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Battered Child Defendants in California: The Admissibility of Evidence Regarding the Effects of Abuse on a Child's Honest and Reasonable Belief of Imminent Danger

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INTRODUCTION

Jose and Kitty sat on the couch with their backs to the door, watching television. Suddenly, the door burst open and a series of shotgun blasts were fired, the rapid sequence sounding like a sting of firecrackers exploding. Moments later, the room was silent. Jose was dead on the couch, having suffered numerous shots to his body, including a wound to the back of his head. His wife Kitty was also dead. She was lying on the floor with several wounds, including a frontal shotgun blast which had removed a portion of her head.[1]

Who committed these heinous acts? Lyle and Erik Menendez, the victims' adult sons, confessed to the two slayings and were subsequently charged with two counts each of first degree murder.[2] The brothers claimed that they killed their parents in self-defense.[3] The specific theory they presented was an imperfect theory of self-defense[4] referred to as the battered child defense.[5] A theory of self-

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1. *See* John Johnson & Ronald L. Soble, *The Brothers Menendez*, L.A. TIMES MAG., July 22, 1990, at 6 (describing the details of the murders of Jose and Kitty Menendez).

2. *Id.*

3. Gale Holland, *An Arresting Trial; TV Transforms the Menendez Brothers Into Star Witnesses*, NEWSDAY, Jan. 2, 1994, at 7; *see* CAL. PENAL CODE § 197(3) (West 1988) (defining self-defense as the authorized use of deadly force against another who poses an imminent threat of death or great bodily injury when there are no other reasonable alternatives); CALJIC 5.13 (providing the California jury instruction for justifiable homicide as a lawful defense of self or another); BAJI 7.55 (1992) (stating the jury instruction for self-defense, or the defense of others); MELROY B. HUTNICK, CRIMINAL LAW AND COURT PROCEDURES 60 (1974) (defining self-defense as a theory which permits a person to take a human life and not be held criminally responsible for the act). A person may use deadly force in order to defend against death or great bodily harm. *Id.*; *see also* John N. Scobey, *Self-Defense Parricide: Expert Psychiatric Testimony on the Battered Child Syndrome*, 13 HAMLINE L. REV. 181, 181 (1992) (noting that in a parricide, self-defense is the primary motivation for children's actions); *infra* notes 5-7 and accompanying text (discussing the theory of the Menendez brothers' defense); *cf.* Anne Burke, Menendez *Jurors Recount Gender War in Jury Room; Women on Panel Say Men Pushed Murder Conviction*, S.F. EXAMINER, Jan. 30, 1994, at A2 (quoting Erik Menendez juror Hazel Thornton as saying the killings were not pure self-defense).

4. *See* People v. Flannel, 25 Cal. 3d 668, 674, 603 P.2d 1, 4, 160 Cal. Rptr. 84, 87 (1979) (defining imperfect self-defense as the honest but unreasonable belief that force is necessary to defend against death or great bodily harm); *infra* notes 96-118, 312-317 and accompanying text (explaining the concept of imperfect self-defense); *infra* notes 194-223, 318-323 and accompanying text (discussing imperfect self-defense as it pertains to battered children).

5. George J. Church, *Sons and Murderers*, TIME, Oct. 4, 1993, at 68; *see* Alan Abrahamson, Menendez *Hearing Revives Some Fascination With Case*, L.A. TIMES, Oct. 28, 1994, at B3 (reporting that the brothers testified during their original trials that they had lashed out in self-defense after years of physical, mental, and sexual abuse); *Erik Menendez Retrial to Put Star Attorney Back in Spotlight*, WASH. POST, Apr. 6, 1994, at C12 (explaining that the defendant's testimony was based on an emotional and tearful defense claiming that he suffered from sexual molestation); *see also infra* note 198 and accompanying text (classifying the battered child defense as an imperfect self-defense). Other types of imperfect self-defenses include the battered woman defense because the focus is on the subjective fear of the female defendant. Other examples of situations in which an abused person has used a theory of imperfect self-defense include battered men who kill their abusers, battered women who kill their female partners, and battered roommates. Lenore E. A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 321 (1992); *see infra* notes 190-191 and accompanying text (discussing other situations to which evidence of the state of mind of a battered defendant has been considered).

defense is deemed imperfect if the person had an honest but *unreasonable* belief of imminent danger.[6] Relying on this theory, the brothers argued that their actions were justified because having previously been abused by their parents, they believed their parents' behavior that evening indicated that their parents intended to kill them.[7]

The battered child defense has been used by some abused children who reacted to their abusers by becoming violent and killing them.[8] The defense stems from the child's fear of the parent as a result of years of physical, sexual, and emotional abuse which causes the child to interpret an act by the parent as a threat, whereas, an outsider would not.[9] Several states have considered the testimony of expert witnesses regarding the effects of abuse on the child's honest and reasonable fear of imminent danger and have ultimately reached different conclusions.[10] The Menendez trial has been the most publicized case in California to provide a jury with the opportunity to consider the history of a child's abuse when assessing his level of culpability.[11]

In January of 1994, the Menendez brothers' murder trial ended in a mistrial for each defendant.[12] These inconclusive decisions did not resolve whether California would accept or reject the admissibility of evidence of the child's abuse. The outcomes also prompted Los Angeles County District Attorney Gil Garcetti to announce that the brothers would be retried for the first degree murders.[13] The

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6. *See infra* notes 96-118, 312-323 and accompanying text (discussing the concept of imperfect self-defense); *infra* note 309 and accompanying text (discussing the concept of perfect self-defense).

7. *See infra* notes 305-317 and accompanying text (discussing the brothers' allegations of abuse by their parents); *cf.* State v. Cruickshank, 484 N.Y.S.2d 328 (1985) (finding that the fact that the defendant teenager had been sexually abused by her father was sufficient to mitigate her crime because the court determined that her action arose out of fear of further abuse).

8. *See infra* notes 194-223, 318-323 and accompanying text (discussing the admissibility of the state of mind of a battered child defendant); *infra* notes 228-86 and accompanying text (discussing specific cases in which children have attempted to present evidence of their state of mind at the time of the killing); *see also* Nancy Blodgett, *Self-Defense: Parricide Defendants Cite Sexual Abuse as Justification*, A.B.A. J., June 1, 1987, at 37 (reporting that over 90% of the children who kill their parents have been physically, emotionally, or sexually abused).

9. Church, *supra* note 5, at 68.

10. *See infra* notes 228-286 and accompanying text (discussing the admissibility of evidence in other jurisdictions of a battered child defendant's state of mind).

11. *See supra* notes 1-7 and accompanying text, *infra* notes 302-317 and accompanying text (discussing the *Menendez* case). The brothers' trial took place in the same courtroom with two different juries. The theory supporting this procedure was that the same or similar evidence would be offered against each defendant and it would be more efficient to try the defendants together. There were occasions in which one jury would be excused because evidence was not relevant to a particular defendant. In addition, the brothers had separate teams of defense counsel who argued solely for their client. Lois Romano, *The Reliable Source*, WASH. POST, Jan. 24, 1995, at E3.

12. *See* Romano, *supra* note 11, at E3 (reporting that Los Angeles County Superior Court Judge Stanley Weisberg set June 12, 1995, as the date for the retrial of the Menendez brothers). One year ago, in the original trial, the brothers were tried as codefendants before two separate juries which deadlocked on murder and manslaughter charges. *Id.*

13. RON SOBLE & JOHN JOHNSON, BLOOD BROTHERS 391 (1994).

brothers will likely be permitted to use the same theory of defense during the second trial.[14] This certainty stems from the 1994 California Supreme Court decision affirming *In re Christian*,[15] a case in which the merits of imperfect self-defense were at issue.[16] Because the supreme court upheld the concept of imperfect self-defense, defendants can continue to present evidence of prior abuse in order to show their fear was well-grounded.

The battered child defense is the most recent theory of imperfect self-defense defense to evolve.[17] It is similar to the battered woman defense, in which the jury is allowed to consider the defendant's subjective state of mind at the time of the killing in order to determine the reasonableness of her conduct.[18] The number of instances in which abusive parents are killed by their children does not presently comprise a significant percentage of total homicides.[19] However, due to the growing public awareness of child abuse, it seems possible to infer that parricides may become more common, which may impact the criminal justice system, the social service system, and the children themselves.

The purpose of this Comment is to explore the reasoning behind the admissibility of evidence of a battered child defendant's state of mind at the time of the killing and to determine the impact that this theory of imperfect self-defense might have on the California criminal justice system. Part I explores the origin and rationale underlying justification defenses.[20] Part II describes the theory of imperfect self-defense.[21] Part III discusses the admissibility of state of

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14. *See infra* notes 15-16 and accompanying text (discussing the California Supreme Court's recent consideration of imperfect self-defense); *infra* notes 287-352 and accompanying text (anticipating the admissibility of evidence of a battered child defendant's state of mind to negate the element of malice in murder).

15. 7 Cal. 4th 768, 872 P.2d 574, 30 Cal. Rptr. 2d 33 (1994).

16. *Christian*, 7 Cal. 4th at 771, 872 P.2d at 575, 30 Cal. Rptr. 2d at 34; *see id.* (upholding the theory of imperfect self-defense by articulating that it arises from a rational need which, absent being terrorized, the defendant would not have felt).

17. Scobey, *supra* note 3, at 182.

18. *Id.*; *see* State v. Janes, 850 P.2d 495, 503 (Wash. 1993) (determining that sufficient scientific evidence exists to justify admitting evidence regarding the battered woman syndrome to analogous situations affecting children); Jamie H. Sacks, Comment, *A New Age of Understanding: Allowing Self-Defense Claims For Battered Children Who Kill Their Abusers*, 10 J. CONTEMP. HEALTH L. & POL'Y 349, 352 (1994) (arguing that it is logical to extend the recognized self-defense claim for women who kill their batterers to children who kill their abusers); *id.* (noting that the psychological effects upon battered children mirror those of battered women and the self-defense claims of each are similar); *infra* notes 127-191 and accompanying text (discussing the evolution of the battered woman's defense).

19. *See* PAUL MONES, WHEN A CHILD KILLS 7 (1991) (citing FBI statistics documenting an average of 350 parricide cases annually in the United States between 1976-1990); Blodgett, *supra* note 8, at 37 (stating that about 400 homicides each year result from children killing their parents or hiring another to do the same); *see also* MONES, at 27 (1991) (noting that parricide is the rarest form of intrafamily murder, except for the less frequent incidents of brothers killing sisters); Mark Thompson, *Battered Child Syndrome Gets No Respect*, L.A. DAILY J., Apr. 26, 1985, at 3 (indicating that in the majority of the parricide cases in 1982, the child had suffered a long period of abuse by the parent).

20. *See infra* notes 26-95 and accompanying text.

21. *See infra* notes 96-120 and accompanying text.

mind evidence in cases of battered woman defendants.[22] Part IV focuses on other states' treatment of evidence regarding a battered child defendant's state of mind.[23] Part V contemplates the California courts' consideration of admitting such evidence in light of the state's current treatment of state of mind evidence in cases with battered woman defendants.[24] Additionally, this Comment addresses the California Supreme Court's recent decision to uphold the concept of imperfect self-defense, and considers ramifications that may result from admitting evidence regarding a battered child's state of mind.[25]

I. THE JUSTIFICATION AND HISTORY OF SELF-DEFENSE

Self-defense originated to protect those who were forced to kill an aggressor in order to save their own lives.[26] Although the theory of self-defense evolved under the common law and, eventually, the Model Penal Code, its basic elements have remained constant.[27] Thus, in order to understand the evolution of self-defense, it is first necessary to review the common law.

A. Common Law

Common law self-defense arose as a defense to justify the use of deadly force to protect one's home or property from another.[28] In order for a person to assert

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22. *See infra* notes 121-193 and accompanying text.

23. *See infra* notes 194-284 and accompanying text.

24. *See infra* notes 285-352 and accompanying text.

25. *See infra* notes 324-352 and accompanying text.

26. *See* State v. Sloan, 47 Mo. 604, 610 (1871) (setting forth the common law rule of self-defense which permits a person to kill an assailant if the person reasonably believes that the assailant is about to cause death or great bodily harm to his person); *see also* JOSEPH GOLDSTEIN ET AL., CRIMINAL LAW: THEORY AND PROCESS 958 (1974) (describing the act of self-defense as one person intentionally killing another in order to further the community objective of preventing unlawful death or great bodily injury to one's person); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 123 (1985) (explaining that traditional self-defense laws were promulgated to allow a person who was unlawfully attacked by another and who lacked time to seek assistance from the legal system to take reasonable steps to defend his life).

27. *See infra* notes 69-75 and accompanying text (comparing the common law theory of self-defense to the Model Penal Code's provision for justification defenses).

28. Thompson v. State, 55 Ga. 47, 50 (1875); *see* Leeper v. State, 589 P.2d 379, 382 (Wyo. 1979) (providing that self-defense justifies a homicide under circumstances in which a reasonable person deems it necessary to prevent death or great bodily harm); *Thompson*, 55 Ga. at 50 (defining justifiable homicide as the killing of another in self-defense or in defense of habitat, person, or property); *see also* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 415 (2d ed. 1960) (stating that common law criminal provisions were developed on the premise that it is generally possible for people to control their conduct so as to not inflict serious bodily harm upon others). Hall notes, however, that common law self-defense provisions also recognized that the infliction of serious harm is sometimes justifiable. *Id.* The early common law required three conditions for justifiable self-defense: (1) The actor must have inflicted the harm under pressure; (2) the force must have been of equal value to that which was threatened; (3) the harm must have been the only alternative available. *Id.* at 426. *See generally* CAL. PENAL CODE § 198.5 (West 1988) (setting forth a recent example of

self-defense under the common law, three elements generally must be proven.[29] First, the person must have a reasonable fear of an apparent danger that an aggressor is going to inflict death or great bodily harm upon him.[30] Second, the person must have no reasonable means of escape and deadly force must be the only option available for self-protection.[31] Third, the amount of force used by the intended victim must be proportional to the magnitude of the harm feared from the aggressor.[32] These common law elements survive in the modern approach to self-defense.[33]

Depending on the jurisdiction, however, additional requirements may exist. For example, some jurisdictions deny the defense to individuals who provoked their aggressor.[34] Another common requirement is that the intended victim not have been the aggressor or in good faith have declined further combat, and that the intended victim also felt that a use of force was necessary.[35] In most juris-

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a statute which provides for the defense of one's home). The Home Protection Bill of Rights provides the presumption that any person who uses deadly force in the protection of his home against another who had forcibly entered the home held a reasonable fear of death or great bodily injury to himself or a member of his family. *Id.*

29. WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 5.7 (2d ed. 1987).

30. LAFAVE & SCOTT, *supra* note 29, at § 5.7; *see also Leeper*, 589 P.2d at 382 (specifying that the traditional self-defense justification requires that the defendant have a reasonable fear of death or great bodily harm); Kirby v. State, 8 So. 110, 111 (Ala. 1889) (emphasizing that in addition to preventing death, a person may use self-defense to prevent great bodily harm).

31. LAFAVE & SCOTT, *supra* note 29, at §§ 5.7, 5.7(a); *see* Shorter v. People, 2 N.Y. 193, 201 (1849) (providing that the defendant must have believed that deadly force was necessary and that a reasonable person in the same or similar circumstances would have reacted the same way). *But see* State v. West, 12 So. 7, 9 (La. 1893) (stating that as a general rule, one who is assaulted by another with a dangerous weapon is not justified in taking the assailant's life).

32. LAFAVE & SCOTT, *supra* note 29, at § 5.7(b); *see* People v. Shimonaka, 16 Cal. App. 117, 124, 116 P. 327, 330 (1911) (ruling that a person who is assaulted is justified in using as much force as necessary in response, although if he is faced with a negligible assault, he may not use any measure of great violence); Trogdon v. State, 32 N.E. 725, 726-27 (Ind. 1892) (articulating that a person may only use as much force as is necessary to protect himself); MODEL PENAL CODE AND COMMENTARIES § 3.04 cmt. 4(a) (1985) [hereinafter COMMENTARIES] (discussing the common law principle that the force used must bear a reasonable relation to the force evaded); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW AND PROCEDURE 691 (5th ed. 1977) (providing that a person may use such force as appears reasonably necessary to defend against an apparent threat of harm from another).

33. *See* LAFAVE & SCOTT, *supra* note 29, at § 5.7 (stating that modern laws allow an intended victim to use force in order to defend himself when he is assaulted by another and has no other lawful alternative).

34. *See* Leeper v. State, 589 P.2d 379, 383 (Wyo. 1979) (explaining that under the traditional self-defense doctrine, a person was not justified in claiming self-defense if he had initiated the attack); Bain v. State, 70 Ala. 4, 7 (1881) (specifying that the defendant must neither have provoked nor encouraged the situation, and must at the time have been so threatened as to create a reasonable apprehension of loss of life or grievous bodily harm, without other means of escape). *But see* Commonwealth v. Shurlock, 14 Leg. Int. 33 (Pa. 1857) (maintaining that, in the eyes of the law, no kind of provocation justifies or excuses the taking of human life).

35. Heard v. State, 70 Ga. 597, 600 (1883); *see* Grainger v. State, 13 Tenn. 458, 462 (1830) (indicating that a person who senses the threat of imminent great bodily harm from another is justified in killing out of fear or cowardice); *cf.* State v. Wilson, 62 A. 227, 231 (Del. 1904) (establishing that when a person is assaulted, he is not obliged to wait until he is struck by an impending blow before responding to the assault; but he is not justified in using more force than is reasonably necessary under the circumstances).

dictions, however, it will not matter if the intended victim harbored adverse feelings toward the aggressor, so long as the intended victim's primary motivation for killing the aggressor was fear.[36]

The common law jurisdictions also vary in the amount of discretion given juries in evaluating the imminence of the danger; but they are generally in agreement that it is a function for the trier of fact to determine whether there was actual danger at the time of the killing.[37] According to this view, the intended victim need not wait until an armed assailant actually makes an attack before defending himself.[38] For example, some courts instruct the jury that if a threat of death or great bodily harm exists, the intended victim may protect himself before the assailant comes within striking distance.[39] Other courts, however, require not only that the danger be present, but that it exists at the instant that self-defense is used.[40]

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36. *See* Cannon v. State, 57 Miss. 147, 154 (1879) (clarifying that a person's animosity towards another does not deny him the right to kill that other in self-defense); Golden v. State, 25 Ga. 527, 532 (1858) (validating a claim of self-defense even if the defendant had expressed malice toward the deceased); *see also* Palmore v. State, 29 Ark. 248, 266 (1874) (requiring that the danger be imminent and sufficiently urgent as to render the killing necessary). In essence, the motive behind the actions of the accused must be fear, as might be entertained by a reasonable person, not revenge. *Id.*

37. *See* People v. Williams, 205 N.E.2d 749, 752-53 (Ill. App. 1965) (specifying that the trier of fact must consider whether an imminent threat is posed and whether the aggressor is willing and able to injure the defendant); People v. Taylor, 4 Cal. App. 31, 37, 87 P. 215, 218 (1906) (stating that in order to justify a killing as self-defense, the danger must have existed at the very time the defendant killed the deceased); State v. Rose, 1 P. 817, 820-21 (Kan. 1883) (approving the propriety of a jury instruction which provides that no one can kill another because he may fear injury at some future time); *Palmore*, 29 Ark. at 266 (holding that the defendant must act under the influence of such fears as would a reasonable person); Dupree v. State, 33 Ala. 380, 389 (1859) (ruling that mere fear, though well-grounded, is not a justification for personal violence unless the danger appears to be imminent or threatening); Dyson v. State, 26 Miss. (4 Cushm.) 362, 386-87 (1853) (dictating that the bare fear of danger or great bodily harm, unaccompanied by any overt act indicating a present intention to injure or kill, does not warrant a killing in self-defense); *cf. infra* notes 56-58 and accompanying text (discussing immediacy under the Model Penal Code).

38. *See* Goodall v. State, 1 Or. 333, 337 (1861) (commenting that if there is a reasonable ground for the defendant to believe he is in imminent danger of death or great bodily harm, it is not necessary that the defendant wait until an assault is actually committed); *see also* Fortenberry v. State, 55 Miss. 403, 408-09 (1877) (recognizing that the actual harm might precede or follow the defensive act by a short interval of time). *But see* People v. Scoggins, 37 Cal. 676, 683 (1869) (noting previous threats alone do not justify a deadly assault).

39. *See, e.g., Goodall*, 1 Or. at 337 (instructing the jury that if the defendant's reaction reveals that he subjectively feared for his life, the defendant would not have to wait until he was attacked before defending himself). *But see* People v. Lynch, 101 Cal. 229, 231, 35 P. 860, 861 (1894) (providing that the danger present must be that which a reasonable person would find life threatening).

40. *See* People v. Williams, 205 N.E.2d 749, 753 (Ill. 1965) (judging the defendant's use of deadly force to be justified because the defendant thought the aggressor's harm was going to be inflicted immediately); State v. Smith, 71 P. 973, 976 (Or. 1903) (stating that a homicide could not be justified as self-defense unless the accused was in imminent danger of another and the killing was done to prevent the apparent commission of a felony by the other upon the accused); State v. Hollis, 1 Houst. Cr. Cas. 24, 27 (Del. 1858) (remarking that neither fear nor apprehension of death or great bodily harm totally excuses one person for killing another; the danger must be imminent and real).

The required degree of reasonableness of the intended victim's apprehension is another issue on which the common law courts differ. Most of the courts agree that the danger must have a strong foundation and be honestly entertained.[41] The courts, however, differ in their determination of the reasonableness of the fear.[42]

There are four basic approaches that courts take with respect to the amount of the defendant's subjective fear that a jury may consider when assessing the reasonableness of the defendant's fear. Some courts combine an objective test and a subjective test to evaluate the perceived danger.[43] These courts require that in order to justify self-defense, the person must have had a subjective belief that there was a danger of death or great bodily injury, and the circumstances must have been such that a reasonable person in the same situation would have thought it necessary to use deadly force.[44] A second group of courts use an objective test which evaluates only whether a reasonable person would have felt it necessary to use deadly force.[45] These courts reason that killing in self-defense is justifiable as long as a person experienced some apprehension of harm and there are reasonable grounds for believing that the danger exists.[46] Courts following the third approach emphasize the defendant's actual belief of fear.[47] These courts consider homicide justifiable only when the defendant actually believed that he was faced with imminent danger, regardless of whether a reasonable person in the same situation would have had the same belief.[48] The last group of courts further nar

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41. *See, e.g.*, People v. Piper, 71 N.W. 174, 175 (Mich. 1897) (finding that the defendant must have an honest belief that his life is in danger); Jackson v. State, 78 Ala. 471, 473 (1885) (deeming it imperative that the defendant honestly and reasonably believe that killing his assailant is a necessity); *see also* People v. Hurley, 8 Cal. 390, 391 (1857) (stating that the defendant must have a reasonable impression that homicide is necessary to defend his life).

42. *See infra* notes 43-49 and accompanying text (describing four theories adopted by courts to determine the level of reasonableness of a defendant's fear).

43. *See, e.g.*, People v. DeWitt, 68 Cal. 584, 587, 10 P. 212, 213-14 (1886) (maintaining that the danger must appear to the comprehension of a reasonable person in a similar situation to be imminent, and based on the danger, a defense must be necessary).

44. *See, e.g.*, Palmore v. State, 29 Ark. 248, 266 (1874) (ruling that the defendant must act under the influence of such fears as would a reasonable person); Shorter v. People, 2 N.Y. 193, 201-02 (1849) (providing that the defendant may only use the force that a reasonable person would use in the same situation).

45. *See, e.g.*, People v. Kennedy, 54 N.E. 51, 52 (N.Y. 1899) (holding that the defendant must show reasonable grounds for justifying his use of self-defense); State v. Warren, 41 A. 190, 191 (Del. O & T 1893) (holding that the fear must be that of an ordinary prudent man under similar circumstances).

46. *See, e.g.*, People v. Williams, 205 N.E.2d 749, 753 (Ill. App. 1965) (emphasizing that the belief of danger may be reasonable even if the defendant is mistaken).

47. *See, e.g.*, Goodall v. State, 1 Or. 333, 337 (1861) (instructing the jury that if the defendant's reaction revealed that he subjectively feared for his life, the defendant was not required to wait until he was attacked before defending himself).

48. *See* Walker v. State, 23 S.E. 992, 992 (Ga. 1895) (explaining that even if the conduct of the deceased would have made a reasonable man believe that his life was in danger, the defendant may not claim justifiable homicide unless the defendant himself felt such fear); *see, e.g.*, People v. Gonzales, 71 Cal. 569, 576, 12 P. 783, 786 (1887) (providing that to render a homicide justifiable on grounds of self-defense, the defendant must not only be in apparently imminent danger, but he must believe that he is in that perilous situation); Munday v. Commonwealth, 81 Ky. Rep. 233, 239 (1883) (stating that the defendant must actually

rows the scope of self-defense by requiring that the defendant's act was motivated by fear of the situation at the time, and for no other reason.[49] Because of the discrepancies between jurisdictions and in order to achieve greater consistency, the American Law Institute (ALI) drafted a penal code intended to serve as a model code for the states.[50]

B. The Model Penal Code

The inconsistency of common law criminal provisions prompted the ALI to draft the Model Penal Code (MPC) in order to promote uniformity in different jurisdictions. Within the MPC, the drafters included definitions and provisions for numerous crimes, punishments, and justifications.[51] The MPC has had a significant impact on the states; within the first twenty-two years of the MPC's existence, twenty-four states revised their penal codes.[52] All of these revisions

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believe that his life is in danger, but he need not have more than reasonable grounds on which to base his opinion); Batten v. State, 80 Ind. 394, 404 (1881) (specifying that the right to claim self-defense is not dependent upon the interpretation that a man of ordinary prudence would have under the same circumstances, but on the defendant's understanding of the situation).

49. *See, e.g.*, People v. Adams, 85 Cal. 231, 235, 24 P. 629, 631 (1890) (asserting that when a defendant attempts to justify a killing through self-defense, the proper jury instruction includes the directive that the defendant should have acted solely out of fear of the situation).

50. MODEL PENAL CODE (Proposed Official Draft 1962); *see* COMMENTARIES § 3.04 cmt. 1(b) (remarking that the Model Penal Code takes a consistent approach in evaluating the actor's belief in necessity for the use of force); *see also* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 683 (1983) (explaining that American criminal law has advanced significantly towards greater precision, clarity, and rationality primarily due to the Model Penal Code); *infra* notes 51-68 and accompanying text (discussing the Model Penal Code).

51. *See, e.g.*, MODEL PENAL CODE §§ 210.1-251.4 (1985) (discussing crimes such as homicide, assault, kidnapping, sexual offenses, arson, theft, and bribery); *id.* §§ 301.1-306.6 (1985) (discussing punishments such as probation, fines, imprisonment, and loss of rights); *id.* §§ 3.01-3.10 (1985) (discussing principles of justifications).

52. ALA. CODE §§ 13A-2-2 to 13A-2-4 (1994); ALASKA STAT. §§ 11.81.600, 11.81.610, 11.81.900(a) (1989 & Supp. 1994); ARIZ. REV. STAT. ANN. § 13-202 (1989 & West Supp. 1994); ARK. STAT. ANN. §§ 5-2-202 to 5-2-204 (Michie 1993); COLO. REV. STAT. §§ 18-1-501, 18-1-503 (1986 & Supp. 1994); CONN. GEN. STAT. ANN. §§ 53a-3(11), (14), 53a-5 (1994); DEL. CODE ANN. tit. 11, §§ 231, 251-253 (1987 & Supp. 1994); HAWAII REV. STAT. §§ 702-204, 702-206 to 702-208, 702-212 to 702-213 (1985 & Supp. 1994); ILL. ANN. STAT. ch. 720 para. 5/3-9 (Smith-Hurd 1993); KY. REV. STAT. §§ 501.010 to 501.050 (1995); ME. REV. STAT. ANN. tit. 17-A, §§ 34-35 (West 1983 & Supp. 1994); MO. ANN. STAT. §§ 562.016, 562.021, 562.026 (Vernon 1979 & Supp. 1994); MONT. CODE ANN. §§ 45-2-101(33), (37), (58), 45-2-103 to 45-2-104 (1993); N.H. REV. STAT. ANN. § 626:2 (1986 & Supp. 1994); N.J. STAT. ANN. § 2C:2-2 (West 1982); N.Y. PENAL LAW §§ 15.00(6), 15.05-15.15 (McKinney 1987); N.D. CENT. CODE § 12.1-02 (1985); OHIO REV. CODE ANN. §§ 2901.21-2901.22 (Page 1993); OR. REV. STAT. §§ 161.085, 161.115 (1993); 18 PA. CONS. STAT. ANN. §§ 302, 305 (Purdon 1983); TENN. CODE ANN. §§ 39-11-301, 39-11-302 (1991); TEX. PENAL CODE ANN. §§ 6.02- 6.03 (West 1994); UTAH CODE ANN. §§ 76-2-101 to 76-2-104 (Michie 1995); WASH. REV. CODE ANN. § 9A.08.010 (West 1988); *see* Robinson & Grall, *supra* note 50, at 685 (observing that the Model Penal Code has been overwhelmingly adopted by the states). *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 3.03 (1992) (discussing the Model Penal Code).

closely parallel the MPC.[53]

Self-defense is one of the issues addressed by the MPC.[54] In drafting the self-defense provision, the ALI had three aims: (1) To create a systematic and consistent approach to analyzing the appropriateness of the use of force; (2) to coordinate the standards used to evaluate the culpability of an actor using self-defense with the standards governing another actor with a similar level of culpability; and (3) to specify in detail the circumstances in which acts of force and of deadly force would be justified.[55] This effort culminated in a self-defense provision which provides that the use of force upon another person is justified when the defendant believes the force is *immediately* necessary to protect himself against the use of unlawful force by another person.[56]

Under the MPC, the need for using defensive action must be immediate, and although the threat of unlawful force does not have to be immediate, it must be anticipated to occur on that occasion.[57] The MPC provision is broader than its

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53. *See, e.g.*, State v. Kelly, 478 A.2d 364, 374 n.8 (N.J. 1984). *Compare* N.J. STAT. ANN. § 2C:3-4 (West Supp. 1994) *with* MODEL PENAL CODE § 3.04 (1985).

54. *See* MODEL PENAL CODE § 3.04 (1985) (setting forth the provision for Use of Force in Self-Protection (self-defense)). The provision states in pertinent part:

> [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

Id.; *see also Kelly*, 478 A.2d, at 374 n.8 (elaborating that the purpose of Model Penal Code § 3.04 is to prevent one who killed with an honest but unreasonable belief in the necessity of murder from being convicted of a crime with such a high scienter requirement). *See generally* MODEL PENAL CODE § 3.04, 10 U.L.A. 478 (1974 & Supp. 1994) (providing case law interpreting the self-defense provision of the Model Penal Code from those jurisdictions which have adopted it).

55. COMMENTARIES § 3.04 cmt. 1.

56. MODEL PENAL CODE § 3.04(1) (1985); *see* COMMENTARIES § 3.04 explanatory note (1985) (proposing that the actor's actual belief is sufficient to support the defense, even if he is mistaken); *id.* § 3.04 cmt. 2(a) (emphasizing that even if a defendant is mistaken as to the degree of force necessary to subdue an assailant, the defendant may still use the defense to decrease the level of his culpability). The terms "necessary" and "serious bodily injury" in Model Penal Code § 3.04(1) are ambiguous, but other provisions in the section help to justify this ambiguity by providing flexibility in unforeseen circumstances. COMMENTARIES § 3.04 cmt. 1. Without this flexibility, people may be discouraged from using force to defend themselves when they feel emotionally compelled, but they fear that such use is unlawful. *Id.* It is not necessary that the force from which the defendant protects himself actually be unlawful; it is enough that the defendant believes that it is. *Id.* § 3.04 cmt. 2(d); *see also* David A. Posner, *The Proper Standard for Self-Defense in New York: Should* People v. Goetz *Be Viewed as Judicial Legislation or Judicial Restraint?*, 39 SYRACUSE L. REV. 845, 914-15 (1988) (noting that the Model Penal Code standard for evaluating a defendant's use of self-defense is purely subjective).

57. *See* MODEL PENAL CODE § 3.04(1) (1985) (remarking that "force . . . is justifiable when the actor believes that such force is immediately necessary"); COMMENTARIES § 3.04(1)(c) (providing that this section does not limit the self-defense privilege to danger that is imminent). *Distinguish* Crocker, *supra* note 26, at 125 (explaining that "imminent" was traditionally interpreted to mean "immediately") *from* State v. Janes, 850 P.2d 495, 506 (Wash. 1993) (underscoring the differences between the concepts of imminent harm and immediate harm).

common law counterpart which requires that the danger be impending or imminent.[58]

The MPC also imposes restrictions on the use of self-defense.[59] One such limitation proscribes the use of force to resist arrest.[60] Another restriction prohibits the use of force against one who is lawfully protecting or claiming property under certain circumstances.[61]

A third restriction limits the situations in which an actor may use deadly force.[62] Such instances include situations where the actor feels it is necessary to protect himself from death, serious bodily injury, kidnapping, or rape;[63] where the

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58. COMMENTARIES §§ 3.04(1)(c), 3.04 cmt. (2)(c) (1985); *see* B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach Justifying Lethal Self-Defense by Battered Women*, 1991 DUKE J. COMP. & INT'L L. 169, 172 (explaining that immediately necessary is broader than imminent). For examples of state statutes which use language that is substantially similar to the Model Penal Code, see ARK. STAT. ANN. § 5-2-601 (Michie 1993); DEL. CODE ANN. tit. 11, § 464 (1982); HAW. REV. STAT. § 703-304 (1985); NEB. REV. STAT. § 28-1409 (1989); N.J. STAT. ANN. § 2C:3-4 (West Supp. 1993); N.Y. PENAL LAW § 35 (McKinney 1975); 18 PA. CONS. STAT. ANN. § 505 (1983). For examples of state statutes which use vague language that is consistent with the Model Penal Code, see ARIZ. REV. STAT. ANN. § 13-404 (1989); TENN. CODE ANN. § 39-11-611 (1991); TEX. PENAL CODE ANN. § 9.31 (Vernon 1974). *Cf. supra* notes 37-40 and accompanying text (discussing imminence under the common law). *See generally* State v. Huett, 104 S.W.2d 252 (Mo. 1937); People v. Giacalone, 217 N.W. 758 (Mich. 1928); BLACK'S LAW DICTIONARY 750 (6th ed. 1990) (defining immediate danger as an inexorable circumstance or situation with the reasonable probability of danger); *id.* (defining imminent danger as one which must be instantly met, or as an impending injury that would put a reasonable and prudent man to his instant defense).

59. *See* MODEL PENAL CODE § 3.04(2) (1985) (setting forth the limitations).

60. *Id.* §§ 3.04(2)(a)(I) (1985); *see* COMMENTARIES § 3.04 explanatory note (1985) (providing that self-protection is not justified during any arrest when the actor knows that the arrest is being made by a peace officer). The arrest may be lawful or unlawful. MODEL PENAL CODE § 3.04(2)(a)(I) (1985); COMMENTARIES § 3.04 explanatory note (1985). *See also id.* § 3.04 cmt. 3(a) (1985) (remarking that in the interest of public policy, there should be other remedies against unlawful arrest without allowing the arrested person to use a form of self-protection). *See generally id.*§ 3.04 cmt. 3(b) (1985) (stating that in the interest of public policy, it is beneficial to reduce the situations in which there may be conflicting claims to use force).

61. MODEL PENAL CODE § 3.04(2)(a)(ii) (1985); *see* COMMENTARIES § 3.04 explanatory note (1985) (specifying that section 3.04(2)(a)(ii) does not apply when the actor is a public officer acting in the performance of employment to regain the property; when the actor has been unlawfully dispossessed of his property; or when the actor believes that use of force is necessary to protect himself against death or great bodily injury while trying to regain property). *See generally* COMMENTARIES § 3.04 cmt. 3(b) (1985) (stating that in the interest of public policy, it is beneficial to reduce the situations in which there may be conflicting claims to use force).

62. MODEL PENAL CODE § 3.04(2)(b) (1985). *See generally* COMMENTARIES § 3.04 cmt. 3(b) (1985) (stating that in the interest of public policy, it is beneficial to reduce the situations in which there may be conflicting claims to use force).

63. MODEL PENAL CODE § 3.04(2)(b) (1985); *see* COMMENTARIES § 3.04 explanatory note (1985) (providing that deadly force is not justified unless the actor believes that such force is essential).

actor did not provoke the use of force;[64] or where there are no alternative means by which to avoid the use of force.[65]

The MPC addresses two significant consequences which would result from requiring an intended victim to have objectively reasonable grounds for his belief that the degree of force used was appropriate.[66] One is the possibility that the actor may have a mistaken belief in the degree of force which may be legally justified.[67] The other consequence is that the intended victim's fear of negligence in his mistaken belief of the appropriate use of force may prevent him from using any form of defensive self-protection at all, possibly further endangering his life.[68]

Since twenty-four states have adopted the MPC, while twenty-six states still follow the common law, a discussion of the differences between the MPC and the common law is necessary.

C. Comparing the Common Law and Model Penal Code

The MPC was drafted primarily to reduce inconsistencies among state statutory codes.[69] There are two significant differences between self-defense provisions under the common law and the MPC. An initial difference is that the MPC requires the use of force to be immediately necessary; whereas, the danger does not have to be imminent as is required under the common law.[70]

Another difference between the MPC and the common law can be found in the criteria used to determine whether the use of self-defense is necessary in a particular situation.[71] Some states combine an objective test with a subjective test to determine the appropriate degree of force needed.[72] This requires not only that

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64. MODEL PENAL CODE § 3.04(2)(b)(I) (1985); *see* COMMENTARIES § 3.04 explanatory note (1985) (stating that deadly force is not justified if the actor provoked the use of force with the intention of causing death or great bodily injury).

65. MODEL PENAL CODE § 3.04(2)(b)(ii) (1985); *see* COMMENTARIES § 3.04 explanatory note (1985) (maintaining that deadly force is not justified if the actor could have taken an alternative course of action). The Model Penal Code requires that the actor attempt to retreat, surrender possession of the item to which the aggressor asserts a claim, or comply with the aggressor's demand to abstain from an action that the actor has no duty to take. *Id.*

66. COMMENTARIES § 3.04 cmt. 2(a) (1985).

67. *See id.* (anticipating situations where there may be uncertainty surrounding the degree of force that a defendant may use and still be acquitted).

68. *See id.* (cautioning that this error may permit the defendant to be convicted of a greater offense, including murder). The ALI adopts the opinion that this second consequence is undesired. *Id.*; *cf.* State v. Bongard, 51 S.W.2d 84, 89 (Mo. 1932) (holding that actual violence must occur before use of force is permitted).

69. *See supra* notes 43-49 and accompanying text (discussing the inconsistencies).

70. *See supra* notes 57-58 and accompanying text (discussing the approach of the Model Penal Code); *see supra* notes 37-40 and accompanying text (discussing the approach of the common law).

71. *See* COMMENTARIES § 3.04 cmt. 2(a) (1985) (discussing the debate on this issue).

72. *See supra* notes 43-49 and accompanying text (discussing the objective and subjective tests).

the defendant subjectively believe that the surrounding circumstances necessitate the use of a reasonable protective force, but that there also be objectively reasonable facts to support the belief.[73]

California is one of the states which has ostensibly rejected the MPC by continuing to use an objective test, which requires that the defendant have a reasonable belief that the use of force was necessary.[74] Although this standard appears stringent, this seemingly rigid rule has some exceptions, and even bears similarities to the more flexible MPC.[75]

D. Self-Defense Under the California Penal Code

California is one of sixteen states that have resisted the trend to align their penal codes with the provisions of the MPC.[76] The primary statute for justifiable homicide was enacted in 1850. It permits a person to use deadly force if threatened with danger that may result in death or great bodily harm.[77] Although California did not adopt the MPC provisions, the California Penal Code contains two statutes on self-defense which, when viewed together, closely resemble the MPC provision.[78]

Like the MPC provision, California's two statutes establish three elements that must be met in order to justify a homicide on the basis of self-defense.[79] First,

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73. *See* COMMENTARIES § 3.09 cmt. 2 n.12 (1985) (listing states that adhere to this analysis); *see also id.* § 3.04 cmt. 2(a) (1985) (commenting that some states added a reasonableness requirement to justify the belief that it was necessary to use self-defense). *Compare* CAL. PENAL CODE § 198 (West 1988) (providing that a person may use deadly force when he has a fear that a reasonable person would have in a similar situation) *with* COMMENTARIES § 3.09 cmt. 2 n.11 (1985) (enumerating statutes from other states that reject this reasoning).

74. CAL. PENAL CODE § 197 (West 1988).

75. *See infra* notes 76-93 and accompanying text (comparing the California Penal Code and the Model Penal Code provisions for self-defense); *cf. infra* notes 288-301 and accompanying text (discussing the objective/subjective dichotomy that exists in California regarding the evaluation of evidence regarding a battered woman defendant's state of mind).

76. *See supra* note 52 and accompanying text (listing the states which revised their penal codes to closely resemble the MPC).

77. *See* CAL. PENAL CODE § 197 (West 1988) (setting forth the state statute for justifiable homicide which states that a person must have an honest and reasonable belief in the need to defend); People v. Mallicoat, 27 Cal. App. 355, 361, 149 P. 1000, 1002 (1915) (allowing a person to protect himself, even to the extent of taking a life, when it reasonably appears necessary to prevent death or great bodily harm to him); *see also* CRIMINAL LAW AND PRACTICE OF CALIFORNIA § 197(1) n.1 (Clinton L. White & Wilbur F. George eds., 1881) (explaining that the law authorizes homicide only for the purpose of preventing death or great bodily harm to the intended victim, not for punishment of the aggressor).

78. CAL. PENAL CODE § 198 (West 1988) (stating that self-defense may only be used when the fear would be present in a reasonable person and when the person only acted out of those fears); *id.* § 197 (permitting the use of deadly force in situations in which the person was fearful of death or great bodily harm).

79. *See id.* § 197 (West 1988) (asserting that in order to use self-defense, a person must have an honest and reasonable belief that a danger of death or great bodily harm is present and that a use of force is the only reasonable alternative); *id.* § 198 (West 1988) (stating that a person may not use self-defense if the action was taken for a reason other than fear of death or great bodily harm).

a jury must apply an objective standard of reasonableness to determine whether sufficient grounds exist for the intended victim's fear.[80] In order to decide the question of reasonableness, a jury must then look to the circumstances surrounding the incident.[81] Second, deadly force must be the only available alternative that would adequately protect the intended victim from the danger.[82] For example, if the intended victim has a reasonable opportunity to escape from the harm, or to attract a third party's attention to the situation, the intended victim must opt for one of these alternatives prior to using force.[83] This requirement is similar to its MPC counterpart.[84]

Although similar in some ways, the California statute and the MPC provisions differ on several points.[85] In California, a defendant claiming self-defense

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80. *See* People v. Flannel, 25 Cal. 3d 668, 679, 603 P.2d 1, 7, 160 Cal. Rptr. 84, 90 (1979) (specifying that the honest belief of imminent peril will negate malice, and the reasonableness of the belief will determine if the killing was justified); People v. Williams, 75 Cal. App. 3d 731, 739, 142 Cal. Rptr. 704, 709 (1977) (elaborating that in order to justify a homicide, the defendant must reasonably believe and actually have sufficient grounds to believe that he was in danger of death); *see also* People v. Webber, 26 Cal. App. 413, 415, 147 P. 102, 103 (1915) (noting that necessity to kill only exists when an innocent person is placed in sudden jeopardy and a reasonable person would fear death or great bodily harm); People v. Russell, 19 Cal. App. 750, 754, 127 P. 829, 831 (1912) (providing that if the circumstances supporting the defendant's fear were sufficient to induce a reasonable person in his situation to believe that he was in imminent danger, the defendant would be justified in his actions).

81. *See* People v. Head, 105 Cal. App. 331, 337, 288 P. 106, 109 (1930) (stating that the jury must consider and determine whether the defendant's testimony supports his belief that his fear was reasonable); *see also Flannel*, 25 Cal. 3d at 681, 603 P.2d at 8, 160 Cal. Rptr. at 91 (holding that manslaughter is not the appropriate conclusion in all cases in which a person uses self-defense in response to an honest but unreasonable belief); People v. Lewis, 186 Cal. App. 2d 585, 588-89, 9 Cal. Rptr. 263, 270 (1960) (providing that if a defendant killed another under the honest but unreasonable fear of death or great bodily harm, the defendant's mental state could be mitigated to manslaughter). *See generally* People v. Toledo, 85 Cal. App. 2d 577, 580-81, 193 P.2d 953, 955 (1948) (indicating that the defense of justifiable homicide does not need to be proved beyond a reasonable doubt, nor by a preponderance of the evidence, but only by evidence that would create a reasonable doubt in the minds of the jury).

82. *See Webber*, 26 Cal. App. at 415, 147 P. at 103 (providing that necessity to kill only exists when an innocent person is placed in sudden jeopardy and a reasonable person would fear death or great bodily harm); People v. Conkling, 111 Cal. 616, 626-27 (1896) (stating that in order to justify a homicide, there must be a present, apparent, and imminent danger to the defendant's life, and the killing must be in response to a well founded belief that it was undeniably necessary to save the defendant); *see also* People v. Robertson, 67 Cal. 646, 649, 8 P. 600, 602 (1885) (stating that if the defendant had an opportunity and failed to decline further combat, and the result was homicide, he could not use the defense of self-protection).

83. For examples of California decisions construing the possible alternatives available to a victim, see People v. Mizchele, 142 Cal. App. 3d 686, 191 Cal. Rptr. 245 (1983); People v. King, 22 Cal. 3d 12, 582 P.2d 1000, 148 Cal. Rptr. 409 (1978). For examples of other state opinions regarding victim's alternatives, see Wright v. People, 171 P.2d 990 (Colo. 1946); Kleinbart v. United States, 553 A.2d 1236 (D.C. App. 1989).

84. *See supra* notes 57-58 and accompanying text (discussing the MPC's requirement that force be immediately—but not imminently—necessary).

85. *See supra* notes 76-93 and accompanying text (discussing the differences between the California self-defense statute and the related MPC provision).

must not have instigated the conflict that results in the other's death.[86] This prerequisite encompasses situations in which a defendant causes the conflict by his own misconduct or by provoking the danger.[87] If either circumstance is present, a defendant may not use the claim of self-defense.[88] Moreover, the California self-defense statute requires that the danger be imminent.[89] Imminence may be satisfied in cases in which the person's anticipation of danger is based upon the aggressor's threatening words or acts.[90] Words alone, however, are not sufficient to meet the statute's requirement of imminence.[91] In addition to witnessing the threatening act, the statute requires that the person perceive an imminent fear from them.[92] Finally, the California statute mandates that the conclusion that

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86. CAL. PENAL CODE § 198 (West 1988); *see* People v. Hoover, 107 Cal. App. 635, 639, 290 P. 493, 495 (1930) (stating that the defendant was not justified in using deadly force upon the deceased because the defendant had instigated the fight). *But see* People v. Farley, 124 Cal. 594, 596, 57 P. 571, 572 (1899) (concluding that the defendant, who had initiated the conflict, was justified in using self-defense when the original victim continued to attack him after the defendant had ceased fighting).

87. *See* People v. Newcomer, 118 Cal. 263, 269, 50 P. 405, 407 (1897) (providing that if a situation arises by the fault of the defendant due to misconduct or lawlessness, no sufficient ground exists to support the right to self-defense).

88. *See* CAL. PENAL CODE § 198 (West 1988) (providing that the surrounding circumstances prompting self-defense must be sufficient to excite the fears of a reasonable person and that the party using deadly force must act under only the influence of these fears); People v. Holt, 25 Cal. 2d 59, 66, 153 P.2d 21, 26 (1944) (stating that even if the cause is reasonable, the defendant is not justified in using self-defense if he provokes the danger in any way); People v. Finali, 31 Cal. App. 479, 486, 160 P. 850, 853 (1916) (insisting that a defendant may not intentionally create a situation in which it appears that he must protect his own life by killing the person that he was actually assaulting).

89. *See* CAL. PENAL CODE § 197 (West 1988) (setting forth the self-defense statute); People v. Lucas, 160 Cal. App. 2d 305, 310, 324 P.2d 933, 936 (1958) (stating that the danger must be imminent; the fear that the danger may become imminent is not adequate); *see also supra* notes 90-92 and accompanying text (discussing the difference between the term "imminence," which is used in the California Penal Code, and the term "immediately necessary," which is used in the MPC); *cf.* ALA. CODE § 13A-3-23(a) (Michie 1982 & Supp. 1993); ARK. CODE ANN. § 41-506(1) (Michie 1993); COLO. REV. STAT. ANN. § 18-1-704(1) (1986); CONN. GEN. STAT. ANN. § 53a-19 (West 1985 & Supp. 1993); FLA. STAT. ANN. § 776.012 (West 1992); GA. CODE ANN. § 16-3-21 (1992); ILL. REV. STAT. ch. 720, para. 5/7-1 (Smith-Hurd 1993); IND. CODE ANN. § 35-41-3-2(a) (West 1986); IOWA CODE ANN. § 704(3) (West 1993); KAN. CRIM. CODE ANN. § 21-3211 (Vernon 1988); KY. REV. STAT. § 503.050 (1984); ME. REV. STAT. ANN. tit. 17-A, § 108 (West 1983); MO. ANN. STAT. § 563.031(1) (Vernon 1979 & Supp. 1993); MONT. CODE ANN. § 94-3-102 (1993); N.H. REV. STAT. ANN. § 627:4(I) (1986); N.Y. PENAL LAW § 35.15(1) (McKinney 1987); N.D. CENT. CODE § 12.1-05-03 (1985); OR. REV. STAT. § 161.209 (1990); UTAH CODE ANN. § 76-2-402(1) (Michie 1990).

90. *See* People v. Biggins, 65 Cal. 564, 565, 4 P. 570, 571 (1884) (classifying insulting words in the category of threatening actions that may prompt the use of self-defense).

91. CAL. PENAL CODE § 197 (West 1988); *see* People v. Lucas, 160 Cal. App. 2d 305, 310, 324 P.2d 933, 936 (1958) (noting that threats which are not accompanied by an act that would cause the defendant to have a reasonable belief that he is in danger of bodily harm will not justify a homicide in self-defense); *see also* People v. Lombard, 17 Cal. 316, 320 (1861) (stating that although the deceased had verbally threatened the defendant's life, the latter's mere apprehension was not sufficient to justify homicide because the deceased had not acted upon these threats).

92. CAL. PENAL CODE § 197 (West 1988); *see* CALJIC 5.12 (noting that actual danger is not necessary to justify self-defense but that a mere fear of death or great bodily injury is not sufficient); People v. Griner 124 Cal. 19, 21, 56 P. 625, 626 (1899) (holding that although the defendant, standing behind the deceased, saw the deceased holding an ax in his hand and waving it around, there was no justification for the defendant to

deadly force is required be a reasonable one.[93] These provisions comprise the major differences between the self-defense statutes of the California Penal Code and the MPC.

There are many possible situations in which a person may perceive an imminent fear of harm from another. One common situation emerges between a battered woman and her abuser.[94] Another situation, which is beginning to attract attention, occurs when a child fears an abusive parent.[95]

II. THE ADMISSIBILITY OF EVIDENCE REGARDING A DEFENDANT'S STATE OF MIND

Because the defense of self-protection inherently requires an inquiry into the defendant's state of mind at the time of the use of force, defendants have argued that evidence of their subjective fear be considered when evaluating their conduct.[96] A defendant's common argument for requesting an evaluation based on a subjective fear arises from an imperfect theory of self-defense. The effect of an imperfect self-defense instruction is that the element of malice aforethought, which is necessary for murder, is negated due to a mitigating circumstance. Without proof of malice aforethought, the most severe degree of homicide for which the defendant can be convicted is manslaughter.

An imperfect theory of self-defense is applicable in a situation in which the defendant used deadly force with an honest but unreasonable belief of a threat of danger.[97] For example, the imperfect self-defense argument presented by the Menendez brothers is that they held an honest belief that deadly force was necessary to protect themselves from their parents, although a reasonable person in the same situation may not have held the same belief. In *Menendez*, the defendants argued that due to years of abuse, they honestly believed that their parents' con-

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shoot the deceased in the back).

93. CAL. PENAL CODE § 198 (West 1988); *cf.* ARIZ. REV. STAT. ANN. § 13-401 to 13-415 (1989 & Supp. 1994); N.Y. PENAL LAW § 35 (McKinney 1987); People v. Gibaldi, 348 N.Y.S.2d 904, 906 (1973) (discussing reasonable force); Vigil v. People, 353 P.2d 82, 86 (Colo. 1960) (holding that Colorado Revised Statutes §§ 40-2-13 to 40-2-15, read together, should be the appropriate statute on which to base a jury instruction for justifiable homicide); State v. Anderson, 51 S.E.2d 895, 896 (N.C. 1949) (holding that self-defense may only be used in a situation in which a reasonable person would deem it necessary); Sikes v. Commonwealth, 200 S.W.2d 956, 959 (Ky. 1947) (using a reasonable person standard in its analysis of self-defense). *See generally* MODEL PENAL CODE § 3.04 (1985) (excluding a requirement for any reasonable belief).

94. *See infra* notes 153-170 and accompanying text (discussing the battered woman syndrome).

95. *See* Scobey, *supra* note 3, at 181 (noting that children may kill their abusive parents out of genuine fear for their lives, although the traditional self-defense requirements are absent). Scobey emphasizes that the lack of self-defense prerequisites is important because self-defense is the child's actual motivation. *Id.*; *see infra* notes 206-222 and accompanying text (discussing the patterns of abuse in cases of battered children).

96. *See, e.g.*, State v. Wanrow, 559 P.2d 548 (Wash. 1977).

97. ARNOLD H. LOEWY, CRIMINAL LAW, § 5.04 (1975); *see id.* (describing another common theory of imperfect self-defense in which a defendant has an honest but unreasonable belief about the amount of force necessary to curtail the danger).

duct indicated that their parents were going to kill them. Further, they argued that this honest belief, though perhaps unreasonable, negated the element of malice necessary to convict them of murder.[98]

Although there are some jurisdictions that do not recognize imperfect self-defense in the aforementioned situation, the growing trend is to allow evidence of the defendant's state of mind at the time of the killing in order to assess the culpability of the defendant. The most common type of state of mind evidence is presented through the testimony of experts. In the case of an abused child defendant, expert testimony is critical to assist the trier of fact in understanding the effects of continuous abuse, but it also lends credence to the defendant's account of the events at the time of the killing.[99] In a recent case, *Commonwealth v. Sheppard*,[100] the majority upheld the defendant's conviction of murder by holding that the objective evidence surrounding the killing did not justify imperfect self-defense; therefore, there was no need to admit psychiatric testimony to attempt to substantiate the defendant's claims.[101] The dissenting opinion argued that based on the evidence, the defendant was the only one to testify that he was acting in self-defense and thus evidence of his state of mind was essential to assess his culpability.[102]

In 1994, the California Supreme Court upheld imperfect self-defense in a case in which a defendant who held an honest but mistaken belief of imminent danger used deadly force.[103] The case, *In re Christian*,[104] involved a seventeen-year-old boy who shot and killed a nineteen-year-old boy.[105] The defendant had been continuously taunted for over a year by the other boy, a reputed skinhead gang member.[106] On the day of the killing, the gang member chased the defendant onto the beach and continued to tease and threaten him.[107] The Court of Appeal found that there was sufficient evidence to show that when the defendant fired the gun he feared the infliction of serious harm.[108] In reversing the murder conviction, the appellate court stated that under the doctrine of imperfect self-defense, the

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98. *See* Gail D. Cox, *Abuse Excuse; Success Grows*, NAT'L L.J., May 9, 1994, at A1 (explaining that the Menendez strategy of defense was to claim imperfect self-defense when they honestly, if unreasonably, thought their parents were going to kill them).

99. *See* People of the State of California v. Bradshaw, No. 146426 (1994) (providing an example of a case in which the jury convicted the abused child defendant of manslaughter although the son lay in wait for his father and shot him in the head repeatedly until his father stopped breathing).

100. No. 94-1683 (Pa. Super. 1994); *Superior Court*, PA. L. WKLY., Oct. 24, 1994, at 14.

101. *Id.*

102. *Id.*

103. *In re* Christian, 7 Cal. 4th 768, 772, 872 P.2d 574, 575, 30 Cal. Rptr. 2d 33, 34 (1994); *see* People v. Trevino, 200 Cal. App. 3d 874, 879, 246 Cal. Rptr. 357, 359 (1988) (holding that a defendant who claimed self-defense was required to act on the basis of reasonable fear alone, whether the danger was real or mistaken).

104. 7 Cal. 4th 768, 872 P.2d 574, 30 Cal. Rptr. 2d 33 (1994).

105. Cox, *supra* note 98, at A1.

106. *Christian*, 7 Cal. 4th at 772, 872 P.2d at 575, 30 Cal. Rptr. 2d at 34.

107. *Id.*

108. *Id.*, 872 P.2d at 576, 30 Cal. Rptr. 2d at 35.

defendant could not be convicted of anything more serious than manslaughter.[109] Justice Baxter, writing for the majority, explained that the harm feared must be imminent. "Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice."[110] The justification for allowing imperfect self-defense is that without it, judges would be compelled to find defendants guilty of murder unless the killing took place in clear self-defense.

Evidence of a defendant's state of mind has been admitted for several years in the case of battered woman defendants who killed their abusers. One of the earliest cases relied upon as support for this practice is *State v. Wanrow*,[111] which provided the legal system with an opportunity to present evidence of the defendant's state of mind in a case of self-defense.

In *Wanrow*, the defendant woman shot and killed a man who had broken into her home and had threatened her person and family.[112] She was convicted of second degree murder.[113] On appeal, the defense argued that the trial court should have used evidence of the defendant's state of mind to evaluate the defendant's fear of the present danger.[114] The Washington Supreme Court held that the trial court had improperly instructed the jury on the appropriate law of self-defense.[115] The court ruled that the defendant's actions should be evaluated in reference to her subjective impressions rather than under an objective standard of reasonableness.[116] The decision appeared to provide an alternative for woman defendants in self-defense cases by permitting evidence of the woman's state of mind at the time of the killing to be considered when evaluating her use of force.[117] Subsequent cases have shown, however, that the admission of evidence regarding the defendant's state of mind in *Wanrow* did not have the effect of reducing convictions as many had hoped.[118]

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109. *Id.* at 772-73, 872 P.2d at 576, 30 Cal. Rptr. 2d at 35.

110. *Id.* at 783, 872 P.2d at 583, 30 Cal. Rptr. 2d at 42.

111. 559 P.2d 548 (Wash. 1977).

112. *Wanrow*, 559 P.2d at 551. The defendant was not only petite in stature, but was also dependent on crutches. *Id.* at 548.

113. *Id.* at 551.

114. *Id.* at 548. The defendant's attorneys argued that the only fair standard by which to evaluate the degree of reasonableness of a woman's use of self-defense is to use a subjective test to measure the particular individual's perspective of the danger with which she was threatened. *Id.*

115. *Id.* at 555.

116. *Id.* at 558.

117. *Id.*

118. *See* CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE—BATTERED WOMEN, SELF-DEFENSE AND THE LAW 118 (1989) (observing that the *Wanrow* decision did not have as great an impact on the outcome of women's self-defense cases as many had hoped). For examples of cases in which the subjective standard for evaluating a woman defendant's mental state was denied, see State v. Riker, 869 P.2d 43, 53 (Wash. 1994); People v. Yaklich, 833 P.2d 758, 762 (Colo. Ct. App. 1992); State v. Kelly, 685 P.2d 564, 566 (Wash. 1984); Commonwealth v. Dillon, 562 A.2d 885, 889 (Pa. Super. 1989).

Although state of mind evidence was not admissible in cases of female defendants generally, the evidence was allowed in cases in which a woman had been abused by her victim.[119] This evidence, in conjunction with specific psychological criteria, is now commonly referred to as the battered woman defense.[120]

III. STATE OF MIND EVIDENCE AND THE BATTERED WOMAN DEFENDANT

Over the past twenty years, the criminal justice system has come to recognize that abuse of women by men is a widespread societal problem.[121] Although it is more prevalent between spouses, all forms of physical abuse towards women have received considerable attention.[122] In most situations, the women are psychologically trapped in their abusive relationships.[123] In spite of the numerous protective and counseling resources available, because they have been abused on a

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119. *See infra* notes 125, 171-193 and accompanying text (indicating that evidence of a defendant's state of mind is admissible in cases in which the defendant woman had been abused).

120. *Id.*

121. *See* State v. Kelly, 478 A.2d 364, 369-70 (N.J. 1984) (noting that between 1974 and 1984, sociologists examined with greater frequency the causes of wife-beating and other domestic violence). For a sampling of recent literature on the subject, see, e.g., Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993); Karla Fischer, et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993); Catherine F. Klein, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence Theory and Practice*, 21 HOFSTRA L. REV. 1295 (1993); Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243 (1993); *Report on Domestic Violence: A Commitment to Action*, 28 NEW ENG. L. REV. 313 (1993); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992); Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 520 (1992); Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After* DeShaney v. Winnebago County of Department of Social Services, 75 CORN. L. REV. 1393 (1990); Maryanne E. Kampmann, Note, *The Legal Victimization of Battered Women*, 15 WOMEN'S RTS. L. REP. 101 (1993); Rhonda L. Kohler, Comment, *The Battered Women and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025 (1992); Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329 (1994); Bernadette Dunn Sewell, Note, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983 (1989).

122. *See Kelly*, 478 A.2d at 370 (observing that those affected by familial violence include more than just the family members, but also strangers to the family who feel the impact of the psychological damage); *see also* Antonia C. Novello, *The Domestic Violence Issue: Hear Our Voices*, AM. MED. NEWS (Mar. 23, 1992) and (Mar. 30, 1992); Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and The Hate Crimes Statistics Act*, 17 HARV. WOMEN'S L.J. 157, nn.33-36 (1994) (discussing the recent attention that Congress has given to the pervasive violence against women).

123. *See Kelly*, 478 A.2d at 370 (noting that domestic violence causes great psychological harm); *see also* LENORE E. WALKER, THE BATTERED WOMAN xiv-xv (1979); Scobey, *supra* note 3, at 184-85 (discussing the psychological impact of abuse on battered women).

consistent basis over an extended period of time, the women in this situation often feel that they will never be safe from their abusers and that killing their abusers is their only viable means of escape.[124] Courts have relied on expert testimony to explain this mystifying psychological bond and have come to recognize a derivative of the self-defense theory—the battered woman's defense.[125]

A. The Emergence of the Theory

Societal recognition of the plight of battered women has increased over the last two decades.[126] Recently, the battered woman syndrome has been recognized by courts as a psychological condition that prevents an abused woman from leaving her batterer.[127] Today, these women are allowed to show in court, through expert witnesses and other testimony, that persistent abuse had impaired them psychologically to the point where it was impossible for them to physically escape their abusive environments.[128] Thus, with no alternative available, they resorted to killing their batterers.[129] Child defendants have attempted to analogize their situations and psychological conditions to battered women, by asserting a theory of imperfect self-defense referred to as the battered child defense.[130] Because the battered child defense is premised largely by analogy to the battered woman defense, in order to better understand the effects of abuse on children, it is helpful to first examine, in some detail, the psychological impact of abuse on women.

1. The History of Spousal Abuse

Before 1874, a husband was permitted to beat his wife without being subject to punishment.[131] To illustrate, a Mississippi court held in 1824 that a moderate

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124. *See Kelly*, 478 A.2d at 372 (noting that battered women are usually unwilling to reach out for help, either out of shame, fear of reprisal by their husbands, or concern that they will not be believed).

125. *See infra* notes 171-193 and accompanying text (discussing the battered woman defense).

126. WALKER, *supra* note 123, at ix; *see supra* note 121 and accompanying text (surveying a sampling of recent legal literature on the battered woman syndrome); *infra* notes 131-151 and accompanying text (discussing the gradual evolution of societal sensitivity toward the condition known as the battered woman syndrome).

127. WALKER, *supra* note 123, at 221; *see infra* notes 153-170 and accompanying text (discussing the importance of understanding psychological impact of abuse on battered women).

128. *See infra* notes 171-193 and accompanying text (discussing the forms and the purpose of expert testimony in courtroom).

129. *Id.*

130. *See infra* notes 224-286 and accompanying text (discussing selected cases in which the child defendant attempted to argue a defense based on a subjective fear).

131. Terry Davidson, *Wifebeating: A Recurring Phenomenon Throughout History*, *in* BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 2, 2-23 (Maria Roy, ed., 1977); *id.* (providing a historical overview of men's treatment of women, beginning in pre-Biblical times); *see id.* at 4 (quoting Sue E. Eisenberg & Patricia A. Micklow, The Assaulted Wife: "Catch 22" Revisited (An Exploratory

form of reprimand was proper for a husband to use on his wife in order to reinforce his control over domestic affairs.[132] Alabama and Massachusetts had wife-beating privileges until they were repealed in 1871.[133] In 1874, the state of North Carolina outlawed wife-whipping, although it refused to hear complaints regarding physical abuse from battered women.[134]

California did not enact a statute prohibiting spousal abuse until 1845.[135] The California Penal Code also contains other statutes which may have been enacted for the purpose of reducing marital violence.[136] Some of these laws address the unique underlying elements that comprise the typical pattern of spousal violence.[137] These features include the role of the victim, the reaction of the offender to the victim's behavior, and the victim's reaction to the abuse.[138]

Spousal abuse possesses its own characteristic pattern.[139] In most domestic abuse situations, the victim inadvertently provokes her batterer by words or actions which is met with a response of physical violence.[140] The man's subsequent violent reaction to a woman's verbal acts can be explained under two

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Legal Study of Wifebeating in Michigan) (1974) (unpublished, University of Michigan Law School (Ann Arbor))) (reporting that the husband was allowed to beat his wife with a stick, pull her hair, choke her, spit on her, and kick her about the floor); *see also Ephesians* 5:22, 24 (quoting the Apostle Paul as saying, "Wives, submit yourselves unto your own husbands . . . . For the husband is the head of the wife").

132. *See* Bradley v. State, 1 Miss. 156, 158 (1824) (ruling that a husband should be allowed to use a form of chastisement in extreme cases, and "salutary restraint" in every case of his wife's misbehavior, without being subjected to bothersome prosecution).

133. *See* Fulgham v. State, 46 Ala. 143, 147-48 (1871) (providing that a husband is not justified or allowed to use a weapon or any other method to moderately discipline his wife); *see also* Commonwealth v. McAfee, 108 Mass. 458, 461 (1871) (noting that beating or violently striking a wife is not one of the rights conferred upon a husband through marriage).

134. *See* State v. Oliver, 70 N.C. 60, 61 (1874) (holding that unless there is permanent injury, malice or cruelty, the charge of abuse is trivial and the courts will not hear such complaints from battered women).

135. 1945 Cal. Stat. ch. 1312, sec. 1, at 2462 (enacting California Penal Code § 273d); *see* CAL. PENAL CODE § 273.5 (West 1988 & Supp. 1995) (incorporating former California Penal Code § 273d and providing that any spouse or cohabitant who willfully inflicts corporal injury resulting in a traumatic condition upon the other spouse or cohabitant is guilty of a felony); *see also* People v. Burns, 88 Cal. App. 2d 867, 873, 200 P.2d 134, 137-38 (1948) (defining corporal injury under the original statute as the touching of a person against his will with physical force in an intentional, hostile, and aggravated manner); *id.* (*quoting* 63 Cal. Jur., *Trauma*, 804 (1933)) (defining traumatic condition as any injury to the body caused by external violence).

136. *See, e.g.*, CAL. FAM. CODE §§ 753, 6300-6388 (West 1994 & Supp. 1995) (providing the statutory guidelines regarding restraining orders and orders to vacate the home); CAL. PENAL. CODE § 415 (West 1988) (intending to prevent disruption of the peace through vulgarity and loud boisterous interactions); *id.* § 12024 (West Supp. 1995) (prohibiting the possession of a deadly weapon with the intent to assault another); *id.* § 837 (West 1988) (allowing a spouse to make a citizen's arrest for assault and battery).

137. *See* Richard J. Gelles, *No Place To Go: The Social Dynamics of Marital Violence*, *in* BATTERED WOMEN—A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 46 (Maria Roy, ed., 1977) (explaining that understanding the dynamics of marital violence may be a way to decrease the incidence).

138. WALKER, *supra* note 123, at xv.

139. *Id.*

140. *See* Gelles, *supra* note 137, at 57 (tracing a consistent pattern in the interactions which lead to marital violence and finding that verbal aggression is a common precursor to physical aggression).

theories.[141] Under the first theory, people who are emotionally tied to each other for a significant length of time become proficient at recognizing and verbally criticizing each other's weaknesses.[142] The abusive spouse uses this knowledge to control and degrade his spouse. Under the second theory, individuals who have low self-esteem perceive a negative statement as a challenge to their already-fragile self-images.[143] Therefore, the batterer misinterprets his victim's banal comments as a personal assault and resort to physical violence in response.[144]

Despite the abuse inflicted upon them, battered women commonly remain in their abusive environment rather than leave.[145] The variables that combine to trap victims of abuse in their surroundings include the extent of the violence experienced; childhood memories they harbor of their own parents' abusive relationship; the lack of economic and social resources; and the inadequate response of law enforcement to the abuse.[146]

Although there have been statutes that prohibit spousal abuse, law enforcement and the judicial system have historically been reluctant to interfere in domestic problems.[147] Until recently, the prevailing attitude of the police was that marital problems needed to be resolved within the confines of the marriage.[148] Thus, women who might have considered calling the police for help realized that it would probably be more effective if they attempted to help themselves.[149] Under these circumstances, the only plausible alternative to eliminate abuse was to eliminate the abuser.

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141. *Id.* at 58.

142. *Id.*

143. *Id.*

144. *Id.*

145. *See id.* at 59 (reporting that approximately half of the 80 family members that responded to the study remained in the abusive relationship even though there was a likelihood of abuse at least once a month); *see also* WALKER, *supra* note 123, at ix (noting that women do not remain in their relationships because they like being battered, but because of complex psychological and sociological reasons).

146. *See* Gelles, *supra* note 137, at 59 (setting forth the aforementioned factors that appear to dictate the actions of abused wives).

147. *See id.* at 60 (conceding that even if a woman attempts to get help to escape her abusive environment, her chances of getting effective assistance from the community are minimal); *see also* GILLESPIE, *supra* note 118, at 135 (acknowledging that battered women in general do not think that they can rely on the police, the courts, neighbors, relatives, or anyone else for protection from their abusers); WALKER, *supra* note 123, at 43 (indicating that police, courts, hospitals, and social service agencies do not offer adequate protection to women who are victims of domestic violence); *id.* at 206 (stating that battered women repeatedly report to social scientists that police do not adequately protect them from their batterers). *See generally* Elizabeth Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259, 262 (1971) (discussing the legal protection available to victims of spousal abuse).

148. WALKER, *supra* note 123, at 206.

149. *See* GILLESPIE, *supra* note 118, at 135-36 (noting that some women have found that attempts to call for outside assistance have proved futile; therefore, their only alternative has been to protect themselves); *see also* Gelles, *supra* note 137, at 60-61 (stating that many service agencies are unwilling to help a battered woman).

Though spousal abuse has become recognized as a social ill and criminalized as a violent offense, the growing incidences of homicide in which abusive spouses have been killed as a solution to domestic violence has raised some concerns. Some psychiatrists began to research the reasons why these battered women did not leave their partners instead.[150] This research resulted in a theory of defense which focuses on the psychological impact that abuse has on battered women.[151]

2. *Recognition of the Battered Woman Syndrome*

The problem of spousal abuse has received public attention only within the past twenty years.[152] In 1975, Dr. Lenore E. Walker began a pioneering study of the issues facing battered women.[153] Evidence gathered from her research demonstrates that abusive relationships entail both physical and psychological violence.[154] Through analyses of such relationships, Dr. Walker created a working definition of a "battered woman."[155] A "battered woman" is one who has been physically, sexually, or psychologically abused by a man with whom she shares an intimate relationship, who coerces her to do as he wishes without regard for her rights.[156]

Most of the abuse in an abusive relationship is psychological, so the primary reasons why women remain in abusive situations are psychosocial.[157] The predominant psychological explanation for the failure of women to leave an abusive relationship is learned helplessness.[158] The underlying rationale of the learned helplessness theory is that the batterer so completely commands every aspect of the woman's life that she comes to believe that she cannot function without that degree of control.[159] A point arrives, however, at which the woman who lives in

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150. WALKER, *supra* note 123, at xi.

151. *Id.* at xv; *see* State v. Kelly, 478 A.2d 364, 372 (N.J. 1984) (providing that battered women who killed their abusers share several common traits which serve as a basis for the defense).

152. WALKER, *supra* note 123, at ix.

153. *Id.* at xi.

154. *Id.* at xiv.

155. *Id.* at xiv-xv.

156. *See id.* at xv (providing that a man's abusive behavior often occurs in a specific cycle, at least twice). Walker states that any woman may find herself in an abusive relationship once; however, if it occurs a second time and she remains in the situation, she is classified as a battered woman. *Id.*

157. *See id.* at 43 (explaining that many women stay in the relationship because of economic, legal, and social dependence, while others are afraid to leave because they have no safe place to go); *see also* GILLESPIE, *supra* note 118, at 127 (stating that violent men use psychological techniques to intimidate and control women, primarily through verbal harassment and criticism).

158. WALKER, *supra* note 123, at 43. A thorough discussion of learned helplessness theory is beyond the scope of this comment. For further detail, see *id.* at 42-54.

159. *Id.* at 42.

a state of "constant anticipatory terror"[160] no longer wants to tolerate the abuse.[161] As a result, some battered women conclude that the only effective method to end the abuse is to kill their abusers.[162]

Many women have been tried for the killings of their abusive husbands or cohabitants.[163] In many of these cases, Dr. Walker has given expert testimony that these female defendants suffered from a psychological condition known as the "battered woman's syndrome."[164] As developed by Dr. Walker, the syndrome consists of a pattern common among abused women who have killed their batterers.[165] The pattern suggests that a battered woman (1) believes that her batterer is going to kill her; (2) suffers an extraordinarily brutal assault prior to the murder; (3) has an uncontrollable fear of her batterer; (4) does not realize that her batterer is dead, and for months after his death, speaks as though the batterer is still controlling her behavior; and (5) states that she did not intend to kill her batterer, but only intended to prevent him from killing her.[166] The last feature, that the woman killed the batterer in order to save her own life, is the basis of the woman's claim of self-defense.[167]

The main problem that arises under this claim of self-defense is that most states require that the victim of abuse be threatened with imminent harm and use the least force necessary to escape the batterer.[168] Although most of these women have the opportunity to physically leave the abuse, they do not leave because often they find it too difficult to break the emotional bond.[169] This psychological condition, to which the abused women attribute their violent behavior, requires defendants to rely heavily on expert witnesses for a medical explanation which may enable juries to view the defendant's behavior from her psychological position.[170]

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160. *See* GILLESPIE, *supra* note 118, at 131 (describing a battered woman's mental state, which consists of continuously building tension caused by the woman's attempts to control as many details of her life as possible in order to prevent her batterer from being triggered into rage). The combination of the strain of the tension, the emotional and physical toll, and the knowledge that her life may depend on her ability to ward off an impending beating for as long as possible creates an intolerable situation for the battered woman. *Id.*

161. *See* WALKER, *supra* note 123, at 43 (remarking that her research has shown that women remain in abusive relationships because of complex psychosocial reasons, not because they enjoy being beaten).

162. *See* GILLESPIE, *supra* note 118, at 144 (observing that some battered women believe that they cannot rely on society to protect them from the violence; thus, it is logical for them to conclude that if they are to be protected, they must seize whatever means necessary to protect themselves).

163. WALKER, *supra* note 123, at 220.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *See supra* notes 54-68, 76-93 and accompanying text (discussing the Model Penal Code and California statutory provisions for self-defense).

169. WALKER, *supra* note 123, at 220.

170. *See* State v. Kelly, 478 A.2d 364, 373 (N.J. 1984) (setting forth the court's test to determine the admissibility of expert testimony as whether the testimony is relevant to the defendant's claim of self-defense and whether such proffer meets the evidentiary standards for admissibility).

B. Presenting Evidence of the Battered Woman Syndrome in the Courtroom

There are two burdens that the battered woman must meet at trial: (1) Explaining to the jury that the emotional damage she incurred by living in a constantly violent and threatening situation affected her judgment; and (2) convincing the jury that her fear of death or great bodily harm was reasonable.[171] The primary method used to satisfy these burdens is expert testimony on the subject of the battered woman syndrome.[172] The expert's testimony includes an objective determination as to whether the woman's behavior was entirely consistent with that of a battered woman.[173] The purpose of this testimony is to help the jury understand the woman's state of mind and consequently, her belief that it was necessary to kill her batterer in the particular situation.[174]

1. Expert Witness Testimony

One function of expert witness testimony is to emphasize that the battered woman's syndrome is not a form of insanity defense.[175] The expert usually explains that the woman is suffering from emotional trauma, not a mental disorder.[176] The distinction is legally significant because if the woman is found to have a mental disorder, she can be committed to a mental institution.[177] However,

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171. GILLESPIE, *supra* note 118, at 123; *cf. supra* notes 54-68, 76-93 and accompanying text (discussing the Model Penal Code and California statutory provisions for self-defense); *id.* (discussing the burdens of proof under each statute).

172. Scobey, *supra* note 3, at 187-88; *see* People v. Patino, 26 Cal. App. 4th 1737, 1745, 32 Cal. Rptr. 2d 345, 349 (1994) (finding that expert testimony is admissible to explain a child sexual abuse victim's state of mind). For examples of cases which allowed expert testimony to explain the battered woman syndrome, see Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979); Hawthorne v. State, 408 So.2d 801 (Fla. Dist. Ct. App. 1982), *cert. denied*, 415 So. 2d 1361 (Fla. 1982); Smith v. State, 277 S.E.2d 678 (Ga. 1981); People v. Minnis, 455 N.E.2d 209 (Ill. App. 1983); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Kelly, 478 A.2d 364 (N.J. 1984); People v. Torres, 488 N.Y.S.2d 358 (1985); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983); State v. Allery, 682 P.2d 312 (Wash. 1984). *But see* State v. Stewart, 763 P.2d 572 (Kan. 1988) (holding that the battered woman syndrome could be used when the woman had no fear of imminent bodily harm).

173. GILLESPIE, *supra* note 118, at 158.

174. *Id.* at 159-60; *see id.* at 158 (classifying spousal abuse among those subjects that necessitate expert testimony during trial in order to aid the jury's understanding of the complex intricacies of psychological trauma).

175. *See id.* at 160 (stressing that the testimony does not serve to argue that the defendant should not be held responsible for her actions because she suffers from a mental illness). It is not the purpose of expert witness testimony to justify the battered woman's act of killing her abuser in order to give her more legal rights than others, nor is it to attempt to rationalize the woman's actions as revenge. *Id.* at 159.

176. *Id.* at 160. The battered woman syndrome focuses on the woman's state of mind, but does not suggest that she is mentally ill. *Id.*

177. *See* Parkin v. State, 238 So. 2d 817, 822 (Fla. 1970) (providing that an acquittal due to the insanity defense may confine the defendant in a mental institution for an indefinite time), *cert. denied*, 401 U.S. 974 (1971).

if the woman is found to suffer from emotional trauma, she can be acquitted on the basis of self-defense or found guilty of the lesser offense of manslaughter.[178]

One of the biggest obstacles for an abused woman who is attempting to use any form of self-defense is to prove that the threatened harm was sufficiently imminent to warrant protective action.[179] This obstacle is often the reason why abused woman defendants forego a claim of self-defense and plead insanity or guilty in exchange for a reduction in the charge and sentence.[180] The incentive to plead guilty to a lesser degree of homicide has been increased by a recent change in the law permitting the court to consider the defendant's actual physical ability to defend herself from her abuser in a nondeadly way.[181]

2. *Admitting Evidence of the State of Mind of a Battered Woman Defendant*

Many states now recognize the battered woman syndrome as legitimate evidence of self-defense.[182] The evidence focuses on the psychological impact that an abusive relationship has on a woman.[183] Most courts give the defendant considerable latitude in the use of expert witnesses to explain the effects of abuse.[184]

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178. *See, e.g.*, State v. Powell, 419 A.2d 406, 408-09 (N.J. 1980); State v. Mendoza, 258 N.W.2d 260, 274 (Wis. 1977) (holding that denying a defendant a jury instruction on a theory of imperfect self-defense in addition to a theory of perfect self-defense is prejudicial error); *see also Parkin*, 238 So. 2d at 822 (providing that acquittal based upon self-defense may allow a defendant to go free).

179. *See* GILLESPIE, *supra* note 118, at 76 (stating that this requirement has been a major hurdle to supporting a self-defense argument and has led to many convictions because of the objective standard by which the jury must evaluate the evidence).

180. *See id.* at 76 (providing examples of cases in which the defendants opted for an insanity plea or a guilty plea to a lesser offense). In one instance, Gillespie discusses Francine Hughes, a woman who suffered continuous abuse and futile attempts to leave her spouse, who raised an insanity defense during the murder trial in which she was accused of pouring gasoline over her then ex-husband as he slept and setting the house on fire. *Id.* Gillespie also describes the situation of Eileen Bartosh who was charged with the murder of her abusive husband and pleaded guilty to voluntary manslaughter, although she had suffered severe physical and psychological abuse for 18 months of marriage. *Id.* at 76-77.

181. *See id.* at 116 (arguing that there should be some flexibility in the law which would permit a court to consider the actions of each defendant, male or female, in light of the defendant's actual ability to defend against an offender in a nondeadly way). This change in the law was affirmed by the Washington Supreme Court in State v. Wanrow, 559 P.2d 548 (Wash. 1977). GILLESPIE, *supra* note 118, at 118. This standard used by the *Wanrow* court was not an objective reasonable person standard; rather, the court considered whether this defendant, with her unique viewpoint, acted reasonably under the particular circumstances. *Id.*; *see supra* notes 111-118 and accompanying text (discussing the *Wanrow* case).

182. *See, e.g.*, ILL. ANN. STAT. Ch. 720, para. 5/9-1 (Smith-Hurd Supp. 1994); MD. CODE ANN., Evidence § 10-916 (1994); MO. ANN. STAT. § 563.033 (Vernon 1979 & Supp. 1994); OHIO REV. CODE ANN. § 2901.06 (Page 1993); OKLA. STAT. ANN. tit. 21, § 733 (West 1994); WASH. REV. CODE § 9A.16.050 (West 1988 & Supp. (1995); WYO. STAT. § 6-1-203(b) (1994).

183. WALKER, *supra* note 123, at xv, 75; Scobey, *supra* note 3, at 184.

184. *See supra* notes 175-181 and accompanying text (discussing the significance of expert witness testimony in cases involving battered woman defendants).

One of the early cases to allow the battered woman defense was *State v. Kelly*.[185] In *Kelly*, a wife stabbed her abusive husband to death.[186] The defendant claimed that her husband's behavior frightened her into thinking that he would harm her.[187] After hearing testimony from expert witnesses on the psychological aspects of the battered woman syndrome, the court held that the syndrome is an appropriate subject on which an expert may testify and a jury may consider as a defense.[188] Furthermore, the court concluded that testimony of the battered woman syndrome may be admitted if the syndrome is relevant to the defendant's claim of self-defense and if specific state standards are met for admitting expert testimony.[189]

The concept and rationale of the battered woman syndrome has been extended to other situations.[190] For example, a homosexual man was able to successfully use battered woman/spouse syndrome evidence to obtain an acquittal of the murder of his partner.[191] The latest extension of self-defense based on the victim's fear of abuse is in the case of battered children who kill their parents.[192] The theory offered by children is that they have been repeatedly abused by either one or both parents and, on a particular occasion, perceived an action by the parent as a threat of death or great bodily injury.[193]

IV. STATE OF MIND EVIDENCE AND THE BATTERED CHILD DEFENDANT

Whether parricide[194] can be justified is probably one of the most challenging decisions a court may have to make. There have only been a few states in which courts have allowed evidence regarding the state of mind of a battered child defendant to be admitted. Many of these states have not decided upon its admis-

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185. 478 A.2d 364 (N.J. 1983).

186. *Kelly*, 478 A.2d at 368.

187. *See id.* at 369 (recounting that the defendant saw her husband running toward her with his hands raised, at which point she was unsure if he had armed himself while he was out of her presence).

188. *Id.* at 368.

189. *Id.* at 373.

190. *See* GILLESPIE, *supra* note 118, at 159-60 (discussing other possible extensions of this defense, including rape trauma syndrome and post traumatic stress disorder).

191. Julie Emery, *Battered-Woman Defense Gets Gay Man Acquitted of Murder*, SEATTLE TIMES, Nov. 21, 1986, at B1; *see* Lynda Gorov, *Battered by a Woman; Lesbian Who Killed Abuser Seeks Pardon*, BOSTON GLOBE, Jan. 10, 1993, at 21 (reporting that a lesbian who was convicted of the manslaughter of her lover sought to obtain a pardon based on her claim that she had been abused during their relationship). *But see Lesbian Convicted of Beating Her Lover*, L.A. TIMES, Oct. 30, 1990, at B2 (describing a case in which a lesbian defendant was found guilty of repeatedly striking her lover despite the presentation of evidence that she had been abused).

192. Scobey, *supra* note 3, at 182; *see supra* notes 8-9, 17-18, *infra* notes 193-286 and accompanying text (discussing the use of psychological evidence in cases of battered child defendants).

193. *Id.*

194. *See* BLACK'S LAW DICTIONARY 1117 (6th ed. 1990) (defining parricide as the crime of killing one's father).

sibility due to procedural errors in the lower courts' proceedings.[195] Although there are few definite positions espoused by these courts, it is possible for California courts to look to some of the considerations by other states' courts when contemplating the admissibility of evidence regarding a battered child defendant's state of mind.[196]

A. The Theory

Recently, when evaluating a battered child defendant's claim of self-defense, the focus has been on the child's state of mind at the time of the killing.[197] The reason for this emphasis is that abused children argue that they feared their parents were going to kill them.[198] This belief prompted the children to use deadly force to protect themselves.[199]

Parricide, however, is generally not committed as an immediate response to abuse; rather, children generally plot to kill their parents for days or weeks before the actual murders.[200] The most famous parricide case is Lizzie Borden's mutilation murders of her parents in 1892.[201] The prosecution speculated that her

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195. *See infra* notes 224-286 and accompanying text (discussing other states' treatment of evidence of the state of mind of a battered child).

196. *See id.* (discussing the factors considered by other states in contemplating the admissibility of state of mind evidence of a battered child).

197. Scobey, *supra* note 3, at 181. *But see* Sacks, *supra* note 18, at 349 (acknowledging that the admissibility of evidence regarding a battered woman defendant's state of mind has not been extended to battered children). *Compare* Steven R. Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 LAW & PSYCHOL. REV. 103, 103-04 (1987) (defining a battered child) *with* RAY E. HELFER & RUTH S. KEMPE, THE BATTERED CHILD 249-51 (1968) (defining a "battered baby" as an infant or a child who has suffered multiple episodes of abuse, as indicated by the presence of recent healing and healed injuries on the skin or skull).

198. *See* Scobey, *supra* note 3, at 184 (indicating that children may kill their abusive parents out of genuine fear for their lives, even if their actions do not meet the statutory requirements of self-defense); Church, *supra* note 5, at 68 (explaining that according to the battered child defense theory, a child can be so terrorized by years of abuse that the child genuinely reads danger, whether or not it is actually present, in any look, act, or words by the parent, which an objective person would not perceive); *see also* Hicks, *supra* note 197, at 105 (explaining that the battered child syndrome focused on the physical effects of abuse).

199. *See* Scobey, *supra* note 3, at 185 (noting that self-defense is the primary motivation for children in a parricide); Greggory Morris, *The Kids Next Door: Sons and Daughters Who Kill Their Parents*, 17 CJA § 37278, Abstract (discussing the psychological motivation behind parricide).

200. MONES, *supra* note 19, at 15. Most of the limited research is from a psychiatric perspective and probes the child's mental processes, without taking into consideration the parents' actions. *Id.* at 6; *see* Scobey, *supra* note 3, at 185 (providing that the key to the battered child defense is the recognition that children learn to predict when their parents are going to harm them, and live with that fear daily); *infra* notes 224-286 and accompanying text (discussing and analyzing five cases which have addressed the subject of parricide); *see also* Hicks, *supra* note 197, at 104 (explaining that a child learns over time the events which can prompt a parent to react in an abusive manner).

201. Edgar Lustgarten, *The Lizzie Borden "Axe Murder" Case*, *in* GREAT COURTROOM BATTLES 1 (Richard E. Rubenstein, ed., 1973). This case was the most sensational murder trial of nineteenth century America. *Id.*

motive was hatred for her parents.[202] However, Borden was acquitted of the murders, and there is still discussion as to whether, based on the facts of the case and the testimony of witnesses, the verdict was correct.[203] Although the specific facts in the Borden case cannot be revisited, there is a chance that with today's focus on child abuse, the justice system will have more opportunities to consider the effect of abuse on children through parricide cases.[204] In fact, common patterns of parricide are emerging.[205]

B. Emerging Patterns

Based on parricide cases that have unfolded within the last decade, social scientists are developing a profile of those involved in these murders.[206] There are similar characteristics among the children who kill, the parents who are killed, and the manner in which the parricides are committed.[207]

Most of the children who commit parricide are Caucasian males between the ages of sixteen and eighteen, who come from middle-to-upper class families.[208] Generally, these children have either never been arrested or have only been charged with non-violent crimes like vandalism or shoplifting.[209] They are usually average or above-average students, loners, eager to please their peers, and overly polite to adults.[210] Although their demeanor may appear calm, they have usually been physically, mentally, and sexually abused for years, and typically have witnessed abuse of other family members.[211]

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202. *Id.* at 12.

203. *Id.* at 31-32. Since Borden's death, 34 years after the murders, students of crime have endlessly debated the propriety of the verdict. *Id*; *see* MONES, *supra* note 19, at 8 (referring to Ann Jones, *Women Who Kill*, which theorized that Borden was acquitted because, although there was convincing evidence to the contrary, the community and jury found it difficult to comprehend that a proper lady like Lizzie Borden could have committed such heinous acts); *see also* Lawrence Meyer, *Kids Who Kill Parents*, WASH. POST, May 13, 1984, at W14 (speculating that neighbors of abusive families see the killings as random and are often unable to imagine that a child's fear was the cause).

204. *See infra* notes 324-343 and accompanying text (speculating on the possible ramifications of the recognition of the battered child defense).

205. MONES, *supra* note 19, at 13-15.

206. Scobey, *supra* note 3, at 184; MONES, *supra* note 19, at 13-15.

207. Scobey, *supra* note 3, at 186.

208. MONES, *supra* note 19, at 13.

209. *Id.*

210. *Id.* at 14; *see* Meyer, *supra* note 203, at W14 (reporting that parricide usually occurs in families that appear "normal" to others).

211. MONES, *supra* note 19, at 14. Mones concedes, however, that not all children who kill are victims of abuse. *Id.* at 16; *see* Patricia Callahan, *When a Child Kills a Parent, Does Abuse Forgive the Act?*, CHI. TRIB., June 17, 1993, at 16 (quoting Joy Byers, Associate Communications Director for the National Committee to Prevent Child Abuse, who observed that abused children "internalize the abuse they see 'over a long period of time' until they reach a breaking point").

The parents of these children also share common characteristics.[212] Usually, they have successful careers and reputations for being hardworking and honest.[213] Typically, they are private people, with no substance abuse problems.[214] Their main flaw is that they believe they have an absolute right to control their children in any way they see fit.[215] Most of these parents beat their children, not for disciplinary reasons, but because they are addicted to their power over them and because they glean satisfaction from using this power.[216]

The parricides also tend to have a consistent pattern.[217] Usually, they occur when the parent is in a vulnerable position.[218] The parents are usually killed while sleeping, watching television, or cooking with their backs turned to the child.[219] It is common for the child to devise a plan for the killing and share it with friends days before the act.[220] Most of the children are convicted because they rarely deny the killing.[221] Although the children usually appear passive, most of them demonstrate an "overkill factor" during the killing by shooting, clubbing, or stabbing the parent numerous times.[222] Recognizing similar patterns in parricides is a significant step in understanding the state of mind of battered children. Through continuous research, social scientists will be able to provide more detailed explanations of the psychological effects of abuse on children.

Although the common characteristics of parricides have been identified, there has only been one well-publicized California case to consider the long-term effects of abuse on children.[223] This fact is important to note because California is considered by many legal authorities as a leading state in adjudicating novel concepts of law, and the California courts have not yet had the opportunity to fully consider whether evidence regarding the state of mind of a battered child

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212. MONES, *supra* note 19, at 14-15.

213. *Id.* at 14.

214. *Id.*

215. *Id.* at 15.

216. *Id.*

217. *Id.*

218. *Id.*; *see* Louis Sahagun, *Murder Case Opens Eyes to Horrific Tale of Child Abuse*, L.A. TIMES, Sept. 9, 1993, at A1 (quoting attorney Paul Mones as saying that parricides almost always occur when the adult is not aggressing towards the child).

219. MONES, *supra* note 19, at 15; Sacks, *supra* note 18, at 349; *see* MONES, *supra* note 19, at 15 (noting that there are very few cases in which the parent was killed while beating or arguing with the child).

220. MONES, *supra* note 19, at 15; *see* Chapin Wright, *Straight A's; Guilty Verdict*, NEWSDAY, Dec. 17, 1990, at 4 (reporting that Nicole Roberts, a girl who brutally slashed her abusive mother's throat, had discussed ways of killing her mother with her sister, prior to the murder).

221. *Morning Edition: Battered Child Syndrome Recognized as Self-Defense* (NPR, June 22, 1993); *see* Jana Mazanec, *Murder or Victim? Town Rallies to Teen's Side*, USA TODAY, Nov. 12, 1992, at 2A (specifying that 95% of children who commit parricide face some form of homicide conviction).

222. MONES, *supra* note 19, at 15; David Margolick, *When a Child Kills Parent, It's Sometimes to Survive*, N.Y. TIMES, Feb. 14, 1992, at D20.

223. In January 1994, the juries in People of the State of California v. Erik Galen Menendez & Joseph Lyle Menendez, BA068880 (1990), considered the battered child defense when they deliberated two murders. *See infra* notes 302-317 and accompanying text (discussing the Menendez brothers' trial).

defendant should be heard by the trier of fact. In order to more accurately speculate on California's treatment of the admissibility of a battered child defendant's state of mind, it is helpful to evaluate cases from other states.

C. Cases

There is little precedent on the admissibility of evidence regarding a battered child defendant's state of mind because only a few courts in the country have addressed it.[224] Some courts have not decided this issue because of procedural errors at trial.[225] Of the courts that have considered its admissibility, some have decided to allow the evidence, while others have not.[226] Thus, the few states that have addressed the issue have drawn different conclusions regarding the admissibility of evidence substantiating an abused child's claim of self-defense.[227]

1. Wyoming

In *Jahnke v. State*,[228] the defendant shot and killed his father several hours after the two had a confrontation.[229] The defendant had a violent argument with his father and later that evening his parents went out to dinner.[230] During their absence, the defendant changed into dark clothing, positioned numerous weapons throughout the house, and hid in the garage in such a position that he could not

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224. *See infra* notes 225-286 and accompanying text (discussing rulings from other states that decide the issue of the battered child defense).

225. *See infra* notes 228-270 and accompanying text (providing a discussion of these courts' analyses).

226. *See infra* notes 271-286 and accompanying text (explaining the rationales of these courts' decisions).

227. Some of the states that have addressed the issue are Florida, Kansas, Louisiana, New York, Washington, and Wyoming. *See infra* notes 228-286 and accompanying text.

Additionally, in Oklahoma, two brothers were charged with the first degree murder of their abusive father. Their attorney had planned to use the battered child defense to justify the slaying. However, the boys pled no contest to the charge and were placed on probation for five years. Because this case involved juvenile defendants, the files concerning the case are sealed; therefore, there is no case citation available. *See* Tony Mauro, *Child Abuse Becoming a Defense Trend*, USA TODAY, Sept. 24, 1993, at 2A (reporting that Lonnie and Druie Dutton were going to use the battered child defense in their trial for the murder of their abusive father); B.E. Stewart, *The Dragonslayer*, WASH. POST, Aug. 15, 1993, at F1 (describing the abusive story of Lonnie and Druie Dutton); *World News Tonight with Peter Jennings* (ABC television broadcast, Aug. 16, 1993) (reporting that the Dutton brothers were scheduled to stand trial for the first degree murder of their abusive father); *48 Hours with Dan Rather* (CBS television broadcast, Sept. 8, 1993) (describing the abuse the Dutton brothers suffered and the support they received from their community after they killed their father); *see also* Arnold Hamilton, *Boys Plead No Contest in Dad's Slaying*, DALLAS MORNING NEWS, Sept. 15, 1993, at 1A (reporting that the brothers pled no contest to the reduced charge of first degree manslaughter, much to the dismay of their friends and family); Sahagun, *supra* note 218, at A1 (describing the support the community of Rush Springs, Oklahoma, gave the Dutton brothers after they killed their father).

228. 682 P.2d 991 (Wyo. 1984).

229. *Jahnke*, 682 P.2d at 995.

230. *Id.*

be seen, but could see any activity on the driveway.[231] When his parents arrived home, he opened fire on his father at the moment he could see his father's head and shoulders.[232] On appeal, the Wyoming Supreme Court denied the defendant the opportunity to present evidence pertaining to the battered child's state of mind because the court determined that self-defense of any kind must be accompanied by a threat of imminent bodily harm.[233]

At trial, the defendant claimed that he had been a victim of his father's abuse and argued that the court should consider his state of mind at the time of the killing, as in cases of battered women.[234] The court disagreed and concluded that the appropriate analysis for self-defense is an objective test.[235] Accordingly, the court ruled that the jury could only look at the facts surrounding the killing, not at the defendant's daily fear of his abusive father.[236] The jury found him guilty of first degree murder, apparently determining that the defendant's behavior was not in accord with that of a reasonable person.[237]

2. *Washington*

In *State v. Janes*,[238] a seventeen-year-old-boy was convicted of second degree murder after shooting his stepfather.[239] The defendant had been emotionally and physically abused by his stepfather for many years.[240] The defendant claimed that because of the history of abuse, he was acting in self-defense when he shot his stepfather.[241]

At trial, the defendant proffered a child psychiatrist who was prepared to testify that the defendant suffered from post traumatic stress disorder.[242] The trial judge, however, excluded the expert and denied the defendant's request for a self-

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231. *Id.*

232. *Id.*

233. *See id.* at 1006 (Wyo. 1984). Self-defense must include circumstances that involve a confrontation which would induce a reasonable person to fear death or great bodily harm. Nunez v. State, 3 P.2d 726, 727 (Wyo. 1965).

234. *Jahnke*, 682 P.2d at 996. The defendant cited Burhle v. State, 627 P.2d 1374 (Wyo. 1981), in which a wife claimed that she suffered from battered woman syndrome. *Jahnke*, 682 P.2d at 996; *see supra* notes 126-191 and accompanying text (discussing the battered woman syndrome).

235. *Jahnke*, 682 P.2d at 996-97.

236. *Id.* at 996.

237. *Id.* at 995. The reviewing court stated that the defendant had failed to make an adequate offer of proof at trial as to the effect or pertinence of an expert witness' testimony and had failed to recall on appeal a psychiatrist whose testimony had given the defense some prior difficulties. *Id.* at 1008. These two defense errors precluded the supreme court from considering the merits of admitting state of mind evidence of the battered child defendant.

238. 850 P.2d 495 (Wash. 1993).

239. *Janes*, 850 P.2d at 495.

240. *Id.*

241. *Id.*

242. *Id.* at 500.

defense jury instruction.[243] The Supreme Court of Washington reversed the trial court's decision, becoming the first court to recognize the need to consider the effects of abuse on a battered child defendant's state of mind.[244] The standard prescribed by the court to evaluate the need for self-defense was that of a "reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees."[245]

The court further held that there is a two-part inquiry that the lower court must use to determine the admissibility of evidence regarding a battered child's state of mind: whether the evidence satisfies (1) the admissibility requirements of Rule 702 of the Federal Rules of Evidence,[246] and (2) the *Frye* test.[247]

3. *Kansas*

In *State v. Crabtree*,[248] a seventeen-year-old male defendant was convicted of second degree murder for killing his stepfather.[249] The stepfather had physically, emotionally, and sexually abused the defendant and his siblings.[250] On the day of the homicide, the stepfather and the defendant had been involved in an argument.[251] After the killing, the defendant told the police that his stepfather had made a threat to get a knife.[252] In response, the defendant had gone into his room, retrieved a shotgun, and followed his stepfather out of the house.[253] The defendant then shot and killed his stepfather.[254]

At trial, the defendant claimed that the killing occurred in self-defense.[255] He argued that if the claim of self-defense creates a reasonable doubt as to his culp-

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243. *Id.*

244. *Id.* at 501. The court recognized that battered children may be acting out of self-defense in parricides. *Morning Edition: Battered Child Syndrome Recognized as Self-Defense* (NPR, June 22, 1993).

245. *Janes*, 850 P.2d at 504.

246. *See* FED. R. EVID. § 702 (requiring that the subject of an expert witness' testimony be proven reliable by an inference or assertion which was derived by scientific method and was shown to be relevant by assisting the trier of fact in understanding the evidence).

247. *Janes*, 850 P.2d at 501. The *Frye* test is a rule by which the proposed scientific evidence is considered for admission if the evidence is generally accepted in the particular field in which it belongs. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). *But see* Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993) (holding that the *Frye* test is not part of the Federal Rules of Evidence, and that the Federal Rules do not have a prerequisite of general acceptance in the scientific community before scientific evidence can be admitted). Those states that do not follow the Federal Rules of Evidence do not necessarily have to consider or comply with the *Daubert* holding. In addition, those states which have adopted the Federal Rules of Evidence are not required to follow *Daubert* because its holding only specifically applies to federal courts.

248. 805 P.2d 1 (Kan. 1991).

249. *Crabtree*, 805 P.2d at 2.

250. *Id.*

251. *Id.* at 3.

252. *Id.*

253. *Id.* The defendant later admitted that he did not know if the decedent actually had a knife. *Id.*

254. *Id.* at 3-4.

255. *Id.* at 5.

ability, he should be found not guilty.[256] The court, however, did not give any self-defense instruction that would allow the jury to consider his state of mind at the time of the killing.[257] On appeal, the defendant maintained that he was entitled to a self-defense instruction with the same language and justification as that used in the case of a battered woman.[258] The appellate court rejected this argument, stating that there was no evidence warranting any form of imperfect self-defense instruction.[259] Thus, the court refused to consider the state of mind of the battered child defendant, although it specified that its decision was not a broad-based ruling but, rather, limited only to the circumstances of the case.[260]

4. Louisiana

In *State v. Gachot*,[261] a fifteen-year-old defendant was convicted of murdering both of his parents.[262] The defendant argued that evidence of his state of mind at the time of the killing should be admitted because it was essential to his defense.[263] He claimed that the verbal abuse that his father had inflicted upon him had caused him to temporarily lose control and shoot both of his parents.[264]

At trial, the defendant attempted to use a psychologist to convince the jury that he suffered from diminished capacity based on severe mental abuse.[265] On appeal, the defendant claimed that a Louisiana statute codified the battered child defense by allowing the presentation of evidence as to the defendant's state of mind at the time of the killing.[266] The appellate court held that, although there were changes in the evidence law, the changes only apply in cases in which a defendant enters a plea alleging that he suffered from a mental condition at the

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256. *Id.*

257. *Id.* at 1.

258. *Id.* at 5.

259. *Id.*

260. *Id.* at 5-6.

261. 609 So. 2d 269 (La. Ct. App. 1992), *cert. denied*, 617 So. 2d 1180 (La. 1993).

262. *Gachot*, 609 So. 2d at 271.

263. *Id.* at 276.

264. *Id.* The defendant and his parents had been arguing when the defendant's father began to verbally attack his son about his homosexuality; the defendant lost control as a result. *Id.*

265. *Id.*

266. *See* LA. CODE EVID. ANN. art. 404(a)(2) (West 1995) (providing in pertinent part "when a defendant pleads self-defense and there is a history of assaultive behavior between the victim and the accused and the accused lived in a familial . . . relationship such as . . . parent-child, . . . it shall not be necessary to first show a hostile demonstration or overt act on the part of the victim in order to introduce evidence of the dangerous character of the victim . . . ."); LA. CODE CRIM. PROC. ANN. art. 651 (West 1981) (specifying that when a defendant is tried upon a plea of "not guilty," evidence of insanity or mental defect at the time of the offense is inadmissible); *Gachot*, 609 So. 2d at 276 (explaining that the court refused to hear evidence that the defendant had a perception that was different than that of a reasonable person, including a battered child defense, because the defendant did not plead "not guilty and not guilty by reason of insanity" per Louisiana Code of Criminal Procedure article 651).

time of the incident.[267] Because the defendant had originally entered a plea of "not guilty" and not the appropriate plea of "not guilty and not guilty by reason of insanity," evidence of the defendant's mental abuse was inadmissible.[268] According to the cited statute, evidence of assaultive behavior between the victim and the accused is admissible only after the defendant enters the appropriate plea.[269] Therefore, this defendant was unable to present any evidence as to his state of mind.[270]

5. Florida

In 1989, a judge acquitted the defendant in *State v. Goodykoontz*[271] of the murder of her physically and sexually abusive father.[272] The judge found that the defendant had a reasonable belief that she was in imminent danger, although there was no actual threat of immediate physical action by her father.[273] In addition, the judge noted that the defendant's use of deadly force was reasonable to protect herself from the impending harm.[274]

In the 1993 case of *State v. Barnes*,[275] a Florida judge acquitted a sixteen-year-old boy of shooting and killing his sleeping father.[276] The defendant claimed that his father had been abusive to him and to his mother.[277] As well, on the night of the killing, the father threatened the defendant with a knife, and had previously threatened the defendant's mother in a similar manner.[278] The judge apparently was convinced that the defendant had acted in self-defense, even though the father was asleep when the defendant shot him.[279]

At the time of the killings, neither defendant in *Goodykoontz* or *Barnes* faced an imminent threat of harm from the abuser. Yet, both defendants were allowed to present evidence of their state of mind at the time of the killings and were acquitted of murder. Based on the holdings in the aforementioned cases, it appears

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267. *Gachot*, 609 So. 2d at 276.

268. *Id.*

269. *Id.*

270. *Id.* at 278.

271. Because this case involved a juvenile offender, the files concerning the case are sealed; therefore, there is no case citation available. *See Judge Acquits Girl Who Killed Abusive Dad*, CHI. TRIB., July 2, 1989, at C24 (discussing the situation of Diana Goodykoontz).

272. *Id.*

273. *Id.*

274. *Id.*

275. Because this case involved a juvenile offender, the files concerning the case are sealed; therefore, there is no case citation available. *See* Karl Vick, *Brothers' Murder Trial True California Tale*, ST. PETERSBURG TIMES, Dec. 23, 1993, at A1 (explaining the details surrounding the killing of J.D. Barnes' father).

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

that the state of Florida recognizes an imperfect theory of self-defense in the case of battered children.

6. New York

In *People v. Cruickshank*,[280] a teenage girl who had been sexually abused shot her father as he walked away from their argument.[281] She told him that he could not enter the home or else he would be in violation of a separation agreement between the girl's mother and father.[282] After he insisted on coming into the home, the defendant shot him in the back and in the head.[283] She was convicted of first degree manslaughter.[284]

The appellate court reversed her conviction based in part on the fact that she was a sexually abused child and her crime directly arose from that condition.[285] On the day of the killing, the defendant feared that her father had entered the home to sexually assault her. The court referred to the expert testimony which had been offered at trial and determined that her extreme emotional disturbance provided a reasonable explanation of her reaction.[286]

By allowing expert testimony of the fear that the defendant experienced at the time of the killing and using that evidence as a basis for reversing the conviction, it appears that the appellate court in New York has recognized that evidence of the accused's state of mind is necessary to evaluate the culpability of a battered child defendant.

V. CALIFORNIA'S ANTICIPATED TREATMENT OF ADMITTING EVIDENCE OF THE STATE OF MIND OF A BATTERED CHILD

It would seem to be in the best interest of California and its battered child defendants for its courts to consider the approaches taken by other states and to develop a well-supported position on the question of whether to admit evidence of the state of mind of such defendants. Because the evidence at issue is analogous to that already allowed in the cases of battered women, it would also seem prudent for California to evaluate its position on admitting state of mind evidence of a battered woman defendant and consider the possible impact that allowing

280. 484 N.Y.S.2d 328 (N.Y. App. Div. 1988).
281. *Cruickshank*, 484 N.Y.S.2d at 332.
282. *Id.* at 331-32.
283. *Id.* at 332.
284. *Id.* at 328.
285. *Id.* at 337.
286. *Id.*

such evidence of any abused defendant may have on the state's criminal justice system.[287]

A. Impact of Cases Involving Battered Woman Defendants

There have only been a few opportunities for California courts to consider admitting evidence of a battered woman.[288] Without the broad foundation of decisions that have involved analyses of the subjective fears of abused woman defendants, California courts may be at a disadvantage when considering the subjective fears of children in parricide cases.[289] Following are two examples of rulings that California courts have made regarding battered woman defendants which may be beneficial in the State's consideration of admitting evidence of a battered child.

In *People v. Aris*,[290] the court of appeal articulated the applicability of evidence of the battered woman syndrome in self-defense cases. The court noted that imperfect self-defense requires the defender's subjectively honest belief that deadly force is necessary.[291] Proof of this subjective belief negates the mental element of malice that is required for homicide, which then reduces the crime to manslaughter.[292] The court also established criteria under which an expert's testimony could be deemed relevant when discussing the battered woman syndrome.[293] The most important consideration is the imminence of danger.[294] Another related factor for the jury to consider is the reasonableness of the woman's reaction to her abuser. To determine whether the defendant is in imminent danger and her reaction is reasonable, the jury is permitted to consider the defendant's subjective fears of the abuser.[295]

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287. *See* C. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 79 (1987) (speculating that battered children who are accused of parricide may be able to use an extension of the battered woman defense as a psychological self-defense claim).

288. *See supra* notes 290-301 and accompanying text (discussing some California cases addressing the admissibility of evidence of the state of mind of a battered woman defendant).

289. *See* Sacks, *supra* note 18, at 379 (explaining that the psychological effects of battered children are similar to those present in battered women and therefore provide a foundation upon which to extend the battered woman defense); *cf.* TEX. CRIM. PROC. CODE ANN. § 38.36(b)(1) (Vernon 1995) (providing the nation's first statute which allows evidence of family violence to be admitted when an abused woman or child kills).

290. 215 Cal. App. 3d 1178, 264 Cal. Rptr. 167 (1989).

291. *Aris*, 215 Cal. App. 3d at 1186, 264 Cal. Rptr. at 172.

292. *Id.*

293. *Id.* at 1197, 264 Cal. Rptr. at 180; *see* James O. Pearson, Jr., Annotation, *Admissibility of Expert or Opinion Testimony on Battered Wife or Battered Woman Syndrome*, 18 A.L.R. 4th 1153, 1154 (1993 & Supp. 1994) (discussing *Aris* as a case in which the court has decided under what circumstances expert testimony concerning the state of mind of a battered woman defendant is admissible in evidence).

294. *Aris*, 215 Cal. App. 3d at 1193-99, 264 Cal. Rptr. at 177-81.

295. *Id.* at 1189, 264 Cal. Rptr. at 174.

In *People v. Day*,[296] the appellate court reversed the defendant's conviction of involuntary manslaughter.[297] The court stated that the woman, who showed signs of physical and emotional abuse, should have been given the opportunity to present evidence and offer testimony about the battered woman syndrome.[298] The court acknowledged that evidence of the battered woman syndrome would have lent credence to the woman's defense.[299] Without the benefit of such testimony, the defendant was ineffectively represented.[300] Accordingly, the court held that the defense counsel's failure to present accurate evidence of the battered woman syndrome was unfairly prejudicial because it did not let the jury consider the state of mind of the defendant at the time of the killing.[301]

By allowing expert testimony regarding the state of mind of an abused woman defendant, jurors are given the opportunity to evaluate the circumstances of the killing from the perspective of the abuse victim in order to determine whether her lethal reaction was reasonable. Although imminence is a necessary element in traditional self-defense analysis, in the case of a battered woman, the imminence must be evaluated from the perspective of the abused woman. Expert testimony is essential to understand the abused woman's perception of imminence in the situation. Evidence of the woman's perceived imminence of the danger will also provide the trier of fact with a foundation upon which the psychological impact of abuse can be considered. In cases of abused children, evidence of the child's state of mind, through expert or lay witness testimony, can also be illustrative of the child's perception of imminence and the reasonableness of the killing.

B. California's Recent Consideration of Admitting Evidence of the State of Mind of a Battered Child Defendant

The most publicized case in which California juries were able to consider the state of mind of battered children was in the murder trial of J. Lyle and Erik Menendez.[302] In *People v. E. Menendez & J. Menendez*,[303] the two brothers were charged with the first degree murders of their parents.[304] The brothers attempted

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296. 2 Cal. App. 4th 405, 2 Cal. Rptr. 2d 916 (1992).

297. *Day*, 2 Cal. App. 4th at 407, 2 Cal. Rptr. 2d at 917.

298. *Id.* at 419, 2 Cal. Rptr. 2d at 925.

299. *Id.* at 420, 2 Cal. Rptr. 2d at 925.

300. *Id.*

301. *Id.* at 419, 2 Cal. Rptr. 2d at 925.

302. The murder trial of J. Lyle and Erik Menendez began in May, 1993 and ended in a mistrial in January, 1994.

303. People of the State of California v. Erik Galen Menendez & Joseph Lyle Menendez, BA068880 (1990).

304. *Id.*

to justify their actions by claiming that years of physical, emotional, and sexual abuse from their parents caused them to fear for their lives.[305]

During the trial, the defense attorneys presented several expert witnesses who testified about the psychological make-up of physically and sexually abused children in order to establish that the brothers had suffered the same psychological trauma as other abused children.[306] Essentially, the expert witnesses set forth the Menendez brothers' defense.[307] They testified that children who are physically and sexually abused on a continuous basis can see no alternative to leaving the abusive situation.[308] Therefore, the experts inferred that at the time of the incident the brothers feared for their lives.[309]

Battered children who commit parricide generally claim their actions were in self-defense.[310] Self-defense is generally defined as a reaction to an honest and reasonable fear of death or great bodily injury.[311] This is known as "perfect" self-defense. However, there is also "imperfect" self-defense, which consists of an honest but *unreasonable* belief of fear of death or great bodily injury.[312] In the *Menendez* trial, the judge instructed the juries that they could find that the defendants used imperfect self-defense.[313] He explained imperfect self-defense as the defendant's genuine belief of a threat to his life, although there was none present.[314] Dr. Ann Burgess,[315] a professor of psychiatric nursing and an expert

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305. Vick, *supra* note 275, at A1; *see* Phil Reeves, *Menendez Brothers' Trial Hinges on Tape*, THE INDEPENDENT, Nov. 23, 1993, at 11 (relating that the brothers denied their involvement in the murders until a judge decided that an incriminating tape recorded during a psychological therapy session could be admitted as evidence in the trial); *see also* Alan Abrahamson, *Last of 56 Witnesses Says That Although the Brothers Told Their Therapist of Murdering Their Parents, They Did Not Trust Him Enough to Disclose Details of Abuse*, L.A. TIMES, Nov. 19, 1993, at B1 (clarifying that the judge allowed the tape into evidence because the defendants had placed their mental stability as a central issue in the trial, and, therefore, the tape between the defendants and their therapist was relevant evidence).

306. *See infra* notes 307-309, 315-317 and accompanying text (discussing the expert witness testimony presented in the *Menendez* case).

307. Vick, *supra* note 275, at A1.

308. *Id.*; *see* Hicks, *supra* note 197, at 119 (explaining that the lack of a viable escape combined with continuous and consistent patterns of abuse may cause a battered child to strike back against the abuser).

309. Vick, *supra* note 275, at A1.

310. Scobey, *supra* note 3, at 181-82.

311. CAL. PENAL CODE § 197 (West 1988); *see supra* notes 26-93 and accompanying text (discussing self-defense).

312. *See supra* notes 96-110 and accompanying text (discussing the imperfect theory of self-defense in which the mental element of malice can be eliminated and the defendant can only be found guilty of manslaughter); *see also* CAL. PENAL CODE § 192 (West Supp. 1994) (defining manslaughter as an unlawful killing, without malice, of another human being).

313. Vick, *supra* note 275, at A1.

314. *Id.*

315. *See Is a Constitutional Amendment Necessary to Protect our Children? Children's Advocates to Sponsor FRE*, PR Newswire, Nov. 30, 1989, *available in* LEXIS, News Library, Arcnews File (listing Dr. Burgess' qualifications as a child advocate; an expert in the areas of victimology, child sexual abuse, and post traumatic disorders; a former member of the U.S. Attorney General's Task Force on Family Violence; an author; and a recipient of many professional awards).

witness in the *Menendez* trial, testified that the brothers may have interpreted a statement by their mother as an indication that the parents were plotting to kill the defendants.[316] She further testified that although the brothers were eighteen and twenty-one years of age at the time of the murders, the extensive abuse they experienced throughout childhood may have caused them to have a difficult time in establishing their independence from their parents, which, in turn, may have prevented them from leaving the threatening situation.[317]

C. The Imperfect Self-Defense Theory

Evidence regarding a defendant's state of mind is admissible when the jury is considering a theory of imperfect self-defense because the propriety of the defendant's conduct is evaluated from the defendant's standpoint, not from that of a reasonable person.[318] As demonstrated in the *Menendez* trial, California currently allows defendants to plead a theory of imperfect self-defense.[319]

Proponents of the defense argue that battered children have a unique psychological makeup that causes them to see killing their parents as their only alternative to ending the abuse.[320] Unfortunately, because courts do not consider continuous abuse an immediate and obvious threat to a child's life, the courts reject this theory of defense because the circumstances of parricide do not conform to the traditional self-defense theory.[321] Advocates further stress that courts must begin to recognize that in an abusive relationship, the danger is subtle and realized only by the abused child.[322]

As shown, the central tenet of the imperfect self-defense argued by battered women and battered children is the subjective fear of the defendant at the time of the killing. Without expert testimony regarding the psychological effects of abuse, juries may be unable to adequately assess the defendant's state of mind. Courts should admit expert testimony in the cases of parricide defendants in order to allow the jury to consider all relevant information including the subjective fear of the child defendant.[323]

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316. Vick, *supra* note 275, at A1; *see supra* notes 306-309 and accompanying text (discussing the *Menendez* case).

317. Vick, *supra* note 275, at A1; *cf. supra* notes 123-130, 156-159 and accompanying text (discussing the emotional bond between battered women and their abusers).

318. Scobey, *supra* note 3, at 183.

319. *See supra* notes 305-317 and accompanying text (discussing the Menendez brothers' defense).

320. Sacks, *supra* note 18, at 349.

321. *Id.*; *see* Scobey, *supra* note 3, at 186 (explaining that the traditional views of self-defense do not consider the psychological circumstances of the child).

322. Mavis J. Van Sambeek, *Parricide as Self-Defense*, 7 LAW & INEQUALITY J. 87, 90-91 (1988).

323. *See* Sacks, *supra* note 18, at 360 n.77 (arguing that using a subjective standard to evaluate the culpability of a parricide defendant is preferred because such a standard would require the consideration of the history of abuse and characteristics of the battered child).

D. Ramifications

There are several consequences that may follow a California court's decision to give defendants the opportunity to present evidence of child abuse. Some of these ramifications will affect the child directly, while others will impact the judicial and child protective systems.

1. Advantages to Admitting Evidence of the State of Mind of a Battered Child Defendant

In some sense, the admissibility of such evidence may provide abused children with an opportunity to escape the entrapment of a violent world. Some children may have considered leaving home to escape the abuse, but were too fearful that their abuser would harm other family members due to their absence.[324] In addition, some children may be unable to leave the home due to limited financial resources, education, or skills. Instead of leaving the situation, battered children, some of whom do not realize that abuse is not normal[325] nor know of resources to which they can turn for help,[326] may opt to defend against the abusive parent to save their own and their loved ones' lives.[327] In many cases, abused children are at a physical disadvantage to their parents during a confrontation, and the size discrepancy often leads the children to submit to the abuse and retaliate later.[328]

In addition to the fear of further abuse, many children are threatened with death or serious injury to themselves or another member of the family if they reveal the abuse.[329] In order to prevent the threatened retaliation, abused children

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324. *See* MONES, *supra* note 19, at 45 (noting that most teenagers continue to feel helpless due to the threats made against other members of their family).

325. *Id.* at 42; *see* Joelle A. Moreno, *Killing Daddy: Developing a Self-Defense Strategy for the Abused Child*, 137 U. PA. L. REV. 1281, 1300 (1989) (mentioning that children in violent families usually do not realize that abuse is wrong).

326. Kathleen M. Heide, *Why Kids Kill Parents*, PSYCHOL. TODAY, Sept./Oct. 1992, at 64; *see* Sacks, *supra* note 18, at 357 n.56 (arguing that the problems of abused children are compounded by a lack of intervention by outside sources).

327. *See* MONES, *supra* note 19, at 37 (explaining that there are psychological reasons why children who commit parricide rarely seek help for the abuse). One reason is that children bond with their primary caregiver. *Id.* The attachment to the primary caregiver is a natural example of a survival mechanism which all children develop. *Id.* at 38 (citing Bessel Van der Kolk, a Harvard Medical School psychiatrist). Abused children also develop this bond, although it is made with the fear of being abandoned. *Id.* (citing Van der Kolk).

328. Scobey, *supra* note 3, at 186; *see* Sacks, *supra* note 18, at 349 (explaining that abused children believe that killing their parents is the only effective means to end the abuse).

329. MONES, *supra* note 19, at 41; *see* Jahnke v. State, 682 P.2d 991, 1022 (Wyo. 1984) (Cardine, J., dissenting) (noting that one of the reasons the defendant set forth for returning home was the fear that his father would injure his mother and sister in retaliation for his departure).

often learn to adapt to their environment.[330] Frequently, these children train themselves to mentally leave the abusive setting.[331] If the child is a teenager, a physical departure may also be a viable alternative.[332] Once again, however, the abuser may have threatened to harm another family member if the child runs away.[333] It is possible that allowing evidence that the defendant is an abused child could allow children who act in self-defense to put their abusive pasts behind them and attempt to lead productive lives, rather than be confined in prison. In allowing a child to protect himself or his family, the admissibility of the child's state of mind to support a claim of imperfect self-defense may be an important weapon in beginning to repair the damage of child abuse by eliminating the source of the pain.

This rationale is similar to that presented by battered woman defendants which has already been adopted by many states through evidence of a battered woman's state of mind. Experts who have testified on behalf of abused women have explained that these women are psychologically trapped in their relationships. These experts have provided needed insight regarding a woman defendant's fear of her abuser. It appears that the experts have been successful in conveying to the jury a woman's state of mind at the time of the killing. Court recognition and consideration of the psychological effects of abuse saves battered women who killed their abusers from suffering the additional harm associated with a murder conviction. Although not all abused women are acquitted, many are convicted of a reduced charge of manslaughter which provides for probation or a reduced term of incarceration. The evidence which is presented to support the battered woman syndrome focuses on the subjective fear victims have of their abusers. Similar evidence can be illustrative of a battered child.

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330. MONES, *supra* note 19, at 41; *see* Peter Arenella, *Perspective on Abuse; Are Kids Who Lash Back Culpable?*, L.A. TIMES, Aug. 4, 1993, at B7 (stating that when given the choice of killing the parent or submitting to further abuse, most children remain in the home and submit); Van Sambeek, *supra* note 322, at 104 (describing the "concentration camp" mentality, in which abused children succumb to the notion that they have no alternatives and must remain in the home); *see also* Hicks, *supra* note 197, at 103 (reciting that battered children live in a severely violent environment in which the abuse often occurs frequently and without warning).

331. *See* MONES, *supra* note 19, at 42 (providing examples of abusive situations in which a child may mentally remove himself from the situation). For instance, a fifteen-year-old boy who stabbed his father to death explained that during episodes of sexual abuse, he would let his mind wander and "just go away" so he would not have any emotional feelings. *Id.*

332. *See Judge Acquits Girl Who Killed Abusive Dad*, *supra* note 271, at C24 (reporting that the defendant's testimony indicated that she considered leaving the home through the bedroom window, but felt that curtains and other obstacles would prevent it).

333. *See* MONES, *supra* note 19, at 46 (explaining that children often refrain from running away because they are afraid of (1) retaliation by the abuser against their family or against themselves if they are caught, or (2) the uncertainty of what may happen to them without the economic security of their parents); *see also* Heide, *supra* note 326, at 63 (explaining that survival on the streets is unrealistic for many children because of their lack of finances, limited education, and limited skills); *cf. supra* note 146 and accompanying text (discussing the reasons why battered women do not leave their abusers and deeming economic insecurity to be a relevant factor).

Allowing evidence regarding the state of mind of an abused child defendant in a parricide case will provide the trier of fact with essential information surrounding the circumstances of the killing. Without this information, the trier of fact will not be able to adequately assess the culpability of the child defendant. Furthermore, denying such evidence will serve as an injustice to the defendant because the child will probably not meet the traditional elements of self-defense, and will therefore be convicted of a more serious degree of murder.

Although there may be a few positive effects from a decision to admit expert testimony of the state of mind of child parricide defendants, the majority of the effects will probably be negative. The negative impact of the decision will probably be most strongly felt by the state's judicial and social service systems, and possibly by the children themselves.

2. *Disadvantages to Admitting Evidence of the State of Mind of a Battered Child Defendant*

Admitting evidence of the state of mind of a battered child would have a significant negative impact in many areas of society. First, the judicial system would be affected by the new focus on self-defense. Second, the social service system, which is designed to intervene and assist in abusive situations, may find that the focus of its counseling services will shift from counseling abuse victims to counseling parricide offenders. Finally, the impact of the defense could ultimately have a devastating impact on a child who kills an abusive parent. The child will not be totally free from the parent; rather, the child will need to overcome the reality that the parent is dead by the child's own hand.

a. Impact on the Judicial System

One of the primary impacts that such evidence would have on the judicial system is the realization of a new standard by which to assess the culpability of the child defendant. No longer would the justice system be evaluating the actions of some children using a purely objective standard. Instead, the courts would be faced with issues regarding the applicability of the imperfect self-defense theory in the case of a battered child. Courts throughout the country, including California, have already addressed similar concerns as applied to battered woman defendants. Many states evaluate the state of mind of a battered woman by allowing and considering expert testimony relating to the psychological dynamics of continuous abuse. Because of the similarity of the effects of abuse on abused women and children, there is no foreseeable problem with applying the battered woman subjective standard to abused child defendants.

Imparting the message that the courts are condoning the behavior of children who kill their parents may have an additional detrimental impact on the criminal justice system. Currently, even without the consideration of the state of mind of

a battered child, the number of violent crimes committed by youth throughout California has continued to increase.[334] It is possible that if the evidence is allowed, children who become angry with their parents may kill them, with the intention of claiming that they were abused.[335] Although it may be difficult for these children to successfully fabricate stories of abuse, the current societal norm dictates that adults subscribe to the truth of the allegations made by children and ask questions later.

b. Impact on the Social Service System

In addition to the effects on the criminal justice system, the impact of the defense may also be felt in the state's social service system. Because child abuse has recently become more recognized, numerous resources have become readily accessible to abused children. For example, counselors, teachers, and other professionals who deal with children are legally obligated to report to the police any potential symptoms of abuse.[336] These signs may include the child's physical appearance, behavior or words.[337] Based on the results of an investigation of abuse, a child protective services agency may be requested to evaluate the situation of a particular child. The agency representative may recommend counseling for the family, or in a severe case, may recommend the removal of the child from the household.

Another important consideration regarding the admission of battered child evidence, however, is the serious implications which ordinarily follow a decision of this magnitude. Abused children are in effect being given a lethal alternative

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334. *See End Violent Video Games, Lungren Asks Makers*, L.A. TIMES, Nov. 17, 1993, at A25 (quoting California Attorney General Dan Lungren as saying that there has been a 135% increase in state juvenile murder arrests between 1986 and 1991). The comparable increase in national statistics has been 119%. *Id.*; *see also* Mareva Brown, *When Kids Molest Kids, State's Justice System Stumbles*, SACRAMENTO BEE, Oct. 31, 1993, at A1 (reporting that between 1987 and 1992, there was an 18.5% increase in the number of juveniles under 15 who were arrested for sexual charges).

Although gangs are the main reason behind the rise in juvenile crime, experts in criminal justice also cite societal factors, including child abuse, as causing the increase. Miles Corwin, *Increase in Youth Crime Brings Push for Tougher Laws*, L.A. TIMES, Nov. 22, 1993, at A3.

335. *See* Mauro, *supra* note 227, at 2A (acknowledging that some experts are concerned that defense lawyers will argue this compelling defense although it may be a false excuse). Adolescents can and do make exaggerated claims of abuse. *Id.* (quoting University of Virginia clinical psychologist Dewey Cornell); *see* Barbara Yost, *Battered Child Defense Abused in Beverly Hills Murder Case*, PHOENIX GAZETTE, Oct. 1, 1993, at A13 (theorizing that the Menendez brothers killed their parents out of greed and, after confessing, contrived stories of abuse); *see also* Mauro, *supra* note 227, at 2A (quoting attorney Paul Mones as saying that jurors and judges can detect false reports of abuse).

336. *See* CAL. PENAL CODE § 11166 (West Supp. 1995) (providing the statutory requirements for reporting suspected child abuse); *see also* MONES, *supra* note 19, at 45 (stating that 1.5 million child abuse reports are filed nationally each year). Some are reported by the abused children, but the majority are from teachers, doctors, friends, and neighbors. *Id.*

337. *See* CAL. PENAL CODE §§ 11165.1-11165.6 (West Supp. 1995) (setting forth the forms of abuse for which a statutory reporter must watch).

to handling a difficult and emotional situation. Once again, it would be beneficial for the children to explore the social service programs in order to curtail any potential problems.[338] Among the examples are the numerous social service programs that are intended to benefit abused children. These include child abuse hotlines, abused victim shelters, and various counseling services.[339] These programs were developed as preventative measures with the purpose of assisting abused children and their parents in dealing with and eventually ending the perpetual cycle of violence. These resources must be publicized so that children and their parents can take advantage of them before resorting to any form of violent behavior. To ignore the efforts of any of these resources while condoning further domestic violence would not benefit abused children nor their abusive parents.[340] If California allows evidence of the child's state of mind, such agencies may have to change their focus from counseling abuse victims to counseling parricide offenders or those who are considering parricide.

c. Impact on the Abused Child

Although it may appear that the defense would be a viable alternative to a child suffering from abuse, there is little evidence that the defense would have a lasting benefit for the child.[341] For example, children do not have the mental capabilities with which to accurately evaluate the severity of their individual cir-

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338. *See infra* notes 339-340 and accompanying text (discussing alternative means to escape child abuse).

339. *See, e.g.*, PACIFIC BELL WHITE PAGES, Government Listings 2 (1995) (naming the appropriate branch of government to which one may report child abuse). Abuse may be reported to the city police, County Child Protective Services, Health and Human Services, or the Social Services Department. *Id.*; *see also id.* Customer Guide, Emergency Crisis Hotlines A2 (1995) (listing a 24-hour service for abducted, abused, and exploited children as (800) 248-8020); *cf. id.* (listing the 24-hour crisis phone number for Women Escaping A Violent Environment (WEAVE), an organization which counsels abused women, attempts to help them improve their relationships and also provides abused women with alternative solutions to remaining in the abusive situations). *But see* Scobey, *supra* note 3, at 188 (providing that abused children are often disappointed in their attempts to find relief from abuse with relatives, police, and social welfare agencies); Jahnke v. State, 682 P.2d 991, 1022 (Wyo. 1984) (providing an example of an abused boy who sought help from his ROTC instructor and the sheriff's department). In *Jahnke*, the detective at the sheriff's department took pictures of Jahnke's bruises and told him that since the foster homes were full, he had the choice of going home or staying in jail. Alan Prendergast, *It's You or Me, Dad*, ROLLING STONE, May 26, 1983, at 41, 44.

340. *See* Corwin, *supra* note 334, at A3 (quoting Barry Krisberg, president of the National Council on Crime and Delinquency, as saying that legislatures are ignoring the cause of the crime problem—children who are abused and neglected). The rise in youth crime is prompting many states to review their juvenile justice systems. *Id. But see* Diana J. Ensign, *Links Between the Battered Woman Syndrome and the Battered Child Syndrome: An Argument for Consistent Standards in the Admissibility of Expert Testimony in Family Abuse Cases*, 36 WAYNE L. REV. 1619, 1625 (1990) (remarking that police intervention is not encouraged in all domestic abuse cases).

341. *See* MONES, *supra* note 19, at 43. This issue extends into an extremely new area of research. All children have different reactions to abuse. To evaluate its long-term impact on a particular child, consideration of various factors are necessary. *Id.* These factors include the nature, duration, and gravity of the abuse. *Id.*

cumstances.[342] To illustrate, parents use different methods of punishment. Some physically spank their child. Others restrict the activities in which their child may participate. There are a few parents who seemingly never discipline their children. If the children who are subjected to each of these methods compare the types of punishment they receive, the spanked child may interpret his punishment as abuse. In situations such as this one, a child may misinterpret discipline as abuse and feel that he has "permission" to kill his parent in self-defense. As the child grows older, however, and realizes that there is a difference between discipline and abuse, he still contends with the fact that he killed a parent who was merely attempting to discipline his or her child, not abuse him. Even before this realization, the child will have to accept the fact that he killed someone.

Many of the concerns expressed above have been addressed by those who counsel abused women and abused woman defendants. The woman may realize that she killed her abuser, who was also her life partner. This man may also have been the father of her children, and her children are now without that parent. In addition, if the woman is incarcerated, the children are left with no parental support. Though these considerations may appear inconsequential as compared to the continuous abuse, the reaction an abused woman has to the killing is shocking.[343] By considering the effects that the killing has on the battered woman, experts and psychologists may be better able to assist an abused child through a potentially difficult period following the abuse.

VI. CONCLUSION

Based on the foregoing, it seems that it would be unwise to permit the youth of California to continue the pattern of violence by providing them with a deadly excuse to remedy a possible error in judgment. Not only are there resources intended to help children escape an abusive environment, but also to confront and help their abusers.

The most recently publicized California case that has presented evidence of the state of mind of a battered child is the trial of two adult brothers.[344] This proceeding ended in a mistrial. Based on this result, it is difficult to speculate on California's treatment of the battered child evidence. It is possible, however, to

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342. *Id.* at 37-43; *see* Sacks, *supra* note 18, at 360 n.80 (explaining that some opponents to the battered child defense argue that children are not in fear of abuse at all times; therefore, there is no imminence to the children's abusive situation and it would be too speculative to conclude that children would react only at a time of imminent peril); Mark Hansen, *Battered Child's Defense: Youths Who Killed Relatives Offer Evidence of Abuse With Mixed Results*, 78 A.B.A. J. 28, May 1992 (observing that in a homicide case involving a battered defendant, the defense attempts to show how the abusive relationship can affect the battered defendant's perceptions of what constitutes an imminent threat).

343. *See supra* note 166 and accompanying text (discussing some examples of the reactions that battered woman defendants exhibit after the killing).

344. *See supra* notes 302-317 and accompanying text (discussing the *Menendez* case).

assume that twenty-four jurors could not agree on the facts of this case, including the potential effect the abuse had on the brothers. Such a result seems to accurately parallel the attitude toward imperfect self-defense in California. Currently, it seems that the California Supreme Court recognizes that a person may act in self-defense if the person had an honest but unreasonable belief of imminent harm.[345] However, the result of the upcoming *Menendez* trial could be important to determine whether evidence regarding the effects of abuse on a child's honest and reasonable belief of imminent danger will be admitted and accepted by a jury.

Due to the unique facts of the *Menendez* case, it appears that other children who seek to introduce battered child evidence could easily distinguish their cases from the *Menendez* situation. This distinction can be partially based on the fact that the *Menendez* case examined the culpability of two adults who killed their parents. In addition, this case presents no evidence that the parents presented a threat of imminent harm to the brothers. Although the defendants claim that they feared for their lives, without any evidence of any type of threat, it does not appear that the brothers will be successful in their claim of self-defense. The defense can probably be refuted because the testimony of abuse will only support the mental element of the killings. The brothers still must establish the traditional elements of self-defense.[346] This case serves as an insufficient precedent for an abused juvenile who commits parricide and attempts to justify it through imperfect self-defense.

There is a possibility, however, for the courts to implement some safeguards to prevent the abuse of such a defense. For example, the majority of other states that have considered the issue of admitting battered child evidence has permitted expert witness testimony regarding the psychological behavior of abused children.[347] It is to the defendant's advantage to have an expert verify and explain the source of the child's violent act, but it is possible that a child who has created the story of abuse may not use one.[348] By requiring expert testimony, the court can reduce the effectiveness of this defense in the case of a child who falsely claims abuse.

Currently, there are statutory and policy provisions which address the issues of abused children. As reflected by the mandatory reporting statutes, the California Legislature has intended to ensure that children do not have to make a

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345. *In re* Christian, 7 Cal. 4th 768, 771, 872 P.2d 574, 575, 30 Cal. Rptr. 2d 33, 34 (1994).

346. *See* Van Sambeek, *supra* note 322, at 105.

347. *See supra* notes 315-317 and accompanying text (discussing the use of expert witness testimony in regard to battered child defendants); *see also* Sacks, *supra* note 18, at 350-51 (specifying that expert testimony imparts to a jury critical information about battered children in order to assist it in making an informed decision regarding the reasonableness of the child's actions). Without the expert testimony, a jury cannot properly evaluate the state of mind of a battered child defense claim. *Id.* at 351.

348. *See* Sacks, *supra* note 18, at 363 (speculating that jurors who believe that a child had a less drastic option may not understand why the child resorted to killing the parent to end the abuse).

determination that they themselves have been abused.[349] Unfortunately, these statutes are not infallible. There may be instances in which a child is abused and this condition goes unreported. There are, however, social service agencies, like child protective services, which are intended to intervene and counsel in child abuse situations. However, there may be a situation in which a child protective services agent is sent to investigate a suspected abusive household and does not discover any abuse. Under these circumstances, an abused child may resort to another means of escape, which may include parricide.

Proponents argue that a battered child defense should be adopted in order to address the needs of abused children, though they emphasize that the defense will not serve as a license for a child to go on a killing rampage.[350] Because the issue regarding the admissibility of evidence of the state of mind of abused child defendants has arisen, it is possible that some legislation may arise in California to codify it. Further, in order to achieve consistency within the jurisdictions, it is possible that the ALI may amend the MPC to include a guidelines provision which could be implemented when the state of mind of an abused child defendant is at issue.

However, it is important to note that an imperfect self-defense does not lead to an automatic acquittal.[351] Because the child defendant will still have to prove the traditional elements of self-defense, the only benefit the child will realize from the defense is the subjective consideration of his or her state of mind at the time of the killings.[352] With imperfect self-defense as an option, a jury is given more options to match actions to moral culpability. The relevant state of mind for the jury to consider is that of an abused child in the same circumstances as the child defendant. Through the presence of mandatory reporting statutes and social service agencies, abusive parents can be recognized and prosecuted through the judicial system, and children do not need to feel that they must resort to violently ending the abuse themselves.

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349. *See* CAL. PENAL CODE § 11166 (West Supp. 1995). The reporter of child abuse is immunized from criminal liability if the report is found to be meritless. *Id.* at § 11172 (West Supp. 1995). This immunity is intended to encourage reports of suspicious signs, even if there is no certainty of abuse. *Id.*

350. Van Sambeek, *supra* note 322, at 104-06; *see* Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 459 n.294 (1988) (recognizing this potential criticism); Moreno, *supra* note 325, at 1287 n.32 (arguing that a self-defense claim based on the dynamics of family violence is not a request for special treatment, but a request for equal and individualized treatment). *But see* Cox, *supra* note 98, at A1 (referring to comments made by attorney Alan Dershowitz who considers defendants which argued that the only way to preserve their lives was to kill their abusers have insulted all the children who overcame hellish childhoods without becoming violent and all battered wives who leave their abusers).

351. *See* Cox, *supra* note 98, at A1 (providing an estimation by attorney Paul Mones that 97% of parricide cases end in manslaughter convictions, and he only knows of three outright acquittals).

352. *See* Mauro, *supra* note 227, at 2A (quoting attorney Paul Mones as saying that just because a child is abused does not give that child the right to kill, but that the child has the right to present evidence of abuse).