A small but increasingly visible number of battered women eventually kill their batterers. While most of these women plead self-defense, they are generally convicted of murder or manslaughter because their homicidal acts rarely fit the narrow legal definition of self-defense. This article (a) explains who battered women are and why they kill; (b) suggests that many, perhaps most, battered women who kill their batterers do so in "psychological self-defense"; and (c) argues that current self-defense law should be expanded to justify such killings.

Leslie Emick and Marshall Allison had been living together for almost three years when he started to abuse her. For the next year and a half, until Leslie killed him, Marshall abused Leslie on an almost daily basis. He constantly accused her of having sexual relations with other men, knocked her head against a tree, beat her
about the head and body with a log, hog-tied and bull-whipped her, and repeatedly
abused her sexually with a variety of devices including ropes, belts, a homemade
wooden dildo, a lighter, a vacuum cleaner attachment, needle-nosed pliers, and a
hunting knife. A week before his death, he forced an electric immersion coil into
her vagina. When she removed the hot coil, he used it to burn various other parts
of her body.

Throughout this period of abuse, Marshall told Leslie that he would kill her
and anyone who tried to help her if she ever told others about the abuse or tried
to leave him. Leslie had no education, no skills, and no job. The couple lived in
an isolated rural mobile home with their two young children. When Marshall left
for work, he locked Leslie in the trailer. Leslie believed she was trapped in this
relationship and that Marshall would make good on his threat if she ever told
anyone about the abuse or tried to leave him. Until the night before she killed
Marshall, Leslie did neither.

That night, Marshall’s former brother-in-law visited the trailer. When Mar-
shall learned that Leslie had told this man about the abuse, he gave Leslie the
choice of killing herself or having him kill her and the couple’s two children the
next day. After making this threat, Marshall went to bed. A few hours later, Leslie
shot him five times in the head and killed him as he lay sleeping in their bed.
Despite her plea of self-defense, her accounts of the above-described abuse, and
abundant medical evidence of that abuse, Leslie was convicted of first degree
manslaughter and sentenced to a prison term of from 2 to 6 years.2

Leslie Emick’s case may be extreme, but it is not unique. Each year, hun-
dreds of thousands of American women are battered by the men with whom they
share intimate relationships.3 A small but increasingly visible proportion of these
battered women ultimately respond by killing their batterers.4 Almost invariably,
battered women who kill are charged with murder or manslaughter and plead
self-defense. Despite generally abundant evidence that they were severely abused
by the men they killed, many if not most of these women are convicted because
the circumstances surrounding their homicidal acts do not meet the requirements
of current self-defense law5—requirements that equate “self” with only the phys-
ical aspects of personhood.6

2 Emick’s conviction was subsequently reversed on evidentiary grounds and the case was remanded
for a new trial. Id. To avoid the trauma of a retrial, Emick pleaded guilty to a reduced charge of
second degree manslaughter and was sentenced to 5 years probation plus community service. Emick
Gets Probation in Manslaughter Case, Buffalo News, April 11, 1985 at C5.
3 It is estimated that as many as several million American women are so abused in any given year. See,
e.g., M. Straus, R. Gelles, and S. Steinmetz, BEHIND CLOSED DOORS: VIOLENCE IN THE
4 See, e.g., C. Ewing, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE
AS LEGAL JUSTIFICATION (1987); A. Browne, WHEN BATTERED WOMEN KILL (1987);
Rovner, When Women Kill the Men Who Abuse Them, Washington Post, April 21, 1987 at 11
(Health).
5 Id. See also C. Ewing, supra note 4, at 47–48; A. Browne, supra note 4, at 12.
6 See text accompanying notes 43–49, infra.
Under current law in virtually all American jurisdictions, the use of deadly force is justified as self-defense only where the person using such force reasonably believed that he or she was in imminent danger of death or serious bodily injury and that it was necessary to resort to deadly force to avert that danger. In rare cases, these requirements pose no obstacle to the self-defense claim of a battered woman who kills: She has killed at a moment when her batterer was severely beating her, clearly threatening to kill her, and/or making obvious efforts to take her life. Much more commonly, however, either or both of these requirements preclude the self-defense claims of battered women who kill because the women kill outside of direct confrontations with their batterers—that is, they kill not while being battered or directly threatened but some time later while the batterer is sleeping or otherwise preoccupied.

In brief, my position is that failure to meet these narrow legal requirements does not mean that a battered woman did not kill in defense of self. I argue that many, perhaps most, battered women who kill their batterers do so in psychological self-defense—that is, to protect themselves from being destroyed psychologically—and that under certain circumstances the law should recognize psychological self-defense as a justification for the use of deadly force. What follows is a brief summary of the argument for legal recognition of a doctrine of psychological self-defense.

BATTERED WOMEN

A rather consistent picture of battered women has emerged from a variety of empirical studies, clinical reports, and other sources. Battered women are repeatedly abused, physically, sexually, and/or psychologically, by the men with whom they share intimate relationships. While there is clear variation among cases, these women have been punched, kicked, strangled, burned, scalded, shot, and stabbed; attacked with guns, knives, razors, broken bottles, iron bars, and automobiles; and beaten with belts, chains, clubs, lamps, chairs, wrenches, and hammers. They have suffered cuts, bruises, lacerations, broken noses, broken bones (including ribs, backs, and necks), dislocations, miscarriages, serious internal bleeding, concussions, and subdural hematomas.

Many of these women—as many as 60% according to some studies—have also been sexually abused by their batterers: forced to have sexual intercourse, sexually abused with a variety of objects, and compelled to engage in group sex.

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7 W. LaFave & A. Scott, Criminal Law 454 (1986).
8 See C. Ewing, supra note 4, at 34.
9 See C. Ewing, supra note 4, for the full argument.
bestiality, bondage, and other sadomasochistic sexual acts. Many of these women have been raped in front of their children.

THE BATTERED WOMAN SYNDROME

In addition to describing the nature and extent of the abuse suffered by battered women, clinicians and researchers have attempted to explain why these women remain in relationships where they are severely abused. Together these explanations are loosely referred to as the battered woman syndrome. Lenore Walker has identified several key features of the syndrome.

First, Walker posits a three-phase cycle theory of violence in battering relationships. Phase one, the tension-building phase, includes verbal abuse, minor physical abuse, and attempts by the woman to placate the batterer in order to prevent more severe abuse. In phase two, the mounting tension of phase one culminates in an acute battering incident—usually a severe beating. In phase three, loving contrition, the batterer becomes remorseful, apologetic, and loving and assures the woman that the battering incident will not be repeated.

In some relationships, this third phase may last for an extended period of time, but in the battering relationship it invariably fades, tension mounts anew, and the woman is subjected to another acute battering incident. As the cycle is repeated, the level of violence escalates. Yet with the completion of each succeeding cycle, the woman is again encouraged to believe that the batterer will change and that the battering relationship will cease; she receives positive reinforcement for remaining in the relationship.

Walker has also adapted Seligman’s theory of learned helplessness to explain why battered women do not leave their abusers. Seligman found that laboratory animals subjected to inescapable electric shocks continued to behave in a passive, helpless manner even when later given opportunities to avoid being shocked. According to Seligman, these animals had learned that responding is futile.

Similarly, according to Walker, battered women, who are repeatedly exposed to painful stimuli over which they have no control and from which there is no
apparent escape, respond with the classic symptoms of learned helplessness. They become passive, lose their motivation to respond, and come to believe that nothing they do will alter or affect any outcome. Like Seligman’s laboratory animals, these women eventually cease trying to avoid the painful stimuli and fail to recognize or take advantage of available avenues for escape.22

Finally, Walker and others have identified several additional characteristics of battered women and their situations that help keep these women trapped in battering relationships. Many women lack the financial resources to leave their batterers. Moreover, those who try often face other serious obstacles: Family and friends disbelieve them and/or encourage them to remain with their batterers; aside from battered women shelters (which, if available, provide only temporary refuge), there is often simply no place to go; the police and other criminal justice officials often provide no help even though the battered woman is clearly a victim of crime; and, perhaps most significantly, many batterers threaten battered women (and/or their children) with more severe abuse, even death, if the women leave.23

BATTERED WOMEN WHO KILL

Battered women who kill their batterers have been the subject of little systematic study. Most of what is known about these women who kill comes from clinical and/or anecdotal reports. But these reports, which together deal with perhaps 200 different women, all paint a remarkably similar picture of the battered woman who kills.24

Battered women who kill have invariably been both physically and psychologically abused by the men they killed. Many if not most of them have also been raped and/or sexually abused by their batterers. Though battered women who kill have much in common with battered women who do not kill (and it is difficult to generalize from the limited data available), it appears that battered women who kill are subjected to more severe abuse, are somewhat older and less well educated, and have fewer resources for coping with that abuse than do battered women in general.25

Battered women who kill their batterers seem to have been more frequently beaten, threatened with weapons, and subjected to threats of death—especially threats of retaliation for leaving.26 Those who kill also appear to have suffered

22 L. Walker, supra note 14, at 49–50.
23 Id. at 42–43. See also C. Ewing, supra note 4, at 13–17.
25 C. Ewing, supra note 4, at 40.
26 A. Browne, supra note 4, at 65.
more serious injuries than other battered women. 27 Finally, those who kill seem more likely to have been socially isolated by their batterers. 28

BATTERED WOMAN HOMICIDES AND THE LAW'S REACTION

The actual incidence of homicide committed by battered women against their abusers is unknown, but not impossible to estimate. Women rarely kill others, but when they do, they most often kill male intimates. In 1984, for example, only 14% of the 13,856 persons arrested for nonnegligent homicide in the United States were women. 29 Roughly 800 of these women killed their husbands. 30 Various lines of research suggest that from 40% to 90% of these women were battering victims who killed their batterers. 31

It is also difficult but not impossible to draw at least rough generalizations about the circumstances under which battered women kill. I collected data on 100 cases in which allegedly battered women killed their batterers. 32 In 87 cases, the data were sufficient to reconstruct the homicidal incidents. Only one third of these killings (29 of the 87) took place during the course of a battering incident. The others occurred sometime after battering incidents, arguments, and/or threats, while the batterers were sleeping or otherwise preoccupied.

Like many other battered women who killed, the 100 women in these cases were all charged with murder, manslaughter, or some other form of criminal homicide, the vast majority pleaded self-defense, and most were convicted and sentenced to imprisonment. Three of these 100 were acquitted by reason of insanity; three had the charges against them dropped; and nine pleaded guilty. The remaining 85 all went to trial, claiming self-defense. Sixty-three were convicted. Twelve of those 63 were sentenced to life in prison, one without parole for 50 years. Others received sentences ranging from 4 years probation (with periodic incarceration) to 25 years in prison. Seventeen of these women received prison sentences potentially in excess of 10 years.

In efforts to avoid being convicted, many—now perhaps most—battered women who kill their batterers (regardless of the circumstances of the homicide) seek to introduce expert psychological or psychiatric testimony regarding the battered woman syndrome. 33 Typically, the expert describes the syndrome and explains that the defendant was, in fact, suffering from the syndrome at the time of the killing. 34 Such testimony is said to answer the "instinctive" questions of lay

27 Id. at 69.
28 L. Walker, supra note 13, at 43.
30 A. Browne, supra note 4, at 10.
31 Id.
34 Id.
jurors as to why the woman endured such serious abuse for so long, why she did not leave the batterer, and why she believed it was necessary to use deadly force at a time when she was not being battered.\textsuperscript{35}

Virtually all legal commentators agree that such testimony should be admissible in homicide prosecutions of battered women who kill their batterers.\textsuperscript{36} Most, but not all, courts now seem to agree.\textsuperscript{37} Unfortunately for battered women defendants, however, the testimony does not appear to be all that helpful. For example, expert testimony on the battered woman syndrome was offered in 44 and admitted in 26 of the 85 cases I studied that went to trial. In 17 of these 26 cases in which the jury was allowed to hear the expert testimony, the battered woman defendant was convicted.\textsuperscript{38}

That result, though perhaps striking, is not surprising. The dispositive legal test under current self-defense law is whether the user of deadly force acted to avert what reasonably appeared to be an imminent threat of death or serious bodily injury.\textsuperscript{39} Expert testimony on the battered woman syndrome helps explain why, despite the claimed abuse, the woman did not leave her batterer before killing him, but such testimony generally offers little in the way of an explanation of the reasonableness of the woman’s ultimate homicidal act.\textsuperscript{40}

Such testimony may, as some courts and commentators suggest, help the jury understand why, because of the beatings she has suffered in the past, the battered woman is better able to predict the likely degree of violence in any particular battering incident.\textsuperscript{41} But, of course, even to the extent that expert testimony serves this function, it does so, primarily if not exclusively, in what appear to be the minority of cases—those in which battered women kill during the course of a battering incident. In what seem to be the majority of cases, those in which the killing takes place after a battering incident or while the batterer is asleep or otherwise preoccupied, the battered woman defendant’s ability to predict the likely extent of violence involved in any given battering incident is not immediately relevant to her legal claim of self-defense.\textsuperscript{42}

\section*{WHY BATTERED WOMEN KILL}

To conclude, as juries seem to be doing, that most battered women who kill their batterers do not do so in response to what reasonably appears to be a threat


\textsuperscript{37} Id. See also APA Brief supra note 35, at 4–5.

\textsuperscript{38} C. Ewing, supra note 4, at 55.

\textsuperscript{39} W. LaFave & A. Scott, supra note 7, at 454.


of imminent death or serious bodily injury is not necessarily to conclude that these women did not act in self-defense. Many, perhaps most of these women, including those who kill outside of direct confrontations with their batterers, undoubtedly kill in self-defense, although not in the unduly narrow legal sense of that term.

As indicated earlier, the law of self-defense equates "self" with only the corporeal aspects of human existence—physical life and bodily integrity. But outside the law, self is commonly understood to encompass not only those corporeal aspects of existence, but also those psychological functions, attributes, processes, and dimensions of experience that give meaning and value to physical existence. Despite disagreements as to its precise parameters, self clearly refers to both the physical and the mental being and thus includes such recognized and socially valued psychological attributes as security, autonomy, identity, consciousness, and spirituality, to name but several. Furthermore, it has long been understood that harm to the psychological aspects of the self can be just as detrimental as injury to the physical or bodily aspects of the self. Indeed, many regard serious psychopathology as largely a product of injury or threat to the psychological components of the self.

If self is viewed from this broader and more commonly accepted perspective, it would seem that many, indeed probably most, battered women who kill their batterers do so in self-defense. They kill to prevent their batterers from seriously damaging, if not destroying, psychological aspects of the self which give meaning and value to their lives. In short, they kill in psychological self-defense.

PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION

Not all battered women who kill their batterers do so in self-defense, however that term is defined. Those who kill under circumstances that fall within the narrow confines of current deadly force doctrine are, of course, entitled to be acquitted on grounds of self-defense. But what of those, probably the majority of battered women homicide defendants, who kill not to avert an imminent threat of death or serious physical injury but rather to protect themselves from the infliction of extremely serious psychological injury—those who kill in what I have called psychological self-defense?

Though these women may not be faced with a choice of killing or being killed, many are confronted with a dilemma nearly as dreadful. Unable to escape (or

43 W. LaFave & A. Scott, supra note 7, at 454.
46 Id.
unable to recognize any viable means of escape) from the battering relationship, they face the "choice" of killing (either their batterers or themselves) or being reduced to a psychological state in which their continued physical existence will have little if any meaning or value. Whatever one chooses to call this state—"life without feeling alive,"47 "partial death,"48 or simply utter hopelessness49—the net result for the battered woman is a life hardly worth living.

Should a battered woman—or anyone else—who uses deadly force to prevent that result, to avert what reasonably appears to be the threat of psychological destruction, be branded a criminal and sent to prison? I think not, but that is precisely what is happening in many cases under current self-defense law. Contrary to current law, I suggest that the use of deadly force to avoid such a dire fate is a legitimate form of self-defense and should be recognized as such by the criminal law. In short, I believe that, under certain circumstances, psychological self-defense should be a legal justification for homicide.

The legal doctrine I am proposing is not a battered woman defense. Such a defense would not only arguably violate constitutional guarantees of equal protection, but would be unsound as a matter of public policy.50 Attaining the status of battered woman or even battered person is not and should not by itself be justification for homicide.

Stated most simply, the proposed doctrine of psychological self-defense would justify the use of deadly force where such force appeared reasonably necessary to prevent the infliction of extremely serious psychological injury. Extremely serious psychological injury would be defined as gross and enduring impairment of one's psychological functioning that significantly limits the meaning and value of one's physical existence.

At first glance, this proposed doctrine of psychological self-defense may seem like a radical departure from existing criminal law. In fact, however, such a doctrine is not only in keeping with the basic principles of criminal law, but is also not without precedent in current law justifying the use of deadly force.

The criminal law operates on the assumption of free will—that normal people choose to behave the way they do and, thus, are both personally and criminally responsible for their unlawful actions. In some instances, however, the criminal law recognizes that the choices made by normal individuals are not fully the product of free will and thus should not subject them to criminal responsibility. Perhaps one of the clearest examples is current self-defense law, which justifies the use of deadly force against an adversary not because the user of that force had no choice but to kill but because he or she has made "the kind of choice that other people would make under the same circumstances."51

Like the person who kills in traditional self-defense, the battered woman who

47 R. Laing, supra note 43, at 40.
49 M. Seligman, supra note 21.
51 G. Fletcher, RETHINKING CRIMINAL LAW 856 (1978).
kills her batterer in psychological self-defense "chooses" to do so. For the most part, however, her "choice" is dictated by external and internal forces beyond her conscious control. Faced with the extremely limited options of killing herself, killing the batterer, or resigning herself to a fate sometimes not much better than physical death, the battered woman has little in the way of true choice. To the extent that she "chooses" to kill her batterer, her "choice" is basically the "choice that other people would make under the same circumstances."52

A major difference, of course, between traditional self-defense and psychological self-defense is that the latter would justify killing not to prevent one's own physical destruction but to preserve one's psychological integrity. As a general principle, one's interest in continued physical existence outweighs all other interests. Legal recognition of psychological self-defense as a justification for the use of deadly force might seem contrary to that principle and might be regarded by some as denigrating the value of human life.

But neither law nor society gives absolute priority to the preservation of physical life. Even current self-defense law, for example, does not require complete proportionality—taking a life only to save a life. To be justified as self-defense, a killing need not be in response to a clear threat of death; a reasonable belief in imminent serious bodily injury is sufficient.53 More importantly, other aspects of the current law make it clear that even a reasonable belief in imminent serious bodily injury is not always required to render a killing a justifiable homicide. A number of well-established criminal law doctrines justify the use of deadly force to protect what are clearly psychological interests and thus provide clear precedents for the proposed doctrine of psychological self-defense.

Perhaps the best known of such precedents is the no retreat rule. In some jurisdictions, even in the face of an imminent threat of death or serious bodily injury, a person may not resort to deadly force in self-defense "if he knows that he can with complete safety as to himself and others avoid the necessity of doing so by retreating."54 In the majority of American jurisdictions, however, one is not required to retreat from an imminent threat of death or serious bodily injury, even if such retreat can be accomplished with complete safety, but one may stand one's ground and justifiably kill the attacker.55 This no retreat rule, known in common law as the true man rule,56 has a clear psychological basis: "There is a strong policy against the unnecessary taking of a human life [but] there is [also] a policy against making one act a cowardly and humiliating role."57 As one commentator has explained, "No one should be forced by a wrongdoer to the ignomy, dishonor and disgrace of a cowardly retreat."58
Even in jurisdictions where retreat is required, there remains an exception which also has a clear psychological basis: One need never retreat when attacked or threatened with attack in one’s own home. This so-called castle doctrine derives from the ancient principle that “a man’s home is his castle,” the one place if no other where he can feel secure. The castle doctrine, like the true man rule, clearly places greater value on a defender’s psychological security and well-being than on an attacker’s life or bodily integrity.

Related to the castle doctrine is the law of defense of habitation. While the general legal rule is that deadly force may not be used to protect mere property interests, most American jurisdictions regard the use of deadly force to prevent unlawful entry into one’s home as legally justifiable. Here, as with the true man rule and castle doctrine, the law is obviously concerned with protecting distinctly psychological interests, even at the expense of human life: “This rule . . . attaches . . . special importance to the dwelling as a place of security, for it permits the use of deadly force even when the anticipated attack would not result in a killing or serious injury of someone within.”

Likewise, there has long been a common law recognition of a right to use deadly force to resist being wrongfully dispossessed of one’s dwelling place. Again, concerns for the dweller’s psychological interest in security are placed above the physical interests, even the life, of the intruder. As the drafters of the Model Penal Code have explained:

> On the one hand, it is desirable to reduce to a minimum the cases where fatal force may be used by way of self-help. To kill a man is, on a dispassionate view, an evil both more serious and more irrevocable than the loss of possession of a dwelling house for a period while a court order is being obtained to recover it. On the other hand, to be illegally ousted from one’s dwelling is a provocation that is not to be deprecated.

In large measure, each of these rules, which seem to protect distinctly psychological values even at the expense of human life, may be viewed as expressions of the principle of autonomy: “The right to resist aggression broadly to cover threats to the personality of the victim . . . the moral claim of the person to autonomy over his life.” Implicit in these rules—as well as in the proposed doctrine of psychological self-defense—is the well-grounded recognition that the value of human life lies not in mere physical existence but rather in the capacity to experience that existence in a psychologically meaningful and rewarding fashion. When, as in the experience of some battered women, victimization becomes so severe that the capacity to function as an autonomous (psychologically integrated and self-directed) individual is lost, severely impaired, or threatened with

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60 *Id.* at 1133–1137.
62 W. LaFave & A. Scott, *supra* note 7, at 467.
63 *Id.* at 467–468.
64 Model Penal Code, Sec. 3.06, Comment (Tentative Draft no. 8, 1958).
loss or severe impairment, physical existence ("life") loses much if not most of its meaning and value.

To justify taking a life to prevent such loss or severe impairment of one's essential selfhood in no way denigrates respect for life. Indeed, such justification expresses a respect for human life even greater than that implicit in current self-defense doctrine. Unlike current self-defense law, which generally gives priority only to mere physical existence, the proposed doctrine of psychological self-defense would give equal priority to those vital aspects of human functioning that give meaning and value to such existence—in other words, those psychological attributes that make life worth living.

OBJECTIONS TO A LEGAL DOCTRINE OF PSYCHOLOGICAL SELF-DEFENSE

The proposed doctrine of psychological self-defense has generated substantial controversy. Most of the major objections to the doctrine have been articulated by Stephen Morse, who takes strong exception to the notion of psychological self-defense as legal justification. Professor Morse says, *inter alia,* that the proposed doctrine is "enormously vague," is based upon "unacceptably soft science," represents an excuse rather than a justification, and rests on "puzzling" and "outmoded" policy arguments.

Is the proposed doctrine vague? I demur:

Legal rules of justification, including current self-defense laws, are necessarily somewhat vague and open-ended. Their application depends largely upon the precise facts of the particular case in question and the result is rarely fully predictable. A few cases are clear, but most are open to argument. Some defendants who claim justification are acquitted, others are convicted. The proposed doctrine of psychological self-defense, with its reliance upon the necessarily vague and open-ended standard of "extremely serious emotional harm" is no exception.

If by "enormously vague," Professor Morse means that the typical lay jury would not understand the proposed doctrine and apply it fairly, he is wrong.

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68 Id. at 597.

69 Id. at 595–596.

70 Id. at 602.

71 Id. at 610, 611.

72 C. Ewing, *supra* note 4, at 88.
Application of the doctrine would, in many cases, be complicated. But as I have explained elsewhere:

Just as in cases of self-defense litigated under current doctrine, jurors weighing a claim of psychological self-defense may be expected to deal with such complications sensibly and fairly. To begin with, as they would in assessing claims of traditional self-defense, jurors may be expected to use their common sense and everyday experience, both direct and vicarious. Just as people ordinarily have a good sense of what it means to be threatened with and fear physical injury or death, they also have a good sense of what it means to be threatened with and fear extremely serious psychological injury. 73

Does the proposed doctrine lack empirical confirmation? That depends upon what one accepts as empirical confirmation. Professor Morse scoffs at the notion of “extinction of self” 74 (his term, not mine) because it does not rest upon “scientifically exacting research,” 75 but merely represents “an imprecisely and broadly defined clinical speculation.” 76 Similarly he questions the existence of the battered woman syndrome apparently because its “scientific validity” has yet to be verified to his satisfaction. 77

The proposition that one can be destroyed psychologically (i.e., reduced to a state in which physical existence has little if any meaning or value) can probably never be put to the kind of “empirically rigorous” test that would satisfy Professor Morse. Nevertheless, I doubt that very many experienced mental health professionals (including, I suspect, Professor Morse) would quarrel with the general validity of that proposition. Nor, I suppose, would concentration camp survivors, prisoners of war, terrorist hostages, and others who, like many battered women, say they have been threatened with psychological destruction. 78 What Professor Morse calls “empirically rigorous” research is not the only method of establishing the validity of a psychological concept.

Much the same might be said of the battered woman syndrome as well. The syndrome, per se, is not central to my proposal; and, contrary to Professor Morse’s speculation, I do not “accept without question the scientific validity of the syndrome.” 79 It is worth noting, however, that there is wide agreement among clinicians who have actually worked with battered women (myself included) that the syndrome exists. Moreover, while I agree with Professor Morse that there is “reason for caution” regarding the “scientific validity” of the syndrome, 80 that is

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73 Id. at 94.
74 Morse, supra note 67, at 597.
75 Id. at 598.
76 Id. at 599.
77 Id. at 601.
78 Numerous commentators have analogized battered women’s experiences to those of concentration camp prisoners, prisoners of war, and other victims of terrorism. See, e.g., Dutton & Painter, Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse, 6 Victimology 139 (1981); S. Morgan, CONJUGAL TERRORISM (1982); C. Ewing, supra note 4, at 73–75.
79 This language was in the original version of Morse, supra note 67.
80 Id. at 598–599.
apparently a minority position, at least among psychologists. The American Psy-
chological Association has taken the position that “the ‘battered woman syn-
drome’ diagnosis has a sound psychological basis”81 and that “the state of sci-
entific knowledge regarding the syndrome is more than adequate to meet” the
legal standard for admissibility of expert testimony.82

More fundamentally, however, I disagree with Professor Morse’s apparent
assumption that psychological theories that have not been (indeed, in most cases,
cannot be) proven by “empirically rigorous” research offer no basis for legal
doctrine. That assumption is belied by the long history of the insanity defense,
diminished capacity, extreme emotional disturbance, and a host of other legal
doctrines, including both excuses and justifications, which rest upon scientifically
undocumented psychological theories. Lawmakers have not been deterred by the
lack of “empirically rigorous” data in creating and reaffirming these legal doc-
trines, nor should they be when it comes to the proposed doctrine of psychological
self-defense. To imply that lawmakers should wait for behavioral scientists to give
them the “empirically rigorous” stamp of approval for this or any other proposed
legal reform is to ignore the realities of the legal process and to exalt social science
research to a position few believe it deserves.

Is the proposed doctrine of psychological self-defense a justification or an
excuse? Does it matter? Professor Morse asserts that, properly construed, psy-
chological self-defense is an excuse. Moreover, he even suggests that I have
confused the concepts of justification and excuse.83 In fact, however, there is no
confusion at all, only disagreement. Whereas Professor Morse would either con-
vict a battered woman such as Leslie Emick84 or acquit her by reason of insanity,
I believe she (and others similarly situated) should be fully exonerated and that
her actions were in no way insane or even irrational.85

As a practical matter, it makes no difference whether the proposed doctrine
of psychological self-defense is called a justification or an excuse.86 Whatever it
is called, the doctrine I have proposed would totally exonerate the defendant
found to have killed in psychological self-defense. Symbolically, however, the
distinction is important. Professor Morse claims it is irrational to kill in response
to a threat of psychological destruction. The battered woman who kills her bat-
terer in psychological self-defense, he says, “could in most cases have left the
psychological field, sought therapy, or behaved in myriad other ways short of

81 APA Brief, supra note 35, at 25.
82 Id.
83 Morse, supra note 67, at 602.
84 See text accompanying notes 1–2 supra.
85 Indeed, the one mental health professional who examined Leslie Emick testified that Emick was
neither psychotic nor emotionally disturbed at the time she killed her batterer. People v. Emick, 481
86 The distinction is, of course, of great interest to legal scholars. But even academic lawyers ac-
knowledge great difficulty in delineating the distinction with any precision. Moreover, they ac-
knowledge that the distinction has no practical application. See, e.g., Greenawalt, The Perplexing
killing that could have prevented the threat of extinction of self.**87 Because the killing is thus not reasonable but irrational, the battered woman is entitled at best to be excused.

My proposal does not confuse justification and excuse. I simply believe that a battered woman, or anyone else, who kills in psychological self-defense (as I have defined that term) is justified in doing so. In short, to use Professor Morse's terminology, I believe that "killing a wrongful perpetrator of self-extinction is the right thing to do in the appropriate circumstances."**88 Such a killing is, in most cases, entirely rational, reasonable, and no less necessary and socially desirable than a killing done in traditional self-defense.

The distinction between justification and excuse in this context has symbolic significance because to characterize a killing in psychological self-defense as merely an excuse is to perpetuate the pernicious myth that battered women are simply free to leave their batterers, and, if they do not, they are irrational and/or masochistic.**89 Contrary to Professor Morse's bald assertion, most battered women cannot simply leave the "psychological field."**90 That assertion has been soundly and unequivocally rejected not only by behavioral scientists and mental health clinicians but also by the courts and virtually every legal commentator who has addressed the subject.91

Finally, does the proposed doctrine of psychological self-defense rest upon "puzzling" and "outmoded" legal and policy arguments? Professor Morse is puzzled by my reference to legal doctrines such as the true man rule, the castle doctrine, and defense of habitation, in support of the proposed doctrine of psychological self-defense.92 Professor Morse acknowledges that these doctrines "allowed the use of deadly force in part to protect psychological interests"93 but he says they are "outmoded doctrines from a time mercifully past."94 What Professor Morse does not acknowledge, indeed what he glosses over in his casual but incorrect use of the past tense, is that these doctrines remain very much alive in modern criminal law in many if not most American jurisdictions. In the majority of states, neither the "true man" nor anyone else has any duty to retreat before resorting to deadly force,95 and in no jurisdiction does one have to retreat from one's own residence.96 If the law remains willing to justify the sacrifice of human life to prevent the humiliation of the "true man" or to protect the sanctity and

87 Morse, supra note 67, at 608.
88 Id. at 599.
90 Morse, supra note 67, at 603.
91 See, e.g., State v. Kelly, supra note 41, at 377 and numerous other cases and commentaries collected and cited in APA Brief, supra note 35, and Empirical Dissent, supra note 36, at 620–621, fn. 5–6.
92 See text accompanying notes 54–64 supra.
93 Morse, supra note 67, at 611.
94 Id. at 611.
95 W. LaFave & A. Scott, supra note 7, at 460–461; R. Perkins, supra note 55, at 1133.
96 W. LaFave & A. Scott, supra note 7, at 461; R. Perkins, supra note 55, at 1133.
security of his "castle," why should it not offer similar justification when life is sacrificed to protect other concerns much more fundamental to one's psychological self?

CONCLUSION

A legally recognized doctrine of psychological self-defense would not exculpate all battered women who kill. The justification offered by the proposed doctrine is necessarily narrow and would apply only where the defendant could prove not only that she killed in response to a threat of extremely serious psychological harm, but that at some point, at or near the time of the killing, she had been physically battered or threatened with battery by the individual killed.97 Nevertheless, legal recognition of this doctrine would have significant impact, both practical and symbolic.

As a practical matter, recognition of the doctrine would provide jurors with a legitimate legal basis for acquitting battered women homicide defendants who, by virtue of their psychological plight, do not deserve to be convicted or punished but would not be acquitted under current self-defense law except through jury nullification. Under the proposed doctrine, the legal fate of these women would be determined by an honest application of the law rather than the unpredictable willingness of some sympathetic jurors to ignore the law.

Symbolically, legal recognition of the proposed doctrine of psychological self-defense would benefit not only those few battered women who kill their batterers but the vast majority who do not. In recognizing this doctrine, which would have its primary application in cases of homicide by battered women,98 the law would fully and unequivocally acknowledge the dreadful psychological plight of battered women. Such acknowledgement would surely serve to promote efforts currently underway to eradicate or at least reduce the incidence and severity of women battering.

97 C. Ewing, supra note 4, at 91.
98 This doctrine might also apply to cases in which abused children kill their abusive parents.