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From Fear to Rage: Black Rage as a Natural Progression From and Functional Equivalent of Battered Woman Syndrome

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FROM FEAR TO RAGE: BLACK RAGE AS A NATURAL PROGRESSION FROM AND FUNCTIONAL EQUIVALENT OF BATTERED WOMAN SYNDROME

Between 1993 and 1995, Americans witnessed a series of notable, highly publicized criminal trials.[1] The most recent notable trial, that of O.J. Simpson,[2] resulted in a not guilty verdict that proved difficult for some to accept.[3] The criminal verdict also was accompanied by a decrease in the level of faith in the criminal justice system.[4] For many, however, doubts about the ability

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1. These trials include those of Eric and Lyle Menendez, O.J. Simpson, Susan Smith, Colin Ferguson, and Lorena Bobbitt. The Menendez brothers, Eric and Lyle, were found guilty on March 20, 1996, of the shotgun slayings of their parents. *See* Ann W. O'Neil, *Menendezes Are Found Guilty of Killing Parents*, L.A. TIMES, Mar. 21, 1996, at 1. The brothers' first trial ended in a hung jury after the brothers alleged that the killings were precipitated by years of sexual and psychological abuse suffered at the hand of their father and tolerated by their mother. *See id.* O.J. Simpson, a Hall of Fame football player, was acquitted on October 3, 1995, of the brutal murders of his former wife, Nicole Brown Simpson, and Ronald L. Goldman. *See* Jim Newton, *Simpson Not Guilty*, L.A. TIMES, Oct. 4, 1995, at 1. Susan Smith was convicted on July 22, 1995, of killing her two sons, aged 3 years and 14 months, by rolling her car into a lake with the boys strapped inside. *See* Tamara Jones, *Smith Found Guilty of Murdering Sons*, WASH. POST, July 23, 1995, at A1. Colin Ferguson was convicted on February 17, 1995, of multiple homicide and attempted murder after opening fire with an assault rifle on a Long Island commuter train. *See* Pat Milton, *Gunman Guilty of Murder in Commuter Train Attack*, WASH. POST, Feb. 18, 1995, at A4. Lorena Bobbitt, on January 21, 1994, was found not guilty by reason of insanity on a charge of malicious wounding after cutting off her husband's penis with a kitchen knife. *See* Marylou Tousignant, *Bobbitt Acquitted in Attack on Husband*, WASH. POST, Jan. 22, 1994, at A1. Bobbitt alleged that her temporary insanity had been brought about by years of abuse suffered at the hands of her husband. *See id.*

2. *See* Newton, *supra* note 1, at 1.

3. On October 3, 1995 a jury of 12 men and women acquitted O.J. Simpson on the charge of murder of Nicole Brown Simpson and Ronald Goldman. *See* People v. Simpson, 1995 WL 704381 at *2-*3 (Cal. Super. Ct. Trans. Oct. 3, 1995). A telephone poll, sponsored by the Gallup Organization, *USA Today*, and CNN, conducted from October 19, 1995 to October 22, 1995, showed that 48% of Americans polled believed that the jury made the wrong decision by reaching a not guilty verdict. *Available in* Westlaw, Public Opinion Online Database.

4. A *Newsweek* telephone poll conducted between October 4, 1995 and October 6, 1995, revealed that 35% of those polled had less confidence in the country's crimi-

of the current criminal justice system to punish wrongdoers and by extension, to protect society at large, likely predated the *Simpson* verdict.

From the much publicized *Menendez* trial, to the much discussed *Bobbitt* trial, Americans have questioned judicial acceptance of "abuse excuses."[5] When evaluating the guilt or innocence of the accused, jurors were urged to consider battered child syndrome in the *Menendez* trial and battered woman syndrome in the *Bobbitt* trial.[6] Both battered child syndrome and battered woman syndrome are commonly asserted abuse excuses.[7] Although some people may not accept them as valid defenses to criminal behavior, defense attorneys expect to use abuse excuses whenever the opportunity should present itself.[8] Few people, however, anticipated the black rage defense claimed by Colin Ferguson, the assailant in the Long Island Railroad shooting,[9] and even fewer people were willing to *accept* the black rage defense.[10] Some commentators argue that as long as the excuses are legitimate, they should be allowed.[11] Others, including some defense attorneys, warn that accepting an expanding number of abuse excuses as defenses eventually will undermine the functioning of our criminal justice system.[12]

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nal justice system as a result of the Simpson verdict. *Available in* Westlaw, Public Opinion Online Database.

5. Harvard law professor Alan Dershowitz coined this term in a book by the same name. *See* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994). Professor Dershowitz defines the "abuse excuse" as "the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation." *Id.* at 3. For a brief overview of abuse excuses and their application in courts, see *id.* at 3-42.

6. *See id.* at 45-47, 57-60.

7. *See id.* at 45-47.

8. *See Eye-to-Eye with Connie Chung* (CBS television broadcast, May 26, 1994). Defense attorney William Kunstler has stated that lawyers must consider the available defenses and determine which defenses may apply to their client's case. *See id.*

9. *See* DERSHOWITZ, *supra* note 5, at 89-92 (briefly describing the formulation of black rage as a defense by defense attorney William Kunstler).

10. A *CBS News* national telephone poll conducted between May 5, 1994 and May 7, 1994, found that 85% of those polled did not believe that black rage was an acceptable defense for having committed a violent crime. *Available in* Westlaw, Public Opinion Online Database.

11. *See Eye-to-Eye with Connie Chung*, *supra* note 8.

12. *See*, DERSHOWITZ, *supra* note 5, *passim*. Concern for the course of the justice

This Note addresses the link between battered woman syndrome, battered child syndrome, and black rage in homicide cases. The first section presents a brief overview of traditional defenses to homicide such as self-defense and insanity and addresses the admissibility of psychological expert testimony in general. The second section defines battered woman syndrome, battered child syndrome, and black rage and analyzes the method by which courts accept and employ each defense. The third section argues for admissibility of expert testimony regarding black rage in order to establish a defendant's insanity. This section also asserts that battered woman syndrome and black rage should receive equivalent treatment. Finally, the fourth section cautions that although black rage theoretically is viable, in practical application the consequences of accepting black rage may prove too enormous for it to become a successful defense.

HISTORICAL OVERVIEW

Traditional Defenses to Homicide

Black rage as a defense to homicide has a foundation in criminal jurisprudence. To accurately understand and assess black rage as a defense to homicide, it is necessary to recognize the nuances of traditional, widely accepted defenses to homicide.

Self-Defense

Self-defense is one of the oldest justifications for homicide in American jurisprudence.[13] Self-defense requires that the use of deadly force be limited to cases involving protection "against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat."[14] A defendant asserting self-defense through use of deadly force must demonstrate a reasonable

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system should such excuses continue to be raised and accepted appears to have been the catalyst for Professor Dershowitz's book. He states: "It is a dangerous trend, with serious and widespread implications for the safety and liberty of every American." *See id.* at 3.

13. *See generally* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1119-27 (3d ed. 1982) (discussing the history and development of the use of deadly force in self-defense).

14. MODEL PENAL CODE § 3.04(2)(b) (1962).

belief in the necessity of the force, a lack of initiation of the altercation on the part of the defendant, and an inability on the part of the defendant to retreat without the use of deadly force.[15] The legal effect of accepting a claim of self-defense in homicide cases is an acknowledgement that the accused caused the decedent's death but that such action was justified given the circumstances and therefore, no crime was committed.[16] When the self-defense theory prevails, the accused is neither convicted nor punished.

"Imperfect" Self-Defense

Imperfect self-defense invokes a slightly more subjective view of traditional self-defense theory. Imperfect self-defense involves a failure to satisfy one of the elements of traditional self-defense.[17] Usually, imperfect self-defense entails using force against another with an honest but unreasonable belief that such force is necessary.[18] In homicide cases, this element means that given the circumstances the defendant faced, deadly force was not necessary.[19] Raising a defense of imperfect self-defense can yield one of two results depending on the jurisdiction. In some jurisdictions, if the use of force is not justified, the defendant is guilty of homicide.[20] Thus, imperfect self-defense is not a justification for homicide in these jurisdictions. Other jurisdictions reduce the charge of homicide to manslaughter, however, thereby using imperfect self-defense as a mitigating factor rather than a complete excuse.[21]

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15. *See id.* § 3.04(2)(b)(i)-(ii). The requirements for the use of force in self-defense differ in each state and are not always identical to the Model Penal Code. The requirements, however, are similar in many jurisdictions. *See* PERKINS & BOYCE, *supra* note 13, at 1143-44.

16. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.7, at 454-55 (2d ed. 1986).

17. *See* Steffani J. Saitow, Note, *Battered Woman Syndrome: Does the "Reasonable Battered Woman" Exist?*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 329, 359 (1993).

18. *See* LAFAVE & SCOTT, *supra* note 16, § 5.7, at 463.

19. *See id.*

20. *See id.*

21. *See id.*

Insanity

The insanity defense differs from traditional self-defense in one major respect. Self-defense acknowledges that the crime occurred, i.e., the defendant committed the act, but further acknowledges that in some way the defendant's behavior was excused because his actions were justified.[22] A successful insanity plea acknowledges that the criminal act occurred, but the insanity defense holds that the accused is not criminally responsible due to his mental state.[23] There are several different legal tests to determine when and whether the insanity defense should apply including the *M'Naghten* rule,[24] the "irresistible impulse" test,[25] the *Durham* "product" test,[26] and the American Law Institute (ALI) "substantial capacity" test.[27] The ALI test is most commonly employed to determine insanity.[28]

In most states, an insanity plea, if accepted, manifests itself

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22. *See supra* notes 14-21 and accompanying text.

23. *See* LAFAVE & SCOTT, *supra* note 16, § 4.1, at 304-06.

24. The M'Naghten rule is the product of an English case by the same name. *See* M'Naghten's Case, 8 Eng. Rep. 718 (1843). Under this rule, to prove legal insanity one must show that the accused suffered from a disease of the mind at the time of the crime and did not know the nature and quality of the act; or if he did know, that he did not know the act was wrong. *See* INGO KEILITZ & JUNIUS P. FULTON, THE INSANITY DEFENSE AND ITS ALTERNATIVES 6 (1984).

25. The "irresistible impulse" test was developed in an attempt to "improve upon the *M'Naghten* rule and broaden the standard of insanity " in order to cover those who might recognize the content and wrongness of an act, but nevertheless be unable to control the conduct. *See* KEILITZ & FULTON, *supra* note 24, at 6-7 (discussing the evolution of the "irresistible impulse" test), *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843). Thus, the standard for proving insanity under the "irresistible impulse" test is whether the accused had a mental disease that kept him from controlling his conduct. *See* KEILITZ & FULTON, *supra* note 24, at 6.

26. The *Durham* "product" test resulted from *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). Dissatisfied with the M'Naghten rule, the court in *Durham* announced that "an accused is not criminally responsible if his unlawful act was the product of a mental disease or defect." *Id.* at 874-75; *see also* KEILITZ & FULTON, *supra* note 24, at 7 (discussing the historical background of the *Durham* test).

27. In order to be classified as legally insane under the "substantial capacity" test one must lack substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law. *See* MODEL PENAL CODE § 4.01(1) (1962); *see also* KEILITZ & FULTON, *supra* note 24, at 7-8 (discussing the repudiation of the "product test" and the history of the ALI standard).

28. *See* KEILITZ & FULTON, *supra* note 24, at 15-16 (classifying jurisdictions and the insanity tests that they employ in chart form).

in one of two verdicts.[29] One verdict is "not guilty by reason of insanity" (NGRI).[30] A NGRI finding indicates that the defendant committed the act but was insane at the time that the crime was committed.[31] No reasonable doubt exists that the defendant committed the act charged.[32] NGRI assumes that the defendant would have been found guilty had the defendant been sane.[33] With a NGRI verdict, the court may continually monitor the defendant by criminal commitment until the defendant is no longer dangerous and in need of treatment.[34] The other verdict involved in insanity pleas is "guilty but mentally ill" (GBMI).[35] GBMI was enacted in large part to assuage the fears of the public concerning crimes committed by NGRI acquittees after their criminal commitment terminated.[36] A GBMI verdict finds that the defendant is guilty of the crime charged but in need of treatment due to psychological illness.[37] Under a finding of GBMI, a defendant is convicted and sentenced like any other sane, guilty defendant, sent to a state mental health facility and, theoretically, treated.[38] The defendant remains in the facility until he has recovered, at which time the defendant serves the remainder of his sentence in prison or on probation, depending on the conditions of his sentence.[39]

Although many aspects of insanity are governed by changing statutory law and public perceptions and concerns,[40] the legal process continues to depend on expert psychological evaluation and testimony for guidance in complex homicide cases.[41]

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29. *See id.* at 20-22.
30. *Id.* at 20.
31. *See id.*
32. *See id.*
33. *See id.*
34. *See id.* at 20-21.
35. *Id.* at 21.
36. *See* George L. Blau & Richard A. Pasewark, *Statutory Changes and the Insanity Defense: Seeking the Perfect Insane Person*, 18 LAW & PSYCHOL. REV. 69, 87 (1994).
37. *See* KEILITZ & FULTON, *supra* note 24, at 21-22.
38. *See id.*
39. *See id.*
40. *See generally* Blau & Pasewark, *supra* note 36, *passim* (analyzing the historical statutory changes of the insanity defense and the role of public perception in facilitating those changes).
41. *See* Former Standing Committee on Association Standards for Criminal Jus-

Admissibility of Psychological Expert Testimony

Battered woman syndrome, battered child syndrome, and black rage all are defenses for which expert testimony is essential to facilitate an understanding of the nature of the defense. Therefore, the way in which courts historically have treated psychological expert testimony is crucial to analyzing the abuse excuse defenses. The following overview of admissibility of expert testimony allows for more informed speculation as to the courts' treatment of expert testimony regarding the black rage defense.

Expert Testimony

Expert witnesses assist the trier of fact by providing opinions and testimony within the witnesses' areas of expertise.[42] When presenting expert testimony regarding issues of present scientific or clinical knowledge, the expert must have "a degree in a medical or scientific discipline; and . . . relevant clinical or research experience, and a demonstrated familiarity with current scientific or clinical information on the specific issue about which the witness is called to testify."[43] Expert testimony is limited in that experts may not express an opinion on any question "requiring a conclusion of law or a moral or social value judgment properly reserved to the court or the jury."[44] Thus, although allowed in the legal arena, psychological experts are not expected or permitted to comment on legal matters in criminal trials.

Most crimes, particularly the crime of murder, focus on the mens rea of the accused.[45] Likewise, defenses such as self-de-

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tice, AMERICAN BAR ASSOCIATION, *Introduction* to ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS xviii (1989).

42. *See* AMERICAN BAR ASSOCIATION, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-3.11 (1989) [hereinafter ABA].

43. *Id.* Standard 7-3.13(a)(i-ii).

44. *Id.* Standard 7-3.9(a); *see also* FED. R. EVID. 704(b):

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

45. *See* LAFAVE & SCOTT, *supra* note 16, at 7 (discussing the basic premises of

fense and insanity also focus on the state of mind of the defendant.[46] Historically, mental health experts have been allowed to testify when a defendant's competency to stand trial was questioned or when the defendant put forth an insanity plea.[47]

With the advent of battered woman syndrome, battered child syndrome, black rage, and other abuse excuses, psychological expert testimony has changed in terms of admissibility, scope, and application to situations other than competency and insanity.[48]

MODERN JURISPRUDENCE

Expanding Self-Defense?

Battered Woman Syndrome[49]

Battered woman syndrome is a concept developed in the late 1970s and a term coined by Dr. Lenore Walker in 1979.[50] The syndrome was developed in order to help explain the psychological characteristics manifested by women who were physically abused by their husbands or lovers and the long-term effects that resulted as a consequence of the abuse.[51]

Dr. Walker has defined the battering relationship in three phases.[52] The first phase is considered the "tension-building phase," in which relatively minor, periodic episodes of psychological, physical, or sexual abuse occur.[53] The second phase is la-

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criminal law).

46. *See supra* notes 14-41 and accompanying text.

47. *See generally* ABA, *supra* note 42, Standard 7-1.1 (detailing the various situations in which psychiatric expert testimony applies).

48. *See* Diana J. Ensign, Note, *Links Between the Battered Woman Syndrome and the Battered Child Syndrome: An Argument for Consistent Standards in the Admissibility of Expert Testimony in Family Abuse Cases*, 36 WAYNE L. REV. 1619, 1619-21 (1990) (discussing new uses of expert testimony outside of its traditional uses).

49. Battered woman syndrome is sometimes called "battered wives syndrome." This Note will use the term "battered woman syndrome," because not all battered women are married to the men who batter them.

50. *See* LENORE E. WALKER, THE BATTERED WOMAN (1979).

51. *See generally id.* (providing a comprehensive study of battered women and their lives).

52. *See id.* at 56-70.

53. *See id.* at 56-59, 107-08.

beled the "acute battering phase," in which extreme violence occurs.[54] The third phase is defined as the "loving phase."[55] It is termed the loving phase because it is during this phase that the batterer apologizes to the woman, appears truly remorseful, promises to change, and the two individuals appear to enter a "honeymoon" phase filled with the love and compassion typically associated with the beginning of a new romantic relationship.[56] When the honeymoon is over, the cycle begins to repeat itself.[57] After the cycle occurs twice, and the woman remains in the situation, the woman is considered a battered woman.[58]

As time progresses, the battering episodes often increase in both severity and frequency.[59] Yet, the woman remains in the relationship.[60] The woman remains in the battering relationship in part because she hopes that the "honeymoon" phase will last forever,[61] and in part because she has been forced into a state of "learned helplessness."[62] Submissiveness and passivity are often associated with learned helplessness.[63] At some point, which varies depending on the battered woman, the woman feels that she has no option but to stay with her batterer and remain the victim of ongoing abuse.[64] Eventually, however, a battered woman may endure so much frustration, despair, and isolation that her perceptions of violence are altered.[65] The woman may violently strike back against the batterer in an effort to free herself from the cycle of abuse that she may believe ultimately

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54. *See id.* at 59-65.

55. *See id.* at 65-70; Ensign, *supra* note 48, at 1623-24.

56. *See* WALKER, *supra* note 50, at 65-70; Ensign, *supra* note 48, at 1624.

57. *See* WALKER, *supra* note 50, at 69.

58. *See id.* at xv.

59. *See* Ensign, *supra* note 48, at 1623-24 (describing the cyclical nature of battered woman syndrome and the way in which the cycles recur and intensify).

60. *See* WALKER, *supra* note 50, at xv.

61. *See id.* at 69.

62. *See id.* at 42-54. Learned helplessness is a theory originated by experimental psychologist Martin Seligman. At a most basic level, learned helplessness incorporates a lack of belief in the ability to control what happens to oneself and, therefore, one does not believe that she can influence her life and thus does not try to change it. *See id.*

63. *See id.* at 47.

64. *See id.* at 42-54 (discussing how battering behavior is maintained by the victim's belief that she has no control over her life).

65. *See id.* at 52 (discussing the possible consequences of learned helplessness).

will lead to her death.[66] Her striking back often takes the form of homicide.[67]

If a woman killed her batterer *during* an attack, it would be a clear case of traditional self-defense.[68] When a battered woman decides to strike back at her batterer, however, it often occurs in a nonconfrontational situation.[69] That is, the woman is not in immediate danger or in the midst of an attack.[70] It is when a woman commits a nonconfrontational killing and asserts a theory of self-defense that her attorneys seek to introduce expert testimony concerning battered woman syndrome.[71]

Battered woman syndrome is used to explain why the defendant reasonably believed that she was in a situation requiring deadly force and to explain why retreating was never an option.[72] It is a subjective approach to traditional self-defense because the focus is not on what a reasonable person in the situation would have felt or how he would have reacted. Rather, the focus is on how a typical battered woman would perceive the situation and react to it.[73]

Because battered woman syndrome required both a new, nontraditional approach to self-defense and the use of psychological expert testimony, courts initially were reluctant to admit expert testimony on the matter.[74] The current trend in most states,

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66. *See id.* at 69-70.

67. *See id.*

68. *See supra* notes 14-21 and accompanying text (discussing the elements of traditional self-defense). When a woman is being physically battered and reasonably believes that deadly force is necessary to save her life, the elements of traditional self-defense would be satisfied. *See* WALKER, *supra* note 50, at 69-70.

69. *See* Saitow, *supra* note 17, at 357-58 (describing situations in which a woman may kill her abuser during a time of relative peace in the relationship).

70. *See id.* (describing killings occurring when a batterer is "off guard—sleeping, intoxicated, or simply in a passive mood").

71. *See* David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 49 (1987) (describing the circumstances under which battered woman syndrome is raised in homicide cases).

72. *See id.*

73. *See id.*

74. *See id.* at 49-51 (providing a brief overview of early treatment of battered woman syndrome by the courts). For an example of a court refusing to allow expert testimony regarding battered women syndrome, see *Ibn-Tamas v. United States*, 455 A.2d 893, 894 (D.C. 1983) (affirming a lower court's decision to exclude such evi-

however, is to admit battered woman syndrome expert testimony.[75] Admission of expert testimony, however, does not guarantee acceptance of battered woman syndrome as a legitimate excuse for the behavior of a woman who kills her batterer.[76] In the instances when battered woman syndrome is used by the defendant and the jury accepts the syndrome, the syndrome may operate under the imperfect self-defense doctrine.[77] Women, therefore, may be convicted of manslaughter, not murder.[78] Allowing a manslaughter conviction rather than a murder conviction serves two purposes. First, a conviction on a reduced charge allows society to atone for creating and perpetuating an environment in which a woman can be brutalized routinely by her partner with no chance of protection. Second, a finding of manslaughter rather than "not guilty" discourages

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dence under the *Frye* standard on the basis that the defendant had "failed to establish a methodology used in the expert's study of 'battered women'"); see also *State v. Thomas*, 423 N.E.2d 137 (Ohio 1981)

> Expert testimony on the "battered wife syndrome" . . . is inadmissible herein because (1) it is irrelevant and immaterial to the issue of whether defendant acted in self defense . . . (2) the subject of the expert testimony is within the understanding of the jury; (3) the "battered wife syndrome" is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise; and (4) its prejudicial impact outweighs its probative value.

Id. at 140. For an explanation and analysis of the *Frye* standard of admissibility see *infra* notes 125-26 and accompanying text.

75. *See* Ensign, *supra* note 48, at 1619-21 (discussing the current trends of admissibility of battered woman syndrome). For examples of cases admitting expert testimony regarding battered woman syndrome, see *People v. Minnis*, 455 N.E.2d 209 (Ill. App. Ct. 1983); *State v. Hundley*, 693 P.2d 475 (Kan. 1985); *State v. Anaya*, 438 A.2d 892 (Me. 1981); *People v. Torres*, 488 N.Y.S.2d 358 (Sup. Ct. 1985); and *Fielder v. State*, 756 S.W.2d 309 (Tex. Crim. App. 1988).

76. Admittance allows experts to testify on the subject. *See* Ensign, *supra* note 48, at 1629-30. Admitting expert testimony does not ensure the fact finder's acceptance, which involves believing the validity of the theory behind battered woman syndrome, believing the accused suffered from battered woman syndrome, believing she had no alternative, and finding in her favor.

77. *See* Saitow, *supra* note 17, at 358-59; *cf.* LAFAVE & SCOTT, *supra* note 16, § 7.11, at 666 (noting that an imperfect self-defense manslaughter instruction may be appropriate when the jury "could find there was an actual but unreasonable belief" on the part of the defendant); *see also supra* text accompanying notes 17-21 (discussing imperfect self-defense).

78. *See supra* notes 17-21 (discussing the legal implications of accepting imperfect self-defense).

nonconfrontational killings totally excusing the behavior.[79]

Imperfect self-defense is both a reasonable and just outcome to a situation in which the line between victim and villain becomes blurred. Women, however, are not the only people to suffer continual, severe abuse at the hands of someone who professes to love them.[80] Children compose a group of individuals who suffer incredible abuse at the hands of their parents.[81] In an effort to understand why children may eventually strike back and kill their parents without warning, the situation of battered children has been compared to that of battered women.[82] The resulting theory is labeled "battered child syndrome."[83]

Battered Child Syndrome[84]

The term battered child syndrome originally was coined by Dr. Henry Kempe in 1962 for purposes of describing serious yet unexplainable injuries observed in children.[85] Historically, expert testimony concerning battered child syndrome was used against the parents of the victim in child abuse and child homicide cases to prove that the injuries were part of a pattern of abuse and therefore intentional rather than accidental.[86] The

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79. *See* Saitow, *supra* note 17, at 359.

80. *See* Ensign, *supra* note 48, at 1619 (listing various parties to abuse within the traditional family structure).

81. *See id.* at 1625 (discussing a 1987 study that revealed "more than three children died each day from abuse and neglect") (citing Summers, *The Hedda Conundrum*, MS., Apr. 1989, at 54).

82. *See* Jamie Heather Sacks, *A New Age of Understanding: Allowing Self-Defense Claims for Battered Children Who Kill Their Abusers*, 10 J. CONTEMP. HEALTH L. & POL'Y 349, 351 (1994) (analyzing the way in which "[t]he psychological effects upon battered children mirror those of battered women" and how "self-defense claims in parricide cases are essentially identical to those asserted when battered women kill their abusers").

83. *See* Ensign, *supra* note 48, at 1626 (noting several syndromes that have arisen to explain child abuse situations).

84. This syndrome often is called "abused child syndrome." For purposes of this Note, the term "battered child syndrome" covers children who are physically and/or sexually abused by their parent(s) or guardian(s).

85. *See* C. Henry Kempe et al., *The Battered Child Syndrome*, 181 JAMA 17 (1962).

86. *See* Estelle v. McGuire, 502 U.S. 62, 68-69 (1991) (allowing expert testimony regarding prior injuries sustained by the child to prove battered child syndrome). In *Estelle*, the defendant was convicted of murdering his infant daughter. *See id.* at 62.

term battered child syndrome has since taken on new meaning.[87]

Generally, when currently mentioned, battered child syndrome refers to the psychological effects of child abuse on the child's "emotions, perceptions, and behavior."[88] There is neither a set definition nor are there clear phases, as in battered woman syndrome, largely because "although there is a huge body of research on the psychological characteristics of children who are abused, that information has not been processed and articulated in the form of a psychological syndrome."[89] There are, however, great similarities between abused children and abused women.

Child abuse, like spousal abuse, is cyclical.[90] Battered children, like battered women eventually suffer frequent and severe abuse.[91] In child abuse cases, the abuse often occurs without warning.[92] Unlike spousal abuse, the child abuser often will not offer an apology, in large part because many parents believe that they have a right to discipline their children physically.[93] The hesitance of society to interfere in parents' rights to discipline their children, coupled with the fact that an abusive family tends to isolate itself from anyone who may notice the abuse and facilitate its termination,[94] leaves the abused child to suffer in silence. The battered child lives in a state of constant fear of the next beating or sexual assault.[95] Thus, the battered child never feels safe.[96] The battered child, like the battered woman, enters

87. *See* Sacks, *supra* note 82, at 354 (describing how the psychological aspects of battered child syndrome, in addition to the physical aspects, are now studied).

88. Lauren E. Goldman, Note, *Nonconfrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuse*, 45 CASE W. RES. L. REV. 185, 192 (1994).

89. *Id.* (citing Steven R. Hicks, Note, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 LAW & PSYCHOL. REV. 103, 140 (1987)).

90. *See id.* at 192 n.27.

91. *See* Sacks, *supra* note 82, at 354.

92. *See id.*

93. *See* PAUL MONES, WHEN A CHILD KILLS: ABUSED CHILDREN WHO KILL THEIR PARENTS 13 (1991) (describing the rights and liberties that parents who abuse their children believe they possess by virtue of being able to reproduce).

94. *See* Sacks, *supra* note 82, at 355.

95. This state has been described as "hypervigilance," in which an abused child has a heightened sense of danger and monitors changes in the parent's behavior in anticipation of another assault. *See id.* at 356 (explaining this phenomenon more fully).

96. *Cf. id.* (describing abused children as developing a "concentration camp" men-

a stage of learned helplessness.[97]

When parricide occurs, the child defendant may seek to introduce expert testimony in the same manner as a woman who kills her batterer.[98] The child asserts an affirmative defense of self-defense rather than an insanity argument, because at the time of commission of the crime, the child often knows exactly what she is doing.[99] Usually, the child may even know that what she is doing is wrong, and that there are legal consequences to such actions.[100] Thus, depending on the standard employed, proving an insanity claim may be prohibitively difficult.[101]

The admissibility of expert testimony concerning battered child syndrome historically has encountered much resistance.[102] The resistance is due not only to the fact that battered child syndrome is a new area with no official recognition as a psychological syndrome, but also because those jurisdictions that do not accept battered woman syndrome, with all of its psychological evidence, likely will reject battered child syndrome for the same reason.[103] Furthermore, those jurisdictions that accept battered woman syndrome may hesitate to further expand nontraditional excuses. Recently, however, Washington accorded battered child syndrome the same status as battered woman syndrome.[104] There is reason to believe that more

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tality).

97. *See id.* at 355-56; *see supra* notes 62-66 and accompanying text (discussing learned helplessness and its importance in cases of battering).

98. *See supra* notes 49-79 and accompanying text. The defendant in a parricide case uses battered child syndrome to try to explain how hypervigilance allowed the child reasonably to perceive that the threat of serious bodily harm was imminent. *See* Goldman, *supra* note 88, at 190.

99. *See* Goldman, *supra* note 88, at 221-23 (discussing why parricide cases often involve a claim of self-defense rather than a claim of insanity).

100. *See id.* at 220-21.

101. *See id.* at 219-21 (providing an overview of the difficulties of proving legal insanity in battered child syndrome cases depending on the various standards available); *see also supra* notes 22-41 and accompanying text (discussing the current state of available insanity defenses).

102. *See, e.g.*, State v. Crabtree, 805 P.2d 1 (Kan. 1991) (refusing to adopt a defense centered on battered child syndrome); Jahnke v. State, 682 P.2d 991 (Wyo. 1984) (excluding expert testimony of battered child syndrome).

103. *See supra* note 89 and accompanying text.

104. *See* State v. Janes, 850 P.2d 495 (Wash. 1993) (en banc). The court held that

states will follow.[105]

Admissibility of expert testimony aside, acquittals and hung juries are consistently less likely in cases of battered child syndrome than in cases involving battered woman syndrome.[106] The child often is convicted of murder, or, less frequently, of manslaughter.[107] Imperfect self-defense again appears to be the ideal compromise.[108]

Battered child syndrome and battered woman syndrome are syndromes in which there are identifiable attackers as well as victims. The ability to portray the now-deceased person as an unlikable, vicious character undoubtedly renders these two syndromes more palatable to jurors. This factor is not present in cases involving black rage. Thus, black rage provides a new angle on nontraditional defenses and creates more of a problem in its acceptance.

Expanding Insanity?

Black Rage

The black rage defense is somewhat of a misnomer because black rage is not asserted as an affirmative defense in its own right. Rather, black rage is one of the many characteristics asserted to help prove insanity.[109] It is correct to say that in the

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battered child syndrome is "the functional and legal equivalent of the battered woman syndrome." *Id.* at 503.

105. *See e.g.*, State v. Gachot, 609 So. 2d 269 (La. Ct. App. 1992) (indicating evidence of mental abuse would be admissible upon a plea of not guilty); Commonwealth v. Kacsmar, 617 A.2d 725 (Pa. Super. Ct. 1992) (stating evidence of battered person syndrome was admissible to explain the defendant's action).

106. *See* Stephanie B. Goldberg, *Fault Lines*, A.B.A. J., June 1994, at 40, 42 (citing attorney Paul Mones who says that there has been more than a 95% conviction rate in the cases in which he has represented parricide defendants). The hung jury result in the first Menendez trial thus should be viewed as an aberration rather than the norm.

107. *See* MONES, *supra* note 93, at 315.

108. *See supra* notes 17-21 and accompanying text (discussing the merits of an imperfect self-defense). In the case of parricide, imperfect self-defense would allow one to address the evil of parricide in light of the evil of child abuse. Similarly, with battered woman syndrome, the doctrine allows for addressing a woman's violent response in light of the cyclical pattern of abuse to which she has been subjected.

109. *See supra* notes 22-28 and accompanying text (discussing the various ways by which to prove insanity).

current discourse concerning black rage, black rage often is defined as a claim by the defendant that white racism drove him to insanity.[110] This is a very simplistic view of black rage that barely begins to explain its many nuances.

Although black rage has been thrust into the limelight as a "new" abuse excuse,[111] the doctrine, in fact, has arisen in the past.[112] The term "black rage" originates from a book of the same name by two psychiatrists, Dr. William H. Grier and Dr. Price Cobbs, published in 1968, which chronicled and analyzed

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110. *See* James Lileks, *Hate America? Just Call Kunstler*, PLAIN DEALER (Cleveland), Mar. 27, 1994, at 6C, *available in* 1994 WL 7203296 (stating that the premise of a black rage defense is that the defendant "was driven insane by centuries of racial prejudice").

111. Much of the most recent attention given to black rage was generated by the Colin Ferguson case. On December 7, 1993, Colin Ferguson opened fire on commuters on the Long Island Railroad. *See* Sylvia Adcock, *"Black Rage" Strategy: New Insanity Defense in LIRR Massacre*, NEWSDAY, Mar. 15, 1994, at 7, *available in* 1994 WL 7405334. Allegedly, Colin Ferguson was aiming to shoot white commuters because of the racism he suffered as a result of his status as a black man in America. *See id.* Ferguson succeeded in killing six commuters and wounding nineteen others that evening. *See id.*

News of the killings spread across the country rapidly as people tried to understand such a horrific incident. The burning question of why Ferguson acted in this violent manner was soon answered by William Kunstler. Acting as Colin Ferguson's defense counsel, Kunstler announced that he would prove that at the time of the shooting spree, Colin Ferguson was insane and that he had been driven insane by black rage. *See id.* The media picked up on the use of this defense and black rage became a new hot topic of discussion. *See* Michael Alexander, *Ferguson Team Balks at Gag: Says DA Trying To Bar His Free Speech*, NEWSDAY, Apr. 7, 1994, at 7, *available in* 1994 WL 7401675 (stating that "the incident was reported as far away as China and has been the subject of major newspaper articles and national television shows").

After a flurry of initial publicity, black rage was not proffered as a defense, but nonetheless the public was confused and incensed. *See* Judd F. Sneirson, *Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate*, 143 U. PA. L. REV. 2251, 2252 n.5 (1995). Ferguson decided to represent himself and assert a simple claim of not guilty, arguing that someone else had committed the shooting. *See id.* Needless to say, Ferguson's defense did not succeed. *See id.* The question remains, however, of whether Kunstler's black rage theory of insanity would have succeeded had it been employed in the Ferguson case.

112. *See, e.g.*, Rorie Sherman, *'Black Rage' Rises Again As Defense*, NAT'L L.J., Apr. 25, 1994, at A6 (discussing a 19th century case in which the court found that a deceased, black defendant had been insane at the time he committed murder and that the killings had been precipitated by the abuse that he had suffered on account of his race).

the psychological state of blacks in America.[113] One of the many observations contained in the book is that over the course of the history of blacks in America, from the institutionalization of slavery to the maintenance of segregationist Jim Crow laws, blacks have developed a cultural paranoia regarding whites.[114] This paranoia leads to an increased suspicion of the actions and motivations of whites towards blacks.[115] Thus, according to the theory, blacks constantly are skeptical and fearful of whites, never letting their guard down.[116]

The book explained how and why a black person's survival in America depends on the development of a "healthy" cultural paranoia.[117] For some blacks, however, it is not possible to contain the healthy paranoia and the paranoia becomes unhealthy.[118] Such sufferers of paranoia see nonexistent dangers everywhere.[119] When blacks kill whites who they perceive as a threat because of their paranoia, the black rage defense applies.[120]

Expert testimony concerning black rage is a fairly new issue although the theory underlying black rage previously has been argued and accepted.[121] In the late 1840s, after a series of hearings, a trial, and an appeal, the appellate court of the state of New York found that a black defendant was insane at the time he killed a white family as the family sat down to dinner.[122] The court based its reasoning on its belief that the murders resulted from the defendant's reaction to having been a

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113. *See* WILLIAM H. GRIER & PRICE M. COBBS, BLACK RAGE (1968).

114. *See id.* at 161.

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.* (stating that a black man "must maintain a high degree of suspicion toward the motives of every white man [and woman] and at the same time never allow this suspicion to impair his grasp of reality. It is a demanding requirement and not everyone can manage it with grace").

119. *See infra* note 132 (detailing the symptoms and manifestations of paranoia).

120. Certain external stimuli, which often take the form of a racial insult, releases an "uncontrollable amount of rage," resulting in physical assault and sometimes murder. *See* Goldberg, *supra* note 106, at 43.

121. *See* Sherman, *supra* note 112, at A6 (discussing the relationship of a 19th century case to the Ferguson case).

122. *See id.*

"brutalized Negro."[123] The court did not specifically articulate the defendant's reaction to the brutality that he suffered as being "black rage," but the court's decision was the functional equivalent of modern claims of black rage.[124]

Because black rage is involved in homicide cases, state trial courts logically would be the primary recipients of demands for admissibility of expert testimony concerning black rage. No per se rule of exclusion of black rage testimony exists, as of yet, but courts currently possess the discretion to exclude expert testimony under both the *Frye*[125] and the *Daubert*[126] standards for admissibility of expert testimony. In jurisdictions using the *Frye* standard, a defendant asserting black rage would need to show that black rage was generally accepted in the psychological community before expert testimony would be admissible. Applying the *Daubert* standard in federal courts, or in jurisdictions that have rules patterned on the Federal Rules of Evidence, the admissibility of expert testimony regarding black rage would depend upon whether such testimony would aid the jury and on the validity of the underlying scientific reasoning or methodology. As evidence of black-specific psychological conditions comes to light and gains acceptance, however, courts may have no choice but to accept such testimony under both standards.[127]

Currently, there is increasing understanding and acceptance within the psychological community of the psychology of blacks

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123. *See id.*

124. *See id.*

125. *See* Frye v. United States., 293 F. 1013, 1014 (D.C. Cir. 1923) (requiring general acceptance of the scientific principle in question before finding the expert evidence to be admissible).

126. *See* Daubert v. Merrel Dow Pharm., Inc., 509 U.S. 579 (1993) (finding that the Federal Rules of Evidence had superseded *Frye*'s requirement of "general acceptance" as a precondition for admissibility). The Court in *Daubert* found that admissibility under the Federal Rules of Evidence depended upon the ability of the evidence in question to assist the trier of fact provided that the "reasoning or methodology underlying the testimony is scientifically valid." *Id.* at 592-93. Unlike the *Frye* standard, "general acceptance" under *Daubert* is merely one factor in assessing the validity of the scientific reasoning/methodology. *See id.* at 594.

127. The eventual admission of black rage testimony will hinge on two factors: (1) the emergence of experts on the psychology of blacks and (2) those psychologists' ability to promote the theory of black rage within the scientific community so that the *Daubert* standard is satisfied.

and the ways in which mental illness may be triggered in, and affect, blacks in different ways than the rest of society.[128] The admissibility of black rage testimony to help explain criminal behavior, therefore, is likely to continue to be an issue facing the courts.

ADMITTING EXPERT TESTIMONY REGARDING BLACK RAGE

Black rage testimony should be allowed into evidence to help prove insanity when the black rage sufferer asserts the defense of insanity. Black rage itself, however, should not be considered a form of insanity. Strictly applying insanity tests to black rage is inappropriate and may be detrimental to the defendant in such cases.

Black Rage as Insanity

Black rage is not a separate form of mental illness recognized in the *Diagnostic and Statistical Manual of Mental Disorders*.[129] Therefore, black rage would not satisfy any of the legal tests of insanity.[130] To successfully evaluate black rage testimony, black rage should be viewed as a contributing factor to a specific mental condition[131] rather than as an independent

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128. *See generally* ROBERT T. CARTER, THE INFLUENCE OF RACE AND RACIAL IDENTITY IN PSYCHOTHERAPY (1995) (analyzing race in the mental health field and advocating a more diverse study of the human psyche).

129. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV].

130. To satisfy the various legal tests of insanity, evidence of mental disease or defect is necessary. *See supra* notes 25-29 and accompanying text. The *DSM-IV* is "the resource on which courts and psychiatrists heavily rely in determining legal insanity." Sneirson, *supra* note 111, at 2265. Because black rage is not included in the *DSM-IV*, it is difficult to prove that it is a mental disease. *See id.* Additionally, the selection of white targets in black rage killings initially may seem like an act of racism rather than insanity. *See* Lileks, *supra* note 110, at 6C (expressing deep skepticism as to Colin Ferguson's insanity based upon the methodical manner in which he selected, then executed his victims).

131. A number of psychiatric diagnoses may negate the responsibility of the defendant. *See* MARTIN G. BLINDER, PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW § 7.4 (3d ed. 1992). These include: (1) psychosis—a state of severe mental and emotional disorganization in which delusions and hallucinations distort reality, *see id.* at 453-59; (2) hysterical dissociation—disengagement of the human impulse control mechanism, often resulting in an inability to conform to social norms, *see id.* at 465-

form of insanity. Therefore, black rage should be linked to a legally cognizable form of insanity to be admissible. The well-established categories of psychosis and paranoia appear to provide the best link to black rage.[132] If black rage may be characterized neutrally as a psychosis or paranoia, some may argue that evidence regarding the causes and effects of black rage is not necessary to prove insanity[133] and may unduly affect the jury and its decision.[134] The experience of being black, however, is important not only to establish legal insanity,[135] but is also an essential factor in psychiatric evaluations of black defendants.[136] Thus, to allow psychiatrists to make a diagnosis of psychosis or paranoia in court without mentioning the "Black Norm" and/or black rage would not give the trier of fact all of the relevant evidence about the defendant and the case.

Assuming, however, that courts do not believe that evidence of black rage is necessary to prove insanity,[137] the courts should

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78; (3) paranoia—characterized by chronic suspicion and perception of hostility where none exists nor is intended, often manifested by exaggerated efforts to stave off such imaginary threats, *see id.* at 478-82; (4) obsessive-compulsive disorders—inabilities to resist specific patterns of behavior (prime examples include kleptomania and pyromania), *see id.* at 482-86.

132. The disorder can be analogized to a specific form of paranoid psychosis generally directed at whites, involving extreme, irrational fears of this group based upon an inability to perceive reality correctly. *See supra* notes 113-18 and accompanying text (explaining the relationship between black rage and paranoia).

133. *See* Joel Dreyfuss, *Beyond the 5:33: "Rage" Defense Plays into White Hands*, NEWSDAY, Mar. 31, 1994, at A54 (stating that "[t]he 'black rage' defense turns a case of simple insanity into a racial issue").

134. The decision to include evidence of black rage in a trial could be seen as an attempt to play on the guilt of white jurors and invoke the sympathies of black and other minority jurors.

135. Specifically, black rage could explain the defendant's irrational fear of whites rather than people in general, when arguing paranoia or a general psychosis.

136. To calculate the degree of insanity suffered by a black person, "one must first total all that appears to represent illness and then subtract the Black Norm." GRIER & COBBS, *supra* note 113, at 179. The remaining elements are "illness and a proper subject for therapeutic endeavor." *Id.* The Black Norm is a sum of healthy cultural paranoia, cultural depression, and cultural antisocialism. *See id.* at 178. This alternate Norm is necessary for blacks to "make it" in America. *See id.*

137. Such a finding would lead to a lack of understanding of the defendant's mental health by the court and the jury because the expert, who may otherwise testify about the mental health of the defendant, would be required to eliminate from testimony any evidence that indicated black rage and that was obtained by the expert's evaluation of the defendant. Thus, the evidence presented to the trier of fact

consider black rage as the functional equivalent of battered woman syndrome. That is to say, battered woman syndrome and black rage, although not exactly the same, should serve the same function in criminal defense jurisprudence.

Black Rage as the Functional Equivalent of Battered Woman Syndrome

Both battered woman syndrome and black rage initially manifest themselves as defense mechanisms to forms of abuse. The battered woman realizes her limited options and becomes passive in response to repeated physical, emotional, and sexual abuse.[138] Likewise, the brutalized black person, seeing and experiencing daily the historical and perpetual ill-treatment of blacks and perceiving that blacks are akin to an endangered species, develops a coping mechanism centered around paranoia.[139] Neither battered woman syndrome nor black rage are independent forms of mental illness but are subsets of other recognized forms of psychoses.[140]

Additionally, expert testimony concerning both battered woman syndrome and black rage provides a subjective view of the life of the accused. Battered woman syndrome focuses on the subjective life of a *battered* woman, as opposed to a "typical" woman, and provides a glimpse of the defendant's thoughts and emotions that led to the homicide.[141] Black rage focuses on the subjective life of a *black* person living in America, as opposed to focusing on the experiences of a hypothetical "citizen."[142] Testi-

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for evaluation would be incomplete and any decision that was reached based upon such evidence would be suspect.

138. *See supra* notes 49-79 and accompanying text (discussing battered woman syndrome).

139. *See supra* notes 109-28 and accompanying text (discussing black rage).

140. Battered woman syndrome sometimes has been defined as a subset of Post-Traumatic Stress Disorder. *See* Goldman, *supra* note 88, at 193 n.30. Cultural paranoia among blacks is viewed as an adaptive device, not a pathology. Black rage operates as a subset of unhealthy paranoia. *See* GRIER & COBBS, *supra* note 113, at 166-79, 206.

141. *See supra* notes 49-79 and accompanying text.

142. This category of black people includes those who were not born in America, including African and Caribbean immigrants. *See Eye-to-Eye with Connie Chung*, *supra* note 8 (Kunstler explaining why the black rage defense applies to Colin

mony would involve the amount of reflection that the accused gave to racism before the homicide, as well as any personal experiences that may have contributed to the move from healthy cultural paranoia to unhealthy individual paranoia.[143] Admitting testimony concerning black rage would allow the trier of fact to hear information relevant to the accused's actions and consider that information when evaluating the evidence, in the same manner that admitting battered woman syndrome evidence aids the trier of fact.[144]

Furthermore, battered woman syndrome and black rage serve to make the criminal justice system more inclusive. Various legal scholars argued that the legal system, including the criminal justice system, was designed for the writers of the laws, namely white males.[145] Battered woman syndrome allows the reality of women's lives to enter the legal landscape.[146] Similarly, acknowledging black rage permits blacks to be brought onto a more even playing field. Battered woman syndrome and black rage thus serve the same function, to ensure that "equal justice," written primarily by and for one group of people, is received by all groups of people.

Differences, however, do exist between the two forms of abuse excuses. The most obvious difference is the theory under which each defense is sought to be introduced. Battered woman syndrome usually is offered under a self-defense theory,[147] while black rage is offered to prove insanity.[148] The two excuses also

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Ferguson even though he was not born in America). The focus is on what white racism in America does to all people labelled "black" regardless of whether or not they actually were born in America.

143. *See* Goldberg, *supra* note 106, at 43 (citing Charles Ogletree's evaluation of the difficulty of proving black rage when a showing of reflection on racism is required). The predominant concern of demonstrating prior reflection on racism is "the more evidence you have of prior race discrimination, the more evidence you have of first-degree murder" because of inferences of premeditation. *See id.* (discussing the application of personal experiences as a catalyst for the murder).

144. *See* Saitow, *supra* note 17, at 347-51.

145. *See, e.g. id.* at 336 ("[T]he legal arena, beginning with early common law, manifested itself as a [white] masculine-oriented field.").

146. *See supra* note 75 and accompanying text (noting that the current trend is for states to admit expert testimony regarding battered woman syndrome).

147. *See supra* notes 49-79 and accompanying text.

148. *See supra* notes 109-28 and accompanying text.

differ with regard to the relationship between the defendant and the homicide victim. The battered woman kills an identifiable victim, the abuser himself,[149] whereas the brutalized black person kills an unidentifiable victim, someone of the Caucasian race, but not necessarily someone who has directly perpetrated physical or mental atrocities against the accused.[150]

The differences between black rage and battered woman syndrome appear to be great, but when viewed as providing a more subjective approach to traditional defenses to homicide, the differences dissipate. The more alike the two theories appear, the more easily compared and accepted they may be. Toward this end, battered child syndrome may prove to be a very important link in promoting the admissibility of black rage.

Battered Child Syndrome as the Bridge Between Battered Woman Syndrome and the Acceptance of Black Rage

Acceptance of battered child syndrome may aid in the acceptance of black rage. Battered child syndrome closely resembles battered woman syndrome[151] with the only difference being the relationship of the abuser to the abused.[152] Given these similarities, it is easier for courts to expand admissibility of battered woman syndrome to cover battered child syndrome than it is to expand admissibility to cover black rage. Black rage differs in the relationship of the abuser to the abused,[153] in the past actions of the now-deceased victim toward the killer,[154] and in

149. *See supra* notes 65-67 and accompanying text.

150. *See supra* note 120 and accompanying text.

151. *See supra* notes 90-108 and accompanying text (discussing the way in which the syndromes are similar in terms of psychological evidence, admissibility of testimony, and reasons for allowing the admittance of such testimony).

152. In the case of the battered woman, a woman typically is battered by her husband or her boyfriend. *See supra* note 51 and accompanying text. In the case of the battered child, the child usually is battered by one or both parents or guardians. *See supra* notes 85-94 and accompanying text.

153. In the case of a person suffering from black rage, white society, as a whole, has abused the black defendant. *See supra* notes 110-16 and accompanying text.

154. Although an explosion of black rage may occur following a racial insult or devaluation, *see* Goldberg, *supra* note 106, at 43, often, there is no prior connection between the victim of black rage and the black defendant. *See* Michael Alexander, *Black Rage*, NEWSDAY, May 9, 1994, at B4 (describing a black rage actor's victims as strangers to the assailant).

the theories used to justify the admissibility of expert testimony.[155] Acceptance of black rage would require the development of a novel argument, while battered child syndrome would require no new analysis.[156] Nevertheless, black rage may gain acceptance more easily if there were a wider understanding and acceptance of battered woman syndrome and its twin, battered child syndrome. Wider acceptance of battered woman syndrome and battered child syndrome would allow the courts and society to begin to approach cases with the requisite subjectivity needed in situations involving black rage.

Battered child syndrome, however, currently engenders substantial controversy.[157] The lack of desire to expand battered woman syndrome to cover children who kill results from a fundamental belief that matricide and patricide are inexcusable.[158] Such crimes strike at the heart of our social organization of the family unit.[159] Additionally, sexual abuse often is involved in parricide,[160] and although the doctrine of self-defense includes sexual assault as a crime warranting violent defensive actions,[161] sexual abuse by parents is not an area with which courts have come to terms.[162]

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155. *See supra* notes 147-48 and accompanying text (describing the different theories of justification under which battered woman syndrome and black rage are sought to be admitted).

156. To accept black rage as the equivalent of battered woman syndrome would require the courts to do additional analysis of the insanity defense and its relation to self-defense. To accept battered child syndrome as equivalent to battered woman syndrome, however, is as simple as substituting the words "husband" and "wife" in battered woman syndrome cases for the words "parent" and "child" in battered child syndrome cases.

157. *See supra* notes 102-08 and accompanying text (chronicling the treatment of battered child syndrome in the courts).

158. *See* MONES, *supra* note 93, at 8.

159. *See id.*

160. *See generally* Nancy Blodgett, *Self-Defense: Parricide Defendants Cite Sexual Abuse as Justification*, A.B.A. J., June 1, 1987, at 36 (quoting attorney/author Paul Mones as stating that "[w]ell over 90 percent of the kids who kill their parents are physically, emotionally, or sexually abused"); *see also* Sacks, *supra* note 82, at 358 (stating that children who commit parricide in many instances "suffer 'poly-abuse,' where they are physically, mentally, and often sexually abused").

161. *See supra* notes 13-21 and accompanying text (discussing the elements of self-defense claims).

162. *See* McCord, *supra* note 71, at 41-44 (discussing the disparate treatment by courts of psychological testimony concerning child sexual abuse claims).

The legal system's failure to recognize the nature and extent of the abuse to which children are subjected mirrors the treatment of the abuse underlying black rage. The psychological scarring caused by racism is seen as less important than the scarring of the physical body. There can be little doubt that if whites currently conducted frequent mass public lynchings of blacks, courts would give more credence to black rage. There is, however, a sense among many in society that racism is not a serious problem,[163] and that, therefore, black rage has no basis.[164] Those who harbor such a belief, however, are usually not racial minorities and, as a result, may be less aware of racism.

Personal or societal feelings about racism should not govern the courts' admittance of expert testimony. Yet ultimately, personal and societal perceptions *will* govern the issue. Either the court or members of society will be the trier of fact. As such, various legal, psychological, and societal concerns may factor into the decision as to whether testimony concerning black rage will be admitted. If such testimony is found admissible, these concerns also will determine whether that testimony convinces juries and whether black rage becomes an acceptable defense.

CONSEQUENCES OF ACCEPTANCE OF BLACK RAGE

Legal Problems

In the end, the legal system, which must determine the course of black rage as an abuse excuse, faces a great number of problems regarding the admittance and acceptance of black rage testimony. Those involved in the various aspects of operation of the legal system are, therefore, important. Likewise, the various stages of a criminal trial for homicide become vital.

When black rage is asserted, many difficulties arise during jury selection. Lawyers must carefully weed out those potential jurors harboring racial biases as well as those who are incredu-

163. *See* Dreyfuss, *supra* note 133, at A54 (stating that "many whites already find [legitimate black anger] difficult to accept").

164. Black rage is predicated upon the idea that blacks in America are suffering at the hands of whites. *See supra* notes 113-20 and accompanying text. Thus, if one allegedly removes the suffering, then no basis for the theory exists.

lous to the idea that racism is very much alive.[165] Although some lawyers may believe that the remedy to juror selection simply entails stacking the jury with blacks, there is reason to believe that blacks are just as hostile to the black rage defense as are other racial groups.[166] Although non-blacks may never understand or believe what blacks experience in America,[167] blacks may be more skeptical of such a defense because they most likely have had similar experiences yet have not been driven to kill.[168] Additionally, safeguarding against the biases of judges also may be necessary.[169]

Fear of other race-based defenses being raised is a concern of some legal commentators.[170] Such defenses likely would not

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165. *See* State v. Lamar, 698 P.2d 735, 741 (Ariz. Ct. App. 1984) (requiring a trial judge to question jurors about racial prejudice when a defense of black rage was asserted).

166. *See The CBS News* poll discussed *supra* note 10. Sixty-eight percent of the 56 blacks polled indicated that black rage was not an acceptable defense for committing a violent crime. *See also* Dreyfuss, *supra* note 133 (arguing that acceptance of black rage would perpetuate negative stereotypes of blacks as barely being able to control their tempers and as being generally inferior to whites); *see generally* DERSHOWITZ, *supra* note 5, at 33 (noting that some blacks disagree with the black rage defense because it stigmatizes them as "prone to violence and lawlessness").

167. *See* Goldberg, *supra* note 106, at 43 (citing Harvard Law School professor Charles Ogletree, who has attempted to use the black rage defense).

168. *See* Alexander, *supra* note 154, at B4 (citing Dr. Alvin Poussaint for the proposition that most blacks take a healthy point of view on dealing with discrimination and racism); *see also* DERSHOWITZ, *supra* note 5, at 90 (stating that "the vast majority of African Americans . . . have not used the mistreatment they have suffered as an excuse to mistreat others"). It is the responsibility of the defense attorney to move the jury from the general theory of black rage to the way in which the defendant, himself, suffered from black rage. *Cf. Eye-to-Eye with Connie Chung*, supra note 8 (quoting attorney William Kunstler on the Ferguson Case: "That's what a lawyer's there for, to look at what available defenses are and then try to see whether any of them fit your particular case.").

It is quite obvious that not every woman suffering from battered woman syndrome and not every child suffering from battered child syndrome kills their abuser. Yet, the syndromes still are admitted and accepted by some juries. *See supra* notes 49-108 and accompanying text. The role of the attorney in conveying the importance of the admitted evidence is therefore a key factor in jury understanding and acceptance of the defense.

169. See United States v. Robertson, 507 F.2d 1148, 1152 (1974) (providing clear evidence of the trial court judge's personal biases against blacks raising a claim of black rage, even though the trial court judge was, himself, black). The trial judge also expressed disbelief in the findings of a psychologist of the defendant's insanity because the psychologist was, herself, black. *See id.* at 1155.

170. *See generally* DERSHOWITZ, *supra* note 5, at 33 (stating that "if the black

succeed, however, as the institution of slavery and the history of state sanctioned discrimination in this country would allow courts to distinguish the experience of blacks in America from that of other ethnic groups.[171] Likewise, admitting and accepting black rage generally will not diminish the quality of defenses. Black rage will not be asserted frequently for several reasons. First, most crime is intraracial,[172] so the black rage issue will not be relevant in most instances.[173] Second, insanity is a rarely asserted defense.[174] Third, insanity pleas are accepted with even greater infrequency than they are employed.[175]

The mental health profession aids the legal system by evaluating the mental condition of defendants and witnesses, and by caring for persons found to require treatment. The acceptance of black rage by the courts thus would have important ramifications on how the mental health community performs these tasks.[176]

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rage defense were to succeed, we would see white skinheads invoking 'white rage' in defense of white-against-black racist killings").

171. This Note does not advance the theory that blacks alone have suffered and continue to suffer atrocities and discrimination in this country. Rather, psychological evidence of the impact of discrimination on blacks is more readily available and can be a basis for disparate treatment of blacks in cases in which black rage is asserted.

172. *Cf.* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1992 (1993) (stating that blacks were significantly more likely than whites or persons of other races to be victims of crime and about 85% of black victims were victimized by blacks).

173. Black rage, as it relates to insanity, should be restricted to cases involving a white victim because whites are the source of fear and paranoia for the sufferer of black rage. Therefore, because blacks mostly kill other blacks, black rage will not apply in most instances.

174. *See* NAT'L MENTAL HEALTH ASS'N, MYTHS AND REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 14-15 (1983) (stating that the insanity defense is raised in less than one percent of all felony cases in the United States); *see also* NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, INSANITY DEFENSE (1986) (stating that of the 463,000 people in prison, less than 4,000 successfully pleaded the insanity defense).

175. *See* NAT'L MENTAL HEALTH ASS'N, *supra* note 174 (asserting that the insanity defense is actually successful one-quarter of the time it is raised).

176. *See* ABA, *supra* note 41, at Standard 7-1.1.

Ramifications of Accepting Black Rage for the Mental Health Profession

Legal punishment of those found to have been insane usually requires some form of confinement or out-patient treatment.[177] Confinement of a sufferer of black rage for the purpose of treatment, however, poses a problem because treating black rage may be outside the scope of mental health experts.[178] The root cause of black rage is white racism, a social evil whose cure is clearly beyond the ability of mental health experts.[179] If no treatment exists for black rage, then courts, society, and mental health providers must reconcile themselves to indefinite incarceration of an individual due to a societal problem.[180]

Indefinite incarceration is the only solution to a problem that neither the legal system nor the psychological community can cure.[181] More important than the legal and psychological implications of accepting black rage as part of an insanity defense, however, are the societal consequences of such acceptance.

Societal Consequences

The most obvious societal concern related to accepting black rage as part of an insanity defense is the possible increase in the negative view of blacks.[182] Because black rage actors harm vic-

177. *See supra* notes 29-39 and accompanying text (analyzing the legal effect of accepting an insanity plea).

178. *See* DERSHOWITZ, *supra* note 5, at 33 (asserting that "no reputable psychiatrist would claim to be able to treat racism as a mental illness").

179. In order for mental health experts to cure the sufferer of black rage, they would have to be able to demonstrate to black rage sufferers that white racism no longer exists. This is a very difficult task, the achievement of which is unlikely. For as long as blacks and whites have had contact with each other in America, white racism has existed. It is not a problem over which mental health experts have control. *See generally* GRIER & COBBS, *supra* note 113, at 208 (describing the constant, historical desolation of black life in America). It also is not likely that racism is a problem that eventually will dissipate with time.

180. *Cf.* DERSHOWITZ, *supra* note 5, at 90 (arguing that acceptance of black rage would lead racists to demand longer sentences and harshen police intrusion against blacks).

181. *See id.*

182. *See* Dreyfuss, *supra* note 133, at A54 (raising the concern that black rage will perpetuate notions that blacks are capable of exploding with rage at any moment and that blacks are "deficient" overall, as compared to whites).

tims that are not identifiable as having personally harmed the black actor before the fatal incident, an increase in fear of blacks and an increase in animosity toward blacks undoubtedly will arise in non-black segments of society. As a result of increased skepticism in non-black communities, the vast majority of blacks, who are not consumed by black rage but who may have developed a healthy cultural paranoia,[183] may experience greater difficulty in proving that they can handle everyday pressures without becoming violently insane.[184]

Black rage's acceptance also may affect law enforcement officers. When policing predominantly black neighborhoods, police officers, especially white officers, may be more fearful and quick to judge the actions of blacks based on a misperception of blacks as being inherently more violent than others.[185] Such misunderstanding undoubtedly will begin a vicious cycle of blacks being judged based on their race, stopped, harassed, and made to feel the full effect of white racism. Such actions and attitudes are often underlying causes of black rage and thus would feed into the perpetuation of black rage.

Acceptance of black rage may produce a final serious consequence: a further diminishing of Americans' faith in the criminal justice system.[186] Though many already question Americans' faith in the administration of justice, and cynics would say that such concerns are a moot point because further reduction in faith in the system is nearly impossible because faith in the system is already very low, the concern remains legitimate. Justice systems function only as long as people allow them to function. Having confidence and faith in the criminal justice system is essential to the continued functioning of the system. Thus, a

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183. *See* GRIER & COBBS, *supra* note 113, at 178 (defining "cultural paranoia" as a survival technique for blacks).

184. *See* DERSHOWITZ, *supra* note 5, at 32-33.

185. *See id.* at 90 (discussing the possibility and repercussions of "preventive intervention in black neighborhoods" by police).

186. The basis for the loss of faith would be a general sense that the system no longer holds individuals responsible and therefore, gives people the license to kill and commit other offenses. *See* Thomas Fahie, *Black Rage Is No Defense*, NEWSDAY, Mar. 27, 1994, at A34 (stating strongly that "If we're going to allow civilization to be attacked and destroyed by cockamamie justifications like Kunstler's, then this country won't be a fit place to live in anymore").

lack of belief that the criminal justice system can punish wrongdoers fairly is not in the best interest of maintaining our current system, assuming that people believe that the system is worth maintaining.

CONCLUSION

The viability of black rage as a defense to the homicide of white victims by black defendants remains uncertain. Permitting expert testimony regarding black rage and its relation to insanity would not alter the course of criminal jurisprudence significantly. Rather, admitting expert testimony regarding black rage would serve to provide a more complete picture of the accused's circumstances for the trier of fact. Battered woman syndrome and battered child syndrome acknowledge the fact that physical and sexual abuse leave psychological scars on the victim. Black rage similarly can illustrate how emotional, economic, and psychological abuse by a racist society leave psychological scars on the black victim. Regardless of whether courts believe that black rage is a catalyst for insanity[187] or whether courts view black rage as another abuse excuse,[188] similar to battered woman syndrome, expert testimony regarding black rage should be admitted by the court in order to assist the trier of fact.

The trier of fact will have the most difficult task of assessing black rage. The trier of fact must carefully evaluate complex psychological testimony while balancing legal and societal interests.[189] A complete balance ultimately should lead the trier of fact to a verdict of NGRI. NGRI allows criminal commitment without finding the defendant was legally capable of knowing and appreciating his actions.[190] Verdicts pronouncing legal insanity however, generally are not favored in society.[191]

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187. *See* Adcock, *supra* note 111, at 7.

188. *See* DERSHOWITZ, *supra* note 5, at 89-91.

189. *See* RITA J. SIMON & DAVID E. AARONSON, THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA 129 (1988) (finding in a study that juries faced with an insanity defense put experts' clinical/medical testimony into a moral-legal context).

190. *See* KEILITZ & FULTON, *supra* note 24, at 20-21.

191. *See* NATIONAL INSTITUTE OF JUSTICE, INSANITY DEFENSE, *supra* note 173, at 2 (noting that "the view of some of the public [is] that the insanity defense is a

Law and society are irrevocably intertwined and functionally interdependent. Society legitimately fears letting murderers roam free. Likewise, the judicial system has a legitimate interest in punishing wrongdoers and deterring potential wrongdoers. These interests, however, should never be furthered at the expense of those who cannot form the requisite intent to commit the crime charged. To allow unjust punishment and incarceration because of societal fears or because of the inability to understand and cure the racism that triggers black rage would produce more harm to America's judicial system than the so-called "abuse excuses" themselves. In the final analysis of black rage, courts are left in the undesirable position of deciding to what extent and by which device the criminal justice system will be harmed: by expanding current abuse excuses to include black rage and alienating society or by denying a black rage sufferer an opportunity to enter evidence of black rage, thereby undermining the mens rea element in criminal jurisprudence.

Tosha Yvette Foster

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piece of legal chicanery").