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Battered Women Syndrome as a Tort Cause of Action

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BATTERED WOMEN SYNDROME AS A TORT CAUSE OF ACTION

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INTRODUCTION

The alert horn which sounds every time a door is opened at the shelter reminds me of the very real danger confronting battered women in our society.¹ Although the domestic violence epidemic is now well documented,² society and the legal system have not done all they can to help these women. While many courts have recognized the use of battered women syndrome³ in criminal prosecutions,⁴ the legal system has not adequately responded to making victims of domestic violence whole.

Testimony on battered women syndrome is now commonly used in various types of litigation.⁵ Yet, a relatively recent development is the use of battered women syndrome as an affirmative cause of action for continuous wrongs perpetrated on women. Battered women face various barriers to litigation when attempting to use traditional tort actions. Thus, an innovative solution is necessary to accomplish society's goals of tort law and simultaneously attempt to solve a national public health problem.

The role of tort law traditionally serves several important functions. A tort's primary purpose is to provide compensation for the victim, restoring parties

¹The shelter referred to is the Center for the Prevention of Domestic Violence in Cleveland, Ohio.

²"[T]he FBI and other law enforcement experts believe that wife abuse is the most unreported crime in the United States." *State v. Kelly*, 478 A.2d 364, 370 (N.J. 1984). See also LENORE E. WALKER, *THE BATTERED WOMAN* 19 (1979) [hereinafter WALKER, *THE BATTERED WOMAN*]. Yet some national estimates indicate that as many as four million women are abused each year. Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being*, 273 JAMA 1781 (1995), available in Westlaw, 1995 WL 10027577. Other statistics indicate that the number may now be as high as six million women annually. CLEVELAND WOMEN, INC., *TEMPLUM: COMMITTED TO ENDING DOMESTIC VIOLENCE THROUGH SERVICE, EDUCATION, AND SOCIAL CHANGE* (1996). Women are injured in domestic assaults more than injuries from auto accidents, rapes and muggings combined. Nancy Gibbs, *Til Death Do Us Part*, TIME, Jan. 18, 1993, at 38, 41.

³The term "battered women syndrome" is also seen in the literature as "battered women's syndrome." I choose the spelling of the former simply because Lenore Walker, who was the first who developed the theory, spelled it that way. Furthermore, the former spelling is more commonly used in the literature.

⁴Lenore E.A. Walker, *Understanding Battered Women Syndrome: Victims and Violence*, TRIAL, Feb. 1, 1995, [hereinafter Walker, *Understanding BWS*], available in Westlaw, 1995 WL 15142585 at *2. Some states have even codified legal decisions, sanctioning the use of expert testimony on Battered Women's Syndrome. *Id.*

⁵Dr. Lenore Walker, a psychologist who developed the theory, cites some instances in which such testimony has proved helpful: (1) in response to criminal charges against a battered woman (self-defense and duress defenses); (2) in criminal courts to convict batterers when the woman is too frightened to testify; (3) in family courts when considering child custody disputes and property settlements; (4) in civil litigation to prove liability and damages; and (5) in coercive contract disputes and will contests. Walker, *Understanding BWS*, *supra* note 4 at *2.

to their original condition insofar as the law can do this.⁶ Tort law also punishes wrongdoing and deters future harmful behavior.⁷ It encourages socially responsible behavior and provides a peaceful means for adjudicating the rights of parties who might otherwise take the law into their own hands. Finally, tort law is a means for educating the public, demanding political action, and solving public health problems.⁸

The focus of this Note is the upcoming development of a new tort cause of action which would afford battered women full recovery and also help alleviate a growing public health epidemic. This Note argues that battered women syndrome is a valid psychological theory which has a place in civil litigation as a recognized cause of action. Although the theory is criticized by feminist scholars who believe that the testimony may perpetuate gender bias in criminal trials,⁹ the syndrome is still advantageous for women seeking redress in civil courts. Part I examines the phenomenon of battered women syndrome and its effects on the health of women subjected to domestic abuse. Part II discusses the various uses of battered women syndrome in criminal trials. Specifically, this section focuses on issues surrounding the use of expert testimony on battered women syndrome to support self-defense and duress defenses. Part III explores traditional tort causes of action currently available to victims of domestic abuse. It argues that these actions are inadequate because women are denied full recovery for all of their injuries. Part IV urges recognition of battered women syndrome as a new tort cause of action. This new tort would allow women suffering from battered women syndrome to receive full compensation from their batterers for injuries occurring during the entire course of the abusive relationship. Part V demonstrates how tort litigation is a necessary tool to help solve this growing public health problem.

I. OVERVIEW OF BATTERED WOMEN SYNDROME

Lenore E. Walker coined the phrase "Battered Women Syndrome" in 1979.¹⁰ She defined those suffering from this syndrome as any woman¹¹ "who is

⁶W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 7 (5th ed. 1984) [hereinafter PROSSER & KEETON].

⁷*Id.* § 2, at 11-12.

⁸Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN L. REV. 853, 877-78 (1992).

⁹See *infra* notes 121-28 and accompanying text.

¹⁰WALKER, THE BATTERED WOMAN, *supra* note 2. Walker's model of the battering relationship is arguably the most "widely-accepted." Beth I.Z. Boland, *Battered Women Who Act Under Duress*, 28 NEW ENG. L. REV. 603, 608 (1994). However, feminist scholars criticize this definition as "rigid and static" excluding "women with diverse experiences who do not fit a particular mold or stereotype." Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 497 (1996). Further, feminists believe that the term has negative connotations of women as victims instead of survivors, reinforcing gender bias in society. *Id.* at 498. Lenore Walker acknowledges the criticism of feminists regarding expert testimony on battered women syndrome yet believes that "[f]rom a purely

repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights.¹² For classification as a battered woman, the couple must experience the battering cycle at least two times.¹³ In a variety of instances, many courts now admit expert testimony on battered women syndrome¹⁴ and some explicitly cite Lenore Walker's research and her definition.¹⁵

practical point of view, at the present time in our system there is ample justification for expert witness testimony." LENORE E. WALKER, *TERRIFYING LOVE*, 11 (1989) [hereinafter WALKER, *TERRIFYING LOVE*].

¹¹For the purposes of this note, domestic violence refers to the abuse of a woman by her male partner. I do not address the abuse of males by their female partners or domestic violence between lesbian and gay couples. For a discussion of homosexuality and domestic violence, see Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Women's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Their Abusive Partners*, 58 BROOK. L. REV. 1379 (1993); Carla M. da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN'S STUD. 251 (1994).

¹²WALKER, *THE BATTERED WOMAN*, *supra* note 2.

¹³*Id.*

¹⁴Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1080 n.7 (1995) [hereinafter Ammons, *Racial Imagery and Stereotypes*], cites examples of state and federal court cases accepting expert testimony on battered women syndrome: *Smith v. State*, 277 S.E.2d 678 (Ga. 1981); *State v. Hodges*, 716 P.2d 563 (Kan. 1986); overruled in part by *State v. Stewart*, 763 P.2d 572 (Kan. 1988); *State v. Anaya*, 438 A.2d 892 (Me. 1981); *State v. Baker*, 424 A.2d 171 (N.H. 1980); *State v. Kelly*, 478 A.2d 364 (N.J. 1984); *People v. Torres*, 488 N.Y.S.2d 358 (N.Y. Super. Ct. 1985); *State v. Allery*, 682 P.2d 312 (Wash. 1984); *United States v. Taylor*, 820 F. Supp. 124 (S.D.N.Y. 1993); *Fennell v. Goolsby*, 630 F. Supp. 451 (E.D. Pa. 1985). See also Monique M. Gousie, *From Self-Defense to Coercion: McMaugh v. State Use of Battered Women's Syndrome to Defend Wife's Involvement in Third-Party Murder*, 28 NEW ENG. L. REV. 453, 481 n.40 (listing cases in several states accepting evidence of battered women syndrome but noting that not all states have permitted its use).

¹⁵*Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. Cir. 1979) (holding that the testimony by Lenore Walker on her theory of battered women syndrome in a claim of self-defense was not inadmissible); *State v. Kelly*, 478 A.2d 364, 371 (N.J. 1984) (specifically relying on Lenore Walker's theory as a basis for holding that battered women syndrome is relevant to support defendant's claim of self-defense); *McMaugh v. State*, 612 A.2d 725, 731 (R.I. 1992) (citing Lenore Walker's definition of a battered woman). But see Robert F. Schoop et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 63 (1994) (criticizing Walker's research and theory of battered women syndrome stating that "[n]either Walker's data nor the later studies sufficiently support the battered woman syndrome as a pattern regularly produced by battering relationships"); Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 317 (1995) ("two major concerns persist regarding the battered woman syndrome in that the underlying research and methodology appear to have a direct bearing on the syndrome's relevance and reliability").

A. The Battering Cycle

There are two distinct components of battered women syndrome, the abusive battering cycle and the resulting phenomenon of learned helplessness. The battering cycle consists of three phases which vary in duration and intensity.¹⁶ According to Walker, based on research of 1,600 abusive instances reported by 400 women, the phases involve a period of "tension building," "acute battering," and a period of "loving-contrition or absence of tension."¹⁷

In the first phase, the woman is subjected to "minor" battering incidents. Responding to these incidents, the woman often assumes responsibility for the batterer's actions by either assuring herself that she will be able to calm the batterer, or just attempting to stay out of his way. "It is not that she believes she should be abused; rather, she believes that what she does will prevent his anger from escalating."¹⁸ She rationalizes the incident while attempting to control external factors which might set off an acute battering. This "psychological torture," coping with the batterer's oppressive jealousy, brutality and humiliation, is "reportedly the most difficult to handle."¹⁹ Eventually, the tension becomes intolerable. In some cases, although unusual, the woman triggers the second phase because she can no longer endure the anxiety of the inevitable period which follows.²⁰ More commonly, an event in the male batterer's life triggers the second phase.²¹

The acute battering phase is "characterized by the uncontrollable discharge of the tensions that have built up during phase one. This lack of control and its major destructiveness distinguish the acute battering incident from the minor battering incidents in phase one."²² The abuse lasts anywhere from two to twenty four hours, with some women reporting acute battering spanning one week.²³ Women usually take the beatings without resistance and "wait out the storm."²⁴

Typically, phase three is marked by a feeling of relief. The batterer is often sorry for his abusive behavior, convincing himself and his partner that he will never commit such acts again.²⁵ When women do attempt to remove

¹⁶WALKER, THE BATTERED WOMAN, *supra* note 2, at 55.

¹⁷Lenore Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 330 (1992) [hereinafter, Walker, *BWS and Self-Defense*].

¹⁸WALKER, THE BATTERED WOMAN, *supra* note 2, at 56.

¹⁹*Id.* at 59.

²⁰*Id.* at 60.

²¹*Id.*

²²WALKER, THE BATTERED WOMAN, *supra* note 2, at 59.

²³*Id.* at 60.

²⁴*Id.* (emphasis added).

²⁵*Id.* at 65. In some exceptional cases, because the violence is so extreme, women may never feel out of danger and phase three is not discernible. Walker, *BWS and Self-Defense*,

themselves from this cycle of destruction, it usually occurs during this phase. However, Walker found that although numerous women expressed a desire to free themselves, many do not follow through.²⁶ Instead, the couple fool themselves into believing that things will change and the batterer's loving behavior in phase three, reinforces this belief.²⁷ The cyclical nature of this relationship partially explains why women stay with their abusers.²⁸ The women hope that their partners will change so that they can stay with the man they love.

B. Learned Helplessness

Another phenomenon, learned helplessness, also contributes to battered women syndrome. The theory was developed by Martin Seligman who conducted a study using dogs exposed to electrical shocks. These caged animals were subjected to random electrical shocks and Seligman "found that the dogs quickly learned there was nothing they could do to predictably control the shocks. Eventually, dogs in the experiment appeared to completely cease all voluntary escape activity."²⁹ Instead of attempting to escape, the dogs developed ways to cope with the shocks by laying in their fecal matter. This served to insulate the dogs from the painful shocks.³⁰ Even when the cages were left opened, the dogs no longer attempted to escape. The researchers then tried to teach the dogs to escape and they resisted. Only when the dogs were repeatedly dragged from the cages did they regain their drive to escape. Researchers determined the dogs developed learned helplessness— because attempting to escape was futile; coping mechanisms were more effective.³¹

Learned helplessness refers to the cognitive aspect of a specific situation.³² "[T]he truth or facts of a situation turn out to be less important than the individual's set of beliefs or perceptions concerning the situation."³³ Research indicates that learned helplessness is exhibited in humans as well as lab animals.³⁴ Women who are continually beaten at various random times may fit this phenomenon. For instance, despite repeated attempts by a woman to

supra note 17, at 330.

²⁶WALKER, THE BATTERED WOMAN, *supra* note 2, at 66-68.

²⁷*Id.* at 67-68.

²⁸See *infra* notes 32-55 and accompanying text explaining other factors which keep women with their abusers.

²⁹WALKER, TERRIFYING LOVE, *supra* note 10, at 49-50.

³⁰*Id.* at 50.

³¹*Id.*

³²*Id.*

³³WALKER, TERRIFYING LOVE, *supra* note 10, at 50.

³⁴PHILIP G. ZIMBARDO, PSYCHOLOGY AND LIFE 246 (1985).

control various situations, their batterer inevitably explodes into a fit of rage. Women begin to "learn" that they cannot control this volatile relationship. "Once the women are operating from a belief of helplessness, the perception becomes a reality and they become passive, submissive, 'helpless.'"³⁵ These repeated batterings, like the electrical shocks administered to Seligman's dogs, throw women into a state of "psychological paralysis."³⁶

C. Other Factors Affecting Battered Women

Several other factors also contribute to a battered woman's reasons for remaining in the abusive relationship. Economics, societal expectations, race, ethnicity, religious beliefs and fear often trap women in the cycle of violence.

Lack of financial resources contributes to a woman's inability to leave her batterer.³⁷

Even with the progress of the last decade, women typically make less money and hold less prestigious jobs than men, and are more responsible for child care. Thus, in a violent confrontation where the first reaction might be to flee, women realize soon that there may be no place to go.³⁸

The reality for some women is that family or friends cannot help them or sometimes it is unsafe for women to move where their batterers can find them. Shelters are often filled to capacity and the hot line workers must refer women and their children elsewhere or tell them to keep calling to see if there is space. Other problems occur if the woman is employed but unable to return to her job because she is fearful of her batterer finding her. Employers are sometimes tolerant of extended absences but oftentimes, battered women must seek new employment. Physical injuries may also cause prolonged absences from work.³⁹ Thus, some women are financially dependent on their batterer and find it extremely difficult to become stable on their own.

³⁵WALKER, *THE BATTERED WOMAN*, *supra* note 2, at 47.

³⁶*State v. Kelly*, 478 A.2d 364, 372 (N.J. 1984).

[W]omen . . . become so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation. There is a tendency in battered women to believe in the omnipotence or strength of their battering husbands and thus to feel that any attempt to resist them is hopeless."

Id. (citations omitted).

³⁷*Id.*

³⁸*Id.*

³⁹These are only a few of the financial constraints I have encountered during my work at a local shelter. For further discussion, see WALKER, *THE BATTERED WOMAN*, *supra* note 2, at 127-44 (devoting a chapter to the impact of economic deprivation on battered women); WALKER, *TERRIFYING LOVE*, *supra* note 10, at 106-13 (dispelling the myth that all battered women are poor and discussing the impact of economics on all socioeconomic

Abused women are adversely affected by social factors. Battered women are often afraid or too ashamed to disclose the abuse to family or friends.⁴⁰ It is not uncommon for abusive men to force women to cut all ties with family and friends.⁴¹ Further, perpetual female stereotypes of traditional submissive women reinforce their reasons for staying⁴² as does society's continued willingness to keep family matters private.

For some married women with strong religious beliefs, divorce or separation is not an option.⁴³ Other women believe that separating her children from their father may be more detrimental than the current situation.⁴⁴

Although research indicates that race and social class are no indication of the prevalence of domestic violence; race, ethnicity or culture may play prominent roles in a woman's decision to leave.⁴⁵ For instance, in some cultures, "love, honor, and obey until death do us part" is taken literally.⁴⁶ In other cases, racial or ethnic minority women

may consider calling the police to be a betrayal not only of her partner, but of her community as well, where the police and judicial system

levels of battered women); Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare In The Face of Violence*, 22 FORDHAM URB. L.J. 1141 (1995) (focusing on the importance of public assistance for battered women); see also Deborah Ann Klis, *Reforms to Criminal Defense Instructions: New Patterned Jury Instructions Which Account for the Experience of the Battered Woman Who Kills Her Battering Mate*, 24 GOLDEN GATE U.L. REV. 131, 140-42 (1994) (reviewing the external social and economic factors which contribute to a woman's decision to stay in the abusing relationship); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women Syndrome*, 21 HOUSTON L. REV. 1191, 1233-34 (1993) [hereinafter Dutton, *Redefinition*] (citing specific barriers contributing to a woman's decision to remain with her batterer.)

⁴⁰State v. Kelly, 478 A.2d 364, 372 (N.J. 1984).

⁴¹This isolation results in a woman believing that she has no resources and is trapped. *The Ohio Attorneys' Assault on Domestic Violence: The Who, What, and How of Domestic Violence Cases*, CUYAHOGA COUNTY BAR ASSOCIATION (Dec. 3, 1996) [hereinafter BAR ASSOCIATION].

⁴²"Some women are brought up to believe in traditional sex roles such as, 'The man is the boss of the house,' or 'The man will 'do,' and you 'obey.' Women are also taught that 'Good Girls don't make trouble,' and that 'Good wives are supposed to be able to make the marriage work.'" *Id.* (citing BARBARA CORRY, UNDERSTANDING DOMESTIC VIOLENCE: A RECOVERY RESOURCE FOR BATTERED WOMEN AND THOSE WHO WORK WITH THEM (1993)).

⁴³BAR ASSOCIATION, *supra* note 41 (citing BARBARA CORRY, UNDERSTANDING DOMESTIC VIOLENCE: A RECOVERY RESOURCE FOR BATTERED WOMEN AND THOSE WHO WORK WITH THEM (1993)).

⁴⁴Dutton, *supra* note 39, at 1234.

⁴⁵*Id.* at 1236-37.

⁴⁶*Id.* at 1237.

may be seen as 'outsiders'. . . She may view the legal system not as a source of protection, but as a source of racial discrimination.⁴⁷

Furthermore, battered women's fear of retaliation once they leave abusive relationships are well founded. Oftentimes, restraining orders and anti-stalking legislation do little to assist women in remaining safe.⁴⁸ "The criminal law is replete with cases describing serious bodily injury and murder committed by an abuser in response to a battered woman's flight."⁴⁹ Retaliation for disobedience may take the form of escalated physical abuse of the woman or those close to her.⁵⁰ Violence occurring once the woman has fled is termed "separation assault."⁵¹ Batterers pursue battered women in an attempt to reconcile or to seek revenge for leaving.⁵² The batterer would rather kill or commit suicide than face abandonment. The story of Patricia Burns⁵³ is one example of separation assault. Patricia was terrified that her husband would follow through with his threats to kill her. After she received a restraining order, she left her husband Clarence to stay with her family. "As his first week alone wore on, Clarence became increasingly frantic."⁵⁴ He stalked Patricia and, one afternoon, located her parked car. He hid in the trunk and Patricia drove away without knowing of the impending danger. Patricia was shot in the face five times as she exited her car. She lay dead outside her family's home.⁵⁵

D. Health Implications of Battered Women Syndrome

Domestic violence is considered a major health problem in our society.⁵⁶ Because of the learned nature of violence,⁵⁷ some commentators refer to family

⁴⁷*Id.*

⁴⁸Davis & Kraham, *supra* note 39, at 1148-49.

⁴⁹*Id.* at 1147. Battered women who leave their abusers report elevated levels of abuse and face an increased risk of homicide. *Id.*

⁵⁰Dutton, *supra* note 39 at 1232. An abuser may seek to hurt the battered woman's children, other family members or her close friends. He may also engage in destruction of her property and harm her pets. *Id.* A battered woman may be aware of previous violent or aggressive behavior by her batterer which makes her even more frightened. For instance, she may know he previously committed a homicide or a rape. *Id.* at 1233.

⁵¹Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

⁵²Davis & Kraham, *supra* note 39, at 1146-47.

⁵³Patricia Burns was an elementary school teacher in Denver, Colorado. Her story is depicted in WALKER, *TERRIFYING LOVE*, *supra* note 10, at 66-69.

⁵⁴*Id.* at 66.

⁵⁵*Id.* at 67.

⁵⁶Hyman, *supra* note 2.

⁵⁷Many batterers typically come from abusive households. Children who were victims of abuse themselves or witnessed abuse, are more likely than others to become

violence as a "generic disease transmitted from one generation to the next."⁵⁸ Others describe it as "a cancer growing in our nation's homes."⁵⁹ Sadly, "[i]n 1992, a congressional report indicated that the most dangerous place in the United States for a woman to be is in her own home."⁶⁰ The Journal of the American Medical Association ("JAMA") indicated that domestic violence is the leading cause of injury for women ages fifteen to forty-four.⁶¹ The National Coalition Against Domestic Violence reports that a woman is abused in the United States every fifteen seconds. JAMA reports that its figure of two million women abused annually is likely underestimated by two million.⁶²

Physical abuse ranges from shoving, slapping, punching, kicking and choking, to stabbings, shootings and forced sexual assaults.⁶³ The injuries are numerous and varied. Examples include broken bones, internal bleeding, bruising, concussions and gunshot wounds.⁶⁴ In addition to the immediate effects suffered by battered women, a number of chronic ailments are tied to such abuse. Women commonly experience chest pains, headaches, prolonged back pain,⁶⁵ arthritis, hypertension⁶⁶ and other long term effects specific to their injuries. Permanent injuries such as scars, loss of hearing or vision and damage to joints also impact a battered woman's well-being.⁶⁷

batterers. WALKER, *THE BATTERED WOMAN*, *supra* note 2, at 38.

⁵⁸Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543, 574 n.62 (1992).

⁵⁹Renee M. Yoshimura, *Empowering Battered Women: Changes in Domestic Violence Laws in Hawaii*, 17 U. HAW. L. REV. 575, 577 (1995).

⁶⁰Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 5 [hereinafter Ammons, *Clemency*].

⁶¹*Id.* at 6-7 (citing Antonia Novello, *From the Surgeon General U.S. Public Health Services*, 267 JAMA 3132 (1992) but noting that there is some debate over the accuracy of these statistics.) However, as with the incidents of rape, domestic violence is largely underreported. Ammons, *Clemency*, *supra* note 60, at 7 (citations omitted).

⁶²Ammons, *Clemency*, *supra* note 60, at 6 (citations omitted).

⁶³Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response From Battered Women*, 68 FLA. B.J. 24 (1994).

⁶⁴WALKER, *THE BATTERED WOMAN*, *supra* note 2, at 79.

⁶⁵See Diana K. Sugg, *Study Ties Abuse to Host of Ailments*, BALTIMORE SUN, Nov. 15, 1995, available in LEXIS, Nexis Library, Curnws file.

⁶⁶*Violence Against Women: Relevance for Medical Practitioners (Report from the American Medical Association's Council on Scientific Affairs)*, 267 JAMA 3184 (1992), available in Westlaw, 1992 WL 11637484 [hereinafter *Report*].

⁶⁷*Id.*

Psychological effects are equally egregious. Battered women syndrome is included in the diagnostic category of Post-traumatic Stress Disorder.⁶⁸ Established by the American Psychiatric Association,⁶⁹ post-traumatic stress disorder is "recognized as a normal reaction to an abnormal amount of stress."⁷⁰ The health effects of battered women syndrome are similar to others who suffer traumatic incidents,⁷¹ yet their effects are sometimes exacerbated by the "fact that the aggressor is someone they may love, trust, and depend on."⁷² Women suffering from battered women syndrome are often depressed and fatigued.⁷³ They experience a loss of appetite, sleep disorders and extreme anxiety.⁷⁴ Trauma of this type alters women's cognitive abilities, their memory and their judgment.⁷⁵ Suicide attempts and alcohol and drug abuse are responses which sometimes stem from prolonged exposure to battering incidents.⁷⁶

II. BATTERED WOMEN SYNDROME IN THE CRIMINAL CONTEXT

Under some circumstances, crimes such as murder or attempted murder, are considered justifiable or excusable by society. For example, the use of force toward another is justifiable when a person believes that such force is necessary to protect herself against what she perceives as imminent danger of serious bodily harm or death.⁷⁷ This is commonly known as self-defense.⁷⁸ In other situations, a person is not guilty of otherwise criminal acts if she commits the

⁶⁸LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE § 1.14, 1.14A (1989 & Supp. 1992) [hereinafter KARP, DOMESTIC TORTS] (citing the Diagnostic and Statistical Manual of Mental Disorders (DSM III and DSM III-R) (3d ed. 1987)).

⁶⁹Report, *supra* note 66, at *16, fn 48.

⁷⁰Ammons, *Racial Imagery & Stereotypes*, *supra* note 14, at 1008-09.

⁷¹Post-traumatic stress disorder is also observed in combat veterans, rape victims and people who witness the violent loss of a loved one. *Id.* at 1009-10.

⁷²Report, *supra* note 66, at *6.

⁷³Not every battered women suffers from battered women syndrome. KARP, DOMESTIC TORTS, *supra* note 68, § 1.14 at 25.

⁷⁴Scherer, *supra* note 58, at 553.

⁷⁵Walker, *Understanding BWS*, *supra* note 4, at *4.

⁷⁶See Anne H. Filtcraft, *Violence, Values, and Gender*, 267 JAMA 3194 (1992), available on Westlaw, 1992 WL11637486; Report, *supra* note 66, at *7; Sugg, *supra* note 65, at 1A.

⁷⁷Schoop, *supra* note 15, at 49-50 (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.7 (2d ed. 1986)).

⁷⁸The Model Penal Code's definition of self defense is as follows:

(1) *Use of Force Justifiable for Protection of the Person.* Subject to the provisions of this Section and of Section 3.09, the 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.

act reasonably believing in a threat of imminent infliction of death or great bodily harm. This is known as the excuse of duress.⁷⁹ When these affirmative defenses are accepted, criminal penalties are not warranted.

A. Self-Defense and Expert Testimony on Battered Women Syndrome

In the late 1970's, lawyers began petitioning courts to allow Lenore Walker's testimony on battered women syndrome.⁸⁰ It was "no coincidence"⁸¹ that the introduction of this testimony paralleled the "growth of the women's movement"⁸² which "began putting labels like 'battering' and 'marital rape' on behaviors that, only a few years before, went unstudied and undiscussed in academic circles."⁸³ Yet courts were often reluctant to admit such testimony believing it did not meet the requirements for introducing expert testimony at trial.⁸⁴

MODEL PENAL CODE § 3.04 (1994).

⁷⁹Many states follow the Model Penal Code's definition of the duress defense. Christine Emerson, Note, *United States v. Willis: No Room for the Battered Woman Syndrome in the Fifth Circuit?*, 48 BAYLOR L. REV. 317, 325-26 (1996). The Model Penal Code defines duress as follows:

- (1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.
- (2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.
- (3) It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this Section. [The presumption that a woman acting in the presence of her husband is coerced is abolished.]
- (4) When the conduct of the actor would otherwise be justifiable under Section 3.02, this Section does not preclude such a defense.

MODEL PENAL CODE § 2.09 (1994).

⁸⁰Ammons, *Racial Imagery and Stereotypes*, *supra* note 14, at 1014.

⁸¹Erich D. Andersen and Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 374 (1992).

⁸²WALKER, *THE BATTERED WOMAN*, *supra* note 2, at ix.

⁸³Andersen, *supra* note 81, at 374.

⁸⁴See *State v. Kelly*, 478 A.2d 364 (N.J. 1984) for a comprehensive discussion of the requirements for admissibility of expert testimony on battered women syndrome.

Each jurisdiction has its own criterion for admitting expert testimony;⁸⁵ but, the requirements are generally analyzed under the test in *Dyas v. United States*,⁸⁶ in which courts ask whether:

(1) the subject matter must be 'so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman'; (2) 'the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or interference will probably aid the trier of fact in his search for truth'; and (3) expert testimony is inadmissible if 'the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.'⁸⁷

The third prong of this test, commonly referred to as the Frye "general acceptance test," was used to determine the "admissibility of novel scientific evidence at trial."⁸⁸ In short, Frye held that the evidence proffered must be "sufficiently established to have gained general acceptance by the particular field to which it belongs."⁸⁹

In 1993, the U.S. Supreme Court retreated from this stringent requirement in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁹⁰ and held that

'[g]eneral acceptance' is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence-- especially Rule 702-- do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.⁹¹

⁸⁵See Janet Parrish, *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*, 11 WIS. WOMEN'S L.J. 75 (1996) (providing an in-depth analysis of the admissibility of expert testimony on battering across the United States).

⁸⁶376 A.2d 827 (D.C.), cert denied, 434 U.S. 973 (1977).

⁸⁷*Id.* at 832 (quoting MCCORMICK ON EVIDENCE § 13, at 29-31 (Edward W. Cleary ed., 2d ed. 1972)).

⁸⁸*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585 (1993).

⁸⁹*Frye v. United States*, 293 F. 1013, 1014 (1923).

⁹⁰509 U.S. 579 (1993).

⁹¹*Id.* at 595. This decision was based on Rule 702 of the Federal Rules of Evidence. Admissibility is further considered in light of Rules 401 and 402 of the Federal Rules of Evidence which weigh the probative value of the testimony against the prejudicial effect it may have on the trier of fact. *Developments in the Law: Legal Responses to Domestic Violence, Battered Women Who Kill Their Abusers* 106 HARV. L. REV. 1574, 1583 (1993).

In the context of battered women syndrome, it was not until 1979 that expert testimony was considered admissible. The landmark case, *Ibn-Tamas v. United States*,⁹² recognized that the probative value of expert testimony on battered women syndrome was not outweighed by its prejudicial impact. The court further held that this testimony would not invade the province of the jury.⁹³ This case involved the trial court's failure to admit Dr. Walker's testimony to support defendant Beverly Ibn-Tamas' claim of self-defense to a charge of second degree murder. The D.C. Circuit Court of Appeals held that "[b]ecause Dr. Walker's testimony was central to the defense theory of the case, we cannot conclude, as a matter of law, that the trial court's exclusion of this testimony, if ultimately in error, was harmless."⁹⁴ The appellate court remanded the case to the trial court for a determination of the admissibility of expert testimony on battered women syndrome.⁹⁵ Although Ibn-Tamas' conviction was not overturned on remand, the appellate decision "signaled to litigants and advocates that the federal courts might consider battered women syndrome testimony admissible."⁹⁶

The New Jersey Supreme Court in *State v. Kelly*, offered battered women a stronger advocacy for the admission of expert testimony. In one of the "seminal decisions addressing this issue,"⁹⁷ the court stated:

The difficulty with the expert's testimony is that it sounds as if an expert is giving knowledge to a jury about something the jury knows as well as anyone else, namely, the reasonableness of a person's fear of imminent serious danger. That is not at all, however, what this testimony is directly aimed at. It is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge. After hearing the expert, instead of saying [defendant] Kelly could not have been beaten up so badly for if she had, she certainly would have left, the jury could conclude that her failure to leave was very much part and parcel of her life as a battered wife. The jury could conclude that instead of casting doubt on the accuracy of her testimony about

⁹²407 A.2d 626 (D.C. 1979).

⁹³*Id.* at 639.

⁹⁴*Id.* at 640.

⁹⁵Despite the court's ruling "that the probative value of this expert testimony would outweigh the risk of engender[ing] vindictive passions within the jury or... confus[ing] the issues," the record was inadequate to determine whether the testimony was admissible. *Id.* at 639.

⁹⁶Ammons, *Racial Imagery and Stereotypes*, *supra* note 14, at 1014-15.

⁹⁷Boland, *supra* note 10, at 618.

the severity and frequency of prior beatings, her failure to leave actually reinforced her credibility.⁹⁸

Although courts today widely accept expert testimony on battered woman syndrome in traditional confrontational cases, admission of testimony is slightly more problematic in cases which the woman kills her batterer when he lay sleeping on the couch or watching television.⁹⁹ In this situation, the "imminence" requirement of a self-defense claim is sometimes thought to be lacking.¹⁰⁰ In other words, the woman is not considered to be in immediate danger of bodily harm because the batterer is not currently beating her and thus, the "justification" for the killing is not valid. For instance, in *People v. Aris*,¹⁰¹ the trial court excluded expert testimony of battered women syndrome to prove self-defense. The defendant, Mrs. Aris was subjected to continuous beatings during the course of her ten year marriage. Mrs. Aris testified that on the night of the killing, her husband beat her and stated he would not let her live until the morning.¹⁰² She feared that when her husband woke up he would "hurt [her] very badly or even kill [her]."¹⁰³ Mrs. Aris shot her husband five times while he lay sleeping on the couch because she felt she "had to do it."¹⁰⁴ The California Court of Appeals affirmed the trial court's conviction of second-degree murder.¹⁰⁵ The court held that it was harmless error to exclude expert testimony as to how the defendant's experiences as a battered woman affected her perceptions of danger and its imminence.¹⁰⁶ Furthermore, the court determined that "the testimony was irrelevant and inadmissible on the issue of the objective reasonableness of the defendant's actions."¹⁰⁷

Testimony on battered women syndrome is generally used to explain the circumstances surrounding the crime committed by the abused woman. For instance, self-defense claims involve three crucial elements: (1) the defendant's

⁹⁸State v. Kelly, 478 A.2d 364, 378 (N.J. 1984).

⁹⁹Anderson, *supra* note 81, at 381; See also Parrish, *supra* note 85, at 84 (Summarizing various findings regarding the types of cases in which expert testimony is admitted and concluding that "[e]xpert testimony on battering and its effects is most readily accepted by state courts in cases involving traditional self-defense situations." Parrish's research indicated that 90 percent of the States admitted expert testimony in traditional self-defense cases and 29 percent of the States admitted expert testimony in non-traditional situations.)

¹⁰⁰Anderson, *supra* note 81, at 381.

¹⁰¹264 Cal. Rptr. 167 (Cal. Ct. App. 1989).

¹⁰²*Id.* at 171.

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵*Aris*, 264 Cal. Rptr. at 180.

¹⁰⁶*Id.*

¹⁰⁷Anderson, *supra* note 81, at 383.

reasonable belief that she was in danger of harm; (2) the imminence of death or bodily harm; and (3) the amount of force used.¹⁰⁸ Evidence of battering helps the jury to understand the woman's particular experiences with her batterer in relation to these elements. Elizabeth Schneider, a Professor at Brooklyn Law School who has explored gender-bias in the criminal law, specifically focusing on battered women,¹⁰⁹ states that:

Evidence of battering is crucial in dispelling myths and misconceptions commonly held by jurors about battered women, and helping jurors to understand the experiences of battered women as they are relevant to woman's understanding of the level of danger they are in and their reactions to the perceived danger. In other words, evidence of battering in a self-defense case is not relevant insofar as it attempts to justify killing in and of itself. It is relevant because it helps the jury to understand the woman's particular experiences with her batterer. It gives the jury insight about the development of her heightened ability to sense that she was in grave danger at the time of the killing. It provides the jury with the appropriate context in which to decide whether her apprehension of imminent danger of death or great bodily harm was reasonable.¹¹⁰

For example, if a batterer is killed while passed out in his bed, jurors may question the "imminence" or immediate threat posed by the batterer. Yet the testimony helps jurors comprehend how the battered woman reasonably believed she was in extreme danger.¹¹¹ Evidence of battering also helps the jury understand why the defendant chose to use force against her abuser rather than leave the relationship.¹¹² Jurors learn about the psychological paralysis which overcomes an abused woman and how a woman "supposedly so 'passive' that she was unable to leave the relationship would find the wherewithal to rise up and kill her batterer."¹¹³ Additionally, such evidence bolsters the defendant's credibility with the jury by helping to account for "perceived inconsistencies" in her story.¹¹⁴ This expert testimony would presumably have helped Mrs. Aris in her claim of self-defense.

¹⁰⁸See Boland, *supra* note 10, at 612-13; Walker, *BWS and Self-Defense*, *supra* note 17, at 324-26.

¹⁰⁹See Schneider, *supra* note 10, at 524 nn. 4,5,6 (listing Schneider's experience in the area of domestic violence and citing several articles she authored on the subject).

¹¹⁰*Id.* at 511 (citations omitted).

¹¹¹For a discussion on imminence, see Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993); B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach To Justifying Lethal Self-Defense By Battered Women*, 1991 DUKE J. COMP. & INT'L L. 169, 206 (1991).

¹¹²Boland, *supra* note 10, at 615-16.

¹¹³*Id.* at 616.

¹¹⁴*Id.*

B. Battered Women Syndrome as a "Special" Defense

Although there is no recognized "battered women syndrome" defense,¹¹⁵ some legal scholars argue for a separate identifiable defense.¹¹⁶ The defense is based on Lenore Walker's work which illustrates that the symptoms of battered women syndrome are specific to victims of domestic abuse.¹¹⁷ Lenore Walker states this is a "new view on an old defense."¹¹⁸ It is introduced to the judge and jury to demonstrate that "living in domestic violence has such a major impact on a woman's state of mind that it could make an act of homicide justifiable, even when the first look at the facts does not appear to be traditional confrontational self-defense."¹¹⁹ Courts have similarly asserted that there is an affirmative defense of battered women syndrome. In 1992, for instance, the Rhode Island Supreme Court suggested that battered woman syndrome might be presented as an affirmative defense to murder.¹²⁰

¹¹⁵Schneider, *supra* note 10, at 510.

¹¹⁶Elizabeth Schneider lists those who discuss this separate defense: Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 631 (1996) ("excuse of battered woman syndrome"); Mira Mihajlovich, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253 (1987) ("battered woman syndrome defense" should be diminished capacity); Elizabeth Vaughan & Maureen L. Moore, *The Battered Spouse Defense in Kentucky*, 10 N. KY. L. REV. 399 (1983) ("battered woman defense" is emerging "as akin to, but separate from, the more familiar and established defenses of self-defense and diminished capacity").

Schneider, *supra* note 10, at 524 n. 131.

¹¹⁷WALKER, *THE BATTERED WOMAN*, *supra* note 2.

¹¹⁸Walker, *BWS and Self-Defense*, *supra* note 17, at 321.

¹¹⁹*Id.* Non-traditional self-defense cases include instances where the man is not engaged in beating the women at the time she commits the murder. In such cases, the man may be sleeping or resting. *Id.*

¹²⁰*McMaugh v. State*, 612 A.2d 725, 733-34 (R.I. 1992) (recognizing that the condition of battered women syndrome has "certain legal consequences" and that the defendant has the burden of proving "the existence of facts that would constitute the battered-woman's syndrome defense"). *Accord State v. Vigil*, 794 P.2d 728, 729 (N.M. 1990) (referring to a "battered woman theory of self-defense"); *Commonwealth v. Tyson*, 526 A.2d 395 (Pa. Super. Ct. 1987) (referring to the "defense of 'battered woman's syndrome'"); *Moran v. Ohio*, 105 S. Ct. 350, 351 (1984) (Brennan, J., dissenting) (citations omitted). Justices Brennan and Marshall, dissenting from a denial of certiorari on an appeal of a convicted battered woman asserting self-defense, stated that "[a]lthough traditional self-defense theory may seem to fit the situation only imperfectly, the battered woman's syndrome [is] a self-defense theory that has gained increasing support over recent years." *But see Hawthorne v. State*, 408 So. 2d 801, 805 (Fla. Dist. Ct. App. 1982) (battered woman syndrome testimony is introduced to understand a claim of self-defense and not to establish a novel defense); *State v. Stewart*, 763 P.2d 572, 577 (Kan. 1988) ("[N]o jurisdictions have held that the existence of the battered woman syndrome in and of itself operates as a defense to murder").

Anne M. Coughlin, an Assistant Professor at Vanderbilt Law School, acknowledges the existence of a "battered woman syndrome defense" yet believes the theory, as presently endorsed, is inadequate.¹²¹ Coughlin asserts that "[t]he defense itself defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities; indeed, the fundamental premise of the defense is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates."¹²² Despite Coughlin's recognition of the "special" excuse for women, she argues that it is anti-feminist and "inadequate" because the defense "rests on and reaffirms this invidious understanding of women's incapacity for rational self-control . . . [and it] denies that women have the same capacity for self-governance that is attributed to men."¹²³ She concludes that the present model of responsibility under the criminal law should be revised to include characteristics traditionally associated with and internalized by women.¹²⁴ This would excuse women without judging them "to be deviant from and inferior to the model human actor the [which the] theory [currently] describes."¹²⁵

Elizabeth Schneider strongly advises against the idea of a separate defense of battered woman syndrome. She believes some courts are "confused" by the relevance of evidence of battering and others employ a "hybrid" defense.¹²⁶ Others caution that "one must be careful not to imply that the 'syndrome' is actually a separate defense, rather than merely a tool by which to interpret evidence presented in support of such traditional defenses as self-defense."¹²⁷

¹²¹Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1 (1994).

¹²²*Id.* at 7.

¹²³*Id.* at 6.

¹²⁴For example, instead of suggesting that women remain in the abusive home because of psychological paralysis, this theory would applaud women for remaining in the "relationship out of a conviction that she has a responsibility to care for her troubled spouse and to sustain the network of family life, especially to assure the welfare of her children." *Id.* at 89. Coughlin also cites problems with this new theory and notes that she continues to research in this area. Coughlin, *supra* note 121, at 90-92.

¹²⁵*Id.* at 92.

¹²⁶Schneider, *supra* note 10, at 511-12 (citing *Banks v. State*, 608 A.2d 1249, 1252 (Md. Ct. Spec. App. 1992)). Schneider further states that

[b]attered woman's advocates have not asked for or claimed any 'special' or separate defense for battered women defendants. Legislation and application of what may appear to be a separate defense are the result of well-intentioned but misguided attempts by legislators, judges, and attorneys to grapple with the problem of women's unequal access to justice.

Schneider, *supra* note 10, at 524 n.139.

¹²⁷Boland, *supra* note 10, at 635 n.5. See also Sue Osthoff, *Preface to Janet Parrish, Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*, 11 WIS. WOMEN'S L.J. 75 (1996). Osthoff, Director of the National Clearinghouse for the Defense of Battered Women, fears that instead of educating lay persons about battered women, a special defense "misconstrue[s] the use of the evidence of abuse in criminal trials, and since the Bobbitt & Menendez trials, there has been increased publicity decrying the so-called

Recognition of a separate defense may result in a stereotype of women suffering from battered women syndrome and consequently, those who are not thought to fit the stereotype, may not be afforded the same protections as women who do.¹²⁸

C. Evidence of Battered Women Syndrome in Other Criminal Cases

Using evidence of battered women syndrome to support defenses of duress or coercion are even more challenging than asserting self-defense. This affirmative defense excuses criminal acts when the defendant, under an unlawful threat of serious bodily harm, commits a crime in response to that threat.¹²⁹ For instance, a battered woman may commit robbery, murder or drug offenses in accordance with the wishes of her batterer. In her defense, she introduces expert testimony that she suffers from battered women syndrome, essentially claiming that because she was subjected to repeated abuse, she was unable to resist the abuser's commands. In the defendant's mind, she was in extreme, imminent danger and had no choice but to commit the criminal act.¹³⁰

Those who advocate use of battered women syndrome in duress equate it to self-defense situations¹³¹ and argue that evidence of battered women syndrome is likewise appropriate to educate and guide the jury. An example of a court acknowledging the relevance of battered woman syndrome in a duress case is illustrated in *People v. Romero*,¹³² where the California Court of Appeals vacated a lower court's robbery conviction because the defense attorney failed to introduce evidence of battered women syndrome.¹³³ The evidence indicated that the defendant, Debra Romero, was ordered to get money to support her husband's cocaine habit and that if she did not comply

'abuse excuses' as condoning vigilantism and freeing people who kill from personal responsibility." *Id.* at 79.

¹²⁸Schneider, *supra* note 10, at 497-99.

¹²⁹Boland, *supra* note 10, at 623.

¹³⁰*Id.* at 625.

¹³¹*See Id.* at 623-35; Emerson, *supra* note 79, at 328-30.

¹³²26 Cal. App. 4th 315 (1992), review granted, 846 P.2d 702 (Cal. 1993) (limited to question of whether writ of habeas corpus should issue).

¹³³The court determined this failure constituted ineffective assistance of counsel. *Id.* at 318. Other courts have also recognized the validity of battered women syndrome in the context of coercion or duress. *See* *McMaugh v. State*, 612 A.2d 725 (R.I. 1992) (recognizing the battered woman syndrome as a means of establishing coercion and granting post-conviction relief to defendant convicted of first-degree murder, conspiracy and carrying a pistol without a license); *United States v. Homick*, 964 F.2d 899, 905 (9th Cir. 1992) (addressing a coercion-based defense and holding "the unique nature of battered woman syndrome justifies a somewhat different approach to the way we have historically applied these principles"); *But see* *United States v. Willis*, 38 F.3d 170 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 2585 (1995) (holding that expert testimony regarding the battered woman syndrome is irrelevant to a defendant's duress claim).

with his orders, she was subjected to repeated threats and violent behavior.¹³⁴ The court determined that such testimony was especially important to explain how her behavior is not inconsistent with her status as a battered woman.¹³⁵ As in the cases of self-defense, expert testimony seems particularly helpful in duress cases to present jurors with facts and information necessary to prevent the mistaken belief that "they can interpret the facts by using their own background and experience."¹³⁶

III. DOMESTIC VIOLENCE IN CIVIL LITIGATION

A. Traditional Tort Actions Involving Domestic Abuse

Improvements in the criminal justice system's responses to domestic violence as well as legislation aimed at violence prevention¹³⁷ illustrate the importance of battered women's plight for assistance.¹³⁸ Because the incidents of domestic violence are at epidemic levels and society recognizes the seriousness of the problem, the civil side of the law is also responding. A new trend in civil litigation, the filing of domestic torts is quickly emerging.¹³⁹ In fact, "[m]ost interspousal tort suits involve domestic violence situations."¹⁴⁰ The abrogation of interspousal tort immunity in many jurisdictions has helped contribute to the development of domestic tort law.¹⁴¹ Redress is now available for many victims of domestic abuse who suffered through years of living in terror and experiencing what some term "torture" and a violation of women's

¹³⁴Romero, 26 Cal. App. 4th at 319.

¹³⁵*Id.* at 329-30.

¹³⁶Boland, *supra* note 10, at 635.

¹³⁷Violence protection refers to civil protection orders. "Civil protection orders are one of the more traditional state responses to the historic inability of the criminal justice system to handle the problem of domestic violence." Edward S. Snyder, *Remedies for Domestic Violence: A Continuing Challenge*, 12 J. AM. ACAD. MATRIM. LAW. 335, 344 (1994). Ideally, a civil protection order operates to prevent any contact between the abuser and the victim. *Id.* Many states have also enacted stalking statutes in response to the growing concern for the safety of domestic violence victims. See Susan E. Bernstein, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 CARDOZO L. REV. 525 (1993); Laurie Salame, *A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 SUFFOLK U. L. REV. 67 (1993).

¹³⁸Scherer, *supra* note 58, at 552.

¹³⁹Fredrica L. Lehrman, *Elements of Interpersonal Domestic Violence Torts: Bringing Traditional Actions*, DOMESTIC VIOLENCE REPORT, Dec./Jan. 1996 at 3 [hereinafter Lehrman, *Traditional Actions*].

¹⁴⁰Leonard Karp & Cheryl L. Karp, *Beyond the Normal Ebb and Flow . . . Infliction of Emotional Distress in Domestic Violence Cases*, 28 FAM. L.Q. 389, 398 (1994) [hereinafter Karp, *Intentional Infliction*].

¹⁴¹Snyder, *supra* note 137, at 354.

human rights.¹⁴² As tort law develops, many victims of domestic abuse are afforded the same remedies as victims of abuse perpetrated by complete strangers.

Tort law is a vehicle of redress for harms such as physical injury, mental distress and damage to property.¹⁴³ Professor William L. Prosser defines a tort as:

a civil wrong, other than a breach of contract, for which the law provides a remedy. This area of law imposes duties on persons to act in a manner that will not injure other persons. A person who breaches a tort duty has committed a tort and may be liable in a lawsuit brought by a person injured because of that tort.¹⁴⁴

In traditional tort law, as well as domestic torts suits, the basis for the action includes: (1) a duty; (2) a breach of that duty which; (3) proximately causes; (4) a harm or injury.¹⁴⁵ The most common and the most useful domestic torts are assault and battery.¹⁴⁶ Other common claims include intentional or reckless infliction of emotional distress and wrongful death.¹⁴⁷

Because tort actions should only be pursued if financial damages are available,¹⁴⁸ some might question the importance of this avenue, falsely assuming that civil suits will do little to help battered women. This is a product of the myth that battered women are predominately found in low income levels. However, "research clearly shows that verbal abuse, minor physical abuse, and severe physical assault occur at all socioeconomic levels."¹⁴⁹ Lenore Walker debunked the myth that middle and upper class women do not experience battering as often or as violently as do poor women. Walker found that many battered women "are highly competent workers and successful

¹⁴²Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 295 (1994) (arguing for recognition of domestic violence as among "the most heinous human rights violations"). *Id.* at 367.

¹⁴³VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 1 (1994).

¹⁴⁴PROSSER & KEETON, *supra* note 6, at 1.

¹⁴⁵Lehrman, *Traditional Actions*, *supra* note 139, at 3.

¹⁴⁶See Daniel T. Barker, Note, *Interspousal Immunity and Domestic Torts: A New Twist on the 'War of the Roses'*, 15 AM. J. TRIAL ADVOC. 625, 626 (1992); Lehrman, *Traditional Actions*, *supra* note 139, at 3; Scherer, *supra* note 58, at 555.

¹⁴⁷Lehrman, *Traditional Actions*, *supra* note 139, at 3.

¹⁴⁸Because domestic torts are expensive to litigate and are emotionally difficult, "[a] personal injury or domestic tort claim should not be considered unless there is a source of recovery . . . [which] may come from the perpetrator if he has a substantial estate, insurance coverage for the tortfeasor, or third parties also legally responsible for the damages." Leonard Karp, *Civil Relief for Victims of 'Uncivilized Behavior'*, FAM. ADVOC., Winter, 1995, at 77-78 [hereinafter Karp, *Civil Relief*]. Such claims are also helpful in leverage during divorce negotiations. Lehrman, *Traditional Actions*, *supra* note 139, at 3.

¹⁴⁹Scherer, *supra* note 58, at 548.

career women . . . found in all age groups, races, ethnic and religious groups, educational levels, and socioeconomic groups."¹⁵⁰

Thus, although tort remedies cannot *directly* help poor women because their abusive partners probably do not have the monetary resources to satisfy a judgment, it is not fruitless to pursue tort litigation on behalf of all battered women. The availability of tort remedies "is an extremely important development from the point of view of abuse victims who may find that a tort claim is the only available way to attain the requisite financial wholeness and independence which is needed to make a fresh start at life."¹⁵¹ For example, an abused woman may be a product of a middle-class relationship yet she is a homemaker and may have difficulty finding a job to support herself and her children. In this case, the batterer, a middle-class man, does have the means to satisfy a judgment against himself and the battered woman would gain a better chance to live on her own and escape the violence. Additionally, although women in lower socioeconomic levels may not directly benefit from civil action, increased litigation in this area will bring greater public awareness, hopefully accompanied by increased funding and services for poor battered women.

1. Assault and Battery

Assault and battery are intentional torts. This means that the actor either purposefully created the particular result or had substantial knowledge that such a result would follow.¹⁵² Assault is defined as the intent to create a well-grounded apprehension of imminent, unconsented, bodily contact¹⁵³

¹⁵⁰WALKER, *THE BATTERED WOMAN*, *supra* note 2, at 18-19. Recent examples of domestic violence affecting middle and upper-class families include Joel Steinberg and Hedda Nussbaum, a middle-class, Jewish couple living in a Greenwich Village brownstone. Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1678 (1990). Steinberg, a lawyer, was found guilty of manslaughter in the death of Lisa Steinberg, his six year old illegally adopted daughter. *People v. Steinberg*, 595 N.E.2d 845-46 (1992). Nussbaum was also battered by Steinberg yet there were questions regarding Nussbaum's failure to prevent Lisa's death. Minow, *supra* at 1699 n.89. In exchange for testimony against her lover, Nussbaum "was never charged and was given the psychiatric and social services support she needed." Ammons, *Racial Imagery and Stereotypes*, *supra* note 14, at 1020. Other examples include, John Fedders, a high-ranking official of the Securities and Exchange Commission charged with abusing his wife, Charlotte Fedders. Lisa R. Eskow, Note, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing its Prosecution*, 48 STAN. L. REV. 677, 709 n.181 (1996). Recently, and equally infuriating, O.J. Simpson, a former football player, actor, and sports commentator, was acquitted of charges that he murdered his former wife, Nicole Brown Simpson, and her friend Ronald Goldman. Ammons, *Clemency*, *supra* note 60, at 79 n.20. The trial was replete with allegations of domestic abuse directed at Nicole Brown Simpson. Nicole's bruised face was a common image on television screens across the nation.

¹⁵¹Snyder, *supra* note 137, at 354.

¹⁵²JOHNSON, *supra* note 143, at 35.

¹⁵³RESTATEMENT (SECOND) OF TORTS § 21 (1) (a)-(b) (1965).

while a battery is defined as the intentional, unconsented, harmful or offensive touching of another.¹⁵⁴

In battery actions, the conduct complained of must be harmful or offensive and a reasonable person standard is used to judge the validity of such claims.¹⁵⁵ The tort of battery can be committed directly or indirectly.¹⁵⁶ Thus, an action lies regardless of whether a batterer hits a woman in the face with his hand or breaks a glass against a wall which ultimately strikes the woman. All that is necessary is that the batterer affirmatively put an object in force which results in the harmful touching. Battery covers any part of the body or anything connected with it such that snatching an object from the victim's person is also considered tortious.¹⁵⁷ Finally, the plaintiff does not need to be aware of the harm or contact at the precise moment the battery occurs. The contact is considered harmful if it results in pain or illness or if there is "any physical impairment of the condition of another's body."¹⁵⁸

Assault and battery are often used interchangeably in a criminal setting "to denote the unconsented infliction of bodily harm"¹⁵⁹ yet they are distinct tort causes of action. An assault can occur without the existence of a battery if the perpetrator "desists before the blow is struck."¹⁶⁰ Likewise, a battery can occur without an assault if the victim is not aware that a perpetrator is preparing to strike a blow.¹⁶¹ Thus, for the tort of assault, the plaintiff must be cognizant of a potential harm and that the perpetrator must have the ability to cause the contact. The plaintiff does not however, need to be placed in fear.¹⁶² It is enough that the plaintiff understands the imminence of the contact. However, threats of future harm do not constitute an assault because the imminence element is not satisfied.¹⁶³ Words alone are not enough to support a claim of assault. The words usually must be accompanied by a threatening gesture.¹⁶⁴ Likewise, no

¹⁵⁴*Id.* § 13 (a).

¹⁵⁵*Id.* § 19.

¹⁵⁶*Id.* § 18 cmt. c.

¹⁵⁷See, e.g., JOHNSON, *supra* note 143, at 56-57 (citing *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967)).

¹⁵⁸RESTATEMENT (SECOND) OF TORTS § 15.

¹⁵⁹JOHNSON, *supra* note 143, at 53.

¹⁶⁰*Id.* at 52.

¹⁶¹*Id.*

¹⁶²RESTATEMENT (SECOND) OF TORTS § 24 cmt. b.

¹⁶³According to the Restatement: "The apprehension created must be one of imminent contact, as distinguished from any contact in the future. 'Imminent' does not mean immediate, in the sense of instantaneous contact . . . [i]t means rather that there will be no significant delay." *Id.* § 29 cmt. b.

¹⁶⁴JOHNSON, *supra* note 143, at 64.

assault occurs if the plaintiff learns much later that the defendant had previously pointed a gun at her back.¹⁶⁵

Both assault and battery afford victims compensatory, punitive, and nominal damages.¹⁶⁶ Physical injury and emotional pain and suffering are damages caused by a battery while "mental disturbance, including fright, humiliation and the like, as well as any physical illness which may result from them" are damages typically caused by an assault.¹⁶⁷

2. Intentional or Reckless Infliction of Emotional Distress

The Restatement (Second) of Torts imposes liability for damages on a person who intentionally or recklessly, through extreme and outrageous conduct, causes severe emotional distress to another.¹⁶⁸ Intentional or reckless¹⁶⁹

¹⁶⁵RESTATEMENT (SECOND) OF TORTS § 22.

¹⁶⁶Compensatory damages represent an award for losses actually suffered.. Punitive damages are imposed as a means of civil penalty and are available in cases of egregious behavior. Nominal damages are symbolic victories. These are awarded when no losses are established and typically "vindicate the plaintiff's technical right." JOHNSON, *supra* note 143, at 55. Fredrica L. Lehrman cites several recent cases in which damages were successfully recovered. These cases include:

Cater v. Cater, 846 S.W.2d 173 (Ark. 1993) (wife recovered \$20,000 compensatory and \$350,000 punitive damages for assault and battery by husband); Sumrall v. Sumrall, 612 So. 2d 1010 (La. Ct. App. 1993) (wife recovered \$43,000 after husband beat her); Murray v. Murray, 598 So. 2d 921 (Ala. Civ. App. 1992) (wife recovered \$5000 compensatory and \$50,000 punitive damages against husband who physically abused her during marriage); Sielski v. Sielski, 604 A.2d 206 (N.J. Super. Ct. Ch. Div. 1992) (wife recovered \$1030 compensatory damages, \$1000 for pain and suffering, and \$5000 punitive damages); Catlett v. Catlett, 388 S.E.2d 14 (Ga. Ct. App. 1989) (wife recovered \$20,000 punitive damages against husband for assault, battery and false imprisonment); Simmons v. Simmons, 773 P.2d 602 (Colo. Ct. App. 1988) (wife recovered \$15,000 compensatory and \$100,000 punitive damages against husband for assault, battery and outrageous conduct); Aubert v. Aubert, 529 A.2d 909 (N.H. 1987) (husband recovered \$350,000 against wife who shot him at close range; wife had been convicted of attempted murder); Duplechin v. Toce, 497 So. 2d 763 (La. Ct. App. 1987) (wife recovered \$52,000 for battery, including scalp lacerations, broken nose, contusions and perforated eardrum). The 1994 decision in the Texas domestic violence assault and battery case of O'Keiff v. Christ, No. 9228795-A (Dist. Ct. Tex., Apr. 6, 1994) (reported in Law Reporter 226 (Aug. 1994)), ended in a jury award of \$10.9 million in compensatory damages and \$150 million in punitive damages against a physician who shot and severely injured his wife.

Lehrman, *Traditional Actions*, *supra* note 139, at 3.

¹⁶⁷PROSSER & KEETON, *supra* note 6, § 10, at 43.

¹⁶⁸RESTATEMENT (SECOND) OF TORTS at § 46 (1).

¹⁶⁹Intentional infliction of emotional distress, like other intentional torts, requires the element of knowledge. The tortfeasor either knew or was substantially certain that his actions would result in injury to the plaintiff. "There are, however, a few cases which

infliction of emotional distress, sometimes referred to as the "tort of outrage,"¹⁷⁰ is a relatively recent judicial development.¹⁷¹ Because of the difficulty of proving damages and the fear that this claim would open the floodgates of litigation for "mere bad manners" and fictitious claims, the courts were once reluctant to recognize this action.¹⁷² Recovery however, is not allowed for insults, threats, abuse or hurt feelings.¹⁷³ The Restatement comments that:

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"¹⁷⁴

Because of the concern about the genuineness of claims, jurisdictions initially required some showing of physical injury to prove mental distress.¹⁷⁵ Now, however, courts generally permit this action without a showing of physical injury¹⁷⁶ and allow recovery of both compensatory and punitive damages.¹⁷⁷

indicate that liability for extreme outrage is broader and extends to situations in which there is no certainty, but merely a high degree of probability that the mental distress will follow, and the defendant goes ahead in conscious disregard of it. This is the type of conduct which commonly is called willful or wanton, or reckless." PROSSER & KEETON, *supra* note 6, § 12, at 64.

¹⁷⁰JOHNSON, *supra* note 143, at 66.

¹⁷¹*Id.*

¹⁷²PROSSER & KEETON, *supra* note 6, § 12, at 56.

¹⁷³*Id.* § 12, at 59-60.

¹⁷⁴RESTATEMENT (SECOND) OF TORTS § 46 cmt. d.

¹⁷⁵Examples of physical injury included heart attacks, miscarriages or some other identifiable less severe physical illness. JOHNSON, *supra* note 143, at 68.

¹⁷⁶*Id.* Fredrica L. Lehrman cites examples of cases in domestic violence tort actions which did not require physical injury in emotional distress claims.

In *Massey v. Massey*, 807 S.W.2d 391 (Tex. Ct. App. 1991), *aff'd*, 867 S.W.2d 766 (Tex. 1993), the court affirmed a \$362,000 jury award to a wife who had to live 'walking on egg shells' to avoid her husband's rage. This case made new law by allowing 'the tort of infliction of emotional distress, without physical injury' to apply to family law cases because to do otherwise would be to deny equal protection to married persons. Another case not requiring physical injury to fulfill the elements of this cause of action was *Murphy v. Murphy*, 486 N.Y.S.2d 457 (1985). (See generally, *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 &ns. 2, 3 (Tex. 1993), listing cases from 43 states that require no physical injury before liability may be established.) Lehrman, *Traditional Actions*, *supra* note 139, at 4.

¹⁷⁷JOHNSON, *supra* note 143, at 92.

However, the law concerning emotional distress cases is still in a process of expansion and the cases that remain "easiest to prove usually involve spouses who have been physically abused."¹⁷⁸ Other possibilities for traditional tort actions involving domestic abuse situations include false imprisonment,¹⁷⁹ wrongful death¹⁸⁰ and negligent infliction of emotional distress.¹⁸¹

B. Non-Traditional Domestic Torts

Several other non-traditional actions exist which create alternatives to common tort suits involving domestic violence. Fredrica L. Lehrman,¹⁸² an attorney practicing in the area of domestic violence and family law, considers the following causes of action to constitute domestic violence torts: intentional interference with custody, visitation and/or parent child relationship, parental kidnapping; defamation, libel and slander; tortious infliction of a sexually transmitted disease; marital rape; using the U.S. Mail to send threats across state lines; invasion of privacy; and negligent operation of a motor vehicle.¹⁸³ Another commentator proposes liability for "the tortious interspousal transmission or exposure to AIDS."¹⁸⁴ Further, in light of the recent passage of

¹⁷⁸Karp, *Intentional Infliction*, *supra* note 140, at 399. The authors categorize emotional distress claims which lack physical injury as "tortious transmission of sexual diseases, interference with custodial rights, and intolerable or atrocious conduct intended to cause severe psychological harm to the spouse." *Id.*

¹⁷⁹Lehrman, *Traditional Actions*, *supra* note 139, at 10 (citing *Catlett v. Catlett*, 388 S.E. 2d 14 (Ga. Ct. App. 1989)); *See also* Karp, *Civil Relief*, *supra* note 148, at 78.

¹⁸⁰Lehrman, *Traditional Actions*, *supra* note 139, at 3 (citing *Herget Nat'l Bank v. Berardi*, 356 N.E.2d 529 (Ill. 1976); *Parman v. Price*, No. 87-CP-08-287 (S.C. Beaufort County Ct. CP Nove. 10, 1988); *Hampdon v. Duda & Sons, Inc.*, 511 So. 2d 1104, 1107 (Fla. 1987)). *See also* Karp, *Civil Relief*, *supra* note 148, at 78.

¹⁸¹Many states require physical injury for an action of negligent infliction of emotional distress. Lehrman, *Traditional Actions*, *supra* note 139, at 10 (citing *Ledger v. Tippitt*, 210 Cal. Rptr. 814 (1995)). Negligent infliction of emotional distress imposes liability when the tortfeasor's negligence creates "an unreasonable risk of bodily harm and emotional disturbance." Lehrman, *Traditional Actions*, *supra* note 139, at 10 (citing *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 54 (5th ed. 1984)). Lehrman states that attorneys "might plead negligent infliction in the alternative to an intentional tort because most insurance policies do not cover intentional torts." Lehrman, *Traditional Actions*, *supra* note 139, at 10. However, the disadvantage to pursuing this action is that negligence judgments are dischargeable in bankruptcy and punitives are not available. *Id.* *See also* Karp, *Civil Relief*, *supra* note 149, at 78.

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¹⁸³Fredrica L. Lehrman, *Elements of Interpersonal Domestic Violence Torts: Some Non-Traditional Alternatives*, DOMESTIC VIOLENCE REPORT, Feb./Mar. 1996, at 3-4 [hereinafter Lehrman, *Non-Traditional*].

¹⁸⁴Robert B. Gainor, *To Have and to Hold: The Tort Liability for the Interspousal Transmission of AIDS*, 23 NEW ENG. L. REV. 887 (1988/1989).

the Violence Against Women's Act of 1994,¹⁸⁵ the federal government now affords a civil rights remedy to victims of gender-motivated crimes.¹⁸⁶ This allows successful plaintiffs to recover compensatory and punitive damages¹⁸⁷ and it may be a viable cause of action in marital rape situations.¹⁸⁸ Although these suits are less common, they are no less important for battered women who need every possible avenue open so that they are afforded full recovery.

C. Obstacles to Domestic Tort Suits

1. Interspousal Tort Immunity

Interspousal tort immunity is a defense to a civil cause of action between husband and wife. The doctrine "prohibits one spouse from seeking tort damages from the other."¹⁸⁹ Because this was the majority rule until the 1970's, many women were precluded from seeking money damages from abusive, battering husbands.¹⁹⁰

The abrogation of spousal immunity in many jurisdictions is a recent phenomenon.¹⁹¹ In fact, the doctrine is still alive in Georgia and Louisiana.¹⁹² Traditionally, courts viewed tort actions against spouses as an interference with "domestic harmony."¹⁹³ Courts also feared such suits would encourage fictitious and fraudulent actions.¹⁹⁴ Interspousal tort immunity has its roots deep in the common law of England. The "most influential reason" underlying the doctrine was the merger of the female's identity with the male's "upon marriage."¹⁹⁵ William Blackstone, in his Commentaries on the Laws of England, stated " '[b]y marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the

¹⁸⁵Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1902 (codified in scattered titles of 42 U.S.C.).

¹⁸⁶42 U.S.C. § 13981(b) (1994).

¹⁸⁷42 U.S.C. 13981(c).

¹⁸⁸Lehrman, *Non-Traditional*, *supra* note 183, at 4.

¹⁸⁹Rhonda L. Kohler, Comment, *The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025, 1037 (1992).

¹⁹⁰*Id.*

¹⁹¹Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 324 (1997) (listing states reluctant to abolish the doctrine including Florida, Delaware, and Hawaii which did so in 1993).

¹⁹²*Id.*

¹⁹³Karp, *Civil Relief*, *supra* note 148, at 77.

¹⁹⁴PROSSER & KEETON, *supra* note 6, § 122, at 902.

¹⁹⁵Carl Tobias, *Interspousal Tort Immunity In America*, 23 GA. L. REV. 359, 363 (1989).

marriage, or at least is incorporated and consolidated into that of her husband, under whose wing, protection, and cover, she performs everything.' "196

The reluctance, even today, to abolish the doctrine is disturbing. Yet the cited justifications include: (1) the preservation of domestic harmony; (2) the fear of fraudulent or collusive claims; (3) the idea of deference to legislatures in resolving the immunity debate; (4) the threat of "excessive and frivolous claims;" and (5) the availability of adequate alternative remedies such as divorces and criminal prosecutions.¹⁹⁷ Despite these concerns, this common law doctrine does not preserve domestic harmony or judicial resources; instead, it perpetuates bias against battered women seeking redress for civil wrongs.

2. Statute of Limitations

Another obstacle for battered women seeking recovery for their injuries, is the relatively short statute of limitations for those tort actions currently available. The statute of limitations bars commencement of a suit after a given period of time. In traditional tort actions of assault and battery, the statute of limitations is typically only a few years from the date of the injury. In Ohio for example, the statute of limitations for a tort of assault or battery is two years after the cause of action accrues.¹⁹⁸ Thus, in a battered woman's situation, where she is paralyzed by fear during years of abuse, she is afforded recovery for only the most recent beatings. Because courts do not toll the statute of limitations for torts committed during the marriage, injuries inflicted five, ten, or fifteen years ago remain uncompensated.¹⁹⁹

Even in the criminal context, the statute of limitations may be relatively short. For example, in Ohio, the statute of limitations for prosecution of felonious assault is six years²⁰⁰ and simple assault, a misdemeanor, is only two years.²⁰¹ Thus, the batterer likely escapes criminal as well as civil punishment because a battered woman is often fearful of commencing either action. If she escapes the cycle of violence, it may be too late to proceed with her complaint.

¹⁹⁶*Id.* at 364 (citing 1 W. BLACKSTONE, COMMENTARIES *442, reprinted in W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 859 (4th ed. 1971)).

¹⁹⁷Tobias, *supra* note 195, at 441-67.

¹⁹⁸OHIO REV. CODE ANN. § 2305.10(A) (Anderson 1996).

¹⁹⁹Kohler, *supra* note 189, at 1052.

²⁰⁰OHIO REV. CODE ANN. § 2903.11 (Anderson 1996) defines the crime of felonious assault. Section 2901.13 sets forth the statute of limitations for criminal prosecutions.

²⁰¹OHIO REV. CODE ANN. § 2903.13 (Anderson 1996) defines the crime of assault and categorizes it as a misdemeanor. Section 2901.13 sets forth the statute of limitations for criminal prosecutions. If the batterer is charged under the Domestic Violence provision of the Ohio Revised Code, the first offense is considered a misdemeanor while subsequent violations of the provision or other assault and battery provisions may be considered a felony. OHIO REV. CODE ANN. § 2919.25.

3. The Option of a Continuing Tort

Because it is patently unfair for an abuser to escape all liability for his actions, a possible solution is the concept of a continuous tort. A continuing tort is defined as:

one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation.²⁰²

False imprisonment, trespass, nuisance and some civil rights violations are common examples of continuous torts.²⁰³ Usually however, courts and statutes do not recognize personal injury torts as continuous.²⁰⁴ Historically, personal injuries were not viewed as continuous in nature because "the injury was caused by an isolated incident, such as an assault and battery or a motor vehicle accident."²⁰⁵ This theory, although plausible in everyday assault and battery tort actions, does not take into consideration the "cumulative effect" of domestic abuse.²⁰⁶ Continuous, unlawful beatings plunge a woman deeper into the cycle of violence and can intensify the phenomenon of learned helplessness. "[E]very time the batterer beats his victim, he is beating a person who is already injured, thereby exacerbating those injuries."²⁰⁷ While not minimizing the tortious injuries inflicted by a complete stranger, the situation is vastly different from enduring relentless abuse by an intimate partner. In the former, the incident is likely a one-time occurrence. In the latter, the woman is systematically beaten, lives paralyzed by fear, and often develops chronic health problems directly resulting from the beatings.

²⁰²Curtis v. Firth, 850 P.2d 749, 754 (Idaho 1993).

²⁰³Twyman v. Twyman, 790 S.W.2d 819, 820 (Tex. Ct. App. 1989), *rev'd on other grounds*, 855 S.W.2d 619 (Tex. 1993).

²⁰⁴Kohler, *supra* note 189, at 1053. Jill Lebowitz, Case Comment, *Giovine v. Giovine: Pursuit of Tort Claims for Domestic Violence in New Jersey and the Creation of a New Tort Cause of Action for 'Battered Woman's Syndrome'*, 17 WOMEN'S RTS. L. REP. 259, 261-62 (1996); See Kohler, *supra* note 189, at 1054 ("Unfortunately, the theory of continuing tort in spousal abuse cases has had limited success."); Compare with *Karjala v. Johns-Manville Prod. Corp.*, 523 F.2d 155 (8th Cir. 1975) (applying the concept of a continuing tort to asbestos exposure); *Bustamento v. J.D. Tucker*, 607 So.2d 532 (La. 1992) (finding sexual harassment a continuing tort).

²⁰⁵Lebowitz, *supra* note 204, at 261-62.

²⁰⁶Kohler, *supra* note 189, at 1050. See also *supra* notes 56-76 and accompanying text discussing the health effects of battered women syndrome.

²⁰⁷Kohler, *supra* note 189, at 1050.

A Texas court was one of the first willing to apply the continuous tort theory to a wife's claim for negligent infliction of emotional distress.²⁰⁸ In *Twyman v. Twyman*, the court held that the conduct which caused the plaintiff's emotional distress was not a series of intentional acts each with its own statute of limitations but instead ruled that her "cause of action is not complete and does not accrue until the tortious acts have ceased."²⁰⁹ The court further noted that "[s]ince usually no single incident in a continuous chain of tortious activity can fairly or realistically be identified as the cause of significant harm, it seems proper to regard the cumulative effect of the conduct as actionable."²¹⁰ Another court, applying the continuous tort theory in domestic situations, also did so in the context of an emotional distress claim.²¹¹ In *Curtis v. Firth*, the Idaho Supreme Court determined that "[b]y its very nature [intentional infliction of emotional distress] will often involve a series of acts over a period of time, rather than one single act causing severe emotional distress. For that reason we recognize the concept of a continuing tort . . . should be extended to apply in other limited contexts."²¹²

However, even if the continuing tort theory of emotional abuse is accepted, emotional distress actions have met with limited success in some courts.²¹³ "[M]any of the decisions recognizing emotional distress have relied on acts of assault and battery to prove the outrageousness of the conduct and relegated the emotional distress to parasitic-type damages."²¹⁴ In other words, in domestic torts, these types of damages have the most success when they are accompanied by assault and battery actions. Thus, even if courts allow battered women to recover for emotional distress under a continuing tort theory, women who are physically hurt may still be barred by the statute of limitations for those injuries.

²⁰⁸*Twyman v. Twyman*, 790 S.W.2d 819, 821 (Tex. Ct. App. 1989), *rev'd on other grounds*, 855 S.W.2d 619 (Tex. 1993) (stating that "neither party cites authority applying continuing tort to negligent infliction of emotional distress" cases).

²⁰⁹790 S.W.2d at 821.

²¹⁰*Id.* (quoting *Page v. United States*, 729 F.2d 818, 821-22 (D.C. Cir. 1984)). Although the court of appeals decision was later reversed by the Texas Supreme Court, the opinion did not address the court of appeal's ruling that emotional distress constituted a continuing tort. The court of appeals decision was reversed because it was based on a theory of negligent infliction of emotional distress. The Texas Supreme Court had recently ruled that a cause of action for negligent infliction of emotional distress no longer existed. However, the Texas Supreme Court "expressly adopt[ed]" the tort of intentional infliction of emotional distress and held that the case should be remanded to the trial court for a determination based on that theory.

²¹¹*Curtis v. Firth*, 850 P.2d 749, 755 (Idaho, 1993).

²¹²*Id.*

²¹³*See Kohler, supra* note 189, at 1057-64.

²¹⁴*Id.* at 1057.

4. Joinder and Res Judicata

Additional bars to civil suits for domestic violence also include joinder and res judicata.²¹⁵ In this context, joinder refers to whether a tort action should be brought together with the divorce proceedings. In a few states, joinder of the tort action is mandatory or "encouraged."²¹⁶ For instance, New Jersey's "entire controversy doctrine" requires domestic violence tort litigation to accompany the divorce proceedings or otherwise be barred from filing suit.²¹⁷ The doctrine "is a preclusionary principle intended to prevent the fractionalization of litigation by requiring all claims between the same parties arising out of or relating to the same transactional circumstances to be joined in a single action."²¹⁸ This strict rule disadvantages women who fail to bring their tort action at the time of the divorce because of fear, lack of knowledge of their rights or embarrassment.²¹⁹

Other states cite the inherent differences between a divorce action and tort suit and forbid joinder.²²⁰ Jurisdictions follow this rule believing that tort claims "are legal in nature [and] should be kept separate from divorce actions, which are equitable in nature."²²¹ However, forbidding joinder is also potentially disadvantageous for women who may not be prepared to commence a separate, expensive and emotionally draining lawsuit after finalizing a divorce.²²² Thus, permissive joinder appears to be the best alternative as a flexible rule gives the woman the opportunity to make the decision herself based on her specific situation. Permissive joinder allows the woman to unite the divorce and tort action if she determines that is her best course of action.

Although permissive joinder appears to be the best option, claim preclusion or res judicata, can still bar the separate tort action.²²³ Thus, if part or all of the

²¹⁵See Dalton, *supra* note 191, at 374-77; Kristyn J. Krohse, Note, *No Longer Following the Rule of Thumb-- What to Do with Domestic Torts and Divorce Claims*, 1997 U. Ill. L. Rev. 923 (1997); Snyder, *supra* note 137, at 354-60.

²¹⁶Snyder, *supra* note 137, at 357-58.

²¹⁷Giovine v. Giovine, 663 A.2d 109, 113 (N.J. Sup. Ct. App. Div. 1995), *overruled on other grounds by* Kinsella v. Kinsella, 696 A.2d 556 (N.J. 1997).

²¹⁸Brown v. Brown, 506 A.2d 29, 32 (N.J. Super. App. Div. 1986).

²¹⁹Lebowitz, *supra* note 204, at 267.

²²⁰States which forbid joinder include Arizona, Colorado, New Hampshire, Illinois, Utah and Vermont. Dalton, *supra* note 191, at 375.

²²¹Snyder, *supra* note 137, at 355 (citing Noble v. Noble, 761 P.2d 1369 (Utah 1988)).

²²²See Kohler, *supra* note 189, at 1043; Snyder, *supra* note 137, at 355-56.

²²³See Dalton, *supra* note 191, at 378-79. Dalton also notes that in Massachusetts, the doctrine of equitable estoppel is also used to prevent spouses from bringing a separate tort action after the divorce. Dalton cites Heacock v. Heacock, 520 N.E.2d 151 (Mass. 1988), *aff'd* 568 N.E.2d 621 (Mass. App. Ct. 1991), which disallowed a wife's tort action against her abusive husband holding that the husband was "disadvantaged by not

aspects of a tort suit are considered in the divorce action or the settlement, this acts as an "absolute bar to a subsequent action involving the same claim, demand or cause of action."²²⁴

IV. BATTERED WOMEN SYNDROME AS AN AFFIRMATIVE TORT CAUSE OF ACTION

Although there are many obstacles to instituting tort actions against a batterer, the persistent problem appears to be the tolling of the statute of limitations. "Courts have shown a near universal reluctance" to toll the short statute of limitations for torts committed during marriage or marriage like relationships.²²⁵ And even if courts eventually choose to toll the statute of limitations, traditional torts such as assault and battery do not fully recognize the extent of injuries associated with battered women. Typically, battered women do not just suffer from single incidents of abuse. Rather, they are trapped in a cycle of abuse in which each new incident perpetuates and worsens the battered woman's condition.

The response of the legal system should be to recognize a new tort cause of action unique to battered women. "Family law practitioners are finding new and expanded remedies for victims of spousal abuse in civil court."²²⁶ It is not unheard of for courts to create new causes of action.²²⁷ For instance, in 1986, the Supreme Court of New Hampshire recognized the new cause of action of wrongful birth.²²⁸ Other emerging torts include the interference with a parent-child relationship,²²⁹ and the tortious transmission of a sexual disease.²³⁰ It is within the power of the courts and the legislatures to assist battered women in obtaining full recovery. Not only would this new tort alleviate some of the problems with bringing traditional tort actions, it would stand as a symbolic victory for battered women. Society and the legal system

knowing, at the time of his divorce, that his wife was planning the later tort claim." Dalton, *supra* note 191, at 380.

²²⁴BLACKS'S LAW DICTIONARY 1305 (6th ed. 1990).

²²⁵Snyder, *supra* note 137, at 360.

²²⁶Karp, *Intentional Infliction*, *supra* note 140, at 389.

²²⁷*Id.* See also *supra* notes 183-88 and accompanying text identifying non-traditional torts actions pled in domestic situations.

²²⁸Smith v. Cote, 513 A.2d 341 (N.H. 1986). This was an action brought by parents whose child was born with severe defects. The action was against a physician who negligently failed to inform the parents of the possibility that the mother would give birth to a child with severe defects. The tort is based on the idea that the parents lacked the right to make an informed decision whether to abort the child or carry it to term. *Id.* at 342-43.

²²⁹See e.g. D&D Fuller CATV v. Pace 780 P.2d 520 (Colo. 1989) (mother successfully brought suit against her in-laws for tortious interference with mother-son relationship resulting from the in-laws financial assistance in the kidnapping of their grandson).

²³⁰See e.g. Doe v. Roe, 267 Cal. Rptr. 564 (Cal. Ct. App. 1988).

should give credence to their claims and it is within the power of the courts and the legislatures to assist them in obtaining full recovery.

The tort of battered women syndrome is both an addition to and an expansion of the current body of tort law.²³¹ The tort of battered women syndrome is a new action in that it has elements distinct from other torts; it is also an expansion of the already existing continuous tort theory recognized in trespass, nuisance and false imprisonment claims.²³²

*A. Cases Which Come Close to Recognizing a New Tort of
Battered Women Syndrome*

In *Davis v. Bostick*,²³³ the plaintiff argued that the defendant "'engaged in an intentional course of conduct designed to inflict emotional stress and mental anguish.'"²³⁴ At trial, the jury was instructed to ignore the statute of limitations because a continuous tort was alleged.²³⁵ The appellate court concluded that substantial evidence supported plaintiff's claim of ten incidents occurring over a period of two years. These incidents included striking, choking and threatening to kill the plaintiff, destroying her property, defaming plaintiff and harassing plaintiff's family and friends.²³⁶ However, the appellate court determined that each incident was individually actionable, each with its own statute of limitations²³⁷ and that the trial court erred in "striking the statute of limitations defense."²³⁸ The appellate court stated that "[t]he acts were discontinuous in the sense that each had a beginning and an end, each was separated from the next by some period of relative quiescence, and each was capable of producing compensable harm."²³⁹ The court "impl[ied] that there could never be a cumulative effect from a continuous course of assaults and batteries."²⁴⁰

²³¹ Although I believe the tort of battered women syndrome is both a new tort and an expansion of existing tort law, for purposes of simplicity in the remainder of this Note, I refer to the action simply as a "new" tort.

²³² Robert A. Clifford, *Two States Give Battered Women Tort Option*, CHICAGO LAWYER, Dec. 1995, available in Westlaw, Allnews Library at *1; see *infra* note 267 and accompanying text citing the possible elements of the tort.

²³³ 580 P.2d 544 (Or. 1978).

²³⁴ *Id.* at 545 (quoting plaintiff's allegations).

²³⁵ *Id.* at 547.

²³⁶ *Id.* at 545-46.

²³⁷ *Davis*, 580 P.2d at 548.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Kohler, *supra* note 189, at 1050.

Conversely, the court in *Curtis v. Firth*,²⁴¹ did allow the tolling of the statute of limitations in a plaintiff's claim for intentional infliction of emotional distress. In *Curtis*, the plaintiff presented testimony that she suffered from "Battered Wife Syndrome" and Post-Traumatic Stress Disorder.²⁴² Testimony at trial elicited the existence of an identifiable cycle of violence.²⁴³ The court held that the plaintiff's claim of intentional infliction of emotional distress constituted a continuing tort and that the tortious acts ceased when the plaintiff was evicted from the home.²⁴⁴ The court essentially reached the same result it would have reached had it recognized a tort of battered women syndrome.

In *de la Croix de Lafayette v. de la Croix de Lafayette*,²⁴⁵ the plaintiff explicitly asked the court to recognize a new tort of spousal abuse. The plaintiff argued that the court should consider "individual acts of violence as part of an ongoing pattern" and that new tort would include all acts of assault, battery and psychological abuse.²⁴⁶ The new tort's three year statute of limitations would begin to run at the last incident of abuse.²⁴⁷ Rejecting this argument, the court held that "[n]othing in this record suggests that a new tort of a continuing nature is required to adequately address the occurrences between these parties."²⁴⁸ However, the plaintiff did not submit expert testimony regarding battered women syndrome which may account for the court's ruling that a new tort was not needed to address the plaintiff's claims.²⁴⁹ Perhaps if the record reflected the cumulative effect of the beatings and the plaintiff's inability to remove herself from the abusive relationship, the court may have ruled differently.

However, in *Laughlin v. Breaux*,²⁵⁰ the plaintiff did present expert testimony that she suffered from battered woman syndrome, yet the court refused to find that it constituted a continuing tort. The court held that learned helplessness did not "produce such an incapacity in [the] [p]laintiff that she was unable to file suit."²⁵¹ The court further stated that defendant's alleged abuse did not constitute a continuing tort because that concept "only applies when continuous conduct causes continuing damages . . . [and in this case] each

²⁴¹850 P.2d 749, 755 (Idaho, 1993).

²⁴²*Id.* at 752.

²⁴³*Id.* at 751.

²⁴⁴*Id.* at 755.

²⁴⁵15 Fam. L. Rep. (BNA) 1501 (D.C. Super. Ct. Aug. 14, 1989).

²⁴⁶*Id.* at 1502.

²⁴⁷*Id.*

²⁴⁸*Id.*

²⁴⁹Kohler, *supra* note 189, at 1065; See *de la Croix de Lafayette*, 15 FAM. L. REP. at 1502.

²⁵⁰515 So. 2d 480 (1st Cir. 1987).

²⁵¹*Id.* at 482.

incident of battery and of assault is separate, and gives rise to a separate cause of action."²⁵² The court reasoned that because the bruises, soreness and emotional upset were "immediately apparent," the statute of limitations runs from that time.²⁵³ Even though the court acknowledged that the abuse "may have combined to produce" the plaintiff's battered women syndrome it still declined to apply the continuing tort concept or create a new cause of action.²⁵⁴

B. The New Jersey Cases

Despite many courts' unreceptive attitudes toward treating battered women's injuries as a continuous tort or as a tort cause of action in itself, battered women have found justice in New Jersey. In a landmark ruling, the New Jersey Supreme Court was the first to recognize an affirmative tort of battered women syndrome.²⁵⁵ In *Cusseaux v. Pickett*, the court denied defendant's motion to dismiss for failure to state a cause of action and held "that the 'battered-woman's syndrome' is now a cognizable cause of action under the laws of New Jersey."²⁵⁶ The court relied on another New Jersey Supreme Court case, *State v. Kelly*,²⁵⁷ which recognized the validity of battered women syndrome in the criminal context.

Kelly determined that battered women syndrome testimony was critical to the defendant's self-defense claim as it was necessary to understand defendant's state of mind.²⁵⁸ The court cited bias toward battered women in case law, statutes, and law enforcement agencies, as well as problems of stereotypes and myths about battered women.²⁵⁹

The *Cusseaux* court, relied heavily on *State v. Kelly* and the state's Prevention of Domestic Violence Act.²⁶⁰ The court cited the following legislative history:

'The Legislature finds and declares that domestic violence is a serious crime against society . . . [and it] is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protections from abuse the law can provide . . . Further, it is the responsibility of the courts to protect victims of violence that occurs in a family or family-like setting by providing access to both emergent

²⁵²*Id.*

²⁵³*Id.* at 483.

²⁵⁴*Laughlin*, 515 So. 2d at 483.

²⁵⁵*Cusseaux v. Pickett*, 652 A.2d 789 (N.J. 1994).

²⁵⁶*Id.* at 789.

²⁵⁷*State v. Kelly*, 478 A.2d 364 (N.J. 1984).

²⁵⁸*Id.* at 375-76.

²⁵⁹*Id.* at 370.

²⁶⁰Prevention of Domestic Violence Act. L. 1981, c. 426, N.J.S.A. 2C:25-1 to -16, (repealed and N.J.S.A. 2C:25-17 to -33 enacted in their place.)

and long-term civil and criminal remedies and sanctions, and by ordering those remedies and sanctions that are available to assure the safety of the victims and the public. To that end, the Legislature encourages . . . the broad application of the remedies available under this act in the civil and criminal courts of this state.²⁶¹

The *Cusseaux* court reasoned that the Prevention of Domestic Violence Act recognized the inadequacies of the law with regard to battered women.²⁶² As proven in *State v. Kelly*, where the "existing criminal statutes"²⁶³ were insufficient to address the problem of battered women, "so too are the civil laws of assault and battery insufficient to redress the harms suffered as a result of domestic violence."²⁶⁴ The court reasoned that the courts are required to fill in the gaps created by the legislature.²⁶⁵

The court articulated four elements which the plaintiff must prove to succeed in sustaining an action for battered women syndrome. These elements are not limited to spouses but can include any "domestic intimate partnership" whether it be heterosexual or homosexual, married or unmarried.²⁶⁶ A person may plead battered-person syndrome as long as the following elements are met. The plaintiff must prove:

- (1) involvement in a marital or marital-like intimate relationship; and
- (2) physical or psychological abuse perpetrated by the dominant partner to the relationship over an extended period of time; and (3) the aforesaid abuse has caused recurring physical or psychological injury over the course of the relationship; and (4) a past or present inability to take any action to improve or alter the situation unilaterally.²⁶⁷

The statute of limitations would begin with the last incident of abuse.²⁶⁸

²⁶¹*Cusseaux v. Pickett*, 652 A.2d 789, 792 (N.J. 1994) (citing N.J.S.A. 2C:25-18).

²⁶²Ruth Jones, *Battered Women's Syndrome as a Cause of Action*, DOMESTIC VIOLENCE RPT. Dec./Jan. 1996, at 10.

²⁶³*Cusseaux*, 652 A.2d at 793.

²⁶⁴*Id.*

²⁶⁵*Id.*

²⁶⁶*Id.* at 794 n.7.

²⁶⁷*Cusseaux*, 652 A.2d at 793-94. Other elements suggested for the tort action are: (1) intentional acts; (2) of extreme and outrageous conduct; (3) of a continuous nature; (4) proximately causing; (5) physical injury or emotional distress. Kohler, *supra* note 189, at 1068. Although Kohler proposes that the statute of limitations would begin to run following the last act of violence, the statute should not start running until women actually leave their abusive relationship as there are many factors preventing them from escaping the cycle of violence. See *supra* notes 16-55 and accompanying text.

²⁶⁸In continuous torts, the statute starts to run when the last tortious act ceases. Lebowitz, *supra* note 204, at 262.

The *Cusseaux* court criticized the decision in *Laughlin v. Breaux*²⁶⁹ which rejected the notion of a continuing tort for battered women's injuries.²⁷⁰ The *Cusseaux* court stated that it is "cruel" and against public policy to limit the recovery of battered women and that failure to recognize this action is equivalent to the court condoning domestic violence.²⁷¹

Following the decision in *Cusseaux*, the New Jersey appellate court in *Giovine v. Giovine*²⁷² determined that the statute of limitations could be tolled based on evidence of battered women syndrome and that such acts giving rise the syndrome constituted a continuing tort.²⁷³ The *Giovine* court claimed disagreement with the *Cusseaux* holding "predicated upon semantics"²⁷⁴ and stated that battered women syndrome itself is not the continuing tort but "more correctly," battered women syndrome is "the medical condition resulting from continued acts of physical or psychological misconduct."²⁷⁵ In other words, the *Giovine* court appeared more comfortable identifying actual conduct instead of a medical condition as a tort. "Regardless of how the *Giovine* court phrases it, whether it be through recognition of the continuous tort of [battered women syndrome], or through recognition of the medical condition [battered women syndrome] which gives rise to a continuous tort,"²⁷⁶ the court allowed the tolling of the statute of limitations and recognized recovery for both physical and psychological injuries inflicted on battered women.²⁷⁷

Similar to the situation in the criminal context, expert testimony is essential to prove the continuous tort of battered women syndrome. The four-part test articulated in *Cusseaux* requires the plaintiff to establish physical or psychological injury and an inability to take action to stop the abuse.²⁷⁸ This implicates the need for expert testimony on the cycle of violence and learned helplessness. Likewise, the *Giovine* court explicitly stated that without expert testimony, "the wife cannot be deemed to be suffering from battered woman's syndrome, and each act of abuse during the marriage would constitute a separate and distinct cause of action in tort, subject to the statute of limita-

²⁶⁹515 So.2d 480 (1st Cir. 1987).

²⁷⁰*Cusseaux*, 652 A.2d at 794.

²⁷¹*Id.*

²⁷²663 A.2d 109, 113 (N.J. Super. Ct. App. Div. 1995), *overruled on other grounds by* *Kinsella v. Kinsella*, 696 A.2d 556 (N.J. 1997).

²⁷³*Id.*

²⁷⁴*Id.* at 114.

²⁷⁵*Id.* at 115.

²⁷⁶Lebowitz, *supra* note 204, at 268.

²⁷⁷*Giovine*, 663 A.2d at 115.

²⁷⁸*Cusseaux v. Pickett*, 652 A.2d 789, 793-94 (N.J. 1994).

tions."²⁷⁹ *Giovine* cited three instances in which expert testimony was fundamental to court proceedings. *Giovine* first cited *State v. Kelly* and the importance of expert testimony to prove self-defense.²⁸⁰ *Giovine* then discussed *State v. Ellis*,²⁸¹ where expert testimony was relevant in "explain[ing] why a victim of a kidnapping neither attempted to escape a kidnapper nor immediately reported the kidnapping."²⁸² And finally, the court cited *Cusseaux v. Pickett*'s requirement that the women suffer from a medically diagnosable condition of battered woman syndrome to prove the tort of battered women syndrome.²⁸³

The *Giovine* and *Cusseaux* opinions are essentially the same. Their awareness of the unique injuries of battered women led both courts to fashion a remedy specifically for victims of domestic violence. They both recognize that the result of repeated abuse by a domestic partner can lead to battered women syndrome and that expert testimony is needed to prove this fact.

C. Why this New Cause of Action is Necessary

The tort of battered women syndrome is needed to hold batterers responsible for the "full consequences of their actions" and to afford full recovery to victims of domestic abuse.²⁸⁴ Not only does this tort toll the traditional statute of limitations, it is an emotional and symbolic victory for women who have endured the battering cycle.

The reluctance to recognize this necessary tort of battered women syndrome "is perplexing at best."²⁸⁵ Perhaps courts believe that existing remedies are sufficient to deal with the problem.²⁸⁶ However, the short statute of limitations for traditional intentional torts, limits recoveries for battered women and sometimes completely bars their actions. Even more troublesome is the reluctance of some courts in recognizing emotional injuries absent physical evidence.²⁸⁷ Thus, the courts are wrong when insisting that adequate remedies are available and a new action for battered women is not warranted.

²⁷⁹*Giovine*, 663 A.2d at 114.

²⁸⁰*Id.* at 113.

²⁸¹656 A.2d 25 (N.J. Super. Ct. App. Div. 1995).

²⁸²*Giovine*, 663 A.2d at 113-14 (citing *Ellis*, 656 A.2d 25).

²⁸³*Id.* at 114.

²⁸⁴*Snyder*, *supra* note 137, at 363-64.

²⁸⁵*Kohler*, *supra* note 189, at 1066.

²⁸⁶*Id.*

²⁸⁷*Id.* at 1057-1066. *Kohler* discusses a case in which recovery for intentional infliction of emotional distress is allowed only when damages attach as "parasitic" to assault and battery. *Id.* at 1057-58. She also cites a case where a higher burden of proof for such claims is required. *Kohler*, *supra* note 189, at 1058-60. *See also* *Karp*, *Intentional Infliction*, *supra* note 140, at 399 (stating that although some courts have found intentional infliction of emotional distress absent physical injury, many others have found the evidence

Courts may also believe that criminal punishment will suffice in domestic abuse situations. However, many batterers may also escape punishment in criminal courts because of the short statute of limitations for some crimes.²⁸⁸ Even if criminal remedies are available against the batterer, this does not replace the need for civil suits. Civil lawsuits are different from criminal prosecutions. In a civil lawsuit, the standard of review is less stringent and the defendant is forced to testify.²⁸⁹

Another possible reason for courts' apprehension in allowing this new cause of action is that with every new development in tort law, there is fear of creating a flood of new litigation.²⁹⁰ This excuse however, is exaggerated and unfair. For example, courts believed that judicial recognition of claims for emotional distress would encourage fraudulent actions.²⁹¹ There was also a concern that mental injury was too subjective to assess damages and that a " 'wide door' " would be open to claims for "mere bad manners."²⁹² However, these obstacles were not insurmountable and intentional infliction of emotional distress is now widely recognized. New actions should not be avoided merely because they may be difficult to adjudicate.²⁹³

Restraintist courts sometimes dislike departing from precedent and creating new causes of action. This view holds that the legislature is the elected branch responsible for creating laws and the function of the judiciary is only to interpret their meaning. However, "it has never been of much use to contend that merely because an action is new it cannot be brought . . . [t]orts of a specific character have increased steadily in number throughout our legal history, and the courts can even now, if they think fit, enlarge the list."²⁹⁴

Finally, other courts may be unwilling to recognize this new cause of action because of the criticism of battered women syndrome by feminist scholars in

"insufficient").

²⁸⁸See *supra* notes 200-01 and accompanying text.

²⁸⁹Perhaps these differences contributed to the different outcomes in the recent criminal and civil trials of O.J. Simpson.

²⁹⁰Kohler, *supra* note 189, at 1067.

²⁹¹PROSSER & KEETON, *supra* note 6, § 12, at 56.

²⁹²PROSSER & KEETON, *supra* note 6, § 12, at 56.

²⁹³"That some claims may be spurious should not compel those who administer justice to shut their eyes to serious wrongs and let them go without being brought to account. It is the function of the courts and juries to determine whether claims are valid or false. This responsibility should not be shunned merely because the task may be difficult to perform. JOHNSON, *supra* note 143, at 68-69 (quoting the Supreme Judicial Court of Massachusetts in *Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 317-18 (Mass. 1976)).

²⁹⁴JOHNSON, *supra* note 143, at 1 (citing Percy H. Winfield, *The Foundation of Liability in Tort*, 27 COLUM. L. REV. 1, 4-5 (1927)).

the criminal context.²⁹⁵ Although a debate ensues as to whether battered women syndrome constitutes a separate, identifiable defense, the same concerns are not raised in the civil context.²⁹⁶ Even if a "special" defense for battered women hinders equality in criminal trials, no such concern is evident in civil litigation. In a tort action, a battered woman seeks compensation for her injuries and is not attempting to justify her own wrongful acts.

Lenore Walker's widely accepted theory supports the idea that it is difficult for women to extricate themselves from the cycle of violence. Women are usually unable to bring a civil cause of action within the short statute of limitations for intentional torts because they are stuck in abusive situations. Sometimes, because of psychological abuse, women do not recognize the full extent of their injuries until much later. Additionally, if a criminal sanction is not pending, women may fear retaliation from their batterers if they initiate a civil action. Therefore, battered women need a special tort to accommodate their paralysis and recognize all injuries.

V. THE TORT OF BATTERED WOMEN SYNDROME AS A SOLUTION TO A PUBLIC HEALTH PROBLEM

Because the incidents of domestic violence remain extraordinarily high, the well-being of our nation's women and children are surely at risk.²⁹⁷ Therefore, in addition to affording battered women full recovery for their injuries, recognition of a new cause of action would also aid in the fight against curbing a national public health epidemic, as tort litigation "is an unusually sensitive barometer to health and safety-related events."²⁹⁸ If past litigation in the area of public health is any indication, the recognition that accompanies increased litigation will likely generate more assistance to those suffering from this reprehensible societal ill.

Advocates for social change commonly use the court system to bring about successful results. Such an example is evidenced by the successful litigation ending racial segregation in education.²⁹⁹ Similarly, national public health

²⁹⁵Critics argue that Lenore Walker's theory of battered women syndrome perpetuates negative stereotypes of women which results in unequal rights at trial in self-defense cases. See *supra* notes 121-28 and accompanying text.

²⁹⁶Although the debate continues, under current law, battered women syndrome is not a separate defense.

²⁹⁷"Domestic violence has been called a national epidemic by physicians, public health experts, and political leaders." Jean Abbott, et al., *Domestic Violence Against Women: Incidence and Prevalence in an Emergency Department Population*, 273 JAMA 1763 (1995), available in Westlaw, 1995 WL 10027573; "Domestic violence is increasingly recognized as a major public health problem, affecting individuals of all ethnic and socioeconomic backgrounds. Hyman, *supra* note 2, at 1781; See *supra* notes 2, 56-62 and accompanying text providing statistics on the prevalence of domestic abuse.

²⁹⁸Rabin, *supra* note 8, at 856.

²⁹⁹*Brown v. Board of Education*, 347 U.S. 483 (1954). For history and a detailed account of the fight against racial segregation in education, see RICHARD KLUGER, *SIMPLE JUSTICE*:

problems are also commonly resolved through litigation. Mass torts such as asbestos, breast implants, Bendectin, and most recently, the tobacco lawsuits, are examples of ways in which litigation spurs resolution of major public health issues.³⁰⁰

On a more individualized basis, alcohol related fatalities were once referred to "America's 'socially accepted form of murder.'"³⁰¹ However, the 1980's brought about drastic reform measures designed to reduce drunk driving incidents and its damaging effects on the health and safety of the public.³⁰² This decrease is attributable to the strengthening of criminal penalties, sobriety checkpoints, public safety campaigns by groups such as Mothers Against Drunk Driving, and the creation of social host liability.³⁰³

Social host liability is the imposition of civil liability on persons furnishing alcohol to inebriated guests who later cause harm to third persons.³⁰⁴ By using litigation to impose liability on social hosts, the sources of compensation to injured victims are increased while simultaneously "inducing responsible behavior from more individuals."³⁰⁵ Although drunk driving will never disappear, it seems that combating the problem through the courts, the legislatures, and public safety campaigns successfully resulted in much safer roadways for the public.

Arguably, many of these advances in health and safety resulted from the imposition of monetary damages on defendants. Such damages are sure to act as a strong deterrent to future wrongful conduct. But in addition to this factor, the educational role of tort lawsuits cannot be underestimated. First, the public

THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976). See also MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

³⁰⁰See e.g. Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847 (1997); Rebecca S. Dresser et al, *Breast Implants Revisited: Beyond Science on Trial*, 1997 WIS. L. REV. 705, 743-44 (1997); Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301, 303 (1992); Anna Burdeshaw Fretwell, *Clearing the Air: An Argument for a Federal Cause of Action to Provide an Adequate Remedy for Smokers Injured by Tobacco Companies*, 31 GA. L. REV. 929, 931 (1997).

³⁰¹Mark Starr, *The War Against Drunk Drivers*, NEWSWEEK, Sept. 30, 1982 at 34.

³⁰²John R. Ashmead, Comment, *Putting a Cork on Social Host Liability: New York Rejects a Trend: D'Amico v. Christie*, 55 BROOK. L. REV. 995, 995 (1989).

³⁰³Starr, *supra* note 301, at 34.

³⁰⁴Ashmead, *supra* note 302, at 996.

³⁰⁵*Id.* Indeed, "[s]ince New Jersey's social host liability statute was enacted in 1987, the state has seen a number of fatalities caused by drunk driving decrease by over fifty percent." Greg K. Vitali, Note, *An In-Depth Analysis of the Development and Ramifications of New Jersey's Social Host Liability Statute*, 20 SETON HALL LEGIS. J. 532, 537 (1996). Although this reduction is not solely attributable to imposing tort liability on third persons, it seems clear that at the very least, this type of litigation educates the public on the risks of such behavior, and deters future dangerous conduct.

becomes more aware of pressing issues surrounding lawsuits through media coverage and resulting debates about the correctness of such legal action. Second, increased litigation tends to channel funding and research toward issues of concern. For instance, in the 1980's, actions involving breast implant and asbestos, spawned research by both plaintiffs and defendants seeking to create a body of scientific evidence that would help prove their cases in the future.³⁰⁶ Finally, when the public becomes more aware of societal and public health problems, demands for political action are sure to follow.

The new tort of battered women syndrome would increase litigation in this area because the chances for recovery would not be so remote. This increased litigation would certainly draw attention to the plight of battered women, educating the public and generating more support for their cause. Hopefully, as in other public health issues, opening the courtroom to battered women will eventually result in decreased instances of domestic violence. Public support may encourage some women to leave their batterers by giving them more choices once they take that step. Ultimately, winning tort lawsuits against batterers affords women full compensation for their injuries, and serves as an enormous symbolic victory in the fight for the health and safety of abused women.

VI. CONCLUSION

Domestic violence is an epidemic. Although society does not have a cure, it can, in some instances, alleviate the harsh realities that accompany women caught in the cycle of violence. Undoubtedly, there is a real need to draw more attention to the problem of domestic abuse in our culture. Because society and the legal system have been slow to respond, the numbers of women subjected to domestic violence are still enormously high.³⁰⁷ The poor conditions under which many shelters currently operate, signifies that not enough attention is given to this problem.³⁰⁸

³⁰⁶Conversation with Peter H. Weinberger, partner with the firm of Spangenberg, Shibley & Liber in Cleveland, Ohio (January, 1997); See also Dresser, *supra* note 300, at 743-44 ("Litigation piqued public and manufacturer interest in learning more about implant safety . . . A similar burst of scientific research occurred as a result of Bendectin litigation.")

³⁰⁷See Ammons, *Clemency*, *supra* note 60, at 61-74 (discussing the development of legal rights for battered women); See also *supra* notes 2, 56-62 and accompanying text discussing the high numbers of women affected by domestic abuse.

³⁰⁸See e.g., *Clemency*, *supra* note 60, at 70-71 (citations omitted).

According to former Surgeon General C. Everett Koop, it took 100 years to create the first shelter, after Congress passed a law to prevent cruelty to animals. Even today, with approximately 1,200 shelters nationwide, the demand far exceeds the need for safe havens for women and children. The public policy priority of providing assistance is dramatized by the following comparison. There are 2,600 animal shelters nationally as compared with the 1,200 battered women shelters.

Id.

Those suffering from battered women syndrome are in a unique predicament, different from those subjected to a single, isolated instance of abuse.³⁰⁹ Therefore, tort law must be molded to accommodate the needs of battered women.³¹⁰ "Real relief cannot come to battered women if they are left to rely upon imaginative legal theories and the sporadic compassion of the courts in combating inappropriately applied limitations statutes."³¹¹ The tort of battered women syndrome is essential to guarantee fairness in the civil litigation of domestic abuse and to aid in the fight against a public health problem that has yet to be solved.

HEATHER TONSING³¹²

³⁰⁹The author does not wish to trivialize single incidents of domestic violence. The point is that women suffering from the syndrome are in need of the continuous tort so they can receive full compensation. Women who experience isolated instances of abuse and are not caught in the cycle are presumably able to pursue the wrongs under existing remedies.

³¹⁰Strict products liability was a response to the inadequacies of the negligence regime . . . Market-share liability theories respond to the plight of victims who cannot identify the particular producer of an injurious drug. The rules of causation have been adapted to accommodate the victims of environmental torts. The discovery rule, softening the rigors of statute of limitations, was developed to assist those who suffer from injuries that manifest themselves only after passage of time . . . When change happens, it is because courts have been moved by a desire to recognize the plaintiffs' injuries, or a desire to hold the defendant class accountable, or both. Victims of domestic violence, who urge recognition of their injuries, an accommodation of their needs, and the accountability of their abusers are participants in the grand tradition of tort reform."

Dalton, *supra* note 191, at 331-32.

³¹¹Snyder, *supra* note 137, at 362.

³¹²After this note was selected for publication, a note dealing with similar issues was published. See M. Mercedes Fort, Case note, *A New Tort: Domestic Violence Gets the Status it Deserves in Jewitt v. Jewitt*, No. 93-2-01846-5 (Wash. Super. Ct. Spokane County, April 21, 1993), 21 S. ILL. U. L.J. 355 (1997).

