

California Law Review

VOL. 82

JANUARY 1994

No. 1

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Excusing Women

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In rare instances, the criminal law allows defendants to offer claims of excuse in order to avoid criminal responsibility. Over the past two decades, women offenders have begun to offer the battered woman syndrome defense as an excuse to a variety of crimes, ranging from homicide to fraud. While many feminist scholars have concluded that courts should consider evidence of abuse the accused woman endured at the hands of her husband, others have argued that this defense institutionalizes negative stereotypes of women. In this Article, the author agrees with the feminist critique of the battered woman syndrome defense, but argues that the critique is inadequate because the negative implications for women go beyond the reinforcement of gender roles. The defense reaffirms that women lack the same capacity for rational self-control that is possessed by men and thereby exposes women to forms of interference against which men are secure. Attempts to reconfigure the defense are likely to fail because the defense affirms the hierarchical understanding of gender that feminism has been determined to dismantle. The author concludes that the practice of excusing women reveals the inadequacy of the theory of responsibility presently endorsed by the criminal law. The present theory is incapable of accommodating women's experiences without judging women to be deviant from and inferior to the model human actor, and therefore should be revised to include characteristics traditionally associated with and internalized by women.

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INTRODUCTION

The dialectic between practice and theory that conditions many areas of the law becomes acute when the criminal law describes the human actor who may be held responsible for a crime. At the level of criminal practice, a finding of personal responsibility carries a painful cost for the accused person because it subjects him to criminal punishment. Understandably, the practitioner who is defending an accused will plead for an excuse, which invites a determination that the accused was not responsible for his misconduct. The practitioner will argue that any available excuse should be defined generously so that blame for the violation will be attributed, not to the accused's evil choice or character, but to the force of circumstances beyond his control. Resisting these appeals, most criminal law scholars, as well as judges and legislators, insist that the criminal law must hold fast to a definition of responsibility that is safe against all but the most compelling claims for excuse. At the level of criminal law theory, the capacity for responsibility is said to carry enormous benefits for¹the accused himself, even though it exposes him to punishment in practice; it also carries benefits for law-abiding persons who share that capacity, because the law respects the autonomy and privacy of responsible actors, as long as they do not offend. The theory of responsibility is claimed to be peculiarly potent, for it guides legal practices outside the criminal law and shapes significant aspects of social relations. Though actors who do not possess the capacity for responsible conduct may not be punished criminally, the decision to excuse them constitutes a negative statement about their status as moral agents, which may expose them to supervision by civil authorities.¹ Thus, criminal law theorists claim that the law must deny the significance of differences in character or opportunity produced by one kind of disadvantage or another, which defense lawyers offer to excuse their clients' crimes,² not only to ensure that the criminal law serves its important social control function, but also to secure to individual citizens the benefits of responsibility.

1. An often-cited example is the offender who is adjudged legally insane; although he is excused from criminal punishment, he is thereby vulnerable to civil interference. See, e.g., 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* 305 (1984) ("Unlike most defendants who successfully offer a criminal defense, a defendant found not guilty by reason of insanity is rarely released after acquittal. It is more likely that he will be committed to a mental institution."); GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 32 (2d ed. 1961) ("For . . . persons of unsound mind the question of technical conviction for crime has lost much of its importance, because they can frequently be treated in much the same way whether they are found guilty of an offence or not."). Similarly, our practice of excusing women from criminal liability may subject them to civil intervention. For example, a mother who is diagnosed as suffering from battered woman syndrome, which would be useful to her in defending against criminal charges, may be labeled dysfunctional and, therefore, an unfit parent in a child custody proceeding. See Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 555-57 (1992).

2. See *infra* text accompanying notes 68-116.

This tension between practice and theory poses a dilemma for feminists,³ some of whom have remarked on the harshness with which criminal courts at times respond to women offenders.⁴ Some scholars have argued that this harsh treatment arises from a conviction that the woman who offends has transgressed twice; by disobeying the commands of the criminal law, she also has violated society's expectations for appropriate conduct from one of her gender.⁵ Aware of this bias and the risks it poses for her client, a feminist practitioner, even were she not dedicated to winning for

3. More than one feminist legal scholar has remarked on the dialectical relationship between law practice and legal theory and on the problems that relationship poses for feminism. See generally Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992) (examining the relationship between feminist theory and practice in the context of the reasonable woman standard); Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13 (1991) (examining the disjunction between theory made "out of abstractions" and actual women's practice); Schneider, *supra* note 1 (examining tensions in current feminist theory and practice in legal work on woman-abuse).

4. See ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 11 (1987) (noting that women charged with the death of a mate have the least extensive criminal records of any female offenders yet often receive harsher penalties than men who kill their mates); ANN JONES, *WOMEN WHO KILL* 9-10 (1980) (noting that women receive longer sentences in part because of discriminatory sentencing statutes); Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 454-55 (1988) (citing studies showing that the conviction rates and sentences for female defendants exceed those for male defendants who commit similar crimes); Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 561 (1988) (noting that because women who commit crimes are believed to be maladjusted, women may receive longer prison sentences than men in order to "cure" or rehabilitate them).

However, as the marital coercion doctrine illustrates, see *infra* text accompanying notes 149-230, the criminal law does not always treat female offenders more harshly than male offenders. A significant body of evidence indicates that the criminal law's attitude towards accused women is uneasy. For at least some categories of offenses, the criminal justice system has at times treated women leniently because, for example, prosecutors, judges, and jurors have been unable to conceive of "respectable" women as criminals. See, e.g., ELAINE S. ABELSON, *WHEN LADIES GO A-THEIVING: MIDDLE-CLASS SHOPLIFTERS IN THE VICTORIAN DEPARTMENT STORE* 7-12 (1989) (explaining that middle-class women shoplifters in Victorian society were defined as sick rather than criminal). Similarly, when women are convicted, their sentences are sometimes less harsh than those imposed on men. See RITA J. SIMON & JEAN LANDIS, *THE CRIMES WOMEN COMMIT, THE PUNISHMENTS THEY RECEIVE* 57-73, 104 (1991). The disparity in terms is caused by a variety of factors, including "chivalry" on the part of the sentencing judge, and the available empirical studies suggest that, at least for some categories of offenses, judges are inclined to afford leniency to female offenders who are married, "economically dependent" on their husbands, or responsible for young children. *Id.* at 62.

5. The language of appellate opinions sometimes supports this view. E.g., *Freel v. State*, 21 Ark. 212, 220-21 (1860) ("For the credit of humanity, and especially of the sex of the plaintiff in error, it is to be regretted that the jury were unable to account for her conduct on some other hypothesis than that she was criminally aiding and abetting her husband in the commission of murder."); *Cothron v. State*, 113 A. 620, 626 (Md. 1921) ("We regret to have to thus speak of any woman, especially a woman just eighteen years of age."); *State v. Baker*, 19 S.W. 222, 225 (Mo. 1892) ("[W]e can but regret for the sake of humanity that she could not have been shown innocent of the charge. At this distance, it is hard to conceive of such a crime by a woman, and that woman a mother, with so little provocation or motive."). One scholar believes that women's "guilt is judged differently" from that of men, particularly where the offense is homicide. "Women guilty of violent crime are at odds with the culturally nurtured image of acceptable womanly behavior, and they are punished as much for this violation as for the actual crime they commit." VIRGINIA B. MORRIS, *DOUBLE JEOPARDY: WOMEN WHO KILL IN VICTORIAN FICTION* 8-9 (1990). Similarly, Eva Figs has remarked that patriarchal culture is particularly concerned with "female aggression . . . since it means either insubordination or competition." EVA FIGES,

ethical reasons or for its own sake, cannot afford to ignore existing excuses or neglect old arguments for new ones, such as those provided by the battered woman syndrome defense.⁶ But leniency holds special perils for women as well,⁷ and it is with those perils that this Article is concerned. When we are able to convince decisionmakers, who may be inclined to punish us harshly on grounds they would not hold against men, that we should be excused, we rightly feel that our practice has succeeded. But if, as is claimed, the reigning theory of responsibility declares that an excused offender is less than a full human being, we must consider whether the practice of excusing women is bringing to law a feminist theory of responsibility⁸ or whether it is exploiting and, thereby, reproducing norms that support the conditions of our subjugation.

While many feminist scholars conclude that the courts cannot justly blame an accused woman without considering abuse that she endured at the hands of her husband,⁹ several others have expressed uneasiness with the

PATRIARCHAL ATTITUDES 25 (1970). Figes reminds us of Boccaccio's explanation for why women who offend must be punished more harshly than men:

"It is a hard and hateful thing to see proud men, not to speak of enduring them. But it is annoying and impossible to suffer proud women, because in general Nature has given men proud and high spirits, while it has made women humble in character and submissive, more apt for delicate things than for ruling. Therefore, it should not be surprising if God's wrath is swifter and the sentence more severe against proud women whenever it happens that they surpass the boundaries of their weakness."

Id. (quoting BOCCACCIO, CONCERNING FAMOUS WOMEN). Boccaccio's understanding of the "nature" of men and women retains vitality today; for example, the battered woman syndrome defense secures leniency for accused women who can prove that they were "humble in character and submissive" to their husbands' commands.

6. "For an accused woman, arousing the sexism of the judge and jury may appear her only chance of acquittal. A prison term is a big price to pay for principle." Catharine A. MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703, 721 (1982) (reviewing ANN JONES, *WOMEN WHO KILL* (1980)). By contrast, Naomi Cahn recently suggested that in some cases a litigant might prefer to present her own story to the court, even if doing so challenges the patriarchal interpretation of her behavior and thereby heightens her risk of losing. *See Cahn, supra* note 3, at 1441-42. Cahn maintains that attorneys should respect their clients' decisions in these situations. *Id.* at 1441-45.

7. For example, during the late-nineteenth and early-twentieth centuries, middle-class women escaped prosecution for shoplifting on the ground that their crimes were attributable not to their choice to violate the law, but to "kleptomania," which was a "mental disorder" caused by a condition known as "'womb disease mania'" that resulted in "'larceny and eroticism with hysteria.'" ABELSON, *supra* note 4, at 173-76. While this defense spared the women and their families the pain and disgrace flowing from a criminal conviction, it still stigmatized the individual woman by construing her as suffering from a mental illness for which she would need medical treatment and from which she and others would require protection. And the defense injured women as a group because it constituted yet "another proof of the[ir] inferiority" by identifying the "sexuality of women . . . with disease and behavioral irregularities." *Id.* at 174.

8. *See* Stephen J. Schulhofer, *The Gender Question in Criminal Law*, in CRIME, CULPABILITY, AND REMEDY 105, 115-16 (Ellen Frankel Paul et al. eds., 1990) ("From the feminist perspective, criminal law doctrine seems gendered to its very core."). However, as Schulhofer points out, not all aspects of the criminal law are incompatible with a feminist agenda. *Id.* (noting that some criminal law prohibitions are "pacifist").

9. *E.g.*, Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 387 (1992) (arguing that disallowing expert testimony on battered woman syndrome may, in some cases, violate the defendant's constitutional right to present a

battered woman syndrome defense because it institutionalizes within the criminal law negative stereotypes of women.¹⁰ I agree with this criticism; in particular, the defense is objectionable because it relieves the accused woman of the stigma and pain of criminal punishment only if she embraces another kind of stigma and pain: she must advance an interpretation of her own activity that labels it the irrational product of a "mental health disorder."¹¹

However, this criticism leaves off precisely where the most profound feminist objection to the defense should begin. It is my thesis that the existing feminist critique of the battered woman syndrome defense is inadequate because the negative implications for women go far beyond the reinforcement of particular aspects of stereotyped gender roles that some of us may wish to shed. None of those who advocate, or, for that matter, criticize, adoption of the battered woman syndrome defense has noticed that, for many centuries, the criminal law has been content to excuse women for criminal misconduct on the ground that they cannot be expected to, and, indeed, should not, resist the influence exerted by their husbands. No similar excuse has ever been afforded to men; to the contrary, the criminal law consistently has demanded that men withstand any pressures in their lives that compel them to commit crimes, including pressures exerted by their spouses.¹² In this way, the theory of criminal responsibility has participated in the construction of marriage and, indeed, of gender, as a hierarchical

defense); Mather, *supra* note 4, at 574-82 (maintaining that without expert testimony on battered woman syndrome, "the average juror would not understand why a battered woman is psychologically unable to leave the battering relationship").

10. See, e.g., Cahn, *supra* note 3, at 1415-20 (explaining that the "reasonable woman standard" is reminiscent of earlier stereotypes of women); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 137 (1985) (asserting that battered woman syndrome allows the court to continue to view women under a "separate and unequal standard of behavior"); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 38-43 (1991) (arguing that the element of helplessness in battered woman syndrome may contribute to stereotyping); Schneider, *supra* note 1, at 559-63; 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, 197 (1986); see also *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1592-93 (1993) [hereinafter *Responses to Domestic Violence*] (noting that misuse of expert testimony on battered woman syndrome fosters stereotypes); Schulhofer, *supra* note 8, at 116 (recounting that some feminist scholars worry that the battered woman's syndrome defense "will perpetuate inaccurate, negative stereotypes").

11. See Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 331 (1992) (referring to battered woman syndrome as a mental health disorder).

12. In some circumstances, the law does rely on gender stereotypes to mitigate men's punishment for crime. The voluntary manslaughter provocation doctrine usually is invoked by men who kill after discovering their wives with a lover. See JOHN KAPLAN & ROBERT WEISBERG, *CRIMINAL LAW: CASES AND MATERIALS* 256-57 (2d ed. 1991) (Although sight-of-adultery doctrine is available to women as well as men, "it is hard to find cases where a woman has her charge or punishment mitigated on provocation grounds when she has killed her husband or her husband's lover."). While the sight-of-adultery cases do reflect an understanding that men sometimes are pressured into offending by their wives' conduct, those cases reinforce the same cultural assumptions about the hierarchical structure of gender relationships that feminism seeks to expose and repair. That is, like the battered woman

relationship. By construing wives as incapable of choosing lawful conduct when faced with unlawful influence from their spouses, the theory invests men with the authority to govern both themselves and their irresponsible wives.

The battered woman syndrome defense rests on and reaffirms this invidious understanding of women's incapacity for rational self-control. For the sake of clarity, I must emphasize that my argument is not that the battered woman syndrome defense is illegitimate merely because it fails to hold women to the same demanding standard against which men are measured. Rather, my claim is that, by denying that women are capable of abiding by criminal prohibitions, in circumstances said to afflict many women at some point during their lives,¹³ the defense denies that women have the same capacity for self-governance that is attributed to men, and, if the theory of responsibility operates in practice as its proponents claim, the defense thereby exposes women to forms of interference against which men are safe.

The existing feminist critique of the battered woman syndrome defense is inadequate in another significant respect. The scholars who worry that the defense may reinforce negative stereotypes of women have assigned the problem to the manner in which the courts are interpreting the defense, rather than to the values embraced by the defense itself.¹⁴ Proponents of

syndrome and marital coercion excuses, which are available to women, the provocation doctrine construes the woman as an object whose fate ultimately is determined by her husband's agency.

13. Estimates of the number of women who are battered in their homes vary. The Council on Scientific Affairs of the American Medical Association recently reported:

In a 1985 survey of intact couples, nearly one out of every eight husbands had carried out one or more acts of physical aggression against their female partner during the survey year. Over one third of these assaults involved severe aggression such as punching, kicking, choking, beating up, or using a knife or a gun. In an average 12-month period in the United States, approximately 2 million women are severely assaulted by male partners.

Violence Against Women: Relevance for Medical Practitioners, 267 JAMA 3184, 3185 (1992) (footnotes omitted). The report cautions that these numbers do not accurately reflect the extent of the problem because, "[a]s with other types of intimate violence, figures based on national surveys are marked underestimates," but goes on to conclude that "[s]tudies on prevalence suggest that from one fifth to one third of all women will be physically assaulted by a partner or ex-partner during their lifetime." *Id.* Other recent estimates suggest that "there are as many as four million incidents of domestic violence against women every year." See *Responses to Domestic Violence*, *supra* note 10, at 1501.

14. For example, as Martha Mahoney puts it, expert testimony on the battered woman syndrome, though designed to overcome misogynist "stereotypes and help show the context for the woman's actions, has through the pressures of the legal system contributed to a focus on victimization that is understood as passivity or even pathology on the part of the woman." Mahoney, *supra* note 10, at 42; see also Crocker, *supra* note 10, at 122 ("As applied by the courts . . . the feminist theory [of the battered woman syndrome defense] has resulted in a perpetuation of the very stereotyping it was designed to eliminate."); Schneider, *supra* note 1, at 561 (ascribing some blame to lawyers who submit testimony focusing on the passive, victimized aspect of battered women's experiences). Elizabeth Schneider concedes that the word "'syndrome' (and the psychological description of battered women that predominates in 'battered woman syndrome') conjures up images of a psychological defense," but she believes that the fault lies in the "tenacity of sex-stereotyping," which had the effect of subverting "the purpose for which this legal strategy was conceived." *Id.* In my view, the defense does not merely

the defense assert that the expert psychological testimony supporting the defense is not offered to prove that battered women are mentally ill or psychologically incompetent, as the language of many appellate opinions suggests, but to expose the underlying conditions of gender inequality that cause women's criminal misconduct and to refute sexist assumptions that blame women for falling victim to domestic violence.¹⁵ While it would not be surprising to discover that the courts have exacerbated the most negative aspects of the battered woman syndrome defense, I do not agree with the commentators who assign to the courts and to defense lawyers the primary fault for the failures of this defense.¹⁶ The defense itself defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities; indeed, the fundamental premise of the defense is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates.

I advance this conclusion with some reluctance because the defense was designed by practitioners who believed that they were bringing to the criminal law a feminist perspective on the way in which women are affected by and respond to domestic violence. Therefore, I emphasize here that the failures of the battered woman syndrome defense really are not, contrary to some recent suggestions,¹⁷ the product of feminism. Rather, the defense is the offspring of the patriarchal assumptions from which the discipline of psychology, as well as law, was constructed.¹⁸ That some feminists initially endorsed the defense underscores the pressing need to examine and revise the epistemological premises of the disciplines to which feminist legal scholars and practitioners turn for assistance in repairing the law's partial understandings of gender.

In Part I of this Article, I describe the normative theory of personal responsibility for conduct that is embraced by the criminal law, and I explore the criminal academy's insistence that efforts to relax that demanding standard imperil our cherished autonomy and freedom from official

conjure up an image of women as pathological, thus reinforcing any misogynist views held by the participants in a criminal trial, *see id.*; rather, the expert testimony in support of the defense, without requiring any help from the courts, explicitly defines the woman as a passive, psychologically paralyzed creature who is incapable of making rational decisions.

15. See LENORE E. WALKER, *TERRIFYING LOVE* 10-11 (1989) [hereinafter WALKER, *TERRIFYING LOVE*] (explaining that expert witnesses can educate juries about both the societal conditions of sex role bias and about an individual battered woman's behavior); LENORE E. WALKER, *THE BATTERED WOMAN* 20-21, 29-30 (1979) [hereinafter WALKER, *THE BATTERED WOMAN*] (describing common myths that blame women for being victims of abuse); Lenore E. Walker, *Battered Women and Learned Helplessness*, 2 *VICTIMOLOGY* 525, 526 (1977) [hereinafter Walker, *Battered Women and Learned Helplessness*] (explaining that despite the myth that women stay in battering relationship because they are masochistic, it is "probable that a combination of sociological and psychological variables account [sic] for the existence of the battered woman syndrome").

16. See *Responses to Domestic Violence*, *supra* note 10, at 1592 (faulting "[c]ourts and defense attorneys" for "emphasiz[ing] female incapacity").

17. See Jean B. Elstain, *Battered Reason*, *NEW REPUBLIC*, Oct. 5, 1992, at 25, 25, 29.

18. See *infra* Part III.C.

interference. However, Part II of the paper establishes that, for centuries, the criminal law has doubted that women possess the same capacity for responsible conduct as men do. In this Part, I provide a partial genealogy¹⁹ of the battered woman syndrome defense; I describe a special excuse from criminal liability that the law afforded to married women, which was founded on women's incapacity for rational self-governance. In Part III, I undertake to show that the battered woman syndrome theory recapitulates these same misogynist assumptions about women's helplessness to govern their own lives, and I trace how the feminist practice that gave rise to the battered woman syndrome defense unintentionally endorsed the patriarchal values that have informed the criminal law's treatment of women for at least the past six centuries.

Finally, in the Conclusion, I tentatively propose that we might recuperate the battered woman syndrome defense in one of two ways. For the reasons identified in Parts II and III, I initially conclude that the defense is not acceptable as presently constructed. Then, I offer thoughts about how we might revise the battered woman syndrome defense as a special excuse for women. I do not feel content, however, with this solution because, by providing this kind of accommodation for women only,²⁰ the criminal law would continue to affirm that men possess the capacity for rational self-governance, but women do not. Accordingly, I suggest that the long-term project that we must undertake is a thorough examination and revision of the theory of responsibility to uncover and repair the patriarchal assumptions underlying its normative model for human behavior.²¹

19. I am using the term "genealogy" in the familiar and nontechnical sense of "family resemblance," which is only part of the complex definition of genealogy that Michel Foucault has constituted. See PAUL A. BOVÉ, *MASTERING DISCOURSE: THE POLITICS OF INTELLECTUAL CULTURE* 13-18 (1992).

20. Of course, some male offenders have been permitted to raise a "battered person syndrome defense," e.g., *Commonwealth v. Kacsmar*, 617 A.2d 725, 726 (Pa. Super. Ct. 1992); *Man Uses "Battered Person" Defense*, CHI. TRIB., Feb. 14, 1993, at 15, or a "battered child syndrome defense," *State v. Janes*, 850 P.2d 495, 496 (Wash. 1993). However, these cases represent the kind of exception that proves the rule, and not merely because they are so few in number. In these cases, the victim of the male defendant is also a man. The victim is older and in a position of some authority over the defendant. The defendant claims that the victim inflicted serious physical abuse on him and dominated him psychologically and/or economically. These exceptional cases instruct only that violent men sometimes subjugate younger and weaker men; they do not begin to reverse our assumptions about who dominates whom in heterosexual marriages. That a handful of men are extended lenience if they can demonstrate that they were dominated by another man in the same way that women are systematically subjugated to and by men in our culture does not challenge, but reinforces, our understanding of gender as a hierarchical relationship.

21. Cf. Schulhofer, *supra* note 8, at 115 (explaining that examining criminal law doctrine from a feminist perspective leads to "questions about whether criminal law's core commitments to an allegedly 'male' conception of rights and responsibilities ought to be altered or abandoned").

I

THE MODEL RESPONSIBLE ACTOR

The scholars who write about criminal law are preoccupied with the project of justifying the imposition of criminal blame, with all of the attendant pain it carries for the wrongdoer.²² While the amount of scholarship is substantial, the dominant theories invoked to support criminal blaming, though subject to constant refinement, have remained remarkably stable at least since the time of Blackstone and Bentham. Over the past two centuries, critics eager to articulate a sound theoretical basis for criminal punishment primarily have appealed to principles of retributivism²³ or of utilitarianism.²⁴ Happily, my purposes require only a minimal account of these theories. Retributivism proceeds from the premise that the offender deserves punishment in return for and in proportion to the harm he has done.²⁵ Utilitarianism is not concerned with retributive action as an end in itself; rather, it emphasizes the beneficial consequences, both individual and social, that punishment can achieve.²⁶ Utilitarianism, therefore, calculates the severity of punishment according to its usefulness.²⁷ Because each of these dominant theories, if carried to a logical extreme, would cause results that even their proponents would decry,²⁸ most of the current scholarship serves up a concoction of the two, in which principles derived from one of

22. See, e.g., L. Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 319 (1984) (discussing "the contradictory functions that blaming serves in our criminal justice system"); Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47, 51 (1986) (discussing the relationship between theoretical justifications of criminal responsibility and punishment).

23. See, e.g., Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 681 (1988) ("[T]he criminal law is premised on the belief that wrongdoers should not be punished in the absence of moral desert; and moral desert is primarily a deontological, essentially retributive, moral concept."); Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 179 (Ferdinand Schoenian ed., 1987) (seeking to justify the retributive theory of punishment).

24. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Hafner Publishing Co. 1948) (1789); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1 (providing an economic analysis of the criminal law as a tool for shaping the behavior and preferences of the population at large); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985) (arguing that the substantive doctrines of the criminal law can be shown to promote economic efficiency). But see Seidman, *supra* note 22, at 319 (arguing that certain utilitarian theories of crime control cannot be implemented because blaming serves contradictory purposes).

25. See Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1534-35 (1992); Moore, *supra* note 23, at 180; Weinreb, *supra* note 22, at 47. As Weinreb points out, difficult issues for the retributivist are the questions of "how desert attaches and, more particularly, how it is translated into a measurement of punishment." *Id.*

26. See Dau-Schmidt, *supra* note 24, at 5.

27. *Id.*

28. See generally Kent Greenawalt, *Punishment*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1336, 1338-43 (Sanford H. Kadisli ed., 1983).

the dominant theories attenuate the excesses that the other would achieve in an undiluted form.²⁹

Whatever their philosophical agendas, criminal law scholars agree that the criminal law should not impose its blaming judgments indiscriminately. Members of the academy have reached a consensus that not every human actor, notwithstanding how severely the criminal law may condemn his conduct, is an equally fit candidate for criminal punishment.³⁰ Just punishment invariably depends on a careful definition of the punishable subject. This definition of the responsible actor is said to be of great theoretical significance because the criminal law cannot accomplish its aims unless its punishments are imposed on such actors.³¹ It is here, over the definition of the responsible actor, that we find a remarkable unanimity in the scholarly canon.³² Virtually all scholars agree that the responsible actor contemplated by the criminal law is a rational character capable of choosing for

29. See Weinreb, *supra* note 22, at 48-49. George Fletcher characterizes the modern literature concerning the purposes of punishment as a "tolerant muddle," in which the critics "pick and choose among the purposes of punishment." George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 964 (1985). Within this muddle, he is able to discern a "dominant view," under which "the requirement of blameworthiness functions at most as a limit on punishment carried out for the sake of deterrence and other social goals." *Id.* at 963-64; see also Peter Arenella, *Character, Choice, and Moral Agency*, in CRIME, CULPABILITY, AND REMEDY, *supra* note 8, at 59, 62 (arguing that "[m]ost utilitarian theorists embrace a mixed value theory of punishment"). Kent Greenawalt and Joshua Dressler agree that utilitarian arguments have dominated the scholarship in this century. See Greenawalt, *supra* note 28, at 1340; Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1156 (1987). However, Michael Seidman believes that "retributivist rhetoric seems to be on the ascent." Seidman, *supra* note 22, at 347.

30. As Lloyd Weinreb puts it,

whatever one's theory, the outcome is about the same. The short explanation for this happy coincidence is that, for whatever reason, criminal law is concerned largely with intentional conduct. Since desert attaches most easily to such conduct, which also can be deterred by the threat of punishment, desert and utility coincide.

Weinreb, *supra* note 22, at 50.

31. See 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW 275-76, 428 (1986) (contending that the deterrent function of the criminal law would not be served by imposing sanctions for involuntary behavior); 2 ROBINSON, *supra* note 1, at 223 n.1, 225 & n.5 (explaining that the criminal law recognizes excuses in situations where punishment would not deter crime); ALAN WERTHEIMER, COERCION 148-50 (1987) (summarizing deontological theories supporting punishment, which conclude that it is unjust to punish unless the suspect possessed freedom of will, and utilitarian theories, which conclude that punishment for involuntary conduct is inefficacious); Posner, *supra* note 24, at 1221, 1223-24 (arguing that the concept of intent in criminal law determines whether the criminal sanction will be an effective means of controlling undesirable conduct); Weinreb, *supra* note 22, at 50, 64-65 (arguing that the felony murder doctrine cannot be justified on either retributivist or utilitarian grounds because the actor did not intend the killing).

32. For example, as Peter Arenella has observed, "While retributivist and utilitarian theorists offer different normative explanations for why the criminal law should require a demonstration of the actor's moral responsibility, prominent members from both camps rely on the rational choice model to explain the law's judgments of moral responsibility." Arenella, *supra* note 29, at 63. In his thorough and informative treatise, Paul Robinson makes a similar point: "Free will is an essential prerequisite to criminal liability" because each of the theories supporting punishment "depends upon men who are capable of choosing how they will behave." 1 ROBINSON, *supra* note 1, at 91 n.2 (quoting A. GOLDSTEIN, THE INSANITY DEFENSE 16 (1987)).

himself among alternative courses of action for good or evil.³³ Not surprisingly, these critics also agree that the criminal law must reject a hard determinist account of human action, which holds that conduct and even "human . . . willings"³⁴ are the product of causal factors that the actor did not himself choose.³⁵ Of course, as one might expect, there is some dispute over precisely how the attributes that constitute self-determination should be defined in this context.³⁶ But, particularly among scholars who believe that

33. See, e.g., Arenella, *supra* note 25, at 1517-18 ("The law's *conduct-attribution* model of moral responsibility generally requires a demonstration that the actor made a knowing, rational, and voluntary choice to act in a manner that breached community norms."); Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2246 (1992) (arguing that criminal law generally "regards the great bulk of human activity as having been produced through the agency of an individual's free will"); Dau-Schmidt, *supra* note 24, at 3-5 (noting that the economic model of criminal law assumes that "people rationally choose among their opportunities to achieve the greatest satisfaction of their preferences"); Weinreb, *supra* note 22, at 56 (asserting that the conduct of a responsible actor is "self-determined").

34. See Michael S. Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091, 1112 (1985).

35. See Boldt, *supra* note 33, at 2246. There is a complex philosophical literature on determinism, which, very simply defined, "is the belief that things must be as they are." Lenn E. Goodman, *Determinism and Freedom in Spinoza, Maimonides, and Aristotle: A Retrospective Study*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS, *supra* note 23, at 107, 107. While there is more than one type of determinist theory, criminal law philosophers and theorists usually defend against "causal determinism," which, according to Goodman, "is the belief that things must be as they are because their causes make them so." *Id.*; see also Moore, *supra* note 34, at 1112 ("Determinism tells us that human choices and actions are caused and that those causes themselves have causes."). Determinism is incompatible with moral blame because, if the criminal's acts are produced by forces over which he had no control, society should assign blame for the act to those forces rather than to his agency. While utilitarian theory is not incompatible with determinism, utilitarianism can achieve its beneficial consequences only if punishment is threatened against and inflicted on those for whom punishment itself can operate as a cause of behavior. Actors for whom punishment is useful in the utilitarian sense, thus, must possess sufficient cognitive capacity and rational control to weigh the likelihood of being punished when deciding between legal and illegal alternative courses of conduct.

36. As Peter Arenella recently remarked, "[D]escribing the types of knowledge, reason, and control that are necessary for moral agency is no small task." Arenella, *supra* note 25, at 1519. Michael Moore is one scholar who has been concerned to provide a theory of personal responsibility for conduct that is compatible with the determinist theory that action is caused. Moore argues that, when we say, as H.L.A. Hart did, see H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 28, 173-74 (1968), that an accused can be blamed only when "he could have done other than he did," we mean that the actor could have acted otherwise "if he had chosen (or willed) to do otherwise." Moore, *supra* note 34, at 1142 (quoting G.E. MOORE, ETHICS 84-95 (photo reprint 1969) (1912); see also Michael S. Moore, *Choice, Character, and Excuse*, in CRIME, CULPABILITY, AND REMEDY, *supra* note 8, at 29, 35. Under this interpretation, "the only freedom the principle of responsibility now requires is the freedom (or power) to give effect to one's own desires." Moore, *supra* note 34, at 1143. Before we may justly assign blame, the actor's "choices . . . must themselves be causes of actions," but it need not be demonstrated "that such choices be uncaused." *Id.* Other critics, relying on the common sense assumptions about responsibility for conduct that we make in daily life, maintain that it is not necessary to define precisely the area in which free will does or can operate. E.g., GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 801-02 (1978) (arguing that we need not "posit" freedom as though we were developing a geometric system on the basis of axioms"); Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 720 (1992). Samuel Pillsbury, for example, concedes that "[t]hose who contend that determinism precludes deserved punishments or rewards have a plausible metaphysical argument for this position"; nonetheless, he believes that we should content ourselves with a "kind of practical compatibilism" because determinist arguments contradict the commitment to personal responsibility that underpins social interaction. *Id.* at 720, 742. Of those critics

retributivism must play some role in criminal punishment, we find a marked commitment to a conception of free will as the foundation of legal blame.³⁷ Accordingly, the responsible subject's power to exercise rational choice is seen as an essential faculty of the, so-called, normal human being.³⁸

It is difficult to catch a direct glimpse of this model, all-important, responsible actor in the records of criminal trials, whose accounts reflect on the far less than model attributes of human misjudgment, folly, cruelty, and vice. Yet, the normative model of the responsible actor is said to be implicit in the key elements of crime, namely, the actus reus and mens rea requirements.³⁹ The actus reus element is absent if the accused fails to exercise conscious physical control over his conduct;⁴⁰ simply put, in such circumstances, the accused does not, in any sense that the criminal law finds meaningful, rationally *choose* the conduct he engaged in.⁴¹ Likewise, the mens rea requirement implies that responsible actors have the capacity for rational choice,⁴² for, as H.L.A. Hart explained, a blaming system that assigns different gradations of culpability based on the actor's mental state must be founded on the assumption that human beings are able to "control" their own "mental operations."⁴³

willing to make concessions to determinist arguments, Herbert Packer has made this latter point perhaps most bluntly: "Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were." HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74-75 (1968).

37. Sanford Kadish has warned that "[t]he idea that a normal actor, who commits a crime intentionally and under no physical or physiological compulsion, might have been unable to choose to act otherwise threatens to undermine blame at its foundation." Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 282 (1987). For similar points, see FLETCHER, *supra* note 36, at 801 (noting that if all human conduct is compelled by circumstances, "we should have to abandon the whole process of blame and punishment and turn to other forms of social protection"); HART, *supra* note 36, at 173-74; Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1249, 1252-54 & n.18 (1976).

38. For example, Michael Moore claims that rationality, that is, "[t]he capacity to engage in practical-reasoning," "is one of the essential prerequisites of personhood." Moore, *supra* note 34, at 1137, 1148-49; see also Dressler, *supra* note 29, at 1166-67; Weinreb, *supra* note 22, at 56, 60 n.27.

39. The most basic premises of the criminal law are that a crime consists of a "physical part," i.e., a bad act, and a "mental part," i.e., a bad state of mind. 1 LAFAVE & SCOTT, *supra* note 31, at 296. Of course, like most other basic premises, these are subject to exceptions, as criminal liability may be imposed in some cases for a failure to act and in the absence of any culpable mental state. *Id.* at 282-96, 340-50 (discussing strict liability crimes and crimes of omission).

40. See *id.* at 275-78 (explaining that acts must be voluntary in order for criminal sanctions to be imposed); MODEL PENAL CODE § 2.01 (1962). Favorite casebook examples of such conduct, found not to support criminal liability, include a man dragged from his home onto the highway by police officers, who there charged him with being intoxicated in public, *Martin v. State*, 17 So. 2d 427 (Ala. Ct. App. 1944), and a case of "somnambulistic homicide," in which a woman who was sleepwalking killed her daughter by smashing her in the head with an ax, see KAPLAN & WEISBERG, *supra* note 12, at 77-79 (describing the unreported case of *King v. Cogdon*, heard in the Supreme Court of Victoria, Canada, in December 1950).

41. See 1 LAFAVE & SCOTT, *supra* note 31, at 275-78.

42. Joshua Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 MINN. L. REV. 335, 342 (1979).

43. HART, *supra* note 36, at 151, 174. Meir Dan-Cohen recently observed that the "clearest example" of the notion that blaming should be founded on the "agent's capacity to choose her actions

Scholars often look to the field of criminal defenses, particularly excuses, for help in characterizing the model responsible actor.⁴⁴ The defenses that excuse an actor who has violated the criminal law are distinct from those that justify misconduct⁴⁵ in a way that is said to make the excuses the most helpful source for critics intent on delineating the responsible actor. A plea of justification claims that the act was right or, at least, legally permissible, while a plea of excuse concedes that the act was wrongful, but claims that the actor should not be blamed for it.⁴⁶ In this way, a justification defense "direct[s] our attention to the propriety of the act in the abstract,"⁴⁷ while an excuse defense focuses on whether the personal characteristics of the accused support his plea that he may not justly be held responsible.⁴⁸

Although the academy has not relied heavily on the law of justification when exploring issues of responsibility, justification defenses nevertheless reflect the criminal law's model of the responsible actor. Justification defenses powerfully imply that normal actors, even under the most deadly circumstances, possess the capacity for rational choice. In a case involving the justification of self-defense, for example, a judgment that the force exerted against an aggressor was justified announces that *ex ante* the accused, though subject to the tremendous pressure of what he believed might be impending fatal harm, was able to exercise self-control⁴⁹ sufficient to properly gauge the strength of the forces arrayed against him and to extri-

freely" is the criminal law's "traditional definition of first degree murder based on premeditation and deliberation. The law deems that any emotional agitation—any heat of passion—clouds judgment and impairs self-control and thus reduces responsibility." Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 959-60 (1992). Samuel Pillsbury claims that the *mens rea* element incorporates important judgments about morality, as

punishment is deserved according to the offender's choice to challenge moral meaning. For this reason, we are preoccupied with an offender's mental state in judging the extent to which her action demeans the value of autonomy. To determine just punishment we must assess the offender's awareness of and attitude toward the harm done.

Pillsbury, *supra* note 36, at 744.

44. See Weinreb, *supra* note 22, at 56 ("The excuses that we offer and accept help to clarify what we mean by responsibility and desert.").

45. See 1 ROBINSON, *supra* note 1, at 100-01; Dressler, *supra* note 29, at 1157-63; Thomas Morawetz, *Reconstructing the Criminal Defenses: The Significance of Justification*, 77 J. CRIM. L. & CRIMINOLOGY 277, 282 (1986) (reexamining the boundary between justification and excuse). Kent Greenawalt has demonstrated that the distinction between excuse and justification is an uneasy one. See generally Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984) (arguing that Anglo-American criminal law should not attempt to distinguish between justification and excuse in a fully systematic way).

46. See WERTHEIMER, *supra* note 31, at 146-47; Fletcher, *supra* note 29, at 954-55.

47. Fletcher, *supra* note 29, at 955; see also 1 ROBINSON, *supra* note 1, at 101.

48. 1 ROBINSON, *supra* note 1, at 101 ("An excuse represents a legal conclusion that the conduct is wrong, undesirable, but that criminal liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him.").

49. Implicit within the characterization of self-defense as a justification is the assumption that the actor defending himself properly exercised his "choice and control" because the defense is "circumscribed by factors the actor is expected to take into account" at the time of the conduct for which he later is prosecuted. See Morawetz, *supra* note 45, at 297.

cate himself in a manner that inflicted the least overall costs.⁵⁰ The actor who is preparing to fend off an attack must calibrate his response by reference not only to his own rights, but also to the interests and capacities of his attacker.⁵¹ Not surprisingly, given the ineluctability of the adversarial forces arrayed against the actor,⁵² George Fletcher characterizes justification defenses as expressing the "ideal of self-regulation."⁵³ By finding that a defendant's conduct was justified, the decisionmaker not only announces that no wrong was committed, it also expresses its confidence in the actor's capacity to behave responsibly in the future.

In sharp contrast to the justified actor, who is adjudged to have governed himself in an exemplary fashion, the excused defendant achieves leniency only by showing that, at the time he offended, his capacity to choose lawful over unlawful conduct was grossly distorted. The job of understanding why we excuse is a complicated one because the criminal law recognizes excuses residing in "several conceptually distinct ideas or practices."⁵⁴ However, each of these distinct practices does appear to share a common feature: excuse is extended to an actor who suffers from a "disability"⁵⁵ that sets him apart from normal actors⁵⁶ in a way that makes us doubt that his actions, though a violation of the criminal law, warrant punishment.⁵⁷

50. Indeed, Fletcher argues that justification defenses should operate "not only ex post as decision rules, but ex ante as conduct rules." Fletcher, *supra* note 29, at 976. On the other hand, he believes that while excuse defenses operate ex post as reasons for not blaming the defendant, they do not serve as ex ante guides for right behavior. *Id.* at 970-71.

51. For example, the actor may use only the amount of force necessary to repel the attack. See 2 ROBINSON, *supra* note 1, at 77. This limitation suggests that, in some situations, even though he feels threatened, the actor should not use any force at all, and that he may not use more force than is necessary to defend himself. *Id.* The limitation also reveals that the law is not solely committed to vindicating individual autonomy. See Schulhofer, *supra* note 8, at 115-16 ("The laws prefers [sic] retreat and loss of honor to the unnecessary taking of life.").

52. As Robinson puts it, "[s]elf-defense is . . . unique among defensive force situations because the actor makes the justification decision at a moment when he is in a difficult position." 2 ROBINSON, *supra* note 1, at 71.

53. Fletcher, *supra* note 29, at 976.

54. William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1242 (1988); see also Weinreb, *supra* note 22, at 58 ("There does not seem to be any general principle that determines definitively what factors count as a sufficient explanation to displace responsibility . . .").

55. George Fletcher uses the word "distortion" to describe the conditions that should excuse. He claims that excuses may be recognized only where there is a "limited, temporal distortion of the actor's character. . . . The circumstances surrounding the deed can yield an excuse only so far as they distort the actor's capacity for choice in a limited situation." FLETCHER, *supra* note 36, at 802.

56. See Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 531 (1978).

57. In the context of the insanity excuse, Paul Robinson has remarked that the prevailing definitions of legal insanity are designed to identify the actor who "is neither culpable nor able to be deterred." 2 ROBINSON, *supra* note 1, at 291.

The kinds of disabilities that excuse generally fall into two categories: defects in cognition and defects in volition.⁵⁸ In other words, excuse may be available where, because of a serious and verifiable disability, the actor either does not realize that he is violating the law (defective cognition) or cannot prevent himself from violating the law (defective volition).⁵⁹ For example, the insanity excuse⁶⁰ encompasses mental illnesses that disturb the actor's cognitive processes to such an extent that he misperceives the physical nature of his conduct⁶¹ or does not know that his conduct is wrong or criminal.⁶² In some jurisdictions, the insanity excuse also extends to mental illnesses that, though they do not cause a distortion in the cognitive faculties with which the criminal law is concerned, severely impair the actor's ability to control his conduct.⁶³ Similarly, the actor who invokes the duress excuse⁶⁴ and proves that he violated the law under threat of death is thought to have labored under a volitional defect in that death threats profoundly disrupt the normal psychological processes by which human beings control their conduct.⁶⁵ Aware of the wrongfulness of the coercer's

58. See *id.* at 223-24, 229-30; HART, *supra* note 36, at 173-75. Traditionally, the law has been more hostile to volitional defects than it has been to cognitive defects as the basis for excusing criminal misconduct. See *id.* at 33, 174-75; 2 ROBINSON, *supra* note 1, at 229.

59. George P. Fletcher, *Excuse: Theory*, in 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE*, *supra* note 28, at 724, 724.

60. The defense I am describing here is the general insanity defense, which excuses the actor even when the prosecution is able to prove all of the elements of the crime beyond a reasonable doubt. Mental illness also can be used to negate the *mens rea* element of the offense; this use of mental illness is usually referred to as a "diminished capacity" claim. See 1 ROBINSON, *supra* note 1, at 272-73. The diminished capacity claim, as opposed to the general insanity defense discussed in text, denies culpability on the ground that the prosecutor has not proved the mental element of his case. *Id.*

61. For example, a man suffering from a hallucination strangles his wife believing that he is squeezing an orange. 2 ROBINSON, *supra* note 1, at 232.

62. For example, an actor kills his child because he heard the voice of God commanding him to sacrifice the child for the sake of mankind. *Id.* at 233-34.

63. For example, if a defendant charged with homicide testifies that demons directed him to kill his victims, he may concede that he knew that killing was wrongful, but claim that the "intensity of [the demons'] commands precluded him from conforming his conduct to the law." *Id.* at 303 n.66. This example, which Robinson took from the defense presented by David Berkowitz, familiar to the public (and now to First Amendment scholars) as the "Son of Sam," illustrates perfectly the futility of making hard distinctions between defects in cognition and volition. Surely, this volitional defect was inextricably related to the cognitive disturbance that led him to believe that a barking dog was possessed by demons. Most jurisdictions limit the insanity defense to mental illnesses that cause cognitive impairments and refuse to extend the defense to persons who claim that their insanity affected only their capacity for self-control. Schulhofer, *supra* note 8, at 113-14.

64. As I explain *infra* note 143, although there is some disagreement over whether duress functions as an excuse or as a justification, most scholars and codifications characterize the defense as an excuse.

65. See Moore, *supra* note 34, at 1129 ("[Threats] interfere with one's normal ability or opportunity to do what is morally or legally required."); see also 2 ROBINSON, *supra* note 1, at 351 ("[D]uress . . . impair[s] the actor's ability to control his conduct."). Sanford Kadish calls misconduct committed under duress an example of "metaphorically" involuntary behavior, Kadish, *supra* note 37, at 266, 272-74, because while the actor literally did make "a choice to do an act that is criminal," he had "no effective choice given the limits of moral fortitude, not just of the defendant, but of humankind generally," *id.* at 266, 274.

demand, the coerced actor does choose to commit the crime rather than suffer a fatal or grievous wound,⁶⁶ but the alternatives open to him were so agonizing that we accept his claim that he was carrying out a course of conduct that he did not choose—and would not have chosen—for himself.⁶⁷

Because criminal punishment is designed to be painful, whether justified by principles of retributivism, utilitarianism, or a mixture of both,⁶⁸ the accused person and his defense counsel have a great incentive to avoid a finding of responsibility. Criminal law scholars, however, insist that the practitioner's understandable concern for the painful costs of such a finding⁶⁹ must not move us to define excusing conditions more expansively. Rather, by carefully confining the scope of excuse and thereby necessarily inferring that virtually all actors are capable of rational choice,⁷⁰ we are said to guarantee many beneficial consequences for the guilty accused, for persons contemplating violations of the criminal law, and for law-abiding actors, in that we secure our prized self-sovereignty in a free society. The roots of these sometimes dizzying claims for the social efficacy of our model of criminal responsibility extend at least as far back as Blackstone, whose brief observations about the normative value of criminal excuses concluded that it is just for the law to excuse in cases where the actor's will was overborne because "the concurrence of the will when it has it's [sic]

66. See Rollin M. Perkins, *Impelled Perpetration Restated*, 33 HASTINGS L.J. 403, 403 (1981); Stuntz, *supra* note 54, at 1244.

67. See HART, *supra* note 36, at 16; Pillsbury, *supra* note 36, at 744 ("[C]oerced actors do not challenge moral meaning" because "[t]heir deeds, even if wrongful, represent the choices of others."); Martin Wasik, *Duress and Criminal Responsibility*, 1977 CRIM. L. REV. 453, 453 (In cases of duress, "the accused claims that there was no act by him."). As Jerome Hall puts it, the actor who offends under duress is not carrying out some "desired objective" of his own. See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 436 (2d ed. 1960); see also *State v. Woods*, 357 N.E.2d 1059, 1066 (Ohio 1976) ("The essential characteristic of coercion . . . is that force, threat of force, strong persuasion or domination by another, necessitous circumstances, or some combination of those, has overcome the mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences."), *vacated in part*, 438 U.S. 910 (1978), and *overruled on other grounds by State v. Downs*, 364 N.E.2d 1140 (1977), *vacated in part*, 438 U.S. 909 (1978).

68. The retributivist inflicts punishment on offenders because they deserve it, while the utilitarian believes that punishment and the threat of punishment will motivate people to abide by the law's directives. See Moore, *supra* note 23, at 179.

69. Individual actors are most tempted to deny responsibility "when a determination of responsibility would entail painful consequences for ourselves or those we care about." Pillsbury, *supra* note 36, at 741. While Pillsbury, like other theorists, concludes that the enhanced personal freedom attending a denial of responsibility is both fleeting and destructive of the moral value of human actions on which our community is founded, *id.* at 741-42, those who defend criminal cases identify their successes and failures by counting acquittals, pleas to lesser charges, and convictions, see, e.g., Lenore E. Walker, *A Response to Elizabeth M. Schneider's Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 223, 224 (1986); Lenore E. Walker et al., *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 14 (1982).

70. "The existence of general human free will . . . is conclusively presumed." Dressler, *supra* note 42, at 342; see also Arenella, *supra* note 25, at 1569 ("The criminal law assumes that all sane adults have the capacity to act rationally and free from compulsion.").

choice either to do or to avoid the fact in question, [is] the only thing that renders human actions either praiseworthy or culpable."⁷¹

Not surprisingly, then, proposals to revise the norm of responsibility by recognizing a new excuse ordinarily are greeted with skepticism, if not hostility. From time to time, a new excuse to criminal liability is proposed, reflecting its sponsor's perception that the law is unjustly condemning some group of actors who lacked the capacity for rational self-control.⁷² Criminal law scholars assess the presuppositions that the new excuse makes about the accused person's ability to restrain himself and measure those presuppositions against the criminal law's assumptions about the responsible actor's capacity for self-governance. Invariably, the upshot of the scholarly exchange is that notable representatives of the academy denounce the proposed excuse on the ground that it invites determinism together with the putative horrors that determinism carries with it, while only a tiny handful of cases reflect on, also to reject, the merits of the proposal. Two prominent examples of this type of academic event are the jury instruction offered by Judge Bazelon in 1976 under which a disadvantaged background might constitute an excuse to a criminal charge⁷³ and the suggestion made in 1978 by Richard Delgado that the criminal law should excuse victims of coercive persuasion, popularly known as brainwashing.⁷⁴

Judge Bazelon developed his new excuse as a response to what he perceived to be shortcomings in the definition of legal insanity. As he considered the best way to cure those deficiencies, the judge came to realize that the "[t]he primary victims of this unsolved problem were . . . defendants from disadvantaged backgrounds" because the "mental impairments" afflicting those defendants were the product of social, economic, and cultural deprivations or of racial discrimination, rather than of a diagnosable mental illness.⁷⁵ These defendants were being judged responsible even though they were, in the judge's estimation, burdened by the same kinds of cognitive and volitional defects that excuse in cases where mental illness is found. Accordingly, Judge Bazelon suggested that a new excuse be adopted under which the jury would be instructed to acquit if it found that, at the time of the offense, the defendant's "'mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly

71. 4 WILLIAM BLACKSTONE, COMMENTARIES *20.

72. E.g., David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 395-96 (1976) (proposing a jury instruction that would permit acquittal where crime was caused by the accused's disadvantaged background); Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1, 11 (1978) (proposing defense for accused who can establish that her crimes were induced by coercive persuasion techniques employed against her by others).

73. See Bazelon, *supra* note 72.

74. See Delgado, *supra* note 72.

75. Bazelon, *supra* note 72, at 394.

be held responsible for his act.”⁷⁶ The judge did not advocate an outright rejection of criminal responsibility,⁷⁷ though his instruction had the potential greatly to expand the class of persons found to lack the capacity to exercise rational choice.⁷⁸ Rather, the aim of the instruction would be to force jurors to confront the causes of criminal behavior and thereby bring home to the community its responsibility for the crime and for the plight of the criminal actor, in cases where the jury concluded that the crime must be attributed, not to the accused’s “free choice to do wrong,” but to a disadvantaged background he had not chosen.⁷⁹ Only one decision ever gave serious consideration to Judge Bazelon’s proposal, and that decision was the judge’s own, separate opinion in *United States v. Brawner*,⁸⁰ where he originally suggested the instruction.⁸¹ Yet, the scholarly chorus of condemnation swells to this day.

Reacting against it at the time, Stephen Morse wrote that the judge’s proposal treated persons from disadvantaged backgrounds “as less than human” because it denied that they were “autonomous and capable of that most human capacity, the power to choose.”⁸² While the pressures on such persons to violate the law might be compelling, making obedience very hard for them, Morse insisted that “behavior is a matter of choice.”⁸³ Therefore, “it is both moral and respectful to the actor to hold the actor responsible.”⁸⁴ Since the judge’s model virtually rejected the theory of personal responsibility for conduct, which is the foundation for punishment, the proposed excuse “could be raised in every criminal case,”⁸⁵ creating the specter of mass acquittals. Yet, as Morse pointed out, the judge had failed to confront the tough question of what we would do with these excused

76. *Id.* at 395-96 (quoting *United States v. Brawner*, 471 F.2d 969, 1032 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part)) (emphasis omitted). Judge Bazelon explained that this

instruction would freely allow expert and lay testimony on the nature and extent of behavioral impairments and of physiological, psychological, environmental, cultural, educational, economic, and heredity factors. Its ultimate aim . . . would be to give all of us a deeper understanding of the causes of human behavior in general and criminal behavior in particular.

Id. at 396.

77. *But cf. id.* at 401-02 (“[I]t is simply unjust to place people in dehumanizing social conditions, to do nothing about those conditions, and then to command those who suffer, ‘Behave—or else!’”).

78. The judge, however, doubted that his proposed new instruction would result in a sharp increase in the number of acquittals. *Id.* at 398.

79. *Id.* at 389, 396.

80. 471 F.2d 969 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part).

81. *Id.* at 1032.

82. Morse, *supra* note 37, at 1268.

83. *Id.* at 1252.

84. *Id.* at 1252, 1253-54. Similarly, George Fletcher claims that the ultimate statement of the community’s disrespect for a disobedient actor is a decision to excuse him. Fletcher pointedly argues that we have the obligation to punish those who engage in acts of civil disobedience because “[t]he surest way . . . to discredit a political protestor is to treat him as insane or otherwise not responsible for his protest. For the disobedient, the price of being taken seriously is being held accountable for deliberate violation of the law.” FLETCHER, *supra* note 36, at 806 (footnote omitted).

85. Morse, *supra* note 37, at 1254.

offenders, who had displayed their propensity for dangerous misconduct.⁸⁶ Obviously, Morse remarked, the community would not tolerate their release and would impose a system of civil incarceration, similar to the controls used to govern those found mentally ill.⁸⁷ Even more misguided was Judge Bazelon's belief that his proposal should spur the community to provide effective assistance to the poor. For example, Morse predicted, if social welfare reforms were enacted as a crime prevention measure, they necessarily would include "intensive intervention into the family life and child-rearing" of all poor families, because we have no basis for predicting which families will turn out lawbreakers.⁸⁸ Rather than providing a moral solution to the problem of blaming those whom society has most neglected, Morse argued, the judge's "program would lead to disrespect for personal autonomy, to massive invasions of privacy, and to the 'tyranny of the normative.'"⁸⁹

In short, the disadvantaged background excuse would quickly and utterly overwhelm the protection against official interference afforded by the model of personal responsibility: excused wrongdoers would be forced to undergo therapeutic treatment or preventive detention, with these solutions soon giving way to preemptive incarceration, in which actors thought to be "deviant" would be subjected to behavior modification even before they had committed any legal infraction.⁹⁰ In the event that his prediction lacked potency for those of us who feel remote from the subculture of deviance identified by Judge Bazelon, Morse grimly observed that criminal offenders are produced by a complex interaction among numerous biological, psychological, social, and economic factors; thus, a decision to junk our model responsible actor ultimately would authorize intrusions into the liberty and privacy of all persons to ferret out, and treat, potential criminogenic influences.⁹¹ The erosion of the safeguard of the responsible actor proposed by Judge Bazelon carried ominous ramifications, indeed. Rather than being left alone by the state, free to rely on our own choices as the measure by which we shall live,⁹² more and more of us would find our-

86. *Id.* at 1255; see also FLETCHER, *supra* note 36, at 802 ("If society is to remain safe and orderly, there are inherent limits on excusing dangerous persons, say, on the ground of social deprivation. If these persons are excused under the criminal law, they will be confined under civil commitment statutes."); Arenella, *supra* note 25, at 1526 (arguing that we cannot "afford to exempt dangerous but morally blameless offenders from criminal liability and punishment unless we are willing to authorize a system of preventive detention that permits involuntary confinement on the basis of dangerousness alone").

87. Morse, *supra* note 37, at 1256; see also FLETCHER, *supra* note 36, at 802 (arguing that dangerous criminals, if excused, would nonetheless need to be confined to protect society).

88. Morse, *supra* note 37, at 1248, 1262-63.

89. *Id.* at 1256.

90. Of course, this warning has resonance in current practice; for example, as Glanville Williams has pointed out, "persons of unsound mind . . . can frequently be treated" as if they had been convicted of a crime "whether they are found guilty of an offence or not." WILLIAMS, *supra* note 1, at 32.

91. See Morse, *supra* note 37, at 1252, 1262-63.

92. See HART, *supra* note 36, at 23-24, 47-48, 181-82.

selves subjected to the kind of supervision now thought necessary to monitor and restrain the activity of animals, children, and the insane.

More recently, Michael Moore has chided that our feelings of sympathy for the disadvantaged persons whom Judge Bazelon would excuse are a disguise for dubious, even pernicious, motives, rather than altruistic ones.⁹³ For Moore, criminal responsibility may justly be assigned whenever the accused had the capacity and opportunity to engage in practical reasoning, even though environmental pressures unquestionably shaped both his character and desires.⁹⁴ Since actors from disadvantaged backgrounds, no less than those from privileged homes, can engage in practical reasoning, Moore charges, our sympathy for the poor offender springs from a sense of "elitism" or "condescension" towards the "unhappy deviant," who is not expected to live up to the same "high moral standards" by which we judge ourselves, and even from a belief that such an offender is a less complete human being than ourselves.⁹⁵

Sanford Kadish also has condemned, perhaps a bit more bluntly, Judge Bazelon's proposal. Kadish believes that excused actors, who lack the capacity to make rational choices, are more like animals or things than human beings; for example, defending our decision to excuse the insane actor, he remarks, "We may become angry with an object or an animal that thwarts us, but we can't blame it."⁹⁶ Comfortable with this characterization and treatment of people who are mentally ill, Kadish rejects the label for actors from deprived backgrounds. Judge Bazelon's excuse designates the accused person as "an infant, a machine, or an animal. Those who propose this defense are plainly moved by compassion for the downtrodden, to whom, however, it is nonetheless an insult."⁹⁷

Samuel Pillsbury makes a similar point when he claims that the disadvantaged background excuse rejects "the source of human uniqueness, what

93. Moore, *supra* note 34, at 1146-47. In a recent paper, Richard Boldt has criticized Moore's theory of responsibility because, though ostensibly grounded on everyday moral experience, it inadequately accounts for the community's feelings of sympathy for the disadvantaged offender. See Boldt, *supra* note 33, at 2266-69. While Moore claims that we must discard these "sympathetic judgments" as untrustworthy because they are inconsistent with the moral judgments we ordinarily make about responsibility, see Moore, *supra* note 34, at 1145-47, Boldt argues that we should reach for a deeper conception of responsibility that does not dismiss as irrelevant our sympathetic responses to some cases, see Boldt, *supra* note 33, at 2268-69.

94. Moore, *supra* note 34, at 1146-48.

95. *Id.* at 1147. For example, Moore remarks that our sympathy for the disadvantaged defendant "betokens a refusal to acknowledge the equal moral dignity of others. It betokens a sense about one's self—as the seat of subjective will and responsibility—that one refuses to acknowledge in others." *Id.* Pillsbury makes the same point when he says that we punish, not "alien enemies," but people who "are fundamentally like . . . us." Pillsbury, *supra* note 36, at 752.

96. Kadish, *supra* note 37, at 280. Michael Moore agrees that insanity throws into question "the very actor's personhood," and he characterizes insane people, for purposes of assessing their culpability, as "animals, or even stones." Moore, *supra* note 34, at 1137, 1149.

97. Kadish, *supra* note 37, at 284-85.

philosophers call autonomy.”⁹⁸ Like Morse, Pillsbury believes that embracing the excuse would carry serious implications for citizens who do not offend by withholding satisfaction of the basic human yearning “to be *somebody*, somebody special, that is.”⁹⁹ The inevitable result of a decision to excuse wrongdoing on the ground, for example, that our misconduct “reflects nothing more than environment and genetic heritage” is that our good works will be attributed to those same sources rather than to personal choice and achievement.¹⁰⁰ Or, as Hart put it when considering another universal excuse, proposals to eliminate criminal responsibility “treat[] men merely as alterable, predictable, curable or manipulable things” and thus are inconsistent with the common judgments that “not only underly [sic] morality, but pervade the whole of our social life.”¹⁰¹

Richard Delgado’s suggestion that brainwashing should excuse a criminal charge has provoked a similarly hostile reaction. Delgado’s suggested defense was more carefully circumscribed than Judge Bazelon’s disadvantaged background excuse; indeed, Delgado sought to distance himself from Judge Bazelon’s theory by protesting that the brainwashing defense would not extend to persons who claimed that their crimes were determined by their social or economic deprivation.¹⁰² Rather, the brainwashing excuse would apply only where the actor’s mental state had been forcibly altered by terrifying abnormal influences practiced by a powerful captor.¹⁰³ The

98. Pillsbury, *supra* note 36, at 731-32, 740.

99. *Id.* at 740. When reading this portion of Pillsbury’s essay, those familiar with Dorothea Brooke, heroine of *Middlemarch*, may remember her aspirations, and their fate: “Here and there is born a Saint Theresa, foundress of nothing, whose loving heart-beats and sobs after an unattained goodness tremble off and are dispersed among hindrances, instead of centering in some long-recognisable deed.” GEORGE ELIOT, *MIDDLEMARCH* xiv (Bert G. Hornback ed., W.W. Norton & Co. 1977) (1874).

100. Pillsbury, *supra* note 36, at 740. Some scholars have argued, however, that the rewards offered by the theory of personal responsibility for misconduct accrue to the benefit of the middle class, at the expense of the disadvantaged. See Nathan Caplan & Stephen D. Nelson, *On Being Useful: The Nature and Consequences of Psychological Research on Social Problems*, 28 AM. PSYCHOLOGIST 199, 210 (1973) (“Person-blame interpretations reinforce social myths about one’s degree of control over his own fate, thus rewarding the members of the great middle class by flattering their self-esteem for having ‘made it on their own.’ This in turn increases public complacency about the plight of those who have not ‘made it on their own.’”).

101. HART, *supra* note 36, at 183.

102. Delgado, *supra* note 72, at 19, 28, 33; see also Richard Delgado, *A Response to Professor Dressler*, 63 MINN. L. REV. 361, 364 (1979) (suggesting that persons should not be exonerated merely “because of socioeconomic reduction of opportunity”).

103. Delgado, *supra* note 72, at 19-22. The guts of Delgado’s brainwashing defense, namely, his description of the coercive techniques exercised by a captor in order to induce obedience and “attitudinal change” in his captive, see *id.* at 2-3, are part of the anatomy of the battered woman syndrome. According to the psychologist who constructed it, battered woman syndrome may be precipitated, in part, by “psychological abuse,” as defined by Amnesty International, which includes precisely the same kinds of techniques used by Delgado’s brainwasher. See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 27-28 (1984). Therefore, despite the brainwashing excuse’s striking lack of success, courts often compare the psychological condition of battered women, whom they eagerly excuse, to the “distorted” mental state of a hostage or prisoner of war. See *State v. Hundley*, 693 P.2d 475, 478-79 (Kan. 1985); *State v. Norman*, 366 S.E.2d 586, 589 (N.C. Ct. App. 1988) (noting expert witness testimony analogizing dehumanization of battered woman by batterer to “practices in prisoner-of-war

excuse would not be available to an actor who voluntarily joined the group he later claimed had brainwashed him or whose condition could otherwise be attributed to some choice on his part.¹⁰⁴ But, Delgado argued, in cases where the coercive indoctrination could not be traced back to some voluntary choice on the actor's part,¹⁰⁵ the actor should be excused on the ground that his misconduct reflected not his own choices, but those of his captors.¹⁰⁶ In such cases, the law should pursue the culpable party, namely, the captor, because the misconduct was the product of a mens rea that he had instilled, for his own benefit, in the brainwashed actor's mind.¹⁰⁷ To reassure any skeptics who might doubt that his proposal had workable limits, Delgado confirmed his commitment to the criminal law's assumption that normal actors possess free will;¹⁰⁸ he cited "extensive[]" psychological and psychiatric studies showing that "even the most strongly resistant" hostages can be brainwashed;¹⁰⁹ and he invoked penological theory, our ordinary moral intuitions, and common sense.¹¹⁰

As far as the courts were concerned, Delgado's appeal fell on deaf ears.¹¹¹ Within the criminal law academy, the commentator who responded to Delgado's proposal claimed that a brainwashing excuse portended the collapse of our entire system of criminal blaming. According to Joshua Dressler, Delgado's "unique theory of a superimposed mens rea" was "doctrinally untenable" in that it logically could not be limited to victims of

camp"), *rev'd*, 378 S.E.2d 8 (N.C. 1989); *Commonwealth v. Stonehouse*, 555 A.2d 772, 783 (Pa. 1989) ("Battered women have been compared to hostages, prisoners of war, and concentration camp victims."). Commentators from various disciplines have also drawn the analogy. See BROWNE, *supra* note 4, at 122-27; EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS 14 (1988); Mahoney, *supra* note 10, at 87-88, 92-93; Walter W. Steele, Jr., & Christine W. Sigman, *Reexamining the Doctrine of Self Defense to Accommodate Battered Women*, 18 AM. J. CRIM. L. 169, 183 (1991). As one court put it, "The horrible beatings [battered women] are subjected to brainwash them into believing there is nothing they can do." *Hundley*, 693 P.2d at 479.

104. Delgado, *supra* note 72, at 20-21.

105. As an example of "psychological servitude" that was "freely chosen," Delgado points to the case of the "Manson women," who, he concludes, "elected to voluntarily become members of the group, and to undergo a lengthy process of initiation and indoctrination without protest." *Id.* at 21 (citing VINCENT BUGLIOSI & CURT GENTRY, *HELTER SKELTER* 173-75, 234-38, 258, 278, 484 (1974)). Delgado's decision to deny the brainwashing defense to Charles Manson's anonymous "women" suggests that he would not be impressed by the battered woman syndrome theory. In fashioning the battered woman syndrome defense, practitioners have sought to cut off arguments, identical to those made by Delgado, about the Manson women's voluntary choice; thus, the battered woman syndrome theory is largely designed to provide an explanation for why a woman's "choice" to enter and remain within a violent marriage was not freely made.

106. Delgado, *supra* note 72, at 10-11.

107. Though Delgado cited none of the pertinent decisions, the criminal law for centuries has been perfectly comfortable, at least in cases where women offenders are involved, with the idea that mens rea can be implanted into the mind of the accused by another person who has power over her. I refer here to the cases and statutes recognizing the marital coercion doctrine, which is discussed at length in Part II.

108. Delgado, *supra* note 72, at 33.

109. *Id.* at 1-3.

110. *Id.* at 6-7, 8-9, 12.

111. See 2 ROBINSON, *supra* note 1, at 438 ("Brainwashing has virtually never been recognized as a valid defense.").

forcible brainwashing.¹¹² Brushing aside Delgado's insistence on the narrow scope of the excuse, Dressler pointed out that "[a]ll ideas and intents originate outside the individual, in the sense that they are shaped by experiences and environment."¹¹³ Dressler argued that it is just to blame the victim of brainwashing, notwithstanding the means through which he came to possess criminal intent, because he "remains free to choose" whether and how he will act on that intent.¹¹⁴ A decision to recognize the brainwashing excuse would require the criminal law to ignore the accused's choice to commit a crime and embrace a determinist view of human conduct, thereby affording universal excuse on the ground that misconduct is the product of influences originating outside the actor's own will.¹¹⁵ Confident that his audience would understand and be alarmed by gloomy allusions to incarceration on "solely utilitarian grounds," Dressler concluded his critique by rebuking Delgado for failing to acknowledge the awful implications of his "revolutionary" proposal.¹¹⁶

For the most part, feminists have not joined these "spirited exchanges"¹¹⁷ over the manner in which excuse structures our theory of criminal responsibility. Feminist practitioners and scholars seem unimpressed with the theoretical claims made by the academy on behalf of the responsible actor, and, therefore, they doubt that women are harmed by the finding of irresponsibility that their successful excuse defenses incur.¹¹⁸

112. Dressler, *supra* note 42, at 342-43. Dressler's belief that the concept of superimposed mens rea was something new to the criminal law is incorrect. Neither Dressler nor Delgado took account of the marital coercion doctrine. The doctrine, which endured for centuries in our cases and statutes, was founded on the concept that a wife could not be held responsible for her criminal misconduct because the misconduct was the product, not of her own choice, but of her husband's choice, and that the husband, therefore, was criminally liable for the misconduct. See *infra* text accompanying notes 203-11. The only "unique" feature of Delgado's theory of implanted mens rea was his effort to make such a theory available, not only to women, but to all actors.

113. Dressler, *supra* note 42, at 343.

114. *Id.* at 342-46.

115. *Id.* at 343, 354-60. Apparently, Delgado ultimately concluded that he should endorse the ramifications of the brainwashing excuse that Dressler criticized since he later wrote a lengthy paper in which he articulated a theory supporting the disadvantaged background excuse, which, as mentioned above, he had explicitly disapproved in his exchange with Dressler. See Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. J. 9 (1985). In turn, Dressler produced an article that criticized Delgado's defense of the disadvantaged background excuse, in part, because the excuse rejected "the belief that humans, as a species, possess free choice," thereby "ignor[ing] our belief in the uniqueness of humans In short, to excuse [such a] defendant would not cause us to slip on a slope, but rather to fall off a moral cliff." Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1384-85 (1989).

116. Dressler, *supra* note 42, at 360.

117. See Boldt, *supra* note 33, at 2267 n.81 (characterizing the debate between Judge Bazelon and Professor Morse over the merits of the disadvantaged background defense).

118. For example, Kit Kinports has remarked that "although the distinction between justification and excuse may have some academic or theoretical importance, it makes no practical difference to the defendant whether the jury determines that her use of defensive force was justified or excused. In either case, she is acquitted and goes free." Kinports, *supra* note 4, at 460 (footnote omitted); see also Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371,

However, when we situate the dubious moral status occupied by the excused actor—that creature who is more like a “dog” or a “rock”¹¹⁹ than a human being—within our long tradition of excusing women, the need to examine that theoretical construct takes on urgency.

I believe that the model of responsibility, in which the excused defendant is foregrounded as the logical and structural foil for the responsible actor,¹²⁰ has profound implications for the construction of gender. By relying almost exclusively on the excuses to give shape to the responsible actor, the academy has committed us to a negative definition of that crucial concept;¹²¹ as Hart remarked, an actor is declared responsible if he “breaks the law when none of the excusing conditions are present.”¹²² Indeed, the academy generally insists that the law must embrace this negative definition: by refusing to prescribe virtuous character traits for or impose affirmative duties on actors who would be found law-abiding,¹²³ the law is said to secure maximum autonomy to pursue individual ends.¹²⁴ Yet, if the ideal model of the responsible actor emerges only in opposition to that which he is not, namely, the excused actor, then we must consider how this model

408-09 (1993) (arguing that the distinction between justification and excuse is, in this context, “much ado about very little” because “[n]either jurors nor putative defendants are aware of the subtle distinctions between a justification and excuse, and from my experiences it is clear that few judges could explain the difference”).

119. See Dressler, *supra* note 115, at 1359 (“Thus, just as we do not blame the pit bull who kills, or the stone that breaks our window, but rather blame the person who lets the dog free or throws the stone, the insane person or similarly excused actor is immune from moral blame for his wrongdoing.” (footnote omitted)); Kadish, *supra* note 37, at 280; Moore, *supra* note 34, at 1137 (Excused actors who lack practical reasoning skills “are no more the proper subjects of moral evaluation than are young infants, animals, or even stones.”).

120. See Arenella, *supra* note 29, at 70-71.

121. Moore’s appropriation of Sigmund Freud’s observation about the significance of dreams engages the explanatory power of criminal excuses; as Moore remarked, “the excuses are the royal road to theories of responsibility generally. The thought is that if we understand why we excuse in certain situations but not others, we will have also gained a much more general insight into the nature of responsibility itself.” Moore, *supra* note 36, at 29.

122. HART, *supra* note 36, at 28; see also Weinreb, *supra* note 22, at 58 (“In the absence of special excusing circumstances, [the] model [of responsible action] is presumed to be applicable, and the attribution is taken for granted.”). Hart provided a slightly more affirmative definition of responsibility when he remarked that the decisionmaker must determine whether the actor possessed, at the time of acting, “normal capacities” for obeying the law and “a fair opportunity to exercise these capacities.” HART, *supra* note 36, at 152; see also Arenella, *supra* note 25, at 1523-24; Moore, *supra* note 36, at 51. However, what constitutes a “normal capacity” and “fair opportunity” appears only by reference to actors for whom these conditions were absent.

123. Peter Arenella explains that the moral norms embedded in our criminal laws do not provide a “robust account of a moral agent’s necessary attributes” because those norms, which he characterizes as minimalist, do not “require the actor to achieve a state of virtue” as other moral norms do. Arenella, *supra* note 25, at 1519.

124. See SANFORD H. KADISH, *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 127-28 (1987) (asserting that criminal law resists punishing omissions to act because “[r]equiring actions of bystanders to save others tends to collide with the autonomy principle”); cf. George P. Fletcher, *Defensive Force as an Act of Rescue*, in *CRIME, CULPABILITY, AND REMEDY*, *supra* note 8, at 170 (contrasting Western tradition, which implies no duty to defend others against aggressors, with Jewish law, which does imply such a duty).

constructs gender relationships when we notice that the criminal law steadfastly has doubted that women are capable of responsible conduct and, therefore, has excused them in circumstances where men would be punished.¹²⁵ In particular, if the criminal law identifies those actors who possess the capacity for responsibility by pointing at undesirable personal characteristics that excused actors share and responsible actors therefore should shun—and if the undesirable characteristics are those that the law most closely associates with and that have been internalized by women—then the model of responsibility reinforces the familiar social understanding of gender as a bipolar, hierarchical arrangement.

Pushing “academic or theoretical” objections aside,¹²⁶ the criminal practitioner understandably may conclude that any costs an excuse entails, such as lingering skepticism over the accused’s competence to manage her affairs, are insignificant when measured against those inflicted by a guilty verdict. But if women achieve leniency by exploiting, rather than challenging and revising, the existing categories of excuse, they not only leave the theory of criminal responsibility intact, they also leave intact the competing life stories that the theory constructs and makes available for excused actors and responsible human beings to experience.¹²⁷ The experience of the responsible actor is one that resonates powerfully in our culture and, by securing excuse, women assure that it is one that will continue to be denied to them.

The story that emerges from the academy’s debates over the virtues of the model responsible actor is nothing short of a celebratory account of the human capacity to achieve self-mastery and to act on commendable, ethical judgments in perilous circumstances. The narrative of the responsible actor is not only a bland parable for our imitation, nor simply an exemplum in which the protagonist bristles with unimpeachable virtues that fortify him against the temptations and aggravations luring lesser subjects to offend. To be sure, this narrative of the responsible actor is more complicated than at first appears, for he harbors a virulent destructive potential, yet is salvaged by a self-overcoming and restored by a felicitous ending. The responsible actor is far from a wholly rational automaton, though not so cognitively flawed as to be a candidate for the insanity excuse. Still, he has the will to overcome his incipient cognitive and volitional impairments, at least to the extent of avoiding harm to others. Although the responsible actor is not a perfect reasoner, nor courageous of temperament, but rather a timid creature, dreading pain and confrontation, still he refuses the most

125. See *infra* text accompanying notes 140-230.

126. See Kinports, *supra* note 4, at 460.

127. Cf. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 129 (1989) (contending that theoretical descriptions of sexuality “determine[] women’s biographies”); see also Cheshire Calhoun, *Responsibility and Reproach*, in *FEMINISM & POLITICAL THEORY* 243, 258-59 (Cass R. Sunstein ed., 1990) (“[W]ithholding moral reproach inhibits the publicizing and adopting of new moral standards.”).

self-expedient measures and chooses to withstand threats and physical harm rather than violate the law. Although he is poor and without prospects, even so he resists the incitement to steal for survival, let alone for gratification. The responsible actor has inherited a taste for strong intoxicants, but he denies the craving and the release from depression it holds out to him. When he was a child, his parents beat and neglected him, but he breaks out of the cycle of violence when he marries and fathers his own children. Despite all his social disadvantages, temperamental shortcomings, and circumstantial anguish, the responsible actor manages to see steadily the legal and moral consequences of his proposed conduct and to govern himself by their demanding light.¹²⁸

II

THE MODEL FEMALE ACTOR

How different is the story told by and the reception given to the battered woman syndrome defense, which is not available to all persons accused of crime but was designed by defense lawyers and their expert witnesses to provide new excuses for women defendants only.¹²⁹ Case law analyzing, refining, occasionally rejecting, but usually endorsing the theory is turned out at an immoderate pace as the theory is applied to a steadily expanding class of offenses.¹³⁰ State and federal legislators busy themselves with reports delving into the competing policy arguments and then

128. As Stephen Schulhofer has remarked, the criminal law is nothing if not demanding, since its directives "are not addressed solely, or even primarily, to people who can easily comply." See Schulhofer, *supra* note 8, at 112-14.

129. While some courts and legislators have used the phrase "battered spouse defense," those who rely on the defense overwhelmingly will be, at least as gender relations are presently constructed, women. For that reason, as Martha Mahoney has explained,

many feminists insist on using "battered woman" in preference to terms such as "spouse abuse" . . . in order to emphasize that women, not men, are almost always the target of spousal abuse. The very substantial psychic damage done through the experience of violence may be minimized or denied through less woman-focused terminology.

Mahoney, *supra* note 10, at 25-26 (footnote omitted). The defense is available to women and not to men, not only because men are rarely the victims of serious physical abuse by their wives, see *Responses to Domestic Violence*, *supra* note 10, at 1501 n.1; *Violence Against Women: Relevance for Medical Practitioners*, *supra* note 13, at 3185-86 (finding that although women also perpetrate acts of physical aggression against their spouses, "[w]omen are much more likely to be injured by their male partners than men are by their female partners"), but also because the particular psychological mechanisms purportedly underlying the defense currently in vogue are overwhelmingly characteristic of women, but not men, see LENORE E. WALKER, *TERRIFYING LOVE* 42-53 (1989).

130. See *Responses to Domestic Violence*, *supra* note 10, at 1582-84 (describing state court decisions on battered woman syndrome and identifying a trend in favor of admitting expert testimony on the syndrome). As I explain below, the battered woman syndrome theory was first used to defend women accused of killing the men who had physically abused them. Within that context, proponents of the theory claim that it operates, like self-defense, to justify the homicide. Since then, the theory has been offered to excuse women who have been charged with a wide variety of crimes. See Walker, *supra* note 11, at 322 (claiming, though without any citations, that battered woman syndrome theory has been used to defend against a wide variety of charges); *infra* notes 274, 282.

draft statutes incorporating the defense.¹³¹ Governors visit women in prison, listen to their stories of abuse and victimization by men, commission studies to examine the problems of battered wives, and then exercise their powers of clemency to free women whom jurors had voted to punish for their misdeeds.¹³² Yet, the usually articulate criminal law academy, especially the defenders of the model responsible actor, responds to this burst of interesting legal activity with barely a murmur.¹³³ Although there are signs that this silence may be, for some, uneasy,¹³⁴ one can only suppose that most members of the academy do not disapprove of the battered woman syndrome defense,¹³⁵ or, at least, that they do not find that this special

131. See *Responses to Domestic Violence*, *supra* note 10, at 1585-86 (identifying the jurisdictions that have codified the battered woman syndrome defense).

132. For example, in 1990, then Governor of Ohio Richard Celeste commuted the sentences of 27 women convicted for killing or assaulting men whom they claimed had battered them. Governor Celeste explained that he took that action because he believed the women unfairly had been denied the opportunity to lay their stories of abuse before the courts. Nancy Gibbs, *'Til Death Do Us Part*, *TIME*, Jan. 18, 1993, at 38, 44. Governor William D. Schaefer of Maryland relied on similar grounds in releasing eight women from prison in 1991. Tamar Lewin, *More States Study Clemency for Women Who Killed Abusers*, *N.Y. TIMES*, Feb. 21, 1991, at A19; see also *Responses to Domestic Violence*, *supra* note 10, at 1589-91.

133. Apart from Stephen Schulhofer's thoughtful treatment of the battered woman syndrome defense and what embracing the assumptions underlying the defense means for the criminal law, see Schulhofer, *supra* note 8, at 116-30, only a few pins have dropped in the criminal law academy. For example, Stephen Morse has written a lengthy piece that criticizes Charles Ewing's proposal that we permit a psychological self-defense theory. See Stephen J. Morse, *The Misbegotten Marriage of Soft Psychology and Bad Law: Psychological Self-Defense as a Justification for Homicide*, 14 *LAW & HUM. BEHAV.* 595 (1990). While Morse's article is thought-provoking, it is curious that he would devote so much energy to refuting a theory that has not been accepted by any court, while ignoring the ramifications of a defense, namely, the battered woman syndrome defense, which has been widely adopted.

134. For example, Joshua Dressler includes the battered woman syndrome defense, as well as the PMS defense, in a list of proposed new excuses that also mentions "drug and alcohol addiction, brainwashing, . . . post-traumatic stress ('Vietnam War') disorder, genetic abnormalities, alien cultural beliefs, and 'rotten social background.'" Dressler, *supra* note 23, at 672-73 (footnotes omitted). Dressler describes his general anxiety over the negative consequences for our criminal blaming system entailed by an expansive view of excusing conditions and rejects as determinist the "rotten social background" excuse, though he takes no position on the merits of the battered woman syndrome defense. See *id.* at 682-89. Language used by Dressler in an earlier piece, however, reveals that he doubts that the battered woman syndrome defense has merit. In the kind of case that he claims occurs "[n]ot infrequently," that is, where "the woman kills her tormentor while he is asleep," Dressler believes it is "hardly a self-evident conclusion" that the woman should be acquitted. Dressler, *supra* note 29, at 1169-70. He vaguely warns that the decision of whether to label the battered woman syndrome defense a justification or an excuse will carry "[a] great deal of baggage about women's rights." *Id.* at 1170. Perhaps most revealing of Dressler's attitude is a remark tossed off at the conclusion of his paper that refers to the battered woman who kills as sometimes motivated by "hatred," *id.* at 1175, rather than by terror, as the advocates of the battered woman syndrome defense claim.

135. See 1 ROBINSON, *supra* note 1, at 487 n.35, 490 n.43 (describing relevance of battered woman syndrome to provocation defense); 2 ROBINSON, *supra* note 1, at 71, 412 n.48 (endorsing use of battered woman syndrome to support a mistaken self-defense excuse).

excuse for women poses a significant threat to the normative assumptions underlying the theory of responsibility.¹³⁶

By contrast, most of the feminist scholars who have treated the battered woman syndrome defense have explicitly endorsed the defense, hailing the court's acceptance of the theory as an important first step towards eliminating gender bias in the criminal law.¹³⁷ What no scholar has noticed, however, is that the criminal law has for centuries recognized excuses that lawmakers, and quite possibly women who were their contemporaries, believed *were* sensitive to the "woman's point of view," a claim that many advocates today assert on behalf of the battered woman syndrome defense. Unlike the reforms commonly proposed in the literature on battered women, which suggest that the criminal law cannot judge women fairly unless it takes account of their alleged small size, physical weakness, and timidity,¹³⁸ the criminal law has not been mainly concerned with supporting the trivial differences between women and men prevailing at any given cultural moment. Instead, the law constructed a difference so profound that, to this day, courts have doubted that female actors could or should possess the trait that is the sine qua non for personal responsibility. In particular, since at least as early as the eighth century,¹³⁹ the criminal law

136. *But see* Schulhofer, *supra* note 8, at 114-16 (arguing that the battered woman syndrome defense is incompatible with the traditional judgmental, demanding, and pacifist features of the criminal law).

137. *E.g.*, Mather, *supra* note 4, at 581-82. Although she believes that expert testimony may serve an important educational function in disabusing jurors of misconceptions about battered women, Elizabeth Schneider has cautioned that in some cases it may be prudent to forgo the expert's assistance in order to avoid the sexual stereotyping that the battered woman syndrome theory may accomplish. 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, 646 (1980); *see also* Mahoney, *supra* note 10, at 4 ("[T]he expert testimony on battered woman syndrome and learned helplessness can interact with and perpetuate existing oppressive stereotypes of battered women.").

138. For example, feminist legal critics frequently assert that women are at a disadvantage when they try to justify a homicide charge on self-defense grounds because self-defense doctrine "presupposes two men each of approximately equal size, weight, and strength fighting each other," and, of course, women are "typically smaller and weaker than men." Mather, *supra* note 4, at 565; *see also* Schneider, *supra* note 137, at 631-36; Steele & Sigman, *supra* note 103, at 178, 180. For a persuasive argument, based on an exhaustive review of the case law, that such characterizations of self-defense doctrine are incorrect, *see* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991).

139. While I have not done the kind of scrupulous legal and historical research necessary to identify with certainty the origins of the marital coercion doctrine, one scholar has traced the doctrine to the laws of Ina, who was a West Saxon king reigning in the year 712. *See* 1 EDMUND H. BENNETT, *LEADING CASES IN CRIMINAL LAW* 86 (2d ed. 1869) (citing WILKINS, *LEGES ANGLO-SAXONS* 24). Another legal scholar attributes the marital coercion doctrine to a decision written in 1353, *see* Francis B. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1012 (1932), and the Supreme Court cited a decision from 1365 as the source of the principle that husband and wife could not be coconspirators, *see* *United States v. Dege*, 364 U.S. 51, 53 (1960). An historian of women's deviance claims that the doctrine was applied in a case decided in 1276, in which a husband and wife were accused of stealing sheep. The husband was convicted and hanged for the offense, while the wife was acquitted under the marital coercion doctrine. N.E.H. HULL, *FEMALE FELONS: WOMEN AND SERIOUS CRIME IN COLONIAL MASSACHUSETTS* 23-24 (1987). Comments by Blackstone support my belief that the origins of the marital coercion

has been receptive to the idea that normal women, unlike men, are susceptible to having their choices guided by the wills of men and that this inclination for submissiveness must be taken into account in judging women's responsibility. Whatever else it means, and the implications are manifold, this idea about women dramatically departs from, even completely reverses, the assumptions about the human capacity for rational self-governance on which the norm of responsibility is founded. This characterization of women's limitations will seem a tired one, since it derives from the common law disabilities that women endured while married. But, because the doctrinal significance of those disabilities in the context of the criminal law constitutes the tradition within which the battered woman syndrome defense is now being placed, they are worth a brief revisit.

The common law (and, in this century, modern penal codes) recognized two distinct situations in which an offender could be excused on the ground that the crime should be attributed, not to the offender's choice, but to pressure exerted by another person. The first line of cases presented the general duress defense mentioned in Part I.¹⁴⁰ This defense, which remains vital today, is theoretically available to all persons accused of a crime.¹⁴¹ The second line of cases employed what I will call the marital coercion defense to distinguish it from the duress defense. The marital coercion defense was available only to married women, and it had all but disappeared in this country by the mid-1970s, when, as is my thesis, it reemerged in the guise of the battered woman syndrome defense. For a general duress claim to succeed, the actor must show that another person specifically threatened to kill or inflict grave bodily injury on him instantly if he refused to commit the crime.¹⁴² Duress constitutes an excuse, rather than a justifi-

doctrine are more ancient than the thirteenth century. Writing in the eighteenth century, Blackstone pronounced that the "doctrine is at least a thousand years old in this kingdom." 4 WILLIAM BLACKSTONE, COMMENTARIES *28.

140. See *supra* text accompanying notes 64-67.

141. As Alan Wertheimer has observed, however, the case law treating duress is "quite thin," though this "dearth . . . is complemented by a wealth of jurisprudential discussion." WERTHEIMER, *supra* note 31, at 145.

142. See *State v. Toscano*, 378 A.2d 755, 761 (N.J. 1977). It appears that the threatened bodily injury had to be very serious indeed, since some of the cases note that, for duress to excuse, the defendant had to prove that he was subjected to threats of death or "dismemberment." *Ross v. State*, 82 N.E. 781, 782 (Ind. 1907); see also 2 ROBINSON, *supra* note 1, at 359-60 & n.28 ("Jurisdictions also commonly limit the permissible causes of the duress disability by requiring, as did the common law, threats of death or serious bodily injury."). In any event, at common law, threats of minor injury to the defendant's person or threats to property could not possibly satisfy the duress defense. During this century, some jurisdictions have adopted a more lenient approach to the duress defense, following the lead of the drafters of the Model Penal Code. Rather than requiring a threat of instant death or serious bodily harm, the Model Penal Code provides that the duress defense is available if the defendant "was coerced to [commit the crime] by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist." MODEL PENAL CODE § 2.09(1) (1962). As it has in other areas of the criminal law, the Model Penal Code's position on the appropriate treatment of duress has proved to be influential. See *Toscano*, 378 A.2d at 764-65 (relying on the Model Penal Code's duress provision to "revise the common law" of

cation, because the community prefers that actors not offend, even under the pressure of serious threats, but will withhold blame where the threats are sufficiently grievous.¹⁴³ The model of the responsible actor is heavily inscribed on the duress defense. The defense assumes that the responsible actor is able, through an exercise of rational self-control, to resist threats and even to endure minor harms to himself rather than violate the law.¹⁴⁴ In the colorful language that the courts sometimes enjoy, minor threats and harms are not enough to reduce the will of the responsible actor to "that degree of slavery and submission which will exempt from punishment."¹⁴⁵

It is not surprising to find that few defendants have been able to make out a successful duress defense, given the extreme circumstances that the defense demands. As one federal court of appeals characterized the state of duress law at mid-century, "[b]arring cases involving children, wives, and mental defectives, there do not seem to be many cases in point."¹⁴⁶ Putting aside the pernicious implication of equality among the persons compared in that series, still, the court's remark is peculiar, at least insofar as it touches wives, for cases involving married women would not support a general duress claim. In this area of the common law, as in others, married women were the objects of special solicitude,¹⁴⁷ namely, there was an excuse to charges of criminal wrongdoing available only to them. According to the black-letter formulation of this defense, a married woman would be excused for engaging in criminal misconduct if she committed the act under the coercion of her husband.¹⁴⁸ We must look to a definitional issue and a rule

New Jersey). The accused also had to show that the threats retained their force throughout the time that he acted and that there was no reasonable opportunity for him to escape his captors before committing the crime. *See, e.g., R.I. Recreation Ctr. v. Aetna Casualty & Surety Co.*, 177 F.2d 603, 605-06 (1st Cir. 1949); *Arp v. State*, 12 So. 301, 303-04 (Ala. 1893).

143. There is some disagreement among criminal law scholars over whether duress should be characterized as a justification or an excuse. *See WERTHEIMER, supra* note 31, at 165-69. Wayne LaFave and Austin Scott treat duress as a justification because they believe that the defense should be available only when the actor's decision to commit the crime, rather than endure the illegal threat, constitutes the lesser of two evils. *See* 1 LAFAVE & SCOTT, *supra* note 31, at 614-16. By contrast, Paul Robinson characterizes duress as an excuse, *see* 2 ROBINSON, *supra* note 1, at 348-72, as does George Fletcher, *see* FLETCHER, *supra* note 36, at 830 (rejecting the notion that duress is a justification and characterizing duress as the "paradigmatic example of an excuse"), and Sanford Kadish, *see* Kadish, *supra* note 37, at 261-62 (noting that a duress claim may be allowed "even when not justified by the lesser-evil principle"). Joshua Dressler agrees that duress is an excuse, and he points out that most penal codes treat the duress defense as an excuse. Dressler, *supra* note 115, at 1349-50.

144. Jerome Hall has argued that the duress defense should be drawn very narrowly because our experience teaches that men will not always choose to preserve their own lives at whatever the cost to others and because the threatened person always has the "chance[] of removing the evil human coercion—by positive action or by flight." HALL, *supra* note 67, at 446-47.

145. *Ross*, 82 N.E. at 781 (quotation omitted).

146. *R.I. Recreation Ctr.*, 177 F.2d at 605.

147. Blackstone does not appear to have intended any irony when, after describing the woman's inferior position in marriage, he remarked "that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England." 1 WILLIAM BLACKSTONE, COMMENTARIES *433.

148. KENNETH C. SEARS & HENRY WEIHOFEN, MAY'S LAW OF CRIMES 38 (4th ed. 1938).

of evidence in order to understand the marital coercion defense and the difference between the assumptions it makes about the model female actor and the assumptions that the general duress defense makes about the model responsible actor.

The definitional problem concerns the meaning of the central concept—"coercion"—in the context of the marital coercion excuse. As I explained above, "duress," for purposes of the general duress defense, means threats that the actor would be killed or seriously injured instantly if he refused to commit the crime. "Coercion" had an entirely different signification. While the precise meaning of "coercion" was elucidated infrequently in the cases, it is relatively clear that a husband's "command" that his wife commit the criminal act could constitute coercion.¹⁴⁹ The language employed in some cases suggests an even more lenient standard; that is, some courts observed that coercion would be found where the husband "requested" or "influenced" or "consented to" the wife's misconduct.¹⁵⁰ Thus, whereas the responsible human actor would be condemned if he submitted to influence short of threats of instant loss of life or limb,¹⁵¹ the law expected that the will of a normal wife would be subjugated by her husband's mere command or request, and that the scope of her responsible self was far less inclusive than that of her husband.

As it turns out, the definition of "coercion" was rarely in need of explanation because the excuse carried with it a rule of evidence that shifted the focus of the litigation away from the nature of the pressures exerted against the wife.¹⁵² This rule of evidence illuminates perhaps most clearly the criminal law's assumptions about the character of the model female actor. Under the rule, a married woman who committed a crime in the presence of her husband was entitled to a presumption that she had acted under his coercion and, therefore, that she could not be held personally responsible for her misconduct.¹⁵³ Furthermore, the requirement that the husband be

149. See, e.g., *Commonwealth v. Neal*, 10 Mass. 152, 152 (1813) (holding that the defendant wife must be acquitted in light of jury finding that she committed assault and battery "in company with, and commanded by, . . . her husband"); David S. Evans, Note, *Criminal Law—Presumption of Coercion—Crimes Committed by Wife in Husband's Presence*, 35 N.C. L. REV. 104, 104 (1956).

150. See *Shannon v. United States*, 76 F.2d 490, 493-94 (10th Cir. 1935); *State v. Baker*, 19 S.W. 222, 224 (Mo. 1892); *State v. Grossman*, 112 A. 892, 893 (N.J. 1921); *State v. Seahorn*, 81 S.E. 687, 688 (N.C. 1914); *O'Donnell v. State*, 117 P.2d 139, 141 (Okla. Crim. App. 1941); *Commonwealth v. Jones*, 1 Pa. D. & C.2d 269, 273, 276 (1953).

151. See, e.g., *People v. Martin*, 108 P. 1034 (Cal. Ct. App. 1910); *State v. Moe*, 24 P.2d 638, 639-40 (Wash. 1933) (finding "conditions of poverty and want" not an excuse for looting of a grocery store).

152. See *State v. Murray*, 292 S.W. 434, 439 (Mo. 1926) (holding that the marital coercion doctrine includes a "rule of evidence" that requires the State "to show that the wife acted freely and of her own volition," and relieves her of the burden "to prove coercion").

153. 2 ROBINSON, *supra* note 1, at 371. Where a wife committed the crime jointly with her husband, "the wife, being presumed in law under his coercion and control, is entitled to an acquittal." *Rex v. Knight*, 171 Eng. Rep. 1126, 1126 (1823). As states began to codify their criminal law, some refused to recognize the presumption of coercion arising from the husband's presence. See *Freel v. State*, 21 Ark. 212 (1860).

present was defined figuratively, so that courts were willing to extend the benefit of the presumption of coercion to wives whose husbands were present only in spirit. As they would put it, the husband's "constructive presence" would suffice.¹⁵⁴

The presumption was a rebuttable one, but it was not rebutted by proof that the husband had not in fact coerced his wife, however coercion was defined. Rather, the prosecution could rebut the presumption and subject the wife to punishment only by proving that she had acted independently of her husband.¹⁵⁵ This feature of the presumption made it unnecessary for the courts to spend much time pondering the meaning of "coercion."¹⁵⁶ The presumption focused the decisionmaker's scrutiny on the wife's independence from her husband, and not, as in cases raising the general duress defense, on the forceful nature of the threats or pressures the coercer had employed. If the prosecution could not present evidence that the wife had acted independently, then the effect of the presumption was to make the husband's mere presence or proximity during the crime, without more, sufficient "coercion" of the wife to excuse her.¹⁵⁷

The presumption of coercion is startling for its complete reversal of the normal assumptions underlying the criminal law's inquiry into an accused person's responsibility for a crime. In cases where a (potentially) responsible actor is involved, the law starts from the assumption that the accused is a fit subject for punishment because he made a rational decision to commit a crime.¹⁵⁸ The law then goes on to entertain only the most compelling evidence that the accused's cognitive and volitional capacities and opportunities were so deficient that he should not be blamed.¹⁵⁹ By contrast, when a married woman came before the criminal court, the law started from the assumption that she had an inevitably malleable nature, and it attributed her crime, not to her own exercise of will, but to the influence exerted by her husband's will.¹⁶⁰ The law only considered evidence suggesting that the

154. Perhaps the most striking examples of the courts' willingness to employ the doctrine of constructive presence are the cases in which the presumption is allowed even though the husband was in prison at the time he issued the illegal directive to the wife. See *State v. Carpenter*, 176 P.2d 919 (Idaho 1947); *State v. Miller*, 62 S.W. 692 (Mo. 1901).

155. 2 ROBINSON, *supra* note 1, at 371.

156. The presumption of coercion was not available in every case; for example, the presumption ordinarily did not apply in cases where the wife was accused of murder or prostitution. *E.g.*, *State v. Weeden*, 114 So. 604, 605 (La. 1927). The marital coercion defense, though shorn of its helpful presumption, nonetheless was available in such cases, rather than the general duress excuse. *Id.*; see also *Freel*, 21 Ark. at 218 (rejecting a presumption of coercion arising from husband's presence, but recognizing that wives were not guilty if they acted under "threats, commands, or coercion of their husbands" (quoting Arkansas statute)). For that reason, the definition of coercion did take on significance independent of the presumption of coercion arising from the husband's presence.

157. See 2 ROBINSON, *supra* note 1, at 371.

158. See *supra* note 70.

159. See *supra* text accompanying notes 54-67.

160. Women probably came to share that assumption themselves; at least, the promise of lenience encouraged them to present themselves as subordinate to their husbands. For example, in one case in

woman should be punished if she acted "independently" of the man. In the eyes of the criminal law, then, the model female actor was the polar opposite of the model responsible actor.¹⁶¹

It would be foolhardy to purport to draw firm conclusions about cultural and political assumptions underlying a rule of law that endured for at least twelve centuries.¹⁶² I make no claim, within the limited scope of this paper, to have undertaken the kind of scrupulous historical examination that would have to precede any attempt to historicize the social and political motivations underlying each age's renewed commitment to the marital coercion doctrine.¹⁶³ Yet, the resilience of the doctrine in the face of the massive social, political, economic, and legal changes occurring in its lifetime marks its significance within the legal arrangements structuring gender relations.¹⁶⁴ At the very least, the durability of the rule testifies to the

which the wife pleaded marital coercion, the statement of facts recited that when she was questioned at the scene by the police about her involvement in the crime, she stated that she was merely obeying her husband's orders. *See State v. Stoner*, 179 N.W. 867, 868 (Iowa 1920).

161. Of course, not all women married, yet it is clear that the criminal law's treatment of married women reflects legal and cultural understandings of women generally. Like so many of the understandings that I touch on in this Article, no firm conclusions about the importance of marriage in women's lives may be drawn without careful historicization. However, there is evidence that in many eras, and particularly those during which the marital coercion doctrine was extant, marriage was the *only* vocation to which women could aspire. *See, e.g.,* VICTORIA E. BYNUM, *UNRULY WOMEN: THE POLITICS OF SOCIAL AND SEXUAL CONTROL IN THE OLD SOUTH* 35-36, 44, 89, 102 (1992) ("Marriage provided the essential means by which white women fulfilled their societal role . . ."); HULL, *supra* note 139, at 54 ("Marriage was the norm for women in colonial Massachusetts, and almost all women (the ratio approaches 90 percent) eventually married."); LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800*, at 179 (1977) (During the seventeenth century, "[t]he choice of a career did not affect girls, for whom the only option was marriage."). Women who failed to marry were considered pitiable figures who occupied, at best, a dubious position in society. BYNUM, *supra* at 89, 102; HULL, *supra* note 139, at 54 ("An unmarried woman was either out-of-step with her peers or in transition from youth to adulthood."); *see also* PAT JALLAND, *WOMEN, MARRIAGE AND POLITICS 1860-1914*, at 253 (1986) ("The Victorian spinster was judged by her contemporaries to be a human failure, condemned to a lonely life of futility, ridicule or humiliation.").

162. Paul Robinson's treatise contains a discussion of the marital coercion doctrine and reports that some jurisdictions continued to recognize the doctrine at least as late as the 1970s. 2 ROBINSON, *supra* note 1, at 371-72. Similarly, the treatise written by LaFave and Scott, which was published in 1986, reports that "[a] dwindling number of states probably still adhere to the old [marital coercion] doctrine." 1 LAFAVE & SCOTT, *supra* note 31, at 626. The latest case approving the doctrine that my research uncovered is *State v. Davis*, 559 S.W.2d 602 (Mo. Ct. App. 1977), and the latest case that I found in which the doctrine was the grounds on which the wife won a new trial is *State v. Cauley*, 94 S.E.2d 915 (N.C. 1956), which is one of the most horrifying accounts of child abuse that I have ever read.

163. Lawrence Stone recently remarked that "few historical topics are harder to handle with clarity, sensitivity, and accuracy than shifts in the sensibilities, mental structures, or moral codes which govern human behaviour." LAWRENCE STONE, *ROAD TO DIVORCE: ENGLAND 1530-1987*, at 22 (1990). For a variety of reasons, which Stone elaborates, it is difficult for the historian even to identify the value systems that are prevalent at any given time and almost impossible to identify "with any precision" the time at which "a shift from one code to another" takes place. *Id.* at 22-24.

164. As an historian has noted in a closely related context, "[W]hat is most striking about the long course of the concept of marital unity is its ability to serve the legal needs of three shifting social structures: the kin-oriented family of the late Middle Ages, the patriarchal nuclear family of early capitalism, and even the more companionate nuclear family of the late eighteenth century." NORMA

strength and longevity of the law's commitment to the hierarchical nature of the marriage relationship. Evidence of this commitment can be found in the reasons given by judges when deciding whether a wife should be excused from punishment. Although the tenor of the judges' comments about the doctrine changed over time, virtually all of their reasons referred to, and endorsed, the unequal positions occupied by the individual parties to a marriage and the hierarchical structure of the marital entity itself.¹⁶⁵ These references portray the judges' recognition that marriage was the dominant social institution in women's lives and that the husband, and not any processes of the criminal law, had been assigned the leading role in controlling women's misconduct.¹⁶⁶

The interesting question is, why would the criminal law conclude, as it did, that it was "necessary for the well-being of society"¹⁶⁷ that a wife not be held responsible for misconduct she committed with her husband?¹⁶⁸

BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 27 (1982).

165. See, e.g., *Haning v. United States*, 59 F.2d 942, 943 (8th Cir. 1932) (Marriage "puts upon [the wife] the duty of obedience to her husband."); *State v. Nelson*, 29 Me. 329, 337 (1849) ("[M]atrimonial subjection of the wife to her husband exonerates her from responsibility."); *State v. Murray*, 292 S.W. 434, 438 (Mo. 1926) (same); *Rex v. Saunders*, 173 Eng. Rep. 122, 123 (1836) ("[T]he wife is only the servant of the husband."); see also 2 ROBINSON, *supra* note 1, at 371.

The humanity of the criminal law does, indeed, in some instances consider the acts of the wife as venial, although she has in fact participated with her husband in certain acts, which, on the part of her husband, would constitute an offence, as against him; upon the ground that much consideration is due to the great principle of confidence which a feme covert may properly place in her husband, as well as the duty of obedience to the commands of the husband, by which some femes covert may be reasonably supposed to be influenced in such cases.

Commonwealth v. Lewis, 42 Mass. 151, 153 (1 Met. 1840), *overruled by Commonwealth v. Barnes*, 340 N.E.2d 863 (Mass. 1976).

166. In her fascinating study of women in antebellum and Civil War North Carolina, Victoria Bynum found that the behavior of female slaves and married women "was generally governed privately by masters and husbands" and not by the criminal punishment system. BYNUM, *supra* note 161, at 10. "[L]awmakers expected the male-headed household, not the courts, to be the primary instrument of social control over women." *Id.* at 86-87. Bynum concludes that this emphasis on the husband's responsibility for the conduct of his wife may have led some courts to be reluctant to grant divorces, even where sufficient grounds appeared, because "granting divorce . . . left little or no control over errant wives. In the interest of maintaining order, [judges] insisted that husbands be held to their custodial responsibilities over wives." *Id.* at 70.

167. *Braxton v. State*, 82 So. 657, 659 (Ala. Ct. App. 1919).

168. The few commentators who have considered the marital coercion doctrine usually argue that the doctrine did not rest on the subjugated position of the wife in marriage or on misogynist views held by judges, but rather arose out of an anomaly created by the rules governing the benefit of clergy. Benefit of clergy was a privilege that was originally available only to ordained churchmen, but later was extended to any layman who could read and later still to virtually anyone. Invoking the privilege permitted the offender to have his sentence determined by the ecclesiastical courts, rather than by the king's court. The practical benefit conferred by the privilege was mitigation of punishment; the offender would be spared the death sentence, and some other penalty imposed. See J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660-1800*, at 141-45 (1986). Various commentators have claimed that the marital coercion doctrine was fashioned by judges during the mid-thirteenth century to protect women from harshly inequitable penalties arising from the fact that men, but not women, could claim benefit of clergy in felony cases. According to Rollin Perkins:

This suggested an amazing possibility. If a man and his wife were convicted of a felony they had committed together, and in which he had been perhaps the leading spirit, the husband (if

The answer to this question resides in a complex interaction among social, legal, and psychological forces shaping the status of wives during the life of the marital coercion doctrine. The doctrine applied literally the legal unity of husband and wife,¹⁶⁹ or, more precisely, it blessed the obliteration of the woman's personality that the marital unity was thought to demand.¹⁷⁰ The marital unity, though now characterized as a legal fiction, had significant implications for the experiences available to married women, as the courts

able to read) would be punished with a mere brand upon the brawn of the thumb and imprisonment not to exceed a year, while nothing less than the sentence of death would be available for the wife.

ROLLIN M. PERKINS, *CRIMINAL LAW* 912 (2d ed. 1969). It was to escape this "absurd result" that judges developed the marital coercion doctrine, thereby sparing the wife from conviction and execution. *Id.* at 912-13. Perkins makes a good case for this view by arguing that judges carefully crafted the marital coercion doctrine so that it would apply only where necessary to avoid sending the wife to her death. *See id.* at 913-14. However, Perkins' reliance on the benefit of clergy ignores several critical objections. First, as I noted above, *see supra* note 139, this special excuse for married women appears to have been extant at least as early as 712 and thus preceded the benefit of clergy privilege by about five centuries. Accordingly, though judges concerned to spare the wife may have adapted the Anglo-Saxon rule to accomplish their purpose, still the legal and social assumptions supporting the marital coercion doctrine significantly predated the benefit of clergy. Second, if we look beneath the law's refusal to extend the benefit of clergy to women, we find that it too, no less than the marital coercion doctrine, rested on women's inferior legal and social status. Third, the "odious results" caused by the quirks of the benefit of clergy cannot explain the extraordinary vigor of the marital coercion doctrine. The benefit of clergy was extended to women in 1692, *see id.* at 914, before the privilege was ultimately abolished, yet the marital coercion doctrine retained its vitality for another three centuries, and, indeed, seemed to be applied with new rigor during the nineteenth century, as society and, presumably, courts began to adopt the ideal of domesticity.

169. Under a rule that was closely related to the marital coercion doctrine, a husband and wife could not be guilty of conspiring together because, for a conspiracy to be found, there had to be two actors. The husband and wife were one person at law, with but one will between them, namely, that of the husband, and one person could not be charged with conspiring with himself. This rule also persisted well past the middle of this century. *See, e.g., Dawson v. United States*, 10 F.2d 106 (9th Cir.), *cert. denied*, 271 U.S. 687 (1926); *People v. Miller*, 22 P. 934 (Cal. 1889); *United States v. Dege*, 364 U.S. 51 (1960) (finally rejecting the rule in federal prosecutions); *see also* Rollin M. Perkins, *The Doctrine of Coercion*, 19 IOWA L. REV. 507, 508-09 (1934). Another application of the legal unity of husband and wife is found in the cases holding that "a communication from a husband to a wife, not in the presence of any other person, does not constitute a publication within the meaning of the law of slander." *Sesler v. Montgomery*, 21 P. 185, 186 (Cal. 1889). In these cases, the courts reasoned that, just as "[a] man entirely alone cannot commit slander by talking aloud to himself," so "[w]hen husbands and wives talk to each other alone, the conversation differs but little from the process of talking to one's self, or, as it is sometimes called, 'thinking aloud.'" *Id.* at 185-86.

170. As Lawrence Stone has reminded us, "It is easy to forget that under the patriarchal system of values, as expressed in the enacted law as it endured until the nineteenth century, a married woman was the nearest approximation in a free society to a slave." STONE, *supra* note 163, at 13; *see also* MARY POOVEY, *UNEVEN DEVELOPMENTS: THE IDEOLOGICAL WORK OF GENDER IN MID-VICTORIAN ENGLAND* 52 (1988) (characterizing as paradoxical the fact that "when a woman became what she was destined to be (a wife), she became 'nonexistent' in the eyes of the law"). Of course, during the heyday of the marital coercion doctrine, the wife's subjugated position was described less invidiously; as Blackstone remarked:

By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; . . . is said to be . . . under the protection and influence of her husband, her *baron*, or lord

1 WILLIAM BLACKSTONE, *COMMENTARIES* *430 (footnote omitted).

applying the marital coercion doctrine recognized. Upon marriage the woman's personal property was vested absolutely in her husband,¹⁷¹ any earnings she might secure in the future were his,¹⁷² his interest in her real property "were almost as extensive" as his rights in her personality,¹⁷³ and divorce was difficult, costly, and, in many cases, impossible, to secure.¹⁷⁴ Since these disabilities assigned many wives to the economic dominion of their husbands and significantly limited their options for independent action and thought,¹⁷⁵ the marital coercion doctrine was a sympathetic and rational response by the criminal law to the predicament of a woman whose husband directed her to join his illegal endeavor.

At the same time, the marital coercion cases suggest that women's experiences in marriage were not uniformly negative. Rather, women's conjugal life surely was much richer than an exclusive focus on their legal and financial subordination to their husbands might suggest. For example, the courts reported in some cases that the woman's participation in the criminal activity was prompted, not by fear of victimization by her husband, but by her desire to protect him from apprehension, a motive that the contemporary culture, the common law judges, and, possibly, the woman herself might construe, if not as praise, as affection for the husband and fidelity to his interests.¹⁷⁶ Thus, when we focus on the material and psychological circumstances that bound a wife to her husband, the marital coercion doctrine represented a sensitive judgment that a woman who joined her hus-

171. At common law, even the wife's clothing was considered the property of the husband. See *Regina v. Glassie*, 7 Cox Crim. Law Cases 1, 2 (1854); MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 15 (1986). Indeed, "the chattels personal or moveable goods belonging to the wife at the time of her marriage, or given to her afterwards, become the absolute property of her husband in the same manner precisely as if they had been originally his own, or had been subsequently given to him." BASIL E. LAWRENCE, *THE HISTORY OF THE LAWS AFFECTING THE PROPERTY OF MARRIED WOMEN IN ENGLAND* 4 (1884).

172. See SALMON, *supra* note 171, at 15; STONE, *supra* note 163, at 161 (At common law, the husband "retained the right to all his wife's earnings during her life, 'every farthing she makes by her labour being his, because she is his wife, though separated.'").

173. SALMON, *supra* note 171, at 15; see also CORNELIUS J. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 52-54 (1962).

174. See MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 31-35 (1972); STONE, *supra* note 163, at 141, 188.

175. In *Road to Divorce*, Lawrence Stone vividly describes the nearly insuperable economic, legal, and social barriers confronted by women who separated from their husbands prior to the reform of the divorce laws in England. See STONE, *supra* note 163, at 160-80.

176. See *Regina v. Brooks*, 6 Cox Crim. Law Cases 148, 149 (1853) (reversing wife's conviction for receiving stolen goods from husband, since "[t]he desire to shield her husband from detection is hardly a fault in a wife"); *Regina v. Boober*, 4 Cox Crim. Law Cases 272, 273 (1850) (If a wife attempted to destroy evidence in order "to screen her husband, she would not be liable although such an act done by another person might make him an accessory after the fact."); *Regina v. M'Clarens*, 3 Cox Crim. Law Cases 425, 426 (1849) ("[I]f the part she took was merely for the purpose of concealing her husband's guilt, and of screening him from the consequences, then . . . she ought to be acquitted."); *Regina v. Good*, 1 Car. & K. 185 (1842) (prosecutor decided to offer "no evidence" to support a charge against a wife for crime of "comforting, harbouring, and assisting" her husband, who had committed murder, because "it is no offence in a wife to comfort and assist her husband").

band in crime was less culpable than other actors because her fate inevitably was determined by his.

When we place the marital coercion doctrine within its broader legal and social context, however, we confront several additional questions. First, although the doctrine may seem to be the logical and humane recognition of the material consequences of the wife's legal disabilities, still we must ask why the law imposed those disabilities on her in the first place. Why did law and culture subordinate wives to their husbands to such an extent that criminal judges felt it was necessary to excuse women under circumstances where men would be condemned? A second question is why should a crime motivated by marital love be excused when a wife, but not a husband, was the accused party? Yet a third question arises when we notice that other subordinated actors, such as children, servants,¹⁷⁷ and soldiers, who were legally and socially bound to obey the commands of their superiors, were not afforded a similar excuse from punishment. Why did the criminal law conclude that women alone should be singled out for leniency in these circumstances? A brief review of the marital coercion cases provides at least partial answers to these questions.

There is some evidence, emerging from cases involving crimes against property, that the wife was thought to be afflicted with a defect in cognition.¹⁷⁸ These cases opined that a woman lacked the intellectual capacity to assess whether or not her husband had a valid claim to property later alleged to have been stolen.¹⁷⁹ When judges presumed the wife's inferior intellect, they only echoed contemporary teaching about women's intellect. For example, during the nineteenth century, scientists determined that women had smaller brains and, therefore, weaker intellects than men

177. See 4 WILLIAM BLACKSTONE, COMMENTARIES *28 ("[N]either a son or a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master.").

178. Of course, women's alleged inferior intellectual condition was used, at various times, to justify, not only the marital coercion doctrine, but also the social subordination of wives to their husbands. For example, as Sir George Savile, the first Marquis of Halifax, explained in a widely-published letter written in 1688 to his daughter:

You must first lay it down for a foundation in general, that there is inequality in the sexes, and that for the better economy of the world, the men, who were to be the law givers, had the larger share of reason bestowed upon them, by which means your sex is the better prepared for the compliance that is necessary for the better performance of those duties which seem to be most properly assigned to it.

MARQUIS OF HALIFAX, *THE LADY'S NEW YEAR'S GIFT* (1688), reprinted in 2 *THE LIFE AND LETTERS OF SIR GEORGE SAVILE* 379, 394 (H.C. Foxcroft ed., 1898).

179. See *Commonwealth v. Neal*, 10 Mass. 152, 152 (1813) (presenting attorney general's argument that excuse was available "only in cases where [the wife] may be supposed ignorant of the criminality of the act; as in larceny, &c., she may not know in whom the property of the goods is"); *Rex v. Hughes*, 168 Eng. Rep. 1137, 1138 n.* (1813).

had.¹⁸⁰ When that fact was disproved,¹⁸¹ they concluded that it nonetheless was unhealthy for women to assert themselves intellectually because the effort would divert to their brains energy needed by their reproductive organs, resulting in disastrous consequences both for them and the human race.¹⁸² The latter finding was supported by biological wisdom prevailing throughout the nineteenth century concerning the devastating effect of menstruation on the nervous system of the human female.¹⁸³ As one nineteenth-century specialist on insanity pronounced, a woman "is less under the influence of the brain than the uterine system."¹⁸⁴ Lacking any empirical evidence concerning the processes driving the human reproductive cycle, physicians and scientists decided that during menstruation women

180. During the nineteenth century, "researchers were convinced that the five ounce difference in weight between male and female brains was the cause of female cognitive inferiority," Judith Genova, *Women and the Mismeasure of Thought*, in *FEMINISM AND SCIENCE* 211, 211 (Nancy Tuana ed., 1989). Women who seemed to challenge this understanding puzzled their communities. For example, many of the contemporaries of Marian Evans, better known under her pseudonym George Eliot, had difficulty reconciling her massive intellectual achievements with her feminine appearance and personality. See Kristin Brady, *Physiology, Phrenology, and Patriarchy: The Construction of George Eliot*, in *WOMEN AND REASON* 201 (Elizabeth D. Harvey & Kathleen Okruhlik eds., 1992). Although they expressed their ambivalence in various ways, many focused on "what they perceived to be the unusually large size of her head and features" and contrasted it with her "weak female body." *Id.* at 203-04. As Kristin Brady concludes, "There was simply no acceptable place in the sexual iconography of Victorian patriarchy for the intellectual woman." *Id.* at 205.

181. Happily, in what soon came to be known as the "elephant problem," elephants and whales rescued women from this particular argument. If intelligence were a matter of absolute brain weight, elephants and whales would outscore men on intelligence tests handily. Since this was clearly absurd (species chauvinism remains unchanged today), absolute brain weight was quickly abandoned as a measure of intelligence.

Genova, *supra* note 180, at 211.

182. See RUTH HUBBARD, *THE POLITICS OF WOMEN'S BIOLOGY* 36-39 (1990); THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* 222 (1990) (noting that nineteenth-century feminists attacked the view that, "because of the supposed ovarian drain" occurring during menstruation, women's "mental and physical energy . . . was . . . in short supply"); Brady, *supra* note 180, at 202 ("Not only by the bearing and nurturing of children, but even by the periodic function of menstruation, women were seen as using up their physical heat—leaving little or no energy that could travel to the head or brain."). Even Charles Darwin, whose discoveries constituted a radical break with dominant social and intellectual institutions of his time, was ensnared by the prevailing ideology of patriarchy. As Ruth Hubbard points out, Darwin decided that through the process of evolution men had attained a superior level of "mental power," as well as, it would seem, of every other faculty. Darwin pronounced, "The chief distinction in the intellectual powers of the two sexes is shown by man's attaining to a higher eminence, in whatever he takes up, than can woman—whether requiring deep thought, reason, or imagination, or merely the use of the senses and hands.'" HUBBARD, *supra* at 96 (quoting CHARLES DARWIN, *THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX* 873 (1871)).

183. LAQUEUR, *supra* note 182, at 213-27.

184. See Sally Shuttleworth, *Female Circulation: Medical Discourse and Popular Advertising in the Mid-Victorian Era*, in *BODY/POLITICS: WOMEN AND THE DISCOURSES OF SCIENCE* 47, 55 (Mary Jacobus et al. eds., 1990) (quoting J.G. MILLINGEN, *THE PASSIONS; OR MIND AND MATTER* 157 (1848)). As Mary Poovey has found in her fascinating study of the debate over whether anaesthesia should be used during childbirth, nineteenth-century obstetricians believed that

the uterus governs the entire female organism whether a woman is pregnant or not, and in spite of her mind, emotions, or will. . . . To quote another medical man, it is "as if the Almighty, in creating the female sex, had taken the uterus and built up a woman around it."

POOVEY, *supra* note 170, at 35.

must be visited by the same behavioral aberrations detected in dogs in heat.¹⁸⁵ Although the analogy between dogs and women was imperfect, given the soothing influence of civilization on women, it was cited as proof against women's undertaking public activities, such as attending school, "which required steady, day-to-day concentration."¹⁸⁶

Perhaps of greater immediate concern for the criminal law were the findings by Caesar Lombroso, a prominent criminologist writing in the late-nineteenth century, which suggested that women must avoid intellectual pursuits or risk falling into a state of moral depravity. Lombroso discovered that any activity that distracted women from their maternal function could have a profound criminogenic influence on them.¹⁸⁷ According to Lombroso, all women possess a "latent fund of wickedness," against which motherhood, fortunately, may act as a "moral prophylactic."¹⁸⁸ That discovery gave new urgency to the alarms raised by the scientific community over the disruption taking place in the reproductive cycle of a woman who

185. As Thomas Laqueur has amply demonstrated, nineteenth-century physicians insisted on this analogy between women and dogs. "The American physician Augustus Gardiner drew out the implications of the . . . analogy less delicately: 'The bitch in heat has the genitals tumefied and reddened, and a bloody discharge. The human female has nearly the same.'" LAQUEUR, *supra* note 182, at 213 (quoting AUGUSTUS GARDINER, *THE CAUSES AND CURATIVE TREATMENT OF STERILITY, WITH A PRELIMINARY STATEMENT OF THE PHYSIOLOGY OF GENERATION* 17 (1856)). The medical journal *The Lancet* made the point even more forcefully: "'The menstrual period in women bears a strict physiological resemblance' to the heat of 'brutes.'" *Id.* at 295 n.56 (quoting LANCET, Jan. 28, 1843, at 644).

186. *Id.* at 216.

187. The work of Lombroso nicely illustrates Mary Poovey's argument that, during the nineteenth century, "the Church's traditional authority to assign individuals social positions—and to maintain the social subordination of women in particular—was being challenged by" the institutions of science. POOVEY, *supra* note 170, at 25. Poovey studied medical articles, textbooks, and manuals from the mid-nineteenth century, and she found that, "whether they borrowed or contested the theological terms in which woman's nature had traditionally been formulated, nineteenth-century medical men constructed their arguments . . . on the same contradictory assumptions about female nature that dominated religious discourse." *Id.* at 30. Similarly, in his writings about women and crime, Lombroso supported judgments about women's fallen moral nature—which had traditionally been uttered by Church leaders—with proof of their inferior physiological condition. See CAESAR LOMBROSO & WILLIAM FERRERO, *THE FEMALE OFFENDER* 27-124 (Fred B. Rothman & Co. 1980) (1895) (cataloging numerous physical "anomalies" and "characteristics of degeneration" found in female criminals and prostitutes, which in some cases satisfied the authors that the women in question were born to do evil).

188. LOMBROSO & FERRERO, *supra* note 187, at 254-55, 265. Some nineteenth-century doctors might not have agreed that maternity constituted a salutary "moral antidote," since they characterized pregnancy and childbirth, like menstruation, as disorders that, in extreme cases, lead to insanity.

"With women, it is but a step from extreme nervous susceptibility to downright hysteria, and from that to overt insanity. In the sexual evolution, in pregnancy, in the parturient period, in lactation, strange thoughts, extraordinary feelings, unseasonable appetites, criminal impulses, may haunt a mind at other times innocent and pure."

POOVEY, *supra* note 170, at 37 (quoting G.J. BARKER-BENFIELD, *THE HORRORS OF THE HALF-KNOWN LIFE: MALE ATTITUDES TOWARDS WOMEN AND SEXUALITY IN NINETEENTH-CENTURY AMERICA* 83 (1976) (quoting ISAAC RAY, *INSANITY PRODUCED BY SEDUCTION* (1866))).

was exposed to the rigors of an education ranging beyond what was necessary to her vocation as wife and mother.¹⁸⁹

If it were true, for whatever reason, that a woman's mind was and must remain so undeveloped as to be incapable of grasping the factual and legal implications of her conduct, the law understandably would want to find ways to encourage her to be guided by her husband's superior intellect. Accepting that state of affairs, the marital coercion doctrine was a sensitive and sympathetic response to women's weakness because it provided them an extra measure of protection from their own feeble-mindedness. By refusing to punish the model wife who had properly followed her husband's counsel, only to be led astray by him, the doctrine reinforced the teaching, amply voiced across other disciplines, that in no circumstances should wives question their husband's judgments. As far as a woman was concerned, her husband was to be the authoritative arbiter of both fact and law. Of course, in a limited set of circumstances, the law expected that women would be able to discriminate between right and wrong without assistance from their husbands. Thus, for example, the presumption of coercion generally was not available in cases of homicide, presumably on the ground that even a woman could be expected to perceive for herself that killing another person was unlawful.¹⁹⁰

The language used in most of the cases suggests that the predominant rationale for the marital coercion excuse was the belief that married women suffered from a volitional disability.¹⁹¹ Certainly, Blackstone saw the defense as excusing the wife because she was "considered as acting by compulsion and not of her own will."¹⁹² Although the source of the constraint on the wife was elaborated in various ways, the judges sometimes pointed out that the law gave the husband the right to "chastise" his wife,

189. The consequences of giving girls the same education afforded to boys were believed to be disastrous. Though young women might be able to "'graduate[] from school or college excellent scholars,'" when they later married, they would find that the cost of their education was sterility. HUBBARD, *supra* note 182, at 38-39 (quoting EDWARD H. CLARKE, *SEX IN EDUCATION* 39 (1874)).

190. While the presumption of coercion did not apply in most jurisdictions in cases of murder, the marital coercion excuse still was available to wives in those cases. I suspect, however, that the courts would require more in the way of "coercion" in these cases than the husband's mere request for or consent to the killing in order for the wife to be excused, though not, perhaps, for the husband to be convicted for her misconduct. On this latter point, see *infra* text accompanying notes 202-09, for a discussion of the offensive use of the marital coercion doctrine. In a case decided in the early-nineteenth century, the Massachusetts Attorney General tried to convince the court to extend the exception for murder to a case of assault and battery. As he argued, the defendant wife "must know, as well as [her husband], that the action is wrong; . . . she could not be ignorant that it was unjustifiable to beat and wound her neighbor." *Commonwealth v. Neal*, 10 Mass. 152 (1813). This argument was unavailing. The wife was excused because she had committed the assault and battery "in company with, and commanded by . . . her husband." *Id.*

191. For example, most authorities seemed to believe that the murder exception assumed that the wife's disability was volitional, rather than cognitive. Murder is a crime of "so much malignity as to render it improbable that a wife would be constrained by her husband, without the operation of her will, into [its] commission." *State v. McDonie*, 123 S.E. 405, 407 (W. Va. 1924) (quotation omitted).

192. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *28.

that is, he had "the right . . . to control his wife with the lash."¹⁹³ If the wife's excuse was premised on a cultural understanding that husbands regularly beat their wives when displeased with their conduct, the marital coercion defense begins to look more like the general duress excuse. It might be sensible to assume that a husband who wanted his wife's assistance towards some illegal end would not hesitate to use his right of chastisement to coerce his wife to go along; and because he had that right, the husband's mere "presence" might be seen as a sufficient proxy for the threat of immediate physical violence.¹⁹⁴ But there are two problems that prevent us from characterizing—as a superficial analogy between the right of chastisement and the illegal threats found in duress cases would tempt us to do—the wife's failure to resist her husband's illegal orders as arising from the same kind of volitional "defect" thought to support a successful plea of duress.

The first problem lies in the reasons supporting chastisement itself. Unlike the illegal threats of harm presented in general duress cases, chastisement was a legal right conferred on the husband precisely for the purpose of breaking the will of an unruly wife.¹⁹⁵ The husband was entitled to correct his wife through corporal punishment presumably because the law believed that, in the general run of cases, the wife possessed an immature moral sense that would not entertain requests to desist from wrongdoing without the aid of physical punishment.¹⁹⁶ Once again, it is impossible, without careful historical research, to draw firm conclusions about the cultural understandings that supported the husband's right of chastisement over the centuries, first because the precise content of those assumptions surely changed during that time, and also because, at given times, various groups within a society appear to have expressed ambivalence about the moral status of women and, presumably, their need for corporal punishment.¹⁹⁷ But,

193. *State v. Meyers*, 74 N.W. 277, 278 (Neb. 1898); *McDonie*, 123 S.E. at 407.

194. See *Regina v. Dykes et Uxor*, 15 Cox Crim. Law Cases 771 (1885) ("[A]s regards the female prisoner there was some evidence to show that in what she had done, and in the violence which she had used against the prosecutor, she was acting under the compulsion of her husband, and in fear of violence from him.").

195. Joyce McConnell has traced chastisement to the *Rules of Marriage*, authored in the late-fifteenth century by Friar Cherubino of Sienna. See Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 232 n.144 (1992).

196. Cf. *State v. McDonie*, 109 S.E. 711, 715 (W.Va. 1921) (explaining that a parent's right to chastise a child stems from the insufficiently developed moral development of children). Blackstone's explanation for why the husband was vested with the right of chastisement, though tautological, illuminates the law's assumptions about the wife's immaturity. Thus, Blackstone remarks that the husband is authorized to control his wife's behavior through the use of physical force because he is responsible for her "misbehavior," just as a "man is allowed to correct his apprentices or children." 1 WILLIAM BLACKSTONE, COMMENTARIES *444.

197. See CAROL F. KARLSEN, *THE DEVIL IN THE SHAPE OF A WOMAN* 153-81 (1987). As Mary Poovey has documented, doctors in mid-nineteenth century England "[p]aradoxically" represented "woman as both an innately sexual creature and a being whose natural modesty and emotional self-control prevent her sexuality from obtruding on the medical men." POOVEY, *supra* note 170, at 32. This confusion flowed, in part, from "contradictory representations of female nature . . . inherited from the

if normal women really were "big children" with a "deficient" moral compass, as, for example, Caesar Lombroso declared at the end of the nineteenth century,¹⁹⁸ not only could they not be trusted to govern themselves, but many also would require some form of routine discipline to coerce their good behavior. The right of chastisement simultaneously recognized the husband as a superior moral being who should administer necessary correction to his wife and announced that physical punishment was beneficial for the wife who rejected her legal and moral duty to obey her superior. Even in cases where the husband commanded the wife to violate the criminal law, the wife's assertion of her own will against her husband still would be the sign of criminogenic and immoral independence in her, in contradistinction to the responsible actor who would be condemned if he failed to exert his will to withstand any influence to violate the law short of mortal threats.

The second problem with drawing an analogy between the right of chastisement and the threats found in general duress cases arises from the manner in which the criminal law acted, through the marital coercion doctrine, as a reinforcement for the husband's authority to break the will of a recalcitrant wife through physical punishment. If the possibility of chastisement admittedly lurking in every marriage really meant that marital coercion was a close relative of duress, why not require the prosecution to prove, in fact, that the husband had not threatened his wife? Why require the prosecutor instead to prove that the wife had acted independently of her husband in order to convict her? The answer, for the nineteenth century at least, may lie in Lombroso's findings concerning the nature of women who were what he called "born criminals."¹⁹⁹ The born criminal was an "incubus [who] . . . egg[ed] on her accomplice to the deed," while the normal woman, lacking initiative and intelligence, usually became the accomplice to a crime only at "the suggestion of a man."²⁰⁰ If those findings were true, any evidence, no matter how slim,²⁰¹ that the wife had a predisposition for independence marked her as a criminal, and it was she whom the criminal law sought to identify and punish, presumably for the same reasons supporting any other decision to impose punishment. On the other hand, the

eighteenth century," in which women were portrayed as "man's temptress" and his "moral guide." *Id.* Thus, even after the "domestic ideal" provided the primary definition of women, contradictory representations of women as innately sexual (i.e., immoral) continued to surface and arouse anxiety within the medical debates. *Id.* at 32-33.

198. LOMBROSO & FERRERO, *supra* note 187, at 151, 156, 160, 161, 165. Lombroso's disdain for the intellectual and moral capacities of normal women was mild compared to his contempt for criminal women, whom he considered irredeemable "moral lunatics." *Id.* at 154, 170.

199. *See id.* at 147-91.

200. *Id.* at 178, 264-65.

201. That the presumption of coercion could be rebutted by slight evidence, *see, e.g.*, *State v. Stoner*, 179 N.W. 867, 868 (Iowa 1920); *State v. Cleaves*, 59 Me. 298, 302 (1871); *Brown v. Commonwealth*, 115 S.E. 542, 543 (Va. 1923), reinforces the idea that good wives were those who abased their will before their husband's, while evil women were those who displayed any tendency towards independent thought or action.

wife who came before the court able to prove that she had honored her "duty of obedience to the commands of the husband," even where it led her into crime, deserved not condemnation and punishment, but compassion and leniency for acting "in subjection to her husband."²⁰² The deeper irony here is that the wife is considered a weak creature, requiring sympathy and excuse from blame, when she, as she "naturally" will, submits to her husband's suggestions; yet she also is found defective, this time deserving condemnation and punishment, if she shows any signs of independence from her husband's will.²⁰³

While the marital coercion excuse repudiated the notion that the model wife could be held responsible for her crimes, unless she showed signs of criminogenic independence, the law, in this same line of cases, redoubled its commitment to the value of responsibility where male actors were concerned. Whether innocently submissive or culpably independent, the figure of the wife always was scrutinized in the context of her relation to her husband, who emerged as the protagonist even of her criminal case. Where a wife who had violated the criminal law was excused on marital coercion grounds, the husband was identified as the culpable party as it was he who had led her into crime. Where the wife was found guilty, the husband still was the villain of the piece because he had failed to manage her properly.

The law was not content to leave the husband's responsibility for his wife's misconduct at the level of inference. Rather, it authorized the prosecution to use the marital coercion doctrine offensively to punish the husband for a crime his wife had committed.²⁰⁴ The offensive use of marital coercion is supported by ancient assumptions about a husband's blameworthiness for failing to control his wife, who like an animal or child, could not be expected to govern herself. Using a metaphor that resonates today in the criminal law academy's description of the animal-like nature of excused actors,²⁰⁵ Xenophon explained in 355 B.C.:

If a sheep is in a bad way, . . . we usually blame the shepherd; if a horse's behaviour is unruly, we blame the trainer. As for a wife, if she has faults even though her husband has tried to teach her virtue, then it would probably be fair to blame the wife; but if he doesn't teach her what is truly good and then finds her ignorant of it, wouldn't it be fair to blame the husband?²⁰⁶

202. See *Commonwealth v. Lewis*, 42 Mass. 151, 153 (1840), *overruled by Commonwealth v. Barnes*, 340 N.E.2d 863 (Mass. 1976).

203. What I characterize here as "irony" is an example of what feminists call a double-bind. See *infra* note 295.

204. *Commonwealth v. Helfman*, 155 N.E. 448 (Mass. 1927), *overruled by Commonwealth v. Barnes*, 340 N.E.2d 863 (Mass. 1976); *Commonwealth v. Barry*, 115 Mass. 146 (1874); *Commonwealth v. Wood*, 97 Mass. 225 (1867); *State v. Boyle*, 13 R.I. 537, 538-39 (1882).

205. See authorities cited *supra* note 119.

206. XENOPHON, *CONVERSATIONS OF SOCRATES* 299 (Hugh Tredennick & Robin Waterfield trans., Robin Waterfield ed., 1990).

As in prosecutions against the wife, the presumption of coercion determined the result of the husband's trial, because the husband could be convicted even though there was no evidence that he had threatened or influenced his wife in any way. Given the manner in which the presumption of coercion operated, he could be convicted merely for standing by without voicing an objection while his wife committed the crime.²⁰⁷ Occasionally, these cases provide a fleeting glimpse into the manner in which the law supported the prevailing ideology of marriage by suppressing accounts that individual men offered to show that they lacked the power or inclination to restrain their wives. The accounts emerge in minor, but significant, slips in which the courts describe "irrelevant" testimony by the husband that reveals how far he had fallen from his ascendant post. Thus, while the criminal courts would allow the husband to offer evidence tending to show that he had used his wife properly by attempting to restrain her misconduct,²⁰⁸ they completely ignored evidence about the husband's relationship with his wife, his family responsibilities, or his economic hardships, which would have suggested that he no longer was, if he ever had been, the master of a household.²⁰⁹ Thus, by punishing husbands whose wives acted independently of them, the criminal law encouraged men to prove that their lives were the specular image of the official story on marriage, in which they mastered their wives, with physical force when necessary. Similarly, it encouraged women to prove their submissive dependence on their husbands by punishing wives whose crimes could be traced to their own exercise of will.

Through the marital coercion doctrine, the criminal law denied for centuries that women possess what scholars claim is *the* most essential human characteristic, namely, the capacity for rational choice. The portrait of women that emerges from these cases explains why scholars dedicated to the value of human autonomy were offended by Richard Delgado's brainwashing excuse. Delgado's "superimposed *mens rea*" doctrine would have drawn direct support from the marital coercion doctrine. As Delgado argued should be the case for any actor who was the victim of brainwashing, the law refused to blame the wife on the ground that her misconduct reflected not her own mental choices, but those of her husband. Like the other excused actors who criminal law theorists believe are, in signifi-

207. *Helpman*, 155 N.E. at 449 (upholding jury instructions to that effect).

208. *See Commonwealth v. Hill*, 14 N.E. 124, 127 (Mass. 1887).

209. For example, in one case, the husband, who was illiterate, protested that it was unfair to hold him responsible for his wife's illegal liquor business where he had no involvement in running the business and had no interest in the stock or profits, which were managed and enjoyed solely by his wife. These facts were irrelevant to the husband's liability because, although the house was owned jointly by the husband and wife, it was presumed that the husband had the power to control the household, making him automatically a participant in any illegal business his wife ran there. *Commonwealth v. Kennedy*, 119 Mass. 211, 213 (1875); *see also Mulvey v. State*, 43 Ala. 316, 317-18 (1869) (holding that husband is liable when wife owns the store in which she sells liquor without a license).

cant respects, "non-human," married women are treated in these cases like things. The wife is just an object that the husband has used in committing a crime.²¹⁰ Lacking agency of her own, indeed, a "marionette, moved at will by the husband,"²¹¹ the wife is not responsible for her conduct. At the same time, while responsible actors must rebuff all but the most compelling illegal pressures and temptations, and are punished for failing to govern themselves according to the law's prescriptions, the wives who were susceptible to punishment were those who failed to submit and be governed by the commands, whether legal or illegal, of their husbands.

Therefore, if the theory of responsibility really informs legal practice and, indeed, the quality of our daily life, as its adherents claim, normal women would be vulnerable to all of the insults against which the responsible actor is immune because women lacked that "most human capacity, the power to choose."²¹² The model female actor, who could not be blamed for her misconduct because it was attributable to her husband's will, must for that same reason be denied praise for her accomplishments. Women could not be "somebody special" in their own right. Their fate was to be the wife of "somebody," whose will, and, necessarily, whose failures and achievements, would subsume theirs. By denying that women could exercise rational self-governance, the law also withheld from them the satisfaction of choosing what course their lives would take and of knowing when they would be free from punishment. The law assigned that authority instead to the husband, even ceding to him the power to identify the grounds for punishment and then to impose punishment on the body of his wife.²¹³ Certainly, the pitying tones in which these opinions describe the excused wife suggest, as Michael Moore has charged, that those administering the criminal law hold themselves superior to the actors whom they excuse; as judges reversed the conviction of the wife whose only fault was to come

210. Even where the evidence suggested that the wife was a significant participant in the wrongdoing, the effect of the marital coercion doctrine was to transform her into an object used by the husband. For example, in *Mulvey*, Mrs. Mulvey owned and ran a grocery store in which whiskey was furnished in the absence of a liquor license; she also owned and sold the whiskey on the occasion that provided the basis for the charges. According to the court, James Mulvey was solely responsible for the wrongdoing:

In this case, it seems that the wife did not move in the matter until the husband "directed" her to let the parties, who had come in to drink, have the whisky. She obeyed his directions, which were his commands. She furnished the whisky to Collins and his friend, as the husband had ordered her to do. They drank it and paid for it, in his presence and without his objection. By his conduct in this case, he made his wife's act his own. In judgment of law, it was he that violated the law, and not the wife.

43 Ala. at 318-19.

211. See *Smith v. Meyers*, 74 N.W. 277, 278 (Neb. 1898).

212. Morse, *supra* note 37, at 1268.

213. The only limit placed on the right of chastisement was that the husband was not permitted to inflict permanent injuries on his wife. See Beirne Stedman, *Right of Husband to Chastise Wife*, 3 VA. L. REG. (n.s.) 241 (1917). Apparently, harms short of lasting wounds were acceptable.

when her husband "stamped his foot and called for her, and tremblingly" fulfilled his orders.²¹⁴

While the model female actor constructed by the criminal law was a married woman,²¹⁵ the assumptions supporting that model may have played themselves out in a way that was especially harmful to women who were not married. If the marital coercion doctrine was a reflection not only of the subordinate legal position occupied by the wife, but also of an obdurate belief in her intellectual, motivational, and moral deficiencies, then it seems safe to assume that those assumptions did not drop away when the criminal law encountered an unmarried woman. The wife's weaknesses did not suddenly appear on her wedding day, thereby justifying and requiring her husband's mastery; she must have been in that condition before coming to the marriage. As I noted above, women were encouraged to marry in order to avail themselves, and society, of the beneficial protections that a husband's superior influence would provide.²¹⁶

The criminal law's reliance on husbands as the primary source of control for women's misconduct exposes the special vulnerability to official interference of women who, though possessed of the same deficiencies afflicting wives, were not assigned to the control of a particular man. Indeed, there is evidence suggesting that the cognitive and volitional capacities of "spinsters" often were judged even more "abnormal" than those of married women; for example, unmarried women in Victorian England were not analogized to dogs, as "normal" women often were, but were relegated "to 'a sort of sub-animal class,' because deprivation of the passion of love produced 'a sad mental defect.'"²¹⁷ Similarly, as an historian of antebellum North Carolina has found, the "bad women" with whom the criminal justice system was most concerned were those "ungoverned by fathers, husbands, or masters."²¹⁸ In colonial Massachusetts, unmarried women "were per-

214. *State v. Fertig*, 67 N.W. 87, 89 (Iowa 1896).

215. In criminal cases, judges were preoccupied with knowing the marital status of the woman accused. *See, e.g., United States v. De Quilfeldt*, 5 F. 276 (C.C.D. Tenn. 1881). It was "quite necessary that [in indictments women] should be described . . . as 'wife of A.B.,' 'widow,' 'spinster,' or 'single woman.'" *Id.* at 281. In the case of a male defendant, a designation of any kind was "wholly unnecessary" and "utter[ly] useless[]." *Id.* While the court did go on to mention possible, though unnecessary, designations for a male defendant, all concerned his social or professional, and not his marital, status. *Id.* An historian of women's deviance in colonial Massachusetts has found that the marital status of the female suspect was "in many ways the most important" information that the indictment conveyed. HULL, *supra* note 139, at 54. Where sexual offenses were involved, the marital status of the woman determined the crime for which she could be charged. *Id.* Moreover, unmarried female offenders were of special concern since judges perceived them as occupying a "dangerous stage[] of life." *Id.*

216. *See supra* note 161.

217. JALLAND, *supra* note 161, at 255-56. Jalland points out that "[i]t was commonly believed that the sexually frustrated spinster was especially liable to hysteria, despite the opinion of some doctors that women lacked sexual feelings." *Id.* at 256; *see also* STONE, *supra* note 161, at 202 ("[P]ost-Reformation English society had nothing but contempt for spinsters.").

218. BYNUM, *supra* note 161, at 41; *see id.* at 10.

ceived by ministers and lawmakers as [occupying] dangerous stages of life, times of vulnerability."²¹⁹ Therefore, it is not surprising to find that these "redundant women"²²⁰ were vulnerable to official charges from which married women were sheltered by the presence of their husbands²²¹ and that the law often intervened and provided for unmarried women, especially those from the lower classes, the kind of supervision expected from the absent husband.²²²

The record left by appellate decisions²²³ suggests that, by the turn of the century, many courts were becoming impatient with claims of marital coercion. The judges often voiced their irritation with the excuse in tones that call to mind the reaction of Mr. Bumble, the unctuous beadle from *Oliver Twist*. Upon learning that the law would blame him for destroying the tokens of Oliver's paternity because he was present when Mrs. Bumble threw them in the river, Mr. Bumble pronounced, "If the law supposes that . . . the law is a ass—a idiot. If that's the eye of the law, the law is a bachelor."²²⁴ Not content to rely on citations to *Oliver Twist*,²²⁵ the courts reasoned that the foundation of the excuse had been undermined by recent improvements in the status of married women in other areas of the law, including most importantly the abolition of the right of chastisement and recognition of the wife's separate property rights. Additionally, they began

219. HULL, *supra* note 139, at 54.

220. JALLAND, *supra* note 161, at 254.

221. See BYNUM, *supra* note 161, at 10, 44, 87.

222. See *id.* at 87. It may be that unmarried women still are the actors most vulnerable to intervention by the criminal law. Modern studies of the treatment of female defendants have found that "whereas . . . married women are significantly less likely than their unmarried counterparts to be imprisoned, . . . marital status does not affect the sentences males receive." Candace Kruttschnitt, *Social Status and Sentences of Female Offenders*, 15 LAW & SOC'Y REV. 247, 262 (1980-1981) (citations omitted). Reviewing these and other studies, Rita Simon and Jean Landis have remarked that women may receive less severe sanctions when they are "subject to more informal social control." RITA J. SIMON & JEAN LANDIS, *THE CRIMES WOMEN COMMIT, THE PUNISHMENTS THEY RECEIVE* 62 (1991).

223. As with other criminal law problems, the appellate opinions cannot tell the whole story concerning attitudes towards the marital coercion doctrine. For example, it is impossible to be sure precisely how the marital coercion doctrine affected prosecutorial charging decisions. Though it seems fairly clear that the doctrine ordinarily was not thought to preclude the lodging of charges in the first instance, it would not be surprising to find that prosecutors sometimes decided not to bring cases against married women based on their assessment of the strength of the evidence of independent conduct on the part of the wife. Similarly, we do not know how often juries deciding to acquit married women were influenced by the portion of the charge treating the marital coercion doctrine.

224. CHARLES DICKENS, *OLIVER TWIST* 461-62 (Peter Fairclough ed., Penguin Books 1966) (1837).

225. See *State v. Seahorn*, 81 S.E. 687, 689 (N.C. 1914) (Clark, C.J., concurring) (quoting *Oliver Twist*). Dickens' attitude on the marital coercion doctrine is unclear. The few commentators who have paid attention to the marital coercion doctrine have noted Mr. Bumble's assessment of the excuse. *E.g.*, 2 ROBINSON, *supra* note 1, at 371; Martin L. Levine, *Excuse: Duress*, in 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE*, *supra* note 28, at 729, 729. I believe that this passage represents a portion of the text whose meaning finally eluded its author's control. While Dickens probably did believe that the marital coercion excuse represented an asinine anachronism, the text implies that Mr. Bumble "is [also] a ass—a idiot," precisely because he fails to get the upper hand on his wife. Mrs. Bumble dominates and abuses her husband, while the typical Dickensian heroine, embodied perhaps most fully in the submissive and passive figures of Agnes Copperfield and Little Dorrit, dedicates herself to nurturing her husband.

to express skepticism towards the assumptions the excuse made concerning the intellectual and moral capacities of the wife.²²⁶ Yet, as this skepticism began to take hold, blowing the marital coercion doctrine before it, some judges provided a new rationale that gave the doctrine sufficient energy to totter on into the twentieth century.²²⁷ Thus, the courts that reaffirmed the defense articulated ostensibly benign explanations for the hierarchical distribution of power within marriage by locating the source of the wife's subjugation to her husband's will in her submissive and confiding nature²²⁸ and in the "affection" she holds for her husband.²²⁹ Judges became struck with the idea that it might be unfair to hold a wife responsible for a crime committed in the company of her spouse when "human experience" testified that it was natural, indeed, noble, for wives to submit to the wills of their husbands.²³⁰ No longer subordinated as a matter of legal convention or forced to submit by a husband willing to use corporal punishment to coerce her obedience, the modern woman's nature was to relinquish her will to the dominant will of the man she loved.

At this point in the story, both temporally and thematically, the battered woman syndrome defense appears, as that defense encourages women to establish at the level of fact all that the marital coercion excuse was willing to assume about them at the level of doctrine.

III

THE BATTERED WOMAN ACTOR

The coincidence in timing is striking. All but a dead letter in this country by the mid-1970s, the marital coercion doctrine reappeared, with its

226. As one federal judge put it in 1881, the marital coercion doctrine was a "relic of a belief in the ignorance and pusillanimity of women which is not, and perhaps never was, well founded." *United States v. De Quilfeldt*, 5 F. 276, 278 (C.C.D. Tenn. 1881). Some courts took longer than others to achieve this insight. Thus, almost another hundred years had to pass before the Supreme Court of Pennsylvania made the same point. *See Commonwealth v. Santiago*, 340 A.2d 440, 445-46 (1975) (characterizing the assumptions underlying the marital coercion doctrine as "outmoded," "outdated and inapplicable to modern society").

227. *See supra* note 162.

228. *See Trust Co. v. Sedgwick*, 97 U.S. 304, 308 (1877).

229. *See State v. Miller*, 62 S.W. 692, 694 (Mo. 1901); *cf. Sedgwick*, 97 U.S. at 308 (Because a wife "knows little of business and property interests[, i]t is natural that she should confide in [her husband's] integrity and be guided in everything by his kindly judgment"; thus, "the law wisely throws [disabilities] around her," including the marital coercion doctrine.)

230. *See Commonwealth v. Jones*, 1 Pa. D. & C.2d 269, 275 (1954). The more recent offensive use cases also rest on the notion that it is natural for the husband to occupy the position of head of household. In those cases, the accused husband would complain that using the presumption of coercion against him was not fair because the law had come around to recognizing the individual legal status of his wife and because the state had presented no evidence that he had, in fact, influenced his wife to commit the crime. The opinions rebuff those complaints with the remark that the changes in the wife's legal position did not disturb the husband's authority, and the responsibility to supervise her that goes with it, as the head of his household. *See, e.g., Braxton v. State*, 82 So. 657, 659 (Ala. Ct. App. 1919); *Commonwealth v. Carroll*, 124 Mass. 30, 31 (1878); *Commonwealth v. Wood*, 97 Mass. 225, 228-29 (1867).

patriarchal understandings about women's incapacity for responsible conduct virtually intact, at that precise moment, in the form of the battered woman syndrome defense.²³¹ Offered to the courts by feminist practitioners, the new defense certainly was not intended to revitalize the archaic excuse for wives. To the contrary, at least at the very outset, the two defenses might have seemed unrelated, had any critic bothered to make the connection. For example, early advocates of the battered woman syndrome defense believed that it was not an excuse at all. Rather, they asserted that evidence that a woman suffered from the syndrome merely supplemented the justification of self-defense in cases where she was charged with killing the man who had battered her.²³² Many of these cases appear to satisfy the traditional requirements of the self-defense justification, because the woman claimed that at the moment she killed her spouse she was engaged in a violent confrontation, initiated by him, in which she reasonably believed it was necessary for her to use deadly force.²³³ However, a significant number of homicide cases in which the defense is offered do not fit comfortably within the self-defense paradigm because the woman killed her abuser, not during a confrontation with him, but, for example, when he was sleeping,²³⁴ or she hired someone else to do the killing for her.²³⁵ Defenders of battered women found that jurors were hostile to the women's self-defense pleas,²³⁶ especially in the nonconfrontational cases,²³⁷ but also in the confrontational cases,²³⁸ and they attributed that hostility to the pressures exerted by gender stereotypes.

231. It appears that the battered woman syndrome defense was first offered in 1977; at least Dr. Lenore Walker, who is the leading expert witness on battered woman syndrome, described that theory for the first time in a criminal trial in Montana in 1977, where she testified in defense of a woman prosecuted for the homicide of her batterer. Walker reports that the defendant was acquitted. See WALKER, *TERRIFYING LOVE*, *supra* note 15, at 303-04.

232. See Crocker, *supra* note 10, at 130-31; Kinports, *supra* note 4, at 421; Schneider, *supra* note 137. All of the early cases in which the battered woman syndrome theory was offered were prosecutions of a woman for the homicide of her spouse. *Smith v. State*, 277 S.E.2d 678 (Ga. 1981); *State v. Anaya*, 438 A.2d 892 (Me. 1981).

233. See Maguigan, *supra* note 138, at 391-401. The focus of the self-defense plea is on whether the defendant reasonably believed that he needed to use deadly force in order to save himself from death or grievous bodily harm. See 1 LAFAYETTE & SCOTT, *supra* note 31, at 649; 2 ROBINSON, *supra* note 1, at 97.

234. See, e.g., *State v. Felton*, 329 N.W.2d 161, 162 (Wis. 1983).

235. See *People v. Yaklich*, 833 P.2d 758, 759 (Colo. Ct. App. 1991), *cert. denied*, 1992 Colo. LEXIS 644 (Aug. 10, 1992); *State v. Martin*, 666 S.W.2d 895, 897 (Mo. Ct. App. 1984); *State v. Leaphart*, 673 S.W.2d 870, 871-72 (Tenn. Crim. App. 1983); *Ortiz v. State*, 781 S.W.2d 399, 401 (Tex. Ct. App. 1989), *vacated*, 834 S.W.2d 343 (Tex. Crim. App. 1992); Schulhofer, *supra* note 8, at 118.

236. See Schneider, *supra* note 137, at 623, 629-30.

237. See Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227, 235-37 (1986); Crocker, *supra* note 10, at 139-42 (discussing courts' exclusion of expert testimony of battered woman syndrome in nonconfrontational cases); Kinports, *supra* note 4, at 394 & n.6, 409, 423.

238. See Crocker, *supra* note 10, at 142-43. Feminist legal scholars have noted that this hostility is not surprising given the fact that women who killed their husbands were at one time charged with

The first set of such pressures were the unstated cultural assumptions concerning appropriate female (and, therefore, male) conduct that jurors would rely on when deliberating over the woman's guilt. For example, jurors were thought to be reluctant to find that a woman's use of deadly force against her husband was reasonable since such conduct violated society's most basic prescriptions for wifely behavior.²³⁹ Even if they managed to persuade the jury that the woman killed only to protect herself from a brutal beating, defense lawyers were concerned that the jurors would believe that it nonetheless was unreasonable for abused women to use deadly force because they were masochists who found the abuse pleasurable²⁴⁰ or because they provoked male violence and deserved the abuse that their conduct incited.²⁴¹

The second set of pressures exerted by gender stereotypes were those embodied in the law itself. That is, the jury would be instructed to apply legal definitions of what constitutes a reasonable perception of and response to a serious threat of harm that were partial to male values and experiences.²⁴²

Accordingly, advocates designed the battered woman syndrome defense ostensibly to refute a variety of misogynist stereotypes²⁴³ and to establish that the woman's lethal action was reasonable.²⁴⁴ Regrettably, the defense achieves neither of these objectives. To the contrary, the defense concedes that the woman's conduct was unreasonable, but then excuses her from criminal liability if she can prove that she was a passive, obedient wife whose choices were determined, not by her own exercise of will, but by the superior will of her husband. Far worse, because the defense is designed to accommodate women's special psychological inclination for submission to men, it requires accused women to embrace precisely the same insulting stereotypes the defense was supposed

having committed, not merely homicide, but a form of treason. See HULL, *supra* note 139, at 26; Schneider, *supra* note 137, at 628-29.

239. See Schneider, *supra* note 137, at 628-29.

240. See *State v. Hodges*, 716 P.2d 563, 567 (Kan. 1986), *overruled by State v. Stewart*, 763 P.2d 572 (Kan. 1988); *State v. Kelly*, 478 A.2d 364, 370 (N.J. 1984); *Commonwealth v. Stonehouse*, 555 A.2d 772, 783 (Pa. 1989); WALKER, THE BATTERED WOMAN, *supra* note 15, at 20; Crocker, *supra* note 10, at 132-33.

241. See *Hodges*, 716 P.2d at 567; *Kelly*, 478 A.2d at 370; WALKER, THE BATTERED WOMAN, *supra* note 15, at 29; Crocker, *supra* note 10, at 129; Kinports, *supra* note 4, at 434; Mather, *supra* note 4, at 551; Schneider, *supra* note 137, at 629.

242. E.g., Blackman, *supra* note 237, at 230-31; Crocker, *supra* note 10, at 123, 126-27; Kinports, *supra* note 4, at 415-16; Mather, *supra* note 4, at 569-70; Katherine O'Donovan, *Defenses for Battered Women Who Kill*, 18 J.L. & Soc'y 219, 220-22 (1991); Schneider, *supra* note 137, at 631-36; Kent M. Williams, *Using Battered Woman Syndrome Evidence with a Self-Defense Strategy in Minnesota*, 10 LAW & INEQ. J. 107, 127 (1991).

243. See WALKER, THE BATTERED WOMAN, *supra* note 15, at 18-41; Crocker, *supra* note 10, at 132-34.

244. See Blackman, *supra* note 237, at 230-31; Crocker, *supra* note 10, at 130; Schneider, *supra* note 137, at 644-47.

to explode, and it endorses the assumption that all women are incapable of the rational self-governance exercised by men.

A. The Battered Woman Syndrome Defense Endorses the Assumptions Embraced by the Marital Coercion Doctrine

Curiously, although the woman who invokes the battered woman syndrome defense has been charged with killing her husband (or, increasingly, with some other crime) and not with failing to leave him, the primary explanation provided by the defense focuses not on why the woman killed,²⁴⁵ but on why she did not separate from her abuser.²⁴⁶ Of course, it is said, some explanation is necessary because the woman's failure to leave the relationship may present obstacles to securing her acquittal. First, the jury might believe that the woman's conduct should not be excused if she could have avoided the crime simply by leaving the marriage.²⁴⁷ Second, the jury might reject as incredible the woman's testimony about the brutal battering she suffered (and about other issues, as well) on the ground that, if the abuse was as bad as she claimed, she would not have endured it but would have separated from the batterer long before their final, deadly encounter.²⁴⁸ It is not clear whether the primary sponsor and expert witness on behalf of the defense, Dr. Lenore Walker, had these obstacles to acquittal in mind when she designed her empirical research study,²⁴⁹ but the psychological diagnosis she developed apparently has proved useful in practice by overcoming these obstacles.

Moreover, by foregrounding this question, namely, "[w]hy do battered women remain in these relationships,"²⁵⁰ the defense initially appears to reflect an understanding that women are autonomous agents who can (and should) choose to terminate their marriages or take other steps to protect themselves from abusive spouses. This understanding might seem, then, to be an improvement over the various disabilities that the convention of marriage imposed on women when the marital coercion doctrine was applied. However, the battered woman syndrome defense instantly reassures us that any such improvement is an illusion because it offers to prove that the assumptions about women's incapacity for responsible self-governance that underlie the marital coercion excuse are accurate. Perhaps it is a sign of

245. Moreover, as I note below, the psychological diagnosis provided by the battered woman syndrome defense actually is inconsistent with the homicidal conduct committed by the afflicted woman. See *infra* text accompanying notes 403-04.

246. See Crocker, *supra* note 10, at 132-34.

247. See Kinports, *supra* note 4, at 439-40; Rosen, *supra* note 118, at 392.

248. See *State v. Hodges*, 716 P.2d 563, 567 (Kan. 1986), *overruled by State v. Stewart*, 763 P.2d 572 (Kan. 1988); *State v. Kelly*, 478 A.2d 364, 375, 377-78 (N.J. 1984); *State v. Hill*, 339 S.E.2d 121, 122 (S.C. 1986); Crocker, *supra* note 10, at 134.

249. My research reveals that at least as early as 1977, Walker articulated in print the anxiety and dismay felt by those attempting to help battered women when the women failed to separate from their abusive spouses. See Walker, *Battered Women and Learned Helplessness*, *supra* note 15, at 31.

250. WALKER, *THE BATTERED WOMAN*, *supra* note 15, at 16.

progress that the experts no longer point merely to women's biology as the source of and justification for maintaining that incapacity in law, but the construction of women that science now is providing to law is, in important respects, no different from what it was in past centuries in that it defines women as irresponsible and, most significantly, explicitly locates the source of women's irresponsibility within the women themselves.²⁵¹ That is, contemporary scientists are teaching the criminal courts that late-twentieth-century women are susceptible to a mental disorder,²⁵² whose characteristic symptoms cause them passively to submit themselves to marriages in which they are so brutally handled by dominant men that they lose their capacity to make rational choices in favor of law-abiding conduct.²⁵³

Many of the facts offered to excuse the battered woman recapitulate the same assumptions about women that supported the marital coercion doctrine. In her testimony, the accused woman will recount the horrible battering she endured during the marriage to make the jury understand that her husband was one who "control[led] his wife with the lash."²⁵⁴ She also may describe external barriers that prevented her from leaving the marriage, such as her lack of individual financial resources and her responsibility for young children.²⁵⁵ Particularly in the early cases, the woman sometimes would testify that, when she turned to legal or other social institutions for sanctuary, she was offered only admonishments that she should remain in the marriage and, even, that she should work harder at satisfying her husband.²⁵⁶ This testimony not only establishes that the woman could not leave the marriage because she had nowhere to go, but it also suggests that the husband possessed a de facto right of chastisement because his physical

251. The experts who testify in court in support of a battered woman syndrome defense do blame external, environmental factors, such as the woman's lack of financial resources and the failure of police intervention, for her plight. See WALKER, TERRIFYING LOVE, *supra* note 15, at 10, 53-54. Still, they focus primarily on how those environmental factors have produced personal shortcomings in the woman, which she must overcome before she may experience a productive life, *id.* at 42-53, rather than on the continuing effects of the cultural forces acting upon her, *cf.* Caplan & Nelson, *supra* note 100, at 204-05 (concluding that "psychologists invest[] disproportionate amounts of time, funds, and energy in studies that lend themselves, directly or by implication, to interpreting the difficulties of black Americans in terms of personal shortcomings" and that "overlook[] the importance of other kinds of forces that operate on black Americans").

252. Walker, *supra* note 11, at 331.

253. See, e.g., WALKER, TERRIFYING LOVE, *supra* note 15, at 42-53; Blackman, *supra* note 237, at 228-30; *cf.* DEL MARTIN, BATTERED WIVES 79 (1976) (describing the "fear" experienced by battered women as so potent that it "'blots out all reason'") (quoting ERIN PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR 39 (1974)).

254. See *State v. McDonie*, 123 S.E. 405, 407 (W. Va. 1924).

255. See *State v. Felton*, 329 N.W.2d 161, 163 (Wis. 1983) (recounting that the defendant testified that she returned to her abusive husband because she was experiencing financial problems). Sometimes these "facts" about external barriers to the defendant's escape from the relationship are described by the defense expert witness as part of battered woman syndrome, see *State v. Kelly*, 685 P.2d 564, 567 (Wash. 1984), or they are included in the court's discussion of the problems confronted by battered women generally, see *State v. Hundley*, 693 P.2d 475, 479 (Kan. 1985); *State v. Kelly*, 478 A.2d 364, 372 (N.J. 1984); Kinports, *supra* note 4, at 405; Schneider, *supra* note 137, at 626-27.

256. See *Felton*, 329 N.W.2d at 163.

abuse of his wife was socially condoned, indeed, tacitly approved. Thus, this new defense instructs us that, just as in the heyday of the marital coercion excuse, women cannot separate from men who beat them, notwithstanding the fact that they possess legal rights to own property and enjoy liberal access to divorce. Women are economically dependent on men and society treats as outcasts those women who seek to leave their marriages.

Sensitive to the material plight of women who endure violence in their homes, Stephen Schulhofer has proposed that the battered woman syndrome defense should be recognized in those cases where the jury is persuaded that the woman's financial situation truly was dire, that is, where she "ha[d] literally no place else to go."²⁵⁷ So limited, and standing alone, the defense would not necessarily be misogynist, at least if it were made clear that these external barriers were erected by culture, rather than by the woman's "natural" inferior capacity to support herself. But when placed alongside the traditional model of responsibility, which steadfastly denies men an excuse based on their disadvantaged social and economic circumstances,²⁵⁸ this accommodation for women reinforces the understanding that women cannot overcome barriers to lawful conduct, barriers that men can and do surmount. Therefore, even if the defense were limited along the lines that Schulhofer suggests, it still would reinforce the understanding that a woman, unlike a man, can survive only if she receives "special aid,"²⁵⁹ either from the individual man to whom she must cling for sustenance or from officials of the state to whom she turns when the man who is responsible for her fails to provide support.

Of course, Schulhofer's proposal that the defense be available only in cases where the typical person would have believed that escape from the abuser was impossible²⁶⁰ bears little resemblance to the much broader defense that battered women's defenders insistently have offered and courts enthusiastically have received. Most significantly, the defense never has relied solely, or even primarily, on "tangible," external barriers²⁶¹ that may confine women within their marriages, abusive or otherwise.²⁶² Even when the defense was in its infancy, the accused woman was not always able to

257. Schulhofer, *supra* note 8, at 129.

258. See *supra* text accompanying notes 74-101.

259. See MacKinnon, *supra* note 6, at 724.

260. See Schulhofer, *supra* note 8, at 129-30.

261. See *id.* at 129 (arguing that battered women who kill should have to prove "tangible barriers to flight").

262. See WALKER, *THE BATTERED WOMAN*, *supra* note 15, at 29-30 (arguing that battered women are unable to leave after being assaulted because they possess the "psychological inability to do so"); Blackman, *supra* note 237, at 228-30 (reporting that psychological and sociological studies "show that battered women may find it nearly impossible to leave abusive relationships because of the psychological changes that follow from remaining in an abusive relationship after a second episode of abuse").

offer proof of any significant external obstacles to her escape.²⁶³ However, the absence of economic or other external obstacles to separation is not fatal to the defense, because battered women are not imprisoned with their mates by tangible bars but are bound to them by an internal, psychological mechanism.²⁶⁴ The heart of this defense is a psychological diagnosis of battered women that construes them as suffering from various "emotional, cognitive, and behavioral deficits," which "negatively influence [them] from leaving a relationship after the battering occurs."²⁶⁵ The central testimony for the defense is not provided by the accused woman, but by the expert witness, usually a psychologist, who claims that the battering caused the woman to succumb to a "mental health disorder[]" called "learned helplessness,"²⁶⁶ which made it impossible for her to contemplate leaving her violent mate even though other people perceived that she could, and should, have separated from him.²⁶⁷ She may have avenues of escape from the marriage, short of homicide, to which others would turn, but the battered woman's dysfunctional mental condition leaves her unable to act to take advantage of them.²⁶⁸

Therefore, notwithstanding their contrary protests,²⁶⁹ the battered women's defenders have not structured this new defense as a justification, nor have they made any sustained effort to challenge the theoretical categories of justification and excuse and the moral and practical discriminations that those categories make between the individual actors who are assigned to them.²⁷⁰ The strategy of the battered women's defenders has *not* been to

263. Moreover, by the beginning of this decade, the leading advocate of the defense began to concede that in some jurisdictions law enforcement and other social agencies have become more responsive to battered women's requests for aid and shelter—and, here, we must give credit to these advocates for the success of this aspect of their project—so that, with the passage of time, proof of external obstacles may become increasingly less compelling. See Trial Transcript at 1053-55, *State v. Hess* (Mont. Dist. Ct. 1990) (Crim. No. 89-43), *aff'd*, 828 P.2d 382 (Mont. 1992) (testimony of Lenore E. Walker); Mather, *supra* note 4, at 559-60 (describing reforms implemented by law enforcement and social service agencies aimed at helping battered women).

264. See WALKER, TERRIFYING LOVE, *supra* note 15, at 44 (contending that the woman is "psychologically trapped" in the battering relationship); Blackman, *supra* note 237, at 228-30 (describing the psychological impairments that make it "nearly impossible" for battered women to leave the abusive relationship).

265. WALKER, *supra* note 103, at 2.

266. See Walker, *supra* note 11, at 330-32.

267. See *People v. Romero*, 15 Cal. App. 4th 1519, 1526 (Ct. App. 1992) (stating that, because of their psychological and behavioral distortions, battered women "respond passively to abuse and will not attempt to leave the abuser, even when it appears to outsiders that they could do so safely"), *review granted*, 846 P.2d 702 (Cal. 1993); WALKER, TERRIFYING LOVE, *supra* note 15, at 49-53; Blackman, *supra* note 237, at 228-29.

268. See WALKER, TERRIFYING LOVE, *supra* note 15, at 49-53.

269. See Kinports, *supra* note 4, at 421.

270. For example, because the woman is relieved of criminal liability in either case, Kit Kinports asserts that we need not concern ourselves with the "academic or theoretical importance" of labeling the defense an excuse as opposed to a justification. *Id.* at 460; see also Rosen, *supra* note 118, at 408-09 (arguing that it does not, "as a practical matter, make any difference," whether the defense is labeled a justification or excuse). While it is true, as Kinports says, that "in either case, [the woman] is acquitted

ask the jurors to find, as under a self-defense claim, that the woman's act of killing was justified because the typical person also would have believed that deadly force was necessary under the circumstances.²⁷¹ Rather, the defense concedes that the typical person would have chosen to terminate the relationship long before the battering escalated to the point where the use of deadly force became necessary.²⁷² Then, carefully tracking the traditional requirements of excuse, the defense goes on to ask the jurors to determine that the accused woman suffered from cognitive and volitional disabilities that deprived her of the capacity to choose lawful conduct (that is, leaving her spouse).²⁷³

The courts' hospitable reception of the battered woman syndrome defense in cases where the woman killed her abuser has encouraged defense lawyers to offer the theory to support additional excuses that are conceptually distinct from the imperfect self-defense claim described above.²⁷⁴ The theory sometimes has successfully supported a plea of not guilty by reason of insanity,²⁷⁵ though advocates of the defense have expressed

and goes free." Kinports, *supra* note 4, at 460, I believe that these arguments fundamentally misconceive the importance of the distinction drawn between justification defenses, on the one hand, and excuse defenses, on the other. As I show in Part I, this "theoretical" distinction, which Kinports dismisses so lightly, actually is of great "practical" significance to the community—and to the accused woman herself—because defendants who are excused on psychological incapacity grounds, unlike those whose acts are found to be justified, often are subjected to ongoing, official supervision to protect both themselves and others from their dangerous disabilities.

271. See Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY 798, 800-02 (1991).

272. See *State v. Hodges*, 716 P.2d 563, 569 (Kan. 1986) ("The same facts perceived by a person who has been repeatedly abused in a relationship would certainly be perceived differently by an ordinary and prudent non-battered person."), *overruled by State v. Stewart*, 763 P.2d 572 (Kan. 1988); Kinports, *supra* note 4, at 416.

273. As Lenore Walker explains, women who suffer from battered woman syndrome present various "cognitive disturbances," which, among other things, see Walker, *supra* note 11, at 327-28, make them unable to perceive avenues of escape, and "motivational" impairments, which disable them from using one of those avenues in cases where they do perceive a way out, see WALKER, TERRIFYING LOVE, *supra* note 15, at 50.

274. In its less than two decades in practice, the battered woman syndrome theory shows promise of being even more forgiving than the marital coercion doctrine because courts seem inclined to allow the theory to be offered to defend against a broad range of offenses, including anything from fraud, see *State v. Lambert*, 312 S.E.2d 31 (W. Va. 1984), to drug running, see *United States v. Johnson*, 956 F.2d 894 (9th Cir. 1992), to child abuse, see Kirk Loggins, *Mother Gets 15 Years for not Protecting Sons*, TENNESSEAN, July 9, 1992, at 5B (reporting that a woman who pleaded guilty to aggravated assault for failing to protect children from abusive spouse asserted that battered woman syndrome should mitigate her sentence), to child homicide, see *State v. Bordis*, No. 91-C-1441 (Tenn. Crim. Ct. 1992); *People v. Gindorf*, 512 N.E.2d 770 (Ill. App. Ct.), *appeal denied*, 517 N.E.2d 1090 (Ill. 1987), and *cert. denied*, 486 U.S. 1011 (1988), to homicide of an adult other than the batterer, see *Neelley v. State*, 494 So. 2d 669 (Ala. Crim. App. 1985), *aff'd*, 494 So. 2d 697 (Ala. 1986), *cert. denied*, 480 U.S. 926 (1987), and *cert. denied*, 488 U.S. 1020 (1989).

275. The best known example of a successful plea of temporary insanity on behalf of a battered woman is the case of Francine Hughes, memorialized in the movie *The Burning Bed*, which takes its title from the method Hughes used to kill her husband as he was sleeping. See JONES, *supra* note 4, at 287-89. Another case in which the syndrome has been offered to support an insanity plea is *State v. Felton*, 329 N.W.2d 161, 172-74 (Wis. 1983).

ambivalence about using the battered woman syndrome as proof of insanity.²⁷⁶ For example, Lenore Walker at times asserts that the battered woman's conduct in killing her spouse must be understood as the product of a "normal," rather than insane, mind.²⁷⁷ Yet, surely, the nature of Walker's own testimony in the self-defense cases obliges defense counsel to consider the possibility of raising an insanity claim. Walker's testimony characterizes the battered woman syndrome as a psychological disorder that disrupts the woman's mental and behavioral processes, and in some cases causes obsessive and recurring "hallucinations"²⁷⁸ and "flashbacks" that "increas[e] [her] perception of danger."²⁷⁹ Walker herself has not been unwilling to testify in support of a battered woman's plea of insanity.²⁸⁰

The other context in which the battered woman syndrome theory is beginning to prove useful is in supporting a claim of duress by a woman accused of committing a crime with a man.²⁸¹ In these duress cases, the accused woman pleads that she committed the crime because she feared violent retaliation by her spouse if she disobeyed his illegal demands.²⁸² In some respects, the battered woman syndrome defense seems to coincide

276. A concise example of Lenore Walker's ambivalence on this score is her description of one client as "a battered woman who had killed, in self-defense, while temporarily insane." WALKER, *TERRIFYING LOVE*, *supra* note 15, at 187. Although theoretically and practically insupportable, Walker's description of the woman's conduct as simultaneously justified ("self-defense") and excused ("temporarily insane") reflects her determination, which reveals itself in myriad other ways throughout her legal publications, to get battered women off. Still, her focus on winning acquittals, *see, e.g., id.* at 327, leaves us to puzzle over the deeper questions that her work poses, including the question of who gets to prescribe, and based on what moral understandings, the conduct that shall be criminalized and the defenses to criminal charges that will be allowed. Instead, Walker accepts as given the patriarchal categories dictated by the criminal law and then uses her expert training to explain that women really are what law always has constructed them to be: passive, helpless, childlike, and irrational.

277. *See id.* at 169-71; Kinports, *supra* note 4, at 463-64.

278. *See* Trial Transcript at 1029-31, *State v. Hess* (Mont. Dist. Ct. 1990) (Crim. No. 89-43), *aff'd*, 828 P.2d 382 (Mont. 1992) (testimony of Lenore E. Walker).

279. Walker, *supra* note 11, at 327-28. The self-defense cases sometimes indicate that the woman was in a hallucinatory state when she killed. For example, in *State v. Gallegos*, the accused woman reported that when she "looked at" her abusive spouse just before shooting and stabbing him to death, "she saw her father [and] her brother," both of whom had also abused her, as well as her spouse, "all coming toward her." 719 P.2d 1268, 1272 (N.M. Ct. App. 1986); *see also* *Commonwealth v. Rose*, 725 S.W.2d 588, 589 (Ky.) (accused woman testified "that 'all that was going through my mind was all the things he had done to me in the past and him threatening us,' and the vision of him stabbing her 'all over my chest,' which was imaginary because at the time he had no knife and was not stabbing at her"), *cert. denied*, 484 U.S. 838 (1987), and *overruled by* *Commonwealth v. Craig*, 783 S.W.2d 387 (Ky. 1990). According to another court, one of the key components of the battered woman syndrome "is that at the time of the incident, all the prior battering incidents appear in a flashback to the woman, thus triggering an immediate fear of death and causing her to respond almost instinctively in self-defense." *State v. Koss*, 551 N.E.2d 970, 972 (Ohio 1990).

280. *See* WALKER, *TERRIFYING LOVE*, *supra* note 15, at 181-87, 191-200.

281. *See, e.g.,* *People v. Romero*, 15 Cal. App. 4th 1519 (Ct. App. 1992) (finding defense counsel constitutionally ineffective for failing to offer expert testimony about battered woman syndrome in support of client's duress defense), *petition for review granted on other grounds*, 846 P.2d 702 (Cal. 1993).

282. *See id.* at 1529; David Dorsey, *Battered Women Coerced into Crime*, in *DEFENDING BATTERED WOMEN IN CRIMINAL CASES* at K3-K10 (ABA 1992). Lenore Walker has asserted that many

with a traditional duress claim since the defense expert testifies that a batterer used violence to coerce his wife into doing what he wanted her to do.²⁸³ However, closer examination reveals that the battered woman syndrome defense functions in this context as a hybrid duress/psychological incapacity claim. As in the self-defense cases, the expert testimony is offered to establish, not that the husband's threats would induce in the typical person the kind of fear necessary to sustain a duress claim, but that the battering relationship had reduced the woman to a state of "psychological paralysis" and abject faith in her batterer's omnipotence,²⁸⁴ which made it impossible for her to reject his illegal commands by using otherwise available means to escape the relationship.²⁸⁵

Dressed up as a duress claim, the battered woman syndrome defense resembles almost perfectly the marital coercion doctrine. In both cases, the demanding "duress" standard, which the criminal law insists that responsible actors must satisfy, is adjusted downward to accommodate women's predisposition for obedience to men. Indeed, the new defense is, if anything, more misogynist than its predecessor. By proving that women suffer from special psychological deficits that make them incapable of resisting illegal pressures exerted by men, it explicitly locates the source of women's subjugation, not within legal or cultural convention, but within women themselves.²⁸⁶ For example, as Lenore Walker instructs us, twentieth-century women may appear competent, rational, and able to "function extremely well in high status positions," but "when it comes to their marriage or in other social relationships with men, they resort to traditional, stereotyped behavior" of precisely the same kind that marked the marital

incarcerated women committed their offenses "under duress, as a way to meet their batterers' demands and avoid another beating." Walker et al., *supra* note 69, at 3. For example, she claims:

There is growing awareness that many women currently in prisons across the country have been battered. Estimates of up to one-half of them committed the crime for which they are being punished to avoid further beating. Forging checks to pay his bills, stealing food or other items that he denied the children, selling drugs to keep his supply filled, hurting someone else so he didn't hurt her were all acts committed under control of the batterer's threat of, or actual, violence.

WALKER, *supra* note 103, at 142.

283. See Trial Transcript at 1031-32, *State v. Hess* (Mont. Dist. Ct. 1990) (Crim. No. 89-43), *aff'd*, 828 P.2d 382 (Mont. 1992) (testimony of Lenore E. Walker); WALKER, *THE BATTERED WOMAN*, *supra* note 15, at xv; McConnell, *supra* note 195, at 229-30.

284. *State v. Kelly*, 478 A.2d 364, 372-73 (N.J. 1984); see also Kinports, *supra* note 4, at 398, 440; Walker et al., *supra* note 69, at 8-9.

285. See *People v. Romero*, 15 Cal. App. 4th 1519, 1526, 1533-34 (Ct. App. 1992), *review granted*, 846 P.2d 702 (Cal. 1993); Dorsey, *supra* note 282, at 7 (reporting court's determination that jurors assessing battered woman's duress claim must hear expert testimony concerning the woman's "mental condition").

286. See *Romero*, 15 Cal. App. 4th at 1527 (suggesting that battered woman syndrome is not the product of cultural or economic subordination of women because the court characterizes the syndrome as "a serious and prevalent problem infecting all socioeconomic and religious groups") (emphasis added).

coercion cases, including helpless deference to men,²⁸⁷ even when the men order them to violate the law.

Although the new excuse for women lacks the presumption of coercion that formerly assisted the accused wife's defense, it creates precisely the same perverse incentives for women's behavior that were sponsored by the marital coercion doctrine because of the evidence on which it rests and the response it elicits from the prosecution. Whatever variation of the battered woman syndrome excuse is being offered, the accused woman pleads that she cannot be held responsible because she was psychologically subjugated by her husband's dominant will. Any prosecutor desirous of winning a conviction will contradict the defense account by portraying the woman as an aggressive and active subject, who acted independently of her husband. For example, during the recent trial of a woman named Clara Hess, who was accused of the deliberate homicide of her husband, Lenore Walker provided expert testimony on behalf of the defense in which she explained that Hess "*perceived* that [her husband] had total control over what she said, what she did, where she went and how she behaved."²⁸⁸ The prosecutor refuted that testimony by arguing that the evidence showed that, far from being helpless and subservient to her husband, Hess was an independent agent, if not, in fact, the dominant figure, in the marriage. The prosecutor brought out that Hess had traveled frequently without her husband, that she managed the family finances and had "money of her own independent of his control," that she made "choices and decisions" regarding the sale of their jointly owned property, and that her husband feared her wrath when he purchased a car without her approval.²⁸⁹ Similarly, during his summation, the prosecutor argued that Hess was "not a helpless woman," but one who "scolded . . . and humiliated" her husband and made him do things "the way she want[ed]."²⁹⁰ This prosecutorial strategy appears to have had its intended effect. Hess was convicted, and, in its opinion denying her a new trial, the Montana Supreme Court recounted the testimony that "depicted [her] as the dominant and oftentimes absent person in the marriage."²⁹¹

By demanding this response from the prosecution, the battered woman syndrome defense vigorously reinforces the hierarchical allocation of power within marriage that supported the marital coercion doctrine, and it appropriates for the state the right to chastise recalcitrant wives formerly wielded by individual husbands. Two women may have endured the same amount of pain, felt the same amount of desperation, or committed the same misconduct; but when they come before the criminal court, the woman who can

287. Walker, *Battered Women and Learned Helplessness*, *supra* note 15, at 529.

288. Trial Transcript at 1074, *State v. Hess* (Mont. Dist. Ct. 1990) (Crim. No. 89-43), *aff'd*, 828 P.2d 382 (Mont. 1992) (testimony of Lenore E. Walker) (emphasis added).

289. *Id.* at 1131-33.

290. *Id.* at 1612, 1623.

291. *State v. Hess*, 828 P.2d 382, 384 (Mont. 1992).

be shown to have a taste for independence is the one who will be condemned and punished. As evidence of the woman's criminal independence, the prosecution cites the same kinds of disrespectful conduct towards her husband that men themselves have invoked over the years as provoking them to beat their wives.²⁹² Far from providing a feminist understanding of the dynamics of a violent marriage, the defense assures that the state will continue to identify appropriate female (and, therefore, male) conduct by relying on the patriarchal perspective that construed wife beating, not as unjustified and painful abuse, but as a necessary and helpful corrective for disobedient wives.

This feature of the battered woman syndrome defense is most objectionable if we believe that criminal punishment acts to deter conduct that the community finds abhorrent. The defense discourages wives from resisting their subordination. Women who manifest the capacity for independence are punished, while those who prove that their husbands controlled their behavior are excused. The defense not only instructs women that independence from our husbands is evidence of our criminality, it also advises that we are incapable of acting on our own to leave violent marriages; instead, we require the assistance of mental health professionals, who must, as Lenore Walker puts it, show us "the way out repeatedly before change is possible."²⁹³ In the vision that Walker conveys to the criminal courts, women are the "alterable, predictable, curable or manipulable things," which the defenders of the model of responsibility insist men are not.²⁹⁴ Thus, the battered woman syndrome defense reinforces an ideology that creates for women a "double-bind"²⁹⁵ even more damaging than that posed by the marital coercion doctrine: the new defense continues to portray the independent wife as evil, deserving condemnation and blame, and the new defense continues to recognize the submissive wife as good and to reward her with the familiar patronizing sympathy; but, additionally,

292. Ironically, while Lenore Walker condemns wife-beating and denounces as "myth" the notion that women who are "bossy" or "uppity" or "angry" or "provocative" "deserve" their beatings, see WALKER, *THE BATTERED WOMAN*, *supra* note 15, at 29, she has constructed a defense that exposes accused women whose conduct can bear one of those explanations to a finding that they "deserve" the pain of criminal punishment inflicted by the state.

293. See Walker, *Battered Women and Learned Helplessness*, *supra* note 15, at 529. Similarly, Walker instructs that "[a] battered woman is not free to end her victimization without assistance." WALKER, *THE BATTERED WOMAN*, *supra* note 15, at 30.

294. See HART, *supra* note 36, at 183.

295. "Double-binds represent a form of contradiction for individuals—they are situations in which persons may incur some social penalty regardless of their behavior." Rhoda K. Unger, *Psychological, Feminist, and Personal Epistemology: Transcending Contradiction*, in *FEMINIST THOUGHT AND THE STRUCTURE OF KNOWLEDGE* 124, 132 (Mary M. Gergen ed., 1988). Social roles for women have been constructed and maintained in a manner that makes them especially vulnerable to the double-bind. *Id.*; see also Brief for Amicus Curiae American Psychological Association in Support of Respondent at 19, *Price Waterhouse v. Hopkins*, 485 U.S. 933 (1988) (No. 87-1167) (arguing that gender stereotypes place women in a double-bind: if they are viewed as adhering to stereotype, they appear incompetent to fulfill positions of authority, whereas if they violate stereotype, they are considered maladjusted).

the new defense recommends that she undergo a course of therapy for her psychological disorders.²⁹⁶

Moreover, although the battered woman syndrome defense ostensibly refutes the understanding that women in abusive marriages are masochists, in reality, the new defense is hardly an improvement over the marital coercion doctrine. The definition of masochism employed by the advocates of the defense is indistinguishable from the one-dimensional, popular understanding of that term, in which masochists are portrayed as women who take sexual pleasure in physical pain inflicted by their lovers.²⁹⁷ The battered woman syndrome defense does depart from the popular understanding insofar as it depicts the accused woman as experiencing the battering as pain, unmingled with any erotogenic "pleasure in pain."²⁹⁸ However, one of the explanations for the woman's misconduct offered by the defense is the notion that, despite suffering that pain, the woman remained in the violent marriage because she "loved" her husband. The title of Lenore Walker's most recent book describing her advocacy on behalf of battered women—*Terrifying Love*—summarizes Walker's thesis that women "love" their abusive partners. I am not trying to suggest that battered women do not subjectively experience feelings of love for their husbands; the literature is replete with evidence suggesting that they do.²⁹⁹ My point is that by characterizing love as a compelling force that bends women to the wills of violent men and, particularly, by coupling that construction of "love" with the other explanations concerning the special psychological deficits of

296. See WALKER, *supra* note 103, at 125-28 (recommending techniques to be used by therapists treating battered women).

297. The literature on battered woman syndrome does not offer a sophisticated description of the construct "masochism." See, e.g., WALKER, *THE BATTERED WOMAN*, *supra* note 15, at 20 ("By masochism, it is meant that she experiences some pleasure, often akin to sexual pleasure, through being beaten by the man she loves."). Although Sigmund Freud's discussion of masochism is complex and not easy to summarize, see ELISABETH YOUNG-BRUEHL, *FREUD ON WOMEN: A READER* 283-85 (1990), the works of Lenore Walker and her followers would be enriched by a more thoughtful treatment of masochism and how, if at all, the battered woman syndrome reconfigures the Freudian theory. For example, while Freud's remarks included the observation that masochism is "an expression of the feminine nature," *id.* at 285 (excerpting SIGMUND FREUD, *THE ECONOMIC PROBLEM OF MASOCHISM* (1924)), Walker's theory, no less than Freud's, reinforces essentialist understandings of women's passivity in the face of treatment that the psychologist construes as brutal beatings. Not surprisingly, Freud's description of "feminine masochism," as well as his reliance on cases involving men to support this construct, *id.* at 285, has proved highly controversial. Feminist criticism levelled against Freudian understandings of female sexuality is powerful, see generally *FEMINISM AND PSYCHOANALYSIS* (Richard Feldstein & Judith Roof eds., 1989), but, out of a sense of fairness towards Freud's complex and massive theoretical undertakings, we must remember that Freud himself acknowledged that "preference for passive aims" and "masochistic impulses" not only were "prescribed for [women] constitutionally," but also were imposed on them "by the influence of social customs, which similarly force women into passive situations." YOUNG-BRUEHL, *supra* at 284, 385. In my estimation, the battered woman syndrome defense is one of the "social customs" that reinforces, if not forces on us, the notion that women are passive.

298. YOUNG-BRUEHL, *supra* note 297, at 285.

299. See, e.g., Kinports, *supra* note 4, at 406 & n.45 (collecting authorities).

women,³⁰⁰ the defense constitutes a trivial redefinition of the popular meaning of masochism, without making any contribution to psychological or feminist critiques of that construct.³⁰¹ According to the defense, women may not taste "masochistic" erotic pleasure in brutal beatings, but they tenaciously cling to the men who dole out the beatings because they "love" those men. This explanation would seem to be masochism sanitized of eroticism—only the woman's sexual pleasure is omitted. The defense thus offers an explanation of the woman's conduct that exploits the popular understanding of women's masochism with only that one slight adjustment, seemingly calculated to make the explanation more acceptable to a decisionmaker who is being asked to treat the woman sympathetically.

By drawing this obscure and superficial distinction between love and masochism, the new defense returns again to understandings of women that were extant during the era of the marital coercion doctrine. During the seventeenth century, the man considering prospective brides was advised that his wife would be "obedient," only if her "will [was] wholly in his power by love."³⁰² Similarly, Walker's observation that women subordinate themselves to and endure abuse from the men they love is reminiscent of the works of nineteenth-century scientists, who found that love has a powerful coercive effect on a woman, even holding her will in the same kind of "slavery" that death threats were thought to produce in the responsible actor. For example, the phrenological studies of O.S. Fowler disclosed that woman is "more loving than man"³⁰³ and, most significantly, that "woman loves *power* in men above all other attributes."³⁰⁴ Those of Caesar Lombroso established that "in women love is a species of slavery, a

300. For example, according to Walker, one of the features of abusive marriages, which she labeled the "Walker Cycle Theory of Violence," see WALKER, *supra* note 103, at 95, is that the physical abuse occurs in a predictable "cyclical" pattern, with which the woman becomes familiar, see WALKER, *TERRIFYING LOVE*, *supra* note 15, at 42. The battering relationship is marked by three distinct phases: "(1) tension building, (2) the acute battering incident, and (3) loving contrition." WALKER, *supra* note 103, at 95-97; Walker et al., *supra* note 69, at 4. During the "loving contrition" phase, the man apologizes to his wife for beating her, promises never to do it again, and engages in warm and nurturing conduct. See WALKER, *TERRIFYING LOVE*, *supra* note 15, at 44-45. Walker believes that it is during the "loving contrition" phase that the "battered woman is most thoroughly victimized psychologically" because she "really [is] emotionally dependent" on her spouse and comes to "believe that death is preferable to separation." *Id.* at 45. Curiously, though Walker remarks that the man is equally dependent on his wife during this phase, which would suggest that his behavior also is determined by pressure exerted by *her*, Walker has not sought to develop a psychological syndrome that would relieve the man of criminal responsibility for the injuries he inflicts on his wife in his attempts to make her stay with him.

301. Moreover, it appears that some clinicians have started to use learned helplessness to supplement, rather than replace, the diagnosis of battered women as masochists. That is, they explain that women remain with abusive spouses because they are both masochistic and suffering from learned helplessness. See GONDOLF & FISHER, *supra* note 103, at 14-15.

302. STONE, *supra* note 161, at 202 (quotation omitted).

303. O.S. FOWLER, *THE PRACTICAL PHRENOLOGIST OF BOSTON* 59 (1869).

304. O.S. FOWLER, *HUMAN SCIENCE: OR PHRENOLOGY; HEALTH, MENTAL PHILOSOPHY, GOD, IMMORTALITY, INTELLECT* 255 (1873).

sacrifice gladly made of the entire personality.”³⁰⁵ Indeed, not unlike the psychological explanation given by the battered woman syndrome defense, Lombroso found that, for some women, the force of love is so potent “that ill treatment on the part of their lover only increases their fury of self-sacrifice.”³⁰⁶

The scientific bases for our understanding of woman’s submissive nature may have changed, but the underlying understanding endures. Undoubtedly, if its success to date is any measure, this understanding of women’s misconduct will continue to prove enormously useful in criminal practice by securing lenient treatment for individual accused women. But this explanation merely manipulates, without reconfiguring, the model of responsibility endorsed by the criminal law, and a key assumption underlying that model is that people who are excused from crime on the ground that they were psychologically unable to control their conduct likely will require some form of oversight to protect them, and others, from their mental disabilities.³⁰⁷ If the warnings of those who criticize the proposals of Judge Bazelon and Richard Delgado are to be believed, the consequences of excusing women on this ground go far beyond the question of what is to be their fate at the close of a criminal trial. Since women are, as Lenore Walker has assisted the courts in constructing us, more prone than men to succumbing to mental disorders³⁰⁸ that cause us helplessly to obey the commands of the males in our lives, then we must be provided supervision, at least in some contexts, *even before* we have violated any criminal prohibition.³⁰⁹ By securing leniency on the ground that we are predisposed to losing our power of rational choice, the battered woman syndrome excuse relinquishes to men, acting either individually as husbands or officially as representatives of the state, the authority to make, or, at least, superintend, our choices for us. The excuse thereby withholds from women the basic life satisfactions that the capacity for responsibility is said to secure. If our misconduct incurs not blame for our evil choices, but pity for our psychological infirmity, then our good works will be characterized, not as the product of our own achievements and willings, but as the successful work

305. LOMBROSO & FERRERO, *supra* note 187, at 274.

306. *Id.*

307. For example, middle-class Victorian women did escape criminal punishment for shoplifting by offering proof that they were kleptomaniacs who were “neither mentally nor morally responsible” for their actions, but they would be released by the courts only “‘on [their] husband[s]’ promise to take charge of [them].” See ABELSON, *supra* note 4, at 176, 178.

308. Walker, *Battered Women and Learned Helplessness*, *supra* note 15, at 529.

309. Lenore Walker, for one, believes that the “most optimistic part of the learned helplessness theory is that it should be possible to build an inoculation schema to protect young women from developing severe psychological reactions to some violence.” Walker, *supra* note 11, at 332. Since she leaves to the readers’ imagination precisely what the prescribed “inoculation” would involve, one can only suppose that she has in mind some kind of therapeutic intervention in the lives of women whom her “assessment instruments,” *id.* at 331, identify as at risk for developing battered woman syndrome.

of the expert therapists whose "[c]ognitive restructuring procedures"³¹⁰ overcame the effects of our mental disabilities.

B. *The Battered Woman Syndrome Defense Constructs Reality*³¹¹

Before I go on to trace how it came to be that the battered woman syndrome defense, which was the product of a feminist project, should rest on assumptions about women rejected long ago by some courts as misogynist and unjustified,³¹² I want to pause briefly to respond to an anticipated—indeed, already forcefully urged—criticism of my thesis.³¹³ As I understand it, this objection asserts that the battered woman syndrome defense cannot be seen as serving the same political ends as the marital coercion doctrine because battering of women by men is *real*, and women in battering relationships *really* are not responsible for their misconduct because they *really* believe that they have and, indeed, *really* have extremely limited lawful options.³¹⁴ By contrast, I have been told, the marital coercion doctrine *artificially* attributed irresponsibility to all women who occupied the status of wife, without regard to their material circumstances. I take this objection seriously because of the especially painful consequences for the accused, who may well share the same perception of reality as my critics, that follow a finding of criminal liability.³¹⁵

One response to this objection is that the theoretical constructs the community uses to describe behavior not only interpret that behavior at the level of theory but also define the experience that is available to those who engage in the behavior.³¹⁶ Not surprisingly, this response is a fundamental tenet of feminism, which insists that we possess the authority to revise experience itself by making changes in cultural understandings of gen-

310. WALKER, *supra* note 103, at 127.

311. In a forthcoming book, Jason Johnston describes the theory known as "social construction of reality," explores its application in outsider legal scholarship, and examines critically its implications for law. See JASON S. JOHNSTON, *THE CONSEQUENCES OF CONSTRUCTIONISM: REFLECTIONS ON THE NEW JURISPRUDENCE OF OPPRESSION* (forthcoming). As Nancy Cott has remarked, "feminism . . . presupposes that women's condition is socially constructed, that is, historically shaped by human social usage rather than simply predestined by God or nature." NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 4 (1987).

312. See cases cited *supra* note 226.

313. This criticism has been voiced by, among others, judges, lawyers, law school deans, professors, and law students in conversations I have had about the ideas expressed in this Article. The criticism also is implicit in arguments made in some of the scholarship on battered women that insist, for example, that current self-defense doctrine is inadequate because it fails to accommodate the "reality" of the woman's situation. *E.g.*, Rosen, *supra* note 118, at 392-99; Mather, *supra* note 4, at 587 (urging law to "take a realistic view of the physical and social differences between men and women when evaluating a battered woman's claim of self-defense").

314. Cf. Rosen, *supra* note 118, at 392-99 (refuting arguments suggesting that the defendant in *State v. Norman*, 378 S.E.2d 8 (N.C. 1989), had alternatives to lethal action and thus did not *really* need to kill her abusive husband).

315. See JOHNSTON, *supra* note 311, at 105.

316. See MACKINNON, *supra* note 127, at 106-25 (definitions of female sexuality determine the way in which women "see reality").

der.³¹⁷ Using domestic violence as an example, there is, indeed, no doubt that husbands really beat their wives. Certainly, my claim is not that wife-beating does not take place. What I suggest is available for our scrutiny is the psychological diagnosis of the women who are beaten, which the new defense supplies, and the manner in which that diagnosis interprets, values, and determines forms of intervention in the practice of wife-beating.³¹⁸ That this diagnosis, this reality, if you prefer, has no independent, essential existence, but, rather, is contingent on contemporary understandings of gender roles and the political structure of the family becomes apparent when we trace evolving understandings of wife-beating.³¹⁹

As Linda Gordon documents in her historical study of changing attitudes towards family violence, advocates of the battered woman syndrome defense have not identified for us a new problem in the sense that men only recently have started beating women or even in the sense that members of the public have never before been aware that wife-beating occurs.³²⁰ To the contrary, even those who argue that the new defense is sensitive to reality must recognize that the community has known for a long time that men beat women.³²¹ Prior generations construed wife-beating as a man's appropriate

317. See *COTT*, *supra* note 311, at 4.

318. For example, by construing the woman as suffering from a psychological "disorder," see Walker, *supra* note 11, at 331, and, thereby, locating the problem within her, potential interventions mainly will focus on ways to cure the woman of her illness, rather than on ways to ameliorate the social and economic conditions that bind her to her abuser. See Caplan & Nelson, *supra* note 100, at 200-01 (If problems are defined "in person-centered terms . . . , then it would be logical to initiate person-change treatment techniques," such as "counseling," "confinement," or "medical solutions"; by contrast, if problems are defined as "situation-centered," then solutions will have a "system-change orientation" so that "existing physical, social, or economic arrangements, not individual psyches, would be the targets for change.").

319. Cf. Laurie Shrage, *Should Feminists Oppose Prostitution?*, in *FEMINISM & POLITICAL THEORY*, *supra* note 127, at 185, 185-99 (discussing different understandings of female prostitution).

320. See LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE*, BOSTON 1880-1960, at 1-26 (1988). Women have long sought to develop methods of resistance against abusive husbands. I am grateful to Robert Mack for bringing to my attention the life of Dorothy Gray, the mother of the poet Thomas Gray. In 1735 or 1736, Dorothy Gray sought a legal opinion concerning her rights under "articles of agreement" executed by herself, her husband, her sister, and her brother prior to her marriage in 1709. The agreement permitted Dorothy to continue her investment in a shop run by her sister and herself, "notwithstanding her intended coverture." 3 CORRESPONDENCE OF THOMAS GRAY 1195 (Paget Toynbee & Leonard Whibley eds., 1935). When she requested the legal opinion, Dorothy explained that, although she had supported herself and her son and had made other financial contributions to the household, her husband had, throughout the marriage, "used her in the most inhuman manner, by beating, kicking, punching, and with the most vile and abusive language; that she hath been in the utmost fear and danger of her life, and hath been obliged this last year to quit her bed, and lie with her sister." *Id.* at 1196. Dorothy pointed out that there was "no cause for this usage," *id.*, which suggests that she believed that a husband would be justified in so using his wife in some circumstances. The lawyer's pessimistic response confirms this belief. He explained, among other things, that "sentences of separation, by reason of cruelty only, [are] very rarely obtained," and he advised Dorothy that she must, "as she has hitherto done, bear what she reasonably can, without giving him any provocation to use her ill." *Id.* at 1197.

321. A fourteenth-century account of violence between spouses, which today might be characterized as the story of a battered woman, is provided by Geoffrey Chaucer's *The Wife of Bath* in *The Canterbury Tales*. During the eighteenth century, the novels of Charles Dickens frequently

handling of one of his possessions, as a useful and necessary discipline for disobedient wives,³²² as the product of women's essentially masochistic sexual desires,³²³ or as an understandable response to the woman's provoking behavior.³²⁴ Those explanations constituted reality for those generations, no less than the battered woman syndrome diagnosis constitutes reality for us. Therefore, the claim that the battered woman syndrome defense captures the reality of wife-beating obfuscates precisely those historical and cultural assumptions that invest this particular form of outward behavior with meaning.³²⁵ In fact, if we take the reality objection seriously, it suggests we really are impotent to examine and alter those assumptions. At least, feminists cannot fall back on the claim that this new defense passively reflects reality. To the contrary, since the new defense, no less than the legal doctrines and social conventions that it replaces, actively interprets wife-beating for us, the urgent question is whether by associating wife-beating with this label, we have provided a new, distinctively feminist understanding and experience of that practice.

As I mentioned above, the response to the reality objection that I have just outlined resonates powerfully for feminists because it holds out the promise that we can change our experiences, perhaps even eliminate domestic violence, for example, if we can persuade the community to change its assumptions about gender relationships. In the context of deciding whether to impose or withhold criminal blame, however, I believe that this response is inadequate. If we adopt a new explanation of wife-beating that rejects the notion that violent men inevitably reduce women to a state of psychological paralysis and helpless faith in their abusers' omnipotence, we must be concerned for those women whose experience of their husband's violence was shaped by precisely the same patriarchal influences that fashioned the battered woman syndrome.³²⁶ It is possible, as the syndrome reports, that some, if not many, women who are beaten by men may feel utterly helpless to change their lives.³²⁷ They may subjectively perceive that there is no way for them to escape the man short of blowing his brains out³²⁸ or that they have no choice but to follow his orders to violate

included descriptions of what today would be called domestic violence. Notably, his description in *Oliver Twist* of the relationship between Bill Sikes and Nancy contains the kind of evidence that defense experts use today when opining that the accused woman suffers from the battered woman syndrome. See MORRIS, *supra* note 5, at 59.

322. See BYNUM, *supra* note 161, at 61; STONE, *supra* note 161, at 197.

323. See SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 20-23 (1982).

324. See MARQUIS OF HALIFAX, *supra* note 178, at 397-98.

325. Cf. Shrage, *supra* note 319, at 188 (noting that prostitution has been given a wide variety of meanings in different historical contexts).

326. See JOHNSTON, *supra* note 311, at 105.

327. See WALKER, *TERRIFYING LOVE*, *supra* note 15, at 49-51.

328. See, e.g., *State v. Felton*, 329 N.W.2d 161, 164-65 (Wis. 1983).

the law, perhaps by starving a baby.³²⁹ Significantly, if the individual woman's perception of her incapacity for responsible conduct is shared and reinforced by many members of her community, the criminal law may seem unjust to deny her an excuse (formerly, albeit briefly, available) from criminal liability on the ground that we are reconstituting our (and her) experience by adopting an understanding of domestic violence that characterizes her as an agent who is not helpless to take control of her life.³³⁰ By reproaching her, we may be condemning her for failing to possess an understanding of her experience—or, in criminal law terms, for failing to possess a mental state—that is not readily accessible to her or to anyone else in her community.³³¹

Therefore, a further response to the reality objection seems required, which I believe emerges directly out of the same body of evidence that the objectors cite. Those who press the reality objection generally rest their conclusions about reality on the facts detailed in the case law concerning battered women's responsibility for crime. These facts are said to establish that the accused woman deserves our sympathy and an excuse, rather than our condemnation and punishment, because they show that the battering *really* did obliterate her human agency and capacity for rational choice.³³² However, even the most superficial reading of the cases reveals that they do not report facts indiscriminately and that the reality they describe is as partial as the story provided by the marital coercion doctrine. The facts included in the battered woman cases are determined solely by the requirements of traditional excuse doctrine and, particularly, are tailored to exploit the same assumptions that earned women leniency under the marital coercion excuse.

Selecting from among the testimony provided by the accused woman and by witnesses in her behalf, the opinions accepting the defense purport to describe a violent relationship between a man and a woman. But most of the opinions provide little more, though their power to horrify is ample, than a comprehensive catalog of the means that one person may use to harm and degrade another who is in his power.³³³ The wife's conduct towards

329. See Trial Transcript at 306-08, *State v. Bordis* (Tenn. Crim. Ct. 1992) (No. 91-C-1441).

330. See JOHNSTON, *supra* note 311, at 105, 120; cf. Calhoun, *supra* note 127, at 250-52 (discussing lag in the evolution of moral reasoning between subgroups and the general public).

331. See JOHNSTON, *supra* note 311, at 126.

332. For example, Lenore Walker characterizes a woman's killing of her abusive mate as "inevitable," and she claims that the "psychological bond between [the woman] and the batterer" is so potent as to "render[] her incapable of acting effectively to escape or save her own life, without killing him." WALKER, *TERRIFYING LOVE*, *supra* note 15, at 4, 267. Thus, the women's psychological condition, which Walker compares to that of a victim of brainwashing, "justifies their actions." *Id.* at 267. But cf. Rosen, *supra* note 118, at 392-97 (arguing that in some cases killing is the woman's only rational alternative because there are no other means of escape).

333. The story that I outline here draws heavily from the facts reported about the life of a woman named Judy Norman, who was tried for the homicide of her husband. See *State v. Norman*, 366 S.E.2d 586 (N.C. Ct. App. 1988), *rev'd*, 378 S.E.2d 8 (N.C. 1989). I suggest that Ms. Norman's case be considered "typical," not to minimize the unique danger, pain, and degradation that she suffered, but

her husband is loving, respectful, obedient, attentive to his needs, and indulgent of his whims. In return, the husband subjects her, repeatedly and regularly, to physical, sexual, and psychological abuse. Yet, up until the murder scene, the wife remains almost passive, as she endures the shoves, slaps, punches, kicks, scratches, burns, whippings, stabbings, chokings, and rapes administered by the husband.³³⁴ Aware that resistance is worse than futile, serving only to redouble the fury of his activity, the wife submits herself, over and over again, to his brutal handling. She does not even flinch during the beatings, as we think all other animals instinctively do to escape the pain caused, for example, by lighted cigarettes held against flesh.³³⁵ It is almost impossible to imagine that a human being, rather than a thing, could really be that passive when abused.

Thus, the new defense not only endorses the metaphors that criminal law scholars use to describe excused actors, it insists that we take them literally, as it transforms the woman into a pet or thing that is brutally misused by its owner. Now we know that the marital coercion cases correctly characterized the woman—she is nothing more than a “marionette, moved at will by the husband.”³³⁶ Moreover, in each set of opinions, it is the oppositional character of the relationship between woman and man that constructs the wife as a thing, though, of course, the battered woman syndrome defense further victimizes the woman by demanding that she achieve that construction herself, as a matter of factual proof, in order to gain leniency. The depiction of the woman’s loss of her human subjectivity emerges in opposition to the man’s exercise of his agency. His authority destroys her autonomy, and we measure the extent of her helplessness and subjugation by reference to his activity and control.

As significantly, just like the marital coercion cases,³³⁷ the decisions in which the battered woman syndrome defense is successful contain crucial omissions; omissions revealing that their account of gender relations serves legal and political purposes similar to those to which the marital coercion doctrine was faithful. When these gaps are repaired, the dissimilarities separating the woman from the man become far less distinct, causing us to question the allocation of agency and authority between them. For example, in cases where the woman ultimately kills her batterer, the sequence of her murderous activities and their precise results are either completely elided or significantly attenuated in detail. The cases barely, if ever, touch

because her case is widely described in the literature both to support the urgent necessity for recognizing the battered woman syndrome defense and to elucidate the “reality” of battered women’s lives. *See, e.g.,* Mahoney, *supra* note 10, at 89-92; Rosen, *supra* note 118, at 392-97.

334. *See* State v. Stewart, 763 P.2d 572 (Kan. 1988); Commonwealth v. Craig, 783 S.W.2d 387, 388 (Ky. 1990); State v. Gallegos, 719 P.2d 1268, 1271-72 (N.M. Ct. App. 1986); State v. Felton, 329 N.W.2d 161, 163 (Wis. 1983).

335. *See* Norman, 366 S.E.2d at 587.

336. *See* Smith v. Meyers, 74 N.W. 277, 278 (1898)

337. *See supra* text accompanying notes 207-09.

on the vulnerability of the man's body at the moment of his death, the fear or surprise that he experienced when he knew that death was imminent, the timing and sensation of death, or the condition of his corpse. Similarly, we often are told little, if anything, about the lethal action that the wife exercised against her husband. Agentless, almost somnambulistic, the wife finds herself holding a deadly weapon. Though no one, not even the woman herself, knows how,³³⁸ the weapon manages to fire itself, with lethal accuracy, into a vital point on the man's body. These omissions have been carefully selected, we know, because the effect of withholding details about the nature and consequences of the only aggressive conduct that the woman reportedly ever undertook, particularly when it was conduct at least as aggressive as any performed by the man, is to enhance the woman's helplessness at the expense of that of the victim of her deadly conduct. By the end of the story, she has killed him, and he is dead; but she remains wholly victim, and he wholly perpetrator. The version of reality selected by these accounts is crafted not merely to enlist our sympathy for the accused woman, but also to reinforce the hierarchical distribution of power within the marriage: all of the violence that occurred during the relationship (and, therefore implicitly, any tranquil, productive moments) is the product of the husband's dominant will and intellect.³³⁹

Other, more crucial, lapses in these accounts foster the impression of the husband's omnipotence. Never is his brutal conduct objectified as the result of conditions over which he likewise was helpless. On the contrary, deterministic accounts of the batterer's activity are concealed altogether or their significance ignored. The cases frequently allude to the husband's alcoholism or drug addiction or mental illness, without ever drawing out the implications that those conditions may have for the man's capacity for self-governance and, ultimately, for his responsibility for his actions.³⁴⁰ By sup-

338. *E.g.*, *State v. Koss*, 551 N.E.2d 970, 971 (Ohio 1990) ("[Defendant] testified that she 'must have picked' up the gun, [but s]he could not remember anything from the time her husband hit her to the time when she heard a 'noise,' which she believed was gurgling blood."); *Felton*, 329 N.W.2d at 164-65 (recounting that the defendant did "not remember firing the [fatal] shot"). Lenore Walker's description of the accused woman's psychological condition suggests that these facts are inaccessible to us because the woman, who is the key witness, is in a "dissociative state" at the time the killing occurs; the woman is in a condition of "imperviousness to the reality and consequences of violence, and also to the reality of death. Battered women who kill their batterers almost never understand that they have actually killed them, until they are informed by the police." WALKER, *TERRIFYING LOVE*, *supra* note 15, at 73.

339. Of course, the "blame the victim" strategy enjoys an honored position in criminal defense work, even though it has roused the ire of feminists, among others, when it is deployed in rape trials. Ironically, the ultimate effect of the strategy in this context, even though it is beneficial to the accused woman on trial, is as harmful as it is in rape cases. Here, by solely blaming the man, the defense implies that, despite his many dysfunctions, he possessed the capacity for responsible conduct, while the woman did not, which means that he will be allowed the authority to control her life as well as his own.

340. *E.g.*, *People v. Minnis*, 455 N.E.2d 209, 216 (Ill. App. Ct. 1983); *State v. Hodges*, 716 P.2d 563, 565 (Kan. 1986); *State v. Hennum*, 441 N.W.2d 793, 795 (Minn. 1989); *State v. Williams*, 787 S.W.2d 308, 309 (Mo. Ct. App. 1990); *State v. Kelly*, 478 A.2d 364, 369 (N.J. 1984); *State v. Gallegos*,

pressing those details, the cases deny us a glimpse of the man's infirmity, dependence, and real impotence to regulate himself. In this way, the cases renounce alternative interpretations of the couple's marital relationship where the wife becomes the dominant figure to whom the man clings for support—where she is strong, sane, rational, and gainfully employed, and she chooses to remain with him out of compassion for his debilities as long as there is hope for his recovery,³⁴¹ or where wife and husband participate in and share responsibility for the violence that has overtaken their lives.³⁴² In the contrary reality we find reenacted in the battered woman cases, the man is the character who possesses all of the control, which presumably he could have exercised, if only he had bothered to try, to restore harmony to this marriage; he is placed in opposition to the woman, every aspect of whose helpless existence is determined by his will, until one day, to the surprise of all, she finds herself holding onto a gun that fires itself into his head.

While these omissions have the effect of construing the wife, but not the husband, as the object of circumstances beyond her control, the last omission that I have selected takes on additional significance when we realize that it could be repaired only by facts that have no meaning for the criminal law. If the husband sought to be excused on the ground that his behavior was determined by his alcoholism or drug addiction, or by some psychopathology caused by abuse he suffered as a child, short of the mental diseases that qualify for the insanity defense, the criminal law would ignore his claim on the ground that the human actor is able to control his conduct, notwithstanding his addictions or dysfunctions.³⁴³ As I explored in Part I, criminal law theorists claim that we must reject these and other explana-

719 P.2d 1268, 1271-72 (N.M. Ct. App. 1986); *State v. Hill*, 339 S.E.2d 121, 121 (S.C. 1986); *Felton*, 329 N.W.2d at 164.

341. One study reports, indeed characterizing it as an "outstanding finding," that the fact that the batterer is in counseling has an "inordinate influence" on his wife's "decision to return to the relationship." See GONDOLF & FISHER, *supra* note 103, at 87. The authors suggest that this finding "supports the hypothesis that women stay in abusive relationships because they expect that their batterer will change" because the fact that the batterer has sought assistance for his problems "makes returning to the batterer a rational option in many women's minds." *Id.* The authors also claim that returning to the batterer is rational because "[a]t least there is a faint hope that the batterer will change, whereas the prospects for change in the larger community [where the woman must seek shelter and employment] seem less favorable." *Id.* at 22. However, the authors found that, if the abuse escalates and hope for the batterer's transformation dims, the woman begins to look for options that will permit her to leave him. *Id.* at 16-17.

342. Cf. JESSICA BENJAMIN, *THE BONDS OF LOVE* 5 (1988) (exploring the complex psychological processes supporting the domination of women by men and characterizing "domination as a two-way process, a system involving the participation of those who submit to power as well as those who exercise it").

343. Although evidence of addiction or intoxication may be relevant to criminal liability, the law only rarely and reluctantly affords excuse on these grounds. Depending on the nature of his dysfunction and the charge against him, the offender might achieve a reduction in offense level or mitigation of his sentence, but he probably would not elude punishment altogether. See 1 LAFAYE & SCOTT, *supra* note 31, at 549-65.

tions that locate the causes of misconduct outside the actor's will, in order to affirm our respect for the individual wrongdoer and to protect him, and others like him, from official control or supervision.³⁴⁴ Yet, the battered woman cases' insistence that the subjugation of the wife's will to that of her husband is *real* and constitutes ground for excuse signals a receptivity to determinist accounts of women's misconduct that is not extended to accounts that would also excuse men. Some feminist scholars are seemingly untroubled by, indeed, endorse, the notion that men should be blamed for personality traits, including those produced by heredity or socioeconomic conditions, that lead them to offend, while women should not be.³⁴⁵ But we must be very clear about what our practice of labeling these partial accounts as reality, which secures leniency for women and condemnation for men, means at the level of criminal law theory as currently constituted. It means that men are expected to be capable, in virtually all situations, of overcoming forces that tempt or pressure them to offend, while women are expected helplessly to succumb to men's superior will. While that distinction does relieve women from criminal punishment in some circumstances where men would not be spared, it also portends, if we take the theory of personal responsibility seriously, that men will be permitted to regulate their lives and make their own choices, while women—or, at least, those of us who are involved in intimate relationships with men—will be denied that authority.

C. *The Battered Woman Syndrome Is the Product of Patriarchal Research*

One final, and provoking, question focuses on how a designedly feminist practice came to produce this misogynist defense. Here, again, I will anticipate an objection that is a modification of the one I described in the

344. See *supra* text accompanying notes 68-116.

345. For example, Kit Kinports asserts that the psychological traits associated with the battered woman syndrome, which are offered to explain why it was reasonable for the woman to believe she needed to kill, are

different. Unlike traits such as hotheadedness, drunkenness, or cowardice, the traits characteristic of a battered woman are not attributes that the woman can reasonably be expected to control, that evidence some sort of moral failure for which she can fairly be blamed, or that the criminal law is designed to alter.

Kinports, *supra* note 4, at 419 (footnotes omitted); see also WALKER, *TERRIFYING LOVE*, *supra* note 15, at 70 (asserting, in effect, that deterministic accounts of an abusive man's conduct must be rejected because batterers "alone are responsible for continuing or for changing their behavior"). Apart from noting that the woman enters a battering relationship by accident, see Kinports, *supra* note 4, at 419 n.102, Kinports does not provide any way to distinguish the woman's helplessness from the presumably male traits that she believes are worthy of criminal condemnation. She does not explain why a hothead reasonably can be expected to control his hotheadedness, a drunk his drunkenness, or a coward his cowardice, while a battered woman cannot be expected to overcome her feelings of helplessness. Nor does she explore why a moral theory that holds the woman blameless for her helplessness would refuse to exonerate, for example, the coward for his cowardice. Nor does she question her conclusion that "the criminal law is designed to alter" cowardice, or, for that matter, hotheadedness or drunkenness, but not helplessness that culminates in a killing.

preceding Section. Advocates for the defense can be expected to claim that it is not misogynist because it accurately records the accused woman's perspective on the violence. Indeed, the defense is said to describe "the psychological reality of these women."³⁴⁶ In this way, the defense appears to promise that it will recuperate the woman's human subjectivity by revealing what her state of mind was throughout the abuse that she seemed to accept so passively. Instead, the psychological diagnosis supplied by the defense directly contributes to the woman's thing- or animal-like quality because its basic premise is that women in battering relationships lose their mental capacity to make rational choices.

Lenore Walker created the battered woman syndrome theory, basing it on empirical research she undertook starting in 1978.³⁴⁷ Walker is also an active expert witness (usually) in support of the various excuses the theory provides.³⁴⁸ In her publications for the legal community, Walker maintains that she is a feminist advocate whose role as expert witness is "to give voice to these battered women who kill" because, she claims, they cannot "testify successfully on their own behalf."³⁴⁹ I understand Walker to be making two arguments to support her appropriation of the battered woman's "voice." Her first argument seems to be that the accused woman *really cannot* speak effectively about the violence; that is, the woman cannot "be expected to explain to a jury of her peers what it meant to be a battered woman" because the internal psychological barriers created by the abuse disempower her to report the relevant events.³⁵⁰ Second, Walker remarks, women need an expert spokesperson in any event because the

346. WALKER, TERRIFYING LOVE, *supra* note 15, at 267 (emphasis omitted).

347. An article published in 1977, *see* Walker, *Battered Women and Learned Helplessness*, *supra* note 15, at 525, gave way to a book-length treatment of the subject, which laid out hypotheses Walker had "developed to explain why the battered woman becomes a victim in the first place and how the process of victimization is perpetuated to the point of psychological paralysis." WALKER, *THE BATTERED WOMAN*, *supra* note 15, at 43. From 1978 through 1981, Walker collected data to test her hypotheses by studying approximately 400 battered women, and, in 1984, she announced the results of that study. *See* WALKER, *supra* note 103, at ix. Although some of the tentative conclusions and observations reported in *The Battered Woman* were disproved by Walker's later research project, some of those erroneous conclusions have become firmly entrenched within the legal literature, which is not surprising since Walker herself never revised her erroneous hypotheses in light of her findings, but revised the findings in light of the hypotheses. *See infra* text accompanying notes 424-38.

348. In 1989, Walker reported that, since 1977, she had "testified as an expert witness on behalf of battered women in more than 150 murder trials." WALKER, TERRIFYING LOVE, *supra* note 15, at 7. During her cross-examination at the murder trial of Clara Hess in 1990, Walker disclosed that she also has appeared as an expert for the prosecution, though "probably" not more than 10 times, and that she also presents the theory in testimony given in civil proceedings. *See* Trial Transcript at 1082-83, *State v. Hess* (Mont. Dist. Ct. 1990) (Crim. No. 89-43), *aff'd*, 828 P.2d 382 (Mont. 1992) (testimony of Lenore E. Walker).

349. WALKER, TERRIFYING LOVE, *supra* note 15, at 10, 12.

350. *Id.* at 10, 27. Walker's basic point in support of this argument is that "one of the effects of being repeatedly violated is the inability to break a code of silence, even when your life depends on it. Battered women, like other tyrannized people, lose the use of their own voices." *Id.* at 27. For example, Walker instructs that the battered woman has been covering up for her husband for so long that she may continue to minimize or deny the extent of his violence even when she is on trial for taking his life.

"methodology of the law" mutes even those women who otherwise could speak for themselves.³⁵¹

I am sympathetic to the deeper implications of Walker's position that a battered woman who commits a crime is unable to account for her conduct in a manner that challenges patriarchal stereotypes because long-standing toleration of domestic violence not only reflects the normative assumptions of the social institutions, including law, to which the woman must appeal for assistance, but also has conditioned the woman's own perception of the violence.³⁵² However, when Walker ultimately comes to speak in court, she neither describes the woman's own perspective nor incorporates that perspective into a feminist account of the violence.³⁵³ As I mentioned above, some scholars have noticed that the battered woman syndrome defense relies on negative stereotypes of women, but they fault the courts, and not the content of the defense, for this unfortunate turn of events.³⁵⁴ I believe that the misogyny reflected in the defense is attributable mainly to another source: Walker's project is not capable of producing a feminist theory of responsibility because critical phases of her research, namely, the specific problems she defined as the object of her study and her interpretation of the data she collected, were informed, not by a feminist methodology or theory of epistemology,³⁵⁵ but by the same cognitive patriarchal

351. *Id.* at 10-12, 27; see also Walker, *supra* note 11, at 323 (suggesting that even when law applies a subjective definition of "reasonable," "it is still difficult for a battered woman's perceptions to be understood as reasonable without expert testimony"). In particular, Walker criticizes evidentiary rules on the ground that women have trouble following judges' directions "to stick to the facts . . . because women, in general, have trouble separating discrete factual events from the general patterns of their lives." WALKER, *TERRIFYING LOVE*, *supra* note 15, at 258. Apart from encouraging defense lawyers to hire an expert witness such as herself, whose testimony will fit comfortably within the "the methodology of the law," Walker's proposals for reform include only vague references to the need for "special legal procedures for battered women . . . that recognize and validate the world view of women as well as of men, procedures that ultimately will allow battered women's voices to be heard." See *id.* at 14-15.

352. Contrary to Walker's suggestion that our ultimate goal should be to provide an "accurate" account of the woman's experience, see WALKER, *supra* note 103, at 3, I am inclined to agree with Sandra Harding, who has argued that

it cannot be that women's experiences in themselves or the things women say provide reliable grounds for knowledge claims about nature and social relations. After all, experience itself is shaped by social relations: for example, women have had to *learn* to define as rape those sexual assaults that occur within marriage. . . .

Moreover, women (feminists included) say all kinds of things—misogynist remarks and illogical arguments; misleading statements about an only partially understood situation; racist, class-biased, and heterosexist claims—that are scientifically inadequate. . . .

. . . [I]t is not the experiences or the speech that provides the grounds for feminist claims; it is rather the subsequently articulated observations of and theory about the rest of nature and social relations—observations and theory that start out from, that look at the world from the perspective of, women's lives.

SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE?* 123-24 (1991).

353. See *infra* text accompanying notes 424-38.

354. See *supra* text accompanying notes 14-15.

355. See Nancy C.M. Hartsock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, in *DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE* 283, 284 (Sandra Harding & Merrill B.

categories that structure the two disciplines—law and psychology—that she sought to bridge.³⁵⁶

In her legal publications, Walker chastises the courts for their failure to “listen” to women before making decisions that affect women’s lives.³⁵⁷ Here, she seems to ally herself with feminist legal scholars who argue that law, like other social institutions, is contingent on cultural and historical understandings that have devalued women and women’s experience. These scholars have been absorbed with the task of exposing the patriarchal perspective from which law is constructed and of suggesting ways to repair law’s partial understandings of human experience and behavior by introducing into law a perspective that is based on and values understandings derived from women’s lives.³⁵⁸ Unfortunately, Walker compromises her announced feminist project by avowing that the findings she utters in court satisfy the prevailing tenets of her discipline; namely, they are the product of the “scientific method[]” of “arriving at truth,” in which “[t]he objective data determine what is to be accepted as scientific truth.”³⁵⁹

These and other similar statements by Walker may, in part, be attributable to her understandable desire to persuade the courts and prospective clients of her bona fides as an expert witness whose findings rest on acceptable scientific bases.³⁶⁰ However, though Walker surely is correct when

Hintikka eds., 1983) [hereinafter *DISCOVERING REALITY*] (exploring the epistemological consequences of the claim that women’s lives differ structurally from those of men).

356. See WALKER, *TERRIFYING LOVE*, *supra* note 15, at 12-13 (describing different truth claims made by law and psychology, which lead some lawyers to question whether “psychology belongs in the courtroom at all,” and concluding that, “in the end, truth is most likely to be found at the intersection where all methodologies meet”); Walker et al., *supra* note 69, at 1 (concluding that through a “new alliance between attorneys and psychologists . . . courts have begun to understand the nature of battering relationships”). Therefore, contrary to the argument made by Jean Elshtain in a recent editorial condemning the battered woman syndrome defense as a misguided product of “feminism of difference,” see Elshtain, *supra* note 17, at 25, the defense is not a product of feminism at all. Rather, it was constructed from the perspective of a discipline, namely, psychology, which for a very long time—and without any assistance from the “radical feminists” whose message Elshtain finds so “disquieting,” see *id.*,—has identified and discriminated against women as the victims of mental conditions in whose construction women did not participate, to serve the perspective of another discipline, namely, law, which always has denied that women have the capacity for responsibility that Elshtain now accuses them of trying to evade.

357. WALKER, *TERRIFYING LOVE*, *supra* note 15, at 14.

358. See, e.g., Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on “Reproduction” and the Law*, 13 NOVA L. REV. 355 (1989); Cahn, *supra* note 3; Christine A. Littleton, *Women’s Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23; Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81 (1987).

359. WALKER, *TERRIFYING LOVE*, *supra* note 15, at 12-13 & n.*.

360. For example, in a recent trial, Walker testified on cross-examination that “being a feminist is . . . just a political point of view. It is like being a Democrat or being a Republican. . . . It’s not something that would stand in the way of anybody’s scientific objectivity. . . . All of the scientific methodology was followed even though [the researchers] were also committed feminists.” Trial Transcript at 1089, *State v. Hess* (Mont. Dist. Ct. 1990) (Crim. No. 89-43), *aff’d*, 828 P.2d 382 (Mont. 1992) (testimony of Lenore E. Walker).

she observes that the "methodology of the law" has been inhospitable to women's perspectives, her legal publications suggest that she fails also to understand that the "methodology of psychology," no less than that of law, serves the interests and values of the patriarchal culture that constructed it.³⁶¹ In particular, her assertion that scientific objectivity is capable of producing value-neutral, or, as she puts it, "true," results would seem to be in conflict with the feminist project of exposing all knowledge claims as socially situated, especially those claims that bear the imprimatur of objective or rational truth.³⁶² Feminist scientists have been eager to demonstrate the "epistemological inadequacy" of objectivism, whose major premise is the radical separation of the researcher and her object of study, and to identify ways of making knowledge claims that embrace female, as well as male, experiences of the world.³⁶³

Therefore, in order for Walker's announced objective of bringing to law a feminist psychological theory to succeed, she at least would have to show us that she arrived at her conclusions by means of a methodology that values understandings derived from women's lives. While I conclude that significant aspects of the methodology Walker employed in her research on battered women were not feminist, I do not mean to suggest that Walker intended to embrace patriarchal values. Rather, she does not seem to have heeded seriously the warnings of feminist philosophers of science about the risks posed by feminist epistemological strategies that incorporate empiricism. The traditional empiricist paradigm is based on a limited set of androcentric assumptions and values³⁶⁴ so that an empiricist strategy may

361. An outpouring of recent studies in every area of the social studies of the sciences forces the recognition that all scientific knowledge is always, in every respect, socially situated. Neither knowers nor the knowledge they produce are or could be impartial, disinterested, value-neutral, Archimedean. The challenge is to articulate how it is that knowledge has a socially situated character denied to it by the conventional view, and to work through the transformations that this conception of knowledge requires of conventional notions such as objectivity, relativism, rationality, and reflexivity.

HARDING, *supra* note 352, at 11-12 (footnote omitted).

362. An article coauthored by Walker four years before she wrote *Terrifying Love* observes that science and scientific methodology are "riddled with sex role bias that influences the selection of whose truth it is." Mary Ann Dutton-Douglas & Lenore E.A. Walker, *Introduction to Feminist Therapies*, in *FEMINIST PSYCHOTHERAPIES: INTEGRATION OF THERAPEUTIC AND FEMINIST SYSTEMS* 5 (Mary Ann Dutton-Douglas & Lenore E. Walker eds., 1988) [hereinafter *FEMINIST PSYCHOTHERAPIES*]. Surely, it is not surprising that she does not share that insight with the legal establishment whose members hire her to testify in court, since her claim to be an "expert" witness, to say the least, would be subject to serious challenge if she were to repudiate the very science of which she claims to be a representative. On the other hand, as I explore in the text, it is hard to find comfort in the thought that the battered woman syndrome defense was part of a carefully calculated strategy to smuggle into law feminist values disguised as objective truths because the defense itself appears to reflect the values of patriarchy that objectivity traditionally has served.

363. See Evelyn F. Keller, *Gender and Science*, in *DISCOVERING REALITY*, *supra* note 355, at 187, 190-201.

364. See Mary M. Gergen, *Toward a Feminist Metatheory and Methodology in the Social Sciences*, in *FEMINIST THOUGHT AND THE STRUCTURE OF KNOWLEDGE*, *supra* note 295, at 87, 89.

serve the feminist agenda only if it is carefully theorized and applied.³⁶⁵ Because they "appear[] to challenge mainly the incomplete practice of the scientific method, not the norms of science themselves," the findings produced by feminist empiricists do have a fair chance of being accepted by mainstream scientists and scholars, even though they often require a dramatic "reevaluat[ion of] women's nature and roles and the social dimensions of gender."³⁶⁶ However, as Harding and others have warned, a strategy that incorporates empiricism will be feminist only if the researcher is sensitive to the shortcomings of empiricism in the design of the research project, the manner in which data are collected and interpreted, and the inability of empirical methods to eliminate sexist bias from the prior stage of research, the stage that identifies the scientific problems to be explored.³⁶⁷

When we turn to Walker's description of her research study and, particularly, to the findings that she derived from it, there is significant reason to doubt that she adequately developed the feminist methodology that she ostensibly would pursue.³⁶⁸ Walker's observations concerning the purpose of her study reveal that she did have a feminist objective in mind. That is, when she states that her intention was to make the existing body of data on "intrafamily violence" more "accurate" by bringing to it "a different view," namely, "the woman's,"³⁶⁹ we may infer that she believed that the extant studies of domestic violence were provided by researchers who either ignored women's accounts of the violence or whose sexist bias made them insensitive to those accounts.³⁷⁰ Moreover, the technique that Walker used for gathering "accurate" information from the individual subjects of her study departs from traditional empirical methods in that the staff members

365. Yet, as Sandra Harding has remarked, practitioners of feminist empiricism "do not usually label it at all; they see themselves as primarily following more rigorously the existing rules and principles of the sciences" because they believe that "sexist and androcentric biases can be eliminated by stricter adherence to existing methodological norms of scientific inquiry; only 'bad science' or 'bad sociology' is responsible for their retention in the results of research." HARDING, *supra* note 352, at 111-18. For other discussions of feminist empiricism see SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* 24-26 (1986); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 868-72 (1990) (describing rational, empirical strategy pursued by some feminist legal scholars); Gergen, *supra* note 364, at 89; Unger, *supra* note 295.

366. HARDING, *supra* note 352, at 112-15.

367. *Id.* at 111.

368. For an example of how a feminist methodology might be developed and then applied to a specific research problem, see Gergen, *supra* note 364, at 95-101 (applying feminist research techniques to study of menopause).

369. WALKER, *supra* note 103, at 3.

370. The Battered Woman Research Center was founded as a way of calling attention to the obvious bias existing in research programs about high prevalence conditions detrimental to women. That bias came from accepting male-defined research assumptions and questions rather than collecting a systematic, empirical, objective account of the woman victim's perspective.

Id. at 107; see also *id.* at 208 ("[Male psychologists] do not understand the differences between male and female prisoners and tend to discount the women's statements.").

who interviewed the subjects were women who had "some previous knowledge about battered women" and "some political awareness of the women's movement."³⁷¹ Walker believed that female interviewers, unlike "male psychologists," would credit the subject's accounts, and she worked with her "all-woman staff" to create an atmosphere of compassionate support in which the subjects would feel free to speak openly about the violence they had endured.³⁷² To this extent at least, and it is considerable when compared with the traditional empiricist paradigm within which Walker was expected to place herself, her strategy offered some promise that it would produce a feminist account of her subjects' experiences. However, when it came time to interpret the data that her researchers had collected for her—and, perhaps, most crucially, in her prior definition of the hypotheses that those data were to substantiate—Walker seems to have given little, if any, thought to the manner in which the androcentric values shaping her professional discipline inevitably would subvert her feminist project.

A serious shortcoming of Walker's work lies in her definition of the scientific hypotheses that her study would explore. Feminist criticism of science has uncovered the significant role that "the identification and definition of research problems" plays in shaping the results that the empirical researcher ultimately announces.³⁷³ That is, "feminist critics have revealed numerous instances in which scientists' orienting assumptions have circumscribed the kinds of results (or realities) that research can derive."³⁷⁴ Since the scientist is likely to discover precisely what he expected to find, a pressing task for the feminist empiricist is to "locate and eradicate the androcentrism" that may taint the process of hypothesis formulation.³⁷⁵ I can find no evidence that Walker had these concerns in mind when she developed her project; indeed, the evidence points to a contrary conclusion.

As an initial matter, Walker's desire to develop a feminist explanation of her subjects' psychological condition would seem to have been subverted from the outset. The pejorative label that she chose, several years before the results of her empirical research were in,³⁷⁶ marks the woman as a collection of mental symptoms and behavioral abnormalities. There is no way to evade the denotation: "The language of 'syndrome'" selected by Walker

371. *Id.* at 215-16. Not surprisingly, though this feature of Walker's methodology would appear to be its primary strength, it has been cited as evidence that the conclusions of her research study are tainted by feminist bias and, therefore, that those conclusions are not sufficiently objective to provide the basis for expert legal testimony. See David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 637-38 (1986).

372. WALKER, *supra* note 103, at 208, 216-18, 231-32.

373. See HARDING, *supra* note 352, at 116.

374. Kenneth J. Gergen, *Feminist Critique of Science and the Challenge of Social Epistemology*, in FEMINIST THOUGHT AND THE STRUCTURE OF KNOWLEDGE, *supra* note 295, at 27, 29.

375. HARDING, *supra* note 352, at 117.

376. See WALKER, *THE BATTERED WOMAN*, *supra* note 15, at 19; WALKER, *supra* note 103, at 1.

"presupposes the existence of a disease-state" afflicting women.³⁷⁷ Although Walker sometimes asserts that battered women are not mentally ill,³⁷⁸ she nonetheless seems comfortable with the characterization of battered women as diseased, for she also explains that the battered woman syndrome is a "mental disorder" against which "young women" can and should be "inoculat[ed],"³⁷⁹ and, for the women who come down with it, she prescribes psychotherapy involving "[c]ognitive restructuring procedures."³⁸⁰

Not only does the label "battered woman syndrome" suggest that Walker construed her subjects as deviant before she ever encountered them, the particular research problems she elected to pursue rest on sexist assumptions about the psychology and behavior of women involved in violent marriages. Walker announced, going into the empirical study, that she expected her data would prove that the women suffered from a variety of psychological disturbances,³⁸¹ and she hypothesized that the study would reveal that the women had succumbed to a "mental health disorder" known as "learned helplessness."³⁸² Today, Walker assures potential legal clients that the theory of learned helplessness will answer the question that she believes most troubles prosecutors, jurors, and judges: why didn't the battered woman leave her batterer at some point before the criminal offense took place?³⁸³ Significantly, this question also was chosen by Walker to be the focus of inquiry for her empirical study of battered women, and her selection of the question reveals how inadequate her empiricist technique was to the task of eliminating sexist bias from the problems she would research. Although Walker now suggests that this question reflects misogyny-

377. Cf. Jacquelyn N. Zita, *The Premenstrual Syndrome: "Dis-easing" the Female Cycle*, in *FEMINISM AND SCIENCE*, *supra* note 180, at 188, 189.

378. *FEMINIST PSYCHOTHERAPIES*, *supra* note 362, at 6-7; WALKER, *TERRIFYING LOVE*, *supra* note 15, at 10, 169-71; WALKER, *THE BATTERED WOMAN*, *supra* note 15, at 20-21.

379. Walker, *supra* note 11, at 331-32.

380. WALKER, *supra* note 103, at 127.

381. "From preliminary investigations, it was believed that women develop a cluster of psychological sequela from living in a violent relationship that could be called The Battered Woman Syndrome." *Id.* Walker had hypothesized, among other things, that "a psychological condition called 'learned helplessness' . . . is responsible for the apparent emotional, cognitive, and behavioral deficits observed in the battered women." *Id.* at 2. It is understandable that Walker would have concluded that the problems of women who suffer domestic abuse should be attributed, largely, to their psychological problems, since that is what, as a psychologist, she was trained to do. As commentators have observed, it is an occupational expectancy that the psychologist would want to demonstrate the applicability of his skills and services. Kaplan called this widely observed tendency the Law of the Instrument: give a small boy a hammer, and suddenly he discovers that everything needs hammering. Train a person in psychological theory and research, and suddenly a world disastrously out of tune with human needs is explained as a state of mind.

Caplan & Nelson, *supra* note 100, at 202 (citation omitted).

382. See WALKER, *THE BATTERED WOMAN*, *supra* note 15, at 43; WALKER, *supra* note 103, at 1-2; Walker, *supra* note 11, at 331. I describe learned helplessness in more detail below. See *infra* text accompanying notes 396-425.

383. E.g., WALKER, *TERRIFYING LOVE*, *supra* note 15, at 47; Walker, *supra* note 11, at 333.

nist stereotypes that will be harmful to the woman on trial,³⁸⁴ it was Walker herself, presumably before she had any ideas about becoming a legal advocate, who urgently asked the question. From the very first, the stated, dominant focus of her work with battered women has been to provide an "understanding why battered women do not attempt to gain their freedom from a battering relationship" and to develop therapeutic techniques to help the woman "make the final decision to leave the relationship."³⁸⁵ Similarly, the primary scientific hypothesis that Walker's empirical research was designed to test was that the battered woman possesses a variety of "emotional, cognitive, and behavioral deficits . . . , which negatively influence her from leaving a relationship after the battering occurs."³⁸⁶ According to the terms that Walker selected to guide her research project, a woman who leaves the relationship is normal, while a woman who remains with her abuser is deviant.³⁸⁷ Of course, it is the conduct and perceptions of the woman who stays that Walker is concerned to reconstruct in court.³⁸⁸ Therefore, no matter how misogynist may be some advocates, jurors, and judges, by questioning the "intelligence and sanity" of a woman who fails to separate from an abusive spouse, they merely are raising precisely the same issue that has so preoccupied Walker.³⁸⁹

When we turn to Walker's interpretation of the data her staff gathered, we can find suggestive evidence that Walker's scientific conclusions were informed by patriarchal values. Throughout her description of her findings, Walker consistently seeks to place a critical and privileged distance

384. E.g., WALKER, *TERRIFYING LOVE*, *supra* note 15, at 31-34, 41, 47, 235-41.

385. See Walker, *Battered Women and Learned Helplessness*, *supra* note 15, at 528, 531.

386. WALKER, *supra* note 103, at 2.

387. Walker is hardly the only mental health expert who construes a decision to stay in the battering relationship as deviant. See Donileen R. Loseke & Spencer E. Cahill, *The Social Construction of Deviance: Experts on Battered Women*, 31 SOC. PROBS. 296, 297-98 (1984).

388. Here, I think that we can detect in Walker's work the kind of "anxiety about the loss of autonomy" that Evelyn Fox Keller suggests may be a crucial personality characteristic of people, whether they be men or women, who are drawn to and find comfort in science, "which advertises itself as revealing a reality in which subject and object are unmistakably distinct." Keller, *supra* note 363, at 200.

389. See Walker, *Battered Women and Learned Helplessness*, *supra* note 15, at 530. In this passage, Walker vividly describes the frustration experienced by mental health workers who, like herself, seek to intervene on behalf of the battered woman, only to have the woman reject their assistance:

Helpers report becoming exasperated and angry with battered women. The helpers try to bring whatever legal and social assistance is possible under a limited system. This often occurs at considerable effort to the helper. Just when some assistance is found (restraining order, a police call, hospitalization, foster home, psychological help, etc.), the battered woman often turns it down. Understandably, helpers become exasperated when she returns to the dangerous relationship, denying that any harm can come to her. She assures herself and others that she can handle her man and returns to him, leaving others speechless at her behavior. They question her intelligence and sanity. It is probable that battered women do not accept the helper's assistance because they do not believe it will be effective. This can be attributed to the learned helplessness hypothesis in which their cognitive set tells them no one can help them. They see the batterer as all powerful. Thus, there is no safety for them.

Id.

between herself and the women she studied.³⁹⁰ Walker frequently remarks on the difficult characteristics shared by women who have experienced domestic abuse, such as their inability to keep or remember appointments, and their manipulative, compliant, passive-aggressive, and chameleon-like response styles, which make them difficult clients for a psychotherapist and frustrating subjects for an empirical researcher.³⁹¹ Perhaps most significantly, as I discuss in more detail below,³⁹² when she interprets the reports of the women she studied, Walker explicitly relies on some of the psychological deficits that she predicted she would find in the women as the reason for rejecting the subjects' perception of their own lives in favor of a "reality" that Walker claims to have identified³⁹³ through, we can only surmise, the application of the accepted, objective diagnostic tools prescribed by the discipline of psychology.³⁹⁴ Thus, from her position of expert competence and superiority, Walker the scientist subjugates the women she studies in a manner that reenacts the same pattern of domination and subjugation that she sometimes claims is the underlying cause of domestic violence.³⁹⁵

The answers that Walker ultimately derived from her empirical study are as disturbingly reductionistic as the ideas of the nineteenth-century physicians who offered findings about canine reproductive systems to prove "that women are not capable of doing what men do."³⁹⁶ Walker's explana-

390. A concise example, though from another context, of the stance of independence from and superiority to her subjects that Walker brought to her interpretive task is supplied by her reaction when a prosecutor suggested that she "too might have been a battered woman who got away with murdering a man." WALKER, *TERRIFYING LOVE*, *supra* note 15, at 318. Walker reports that she was "stung by the personal nature of the question" and that she threatened to "haul [the prosecutor into court] with a civil lawsuit," if he brought the matter up in his cross-examination of her. *Id.* at 318-19. When we consider what Walker's construction of the battered woman's mental state is, it is no wonder that she would be offended by any effort to identify her with the subjects she has defined as so dysfunctional, and whom she has so carefully defined as other than herself. No one desires to be described in such terms. See Mahoney, *supra* note 10, at 8-9 (describing her own and other abused women's "fear of being identified with the[] stereotypes" of battered women).

391. WALKER, *supra* note 103, at 126, 205-06, 230-32.

392. See *infra* text accompanying notes 426-37.

393. See Trial Transcript at 1038-39, *State v. Hess* (Mont. Dist. Ct. 1990) (Crim. No. 89-43), *aff'd*, 828 P.2d 382 (Mont. 1992) (testimony of Lenore E. Walker) (explaining that battering is not as random as the battered woman perceives it to be); WALKER, *supra* note 103, at 78-80 (rejecting as contrary to "reality" reports by women that they, and not their powerful husbands, are in control of their lives); Walker, *supra* note 11, at 330 (also explaining that battering is not as random as the battered woman perceives it to be).

394. As Walker understands the interpretive process she employed, she sought to uncover "the typical way any woman and in particular, this battered woman would have perceived the same situation." Walker, *supra* note 11, at 323-324. Nowhere does she explain how feminist values informed her interpretation of what was the "typical" perception of battered women, and, contrary to her suggestion that she is describing the perspective of an individual woman, her interpretation of her empirical data and her testimony explicitly characterize as false the woman's accounts of her own experience. See *infra* text accompanying notes 427-436.

395. Cf. Gergen, *supra* note 364, at 94 ("As feminist thinkers maintain, presumptions of experimenter superiority and the subjugation of the research subject recapitulates the traditional patterns of gender relationships in the culture . . .").

396. LAQUEUR, *supra* note 182, at 207-08.

tion of why a woman is psychologically incapable of choosing lawful means to escape an abusive mate rests almost exclusively on her description of laboratory experiments that produced learned helplessness in dogs.³⁹⁷ These experiments, which gave rise to a vast and complex literature on the phenomenon of learned helplessness and its relationship to human depression, were conducted by Martin Seligman, a psychologist at the University of Pennsylvania, in the 1960s.³⁹⁸ The criminal courts' uncritical acceptance of expert testimony drawing a superficial analogy between female and canine psychological processes should not come as a great surprise, I guess, given the androcentric assumptions that have burdened law. Nor perhaps should we fault Walker for developing a defense that so perfectly exploits the criminal law's view that the excused actor is, in essential respects, an animal. Still, it is curious that Walker would decide to make the dog studies the centerpiece of the account she gives to her legal audience rather than starting her discussion with any of the numerous studies of helplessness in human beings.³⁹⁹

In any event, Walker explains to the courts that Seligman detected the learned helplessness response in dogs after he "placed [them] in cages from which they could not escape and administered electric shocks to them at random and variable times."⁴⁰⁰ Once the dogs realized that "there was nothing they could do to predictably control the shocks," Walker reports, they became afflicted with learned helplessness and were unable to perceive avenues of escape, though they did develop certain coping behaviors to reduce the pain, such as "lying in their own fecal matter" to insulate themselves from the shocks.⁴⁰¹ Walker then claims that, "like the animal studies" she cites, her own research establishes that, after being battered by a spouse, women develop learned helplessness so that they both fail to perceive available avenues of escape and become incapable of making any response beyond simple "coping strategies" that permit them to endure the

397. Trial Transcript at 1032-34, *State v. Hess* (Mont. Dist. Ct. 1990) (Crim. No. 89-43), *aff'd*, 828 P.2d 382 (Mont. 1992) (testimony of Lenore E. Walker) (testifying that Martin Seligman's animal studies support her theory of how learned helplessness develops in women); WALKER, TERRIFYING LOVE, *supra* note 15, at 49-50 (applying the results of experiments on dogs to women to show that a woman "can learn she is unable to predict the effect her behavior will have"); Walker et al., *supra* note 69, at 8-9 (applying the results of experiments on dogs to women to show that battered women often believe that their batterer is omnipotent and that no one can help them).

398. See J. Bruce Overmier & Martin E.P. Seligman, *Effects of Inescapable Shock Upon Subsequent Escape and Avoidance Responding*, 63 J. COMP. & PHYSIOLOGICAL PSYCHOL. 28 (1967); Martin E.P. Seligman & Steven F. Maier, *Failure to Escape Traumatic Shock*, 74 J. EXPERIMENTAL PSYCHOL. 1 (1967).

399. One of the key articles on learned helplessness in humans is Lyn Y. Abramson, Martin E.P. Seligman & John D. Teasdale, *Learned Helplessness in Humans: Critique and Reformulation*, 87 J. ABNORMAL PSYCHOL. 49 (1978).

400. WALKER, TERRIFYING LOVE, *supra* note 15, at 49-50.

401. *Id.*

ongoing "cycle of violence."⁴⁰² Indeed, Walker says, battered women's psychological disabilities are so acute that, "[l]ike Seligman's dogs, they need to be shown the way out repeatedly before change is possible."⁴⁰³

The criminal courts' warm reception of this excuse might be understandable if the excuse provided a coherent interpretation of the woman's psychological condition and resulting criminal, often homicidal, conduct. As it stands, however, the learned helplessness diagnosis fails to explain adequately, or at all, at least two significant aspects of the woman's conduct. First, the diagnosis not only fails to explain the conduct with which the criminal law is primarily concerned, namely, the killing of the batterer, the diagnosis actually is inconsistent with the homicidal act that the woman performed. If the woman is psychologically paralyzed, as Walker claims, then it seems much more likely that she will continue to endure the ongoing violence, rather than resort to such an extreme form of self-help. Certainly, nothing in the learned helplessness literature suggests that we might expect the woman to behave violently. For example, the animal studies that Walker cites do not appear to report any incidents in which one of the experimental dogs suddenly attacked the experimenter who was doling out the electrical shocks. To the contrary, the animal studies provide "evidence that . . . learned helplessness could immobilize a victim to the point of death."⁴⁰⁴

Second, even in the context where the learned helplessness diagnosis would seem to possess greater explanatory power, in answering the question "Why didn't she leave him?," the theory is seriously flawed. The success of Walker's analogy between the women who are helpless to leave their violent mates and Seligman's dogs appears to rest on the strength of the similarity between the constraints imposed by an abusive relationship and the bars of a cage.⁴⁰⁵ Walker, on the one hand, emphasizes that the barriers to the woman's escape are the product of her defective cognition, rather than her physical circumstances.⁴⁰⁶ She claims that this is a distinc-

402. Trial Transcript at 1049-50, *State v. Hess* (Mont. Dist. Ct. 1990) (Crim. No. 89-43), *aff'd*, 828 P.2d 382 (Mont. 1992) (testimony of Lenore E. Walker). The phrase "cycle of violence" is another term of art that Walker has contributed to the specialized psychological vocabulary concerning the problems of battered women. See *supra* note 300.

403. Walker, *Battered Women and Learned Helplessness*, *supra* note 15, at 529; see also WALKER, *THE BATTERED WOMAN*, *supra* note 15, at 16 ("The women's passivity and inability to leave a situation even when shown the way out were strikingly similar to that of the experimental dogs.").

404. GONDOLF & FISHER, *supra* note 103, at 13.

405. Martha Mahoney has made the analogy more convincing by identifying "separation assault," which is "the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return." Mahoney, *supra* note 10, at 65. According to Mahoney, separation assault "does not contradict the possibility of developing learned helplessness," but it does "confirm[] the difficulties of exit." *Id.* at 81.

406. See, e.g., Trial Transcript at 1053, 1055, *Hess* (Crim. No. 89-43) (testimony of Lenore E. Walker) (testifying that even if social support and law enforcement resources are available, the woman cannot perceive either the need for or availability of escape).

tion between the woman and the caged dog,⁴⁰⁷ which, by itself, it is not.⁴⁰⁸ Yet, on the other hand, she simultaneously enhances the force of her analogy between a battering relationship and a cage by insisting that the cognitive and motivational symptoms interfering with the woman's capacity to escape her abuser can, and often do, arise solely from the abuse inflicted within the battering relationship itself.⁴⁰⁹

It may well be that Walker's finding of learned helplessness in battered women is fully justified under prevailing psychological wisdom, but her summary of Seligman's work with dogs omits certain key features of his experiments—key features that discredit the crude comparison between the psychology of battered women and caged dogs that has so impressed the legal community. Walker's truncated description of Seligman's complicated experiments suggests that those studies involved only one group of dogs, all of whom developed learned helplessness after being placed in cages and shocked. It is true that Seligman detected learned helplessness after placing dogs in cages and exposing them to shock, but his experiments actually involved two groups of dogs.⁴¹⁰ The first group included dogs who, *prior* to being placed in the cages, were exposed to shocks that were literally, physically inescapable and uncontrollable by the dog;⁴¹¹ the second group consisted of dogs who were "experimentally naive," dogs that had "not been given uncontrollable shock" before being placed in the cages.⁴¹² Moreover, the cages in which the dogs were confined in the next phase of the experiment contained a mechanism through which they could readily escape the shocks that the researchers administered.⁴¹³ Walker fails

407. WALKER, *TERRIFYING LOVE*, *supra* note 15, at 50.

408. The very "cornerstone" of the learned helplessness theory derived from the animal experiments is "'cognitive' in that it postulates that mere exposure to uncontrollability is not sufficient to render an organism helpless; rather, the organism must come to expect that outcomes are uncontrollable in order to exhibit helplessness." Abramson, Seligman & Teasdale, *supra* note 399, at 50. Therefore, it makes no sense to insist, as Walker does, that the "all-important" aspect of learned helplessness in humans is its impact on cognition. WALKER, *TERRIFYING LOVE*, *supra* note 15, at 50. The whole point of the theory emerging from the animal studies that Walker cites was to show that a dog afflicted with learned helplessness, no less than a woman, suffers from a cognitive disturbance, as well as from motivational and emotional deficits. Abramson, Seligman & Teasdale, *supra* note 399, at 50.

409. WALKER, *supra* note 103, at 92 (asserting that childhood experiences do not "cause a woman to be more or less vulnerable to helplessness in a battering relationship"); Walker, *supra* note 11, at 331-32.

410. Like Walker, I too am providing an oversimplified description of Seligman's experiments. In fact, the experiments involved "three groups" of dogs, rather than two. See Seligman & Maier, *supra* note 398, at 5.

411. MARTIN E.P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH* 21 (1975). The dogs in the first group initially were immobilized in a "Pavlovian hammock," not a cage, and were exposed to "moderately painful, but not physically damaging" shocks whose "onset, offset, duration, and intensity were determined only by the experimenter. (These conditions meet the definition of uncontrollability.)" *Id.*

412. *Id.* at 22.

413. Each cage was a "shuttle box, a two-sided chamber in which a dog jumping over a barrier from one side to the other" escapes the shock. *Id.* at 21-22.

to mention the significant point that the experimentally naive dogs did *not* develop learned helplessness; rather, the naive dogs quickly learned how to avoid shock altogether.⁴¹⁴ The dogs that manifested learned helplessness were those who previously had been given objectively uncontrollable shock; it was this group of dogs that “seemed to give up and to accept the shock passively,” even though a means of escape was at hand, because the dogs had come to expect from their prior experience that none of their reactions could control shock.⁴¹⁵

These points discredit Walker’s suggestion that her theory will help to repair the law’s partial and biased impression of women’s misconduct. If we must be stuck with the superficial analogy between women and dogs, of which both science and law seem so fond, it would be helpful to know why a woman who is beaten by her husband reacts like the dog previously given uncontrollable shock, rather than like one that is experimentally naive. Of course, since Walker’s definition of a battered woman requires that the woman have been abused by her husband on at least two occasions,⁴¹⁶ presumably she would respond to my objections by pointing out that it was the woman’s prior experiences with her batterer that taught her to be helpless. However, still unanswered is the significant question of why, as a useful analogy to the dog studies would demand, a woman incorrectly perceives her batterer’s abuse on the *first occasion* to be objectively uncontrollable when everyone else, according to and including Walker, believes that she can and should try to escape the violence by leaving the relationship.⁴¹⁷ Walker may be correct insofar as she observes the inevitable fact that women often stay with their men, brutal or not. But the “learned helplessness” diagnosis criticizes women as psychologically deviant. That criticism overlooks, and thus reinforces, women’s subjugated cultural position precisely by labeling that position the product of their individual, deviant psychology. The reason why the woman can never occupy a position analogous to that of the experimentally naive dog is that women, unlike dogs, are the products of culture, which prepares a subject position for them before they are born. Part of that position, it seems, label it helplessness or whatever you like, is to cling to and take responsibility for maintaining the significant relationships in their lives even when those relationships inflict suffering on them. To be fair, Walker’s work sometimes signals her understanding that women are subordinated by culture, rather than by their defec-

414. *Id.* at 22.

415. *Id.* at 22-26.

416. *E.g.*, WALKER, *supra* note 103, at 203; WALKER, *THE BATTERED WOMAN*, *supra* note 15, at xv.

417. For example, for Walker, the big challenge is to assist women to “learn to use escape skills,” rather than “the survival behaviors” that Seligman found in the dogs previously exposed to shock and Walker detected in battered women. WALKER, *supra* note 103, at 87.

tive psychology.⁴¹⁸ But her expert testimony that the dog studies provide the psychological model for why women remain with their men reflects, at best, profound ambivalence over the source of women's subjugation, and ultimately instructs the courts that women are at the mercy, not of culture, but of their own unstable mental processes.

The psychological literature suggests another objection to the superficial analogy between women and dogs to which Walker testifies in court. In describing learned helplessness to her legal audience, Walker relies on a book Seligman published in 1975.⁴¹⁹ In that book, Seligman cautioned against "generalizing without evidence from one species to another," and he took pains to explain why the theory of learned helplessness derived from his animal experiments could be used to support conclusions about human helplessness and depression.⁴²⁰ Just three years later, however, Seligman and his colleagues announced that they had "become increasingly disenchanted" with the hypothesis derived from the animal studies because it was inadequate to understand learned helplessness in human beings, and they produced a paper that "criticized and reformulated" that hypothesis.⁴²¹

The reformulation proposes an "attributional framework" to explain the development of learned helplessness in people. This model postulates that "when a person finds that he is helpless, he asks *why* he is helpless."⁴²² The causal attribution the subject makes in response to that question is crucial because it determines whether his helplessness will be generalized so that he will perceive himself to be helpless in future situations that are in fact controllable by him, whether his helplessness will persist over time or dissipate rapidly, and whether he will suffer a loss of self-esteem.⁴²³ In

418. See, e.g., WALKER, *TERRIFYING LOVE*, *supra* note 15, at 10 (discussing the difficulties women face in the criminal justice system); WALKER, *supra* note 103, at 89 (hypothesizing that "women are taught sex role stereotyping which encourages passivity and dependency even as little girls").

419. See Walker, *supra* note 11, at 330 n.25 (citing SELIGMAN, *supra* note 411); Walker et al., *supra* note 69, at 8 n.38 (same). Although *Terrifying Love* contains no citations or bibliography, it appears to be referring to the same book. See WALKER, *TERRIFYING LOVE*, *supra* note 15, at 49-50.

420. SELIGMAN, *supra* note 411, at 27-31. Of course, Seligman relied on laboratory studies by other researchers who reported that they had replicated in humans the same learned helplessness response that Seligman had produced in dogs. *Id.* at 30-31.

421. Abramson, Seligman & Teasdale, *supra* note 399, at 49-50.

422. *Id.* at 50.

423. See *id.* The learned helplessness literature contains terms of art that characterize various attributional styles that people invoke to explain their experiences of helplessness. Significantly, those explanatory styles appear to determine whether and the extent to which feelings of helplessness will cause the onset of depression. People who attribute their helplessness to internal, stable, and global causes "tend to become depressed when bad events occur," see Christopher Peterson & Martin E.P. Seligman, *Causal Explanations as a Risk Factor for Depression: Theory and Evidence*, 91 *PSYCHOL. REV.* 347, 347 (1984), while those who invoke external, unstable, and specific causes, presumably do not. People who invoke internal causes "tend[] to believe outcomes are caused by their own responding," while those who rely on external explanations "tend[] to believe outcomes are not caused by their own responding but by luck, chance, or fate." Abramson, Seligman & Teasdale, *supra* note 399, at 51. Stable causes "are considered to be long-lived and recurrent, whereas unstable factors are short-lived or intermittent." Lyn Y. Abramson, Judy Garber & Martin E.P. Seligman, *Learned Helplessness in Humans: An Attributional Analysis*, in *HUMAN HELPLESSNESS* 3, 13-14 (Judy Garber &

other words, according to the researchers who have been concerned to explain how experiences of helplessness affect human beings, it is the individual subject's personal explanation that determines whether he succumbs to learned helplessness in the first instance, as well as the form his helplessness assumes. Some of Walker's legal publications appear to mention the problem of attribution, but these references are so cryptic that they convey no useful information to the readers lacking expertise in the field of psychology for whom they are intended.⁴²⁴ While her publications for members of her own discipline report that her research did test the attributional styles of the battered women she studied,⁴²⁵ her interpretation of those findings, together with her general description of the battered woman's helplessness in her legal articles, establish that her "reconstruction" of the battered woman's "state of mind"⁴²⁶ succeeds only to the extent that it discredits the woman's account of her own experience.

In *The Battered Woman Syndrome*, Walker confessed that she was "surprised" by her findings concerning the battered women's attributional styles.⁴²⁷ Contrary to Walker's expectation that the subjects would report feelings of helplessness, the women perceived "themselves as having a great deal of control over what happens to them," and they did not believe that their lives were controlled by "powerful others."⁴²⁸ Also "surprising" to Walker were the women's reports that they enjoyed high self-esteem, as was her finding that women remaining in a battering relationship were less depressed than women who had left the relationship.⁴²⁹ In each instance, Walker disputed and ultimately discounted or rejected outright the women's reports. Significantly, her construction of the women's accounts specifically relies on and, as one would expect, is consistent with her hypothesis that the women suffer from learned helplessness. For example, while "[i]t may be that battered women do believe they control their own lives,"

Martin E.P. Seligman eds., 1980). Finally, global explanations for helplessness are those that "affect a wide variety of situations, whereas specific factors do not." *Id.*

424. For example, in her most recent law review article, Walker remarks that Seligman's latest work "demonstrates a link between an attitude of optimism and reversal or even inoculation against the development of learned helplessness." Walker, *supra* note 11, at 331. Likewise, in *Terrifying Love*, Walker mentions in a footnote to her discussion of the learned helplessness theory derived from the animal experiments that some research indicates that battered women tend to attribute their helplessness to external causes, and she asserts that "externalizers" seem to succumb to learned helplessness more easily than "internalizers." *Id.* at 51 n.*. The one transcript of Walker's expert testimony that I reviewed contained no references to the accused woman's attributional style.

425. See WALKER, *supra* note 103, at 78-80.

426. WALKER, *TERRIFYING LOVE*, *supra* note 15, at 29.

427. WALKER, *supra* note 103, at 78-80.

428. *Id.* at 78-79. As Walker expected, the women tended to perceive that events in their lives were controlled by chance. *Id.* at 79-80. But that finding alone does not support a conclusion that the women were afflicted with learned helplessness; as I noted above, see *supra* note 423, "chance" constitutes an "external" explanation of helplessness, and, depending on the circumstances, people who invoke external factors appear to be less likely to become depressed.

429. WALKER, *supra* note 103, at 80-85.

Walker asserts, the "reality" is that the "batterer is, in fact, in control of [their] everyday activities and of [their lives]," and this "realization" must be brought home to the women.⁴³⁰ Similarly, Walker characterizes her finding that battered women have a "positive self-image" as "unusual and inconsistent" with her theory that the women suffer from learned helplessness.⁴³¹ She remarks that this portion of the women's reports may have been calculated "to gain approval" from the researcher because the women's "desire to please" is so potent that it "may override their ability to accurately know and label their feelings."⁴³² Later in the study when she is giving advice for how counselors should approach these "difficult therapy client[s]," she asserts authoritatively that battered women "do have low self esteem."⁴³³ By the time Walker's data are transformed into the battered woman syndrome defense, the women's accounts have vanished completely. Walker asserts that "[t]he typical battered woman has poor self-image and low self-esteem";⁴³⁴ she may "believe[] that she does not" have control over her situation; she "believe[s] that things happening to [her] are caused by powers outside" herself;⁴³⁵ and she "often believes that the batterer is omnipotent."⁴³⁶ While Walker does not use the "false consciousness" jargon in fashion in some legal scholarship these days,⁴³⁷ the vocabulary of psychology is well up to her task, with nouns such as "denial," "minimization," "repression," "manipulation," and "distortion," of contradicting the women's own accounts of their lives.⁴³⁸

The irony here is that by ignoring the whole point of the attributional reformulation, which was to show that the only way to measure learned helplessness in people is to pay careful attention to the subject's personal explanation, Walker has missed perhaps her only opportunity to claim, at once, fidelity to the woman's perspective and to psychological methodology. Of course, that the battered woman syndrome may be, to some, bad

430. *Id.* at 79-80.

431. *Id.* at 80.

432. *Id.* at 80-81.

433. *Id.* at 126-27.

434. WALKER, TERRIFYING LOVE, *supra* note 15, at 102.

435. *Id.* at 50-51 & n.*.

436. Walker et al., *supra* note 69, at 8-9.

437. As Kathryn Abrams has pointed out, "[t]he argument that women suffer from 'false consciousness,' or that their choices are unconsciously determined by gender ideology, has been a continuing source of controversy in feminist theory." Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 761 (1990).

438. Trial Transcript at 1073, *State v. Hess* (Mont. Dist. Ct. 1990) (Crim. No. 89-43), *aff'd*, 828 P.2d 382 (Mont. 1992) (testimony of Lenore E. Walker); WALKER, *supra* note 103, at 126. Of course, prosecutors have not missed the fact that Dr. Walker's insistence that the women have been lying to everybody, including themselves, is a helpful source of impeachment when they are cross-examining Walker and the accused woman herself. For example, during a recent trial, a prosecutor asked Dr. Walker a series of questions during cross-examination that were designed to establish that, if the defendant had been making up stories for years to minimize the battering in her marriage, perhaps she also was making up stories when she described her psychological symptoms to the defense expert witness. See Trial Transcript at 1034-37, *Hess* (Crim. No. 89-43) (testimony of Lenore E. Walker).

psychology, when measured by the standards that field has constructed, is not an objection that feminists necessarily should care about. Yet, we must examine the criminal law's enthusiastic reception of the theory, which is founded, in part, on the claim that it is sensitive to and values the woman's perspective.⁴³⁹ What is remarkable about this claim is that the expert advice has precisely the same effect as the archaic presumption of marital coercion: it denies to women the authority to control our own self-representation—indeed, it encourages us to give up that authority to an expert whose reconstruction is conditioned by values antithetical to feminism—in a context where it may have the effect of denying us the power to control our lives.

CONCLUSION

Articles of this kind often conclude by offering some proposals, however tentative, for doctrinal reform that will assist in bringing understandings derived from women's experiences to law, and through law, to culture. My objections to the battered woman syndrome defense require an undertaking much larger than suggesting revisions to the particular rules that govern, for example, self-defense and duress claims. My objections suggest that we must consider a revision of the model of responsibility presently endorsed by the criminal law.

If the community holds powerful feelings of sympathy for women who offend under the pressure of domestic violence, (and the widespread recognition of the new defense certainly suggests that it does), then we must decide whether we can embody those feelings in a defense that does not effectively withhold from women the respect for their achievements and authority over their lives that the capacity for responsible conduct presently secures for men. For the reasons expressed in the preceding parts of this paper, I am persuaded that the battered woman syndrome defense, at least as it is presently constituted, is profoundly anti-feminist. To invert a remark made by Joan Williams about the work of Carol Gilligan, this defense reclaims for women all of the insults of the gender ideology of domesticity⁴⁴⁰ while endorsing none of its compliments.⁴⁴¹

439. See Schneider, *supra* note 10, at 212 (describing cases in which the court admits expert testimony on battering in order to effectively present the situation as perceived by the battered woman).

440. Williams explains that this ideology, which emerged during the eighteenth century, was one "in which women continued to be viewed as weaker than men physically and intellectually, but were newly extolled as more moral than men." Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 806-07 (1989); see also NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835*, at 63-100 (1977) (discussing the canon of domesticity as reserving a separate sphere for women, which acts as a moral counter balance against the outside world that men must inhabit); Shuttleworth, *supra* note 184, at 55 (describing the Victorian era's characterization of women as spiritually pure but biologically unstable).

441. See Williams, *supra* note 440, at 807. In this passage, Williams argues that Carol Gilligan's description of "female emotional maturity" offers "domesticity with a difference." *Id.* That is, Gilligan and her followers "agree with the Victorians that women are more nurturing than men . . . , less tied to

If the task that I have in mind is beyond our present intellectual or political capacities, we may conclude that a special excuse for women is the best that we can hope to achieve at this time, and we might retain the battered woman syndrome defense but find some way to revise its judgment that the accused woman is psychologically disabled. If defenders of battered women are convinced that they can win acquittals only by offering expert testimony about their clients' mental condition, the substantial body of scholarship by feminist psychologists surely offers more than one theory that could be used to recuperate the defense while eliminating its most negative aspects. However, I am skeptical of this strategy, even as a short-term or transitional measure,⁴⁴² because this kind of special accommodation for women probably will continue to enforce an understanding of gender relations in which men are expected and permitted to govern both their own lives and the lives of the women with whom they are intimate. For that reason, I believe that we must rethink the model of responsibility itself so that we may begin to recognize and act on legitimate feelings of sympathy for the accused person,⁴⁴³ whether female or male, without constructing those to whom we do extend leniency as less than full human beings.

As I suggested above,⁴⁴⁴ the facts reported in the battered woman cases are capable of generating multiple theoretical interpretations, each of which provides different experiences (or realities, if you will), both for the people who live in violent homes and for those who observe or assist the family members. For example, the widely cited work of Carol Gilligan⁴⁴⁵ offers an alternative explanation that we might draw upon if we were inclined to revise the battered woman syndrome defense. Of course, Gilligan never studied women involved in abusive marriages, and it would not be surprising if she were to reject my tentative application of her theories to this situation. However, Gilligan's work yields a description of the accused woman's psychological processes that, at least on the surface, seems less pejorative than that furnished by the current defense. Gilligan

the questionable virtues of capitalism, and ultimately more moral than men. But they disagree with the Victorians' view that women are also more passive than men, less competent, more timid and naturally demure." *Id.* In the sentence that I rephrase, Williams observes that "[t]hese 'relational feminists,' as they have been aptly called, reclaim the compliments of Victorian gender ideology while rejecting its insults." *Id.* (footnote omitted). In contrast to Williams' characterization of Gilligan's theory, the battered woman syndrome defense testifies to woman's passivity, incompetence, and timidity, without attributing to her any positive qualities or traits.

442. See Littleton, *supra* note 358, at 52 ("We cannot afford to treat our goal as the limited, albeit important one of gaining acquittal for battered women who kill; our goal must be the far more difficult one of stopping the violence.").

443. See Boldt, *supra* note 33, at 2267-69 (discussing the tension between the model of responsibility based on a capacity for practical reasoning and many people's instinctual sympathy for criminals with disadvantaged backgrounds).

444. See *supra* text accompanying notes 332-45.

445. The work I have in mind is, of course, Gilligan's book, *In a Different Voice*, in which she concludes that men and women invoke different values in resolving moral dilemmas. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

reports that, in the course of researching the manner in which people define and resolve moral conflicts, she discovered that men and women present "different modes of thinking," particularly with respect to relationships.⁴⁴⁶ Whereas men value autonomy and perceive the actors involved in a moral dilemma as "opponents in a contest of rights," women value caring and construe the actors "as members of a network of relationships on whose continuation they all depend."⁴⁴⁷ For men, responsibility connotes self-restraint and a "limitation" on action, while, for women, responsibility means responding to the needs of others and an "extension" of action.⁴⁴⁸ Therefore, in contrast to men, who resolve moral problems by assuming that their primary responsibility is to themselves and then weighing their responsibility to others, women "[p]roceed[] from a premise of connection" so that first they consider their responsibility to others and only then measure the extent to which they also have a responsibility to themselves.⁴⁴⁹

Applied to the woman who lives in a violent home, Gilligan's findings suggest that the woman is not trapped there by a paralyzing mental disorder, but rather that she made a choice to remain in the relationship out of a conviction that she has a responsibility to care for her troubled spouse and to sustain the network of family life, especially to assure the welfare of her children. According to this argument, then, the woman who experiences battering at the hands of her husband should not be faulted for her failure to leave such a physically and psychologically damaging situation, but, on the contrary, applauded for her endurance, her perseverance, and self-sacrifice in order to nurture her violently explosive spouse and repair, if possible, their pathological interactions.⁴⁵⁰

446. *Id.* at 1-2, 24-63.

447. *Id.* at 30.

448. *See id.* at 37-38.

449. *See id.* at 38.

450. I have found one study of women in abusive relationships that refutes the learned helplessness diagnosis and offers an alternative explanation of their experience. *See GONDOLF & FISHER, supra* note 103, at 3-22. Not surprisingly, the authors of this study refer approvingly, though briefly, to Gilligan's revised model of women's developmental psychology. *Id.* at 20. Relying on their own and other researchers' empirical data, including the findings made by Lenore Walker, the authors argue that battered women are "survivors" who "assertively and persistently attempt to do something about their abuse." *Id.* at 93. While women may begin their marriages holding "societal conceptions of their duty in a relationship," which they endeavor to satisfy, they abandon those conceptions when they discover that they are "no longer plausible"; far from being pathological, the women are "rational" in that they "learn . . . that the self-blame associated with learned helplessness is inappropriate." *Id.* at 16-17. This study also disputes Walker's conclusion that battered women, like the dogs in Seligman's experiments, often must undergo therapeutic retraining before they can even perceive alternatives to remaining in the dangerous relationship. Rather than requiring the "cognitive restructuring" that Walker recommends for some women who have survived domestic abuse, *see WALKER, supra* note 103, at 125-28, the women "heroically" overcome their "previous conditioning and present circumstances," and they begin seeking help that will either stop the violence or permit them to leave the relationship. *See GONDOLF & FISHER, supra* note 103, at 18, 20-21; GORDON, *supra* note 320, at 252 (recounting battered women's efforts to solicit help from child protection agencies). Therefore, the study implies, the question that requires an

Although the foregoing account seems to be both as plausible and less misogynist than that provided by the learned helplessness diagnosis, there are several reasons to doubt that the defense, if revised along these lines, would constitute much of an improvement over the battered woman syndrome theory. A primary problem with this strategy is that the human traits (or values), such as rational self-restraint, that Gilligan associates with men, but not women, are precisely those that the criminal law prizes most highly and, of course, assigns to the responsible actor. If we reinterpret the woman's behavior as the product of her commitment to an ethics of caring without revising the content of the model of responsibility so that it too values caring, we still are institutionalizing within law an understanding that women are dispossessed of the salient attributes that the model of responsibility prizes most. Hence, this revised defense also, stubbornly, construes women as only partially (innately inadequate) responsible agents, even if it urges that society should afford them leniency out of a sense of compassion for their incorrigible deficiencies of gender.

Another significant problem with this strategy is that a doctrine that endorses the understanding that women, but not men, are nurturing of others and of relationships is not clearly helpful to women. Such a doctrine, which depends on (and encourages) the perception that women but not men are gendered to care for others, ultimately obscures the intended goal, which is to liberate women from the consciousness that they are inevitably the battered subject. The inequality that such a revised defense subtly masks is not simply that society generally devalues the particular ethical qualities that Gilligan, among others, assigns to women, for it is at least partially true that culture celebrates those qualities when located within their proper sphere. We may even go so far as to assume that the community does not (consciously) attribute a variety of negative traits to those (always women) who embody and provide this care. Rather, the inequality of the revised defense surfaces when we perceive that the sphere of activity where the model caring self is permitted to act is limited⁴⁵¹ to the context of family and other intimate relationships, where it earns the (not trivial) satisfactions those relationships afford. Caring is impotent, even denigrated, in the sphere of work and often is conceived as weakness in the sphere of public action. There, only an aggressive commitment to self-interests (or company interests) secures the rewards those arenas have to offer.⁴⁵² If we

answer is not why women fail to leave violent spouses, but why the agencies to which they turn for assistance fail to provide effective support. See GONDOLF & FISHER, *supra* note 103, at 3.

451. See Brief for *Amicus Curiae* American Psychological Association in Support of Respondent at 13-14, *Price Waterhouse v. Hopkins*, 485 U.S. 933 (1988) (No. 87-1167) (describing empirical studies showing that "nurturance or affiliation, traits associated with women" are not as "highly valued" in the workplace).

452. See *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 319-21 (7th Cir. 1988) (upholding district court's finding that women had different attitudes, interests, beliefs, and lifestyles from men, which made them choose lower paying jobs).

base law on the judgment that acts of selfless caring are peculiarly the province of women, we risk endorsing, once again, the tyrannical ideology that first assigns women a sex-specific gender role and then imprisons them in the domestic sphere,⁴⁵³ the only location where their behavior is efficacious. The tyrannical ideology, then, finally, reproduces the centuries' old denial to women of the satisfactions of public activity and achievement.

Revising the defense to emphasize women's commitment to caring would raise two additional, related problems. First, contrary to the assumptions indulged in the preceding paragraph, it would not be surprising to find that the community, though valuing women's caring, still closely associates caring with other, negative qualities that have traditionally been assigned to women.⁴⁵⁴ Indeed, the line between women's self-sacrifice, which Gilligan's theory finds praiseworthy, and passive subjugation to the wills of others may be virtually invisible to a community that prizes autonomy and the pursuit of individual interests. Thus, it is not clear that a revised defense ultimately would be any less pejorative and psychologically disabling than the battered woman syndrome theory. Second, I am reluctant to recommend that we simply replace the law's current vision of women as susceptible to learned helplessness with an understanding that women are nurturing and dedicated to their relationships. If the model of responsibility is preserved intact, a doctrine that has the effect of extending leniency to the woman who can show she was caring will create for women the same perverse self-immolating incentives as the battered woman syndrome and marital coercion defenses, both of which reward women for unconsciously conspiring in their own negative self-definition. Women will continue to be punished for possessing attributes that culture strenuously encourages men to cultivate. That is, under this revised defense, evidence of the woman's independent thought and conduct still will constitute a badge of culpability. Rather than being celebrated by law as vigorously autonomous, a quality that is applauded and rewarded when discovered in men, the independent woman will be disparaged because she was uncaring, aloof, and disdainful of nurturing her familial relationships.⁴⁵⁵

In short, special excuses for women, in whatever form, reinforce incommensurable gender differences, in which the qualities characterized as male inevitably are privileged over those characterized as female; such

453. See, e.g., Cott, *supra* note 440, at 63-100 (discussing domesticity and the contrast between the home and the world).

454. See Williams, *supra* note 440, at 807; Brief for *Amicus Curiae* American Psychological Association in Support of Respondent at 13, *Price Waterhouse* (No. 87-1167) (referring to empirical studies that show that "women are thought to be incompetent, weak, dependent, passive, uncompetitive, and unconfident").

455. Cf. Brief for *Amicus Curiae* American Psychological Association in Support of Respondent at 18-20, *Price Waterhouse* (No. 87-1167) ("Women pursuing traditionally masculine occupations are likely to be penalized for their violation of sex-related expectations no matter what their background or qualifications . . .").

excuses obscure feminist efforts to clarify our understanding of gender as a patriarchally constructed hierarchy of social differences and behavioral expectations.⁴⁵⁶ By the same token, our practice of excusing women reveals the inadequacy of the theory of responsibility presently endorsed by the criminal law. The theory is inadequate precisely because it is not capable of accommodating women's experiences without judging women to be deviant from and inferior to the model human actor the theory describes. Our practice of excusing women reveals that the ostensibly human traits and psychological processes privileged by the model of responsibility are those that culture construes as male. Therefore, the task we must undertake is to reconceive and revise the model of responsibility so that it values characteristics traditionally associated with women, as well as with men.

Although my ongoing research on this problem is too preliminary to be included here, I want to anticipate and respond briefly to an objection that will be urged as a reason for refusing even to consider the task I propose. As the numerous critics of Judge Bazelon's disadvantaged background defense insist, the judge's proposal is objectionable because it would invite, if not require, various forms of civil intervention into citizens' lives, perhaps even before they had offended. Our present model of responsibility should be retained, it will be argued, because it assures us that people will be permitted to govern their own lives, up until the point at which they unequivocally manifest their dangerous propensities by committing a criminal violation. Because so many of us have internalized a powerful desire for personal autonomy, this objection is a weighty one and must be considered seriously.

Of course, until we have theorized a revised model of responsibility, it is difficult to predict whether careful adjustments and rethinkings will actually unleash the official hounds of intervention. But two preliminary responses to this objection suggest that we should not be deflected from this task. In the first place, the people who usually are identified as the candidates for a new excuse from criminal liability, such as women and the actors eligible for the disadvantaged background excuse, are hardly strangers to interventionist discipline and regulation. For centuries, law has intervened in women's lives by enforcing an understanding of women's nature that confines them within the domestic arena and encourages automatic practices of self-relegation to the control of their husbands. Similarly, people whose lives are economically and socially impoverished are familiar with the overt intervention that routinely accompanies the governmental aid necessary for survival. Certainly, then, it would not be unreasonable to assess any threat of intervention from the perspective of the

456. See *CORR*, *supra* note 311, at 4 (defining an element of feminism as a presupposition that women's condition is socially constructed); *MACKINNON*, *supra* note 127, at 129 (asserting that "the interests of male sexuality construct what sexuality as such means" and thus determine "women's biographies").

candidates for these excuses, as well as that of members of the criminal law academy. Judged from the perspective of women and of those who are economically impoverished, intervention, especially if it holds out the possibility of freeing us from abusive human masters or from crushing economic privation, may not seem to be nearly as threatening as the alternative. From our perspective, official intervention may not constitute a threat to our dreams of achievement, to our yearning to be "somebody special," particularly if it could be accomplished prior to our entanglement with the criminal justice system. From our perspective, perhaps it is the refusal to intervene and offer assistance that is certain to extinguish our culturally sacred prize of self-reliance and self-determination. Indeed, from the perspective of those of us who have little autonomy, little space for self-expression, and little financial self-sovereignty to lose, refusal to intervene looks much more like a treacherous absence of care, which is valorized so vigorously in another context, than like respect for our autonomous selves.⁴⁵⁷

Moreover, if we adopt a new theory of responsibility—for example, one that transvalues the morality of individual autonomy to affirm the perspective of those to whom such freedom is sheer indifference and, therefore, enlarges the field of ethical responsibility—then our experience of intervention will be reconstructed from the perspective of that revised theory. Perhaps Judge Bazelon's proposal now appears to be a theoretical, as well as a practical failure, simply because he situated it within the constricting and weakly undertheorized propositions of our present model of responsibility, a model dependent on a trenchantly antisocial and, again, undertheorized model of human free will. The challenge is to find a way to revise our understanding of personal responsibility for conduct so that we may continue to lay claim to our achievements and good works, as well as our misconduct, while at the same time alleviating the conditions that lead to crime without condemning the recipients of our assistance as less than full human subjects.⁴⁵⁸ Perhaps, then, intervention may be intended and perceived as helpful particularly if it arrives in time to avert forms of physical and psychological misery that inevitably erupt in violent, criminal transgressions.

457. Here, I have in mind Lawrence Stone's remark that "[t]he spirit of toleration for the autonomy of others derives as much from indifference as from principle." STONE, *supra* note 161, at 224.

458. Nathan Caplan and Stephen Nelson made a similar argument two decades ago in their critique of psychological research of social problems, such as poverty. They argued that "[o]ne of the most serious philosophical and psychological problems of our age may be to provide a view of man and his surroundings that recognizes the validity of situational causality without leaving the individual feeling helpless and unable to shape his fate." Caplan & Nelson, *supra* note 100, at 209 n.9.

