fraser, 85 A.2d 126, 128 (Pa. 1952) (stating that the privilege of nonretreat when attacked by an intruder "has always been recognized as the law of this State" and should have been applied to a defendant who had separated from the decedent and obtained her own apartment; the privilege was not defeated by the lower court's view that the decedent "'was defendant's lawful husband, and as such he was entitled to return to his wife's apartment'" (quoting lower court opinion)); State v. Allery, 682 P.2d 312, 316 (Wash. 1984) (en banc) (citing a 1936 precedent as support for the conclusion that the trial court erred in refusing to instruct the jury that the defendant had no duty to retreat).

[203] *See infra* text accompanying notes 245-50; *see also Crigler*, 598 P.2d at 741 (concluding that an additional reversible error was the trial court's use of "immediate" rather than "imminent" in its instruction). The *Crigler* court relied on the holding of State v. Wanrow, 559 P.2d 548 (Wash. 1977) (en banc), *see Crigler*, 598 P.2d at 741, which in turn had relied on precedents dating back to 1902 for guidance in framing the jury instructions.

[204] *See, e.g.*, People v. Reeves, 362 N.E.2d 9, 13 (Ill. App. Ct. 1977) (noting "firmly established rule that the aggressor need not have a weapon to justify one's use of deadly force in self-defense"); Bennett v. State, 188 A.2d 142, 144 (Md. 1963) (citing precedents dating from 1894 for proposition that anticipatory arming does not deprive a defendant of the right to claim self-defense).

[205] *See, e.g.*, People v. Yokum, 302 P.2d 406, 416 (Cal. Dist. Ct. App. 1956) (stating that exclusion of history-of-abuse evidence violated a rule "'conclusively established in almost all jurisdictions,'" including California (quoting Annotation, *Admissibility of Evidence as to Other's Character or Reputation for Turbulence on Question of Self-Defense by One Charged with Assault or Homicide*, 64 A.L.R. 1029, 1030 (1930))); Borders v. State, 433 So. 2d 1325, 1326 (Fla. Dist. Ct. App. 1983) (relying on precedents dating back to 1891); State v. Edwards, 420 So. 2d 663, 671 (La. 1982) (finding that precedent with respect to previous threats was established in 1909); State v. McMillian, 64 So. 2d 856, 857 (La. 1953) (holding that the exclusion of history-of-abuse evidence was error, as "text writers throughout the country recognize that evidence of prior difficulties between the accused and the deceased is admissible and relevant" for the purpose of showing "the reasonableness of defendants fear . . . at the time of the homicide"); People v. Stallworth, 111 N.W.2d 742, 746 (Mich. 1961) (finding that the defendant should have been permitted to introduce testimony pertaining to the decedent's reputation for violence as "[s]uch testimony is generally held admissible in homicide cases").

[206] *See, e.g.*, People v. Bush, 148 Cal. Rptr. 430, 436 (Ct. App. 1978) (holding erroneous the trial court's refusal of an instruction on the significance of prior threats and noting that the rule requiring history-of-abuse instruction had been announced in 1949); State v. Temples, 327 S.E.2d 266, 267 (N.C. Ct. App. 1985) (concluding that offering evidence of decedent's general good character, for purpose of rebutting history-of-abuse testimony, violated precedent established in 1942).

consistent with the hypothesis that the problem in these cases is the inability of many judges to see battered women's use of deadly force as reasonable under established definitions.[207]

D. *Summary of Analysis of Opinions*

Impediments to getting to the jury result from the law's definitions in only a minority of jurisdictions. Where they exist, these definitional impediments operate, not in a vacuum, but in conjunction with other substantive, evidentiary, and procedural provisions. Any attempt at redefinition must take those interrelationships into account.[208] In the majority of jurisdictions, it is not the definition of self-defense jurisprudence that prevents battered women from receiving fair trials. Rather, the failure of trial judges to apply the generally applicable standards of self-defense jurisprudence in cases where the defendants are battered women is to blame. Problems that result from a refusal to apply the law will not be remedied by either current proposals for legal redefinition or by the creation of separate standards.[209]

III. WHERE LEGAL DEFINITIONS CAUSE DEPRIVATION OF FAIR-TRIAL RIGHTS, REFORM EFFORTS SHOULD BE AIMED AT GENERALLY APPLICABLE DEFINITIONS

A first step before undertaking reform in any jurisdiction is deciding whether fair-trial problems are the result of definitions or of judicial applications of existing standards. Most problems resulting from judicial reluctance to apply existing appropriately

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[207] The same belief, that traditional self-defense doctrine does not encompass the reasonableness claims of battered women who kill, is reflected by one trial judge's explanation of jury verdicts of not guilty in these cases:

> Juries have always had the power, though not the right, to nullify the law, to ignore the self-defense requirement of immediacy, for example, and the defendant's lack of options. Now I see an upsurge in this nullification process, with some judges going along . . . . There is a direct correlation between the use of self-defense and the sense that law-enforcement agencies are not doing their jobs. Juries seem to be saying that if I were a battered woman . . . I would have killed him.

Margot Slade, *Justice is Stretched to Allow Wider Self-Defense*, N.Y. TIMES, Nov. 11, 1988, at B5 (quoting Brooklyn Supreme Court Justice James B. Starkey).

[208] From this perspective, I will offer specific criticism of proposed redefinitions of evidentiary and substantive law, particularly those aimed specifically at battered women defendants, which are especially susceptible to narrow application by trial judges. *See infra* text accompanying notes 227-38 & 257-78.

[209] *See infra* notes 227-37 and accompanying text.

defined doctrine will not be remedied by redefinition. In the minority of jurisdictions where the structure and content of self-defense doctrine are defined in a way that prevents fair trials, reformers should assess which definitions, alone or in combination with other factors, are the impediments. The analysis must include systematic evaluation of substantive law, evidentiary provisions, and procedural rules, as well as the effects of change in one area upon the operation of definitions in other areas.[210]

The impediments to getting to the jury that result from the definition and structure of substantive, evidentiary, and procedural law limit a defendant's ability to have the jury receive evidence and instructions regarding the social context of her action. Definitions in need of change exist in each of these three areas. Current reform efforts address only two of them. Most currently proposed and recently accomplished substantive and evidentiary changes aimed at guaranteeing the fair-trial rights of battered women share a common failure of their proponents to recognize the interrelation of existing definitional impediments.

Within the area of substantive-law proposals, most of the suggested redefinitions deal with creation of a new or separate standard of reasonableness. In the area of evidentiary changes, most of the suggested redefinitions do not, by their terms, provide separate standards for battered women defendants.[211] In this Part of the Article, I will make suggestions for change in both substantive and evidentiary definitions. To put these suggestions in context, I will begin with a discussion of procedural rules that current reformers ignore.

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[210] I propose that the methodology of such an evaluation of a state's self-defense jurisprudence be that utilized in this Article. *See supra* notes 105-85 and accompanying text. Among the factors to be considered are those summarized for each state in the Table.

[211] Many of these changes, discussed *infra* text accompanying notes 257-84, provide special evidentiary standards for defendants accused of homicides that occur in the context of family violence and refer to "battered person syndrome." Another proposed evidentiary rule change, Act of Oct. 10, 1991, 1991 Cal. Adv. Legis. Serv. 812 (Deering) (to be codified at CAL. EVID. CODE § 1107) [hereinafter Cal. Act], was introduced to add a provision to the evidence code. It uses the term "battered woman syndrome," but is specifically applicable to male defendants also.

A. *Procedural Rules*

Current scholarship addresses the content of self-defense instructions and the admission of evidence on the question of whether the battered woman acted in self-defense, but generally ignores the threshold question of whether the defendant is entitled to an instruction at all on self-defense.[212] A jurisdiction's definition of the evidentiary showing that is a precondition to entitlement to the instruction is the single most important determinant of a defendant's ability to get an instruction on self-defense. The content of a self-defense instruction is only relevant if the rules do not block a defendant from receiving one, and the significance of evidence of a defendant's social context is clear to jurors only when a judge tells them to consider its significance to her claim of self-defense. The definition and application of the rules that govern a judge's decision on whether to allow the jury to consider self-defense illustrates the enormous power of trial judges to make outcome-determinative decisions in cases involving battered women defendants. Substantive and evidentiary law proposals must be analyzed in the context of the operation of this definitional requirement.

The most basic of the get-to-the-jury inquiries is this: what criteria must a defendant satisfy before the judge will instruct her jury to consider whether she acted in self-defense? The inquiry has four parts.[213] The first, called the quantum of evidence in this Article, defines the amount of evidence on the self-defense claim the defendant must offer and have admitted. The conclusions reached in various jurisdictions range from (a) "slight" or "any," through (b) enough to raise the (even insubstantial) possibility of a reasonable doubt, to (c) "appreciable" or "substantial." The second definition involves the source of the evidence, whether it may come from any witness (including evidence developed during direct and cross-examination of the prosecution's witnesses), or whether it must be offered through a witness or witnesses called by the defense. The third inquiry is the scope—or the required extent—of the evidence: does the defendant get a self-defense instruction if

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[212] Exceptions are EWING, *supra* note 22, at 90 (discussing one aspect of this question), and Mahoney, *supra* note 87.

[213] For a description drawn from battered women's appeals of the standards set in each of the four parts in the various jurisdictions, and of their correlations with the jurisdictions' definitions of reasonableness and temporal proximity of danger, see *infra* Table.

she produces evidence of any element of the claim,[214] or must she satisfy the trial judge that she has produced evidence (at the required quantum, from the required source) on each element of the self-defense claim? The final inquiry, called the quality of the evidence in this Article, is whether the trial judge, whatever the quantum of evidence required and whatever its required source and scope, exercises his or her own determination about the credibility of the evidence of self-defense.[215]

A rule whose definition of the last part of the test includes the judge's duty to evaluate credibility puts defendants most at risk of judicial misapplication of substantive and evidentiary standards, regardless of the standards' definitions. A judge vested with the power to make credibility determinations on the sufficiency of defense evidence essentially has license to direct a verdict against a defendant.[216]

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[214] In jurisdictions where the defendant need adduce evidence on only one or some of the elements, the judge instructs the jury on the legal requirements of all of the elements, and the jury decides whether they have been satisfied. *See infra* note 224 & Table. *Compare* State v. Leidholm, 334 N.W.2d 811, 818 (N.D. 1983) (reversing conviction in sleeping-man case because self-defense instruction contained incorrect reasonableness standard, and assuming without discussing defendant's entitlement to a self-defense instruction despite lack of evidence on imminence) *with* State v. Stewart, 763 P.2d 572, 579 (Kan. 1988) (holding that defendant in a sleeping-man case who failed to establish imminence was not entitled to an instruction on self-defense).

[215] For the relationships between a state's choices in each of the four parts and its definitions of the reasonableness standard and of the temporal proximity of danger, see *infra* Table. The highest-requirement states are usually, but not always, those with both an objective test and an immediacy requirement. *See infra* Table.

[216] The Alaska Court of Appeals analyzed the constitutional significance of the procedural rules governing standards for getting to the jury in the context of a case in which a defendant had killed his abusive brother:

> [T]he role played by the trial court in deciding whether a self-defense instruction is called for must be a limited one. The court must be mindful of the need to refrain from adjudicating factual issues that fall within the jury's domain. Application of too severe a standard in determining whether "some evidence" of self-defense has been presented will inevitably place the court in jeopardy of encroaching on the prerogative of the jury and, to that extent, impinging on the right of the accused to a jury trial . . . . Thus, in determining whether "some evidence" of self-defense has been presented, the court is not called upon to determine the credibility or strength of the evidence or the weight to be given to testimony.

Paul v. State, 655 P.2d 772, 775-76 (Alaska Ct. App. 1982). The court further stated:

> Where there is evidentiary support for special facts sustaining a rational defensive theory, to which the court's attention is specifically directed, the defendant is entitled to have the jury charged on that theory. However weak the evidence, however implausible the theory may appear to be, the

The appellate opinions resolving battered women's complaints on appeal that no self defense instruction was given demonstrate the critical importance of the definition of this standard. Although courts in various jurisdictions reversed trial judges' resolutions of each of the other inquiries, no trial-level ruling denying a self-defense instruction was reversed in any jurisdiction that permitted credibility determinations.[217] A different result was reached in jurisdictions where the rules limited the judge's credibility-determining role, even where high standards were used in other parts of the test.[218]

In a proper formulation of the showing-necessary requirement the required quantum of evidence is "any" or "slight."[219] The evidence may come from any source, whether introduced during the prosecution's case on direct or cross-examination or during the defendant's case.[220] The defendant does not have the burden of satisfying the judge that she has produced the requisite evidence on each element of the defense;[221] rather, the jury is instructed on

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matter is for the jury's determination.

Id. at 776 n.5 (citing Wilson v. State, 473 P.2d 633, 638 n.2 (Alaska 1970) (Rabinowitz, J., dissenting) (quoting Brooke v. United States, 385 F.2d 279, 284 (D.C. Cir. 1967)).

[217] The likely explanation is that each of the other requirements is susceptible to review and, where necessary, quantification on the basis of an appellate record. Credibility judgments are more difficult to review and are generally subject to an abuse-of-discretion analysis. *See, e.g.*, State v. Martin, 666 S.W.2d 895, 899 (Mo. Ct. App. 1984) (holding that the determination of the sufficiency of the credible evidence submitted in support of the self-defense justification is for the trial court), *later proceeding*, 712 S.W.2d 14 (Mo. Ct. App. 1986) (affirming denial of post-conviction relief). *But see* State v. Landis, No. 86-0892-CR, at *4-*5 (Wis. Ct. App. Mar. 11, 1987) (LEXIS, States library, Wisc file) (stating that because it is the trial judge's duty to decide "if there are sufficient credible facts" as a matter of law no deference was owed the trial court's conclusion that there were insufficient credible facts to justify submitting the question of self-defense to the jury, but upholding the trial court's conclusion after the appeals court conducted a separate review of the facts).

[218] For examples of reversals for failure to instruct on self-defense from jurisdictions with high requirements in the first three parts of the test but with no defined judicial duty to assess credibility, see People v. Giacalone, 217 N.W. 758, 759-60 (Mich. 1928) (reversing conviction despite rule requiring evidence from the defendant on each element of the claim, including proof of an overt act of aggression by the decedent); State v. Gallegos, 719 P.2d 1268, 1270 (N.M. Ct. App. 1986) (reversing conviction despite standard requiring sufficient evidence from the defendant to raise a reasonable doubt on each element of the self-defense claim); State v. Branchal, 684 P.2d 1163, 1165 (N.M. Ct. App. 1984) (same).

[219] For examples of states with this formulation, see *infra* Table.

[220] *See infra* Table.

[221] This question is analytically distinct from that of the constitutionality of imposing the burden of proof on self-defense on a defendant, which was resolved in Martin v. Ohio, 480 U.S. 228 (1987) (finding such an imposition constitutional).

the jurisdiction's definition of each element and on its obligation to determine whether the defendant's evidence satisfies it.[222] Finally, the judge makes no credibility determination regarding the sufficiency of the evidence.[223]

B. *Substantive-Law Definitions*

1. Choice of Standard of Reasonableness

No current legislative proposal suggests a separate standard of reasonableness for battered women, though it is the subject of scholarly argument.[224] The high courts of Kansas and Wiscon-

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Difficult as that burden is for any defendant, particularly a battered woman, to meet, *see* Moran v. Ohio, 469 U.S. 948, 950 (1986) (Brennan, J., dissenting from denial of certiorari), it is not clearly a *greater* impediment to a fair trial than a procedural rule that operates to deny a battered woman any instruction on the question. Ohio, for instance, where the burden of proof is on a defendant who claims self-defense, has a low necessary-showing requirement for an instruction on self-defense and relatively few appeals complaining that no self-defense instruction was given. One scholar explicitly contemplates that the defendant will have the burden of proof on "psychological self-defense." *See* EWING, *supra* note 22, at 90-91. Another would, in some battered women's trials, impose such a burden on the question of her failure to leave the relationship. *See* Schulhofer, *supra* note 25, at 117-21.

[222] For a rules approach to this question, see Matthews v. United States, 485 U.S. 58, 62-64 (1988) (holding that a defendant is entitled to instructions on entrapment despite his failure to admit all elements of the crime, and summarizing federal and state precedents involving jury instructions on inconsistent defenses). *See also* People v. Everette, 565 N.E.2d 1295, 1298-99 (Ill. 1991) (holding that a homicide defendant is entitled to instructions on both accident and self-defense, even when evidence for one is "'very slight'" (quoting People v. Brachter, 349 N.E.2d 31, 34 (Ill. 1976) (quoting People v. Khamis, 103 N.E.2d 133, 136 (Ill. 1951) and People v. Kalpak, 140 N.E.2d 726, 728 (Ill. 1957)))). *But see* Commonwealth v. McFadden, 587 A.2d 740, 744 (Pa. Super. Ct. 1991) (holding that defendant claiming accident as well as self-defense was entitled to self-defense charge when there was evidence in support of all elements of self-defense and her testimony did not negate any element).

[223] *See, e.g.*, Paul v. State, 655 P.2d 772, 775-76 (Alaska Ct. App. 1982) (describing the role of the court in deciding whether a self-defense instruction is proper).

[224] Some legislative proposals appear to set a separate standard, but in fact apply to evidentiary rather than to substantive-law provisions. A recent example is Pennsylvania's House Bill 1295 that would amend the criminal code to provide for a "Battered Person's Defense." *See* Pa. H. 1295, 175th Gen. Assembly., 1991 Sess. (amending PA. STAT. ANN. tit. 18, § 505.1(b) (1991)). The provisions of the proposed amendment in fact relate to the admissibility of expert testimony regarding the "battered person syndrome." *See id.* § 505.1(b).

The intermediate appellate court of Missouri, however, has interpreted legislation providing for the admission of such testimony as creating a separate standard for battered women defendants. *See* State v. Williams, 787 S.W.2d 308, 312-13 (Mo. Ct. App. 1990). Another court suggests that legislative efforts are necessary to reform the definition of reasonableness in jurisdictions where the statutory definition is

sin,[225] as well as the intermediate appellate court of Missouri,[226] have recognized a "reasonable battered woman" or a "reasonably prudent battered woman" standard. The operation of a purportedly separate standard in these jurisdictions illustrates the lack of theoretical coherence and practical utility of the scholars' proposals.

a. *Criticism of Scholarly Proposals for a Separate Standard for Battered Women*

Scholars who address the question of standards in the context of battered women's homicide trials do not answer the fundamental question posed by Professor Schneider: how to resolve the tension between group and individual standpoint in the context of a criminal trial, whose purpose is the assessment of individual culpability.[227] If there is a separate standard of reasonableness, to what degree does the definition of the group require conformity to the definition by the individual defendant on trial?[228] Professor Kinports specifically contemplates a factual model that seems

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objective. *See* People v. Furber, 43 Cal. Rptr. 771, 776 (Ct. App. 1965) (reversing a conviction on other grounds; noting that where evidence at trial showed a history of past abuse of the defendant at the hands of her husband, but an equivocal confrontation between them at the time of the incident, there was no error in denial of self-defense instruction under existing objective standard of reasonableness, and proposals for change should be addressed to the legislature).

[225] Of those two, only the Kansas Supreme Court has squarely announced a separate standard for battered women who claim self-defense. *See, e.g.*, State v. Stewart, 763 P.2d 572, 579 (Kan. 1988) (reviewing the development of the standard). The standard reviewed in *Stewart* incorporated both subjective and objective components, first using "a subjective standard to determine whether the defendant sincerely and honestly believed it necessary to kill in order to defend . . . [and] then [using] an objective standard to determine whether defendant's belief was reasonable." *Id.* Specifically, "in cases involving battered spouses, . . . [the objective test would be] 'how a reasonably prudent battered wife would perceive [the aggressor's] demeanor.'" *Id.* (quoting State v. Hundley, 693 P.2d 475, 479 (Kan. 1985)).

Wisconsin's separate standard was announced in a slightly different context. *See* State v. Felton, 329 N.W.2d 161, 172 (Wis. 1983) (applying a separate standard to the evaluation of the reasonableness of a defendant's claim that the decedent provoked the homicide and that her conviction should be for the lesser offense of manslaughter). For a discussion of the current status of the "reasonably prudent battered woman" standard in Pennsylvania, see *supra* note 111.

[226] *See supra* notes 111 & 224.

[227] *See* Schneider, *Describing and Changing*, *supra* note 79, at 217-18. Crocker does address the challenge. *See* Crocker, *supra* note 22, at 131-32.

[228] Kinports suggests that the jury should be invited to weigh the differences between the case on trial and other cases involving battered women defendants. *See* Kinports, *supra* note 22, at 452.

very close to a new stereotype,[229] that of the reasonable battered woman who kills:

> Where the facts differ markedly from this model, courts frequently reject self-defense claims .... Any such differences between a particular case and other similar cases can be brought to the jury's attention to rebut the defendant's self-defense claim .... The jury ... should be given the opportunity both to weigh the differences between the case before it and other homicide cases involving battered women and also to consider the defendant's explanations for those differences in determining whether or not this defendant was truly a battered woman.[230]

This proposal is unconstitutional. Guilt is personal. A defendant's due process rights forbid the prosecution's or the court's appeal to the jury to compare the facts of her case to the facts of similar trials. This model is also open to precisely the narrow application observed in jurisdictions that have a reasonably prudent battered woman standard.[231] Phyllis Crocker, although she prefers a "reasonable woman" standard, offers one that is similarly open to narrow application: "A better approach to battered women's self-defense cases may be to use an objective, explicitly group-based view of the reasonableness of the individual defendant and of battered women generally."[232]

The creation of a generalized model of the battered woman, to say nothing of the battered woman who kills, invites courts to

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[229] Kinports bases such a model on a set factual pattern:

> [B]ecause the cases involving battered women who kill their husbands in nonconfrontational settings tend to follow a certain pattern, the jury's task may be simplified. Typically, the battered woman admits that she killed her husband. Indeed, she frequently calls the police immediately after the incident and does nothing to attempt to conceal her complicity. In addition, the woman often does not realize she has killed her husband until she is informed he is dead. She may not even remember the events leading up to the killing. When she learns her husband is dead, she frequently expresses grief and remorse, explaining that she did not intend to kill him but only to prevent him from inflicting further abuse or from impeding her escape.

Id. at 450-51 (citations omitted).

[230] *Id.* at 451-52.

[231] *See infra* notes 234-37 and accompanying text.

[232] Crocker, *supra* note 22, at 152. A "group-based view of the reasonableness of ... battered women generally" invites the same stereotyping. The proposal ignores the force of the author's earlier correct assertion that "[t]he issue in a self-defense trial is not whether the defendant was a battered woman, but whether she justifiably killed her husband." *Id.* at 149.

prevent the fair trials of women who are not "good" battered women. In the next Part, I will show that courts in jurisdictions with a separate standard have readily accepted the invitation.

b. *The Operation of a Separate Standard of Reasonableness*

In the states which employ it, an objective standard is a definitional impediment to good outcomes and, in combination with other factors, to getting to the jury.[233] Replacement of an objective standard with a separate standard for battered women does not guarantee removal of that impediment. In jurisdictions that have adopted a separate standard, its application, to the extent that it is reflected in appellate opinions, often operates to establish a definitional standard of the "reasonable battered woman who kills," which is difficult for many defendants to meet.

In Kansas, defendants who fail to satisfy the requirements of that jurisdiction's "reasonably prudent battered wife" test are measured against that state's otherwise generally applicable objective standard of reasonableness:

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[233] *See supra* notes 105-17 and accompanying text. The objective standard's outcome-determinative impact at trial is, obviously, analytically different from the question whether the standard affects the statistical likelihood of success on appeal. They may, of course, be related, and there are reasons to think that they will be related: a state whose standard is more subjective is likely to be one in which rights of individual defendants are particularly valued; such a state may well have appellate determinations that are more pro-defendant.

Although this is not a necessary correlation, it does seem to occur in the choice-of-reasonableness area. Of the convictions in confrontation cases, 80% were affirmed in opinions where the resolution of issues raised on appeal required discussion of the jurisdiction's choice of an objective standard, as opposed to 23% affirmances in cases where the relevant standard discussed involved a subjective component, and 52% affirmations in all confrontation cases. These figures apply only to cases in which the choice of standards was discussed by the court as it resolved the issues presented on appeal. An examination of all of the opinions (both confrontation and nonconfrontation, including those not discussing the choice of standard) arising from the objective states leads to the finding that 87% of the convictions were affirmed and 13% were reversed. *See* Affirmance and Reversal Rates, *supra* note 187.

Of all opinions (confrontation and nonconfrontation) in the states where the opinions discussed the requirement that the reasonableness standard include the individual characteristics of the defendant, 30% of the convictions were affirmed, 67% were reversed, and 3% were otherwise disposed. These numbers contrast dramatically with the rates for the whole base of cases (including those where choice of reasonableness standard was not relevant to disposition of the appeal): overall, 59% of convictions were affirmed, 40% were reversed, and 1% were otherwise disposed. *See id.*

> Where the battered wife syndrome is an issue in the case, the standard of reasonableness concerning an accused's belief in asserting self-defense is not objective, but subjective. The jury must determine, from the viewpoint of a defendant's mental state, whether defendant's belief in the need to defend herself was reasonable.
>
> The trial court properly refused Debbie's requested instruction because its language presumed that Debbie was in fact a battered wife. There was conflicting evidence on this point. If the requested instruction were given, it would have taken from the jury the opportunity to evaluate the evidence for itself. Further, and more to the point, the evidence presented in this case did not support giving a subjective self-defense instruction .... Debbie did not testify that she killed J.R. in self-defense. Instead, the fatal shot, according to Debbie, was accidental. Her only arguable act of self-defense against her husband was related to the first shot. Debbie was not charged with any crime related to the first shot and therefore the subjective self-defense instruction had not relevance and should not have been given.[234]

A plurality of the Pennsylvania Supreme Court endorsed a "reasonably prudent battered woman" standard in 1989.[235] Shortly thereafter, the Pennsylvania Superior Court upheld the exclusion of battered-woman-syndrome testimony, noting that even if a majority of the highest court were to adopt a separate standard, the appellant before the court failed to meet it:

> [T]he plurality opinion ... emphasized that expert testimony pertaining to the battered woman syndrome was appropriate "where uncontradicted testimony reveals that the defendant was a victim of

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[234] State v. Meyer, No. 59,213, at *8-*9 (Kan. Ct. App. Dec. 4, 1986) (LEXIS, States library, Kan file). The Kansas court noted that the defendant described responding to an ongoing attack and claimed that her first shot was in self-defense and that her second and third shots, one of which wounded a roomer and the other of which killed her husband, were accidental. *See id.* Missouri similarly limits application of its evidentiary statute to cases in which the defendant satisfies the trial judge that she acted in self-defense. *See* State v. Anderson, 785 S.W.2d 596, 600 (Mo. Ct. App. 1990) (finding no error in exclusion of expert testimony because a "literal reading of [the Battered Spouse Law] prohibits the battered spouse syndrome where the defendant has not been able to raise the issue of self-defense") (citing Battered Spouse Law, MO. REV. STAT. § 563.033 (1988), *amended by* MO. ANN. STAT § 563.033 (Vernon Supp. 1991)).

[235] *See* Commonwealth v. Stonehouse, 555 A.2d 772, 784 (Pa. 1989) (plurality opinion). The majority opinion reversed the conviction on the ground that counsel was ineffective for failing to request an instruction on the relevance of the history of abuse. For a discussion of the apparent rejection of a separate standard in a later opinion of that court, see *supra* note 111.

> such abuse." The facts of the instant case are not so compelling. Whether appellant in the instant case was a battered woman was sharply disputed by the Commonwealth, and the evidence was contradictory. Appellant's testimony that she had been beaten by a drunken husband prior to the stabbing and her general accusation that he had beaten her repeatedly during fourteen months of marriage was largely uncorroborated and was substantially contradicted by other evidence.[236]

Redefinitions that are specific to a particular class of defendants are susceptible to narrow application by trial judges, and those who see women who kill as outside standard doctrine often find a way to exclude them from specially designed exceptions. For example, a trial judge in Missouri made a pretrial determination, reversed on appeal, that a defendant was not entitled to the operation of the statute providing for admission of "battered spouse syndrome" testimony because she was not married to the abuser.[237]

Replacing the objectively reasonable man with a new stereotyped reasonable battered woman does not work, either as a theoretical or as a practical matter. A separate standard is not likely to guarantee fair trials or good outcomes in either confrontation or nonconfrontation cases. In the latter category of cases, any reasonableness standard with an objective prong can operate as an impediment to fair trials. Neither the scholarly proposals nor the courts endorsing a separate standard have moved to a completely subjective test. Scholars propose and courts retain an objective component in the separate test of reasonableness.[238]

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[236] Commonwealth v. Dillon, 562 A.2d 885, 889 (Pa. Super. Ct. 1989) (citations omitted), *rev'd*, No. 123, 1991 Pa. LEXIS 234 (Oct. 31, 1991). For discussion of the Pennsylvania Supreme Court's series of concurring opinions in the *Dillon* reversal, two of which make clear that expert testimony is relevant to the generally applicable self-defense standard, see *supra* note 111.

[237] *See* State v. Williams, 787 S.W.2d 308, 312 (Mo. Ct. App. 1990). The Missouri legislature subsequently changed its definition to "battered person syndrome." *See* MO. ANN. STAT. § 563.033 (Vernon Supp. 1991).

[238] *See supra* notes 229-32; *infra* note 241 and accompanying text. To the extent that a model of the reasonable battered woman is a standard defendants must meet, it is likely that both confrontation and nonconfrontation cases will involve women who are not sufficiently in conformity with its requirements. For scholarly proposals for the imposition of such a standard, see *supra* notes 227-32 and accompanying text. For restrictive legislative definitions in the context of evidence codes, see *infra* notes 263-78 and accompanying text.

c. *The Appropriate Standard of Reasonableness*

The case of Bernhard Goetz[239] has been characterized as a "hard case for feminists" because the subjective portion of the reasonableness standard employed at the trial is seen as having led to the acquittal of a subway vigilante,[240] and because retaining more of an objective test than was employed in that trial is seen as likely to work to the disadvantage of battered women, especially those who kill in nonconfrontational circumstances.[241]

The *Goetz* standard, however, is consonant both with the standard of reasonableness currently employed in most jurisdictions and with the self-defense claims raised by most battered women defendants. The correct standard uses a combination of subjective and objective analyses to aid the jury's determination whether the defendant actually and honestly believed in the necessity of using deadly force, and whether a reasonable person in the defendant's circumstances—including her history with the decedent and her perceptions of his dangerousness—would so believe.[242]

In objective jurisdictions the necessary redefinition is not the creation of a separate standard for battered women. It is the creation of a generally applicable standard which incorporates a subjective reasonableness analysis. Including a subjective inquiry in the reasonableness analysis has an impact on more than the content of the self-defense instruction. It influences the content of related instructions on evidence of history of abuse and history of other violence. It has an effect also on the permissible scope of battered-woman-syndrome testimony.[243]

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[239] *See* People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).

[240] *See* GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 39-62 (1988) (discussing the history and development of the reasonableness standard).

[241] *See* Shirley Sagawa, Comment, *A Hard Case for Feminists:* People v. Goetz, 10 HARV. WOMEN'S L.J. 253, 263-67 (1987). Sagawa's arguments demonstrate the unlikelihood of widespread support for a completely subjective standard, despite a sense that nonconfrontation defendants are unjustly convicted under a standard with an objective component. For the jury instructions given at the *Goetz* trial, see *supra* note 108.

[242] *See supra* notes 108-09.

[243] Although in most jurisdictions there is no correlation between utilization of a subjective test and *admissibility* of context evidence, the Supreme Court of Ohio ruled that its reversal of a long line of cases excluding expert testimony was required by two conclusions: (1) that battered woman syndrome was commonly accepted in the scientific community; and (2) that the reasonableness test in that jurisdiction is subjective. *See* State v. Koss, 551 N.E.2d 970, 972-74 (Ohio 1990). The court quoted with approval an instruction similar to those set forth *supra* notes 108-09, and

2. Definition of Temporal Proximity of Danger

Some scholars suggest elimination of the imminence requirement in the context of battered women defendants.[244] Complete elimination of the requirement would remove an impediment to fair trials that occurs most frequently in nonconfrontation cases, although on balance its elimination would probably not maximize the safety of women's lives.[245] There is, however, no current proposal for its complete elimination.[246] Rather, reformers retain a general necessity requirement, recognizing that the law of self-defense is a rule of necessity.

The appropriate definition, utilized by most jurisdictions, is "imminent" rather than "immediate."[247] The court's instructions on imminence should specifically direct the jury to consider the history between the defendant and the decedent, the decedent's history of other violence, and expert testimony introduced on the effects of the history of abuse.[248]

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determined that expert testimony was essential for the jury to obey the mandate that "you must put yourself in the position of the Defendant, with her characteristics, knowledge, or lack of knowledge, and under the same circumstances and conditions that surrounded the Defendant at the time." *Koss*, 551 N.E.2d at 973.

[244] *See, e.g.*, Schulhofer, *supra* note 25, at 122-26 (arguing in favor of retaining a general necessity requirement and eliminating the requirement of "imminence *per se*"). For a discussion of the likelihood that this change alone would change outcomes in nonconfrontation cases, see *infra* text accompanying notes 295. Much more likely to have a positive effect, both on the ability of nonconfrontation defendants to get to the jury and on the outcomes in their cases, is Professor Martha Mahoney's suggestion for introduction of evidence of "separation assault" to meet the imminence requirement. *See* Mahoney, *supra* note 87, at 83-93 (proposing definition and explanation of "separation assault" as evidence regarding the likelihood of increased violence toward women who attempt to leave abusive relationships, and arguing, with particular reference to sleeping-man cases, that such evidence will both answer the question why a battered woman would fear retaliation for attempts to escape and why the imminence of the danger facing her should be analogized to that in hostage situations).

[245] More men kill women partners than women kill male partners. *See* FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS 12 (1989) (stating that in 1989, 3.8% of all homicide victims were men killed by their wives or girlfriends, but 6.7% of all homicide victims were women killed by their husbands or boyfriends).

[246] One current legislative proposal is New York's Assembly Bill 4970, introduced in 1991 to amend N.Y. PENAL LAW § 35.15 to use the word "imminent" in the justification definition. The proposal's accompanying comments suggest a purpose to make clear that existing statutory and case law require imminent rather than immediate danger and to guarantee to battered women defendants the benefit of that clarification.

[247] *See supra* note 119 and accompanying text.

[248] *See supra* notes 126-28 and accompanying text.

Jury instructions that direct a jury to focus on the "immediate" circumstances of the killing, which occur most frequently in "objective" jurisdictions,[249] limit a defendant's ability to get the question of social context before the jury.[250] The immediacy requirement results in a higher threshold showing for admission of evidence and in a lower likelihood that instructions are given to the jury on the relevance of evidence received about the history of other violence, the history of abuse, and expert testimony.[251]

a. *Assessment of the Reasonableness of the Degree of Force Employed*

In this area, scholars have posited and then argued against a like-force requirement that does not exist. There are no current proposals in any legislature for change in this substantive area, and none are necessary. The appropriate inquiry in this area is the one ordinarily conducted: whether the force employed by the defendant was *necessary*, not whether it was the same as that directed against the actor.[252] It is true that trial courts have *applied* the proportionality-of-force requirement in a way that has limited defendants' ability to get to the jury on the question of self-defense, and they have been reversed for so doing.[253] Redefinition does not reach the application problem.

b. *Duty to Retreat*

Scholars are correct when they observe that battered-women defendants are denied fair trials in the minority of jurisdictions that impose a duty to retreat and do not exempt from that duty defendants attacked in their homes.[254] In some of those jurisdictions, the definition, coupled with a procedural rule that requires evidence on each element of a self-defense claim, prevents defendants from getting any self-defense instruction at all. In others, the jury is instructed on self-defense but is also instructed that the law of self-defense is inapplicable if they find, as a matter of fact, that the defendant violated the defined duty to retreat.[255] In this area,

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[249] *See infra* Table.

[250] *See supra* note 128 and accompanying text.

[251] *See infra* Table.

[252] *See supra* notes 132-35 and accompanying text.

[253] *See supra* note 204 and accompanying text.

[254] *See supra* notes 139-42.

[255] *See* Commonwealth v. Shaffer, 326 N.E.2d 880, 884 (Mass. 1975). In this case the jury was instructed on self-defense and told that the defendant had a duty to

legislative reform is necessary, yet there are no proposals pending in the relevant jurisdictions. Elimination of the duty to retreat, in the minority of jurisdictions that impose it, will not undercut the operation of the general requirement that the defendant use deadly defensive force only when necessary. Standing alone, however, such a change will not guarantee fair-trial rights. If necessity is measured against an objective reasonableness test and against an immediacy requirement, the elimination of a duty to retreat will not necessarily result in an increase in the number of defendants who can get to the jury on self-defense.

At a minimum, in those jurisdictions that retain a general duty to retreat, defendants attacked in their homes should be exempted from its operation, and the exemption should not depend on the status of the attacker. This definitional change, of general applicability, is essential to remove an impediment to getting to the jury in cases that arise in the context of family violence.[256]

C. *Evidentiary Rules*

Most recently enacted and currently proposed amendments or additions to evidentiary codes[257] do not advance their usually stated purposes of enlarging the fair-trial rights of battered-women defendants by increasing their ability to put before the jury evidence in the form of expert testimony on the effects of a history of abuse. In some cases, the amendments actually cut back on a jurisdiction's existing provisions.[258] In others, including the minority where

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retreat, even though the incident occurred in her home. The court specifically declined to adopt an exception to the retreat doctrine. *See id.* at 883. Thereafter, the Massachusetts legislature exempted from the retreat requirement defendants attacked at home by persons unlawfully in the dwelling. *See* MASS. ANN. LAWS ch. 278, § 8A (Law. Co-op. Supp. 1991). The retreat rule still applies to persons attacked by cohabitants and invitees.

[256] *See supra* text accompanying notes 136-42.

[257] The term "codes" is used to refer to the evidentiary law of a jurisdiction. In some states rules of evidence are codified, in others, evidentiary rules are all common law, and in some jurisdictions the rules are a combination of code and common law. The criticisms of the enactments and proposals discussed in this Article are in part the result of the failure of their proponents to analyze existing provisions, whether codified or common law.

[258] With the exception of Louisiana and Missouri, appellate rulings providing for the admissibility of expert testimony have been made on the basis of existing evidentiary doctrine rather than as the result of the passage of special legislation. *See* LA. CODE EVID. ANN. art. 404 (West 1990); MO. ANN. STAT. § 563.033 (Vernon Supp. 1991). In Ohio, the pendency of legislation requiring admission of expert testimony may have influenced the Ohio Supreme Court's decision to overturn its own line of

existing evidentiary law is insufficient to guarantee the admission of expert testimony, the amendments are so specifically and narrowly drawn that they will make the testimony available to only a small percentage of battered-women defendants. These defects are the result of two related failures. First, the advocates for change often do not analyze existing law for the purposes of determining whether perceived impediments to the admission of this social-context evidence actually result from the law's structure and content.[259] Secondly, they fail to make use of current social science findings to define the categories of evidence whose admission is legislated.[260]

Expert testimony about the effects of a history of abuse has been ruled admissible by the vast majority of appellate courts that have confronted the question,[261] generally because it is deemed relevant to a self-defense claim for the broad purposes of explaining a defendant's state of mind and of rebutting myths and misconceptions about battered women, and generally after a defendant claims self-defense and introduces evidence of a history of abuse.[262] Many enacted and proposed reforms contain provisions that are significantly more restrictive than the existing law in most jurisdictions. For instance, some legislators have undertaken to define the content of expert testimony in a way that is not only narrower than the current definition in their jurisdictions, but is also inconsistent with the findings of social scientists. An illustrative example is the statutory definition of "battered person syndrome" proposed but not introduced in Washington and modeled closely on an enacted Missouri provision:

> "Battered person syndrome" means a group of concurrent psychological and behavioral characteristics resulting from repeated victimization by family violence or threat of family violence, including:
> (a) An extreme level of anxiety or depression;

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cases upholding the testimony's exclusion. *See supra* note 243 (discussing State v. Koss, 551 N.E.2d 970 (Ohio 1990)).

[259] There is also a failure to determine in those jurisdictions where there is a definitional impediment to admission of expert testimony whether the problem occurs in the definition of admissible evidence or whether it occurs in the definition of the threshold-showing requirements that set the preconditions to the admission of evidence, however it is defined. A liberal definition of expert testimony will not solve the problem of requiring a high showing by extrinsic evidence before it may be received.

[260] For criticism of legislative provisions for a diagnostic checklist of the "battered person syndrome," see *infra* text accompanying notes 263-67.

[261] *See infra* Table.

[262] *See infra* Table; *supra* text accompanying notes 176-80.

(b) Repeated unsuccessful attempts to stop, decrease, or escape from acts or threats of family violence;
(c) Extreme fearfulness of the family violence perpetrator and constant anticipation of future acts of violence; or
(d) Loss of belief in one's ability to take effective action for self-protection.[263]

Neither Missouri's earlier statute[264] nor Washington's existing common-law evidentiary rule[265] contained any attempt to limit the *content* of expert testimony. The definition quoted above, even though its four "included" factors are arguably disjunctive, is one with which many experts would not agree.[266] The Missouri legislators' and Washington advocates' assumption of the general applicability of the second factor—the battered person's repeated attempts to leave or stop the violence—is not shared by the American Psychological Association.[267] Another factual assumption[268] reflected in some current reform efforts, also

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[263] Proposed bill to amend WASH. REV. CODE ANN. § 9A.16.010(3)(b) (West 1991) [hereinafter Washington's proposed bill] (on file with author). The fact that the legislation was not introduced may reflect Washington legislators' recognition of its flaws. The proposed bill's language is the same as that of a statute enacted in Missouri. *See* MO. ANN. STAT. § 563.001(1)(b) (Vernon Supp. 1991) (amending a 1988 version of the same statute). Its advocates in Washington appear to have borrowed the Missouri language without any attempt to distinguish between the state of evidentiary common law in Washington, *see* State v. Allery, 682 P.2d 312, 316 (Wash. 1984) (en banc), and the very different deficiencies in Missouri's jurisprudence that its 1988 statute was designed to remedy.

[264] That statute provided for the admission of "battered spouse syndrome" testimony. *See generally* State v. Williams, 787 S.W.2d 308, 312 (Mo. Ct. App. 1990) (discussing admissibility under "battered spouse syndrome" statute).

[265] *See Allery*, 682 P.2d at 316.

[266] *See* BLACKMAN, *supra* note 146, at 192-200; BROWNE, *supra* note 68, at 177; WALKER, THE BATTERED WOMAN SYNDROME, *supra* note 167, at 78; *see also* Brown v. State, No. 64,355, 1990 Kan. App. LEXIS 581, at *10 (Aug. 3, 1990) (quoting trial testimony of prosecution expert that there is no fixed checklist of characteristics).

[267] The Association has argued:

> *Often the woman does not reach out for help* from family, friends or the police because she is ashamed of her status as a battered woman and because she has been isolated from these sources of assistance by the batterer. Even when the woman seeks help from others, they are usually reluctant to intervene and often encourage her to return home, thereby confirming her belief that the fault is hers or that relief is not available.

American Psychological Association, Brief of Amicus Curiae at 2, Hawthorne v. State, 470 So. 2d 770 (Fla. Dist. Ct. App. 1985) (emphasis added), *quoted in* Ewing & Aubrey, *supra* note 93, at 258. No legal scholars suggest that repeated, unsuccessful attempts to leave typically characterize the behavior of battered women.

[268] If it is not a factual assumption, then the drafting reflects a deliberate intent to exclude certain battered women from the operation of the reform.

belied by the work of social scientists, is that battering occurs only in relationships involving present or past marriage or cohabitation.[269] In fact, women are also battered by men with whom they are in intimate relationships but with whom they have not lived.[270]

Recent legislative efforts have contained a further restriction on battered-woman-syndrome expert testimony, limiting the testimony to cases involving charges of the use of force against another.[271] Other statutory language limits introduction of expert testimony to cases involving the defendant's use of deadly force and, therefore, excludes assault cases.[272] Still other proposals limit introduction of such testimony to those cases in which a defendant claims self-defense or defense of third persons[273] and exclude duress, accident, and insanity claims.

In some of the statutes and proposals limiting admission of expert testimony to cases involving self-defense claims, there are even more refined limitations on the purpose and scope of expert testimony. These statutes and proposals limit the testimony to the reasonableness of a defendant's belief that the use of force was immediately necessary,[274] or that danger was imminent.[275]

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[269] *See, e.g.*, MD. HEALTH-GEN. CODE ANN. § 10-916(2) (1991) (defining "battered spouse syndrome" as a condition of one who has been abused by "a spouse, a former spouse, cohabitant, or former cohabitant").

[270] *See supra* note 75; *see also* Cal. Act, *supra* note 211 (using CAL. CIV. PROC. CODE § 542 definition of battered woman to include persons "with whom the respondent has had a dating or engagement relationship").

[271] *See e.g.*, MO. ANN. STAT. § 563.033.1 (Vernon Supp. 1991) (limiting admissibility of battered-woman-syndrome evidence to "the issue of whether the actor lawfully acted in self-defense or defense of another"); OHIO REV. CODE ANN. § 2901.06(B) (Anderson Supp. 1990) (limiting battered-woman-syndrome expert testimony to "a person charged with an offense involving the use of force against another"); Pa. H. 1295, *supra* note 224 (providing that the battered person defense can be used "[i]f a person is charged with an offense involving the use of force against another"); Tex. S. 275, 72d Leg., 1991 Sess. (enacted Apr. 29, 1991, to be codified TEX. PENAL CODE ANN. § 19.06) (providing that "in order to establish the defendant's reasonable belief that use of force or deadly force was immediately necessary . . . relevant expert testimony . . . relating to family violence' can be offered); Vt. H. 329, 1991 Sess. (bill as introduced) (on file with author) (proposing to permit battered-woman-syndrome testimony in "cases involving the use of force").

[272] *See* MD. HEALTH-GEN. CODE ANN. § 10-916 (1991).

[273] *See* MO. ANN. STAT. § 563.033.1 (Vernon Supp. 1991); OHIO REV. CODE ANN. § 2901.06 (Anderson Supp. 1990); Pa. H. 1295, *supra* note 224; Tex. S. 275, *supra* note 271; Vt. H. 329, *supra* note 271.

[274] *See* MO. ANN. STAT. § 563.033.1 n.3 (Vernon Supp. 1991); Tex. S. 275, *supra* note 271.

[275] *See* OHIO REV. CODE ANN. § 2901.06 (Anderson Supp. 1990); Pa. H. 1295,

These provisions may be read to exclude the presently admissible testimony on state of mind, on myths and misconceptions, and on the question why the defendant did not leave the abusive relationship.[276] Further, some legislative language creates an additional hurdle to the admissibility of expert testimony in the form of a written notice requirement and a mandatory court-ordered pre-trial psychiatric or psychological examination of the defendant.[277] The risk of such provisions is not only that they subject a self-defense claim to the procedural rules governing insanity defenses, but also that they appear by their terms and have been interpreted by trial judges to provide for a pre-trial factual determination whether the defendant meets the statutory definition of a person who experiences the battered woman syndrome.[278]

Appropriate legislation regarding admissibility of expert testimony and other social context evidence may have several goals. In jurisdictions in which expert testimony is not received or is received in a limited fashion,[279] legislative efforts should be geared toward bringing the law into conformity with the general rule in the majority of jurisdictions. In jurisdictions already in conformity with the majority rule, legislative efforts may be undertaken to secure existing law against the possibility of change with changing judicial personnel or to send a message to trial judges who persist in declining to apply existing doctrine.[280]

Certain provisions are essential to legislative language, whatever the existing law of the jurisdiction in which it is drafted. First, a legislature should no more attempt to define the content of battered-woman-syndrome expert testimony by providing a diagnostic checklist than it would attempt to structure or limit testimony from other experts.[281] The preferable language is

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supra note 224; Vt. H. 329, *supra* note 271.

[276] *See infra* Table.

[277] *See* MO. ANN. STAT. § 563.033.2 (Vernon Supp. 1991); Washington's proposed bill, *supra* note 263.

[278] *See supra* note 237 and accompanying text.

[279] For examples of limitations, see *supra* note 181.

[280] In both types of jurisdictions the efforts may share yet another purpose: public education on the larger social problem of battering.

[281] For instance, although many states define mental status defenses generally in terms of the effect on the defendant's ability to form the requisite intent, none defines or limits the factors that may lead to a particular diagnosis. *See, e.g.*, N.Y. PENAL LAW § 40.15 (McKinney 1987) (defining without setting up a diagnostic checklist an affirmative defense that a defendant lacked criminal responsibility because "as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either: 1. The nature and consequences of such conduct; or 2.

general and flexible rather than descriptive of a particular syndrome; and the legislation certainly should not attempt to codify elements of a syndrome.[282] In those circumstances, where a certain level of specificity regarding the nature of the testimony is deemed necessary,[283] the language should still be sufficiently general to maintain conformity with current scientific opinion.[284]

The admissibility of battered-woman-syndrome expert testimony should not be limited to criminal cases involving charges of use of force.[285] Rather, it should be admissible in all cases, civil and

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That such conduct was wrong").

[282] An example of useful language, taken from Federal Rule of Evidence 702, proposed in New York where courts routinely admit expert testimony, is found in Assembly Bill 5341 drafted to amend the evidentiary provisions of Section 60.15 of the Criminal Procedure Law and Section 834 of the Family Court Act: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." N.Y. Assembly 5341, 1991 Sess. (Memorandum in Support of Legislation) (on file with author). The accompanying justification offered for the bill makes clear that its liberal provisions are meant to apply to testimony on battered woman syndrome as well as other testimony regarding "complex psychological and social phenomena, such as rape trauma syndrome [and] untimely disclosure of child sexual abuse . . . ." *See id.* (Justification Section). The language itself is generally applicable to all civil, criminal, and family court proceedings. *See id.* (Purpose Section).

[283] Some legislators apparently require a certain level of specificity because they want to be associated with a statute that, by its terms, demonstrates a concern for battered women. *See* Telephone Interview with Sue Osthoff, Executive Director of the National Clearinghouse for the Defense of Battered Women (June 17, 1991) [hereinafter Osthoff Interview].

[284] A congressional resolution regarding expert testimony in criminal trials of battered women, whose preamble specifically details its focus on battered women, contains useful general language within the domestic violence limitation:

> [I]t is the sense of Congress that
>
> (1) expert testimony concerning the nature and effect of domestic violence, including descriptions of the experiences of battered women, should be admissible when offered in a state court by a defendant in a criminal case to assist the trier of fact in understanding the behavior, beliefs, or perceptions of such defendant in a domestic relationship in which abuse has occurred;
>
> (2) a witness should be qualified to testify as an expert witness based upon her or his knowledge, skill, experience, training, or education, and should be permitted to testify in the form of an opinion or otherwise; and
>
> (3) a domestic relationship about which such expert testimony should be admissible includes relationships between spouses, former spouses, cohabitants, former cohabitants, partners or former partners, and between persons who are in, or have been in, a dating, courtship, or intimate relationship.

H.R. Con. Res. 89, 102d Cong., 1st Sess. (1991).

[285] Although such a limitation creates no impediment in homicide and assault

criminal, in which an explanation of the state of mind of a party or witness is otherwise relevant and admissible. If a limitation of such evidence to criminal cases is deemed necessary,[286] the statute should, at a minimum, apply to criminal trials generally, and expert testimony should be admissible where relevant to any defense.[287] Judicial recognition of the empirical work of social scientists regarding the prevalence of myths and misconceptions about battered women[288] makes clear that there is no sound justification for statutory language that is open to an interpretation limiting the testimony's relevance to the specific self-defense issues of imminence or degree of necessary force at the time of the incident.[289]

Where impediments to the admissibility of expert testimony arise not from the problems of defining the testimony itself, but from the requirements of threshold showings by the party offering it, legislation should be aimed at both guaranteeing that those showing requirements do not impede the fair-trial goal of full jury consideration of a defendant's case and guaranteeing their consistency with the current law of most jurisdictions.[290]

Reform efforts designed to enact generally applicable evidentiary standards and definitions should have the following two effects when applied specifically to battered women's self-defense cases. First, when a defendant claims to have acted in self-defense, both

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cases, it unnecessarily restricts the use of expert testimony.

[286] This necessity is political. For another example of such political considerations, see *supra* note 283. Advocates have reported to the National Clearinghouse for the Defense of Battered Women that some legislators want attention focussed specifically on criminal trials of battered women and are willing to ignore the relevance of expert testimony to civil cases in which battered women are parties. *See* Osthoff Interview, *supra* note 283.

[287] The limitation of the testimony to a defendant is not logically compelled, so long as the language makes clear that expert testimony may not be introduced against a defendant for the purpose of proving the occurrence of the charged offense. Such a provision is consistent with most current holdings regarding the prosecution's use of battered-woman-syndrome testimony. *See* Cal. Act, *supra* note 211; *supra* note 168.

[288] *See, e.g.*, Commonwealth v. Dillon, No. 123, 1991 Pa. LEXIS 234, at *19-*26 (Oct. 31, 1991) (Cappy, J., concurring) (referring to a number of empirical works as authorities on myths and misconceptions about battered women).

[289] *See supra* notes 274-75 and accompanying text.

[290] *See infra* Table.

evidence of the history of abuse and of a history of other violence, where offered, should be admissible without a prior showing of an overt act on the part of the decedent.[291] Second, once that testimony is received, it should be a sufficient predicate for receipt of expert testimony. The expert testimony should be admitted to explain the effects of a history of abuse on a defendant's behavior and perceptions and to rebut popular myths and misconceptions about battered women.[292] There should be no requirement of a judicial determination either pre-trial or at trial that the defendant "established" herself as a battered woman.

CONCLUSION

In most jurisdictions, existing substantive law and related evidentiary and procedural rules are defined in a way consistent with the self-defense claims of battered women who kill. Again, in most jurisdictions, to the extent that those defendants are precluded from getting a self-defense instruction, from presenting evidence of a history of abuse or expert testimony, and from having the jury instructed on the relevance of that evidence, the preclusion is the result of unfair application of existing law and not of its structure or content. Current reform efforts aimed at redefining the law offer neither the necessary nor the sufficient conditions for change in those jurisdictions.

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[291] In Louisiana, an overt-act requirement had operated to preclude the admission in many cases of evidence of history of abuse and history of other violence, and a mental-status defense requirement precluded the admission of expert testimony in self-defense cases. *See supra* note 174. The Louisiana legislature enacted language that is useful in its general *definitions*, but insufficiently general in its *applicability* only to criminal cases that arise in the context of family violence and in which the defense is self-defense:

> [W]hen the accused pleads self-defense and there is a history of assaultive behavior between the victim and the accused and the victim and the accused lived in a familial or intimate relationship such as, but not limited to, the husband-wife, parent-child, or concubinage relationship, it shall not be necessary to first show a hostile demonstration or overt act on the part of the victim in order to introduce evidence of the dangerous character of the victim, including specific instances of conduct and domestic violence; and further provided that an expert's opinion as to the effects of the prior assaultive acts on the accused's state of mind is admissible . . . .

LA. CODE EVID. ANN. art. 404(A)(2) (West 1990).

[292] The testimony admitted to explain social context is not character evidence and should not open the door to rebuttal by evidence of a defendant's prior bad acts. *See supra* notes 40 & 175.

In the minority of states where fair-trial rights are impeded by substantive and evidentiary law definitions, current reform efforts will not remove existing impediments because their proponents have failed to analyze the interrelationship of those two areas of self-defense jurisprudence, to assess the impact on each of the rules defining the circumstances under which *any* self-defense instruction is given, and to draw on existing empirical work. Consequently, both scholarly and legislative proposals not only do not enlarge, but often have the effect of narrowing a battered woman defendant's ability to get to the jury on her self-defense claim. Improvement of the chances of getting to the jury will not result from proposals for separate standards for battered women.

This Article's suggested reform of the standards defining the procedural requirements for a self-defense instruction,[293] in combination with its substantive and evidentiary law proposals, is the change most likely to have a specific impact on the cases of battered women who kill in both confrontational and nonconfrontational circumstances. Neither a reasonably prudent battered woman standard that retains an objective component,[294] nor the elimination of an imminence requirement with retention of a general necessity requirement,[295] will alone lead to better outcomes. The substantive law standards proposed by scholars, like the special evidentiary provisions presented to legislatures, will be applied in high threshold-showing jurisdictions to prevent defendants from introducing context evidence and from receiving self-defense instructions. Taken together, the proposals of this Article present the reform plan most likely to enable all battered women defendants to get to the jury on their self-defense claims.

Made in the context of a careful assessment of the interrelationship of the elements of self-defense jurisprudence, the proposals are modest. They are aimed, not at changing societal attitudes toward battering, but at maximizing jurors' access to information about the social context of the act of the defendant whose case they must decide. They will not eliminate judicial bias against battered women who kill, but they will minimize the opportunities for trial judges to

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[293] *See supra* text accompanying notes 212-13.

[294] *See supra* notes 229-32 & 241 and accompanying text.

[295] *See supra* note 244 and accompanying text.

implement that bias through the exclusion of evidence or the denial of self-defense instructions. They represent the realistic limits of the possibility of influencing jury verdicts through legal redefinitions.

TABLE

This table shows the definition and operation of standards as they are reflected in each state's decisions on battered women's appeals from homicide convictions. Where other types of cases are discussed as authority, they are clearly identified.

LEGEND

REASONABLENESS STANDARD: The significant distinction is between objective jurisdictions and all others.
- O = completely objective;
- C = incorporates to some degree a subjective analysis;
- R/O = reasonably prudent battered woman standard in an otherwise objective state.

TEMPORAL PROXIMITY OF DANGER:
- ID = immediate;
- IN = imminent.

SHOWING NECESSARY FOR SELF-DEFENSE INSTRUCTION: The four parts of the test are separated by periods.

First, quantity of the evidence:
- SL = slight;
- SM = some;
- RD = enough to raise the possibility of a reasonable doubt;
- SB = substantial.

Second, source of evidence:
- A = any, including prosecution's case;
- D = must come from defense witnesses.

Third, scope of evidence needed on self-defense elements:
- L = evidence on each element required;
- OA = evidence on each element, plus evidence of an overt act of aggression by decedent, required;
- NL = evidence on each element not required.

Fourth, judge's power to assess credibility in giving jury self-defense instruction:
Y = judge makes credibility determination;
N = judge does not make credibility determination.
A "—" means that opinions in the jurisdiction do not discuss that part of the standard.

SHOWING NECESSARY FOR ADMISSION OF HISTORY-OF-ABUSE & OTHER-VIOLENCE EVIDENCE:
ND = not discussed, although testimony admitted;
PF = prima facie evidence of self-defense;
OA = PF plus evidence of overt act of aggression by decedent;
LOW = slight or some evidence;
CLSD = no discussion of standard aside from claim of self-defense.

SCOPE & RELEVANCE OF HISTORY-OF-ABUSE & OTHER-VIOLENCE EVIDENCE:
ST = relevant to defendant's state of mind and the claim of self-defense;
R = specifically relevant to jury's assessment of reasonableness;
T = relevant to defendant's perception of temporal proximity of danger;
IA = relevant to question whether decedent was initial aggressor;
F = relevant to assessment of proportionality of force used by defendant;
* = get jury instruction on relevance.

ADMISSIBILITY OF EXPERT TESTIMONY EVIDENCE:
H = square holding on admissibility;
S = admissible as result of passage of statute;
D = appellate opinions contain discussion of content, but not standards of admissibility, of expert testimony received in trial court;
C = opinions state that battered-woman-syndrome testimony will be admissible once appropriate conditions met (usually appropriate foundation or proffer);
O = there is information outside the opinions that the testimony is being admitted at the trial level;
"—" = no information;
E = testimony is excluded.

SHOWING NECESSARY FOR INTRODUCTION OF EXPERT TESTIMONY EVIDENCE:
ND = not discussed, although testimony admitted;

PF = prima facie evidence of self-defense;
OA = PF plus evidence of overt act of aggression by decedent;
LOW = slight or some evidence;
CLSD = no discussion of standard aside from claim of self-defense;
ESTAB = sufficient evidence of a history of abuse to "establish" that the defendant is a battered woman.

SCOPE & RELEVANCE OF EXPERT TESTIMONY EVIDENCE:
ST = relevant to defendant's state of mind and the claim of self-defense;
R = specifically relevant to jury's assessment of reasonableness;
T = relevant to defendant's perception of temporal proximity of danger;
* = get jury instruction of relevance;
B = testimony admissible to bolster defendant's credibility;
NB = not admissible for purpose of bolstering defendant's credibility;
L = relevant to question why defendant did not leave relationship;
NL = not relevant to question why defendant did not leave relationship;
U = expert can give opinion on ultimate question of reasonableness;
NU = expert cannot give opinion on ultimate question;
G = generic testimony only;
PBA = evidence of defendant's prior bad acts admissible to rebut expert testimony;
NPBA = evidence of defendant's prior bad acts not admissible to rebut expert testimony;
F = relevant to assessment of proportionality of force used be defendant;
M = admissible to rebut common myths and misperceptions about battered women.
All states except those which are "G" coded admit testimony on battered woman syndrome generally and on question whether defendant experiences syndrome, and none has ruled that battered-woman-syndrome testimony creates a separate defense.

ADDITIONAL SYMBOLS:
? = conflict exists in the appellate courts of the jurisdiction.
No entry = the appellate courts of the jurisdiction have not yet addressed the issue in the context of battered women's appeals from homicide convictions.

State	Reasonableness Standard	Temporal Proximity of Danger	Showing Necessary for Self-Defense Instruction	Decedent's History of Abuse & Other Violence				Expert Testimony on Battered Woman Syndrome		
				Showing Necessary for History-of-Abuse Evidence	Scope & Relevance of History-of-Abuse Evidence	Showing Necessary for Other Violence Evidence	Scope & Relevance of Other Violence Evidence	Admissibility	Showing Necessary for Introduction	Scope & Relevance
Ala.	O[1]	ID[2]	RD.D.L.N?[3]	ND		PF ?		C,[4] D,[5] O[6]		
Alaska	C	IN	SM.A.L.N[7]	ND				O[8]		
Ariz.	O[9]	ID		ND				–		
Ark.				ND	ST,IA			C[10]		
Cal.	O[11]	IN[12]	SB.–.L.–[13]		ST,IA,R,[14] T*[15]		ST,IA	H,[16] S[17]		ST,NU, T,F
Colo.	C[18]	IN[19]		ND				D[20]		
Conn.								O[21]		
Del.	C[22]	IN	RD.D.–.–					–[23]		
D.C.		IN		LOW		ND		C[24]		ST,R,T
Fla.	C ?	IN	–.–.OA. –[25]	LOW[26]	ST,T	OA	ST	H[27]		ST,L
Ga.	O[28]	ID		PF[29]	ST,IA	PF	ST	H[30]		ST,R,L,T, U?[31]
Haw.								–		
Idaho	O							D[32]		

Ill.	C ?	IN[33]	SM.D.–. –?[34] SL.A.NL.N	ND	ST,T*,F	ND	*	H[35]	CLSD[36]	ST,NL?[37]
Ind.	O ?	IN	SB.D. OA.Y[38]	OA[39]				O[40]	OA[41]	
Iowa	C	IN	SB.A.–.Y[42]	LOW		LOW	ST,IA	D[43]		
Kan.	R/O[44]	IN	SL.A.OA. –[45]	LOW	T*[46]			H[47]	CLSD[48]	ST,R,L,M
Ky.	C	IN	RD.D.–. Y[49]	ND	ST	ND	ST	C[50]	ND	ST
La.	O	IN	SB.–.OA. Y ?[51] SB.–.OA.N	LOW[52]	ST,IA	LOW[53]	ST,IA	S[54]	CLSD[55]	ST
Me.								H[56]		ST,M
Md.								O,[57]S[58]	CLSD	
Mass.	O ?	IN	–.–.NL.–[59]	ND				C[60]	CLSD[61]	T,L[62]
Mich.	C	IN	–.D[63].L.N	CLSD	ST,R	CLSD	ST,R,IA	O[64]		
Minn.	C	IN	RD.–.–.–[65]	ND		ND		H[66]		G[67]
Miss.	O			ND		ND		–[68]		
Mo.	R/O[69]	ID ?	RD.A.L. Y?[70] RD.D.L.Y	PF ?	ST,T*,R*	PF[71]	ST,R*,IA	S[72]	PF[73]	ST
Mont.	O							O[74]		ST,NB[75]
Neb.	O ?	IN		ND				D[76]	ND	
Nev.								–[77]		
N.H.				ND				D[78]		

State	Reasonableness Standard	Temporal Proximity of Danger	Showing Necessary for Self-Defense Instruction	Decedent's History of Abuse & Other Violence				Expert Testimony on Battered Woman Syndrome		
				Showing Necessary for History-of-Abuse Evidence	Scope & Relevance of History-of-Abuse Evidence	Showing Necessary for Other Violence Evidence	Scope & Relevance of Other Violence Evidence	Admissibility	Showing Necessary for Introduction	Scope & Relevance
N.J.	C	IN	SL.A.–.–[79]	ND				H[80]	ND	ST,R,L, B,[81] NU[82],M
N.M.	C	ID	RD.D.L.N ?[83]	LOW[84]	ST,R,T	LOW	ST	H[85]	ND	ST,T, R,M[86]
N.Y.	C	IN	SL.A.NL.N ?[87]	LOW	ST	LOW		H[88]	ND	ST, PBA,[89] NB[90]
N.C.	O ?	ID	RD.A.L.Y[91]	ND				D[92]	ND	U?[93]
N.D.	C	IN	–.–.NL.–[94]	ND				D[95]	ND	F,T
Ohio	C[96]	IN	–.–.NL.–[97]	ND				H/S[98]	CLSD, ESTAB[99]	ST,R, T*?,M
Okla.	C	IN		ND		LOW[100]		O[101]		
Or.								O[102]		
Pa.	C[103]	IN	SL.A.L. N[104]	LOW	ST,R,T, *[105]	LOW[106]	ST,R, IA,*[107]	D[108]	LOW	ST,L, M,[109]R
R.I.								O[110]		
S.C.				ND		ND		H[111]	CLSD	ST,[112] L,U?[113]
S.D.								O[114]		

Tenn.	O ?	IN	RD.D.OA. Y[115]	ND		LOW[116]	ST,IA[117]	D[118]		ST[119],L[120]
Tex.	O	ID	SM?.A.OA?. N[121]	OA[122]	ST,IA,[123] *[124]	OA[125]	ST,IA[126]	H[127]	ND	ST,L[128]
Utah	O ?[129]	ID/IN		ND				—[130]		
Vt.								O[131]		
Va.				ND	—[132]	ND	ST,R, IA[133]	O[134]		
Wash.	C[135]	IN[136]	SM.D.NL?. N[137]	ND	ST,T, F,[138]*[139]			H[140]	CLSD[141]	ST,R,T, L,[142]NP BA,[143] NB[144]
W. Va.				CLSD[145]	ST,[146]R[147]	ND	ST[148]	D[149]	ND[150]	ST,L, M*[151]
Wis.	R/O[152]		—.—.—.Y[153]	ND	—[154]	ND		D[155]	ND	ST?[156]
Wyo.			SM.—.—. Y?[157]	ND	ST[158]			E/C,[159] O[160]	CLSD,[161] ESTAB[162]	

1. *See* Collier v. State, 275 So. 2d 364, 367 (Ala. Crim. App. 1973).
2. *See id.*
3. *See id.*
4. In *Ex parte* Hill, 507 So. 2d 558 (Ala. 1987), the court denied the writ of error from the lower court opinion affirming the conviction, *see* Hill v. State, 507 So. 2d 554 (Ala. Crim. App. 1986), but adopted that court's specially concurring opinion, *see id.* at 557-58 (Bowen, J.), which argued that testimony about battered woman syndrome should be admitted when the proper predicate and foundation are established.

5. *See, e.g.*, Neelley v. State, 494 So. 2d 669, 681, 689 (Ala. Crim. App. 1985) (expert testimony on battered woman syndrome admitted at hearing on motion for new trial after imposition of death penalty for homicide of a child), *aff'd sub nom. Ex parte* Neelley, 494 So. 2d 697 (Ala. 1986), *cert. denied*, 480 U.S. 926 (1987).
6. Expert testimony has been received at a trial where the defense was insanity. *See* Information on File with the National Clearinghouse for the Defense of Battered Women, 125 South 9th Street, Philadelphia, PA 19107 [hereinafter National Clearinghouse Information].
7. *See* Paul v. State, 655 P.2d 772, 778 n.8 (Alaska Ct. App. 1982) (noting in a family homicide case not involving a battered woman defendant that "battered wife syndrome" homicides may fail to meet the standard because they "typically involve a battered wife who kills her husband in his sleep").
8. Admitted at trials which did not lead to appellate decisions. *See* National Clearinghouse Information, *supra* note 6.
9. *See* State v. Copley, 418 P.2d 579 (Ariz. 1966); State v. Korzep, 791 P.2d 1058 (Ariz. Ct. App. 1989).
10. In Thompson v. State, 813 S.W.2d 249, 251 (Ark. 1991), the court upheld the exclusion of testimony offered as a foundation for "the battered woman's syndrome defense" when trial counsel declined to tell the court whether he would call an expert to testify or make a proffer regarding the content of such testimony. The ruling, based on generally applicable precedents that require a proffer to preserve an objection to exclusion of testimony, did not suggest that battered-woman-syndrome testimony would be inadmissible if properly offered.
11. *See, e.g.*, People v. Furber, 43 Cal. Rptr. 771, 776 (Ct. App. 1965) (finding no error in denial of self-defense instruction under existing objective standard of reasonableness).
12. For a recent discussion of California cases upholding an immediacy instruction despite use of the term "imminent," and imposing narrower restrictions on temporal proximity of danger than were applied in earlier cases, see People v. Aris, 264 Cal. Rptr. 167, 173 (Ct. App. 1989) (equating "imminent" with "immediate" in an analysis specific to sleeping-man situation), *review denied*, No. 5013365, 1990 Cal. LEXIS 906 (Mar. 1, 1990). *But see* People v. Bush, 148 Cal. Rptr. 430, 436 (Ct. App. 1978) (finding error in focusing jury's attention only on immediate circumstances so that history-of-abuse evidence was not considered).
13. *See Aris*, 264 Cal. Rptr. at 173.
14. *See* People v. Yokum, 302 P.2d 406, 416 (Cal. Ct. App. 1956).
15. *See Bush*, 148 Cal. Rptr. at 436-37.
16. *See Aris*, 264 Cal. Rptr. at 180.
17. *See* Act of Oct. 10, 1991, 1991 Cal. Adv. Legis. Serv. 812 (Deering) (to be codified at CAL. EVID. CODE § 1107).
18. *See* People v. Hare, 800 P.2d 1317, 1319 (Colo. 1990).
19. *See id.*
20. *See* People v. Hare, 782 P.2d 831, 833 (Colo. Ct. App. 1989) (Dubofsky, J., dissenting) (discussing trial testimony by expert), *aff'd*, 800 P.2d 1317 (Colo. 1990).

21. Testimony received at trials which did not lead to appellate opinions. *See* National Clearinghouse Information, *supra* note 6. *See also* State v. Veal, 517 A.2d 615, 617-18 (Conn. 1986) (upholding exclusion of evidence in support of male defendant's claim of justification analogous to "battered spouse syndrome" because self-defense was not raised at trial, although whether proffered evidence included expert testimony was not discussed).
22. *See* State v. Scott, Nos. K86-09-0161, K86-09-0162, 1989 Del. Super. LEXIS 291, at *3-*5 (July 19, 1989).
23. *See id.* (permitting withdrawal of guilty plea on the ground that trial counsel was ineffective for failing to recognize that "the battered woman's defense" is encompassed by generally applicable self-defense standards; admissibility of expert testimony was, however, not discussed).
24. *See* Ibn-Tamas v. United States, 407 A.2d 626, 639 (D.C. 1979) (reversing trial court ruling that proffered expert witness testimony was not beyond the ken of jurors), *opinion after remand*, 455 A.2d 893, 896 (D.C. 1983) (holding that defendant failed to establish general acceptance in the scientific community of an expert witness's methodology).
25. *See* Hawthorne v. State, 470 So. 2d 770 (Fla. Dist. Ct. App. 1985).
26. *See* Borders v. State, 433 So. 2d 1325, 1326 (Fla. Dist. Ct. App. 1983).
27. *See* Terry v. State, 467 So. 2d 761, 764-65 (Fla. Dist. Ct. App. 1985).
28. *See* Teal v. State, 22 Ga. 75, 84 (1857) (not a battered woman's appeal).
29. *See* Chapman v. State, 367 S.E.2d 541 (Ga. 1988) (reversing conviction of battered woman defendant who shot decedent as he bathed, finding the case a confrontation situation and ruling that trial court erred in excluding evidence of history of abuse where defendant made prima facie showing that decedent was aggressor, and further noting that the expert testimony admitted at trial authorized a jury to find self-defense despite the lapse in time since decedent's last assault), *opinion after remand*, 386 S.E.2d 129 (Ga. 1989) (affirming conviction).
30. *See* Smith v. State, 277 S.E.2d 678, 683 (Ga. 1981).
31. *Compare id.* at 682-83 *with* Pugh v. State, 401 S.E.2d 270, 271-72 (Ga. 1991).
32. In State v. Griffiths, 610 P.2d 522, 524 (Idaho 1980), the court found no error in limitation of psychiatric testimony to the effects of fear and the exclusion of the expert's opinion that the defendant was in a state of fear when she shot her husband. The opinion contains no reference to battered woman syndrome.
33. Compare the broad interpretation of the statutory term "imminence" in People v. Estes, 469 N.E.2d 275, 281 (Ill. App. 1984) with the narrower particular-instant focus of People v. White, 90 Ill. App. 3d 1067, 1070-71 (1980).
34. *See* People v. Scott, 424 N.E.2d 70 (Ill. App. Ct. 1981).
35. *See* People v. Minnis, 455 N.E.2d 209 (Ill. App. Ct. 1983).
36. *See* People v. Jackson, 535 N.E.2d 1086, 1095 (Ill. App. Ct. 1989).
37. *See White*, 90 Ill. App. 3d at 1072 (upholding exclusion of expert testimony on the question whether battered women tend to remain with their mates).
38. *See* Fultz v. State, 439 N.E.2d 659, 662 (Ind. Ct. App. 1982).
39. *See id.* (finding that history of abuse is inadmissible without "appreciable evidence" of the decedent's aggression at the time of the killing).

40. *See* Allen v. State, 566 N.E.2d 1047, 1052 (Ind. Ct. App. 1991) (examining sentencing phase evidence that defendant experienced battered woman syndrome in a case where the defendant killed her brother-in-law and did not claim self-defense).
41. *See, e.g.*, *Fultz*, 439 N.E.2d at 662 (finding that, like history of abuse, expert testimony on battered woman syndrome is inadmissible without "appreciable evidence" of the decedent's aggression at the time of the killing).
42. *See* State v. Badgett, 167 N.W.2d 680 (Iowa 1969).
43. *See* State v. Nunn, 356 N.W.2d 601, 604 (Iowa Ct. App. 1984).
44. *See* State v. Meyer, No. 59,213, at *8-*9 (Kan. Ct. App. Dec. 4, 1986) (LEXIS, States library, Kan file)
45. *See* State v. Stewart, 763 P.2d 572, 579 (Kan. 1988) (finding that a defendant in a sleeping-man case who failed to establish imminence was not entitled to a self-defense instruction).
46. *See* State v. Hundley, 693 P.2d 475, 477 (Kan. 1985).
47. *See* State v. Hodges, 716 P.2d 563 (Kan. 1986).
48. *See* State v. Dunn, 758 P.2d 718, 725 (Kan. 1988) (upholding exclusion of expert testimony on duress defense to felony-murder charge, and limiting the holding of *Hodges* to cases "[w]here self-defense has been asserted by a woman who has committed a crime against her batterer").
49. *See* Richie v. Commonwealth, 242 S.W.2d 1000, 1004 (Ky. 1951).
50. In Dyer v. Commonwealth, No. 90-SC-248-MR, 1991 Ky. LEXIS 150, at *19-*21 (Sept. 26, 1991), the Kentucky Supreme Court appears to have ruled that battered-woman-syndrome testimony describes a mental condition and can be offered only by a psychiatrist or clinical psychologist trained to make such diagnoses. Although *Dyer* involved an appeal from a conviction for child sex abuse, the Kentucky Supreme Court overruled Commonwealth v. Craig, 783 S.W.2d 387 (Ky. 1990), which held that battered-woman-syndrome testimony did not describe a mental condition, and that an expert could be properly qualified without being a psychiatrist or a clinical psychologist, and which in turn overruled Commonwealth v. Rose, 725 S.W.2d 588 (Ky.) (limiting the testimony of a registered nurse to a general description of the syndrome), *cert. denied*, 484 U.S. 838 (1987).
51. *Compare* State v. Burton, 464 So. 2d 421 (La. Ct. App.), *writ denied*, 468 So. 2d 570 (La. 1985) *with* State v. Edwards, 420 So. 2d 663 (La. 1982) *and* State v. Gibson, 529 So. 2d 1347 (La. Ct. App. 1988).
52. *See* LA. CODE EVID. ANN. art. 404 (West 1989) (removing family homicides involving a claim of self-defense from common-law self-defense standard, which requires proof of an overt act of aggression before evidence relating to the character of the accused is admitted).
53. *See id.*
54. *Compare id.* art. 404(A)(2) (providing further that expert opinion is admissible not only without overt-act requirement, but without common-law requirement of a claim of insanity) *with Edwards*, 420 So. 2d 663. *See Burton*, 464 So. 2d 421; State v. Necaise, 466 So. 2d 660 (La. Ct. App. 1985).
55. *See* LA. CODE EVID. ANN. art. 404.
56. *See* State v. Anaya, 438 A.2d 892, 894 (Me. 1981).

57. In Boyd v. State, 581 A.2d 1, 8 (Md. 1990), a case not involving a self-defense claim, expert testimony was proferred but not introduced by defense counsel. Battered-woman-syndrome testimony has been received in a child custody case. *See* National Clearinghouse Information, *supra* note 6.
58. *See* MD. HEALTH-GEN. CODE ANN. § 10-916(2) (1991).
59. *See* Commonwealth v. Shaffer, 326 N.E.2d 880, 883-84 (Mass. 1975).
60. *See* Commonwealth v. Moore, 514 N.E.2d 1342, 1344-45 (Mass. App. Ct. 1987) (assuming, without deciding, that expert testimony regarding battered woman syndrome is admissible; the court found no error in exclusion of such evidence from the trial in which defendant did not claim self-defense).
61. *See id.*
62. *See id.*
63. *See* People v. Giacalone, 217 N.W. 758, 759-60 (Mich. 1928) (noting rule requiring evidence from defendant on each element of the claim, including proof of an overt act of aggression by the decedent).
64. Expert testimony has been received at trials which did not lead to appellate opinions. *See* National Clearinghouse Information, *supra* note 6.
65. *See* State v. Hennum, 441 N.W.2d 793, 799 (Minn. 1989).
66. *See id.* (limiting expert testimony to a general description of battered woman syndrome and the characteristics present in an individual who experiences it; the expert is not allowed to testify that a particular defendant actually experiences the syndrome).
67. *See id.*
68. *See* May v. State, 460 So. 2d 778, 785 (Miss. 1984) (containing a general discussion of battered woman syndrome but no suggestion that expert testimony was received at trial).
69. *See* MO. ANN. STAT. § 563.033.1 (Vernon Supp. 1991). Section 563.033, authorizing admission of the testimony, has been read to create a separate reasonableness standard when the defendant is a battered woman. *See* State v. Williams, 787 S.W.2d 308, 312-13 (Mo. Ct. App. 1990) (construing 1988 version of the statute, which provided for admission of "battered spouse testimony," as creating a separate "reasonable battered woman" standard of reasonableness).
70. *Compare Williams*, 787 S.W.2d at 315 (reading MO. REV. STAT. § 563.033 (1988) (authorizing admission of battered-spouse-syndrome testimony to reduce the requirement of a showing on each element when the defendant is a battered woman) *with* State v. Martin, 666 S.W.2d 895 (Mo. Ct. App. 1984), *later proceeding*, 712 S.W.2d 14 (Mo. Ct. App. 1986) (affirming denial of post-conviction relief and holding that the determination of the sufficiency of the credible evidence submitted in support of the self-defense justification is for the trial court).
71. For recent discussion, not in a battered-woman context, see State v. Waller, No. 73488, 1991 Mo. LEXIS 98, at *10 (Sept. 10, 1991) (enlarging the scope of admissible evidence of history of other violence to include, in addition to reputation testimony, specific acts, and requiring as a precondition to admission of such evidence that "[o]ther competent evidence must have raised the question of self-defense").

72. *See* MO. ANN. STAT. § 563.033.1 (Vernon Supp. 1991) (providing for admission of "battered person testimony" on the question of justification).
73. *See id.* § 563.031.4 (providing that the defendant has the burden of injecting the issue of justification before syndrome testimony is admissible). The state's appellate courts have not yet ruled whether "injection" is equivalent to the requirement for history of other violence announced in *Waller*, 1991 Mo. LEXIS 98, or whether it means the more liberal standard applied in the context of the showing necessary to get a self-defense instruction, as discussed in State v. Goforth, 721 S.W.2d 756, 758 (Mo. Ct. App. 1986).
74. *See, e.g.*, State v. Redcrow, 790 P.2d 449, 451, 454 (Mont. 1990) (holding that a post-verdict diagnosis of battered woman syndrome was not new or material evidence warranting a new trial on charge of killing another woman); State v. Dannels, 734 P.2d 188, 192-93 (Mont. 1987) (finding no error in trial court's refusal to fund battered-woman-syndrome expert, since defense proffer related not to state of mind of defendant at time of homicide but to buttressing credibility of defendant's explanation of lies to investigating officers; court found no necessity, on facts before it, to reach question whether the syndrome "should be allowed as a defense to a homicide charge").
75. *See Dannels*, 734 P.2d at 193.
76. *See* State v. Jackson, 435 N.W.2d 893, 895 (Neb. 1989) (finding that the issue of appropriateness of battered-woman-syndrome evidence was not before the court where such evidence had been presented at trial in the manner desired by the defendant, and no party raised any questions of the appropriateness of such evidence on appeal).
77. *See* Larson v. State, 766 P.2d 261, 262-63 (Nev. 1988) (declining to rule on the availability of a "battered wife defense," the court found counsel ineffective where he declined plea offers because of his desire for national acclaim from his successful presentation of such a defense).
78. *See, e.g.*, State v. Briand, 547 A.2d 235, 240 (N.H. 1988) (ruling that trial court has inherent authority to order psychiatric evaluation of a defendant who might offer expert testimony on battered woman's syndrome at trial); State v. Baker, 424 A.2d 171, 174 (N.H. 1980) (ruling that there was no error in permitting the prosecution's use of battered-woman-syndrome testimony to rebut insanity defense raised by man accused of assaulting his wife).
79. *See* State v. Kelly, 478 A.2d 364 (N.J. 1984).
80. *See id.* at 365 (ruling that battered woman syndrome is an appropriate subject for expert testimony).
81. *See* State v. Frost, 577 A.2d 1282, 1287 (N.J. Super. Ct. App. Div. 1990) (testimony admissible to bolster credibility of battered women when they testify either as complainants or defendants).
82. *See* State v. McClain, 591 A.2d 652, 657 (N.J. Super. Ct. App. Div. 1991) (holding that expert testimony is relevant only to honesty of defendant's belief, not to its objective reasonableness).
83. *See* State v. Gallegos, 719 P.2d 1268, 1270 (N.M. Ct. App. 1986) (reversing conviction despite rule requiring evidence from the defendant on each element of the claim, including proof of an overt act of aggression by the decedent).
84. *See* State v. Branchal, 684 P.2d 1163, 1168 (N.M. 1984) (holding that "even slight evidence" of self-defense is sufficient to require admission of evidence of past abuse).

85. *See Gallegos*, 719 P.2d at 1274 (ruling that where a trial court finds expert testimony to be admissible it is error to exclude use of the term "battered woman syndrome").
86. *See* State v. Vigil, 794 P.2d 728, 732 (N.M. 1990) (concluding that although expert testimony may be necessary to rebut myths and misconceptions of jurors, counsel is not *per se* ineffective for failing to introduce such testimony).
87. *Compare* People v. Stamen, 558 N.Y.S.2d 175, 177 (App. Div. 1990) (holding not error to refuse to instruct on self-defense justification where element of imminence was not established by evidence showing that defendant and codefendants staged a robbery, during which one of the codefendants killed the decedent), *appeal denied*, 568 N.E.2d 662 (N.Y. 1991) *with* People v. Emick, 481 N.Y.S.2d 552, 563 (App. Div. 1984) (holding that trial court erred in mentioning duty to retreat in its self-defense instruction in a case in which defendant was in her own dwelling and shot her husband while he was asleep).
88. Although there is no square holding from the highest appellate court on admissibility in New York, allowance of battered-woman-syndrome testimony is discussed with approval in a general review of the "familiar rules" that permit expert testimony on the psychological and behavioral effects of abuse in a familial setting. *See In re* Nicole V., 518 N.E.2d 914, 917 (N.Y. 1987). Several appellate opinions discuss admission of testimony at trials. *See, e.g.*, People v. Ciervo, 506 N.Y.S.2d 462, 464 (App. Div. 1986) (noting that evidence of husband's prior acts is admissible only if the jury is instructed to its limited purposes, which include establishing defendant's motive and credibility, and determining whether defendant is a victim of "battered woman's syndrome"); *Emick*, 481 N.Y.S.2d at 561 (approving trial court's admission of testimony regarding "the availability of alternatives to the defendant prior to the shooting" because the evidence is "relevant and probative as to the defendant's state of mind").
89. *See Ciervo*, 506 N.Y.S.2d at 464.
90. *See Nicole V.*, 518 N.E.2d at 917.
91. *See* State v. Norman, 378 S.E.2d 8 (N.C. 1989).
92. *See, e.g., id.* at 16 (holding that expert testimony received at trial did not require expansion of the state's "law of self-defense beyond the limits of immediacy and necessity" in a sleeping-man case).
93. *See* State v. Clark, 377 S.E.2d 54, 62-63 (N.C. 1989) (holding that battered-woman-syndrome expert testimony is generally admissible on the ultimate issue to be decided by the jury, but was not admissible on the ultimate issue in an insanity case when the expert opinion was based on speculation and conjecture).
94. *See* State v. Leidholm, 334 N.W.2d 811, 818 (N.D. 1983).
95. *See id.* at 820 (holding battered-woman-syndrome expert testimony is necessary to aid the jury in "deciding the issue of the *existence* and *reasonableness* of the accused's belief that force was necessary to protect herself from imminent harm").
96. *See* State v. Koss, 551 N.E.2d 970, 973 (Ohio 1990); Nelson v. State, 181 N.E. 448, 449 (Ohio Ct. App. 1932) (not a battered woman's case).
97. *See* State v. Manning, No. 90CA004871, 1991 Ohio App. LEXIS 2111, at *20 (May 17, 1991).

98. In *Koss*, 551 N.E.2d at 974, the Ohio Supreme Court overruled its nine-year-old ruling that battered-woman-syndrome testimony was inadmissible, and noted the pendency of legislation authorizing its admission. That legislation passed both houses in July 1990 and was signed by the governor in August of that year, five months after the *Koss* decision. *See* OHIO REV. CODE ANN. § 2901.06 (Anderson Supp. 1990).
99. *See* OHIO REV. CODE ANN. § 2901.06(B) (Anderson 1987 & Supp. 1990) (requiring a claim of justification). *Koss* requires, in addition, that the defendant offer evidence to establish that she is a battered woman. *See Koss*, 551 N.E.2d at 974; *see also* State v. Rice, No. 58643, 1991 Ohio App. LEXIS 2731, at *32 (June 6, 1991) (interpreting *Koss* requirement to mean that defendant must testify to a "cycle of abuse" to establish herself as a battered woman and will not establish herself as one by testifying to one prior battering); State v. Poling, No. 88-T-4112, 1991 Ohio App. LEXIS 2294, at *15 (May 17, 1991) (noting that defendant must present "sufficient evidence for the jury to find that she was a battered woman" before expert testimony is admissible).
100. *See* French v. State, 501 P.2d 853, 859 (Okla. Crim. App. 1972) (holding that evidence of the violent character or reputation of the decedent is admissible once defendant introduces competent evidence tending to show that she acted in self-defense).
101. *See* McDonald v. State, 674 P.2d 1154, 1155 (Okla. Crim. App. 1984) (holding that a trial judge, sitting without a jury, is not required to credit battered-woman-syndrome testimony that was admitted on a duress defense to felony murder).
102. Testimony has been received at the trial level in a case that did not lead to an appellate opinion. *See* National Clearinghouse Information, *supra* note 6. *See* State v. Moore, 695 P.2d 985, 987-88 (Or. Ct. App. 1985) (finding no error in exclusion of battered-woman-syndrome testimony where expert was not qualified). The concurring opinion in *Moore* discusses the purpose of admitting testimony on the battered woman syndrome from properly qualified experts. *See id.* at 988-90 (Newman, J., concurring).
103. *See* Commonwealth v. Dillon, No. 123, 1991 Pa. LEXIS 234 (Oct. 31, 1991).
104. *See* Commonwealth v. McFadden, 587 A.2d 740, 742-43 (Pa. Super. Ct. 1991) (discussing the appropriateness of a self-defense charge whenever "there is any evidence from whatever source that will support these three [self-defense] elements," in the context of a battered woman's appeal from an assault conviction).
105. In Commonwealth v. Stonehouse, 555 A.2d 772, 781-82, 785 (Pa. 1989), a majority found trial counsel ineffective for failing to request an instruction on the relevance of the history of abuse to the reasonableness of defendant's fear of imminent danger.
106. *See* Commonwealth v. Grove, 526 A.2d 369, 372 (Pa. Super. Ct. 1987) (requiring a claim of self-defense and some evidence to support it, and finding no error in exclusion of history-of-other-violence evidence in a sleeping-man case).
107. *See Dillon*, 1991 Pa. LEXIS 234, at *23-*26 (Cappy, J., concurring).
108. *See id.*
109. *See id.*
110. Expert testimony has been admitted at a trial that did not lead to an appellate opinion. *See* National Clearinghouse Information, *supra* note 6.
111. In State v. Hill, 339 S.E.2d 121, 122 (S.C. 1986), the South Carolina Supreme Court held that expert testimony is relevant to a claim of self-defense and is admissible when the expert is properly qualified.

112. *See* State v. Wilkins, 407 S.E.2d 670, 672-73 (S.C. Ct. App. 1991) (holding that the expert may offer an opinion on the "ultimate issue" of the defendant's state of mind at the time, with no discussion of the propriety of an opinion on the ultimate question of the reasonableness of the defendant's state of mind).
113. *See id.* at 677.
114. Expert testimony was received in the prosecution's case, not in a state court but at a trial in a federal district court in South Dakota. *See* Arcoren v. United States, 929 F.2d 1235, 1240-41 (8th Cir.) (upholding use of battered-woman-syndrome testimony to explain recantation of a rape victim), *cert. denied*, 60 U.S.L.W. 3292 (U.S. Oct. 15, 1991) (No. 91-5474).
115. *See* State v. Blaylock, C.C.A. No. 152, 1988 WL 99958, at *8-*9 (Tenn. Crim. App. Sept. 30, 1988); State v. Leaphart, 673 S.W.2d 870 (Tenn. Crim. App. 1983).
116. *See* State v. Aucoin, 756 S.W.2d 705, 711 (Tenn. Crim. App. 1988) (holding that in the defense case in chief, a defendant, but not witnesses, may offer evidence of decedent's reputation for other violence upon a claim of self-defense).
117. For discussion of admissibility of history of other violence to establish defendant's state of mind and to resolve the question of whether the victim was the initial aggressor, see State v. Furlough, 797 S.W.2d 631, 648-49 (Tenn. Crim. App. 1990).
118. *See id.* at 648-49.
119. *See* State v. Zimmerman, No. 01-C-01-9104-CC-00110, 1991 Tenn. Crim. App. LEXIS 786, at *2, *16-*18 (Sept. 24, 1991) (finding trial counsel ineffective for many reasons, including his failure to offer battered-woman-syndrome expert testimony on the defendant's state of mind); *see also Furlough*, 797 S.W.2d at 651 (expert testimony is admissible on the question of the defendant's fear and perception of imminence of danger).
120. *See* State v. Leaphart, 673 S.W.2d 870, 872 (Tenn. Crim. App. 1983) (reviewing, without discussing admissibility, expert testimony on question of why battered women do not leave abusive relationships).
121. *See* Pierini v. State, 804 S.W.2d 258, 260 (Tex. Crim. App. 1991) (stating that "the truth of the accused's testimony is not at issue" when the court assesses the sufficiency of the evidence to get a self-defense instruction).
122. *See* Thompson v. State, 659 S.W.2d 649, 653 (Tex. Crim. App. 1983) (requiring, for both history of abuse and history of other violence, introduction of evidence of "some act of aggression on the part of the deceased which is sufficient to raise an issue [of self-defense]").
123. *See* Fielder v. State, 756 S.W.2d 309, 319 (Tex. Crim. App. 1988) (discussing a century-old authority for admission of history-of-abuse evidence to show that the decedent was the initial aggressor).
124. *See* Valentine v. State, 587 S.W.2d 399, 401-02 (Tex. Crim. App. 1979).
125. *See Thompson*, 756 S.W.2d at 653.
126. *See* Harris v. State, 722 S.W.2d 436, 438 (Tex. Ct. App. 1986).
127. *See Fielder*, 756 S.W.2d at 315-21 (reversing a conviction where expert testimony was limited by trial judge and discussing the purpose and proper scope of battered-woman-syndrome testimony).
128. *See* Pierini v. State, 804 S.W.2d 258, 259 (Tex. Ct. App. 1991).

129. *See* State v. Strieby, 790 P.2d 98 (Utah Ct. App.), *cert. denied*, 795 P.2d 1138 (Utah 1990).
130. The appellate courts have not yet confronted directly the admissibility of expert testimony. *See, e.g.*, *Strieby*, 790 P.2d at 101 (reversing conviction on sufficiency grounds in opinion reviewing medical testimony offered to corroborate history of abuse, but containing no discussion of battered-woman-syndrome testimony); Marchant v. Marchant, 743 P.2d 199, 204 & n.3 (Utah Ct. App. 1987) (reversing custody and alimony award, partly on ground of trial court's bias against battered woman plaintiff, and discussing the general phenomenon of family violence, but making no reference to expert testimony).
131. Expert testimony has been admitted in at least one case that has not resulted in an appellate opinion. *See* National Clearinghouse Information, *supra* note 6. *See also* Blair v. Blair, 575 A.2d 191, 193 (Vt. 1990) (reversing property distribution partly on ground that trial court participated in popular myths and misconceptions about battered women, and citing with approval opinions from other jurisdictions holding battered-woman-syndrome testimony admissible in criminal trials).
132. *See* Yarborough v. Commonwealth, 234 S.E.2d 286, 290-92 (Va. 1977) (general discussion on appeal from bench trial of relevance of history of abuse to a self-defense claim).
133. For a recent discussion and review of authorities, see Edwards v. Commonwealth, 390 S.E.2d 204, 206 (Va. Ct. App. 1990) (reversing conviction of a male appellant because trial court excluded history-of-other-violence evidence, and holding that "[w]here the defendant claims self defense, evidence of prior acts of violence by the victim is relevant as bearing on the reasonable apprehension which the defendant may have experienced and on the likelihood of the victim's aggressive behavior as claimed by the defendant").
134. Expert testimony has been admitted at trials that did not lead to appellate opinions. *See* National Clearinghouse Information, *supra* note 6. *See also* Wilmoth v. Commonwealth, 390 S.E.2d 514, 515 (Va. Ct. App. 1990) (finding no error in denial of motion for continuance based on pretrial publicity that concentrated on "the expected use of the 'battered wife syndrome' as a defense").
135. *See* State v. Walker, 700 P.2d 1168, 1171 (Wash. Ct. App. 1985) (an assault case in which the court noted that, even under a "subjective" standard, appellant's evidence at trial "falls woefully short of establishing an issue of justifiable self-defense"); *see also* State v. Allery, 682 P.2d 312, 314 (Wash. 1984) (applying to a battered woman's homicide case the analysis of State v. Wanrow, 559 P.2d 548 (1977)).
136. *See* State v. Crigler, 598 P.2d 739, 741 (Wash. Ct. App. 1979) (applying to a battered woman's homicide case the holding of *Wanrow*, that an instruction limiting the jury's attention to the immediate circumstances of a killing is reversible error).
137. *See Walker*, 700 P.2d at 1171-73 (holding that the defendant bears the initial burden of producing evidence showing self-defense and that there must be evidence of danger prior to use of force).
138. *See* State v. Bailey, 591 P.2d 1212, 1214 (Wash. Ct. App. 1979) (applying the rule of *Wanrow*, and reversing a battered woman's assault conviction where the trial court failed to instruct the jury on the relevance of the history of abuse to the degree of force employed by the defendant).
139. *See Allery*, 682 P.2d at 315 (finding that the jury should have been instructed to consider the self-defense issue from the perspective of a defendant familiar with her husband's history of violence).
140. *See id.* at 316.

141. *See* State v. Hanson, 793 P.2d 1001, 1002-03 (Wash. Ct. App. 1990) (upholding exclusion of expert testimony where claim was accident rather than self-defense).
142. For a discussion of general scope and relevance, see *Allery*, 682 P.2d at 315-16. The *Allery* court found that expert testimony would help explain why a battered woman would not leave her mate or inform police or friends, and would bear on her "perceptions and behavior at the time of killing." *Id.*
143. *See* State v. Kelly, 685 P.2d 564, 569-71 (Wash. 1984) (holding that expert testimony on battered woman syndrome is not character testimony and therefore not subject to rebuttal by evidence of defendant's character).
144. *See Hanson*, 793 P.2d at 1003 (noting that expert testimony is not admissible for general bolstering purposes).
145. *See* State v. Dozier, 255 S.E.2d 552 (W. Va. 1979).
146. *See id.* at 555 (holding that in a self-defense case a defendant is entitled "to elicit testimony about the prior physical beatings she received in order that the jury may fully evaluate and consider the defendant's mental state at the time of the commission of the offense").
147. *See* State v. Steele, 359 S.E.2d 558, 564 (W. Va. 1987) (finding history of abuse relevant "to the reasonableness of the defendant's belief that the deceased intended to inflict serious bodily injury or death and, as a consequence, the defendant was justified in the killing").
148. *See id.* at 565 (noting that where self-defense is relied upon, evidence of the victim's history of prior violence is relevant to prove the character of the deceased as a dangerous man; upholding the trial court's exclusion in this case because the defendant had no knowledge of this prior violence).
149. *See id.* at 563-65 (discussing generally, with a review of authorities, admissibility and purpose of expert testimony); State v. Duell, 332 S.E.2d 246, 249 (W. Va. 1985) (noting that battered-woman-syndrome testimony was admitted at the trial level to support a claim of insanity); *see also In re* Betty J.W., 371 S.E.2d 326 (W. Va. 1988) (characterizing *Steele* and *Duell* as "recognizing" the battered woman syndrome).
150. Although the showing necessary has not been discussed in either the self-defense or the insanity contexts, the analysis of the relevance of history of abuse in State v. Lambert, 312 S.E.2d 31, 34 (W. Va. 1984) (involving a welfare fraud prosecution where the battered woman's defense was duress), suggests that expert testimony will not be limited to self-defense cases: "Not only are defendants entitled to present evidence to support such theories as the battered spouse syndrome, which go to negate criminal intent, they are also entitled to receive proper instructions on those theories." *Id.* at 35.
151. *See Steele*, 359 S.E.2d at 564 (stating that the testimony is relevant in showing the woman's loss of "the capability to objectively determine the degree of danger" and explaining the "dependency that occurs whereby the abused woman is unable to free herself from her situation or report the abuse to the authorities").
152. The Supreme Court of Wisconsin has considered the reasonableness standard of the "ordinary person who is a battered spouse" only in the context of reduction of murder to heat-of-passion manslaughter. *See* State v. Felton, 329 N.W.2d 161, 173 (Wis. 1983); *see also* State v. Hoyt, 128 N.W.2d 645, 648-49 (Wis. 1964) (analyzing the relationship of the cumulative effect of a history of abuse to provocation and heat-of-passion manslaughter); *id.* at 654-55 (Wilkie, J., concurring) (analyzing the relationship of an objective reasonableness standard to family violence homicides).

153. *See generally* State v. Landis, No. 86-0892-CR, at *4-*5 (Wis. Ct. App. Mar. 11, 1987) (LEXIS, States library, Wisc file) (holding that there was no error in refusal of self-defense instruction, even under standard which requires evaluation of the evidence in the light most favorable to the defendant, when defendant produces insufficient credible facts to justify the submission of her self-defense claim to the jury).
154. Not discussed in context of battered women's self-defense claims; however, *Felton*, 329 N.W.2d 161, and *Hoyt*, 128 N.W.2d 645, address the relevance of history of abuse to heat-of-passion manslaughter. *See Felton*, 329 N.W.2d at 172 ("[T]he question is how an ordinary person faced with similar provocation would react. The provocation can consist . . . of a long history of abuse."); *Hoyt*, 128 N.W.2d at 648-49 (stating that along with a history of abuse, "the public humiliation of [the defendant] within the previous hour would have a cumulative effect upon any ordinary person," reasonably magnifying the provocation to shoot the abusive decedent).
155. *See Felton*, 329 N.W.2d at 165 (discussing expert testimony received at trial). *See generally Landis*, at *6 (affirming, on the specific facts involved in the trial below, the trial court's decision to limit expert testimony to general characteristics of battered women).
156. *See generally Landis*, at *6 (refusing to admit specific testimony as to whether defendant fell into battered woman category since the expert had limited contact with the defendant, had not diagnosed her, and had not been present when the defendant testified at trial).
157. The general rule is that any instruction must be supported by "competent evidence." *See* Griffin v. State, 749 P.2d 246, 256 (Wyo. 1988) (upholding trial court's refusal of defendant's proposed instruction on the justification for arming oneself in reasonable anticipation of an attack).
158. *See* State v. Burhle, 627 P.2d 1374, 1380 & n.5 (Wyo. 1981) (noting that history of violence is generally admissible in self-defense cases and citing, inter alia, Mortimore v. State, 161 P. 766, 772 (Wyo. 1916) (holding that evidence of prior violent acts is admissible if known to the defendant and "to show the defendant's knowledge of the character of the deceased for violence and brutality")).
159. *See Burhle*, 627 P.2d at 1377 (upholding exclusion of expert testimony where, because research in battered woman syndrome was "in its infancy," counsel failed to demonstrate that the state of the art would permit a reasonable expert opinion; but noting specifically that "[t]his is not to deny a battered woman syndrome and all its ramifications").
160. Expert testimony has been admitted at trials that did not lead to appellate opinions. *See* National Clearinghouse Information, *supra* note 6.
161. When squarely presented with the question of admissibility of expert testimony, once a proper foundation for scientific reliability has been established, it is likely that the Wyoming Supreme Court will require a claim of self-defense. *See, e.g.*, Jahnke v. State, 682 P.2d 991, 1007-08 (Wyo. 1984) (upholding exclusion of battered-child-syndrome evidence in part because of counsel's failure to establish its reliability and in part because other evidence failed to show that danger was imminent and was, therefore, insufficient to establish a claim of self-defense).
162. The Wyoming Supreme Court may, when confronted directly with the issue, require that a defendant establish herself as a battered woman by extrinsic credible testimony. *See, e.g.*, Griffin v. State, 749 P.2d 246, 248-49 (Wyo. 1988) (noting in the context of evidence of a mutual history of abuse that "[a]ppellant hardly qualifies for what the literature describes as a battered wife").

APPENDIX I

METHODOLOGY - IDENTIFICATION AND ANALYSIS OF OPINIONS

My purpose was to test two assumptions that dominate the current legal literature on the homicide trials of battered women who assert self-defense: (1) that most battered women who kill do so in nonconfrontational situations; and (2) that existing self-defense jurisprudence is too narrowly defined to accommodate the claims of these defendants. In the literature, both assumptions purport to be derived from reviews of selected opinion issued on battered women's appeals from convictions; but no author appeared to have conducted a complete and systematic analysis of all of the relevant opinions. I decided to conduct such an analysis.

A. *Identification of the Relevant Opinions*

I read each case cited by authors who, on the basis of the assumptions discussed above, proposed redefinition of self-defense jurisprudence. In addition, I conducted an exhaustive survey of other legal literature—law review articles, comments, and notes, as well as books, treatises, practice manuals, periodicals, and newsletters—that addressed issues presented by the homicide trials of battered women, and read each case cited by those authors. Finally, I conducted an independent search—using both traditional methods and Lexis and Westlaw—for cases that fit the definition set forth in the Article *supra* notes 45-49 and accompanying text and that raised trial errors on appeal.

Those searches, conducted between June 1989 and November 1991, led to the retrieval of over 400 opinions issued between 1902 and 1991. I excluded from my analysis several categories of cases: those in which the factual discussion did not include a history of abuse of the defendant by the decedent; those in which the defendant was not a woman; those in which the defendant and the decedent were not involved in an intimate heterosexual relationship; those in which the charge against the defendant was other than homicide; those in which no self-defense claim was raised; those that did not address trial or pre-trial errors; and trial-level opinions. Two hundred seventy opinions survived that exclusion process. Those opinions represented 223 incidents.

Most of these 223 cases had been tried in the courts of forty-five states and of the District of Columbia. At the time of the close of the search, there were no appellate opinions that fit the definition from Connecticut, Hawaii, Rhode Island, South Dakota, or Vermont. Included in the base were federal opinions which arose both from cases originally tried in federal district court and from habeas corpus petitions or direct appeals challenging state court convictions.

B. *Analysis of the Opinions*

The identified cases were coded and entered in Folio VIEWS v2.0 (Folio Corporation 1990), an information management computer program. Each entry, or "Folio," represented only one incident. Cases involving multiple opinions (sometimes resulting from successive appeals from the same conviction, other times resulting from appeals after reversals and subsequent convictions after new trials) contained sub-entries for those opinions. The opinions were coded by state, year of decision, and level of appellate tribunal.

1. Analysis of Incident Facts

A single entry for each incident enabled me to avoid overcounting the homicide convictions which led to more than one appellate opinion. Folio VIEWS is designed to count each entry as only one match, even if a code or search term utilized in a query occurs more than once in the document. The factual information entered was that discussed in each opinion.

The factual circumstances of the homicides were entered with both codes and search terms. For example, each case was coded as "Y" (confrontation), "N" (nonconfrontation), or "Q" (resolution of the question on appeal did not involve discussion of the incident facts). The definitions of these terms are set forth in the Article *supra* notes 34-43 and accompanying text. Their application to the analyzed cases is described in the Article *supra* notes 50-53 and accompanying text. Descriptive search terms were inserted in the coded cases, so that, for instance, within the "Y" category I could retrieve cases where the defendants' facts were controverted at trial, or within the "N" category I could retrieve cases in the subcategories of sleeping-man, contract-killing, and defendant-as-initial-aggressor.

The information entered for the factual analysis also included a summary of the circumstances of the homicide, a review of the history of abuse, the location of the incident, the weapons used by the defendant and by the decedent (if any), evidence of a history of other violence directed against third persons by the decedent, the introduction of expert testimony (which, when offered, was usually in the form of battered-woman-syndrome evidence in the cases tried after 1977), and any evidence of prior bad acts of the defendant.

2. Analysis of Definitions and Applications of Legal Principles

The legal analysis of the opinions was entered, similarly, with a combination of codes and descriptive search terms. Each case was coded, according to the final disposition of the last opinions as affirmed, reversed, or other disposition. To the extent discussed in the opinions, each was also coded for the applicable standard of reasonableness (for purposes of analysis, the coding identified four standards: objective; subjective; combinations objective and subjective; and reasonably prudent battered woman), the definition of temporal proximity of danger (immediate or imminent), and the showing necessary requirement for entitlement to a self-defense instruction. Search terms were used to identify opinions which discussed the remaining legal questions analyzed: the substantive law issues of duty to retreat and proportionality of force; the evidentiary issues of admissibility of history of abuse, history of other violence, and expert testimony on the effects of a history of abuse, and the related question of instructions on the relevance of such evidence. Similarly, search terms were used to identify the "ordinary" issues resolved in many of the appeals, including admissibility of a defendant's confession, sufficiency of the evidence, evidentiary issues not involving social context, ineffective assistance of counsel, prosecutorial misconduct, pretrial publicity, presumptions, waivers, and miscellaneous jury instruction issues.

APPENDIX II

METHODOLOGY - RETRIEVAL OF INFORMATION AND GENERATION OF COMPUTER "MANUSCRIPTS"

Folio VIEWS v2.0 permits retrieval of individual codes and search terms and combinations thereof. The method of retrieval is a "Query" for the information entered in a Folio. Each query results in a "View." The queries may be inclusive as well as exclusive. I can, for instance, retrieve all confrontation cases that were reversed because of an improper instruction on duty to retreat, or alternatively, all confrontation cases that were reversed on that ground in which the incident did not occur in the defendant's home. When I design a query, the program displays the number of folios with each characteristic as well as the number of folios with the specified combinations of characteristics. It displays also the total number of cases in the program. When I execute a query, the program creates a view, which contains each of the folios that meet the query's definition. It is possible to save views and make them a permanent part of the program. Within permanent views, the design of a query displays the number of folios with the characteristics identified as well as the total number of folios in the permanent category.

The views created within the program are the "manuscripts" to which reference is made in the Article. The manuscripts do not represent the limits of the combinations of factors that can be evaluated with the aid of the program. Rather, they are those that contain general information or those on which certain conclusions specifically rely, and they are described below in the order in which they are cited in the Article.

A. *Mainfile*

"Mainfile" is the information base that contains all of the information entered about the analyzed opinions. A focussed view produces a list containing the name, citation, year of decision, level of appellate tribunal and disposition on appeal for each case. In the case of the folios containing more than one opinion, the most recent opinion is listed.

B. *Confrontation/Nonconfrontation*

"Confrontation/Nonconfrontation" is a list containing the name, citation, year of decision, level of appellate tribunal and disposition on appeal for each case, together with the coding "Y," "N," or "Q," as those codes are defined *supra* Appendix I.B.1.

1. Confrontation

"Confrontation" is a view generated by a query for "Y" within Mainfile. When the query is designed, the program displays both the number of confrontation cases and the total number of cases in Mainfile. This view contains a summary of each opinion in the category. A focussed view of Confrontation produces a list containing the name, citation, year of decision, level of appellate tribunal, and disposition on appeal for each case.

2. Nonconfrontation

"Nonconfrontation" is a view generated by a query for "N" within Mainfile. When the query is designed, the program displays both the number on nonconfrontation cases and the total number of cases in Mainfile. This view contains a summary of each opinion in the category. A focussed view of Nonconfrontation produces a list containing the name, citation, year of decision, level of appellate tribunal and disposition on appeal for each case. Within Nonconfrontation, queries for sleeping-man, contract-killing, and defendant-as-initial-aggressor cases produce both a display of the numbers in each category and a summary of each opinion. A focussed view of each of these Nonconfrontation subcategories produces a list containing the name, citation, year of decision, level of appellate tribunal, and disposition on appeal for each case.

3. Question

"Question" is a view generated by a query for "Q" within Mainfile. When the query is designed, the program displays both the number of cases whose opinions do not include a discussion of the incident facts and the total number of cases in Mainfile. This view contains a summary of each opinion in the category. A focussed view of Question produces a list containing the name, citation, year of decision, level of appellate tribunal, and disposition on appeal for each case.

C. *Jury/Bench*

"Jury/Bench," the breakdown between jury trials and cases tried to a judge sitting without a jury, is a view generated by the queries for jury ("^N bench") and for "bench" within Mainfile. When designed, the query displays the number of each in relation to the total Mainfile. When executed, the query generates a view that contains a summary of each opinion in either category. A focussed view of either produces a list containing the name, citation, year of decision, level of appellate tribunal, and disposition on appeal for each case.

D. *No Self-Defense Instruction*

"No Self-Defense Instruction" is the view of all appeals from jury convictions in which the appellant complained that the jury received no instruction on the law of self-defense. A comparison of the numbers of these complaints, between objective jurisdictions and those that include some subjective component in the standard of reasonableness, is generated by a query for "no self-defense instruction" in combination, serially, with the codes for the various standards of reasonableness, described *supra* Appendix I.B.2 ("std.o", "std.s.", "std.c.", and "std.r."). An additional comparison of the numbers of such complaints between confrontation and nonconfrontation cases is generated by a query for "no self-defense instruction" and "Y," in serial combination with the reasonableness codes, and for "no self-defense instruction" and "N," in serial combination with the reasonableness codes.

E. *Location*

"Location" is a series of views generated by queries for codes that were placed in all folios and for search terms inserted in some. Each case was coded to reflect the location of the incident: the home shared by the defendant and decedent ("sh"); the home of the defendant where the decedent did not live ("dh"); some other location ("lo"); an unspecified and therefore unknown location ("lu"); or the home of the decedent ("vh"). Cases coded as "lo" (a known location, other than the home of the defendant to decedent) also contain search terms for the identification of the locations (common examples being cars, bars, and outside areas near the home of one or both of the parties). The design of a query for each code generates the number of cases containing the code and the

total number of Mainfile cases. Confrontation and Nonconfrontation are permanent views, and within each the design of a query for a location code generates the number of cases containing the code and the total number of cases in either the Confrontation or the Nonconfrontation category.

F. *Affirmance and Reversal Rates*

"Affirmance and Reversal Rates" is a combination of the permanent views for "Affirmed," "Reversed," and "Other," and of queries that combine them with other permanent views. The overall affirmance and reversal rates (as well as the rate of "other" dispositions on appeal) are generated by the display of a query for each, which contains the number of cases in each view as well as the number of cases in Mainfile. Executing each query produces a view that contains summaries of all opinions in each category. Within each, a focussed view produces a list containing the name, citation, year of decision, level of appellate tribunal, and disposition on appeal for each case.

The numbers of affirmance and reversals in the confrontation and nonconfrontation categories are displayed in response to the designs of queries that combine, serially, the views for Affirmed ("afd"), reversed ("rev"), and Other ("^N (afd/rev)"), with the view for Confrontation and then with that for Nonconfrontation. The results of those queries are a series of permanent views: Affirmed-Confrontation ("afd.y"); Affirmed-Nonconfrontation ("afd.n"); Affirmed-Other ("afd.o"); Reversed-Confrontation ("rev.y"); Reversed-Nonconfrontation ("rev.n"); and Reversed-Other ("rev.o").

The numbers of appellate resolutions in each of those six categories that involved discussions of a state's reasonableness standard were displayed in response to the design of queries that combined, serially, each of the six categories with the permanent views for the reasonableness standards. For purposes of comparison of the numbers of affirmances and reversals (both confrontation and nonconfrontation, including cases in which the opinions contained no discussion of the standard) between objective states and those with some subjective prong of the reasonableness test, I created special views (combining with each permanent view of reasonableness standard other opinions form the represented states) and designed queries that combined those special views with the permanent Mainfile views for Affirmed, Reversed, and Other dispositions.

The numbers of affirmances and reversals by high and intermediate appellate courts are displayed in response to the designs of queries that combine, serially, the views for Affirmed, Reversed, and Other, with the codes for the highest courts ("high") and for intermediate tribunals ("int").

G. *Waiver*

"Waiver" is a view that contains cases in which the appellate court refused to reach a claimed trial error because trial counsel had failed to preserve it or because appellate counsel had failed to pursue it. Waiver includes opinions that reversed convictions (on the basis of other errors that were properly presented). The number of convictions affirmed by courts that found that counsel waived claimed trial errors, in comparison with the total number of affirmances, is displayed in response to the design of the query, which combines the search term "waiver" with the permanent view "Affirmed."