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BLACK RAGE: THE ILLEGITIMACY OF A CRIMINAL DEFENSE

INTRODUCTION

In an era of rising violence,[1] citizens are demanding increased police protection, maximum mandatory sentencing laws and stricter gun regulations.[2] In light of this increased fear of violence, it is ironic that more and more juries are accepting sympathy pleas or "abuse excuses"[3] from criminal defendants accused of violent crimes. It is the defense attorney's goal to assert an abuse defense in order to evoke the jury's sympathy and compassion towards his client.[4] In some instances the tales of abuse are so compelling that the trial results in an acquittal,[5] a hung jury[6]

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1. According to United States Department of Justice statistics, the number of violent crimes in 1992 was 6.62 million, a jump from 6.58 million in 1981. Rorie Sherman, *Crimes Toll on the U.S.: Fear, Despair, and Guns*, NAT'L L.J., Apr. 18, 1994, at A1.

2. A National Law Journal poll shows that 70% of the 800 people polled believe crime is a problem that requires national emergency action. *Id.* However, 75% say that the police and the justice system alone are not enough to curb the crime problem. *Id.* Many people feel that there is a need to take personal action against crime. Thus, 36% say they own a gun in order to insure their safety. *Id.*

3. Essentially abuse defenses ask the jury to forgive the criminal defendant for committing his crime because, in some sense, the defendant himself is a victim of abuse and, therefore, his actions are justified. ALAN M. DERSHOWITZ, THE ABUSE EXCUSE 6-7 (1994).

4. James J. Clark et al., *The Fiend Unmasked: Developing the Mental Health Dimensions of the Defense*, 8 CRIM. JUST. 23, 27 (1993). Attorneys raise abuse defenses because jurors instinctively want to know *why* something has happened. *Id.* Jurors are more apt to deal with a gruesome crime if they hear its details in the context of a compelling story, including history of some sort of abuse which may be responsible for the criminal acts. Sophfronia Scott Gregory, *Oprah! Oprah in the Court!*, TIME, June 6, 1994, at 30. A Los Angeles public defender observed that when jurors hear evidence of victimization, their "ears perk up." *Id.* Eliciting jury sympathy requires the presentation of: (1) evidence of a dysfunctional childhood or childhood trauma; (2) evidence of other psychiatric and neurological impairments; (3) testimony of the defendant's subjective purpose behind his acts; and (4) evidence of the lack of support, help, or treatment available to the defendant. Clark et al., *supra*, at 4.

5. Lorena Bobbitt was found not guilty on charges of malicious wounding for severing her husband's penis while he slept. *Lorena Bobbitt Likely to Be Freed Soon*, CLEV. PLAIN DEALER, Feb. 25, 1994, at 11A. The jury empathized with Bobbitt's reports of mental, physical and sexual abuse, and eventually found her not guilty. *Id.*

6. Perhaps the most infamous recent case is that of Erik and Lyle Menendez.

or a conviction of a lesser offense.[7]

As the success of abuse defenses grow, more defense lawyers are taking advantage of them, especially in instances of last resort when no "true" legal defense[8] exists. Therefore, the once narrow range of acceptance of such defenses is rapidly expanding. Lawyers search for any likely abuse or possible oppression in their client's background in order to turn such abuse into a sociological or psychological sounding syndrome.

The first widely accepted "abuse" defense was "post traumatic stress disorder,"[9] after which "battered woman syndrome"[10]

Gail Cox et al., *California's Hot Trials*, NAT'L L.J., Aug. 9, 1993, at 6. The two brothers instinctively shot and killed their parents, Jose and Kitty Menendez, while the parents sat quietly in the family room watching television. Alex Rodriguez, *Son's Abuse Charges Focus of Slaying Cases*, CHI. SUN-TIMES, Dec. 11, 1994, at 6. In two separate trials, the brothers justified their actions because they said each had endured years of mental, sexual and physical abuse at the hands of their parents and feared that their parents would kill them should the sons confront them with tales of abuse. *Id.* The first juries to hear the cases deadlocked. Alan Abrahamson, *A Mistrial for Second Menendez Brother*, MIAMI HERALD, Jan. 29, 1990, at A1. Likewise, the second juries to hear the Menendez cases also resulted in deadlock. Christine Spolar, *Menendez Jury Deadlocks*, WASH. POST, Jan. 11, 1994, at B3.

7. Mr. Moosa Hanoukai admitted he was sane when he bludgeoned his wife of 25 years to death with a wrench. Gail Diane Cox, *Abuse Excuse: Success Grows*, NAT'L L.J., May 9, 1994, at A1. Hanoukai claimed he was psychologically emasculated by his wife, because she forced him to sleep on the floor. *Id.* The jury found Hanoukai guilty of manslaughter, a lesser offense than murder. *Id.*; *see also* Margot Slade, *'It's not my fault' Era Leaves Legal Puzzles*, COM. APPEAL, May 22, 1994, at 7A (discussing a case in which a son was found guilty of manslaughter, as opposed to murder, for killing his father because of alleged sexual abuse).

8. "True" legal defenses are traditionally accepted affirmative and mitigating-factor defenses such as insanity, self-defense, mistake, or ignorance. PAUL ROBINSON, CRIMINAL LAW DEFENSES § 28, at 117-18 (1984).

9. An individual suffers from post traumatic stress disorder as a consequence of surviving a life-threatening trauma such as a severe accident, rape, attempted murder, torture, a natural disaster, or abuse or death of a loved one. Herbert Hendin, *Post-Traumatic Stress Disorder: A Psychiatrist Discusses the Ramifications of Life-Threatening Trauma*, TRIAL, Feb. 1987, at 62. Post traumatic stress disorder was first recognized in veterans of war who had witnessed repeated bloodshed and bombings. *Id.* at 63. As a result of exposure to such a severe tragedy, the survivor may suffer recurring nightmares and flashbacks, feel estranged from family and friends, suffer an exaggerated startled response, or have feelings of aggression and moodiness. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS III-R 247, 248 (1987). Physiologic reactivity is often intensified or facilitated when the victim is subjected to situations which resemble the prior trauma. *Id.* at 248. See *infra* Part II(A) for a discussion of post traumatic stress disorder.

10. A female defendant will typically raise the theory of battered woman syndrome along with self defense to explain why she has attacked her abuser. Battered women often contend that despite frequent abuse, it is psychologically impossible for them to leave the abusive relationship. Alan M. Dershowitz, *The Abuse Excuse*, S.F. EXAMINER, Jan. 16, 1994, at A15. The theory of battered woman syn-

quickly followed. The success of these syndromes has opened the door for increasingly more bizarre excuses. Examples of these excuses include "battered child syndrome,"[11] "urban survival syndrome"[12] and most recently, the defense of "black rage."[13]

Black rage was recently raised by the late defense attorney William Kunstler in the case of Colin Ferguson,[14] the since-convicted gunman who opened fire on commuters aboard the Long Island Railroad. Although Kunstler's defense sparked controversy, the legal community will have to wait in order to test its viability in a courtroom setting. Prior to trial, Ferguson dropped the black rage defense and released Kunstler as his attorney in order to proceed *pro se*.[15] However, the validity of black rage must be scr-

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drome insinuates that as a result of the years of abuse suffered at the hands of the abuser, the battered woman is justified in killing her abuser. *Id.* See *infra* Part II(B) for a detailed discussion of battered woman syndrome.

11. Battered child syndrome is claimed by an adult defendant who feels justified in killing his parents because of past child abuse and believes that the parents "had it coming." DERSHOWITZ, *supra* note 3, at 21-25; *see also* Rodriguez, *supra* note 6, at 6.

12. "Urban survival syndrome" was first coined in the Fort Worth, Texas trial of Daimian Osby. Jacquelynn Floyd, *FW Jury Deadlocked on Killings; Survival Defense Prompts Questions*, DALLAS MORNING NEWS, Apr. 20, 1994, at 21A. Osby, a black 18-year-old male, shot and killed two black male cousins. *Id.* The victims were unarmed at the time of Osby's attack. *Id.* Osby alleged, however, that they had threatened him with a shotgun on a prior occasion. *Id.* Osby's defense relied on the social problems and stress of urban ghetto life, including the defensive mindset of "kill or be killed." *Id.* The jury that heard Osby's case split 11-1, resulting in a mistrial. *Id.* In Baltimore, Md., a similar defense, "urban fear syndrome," is expected to be asserted in attempt to justify the actions of a 62-year-old janitor who shot and killed a 13-year-old boy. Mary Pemberton, *'Urban Fear Syndrome' Is Defense of Man Who Killed*, CHI. DAILY L. BULL., Mar. 31, 1995, at 3. The teenage boy and his friends allegedly threw garbage, bricks and bottles into the defendant's yard on a daily basis despite defendant's repeated requests that they stop littering. *Id.* Acceptance of urban survival syndrome is not universal. *See* Greg Seigle, *Union Station Killer Gets 10-year Minimum*, WASH. TIMES, June 10, 1994, at C10 (sentencing male teen to a minimum of 10 years despite urban survival defense).

13. Proponents of the black rage defense assert that African-Americans who are constantly subjected to prejudices and racism which they perceive to be unfair and oppressive become enraged. DERSHOWITZ, *supra* note 3, at 90-91.

14. Ferguson opened fire on a Long Island commuter train, killing six and wounding 17 white and Asian passengers. Tracie Reddick, *Bay Area Community Leaders Argue Whether It's Reality or Theory*, TAMPA TRIB., Dec. 4, 1994, at 1. Ferguson's defense attorney, the late William Kunstler, was prepared to claim that Ferguson was a victim of "black rage," blaming his shooting spree on years of racism and oppression. *Id.* However, Ferguson fired Kunstler and dropped the black rage defense in order to proceed *pro se*. John T. McQuiston, *In the Bizarre L.I.R.R. Trial, Equally Bizarre Confrontations*, N.Y. TIMES, Feb. 5, 1995, at 13LI. The jury ultimately convicted Ferguson of six counts of murder and 19 counts of attempted murder. *Judge Gives Life Term in NY Train Deaths*, DALLAS MORNING NEWS, Mar. 23, 1995, at 11A. Ferguson was sentenced to more than 200 years in prison. *Id.*

15. McQuiston, *supra* note 14, at 13LI. Ferguson ultimately claimed at trial that he dozed off while on the commuter train and that someone stole his gun from

utinized for its foreseeable that other criminal defendants lacking traditional defense theories may seek to assert the defense of "black rage."

Part I of this Note introduces the components of traditional affirmative and mitigating-factor defenses, including self-defense and insanity. Part II explores the contours of recent abuse excuses such as post traumatic stress disorder and battered woman syndrome, and compares and contrasts them to traditional legal defenses. Part III examines oppression and racism against African-Americans in an attempt to find a rational psychological basis for black rage in general. Also, assuming *arguendo* that the two abuse excuses discussed in Part II are legitimate, Part III discusses how the black rage defense differs from them because it seeks to excuse an entire race. Part IV discusses the ramifications of accepting black rage as a defense: some consequences may include a resurgence of self-help, vigilantism and conflicts between other ethnic groups. Finally, this Note concludes that courts should not accept evidence of black rage as a defense.

I. TRADITIONAL DEFENSES

Abuse excuses do not fall clearly into a category of traditional affirmative or mitigating-factor defenses. Instead, abuse defenses typically attempt to borrow from or "stretch" the bounds of the defenses of self-defense and insanity.[16] A defendant who claims to suffer from an abuse or syndrome seeks justification,[17] mitigation,[18] or excuse[19] of his[20] offenses because of the pres-

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his bag and committed the shootings. *Id.*

16. DERSHOWITZ, *supra* note 3, at 9.

17. When a defendant seeks justification, he claims to have had a legal privilege which warrants his criminal behavior. DAVID A. JONES, CRIME AND CRIMINAL RESPONSIBILITY 54 (1978). Thus, justification exists when a legal reason, not a moral reason, is blamed for the defendant's criminal conduct. *Id.* Justification defenses include self-defense, defense of others, defense of property, ignorance and mistake. *Id.* at 54-65.

18. Criminal responsibility may be mitigated when extenuating circumstances are present at the time of the crime. *Id.* at 134-35. For example, a murder charge may be mitigated or reduced to manslaughter upon the defendant's proof that the murder occurred during a "heat of passion." *Id.* at 135. However, difficulty exists in determining what circumstances are sufficient to mitigate an offense. *Id.* at 134.

19. A defendant's criminal actions are excused upon the defendant's showing that his misconduct was a result of a compelling force. *Id.* at 62. For example, the defendant was subjected to coercion, duress, or necessity. *Id.*

20. The use of the pronoun "he," or any form thereof, as used throughout the text and footnotes is used as a matter of convenience and is meant to be a generic term. The principles discussed which refer to "he" apply equally to females, with the exception of the discussion of battered woman syndrome in Part II(B) and its accompanying footnotes. Courts are in debate as to whether males may claim spousal abuse as a defense.

ence of a syndrome with elements similar to that of traditional criminal defenses. However, it is difficult to categorize these syndromes within the framework of insanity and self-defense.

In order to understand the problems inherent in abuse excuses in general, and black rage in particular, it is first necessary to examine the elements of traditional affirmative defenses. This Part first outlines the elements a defendant must establish to make a successful self-defense claim. Then, it discusses the components of a successful insanity defense.

A. Self-Defense

Generally, the self-defense doctrine allows one who faces an aggressor to use a reasonable amount of force to counter that asserted by the aggressor.[21] In order to justify the use of self-defense, a defendant must meet the following criteria: (1) at the time of retaliation, the defendant must have reasonably believed he was in imminent danger[22] of receiving bodily injury; (2) the defendant must have used a reasonable amount of force necessary to counter that exerted by the attacker;[23] and (3) the defendant must not have initiated the attack.[24] In addition to these ele-

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21. Brown v. United States, 256 U.S. 335, 343 (1921); WAYNE R. LAFAVE ET AL., HANDBOOK ON CRIMINAL LAW § 53, at 391 (1972); IRVING J. SLOAN, LAW OF SELF-DEFENSE: LEGAL AND EQUITABLE PRINCIPLES 7 (1987).

22. *See* ALA. CODE § 13A-3-23(a) (1994); COLO. REV. STAT. ANN. § 18-1-704(1) (West 1986); CONN. GEN. STAT. ANN. § 53a-19(a) (West 1994); FLA. STAT. ANN. § 776.012 (West 1992); 720 ILCS 5/7-1 (1993); IND. CODE ANN. § 35-41-3-2 (Burns 1994); KAN. STAT. ANN. § 21-3211 (1988); KY. REV. STAT. ANN. § 503.050 (Michie/Bobbs Merrill 1990); LA. REV. STAT. ANN. § 14:20 (West 1995); MONT. CODE ANN. § 45-3-102 (1994); N.Y. PENAL LAW § 35.15(1) (McKinney 1987); OR. REV. STAT. § 161.209 (1990); WIS. STAT. ANN. § 939.48(2)(a) (West 1994); Wilson v. State, 276 A.2d 214 (Md. 1971); People v. Kohler, 318 N.W.2d 481 (Mich. Ct. App. 1981); State v. Norman, 378 S.E.2d 8 (N.C. 1989); Stoneman v. Commonwealth, 66 Va. (25 Gratt.) 887 (1874). The imminent danger must be of death or serious bodily harm. Martin v. Ohio, 480 U.S. 228, 230 (1987). If the violence is to occur at a future time, and avenues other than violence will be open to the defendant, self-defense is not justified. People v. Menton, 108 P. 1034, 1041 (Cal. Ct. App. 1910); MODEL PENAL CODE § 3.04(1) (Tentative Draft 1958).

23. State v. Woodward, 74 P.2d 92, 95 (Idaho 1937). The amount of force one may justifiably use to counter the attack of an aggressor is limited to the amount of force reasonably related to the threatening harm. State v. Metcalfe, 212 N.W. 382, 388 (Iowa 1927); Commonwealth v. Emmons, 43 A.2d 568, 569 (Pa. Super. Ct. 1945). Therefore, an actor may use nondeadly force against a nondeadly assailant, but he can respond with deadly force only if deadly force is threatened. LAFAVE, *supra* note 21, at 392. Deadly force is defined as that which its user asserts with the intent to cause death or serious bodily injury to another or which he knows creates a substantial risk of death or serious bodily injury. MODEL PENAL CODE § 3.12(2) (Tentative Draft 1958); SLOAN, *supra* note 21, at 24.

24. Smart v. Leeke, 873 F.2d 1558, 1560 (4th Cir. 1989); State v. Jeffries, No. 94-CA00068, 1994 Ohio App. LEXIS 5938, at *7 (Ohio Ct. App. 1994).

ments, a minority of jurisdictions require the defender to retreat from the aggressor provided that a reasonable and safe means for retreat exists.[25] However, if a defendant is attacked in his dwelling place, a strong majority holds there is no duty to retreat.[26] Self-defense is a complete defense which can exonerate the defendant of criminal charges of murder, manslaughter, attempted murder, battery and assault, both aggravated and non-aggravated.[27]

B. Insanity

The defense of insanity is slightly different than other affirmative defenses and the standard courts use in applying the insanity defense is less settled than that of self-defense. If a defendant is found "not guilty by reason of insanity," it is not equivalent to exoneration or mitigation of the offense.[28] Rather, the defendant is typically committed to an institution, as opposed to being incarcerated or acquitted.[29]

Historically, American courts have used four tests to evaluate a defendant's cognitive competence. The first test, the *M'Naghten*[30] test, was imported from England in 1843. It pre-

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25. State v. Abbott, 174 A.2d 881, 884 (N.J. 1961). The issue of retreat typically arises in matters of homicide. *Id.* at 883. If the defendant can safely retreat from the assailant's attack, there is a strong policy requiring him to retreat before the use of *deadly* force in order to protect human life. *Id.*; MODEL PENAL CODE § 3.04 cmt. 3, at 23-25. However, a majority of jurisdictions hold that a defender may stand his ground and need not retreat before resorting to the use of deadly force if the defender reasonably believes the assailant may kill or inflict serious bodily harm upon him. Brown v. United States, 256 U.S. 335, 343 (1921); People v. Gonzales, 12 P. 783, 787 (Cal. 1887); People v. Durand, 139 N.E. 78, 82 (Ill. 1923). As Justice Holmes stated, "Detached reflection cannot be demanded in the presence of an uplifted knife." *Brown*, 256 U.S. at 343. Also, one is not required to retreat and may stand his ground if (1) he is attacked at home; or (2) he is the subject of a dangerous felony. SLOAN, *supra* note 21, at 10. Because of the prevalence of guns, the duty to "retreat to the wall" is increasingly considered archaic. PAUL ROBINSON, CRIMINAL LAW DEFENSES § 131(c), at 80 (1984). Forcing a defendant to retreat when confronted by an assailant possessing a firearm puts the defendant in an undue risk of bodily harm, thus generally negating the duty to retreat. *Id.*

26. Beard v. United States, 158 U.S. 550, 559-60 (1895). In People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914), Judge Cardozo reasoned, "It is not now, and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground, and resist the attack." *Id.*

27. State v. Martin, 57 S.E.2d 55, 57 (S.C. 1949).

28. ROBINSON, *supra* note 25, § 173(g), at 305. Some states require mandatory commitment to an institution following a "not-guilty-by-reason-of-insanity" verdict while other states have held a mandatory commitment to an institution to be unconstitutional in that it violates the rights of due process and equal protection of the law. *Id.* at 305 nn.71-73.

29. *Id.* at 305.

30. The Queen v. M'Naghten, 8 Eng. Rep. 718, 718 (1843). Daniel M'Naghten believed Sir Robert Peel was planning a conspiracy to kill him. *Id.* In response,

sumed a defendant to be sane unless it was proved that the party accused acted under a defect of reason from a mental disease and, as a result, did not understand the nature and quality of his acts or, if he did understand them, he did not perceive what he did as wrong.[31] Therefore, in order for the defendant to meet the *M'Naghten* test, the defendant essentially had to lack the mental capacity to distinguish between right and wrong. Later, many jurisdictions supplemented *M'Naghten* with the "irresistible impulse" exception.[32] This exception allowed for an acquittal if the accused showed that his mental disorder caused him to experience an irresistible and uncontrollable impulse to commit the offense regardless of whether he understood the nature of his offense and its wrongfulness.[33]

Medical and legal scholars[34] criticized the *M'Naghten* test because it was inconsistent with modern psychological developments.[35] In 1954, in response to controversy over *M'Naghten*, the United States Court of Appeals for the District of Columbia, in *Durham v. United States*,[36] rejected its use and adopted a less stringent test for insanity. The *Durham* rule excused the defendant of criminal responsibility if his unlawful act was a product of mental disease or defect.[37] The ambiguous language used in the

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M'Naghten intended to take Peel's life but instead shot and killed Edward Drummond. *Id.* M'Naghten claimed he was insane and that his illusions drove him to commit the murder. *Id.* The jury found M'Naghten not guilty by reason of insanity. *Id.*

31. RUDOLPH J. GERBER, THE INSANITY DEFENSE 24 (1984).

32. MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 85 (1994). Nearly half of the jurisdictions that followed *M'Naghten* adopted the irresistible impulse doctrine. LAFAVE, *supra* note 21, at 283.

33. PERLIN, *supra* note 32, at 86.

34. *See* Durham v. United States, 214 F.2d 862, 870 n.25 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (listing works that criticize the *M'Naghten* insanity test).

35. *Id.* The gravamen of the complaint against *M'Naghten* was that it only took into account a man's reasoning and not other factors of his personality. *Id.* at 871-72. This was inconsistent with modern psychiatry which recognized a man's reason was not the sole determinant of his behavior, but rather only one unit of his personality. *Id.* Also, psychiatrists learned that one suffering from mental illness could answer correctly when questioned about what was right or wrong. *Id.* at 868.

36. 214 F.2d 862 (D.C. Cir. 1954). *Durham* was the first appellate case to reject *M'Naghten*. *Id.* However, 83 years earlier, New Hampshire rejected *M'Naghten* in State v. Jones, 50 N.H. 369 (1871), but no subsequent cases afforded the opportunity to evaluate the New Hampshire Rule nor did any other American jurisdiction adopt the rule. LAFAVE, *supra* note 21, at 287. After *Durham*, most federal and state courts declined to follow the *Durham*'s test for insanity. *See* Abe Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 906 n.8 (1960) (listing courts rejecting the *Durham* rule); see *supra* note 35 and accompanying text for discussion of complaints against *M'Naghten*.

37. *Durham*, 214 F.2d at 874-75. The *Durham* rule received criticism for the

Durham definition eventually led courts to abandon its use.

In a leading 1972 decision, the United States Court of Appeals for the District of Columbia overruled *Durham* in *United States v. Brawner*[38] and adopted the American Law Institute (A.L.I.) Mode Penal Code test for insanity.[39] The A.L.I. test required the actor, as a result of his mental disease or defect,[40] to "lack substantial capacity to appreciate the wrongfulness of his conduct."[41]

After more than 150 years of psychological study and development, the insanity standards came full circle when a jury rendered a verdict of not guilty by reason of insanity in *United States v. Hinckley*.[42] Public outrage following the verdict prompted demands for stricter insanity defense controls. Americans could not believe that a man who attempted to assassinate the President of the United States could be acquitted by reason of insanity. In the eyes of society, it appeared that Hinckley had "beaten" the system.

In response to societal dismay, the Reagan Administration

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ambiguity of the terms "product" and "mental disease." LAFAVE, *supra* note 21, § 19, at 286. Subsequent cases determined that one acting under a "product" of mental disease or defect meant that but for the disease, the defendant would not have committed the act. Carter v. United States, 252 F.2d 608, 615-16 (D.C. Cir. 1959). "Mental disease or defect" was defined as any abnormal condition of the mind which substantially affected the mental or emotional processes and impaired behavioral controls. McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962).

38. 471 F.2d 969 (D.C. Cir. 1972). The court overruled *Durham* because the vague language used in its definition opened the door for acceptance of a wider range of psychological disorders. *Id.* at 977. As a result, expert testimony became critical to a jury's understanding of the particular disorder raised. *Id.* Expert testimony became so important that it virtually stripped the jury of its right to determine the case. PERLIN, *supra* note 32, at 87. Jury decisions were dominated by testimony from psychiatrists and other medical experts who baffled jurors with their complex jargon. *Brawner*, 471 F.2d at 979. This opened a loophole for cunning criminals. *Id.* at 976.

39. MODEL PENAL CODE § 4.01(1) (Tentative Draft 1958).

40. The Model Penal Code notes that the term "mental illness or defect" does not include an abnormality which is manifested only by repeated criminal or otherwise anti-social conduct. *Id.*

41. ROBINSON, *supra* note 25, § 173(d), at 296. The A.L.I. insanity test appeared to be a modern version of the *M'Naghten* and irresistible impulse test. However, the A.L.I. test only required a lack of "substantial capacity" whereas *M'Naghten* and the irresistible impulse tests required a complete impairment of intellectual capacity and self control. *Id.* A number of courts and legislatures accepted the A.L.I. test. *See* LAFAVE, *supra* note 21, at 294-95 nn.78-80 (listing federal courts, state courts and state legislatures accepting the A.L.I. test).

42. 672 F.2d 115 (D.C. Cir. 1982). The concern over the stringency of the insanity defense came to the forefront in response to the outcome of the trial of John Hinckley, Jr. PERLIN, *supra* note 32, at 16. Americans were outraged that a man could shoot President Reagan on national television and still "beat" the criminal justice system. *Id.* This single event directly unraveled more than 150 years of psychological study and understanding. *Id.* at 17.

urged Congress to abolish the insanity defense.[43] Congress, however, responded with the passage of the Comprehensive Crime Control Act of 1984 (the Act).[44] The Act included the Insanity Defense Reform Act, which essentially returned the insanity test used in federal courts back to *M'Naghten*, with the addition of two significant changes.[45] First, the present federal insanity test requires the accused to suffer from a *severe* mental disease or defect.[46] Secondly, the Act shifted the burden of proving a severe mental illness to the defendant.[47]

Since 1984, and also in response to the *Hinckley* verdict,[48] most states have likewise reformed their rules concerning the insanity defense. Three states have totally abolished insanity as a legal defense.[49] Nearly a dozen others responded by developing a defense known as "guilty but mentally ill" in an attempt to give the jury another verdict option and thereby limit the number of

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43. PERLIN, *supra* note 32, at 25.

44. 18 U.S.C. § 17 (1988).

45. *Id.* The act states:

(A) AFFIRMATIVE DEFENSE. It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a *severe* mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(B) BURDEN OF PROOF. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

Id. (emphasis added).

46. *Id.*

47. *Id.*

48. *See, e.g.*, Ware v. State, 584 So. 2d 939, 942 (Ala. Crim. App. 1991) (discussing passage of an insanity test identical to the federal statute in response to Hinckley's acquittal); Commonwealth v. Trill, 543 A.2d 1106, 1117 (Pa. Super. Ct. 1988) (responding to Hinckley's acquittal).

49. *See* IDAHO CODE § 18-207 (1987); MONT. CODE ANN. §§ 46-14-101 to -401 (1994); UTAH CODE ANN. § 76-2-305 (1995). The above-cited statutes abolished insanity as an independent defense. However, psychiatric testimony as to the defendant's mental state is admissible to rebut the state's evidence that the defendant had the requisite intent to commit the charged offense. IDAHO CODE § 18-207(c) (1987); MONT. CODE ANN. § 46-14-102 (1985); UTAH CODE ANN. § 76-2-305 (1995). The statutes were upheld by their respective state courts as constitutional and were not found to be in violation of the defendant's right to due process of law. *See* State v. Beam, 710 P.2d 526 (Idaho 1985), *cert. denied*, 476 U.S. 1153 (1986); State v. Korell, 690 P.2d 992 (Mont. 1984). Although the United States Supreme Court has not decided whether the insanity defense is a constitutional right, there is evidence in Supreme Court opinions indicating that it is not. *See* Powell v. Texas, 392 U.S. 514 (1968) (observing that insanity defense had a long history in the legal system but it has always been thought to be within province of the States to allow its use); *see also* Ake v. Oklahoma, 470 U.S. 68 (1985) (Rehnquist, C.J., dissenting) (stating that it is highly doubtful that due process of law requires a state to make available an insanity defense to a criminal defendant); *cf.* Harris v. Pulley, 885 F.2d 1354 (9th Cir. 1989) (holding that the 8th Amendment does not command that mental illness be contemplated as a mitigating circumstance).

acquittals.[50] Some states shifted the burden of proving insanity from the prosecution to the defendant.[51] Finally, others established more stringent provisions to govern the release of defendants found not guilty by reason of insanity.[52] Today, courts and scholars continue to debate the appropriate standard for defining insanity.

C. Guilty But Mentally Ill

After the Hinckley acquittal, some states enacted a defense known as "guilty but mentally ill."[53] This alternative acts as a middle ground or compromise; it allows a jury to find a criminal defendant guilty of the charged offense despite the presence of a mental illness.[54] Following a finding of guilty but mentally ill, it is left to the court to determine the appropriate sentence. The court has the discretion to sentence the defendant in the same manner as one who is found guilty of the same offense but does not suffer from a mental illness.[55] Based on the court's evaluation of the defendant's mental state, the defendant is most likely to be sentenced to a mental institution until it is determined that hospitalization is no longer necessary.[56] Thereafter, he is incarcerated for the remainder of his sentence.[57]

This option was designed to decrease the number of acquittals and to assure that defendants who were mentally ill received adequate medical attention.[58] However, despite the abrupt adop-

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50. *See* ALASKA STAT. § 12.47.010 to .050 (1990); DEL. CODE ANN. tit. 11, § 408 (1987); 725 ILCS 5/115-2; IND. CODE ANN. § 35-36-2-5 (Burns 1994); KY. REV. STAT. ANN. § 504.130 (Michie/Bobbs-Merrill 1990); MICH. COMP. LAWS ANN. § 768.36 (West 1982); N.M. STAT. ANN. § 31-9-3 (Michie 1984); 18 PA. CONS. STAT. ANN. § 314 (1983); S.C. CODE ANN. § 17-24-20 (Law Co-op. 1993).

51. ARIZ. REV. STAT. ANN. § 13-502(b) (1989); IND. CODE ANN. § 35-41-4-1(b) (Burns 1994); 18 PA. CONS. STAT. § 315(a) (1983). *See also* Ware v. State, 584 So. 2d 939, 943 (Ala. Crim. App. 1991) (noting that the burden of proving the defense of insanity rests upon the defendant).

52. PERLIN, *supra* note 32, at 27.

53. A judge or jury may find a defendant guilty but mentally ill, provided that the defendant (1) is guilty beyond a reasonable doubt of the charged offense; (2) was mentally ill at the time he committed the offense; and (3) was not legally insane at the time of the offense. N.M. STAT. ANN. § 31-9-3 (Michie 1984). See *supra* note 50 for state statutes enacting the guilty but mentally ill defense.

54. Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 495 (1985).

55. *See, e.g.*, 730 ILCS 5/5-2-6(a) (1993).

56. *See, e.g.*, 730 ILCS 5/5-2-6(d)(1) (1993) (requiring that the defendant be institutionalized until it is determined hospitalization is no longer necessary); MICH. COMP. LAWS ANN. § 768.36(c) (West 1982) (stating that upon the defendant's discharge from a mental hospital, he will be transferred to the department of corrections to serve the remainder of his sentence).

57. MICH. COMP. LAWS ANN. § 768.36(c) (1982).

58. PERLIN, *supra* note 32, at 92.

tion of the guilty but mentally ill defense, many professionals criticize its use.[59] Mainly, researchers argue that the "guilty but mentally ill" verdict has not displaced "not guilty by reason of insanity" acquittals[60] nor have defendants found guilty but mentally ill received any extra medical treatment.[61]

II. THE ACCEPTANCE OF POST TRAUMATIC STRESS DISORDER AND BATTERED WOMAN SYNDROME

During the past twenty years, courts have increasingly admitted evidence of abuse in conjunction with traditional criminal defenses. In particular, courts have permitted criminal defendants to introduce the abuse defenses of post traumatic stress disorder and battered woman syndrome. These defenses may not be asserted alone but when coupled with traditional primary defenses of insanity and self-defense, have found increasing acceptance in American criminal law.

These two defenses bear some resemblance to insanity and self-defense. This Part compares post traumatic stress disorder and battered woman syndrome to traditional legal defense theories. This Part concludes that despite possible criticisms, evidence of both of these syndromes are generally accepted.

A. Post Traumatic Stress Disorder

The first abuse defense to earn medical and legal acceptance as a valid excuse defense was post traumatic stress disorder (PTSD). Diagnoses of PTSD date back as far as the American Civil War, when they were known as "disorderly action of the heart" or "irritable heart."[62] During World War I and World War II similar characteristics of the disorder were observed, known then as "shell shock"[63] or "combat fatigue."[64] Post-Vietnam War psychologists diagnosed the symptoms of "PTSD" which was then

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59. Slobogin, *supra* note 54, at 496. Specifically, the American Bar Association and the American Psychiatric Association have expressed disapproval of the guilty but mentally ill verdict. *Id.*

60. RITA J. SIMON & DAVID E. AARONSON, THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA 193 (1988) (discussing a 1982 Michigan study which revealed that the number of "not guilty by reason of insanity" verdicts had not decreased after the implementation of the "guilty but mentally ill" option).

61. *Id.* Dr. John Prelesnick, Superintendent of the Reception and Guidance Center in Jackson, Mich., found that guilty but mentally ill prisoners were not afforded any additional treatment; they were treated as any other prisoner. *Id.*

62. F.W. Furlong, *Looking for a Biological Marker in PTSD*, 59 DEF. COUNS. J. 588, 588 (1992).

63. Eric H. Marcus, M.D., *Post-Traumatic Stress Disorder: Facts and Myths*, 32 TRAUMA 49, 54 (1990).

64. *Id.*

accepted by the American Psychiatric Association.[65] Today, PTSD has broadened from a disorder experienced solely by veterans exposed to war combat to include anyone exposed to a tragic event in which severe anxiety follows.[66]

The American Psychological Association has established five requirements necessary for a diagnosis of PTSD. First, the person must experience an event or trauma that is outside the range of "usual human experience" and which would be distressing to nearly anyone who experienced it.[67] Second, the individual must suffer from persistent recurrence of the extraordinary event.[68] Third, the defendant must act to avoid stimuli which are closely connected to the traumatic event.[69] Fourth, the defendant must experience persistent symptoms of increased arousal that were not present prior to his exposure to the trauma.[70] Finally, the disturbances must occur for a duration of at least one month.[71] Diagnosis of PTSD is difficult because symptoms of the disorder may not develop until months or years after the individual experiences the triggering trauma.[72]

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65. *Id.* In 1980, the American Psychiatric Association used the term "post traumatic stress disorder" as a diagnosis for a sudden onset of severe mental symptoms arising directly from catastrophic events. *Id.*

66. Furlong, *supra* note 62, at 588.

67. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS III-R 250 (1987) [hereinafter DSM III-R]. Examples of events which are outside the range of normal human experience include: a serious threat to an individual's life, a serious threat to the life of an immediate family member or close friend, the sudden destruction of one's dwelling, or witnessing the injury of another in a severe accident or act of violence. *Id.*

68. *Id.* A diagnosis of post traumatic stress disorder requires that one reexperience his trauma in at least one of the following ways: (1) recurrent distressing recollection of the event; (2) recurrent distressing dreams of the event; (3) sudden feelings that the event is recurring, in the form of hallucinations, illusions, or flashbacks; or (4) intense psychological anxiety when exposed to events which mimic or resemble the trauma. *Id.*

69. *Id.* Additionally, DSM III-R indicates that an individual suffering from post traumatic stress disorder must: (1) make efforts to avoid feelings associated with the trauma; (2) make efforts to avoid activities which arouse emotions closely related to the event; (3) be unable to recall significant details or events surrounding the trauma; (4) exhibit decreased interest in important activities; (5) feel detached or alienated from others; (6) feel immune to affection (i.e. he is unable to have loving feelings); or (7) express negativity toward his future (i.e. believe he will never be married or have a career). *Id.*

70. *Id.* At least two of the following symptoms must be present in order to satisfy the criterion of increased arousal. *Id.* The person must experience insomnia, agitation or outbursts of anger, difficulty in concentration, hypervigilance, an exaggerated startled response, or physical reactions when exposed to events which symbolize part of the traumatic event. *Id.*

71. *Id.*

72. Herbert Hendin, *Post-Traumatic Stress Disorder: A Psychiatrist Discusses the Ramifications of Life-Threatening Trauma*, TRIAL, Feb. 1987, at 63.

PTSD, however, is not free from criticism. Critics of the disorder have attacked it for its broad definition of an "unusual human experience"[73] and for its subjective nature.[74] This uncertainty causes concern over whether a defendant truly suffers from the disorder or whether the disorder is contrived.[75]

B. Battered Woman Syndrome

In the earliest stages of the development of battered woman syndrome (BWS), women battered by their male partners attempted to use PTSD as an excuse for wounding or killing their abusers.[76] Unfortunately, these women encountered several difficulties in meeting the stringent requirements of PTSD. One difficulty was that PTSD required a defendant to assert the primary defense of insanity and to suffer specific symptoms.[77] Battered

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73. Mary Ann Dutton, Ph.D. & Lisa A. Goodman, Ph.D., *Posttraumatic Stress Disorder Among Battered Women: Analysis of Legal Implications*, 12 BEHAV. SCI. & L. 215, 216 (1994). The authors note that, in the future, this criticism may become more significant considering the definition of post traumatic stress disorder proposed in the draft of DSM-IV. *Id.* The proposed DSM-IV draft eliminates the requirement that the traumatic event be outside the realm of usual human experience. *Id.* The new definition would require the person to experience, witness, or be confronted with an event that involved or threatened death or serious injury, and followed with intense fear, helplessness, or horror. *Id.*

74. Roger K. Pittman, M.D. & Scott P. Orr, Ph.D., *Psychophysiologic Testing for Post-Traumatic Stress Disorder: Forensic Psychiatric Application*, 21 BULL. AM. ACAD. PSYCHIATRY L. 37, 39 (1993). Current psychiatric evaluations for post traumatic stress disorder rely on self-reports and personal perceptions, and are, therefore, subjective in nature. *Id.* In an attempt to increase objectivity, psychiatrists have studied psycho-physiological responses in post traumatic stress disorder patients. *Id.* at 41. Thus far, researchers have detected an increase in heart rate and blood pressure amongst individuals who suffer from post traumatic stress disorder when the patients were exposed to stimuli associated with their trauma. *Id.* However, physiological evidence has not yet been presented in any legal trial. *Id.* at 50.

75. CHARLES J. SYKES, A NATION OF VICTIMS: THE DECAY OF AMERICAN CULTURE 39 (1992). One must also question the interviewer's integrity when giving a diagnosis. For example, a test was conducted in which eight "eminently normal" individuals sought to gain admission to a psychiatric hospital. *Id.* The participants, however, did not possess any recognizable symptoms of a psychological disorder. *Id.* However, all eight gained admission to the hospital. *Id.* During the hospital interview, one participant took notes to record his experiences. *Id.* The interviewer noted on the patient's record that the patient engaged in unusual "writing behavior." *Id.*

76. Dutton & Goodman, *supra* note 73, at 215. Some researchers contend that the psychological responses of women involved in violent relationships resemble the psychological responses of hostages or prisoners of war and, thus, battered women could possibly be diagnosed with post traumatic stress disorder. Gail D. Rodwan & Jeanice Dagher-Margosian, *The Battered Woman as Criminal Defendant*, 73 MICH. B.J. 912, 917 (1994).

77. Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1199 (1993).

women, however, did not claim to be insane, but rather perceived their actions to be a matter of self-defense.[78] Another difficulty was that abused women did not always suffer all of the symptoms necessary for a diagnosis of PTSD.[79] While battered women could not squarely meet the requirements of PTSD, courts have increasingly allowed admission of evidence regarding BWS to excuse women accused of wounding or killing their abusive partners. After nearly fifteen years of struggle, evidence of the BWS is admissible in nearly every state.[80]

Traditionally, courts did not accept evidence of abuse because an abuse defense did not fit neatly within the boundaries of self-defense.[81] The actions of the battered woman failed to conform to the elements of self-defense in three aspects. First, battered women had difficulty proving an imminent perceived danger at the time of the attack[82] and, second, that the amount of force exerted against their attacker was reasonable.[83] Finally, there was often a means by which the battered woman could safely retreat rather than resort to deadly force, but she failed to do so.[84] These three

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78. *Id.*

79. *Id.* at 1199-1200.

80. *See* People v. Aris, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989); Knock v. Knock, 621 A.2d 267 (Conn. 1993); Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979); Hawthorne v. State, 408 So. 2d 801 (Fla. Ct. App. 1982); Smith v. State, 277 S.E.2d 678 (Ga. 1981); People v. Minnis, 455 N.E.2d 209 (Ill. App. Ct. 1983); State v. Green, 652 P.2d 697 (Kan. 1982); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Hennum 441 N.W.2d 793 (Minn. 1989); State v. Kelly, 478 A.2d 364 (N.J. 1984); State v. Gallegos, 719 P.2d 1268 (N.M. 1986); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983); Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989); State v. Wilkins, 407 S.E.2d 670 (S.C. 1991); State v. Furlough, 797 S.W.2d 631 (Tenn. 1990); Fielder v. State, 756 S.W.2d 309 (Tex. 1988); State v. Allery, 682 P.2d 312 (Wash. 1984); *see also* James O. Pearson, Jr., Annotation, *Admissibility of Expert or Opinion Testimony on Battered Wife or Battered Woman Syndrome*, 18 A.L.R.4th 1153 (1982 & Supp. 1994) (citing many of the foregoing cases).

81. Stephanie B. Goldberg, *Fault Lines*, A.B.A. J., June 1994, at 44. "It was like fitting a square peg into a round hole," comments Charles P. Ewing, psychologist and law professor at the State University of New York at Buffalo. *Id.*

82. See *supra* note 22 and accompanying text for a discussion of the "imminence" requirement of self-defense; *see also* State v. Stewart, 763 P.2d 572, 577 (Kan. 1988) (giving self-defense instruction is erroneous where husband-victim was asleep); State v. Norman, 378 S.E.2d 8, 13-16 (N.C. 1989) (sleeping husband-victim did not pose an imminent threat or danger to defendant and did not support instructions of self-defense); State v. Liedholm, 334 N.W.2d 811, 816-17 (N.D. 1983) (stating self-defense measure is subjective but imminence definition does not extend to a sleeping husband-victim).

83. See *supra* note 23 and accompanying text for a discussion of reasonable force in the context of self-defense. Battered women often combat their mates' fists and verbal threats with deadly force. *Legal Responses to Domestic Violence* (pt.5), 106 HARV. L. REV. 1574, 1577 (1993).

84. See *supra* note 25 and accompanying text for a discussion on the rule of retreat, specifically noting that a person attacked in his home has no duty to retreat.

obstacles typically arose because the cases involved an instance where the abused woman wounded or killed her partner while he slept or during a lull in the violence and not in the heat of a violent situation.[85]

Dr. Lenore E. Walker, a clinical and forensic psychologist, developed the theory of BWS to justify a woman's retaliation against her abusive partner at a time of relative calm.[86] In Walker's explanation of the relation of self-defense and BWS, she identifies three phases in the abuse cycle: tension building,[87] acute battering[88] and loving contrition.[89] Together the theory behind the three phases help battered women overcome the obstacles encountered with self-defense.

Walker's cycle theory enables battered women to meet the required elements of self-defense. First, the theory of BWS explains that the abused woman perceives herself to be in a constant state of fear as there is not a predictable time duration for each phase of the abuse cycle. Therefore, the woman *always* perceives herself to be in imminent danger.[90] Second, the theory states that a woman is justified in using deadly force because she has experienced past beatings which have trained her to foresee encroaching violence and estimate its impact.[91] Finally, Walker's theory argues that in most instances the violence occurs in the

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85. People v. Aris, 264 Cal. Rptr. 167, 178 (Cal. Ct. App. 1989) (stating it is common for the abused wife to kill her partner while he sleeps); Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 409 (1988) (discussing that battered women who kill their abusive partners often do so during a "non-confrontational" period).

86. *Aris*, 264 Cal. Rptr. at 177.

87. Ibn-Tamas v. United States, 407 A.2d 626, 634 (D.C. 1979). In the "tension building" stage, small incidents of abuse occur and agitation grows between the male and female. *Id.* It is in this stage that the battered woman typically retaliates against her assailant, because she fears a severe battering will soon follow. *Aris*, 264 Cal. Rptr. at 178. However, it is also common for the battered woman to kill her abusive mate while he sleeps. *Id.* In this instance, it is often the case that the acute battering is not complete, and the woman believes a severe beating will continue when the abuser awakes. *Id.*

88. *Legal Responses to Domestic Violence*, *supra* note 83, at 1578. During "acute battering," the abuser falls into an uncontrollable rage and the beatings are most severe. *Id.*

89. *Ibn-Tamas*, 407 A.2d at 634. In the "loving contrition" phase, the batterer expresses remorse for beating his partner and promises that the abuse will stop. *Id.*

90. Fennell v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985). Because there is no definite time frame in which each phase of the cycle is to occur, the battered woman is in a constant state of fear. *Id.*

91. *Aris*, 264 Cal. Rptr. at 177 (quoting Dr. Walker's testimony on a battered woman's greater sensitivity to violence). *But see* Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 52 (discussing inconsistencies in the theory of battered woman syndrome).

home, a location in which most jurisdictions do not require one to retreat[92] before retaliating with violence. In addition to this analysis, the theory explains that the abused woman does not leave the abusive relationship because she suffers from learned helplessness,[93] a psychological paralysis. Despite the obstacles faced in proving self-defense, women have successfully presented evidence of BWS and have succeeded in receiving lesser sentences or acquittals.[94]

Legal scholars have criticized the idea of BWS as a defense.[95] Specifically, critics claim that the results of Walker's studies are inconsistent with her conclusions.[96] Also, critics have questioned Walker's survey techniques.[97] However, despite the skepticism, courts in nearly every jurisdiction admit evidence regarding BWS.[98]

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92. See *supra* note 25 and accompanying text for a discussion of retreat and the right to stand one's ground in his dwelling place.

93. People v. Romero, 13 Cal. Rptr.2d 332, 336 (Cal. Ct. App. 1992); State v. Kelly, 478 A.2d 364, 377 (N.J. 1984); People v. Torres, 488 N.Y.S.2d 358, 361-62 (N.Y. Sup. Ct. 1985); Dutton, *supra* note 77, at 1208 (1993). The theory of learned helplessness suggests that because the abused woman is subjected to random, unprovoked attacks, she learns that there is no connection between her behavior and violence. *Id.* Therefore, after repetitive beatings, the woman becomes passive and compliant and believes she cannot leave the relationship. *Romero*, 13 Cal. Rptr.2d 332, 336.

Another explanation for why the battered woman remains with her partner is that she hopes the affection displayed during the loving contrition stage is real and that the abuse will stop. *Legal Responses to Domestic Violence*, *supra* note 83, at 1578. Further, terminating the relationship may subject the woman and children to adverse economic conditions. People v. Day, 2 Cal. Rptr.2d 916, 923 n.4 (Cal. Ct. App. 1992). Finally, many battered women fear severe retaliation from their abusers should they attempt to flee. Joan Zorza, *Women Battering: High Costs and the State of the Law*, CLEARINGHOUSE REV., spec. issue 1994, at 386.

94. *See Romero*, 13 Cal. Rptr.2d at 342 (citing Schuller, *The Impact of Battered Woman Syndrome Testimony on Jury Decision Making*, 10 WINDSOR Y.B. ACCESS TO JUSTICE 116-17 (1990)). The Schuller article reports a study of 44 cases which attempted to admit evidence of battered woman syndrome. *Id.* Eighteen of the 44 excluded evidence of battered woman syndrome and consequently, all 18 women were convicted. *Id.* However, 26 cases admitted evidence of battered woman syndrome and in one-third the women were acquitted. *Id.*

95. *See, e.g.*, Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45; David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986).

96. *See* Faigman, *supra* note 95, at 636 (suggesting that Walker's conclusion that battered women are passive and compliant is contrary to Walker's interviews).

97. *Id.* at 636-37. Specifically, Walker is criticized for asking closed-ended questions during her interviews with battered women. *Id.* at 637.

98. See *supra* note 80 for a listing of cases accepting evidence of battered woman syndrome.

C. Battered Child Syndrome

The success of BWS as a defense has increased the likelihood that other abused groups will submit similar testimony. And so they have. Battered child syndrome, like BWS, has emerged as an excuse to justify children's killings of their abusive parents.[99]

Battered child syndrome faces the same obstacles as BWS in reshaping the law of self-defense. Typically, the child attacks the parent at a time when the parent poses little or no threat, and the parent is in a vulnerable state, perhaps sleeping.[100] Therefore, the child has difficulty proving an imminent threat existed to warrant the use of deadly force.[101] Battered child syndrome, though not as widely accepted as BWS, is gaining recognition by state legislatures and courts.[102]

III. THE THEORY OF BLACK RAGE AND A COMPARISON OF BLACK RAGE TO PTSD AND BWS

The acceptance of abuse defenses has transformed America into a nation of victims.[103] This victimization has led to increased assertions of novel abuse defenses. America's new culture asserts an instinctive readiness to blame someone for every misfortune. Explanations for disadvantages are based on theories of

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99. DERSHOWITZ, *supra* note 3, at 21-25. In the United States, it is estimated that parricides account for two percent of all homicides or 300-400 homicides each year. Renee Cordes, *Self-Defense Claims Gain Acceptance in Parricide Cases*, TRIAL, Mar. 1993, at 11.

100. Cordes, *supra* note 99, at 11.

101. Jamie H. Sacks, Comment, *A New Age of Understanding: Allowing Self-Defense Claims for Battered Children Who Kill Their Abusers*, 10 J. CONTEMP. HEALTH L. & POL'Y. 349, 350 (1994).

102. *See e.g.*, TEX. PENAL CODE ANN. § 19.03 (West 1993) (allowing juries to hear evidence of domestic violence as a defense to killing a family member, including evidence in parricide cases); Gilstrap v. People, 450 S.E.2d 436, 439 (Ga. Ct. App. 1994) (Andrews, J., concurring) (stating the Georgia Supreme Court has determined that expert testimony concerning battered child syndrome is admissible); State v. Janes, 822 P.2d 1238, 1243 (Wash. Ct. App. 1992) (suggesting no reason to limit recognition of an abusive relationship defense to only women).

103. SYKES, *supra* note 75, at 38-39. Partly to blame for the increased number of therapeutic defenses asserted in American courts is health researchers' strong interest in discovering "new disorders." *Id.* Dr. Bernie Zilbergeld, author of SHRINKING OF AMERICA (1983), explains that today mental health researchers call attention to symptoms otherwise ignored and label them as a type of neurosis. *Id.* The logic behind this is that increased pathology means an increased need for studies, more therapists, and more therapy. *Id.*

In a study illustrating Zilbergeld's theory, an actor who played the role of a happy, relaxed man interested in therapy entered a therapy session. *Id.* at 39. Surprisingly, only 38% of the therapists diagnosed the actor as "healthy." *Id.* Forty-three percent of the therapists concluded that the actor was psychotic or neurotic and 19% concluded that he suffered "mild symptoms." *Id.*

sexism, racism, illness, rotten childhood, poor education, or anything else which can project guilt onto others.[104] The most recently developed abuse defenses are far more creative than the previously accepted excuses of PTSD and BWS.

For example, a San Francisco jury accepted the "Twinkie defense" in which the defendant claimed mental incapacity after consuming large quantities of junk food.[105] Ultimately, the jury reduced the charges against the defendant from murder to involuntary manslaughter.[106] Similarly, a Florida court heard the "television defense" asserted by a fifteen-year-old boy who claimed watching violent television programs drove him to kill an eighty-two-year-old woman.[107]

The most recent abuse defense to evolve is "black rage."[108] Specifically, an African-American defendant who relies on the black rage defense seeks to absolve his criminal conduct on the basis of years of oppression and racist hostility which African-Americans endured at the hands of white Americans.[109] Thus, asserted as a criminal defense, the African-American defendant seeks excuse for violent retaliation against his white victim.

This Part explores the possible validity of black rage. Next, it compares and contrasts black rage to the more generally accepted abuse excuses of PTSD and BWS. Finally, this Part concludes that black rage is distinguishable from PTSD and BWS in critical aspects.

A. Social Sciences and Evidence of Black Rage

Studies indicate that there is no correlation between genetics and crime.[110] Sociologists support this contention by comparing the crime rate between blacks in the United States and blacks in Africa. In Africa, the homicide rate is roughly comparable to that of Western Europe; the American homicide rate among blacks is three to five times higher than that of blacks in Africa.[111]

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104. SYKES, *supra* note 75, at 11-12.

105. DERSHOWITZ, *supra* note 3, at 339.

106. *Id.*

107. Zamora v. Dugger, 834 F.2d 956, 958 (11th Cir. 1987). Ultimately, the court rejected the "television defense" and found Zamora guilty of murder. *Id.*

108. See *supra* notes 14-15 and accompanying text for details of the Ferguson case.

109. WILLIAM H. GRIER & PRICE M. COBBS, BLACK RAGE 4 (1968). Black rage was first examined by the black psychiatrists William H. Grier and Price M. Cobbs, authors of BLACK RAGE (1968). The theory posits that African-Americans have endured too much oppression and cannot bear any more and, therefore, are "turning to their tormentors [white Americans], filled with rage." *Id.*

110. ANDREW PEYTON THOMAS, CRIME AND THE SACKING OF AMERICA 213 (1994).

111. *Id.*; CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 123 (1978) (suggesting that since genetics does not increase one's propensity to commit

However, the difference in the crime rate between blacks and whites in the United States is great. Although African Americans make up approximately 12% of the United States population, they constitute 55% of convicted murders, and 49% of murder victims.[112] Some blame the disparity between crime and race on environmental differences between blacks and whites.[113]

To explain this disparity, black rage theorists posit that because African-Americans have endured years of racial discrimination and inequality, they suffer pent-up frustration. This frustration leads the defendant to retaliate against members of the white race. In particular, the theory holds that from the beginning of black slavery until today, whites have stripped blacks of their heritage.[114] According to the black rage theory, an African-American defendant holds the white race responsible for African-Americans' poor education, poverty and high unemployment.[115]

1. Education

Education is one area in which blacks have endured discrimination which has facilitated oppression. Lack of educational opportunities for African-Americans began with the introduction of slavery in America in 1650.[116] While enslaved, blacks were rarely granted the privilege of education and were generally forbidden to read or write.[117] Despite the abolition of slavery in 1865, remnants of racial inequality in education still linger today.[118]

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a crime, then violence is something learned through one's environment).

112. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 16-17 (1992).

113. THOMAS, *supra* note 110, at 213.

114. GRIER & COBBS, *supra* note 109, at 25 (explaining that black history has been forgotten because little record was kept of the first Africans brought to the United States).

115. SILBERMAN, *supra* note 111, at 123.

116. Joe Feagin, *Slavery Unwilling to Die: The Background of Black Oppression in the 1980s*, J. BLACK STUD., Dec. 1986, at 177.

117. WINTHROP JORDAN, THE WHITE MAN'S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES 63 (1974). Even more absurd than African Americans not being given the opportunity to earn an education is the fact that African-American slaves were not granted the right of citizenship. Dread Scott v. Sanford, 60 U.S. (19 How.) 393, 393 (1857). The Court in *Scott* stated:

> A free Negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a 'citizen' within the meaning of the Constitution of the United States. [Therefore], [w]hen the Constitution was adopted, they were not regarded in any of the States as members of the community which constituted the State, and were not numbered among its 'people or citizens.' Consequently, the special rights and immunities guarantied [sic] to citizens do not apply to [blacks]. And not being 'citizens' with the meaning of the Constitution, they are not entitled to sue in that character in a court of the United States.

Id.

118. The institution of slavery was abolished by the ratification of the Thirteenth

The United States Supreme Court decision in *Brown v. Board of Education*[119] and the Civil Rights movement of the 1950s and 1960s were the first major attempts to foster equality of education between the races. However, a broad educational gap between blacks and whites persist today, suggesting the shortcomings of the equality movement. For example, a 1990 study of inner-city Milwaukee schools revealed that fewer than one-third of black students graduated from high school.[120] The study further revealed that the average grade point average for African-American students was an F-plus.[121]

A Chicago-area study explained that the significant gap in performance between black and white children was partially due to the failure of teachers to warn African-American parents of their children's poor academic performance.[122] Researchers attributed the failure to warn minority students and their parents of academic trouble to the teachers' beliefs that disadvantaged black students were on the verge of mental breakdown caused by outside environmental pressures.[123] Therefore, in an effort to protect the students from undue stress, teachers hesitated to report academic difficulties.[124] In doing so, the teachers continued to give positive reinforcement to the minority child and never brought the problem of potential failure to the attention of the child or his parents. This behavior significantly stalled the progress of minorities and was blamed on lingering racism.[125]

Amendment to the United States Constitution. U.S. CONST. amend. XIII, § 1. However, although the Thirteenth Amendment ended slavery, freed African-Americans were still not considered "citizens" of the United States and thus, not afforded constitutional liberties. WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 479 (9th ed. 1993). Hence, the Fourteenth Amendment was ratified in 1868 to grant citizenship to freed African-Americans and to guarantee them equal protection of the laws. U.S. CONST. amend. XIV, § 1. However, despite the passage of the amendments, America was reluctant to change. In *Plessy v. Ferguson*, the United States Supreme Court endorsed the notion of "separate but equal" by holding that the objective of the Fourteenth Amendment was to guarantee equality between the races, and not commingling between the races. 163 U.S. 537, 543-44 (1896).

119. 347 U.S. 483 (1954). The *Brown* decision was the first time the Court questioned the validity of the "separate but equal" doctrine in public education. *Brown* questioned whether segregation in public schools, based solely on race, deprived black children of an equal education, even when the schools were comparable in all tangible aspects. *Id.* at 493. The Court decided that segregation had no place in American public education. *Id.* at 495.

120. SYKES, *supra* note 75, at 115.

121. *Id.*

122. *Id.* at 116.

123. *Id.*

124. *Id.* (quoting the Los Angeles math teacher, Jaime Esclante, whose success in teaching inner-city students was illustrated in the movie STAND AND DELIVER (Warner 1988)).

125. SYKES, *supra* note 75, at 115.

2. Employment

Inadequate education adversely affects occupational opportunities for African-Americans. This in turn leads to increased frustration and oppression. The history of job inequality between blacks and whites likewise stems from the abolition of slavery. After 1865, blacks were freed without education, money, or skills.[126] As a result, most blacks were forced to remain involved in semi-slavery positions such as share-cropping or service-oriented jobs resembling house-slaves of the past era.[127] In the 1930s, African-Americans continued to face job discrimination as they were forced out of their jobs, not because they were unqualified, but because white Americans began to seek employment in job areas typically considered to be "African-American"-type jobs.[128]

Employment inequality led to affirmative action plans in the 1960s and 1970s.[129] Despite these programs, continued employment inequality is evident by the high unemployment rate of

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126. Feagin, *supra* note 116, at 181.

127. *Id.* at 182.

128. SILBERMAN, *supra* note 111, at 129-30. At times African-Americans dominated skilled and semi-skilled labor. *Id.* However, during the Depression, as jobs became scarce, white Americans began to seek "African-American" jobs. *Id.* For example, in 1865 African-Americans monopolized jobs within the construction industry, occupying 80% of the skilled jobs. *Id.* at 130. By 1930, however, African-Americans occupied only 17% of the jobs in the construction area. *Id.* Similar situations were experienced in the railroad industry. *Id.*

129. The Civil Rights Act of 1964 was the first modern statutory provision against discrimination in employment and public accommodations. BUREAU NAT'L AFF., DAILY LABOR REPORT, U.S. COMM'N ON CIVIL RIGHTS BRIEFING PAPER ON AFFIRMATIVE ACTION, Apr. 4, 1995, at 64-65. Affirmative action policies emerged in 1961 with President Kennedy's establishment of the Committee on Equal Employment Opportunity. *Id.* at 63. The goal of the affirmative action plan was to aid historically disadvantaged minorities and attempt to remedy the effects of past discrimination. *Id.* Contrary to popular belief, affirmative action plans were not meant to impose racial quotas. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 272 (1978) (holding that strict racial quotas for medical school admissions were unconstitutional).

The Supreme Court seemingly espouses a similar attitude to the theory that race should not necessarily provide certain privileges. *See* Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 2113 (1995) (holding that all affirmative action programs, whether implemented by federal, state or local government, were subject to the test of strict scrutiny). The *Adarand* Court stressed that the Fifth and Fourteenth Amendments protect persons, and not entire groups. *Id.* at 2112. The Court further stated that preferential treatment based on race actually fuels racism rather than reduces it; thus, affirmative action programs delay the time in which race will become irrelevant. *Id.* at 2113. In the opinion for the majority, Justice O'Connor concluded that the Court's decision does not terminate all affirmative action programs; rather applying strict scrutiny to affirmative action programs is the only way to ensure that such programs are consistently construed and truly further a compelling interest. *Id.* at 2117.

blacks in comparison to whites. In 1993, the unemployment rate of African-Americans was more than double that of white Americans.[130] Consequently, the median income among working blacks was only about half that of the income of whites.[131]

3. Poverty

Proponents of the black rage theory contend that the lack of education and employment opportunities for African-Americans is responsible for keeping blacks in poverty and in crime-ridden ghettos. Poverty further fuels black rage because with poverty comes substandard housing, malnourishment and inadequate medical care.[132] Poverty further alienates African-Americans from mainstream society because there is a heavy reliance on welfare, perpetuating shame and scorn.[133]

Moreover, many researchers have accepted that there is a causal relationship between poverty and crime,[134] indicating that blacks have a higher tendency to commit crime solely because of their poor economic situations. This was confirmed by the 1968 Kerner Commission report which held that poverty and racism were the chief causes of crime in the black ghettos and concluded that white racism was responsible.[135] Sociologists have explained the close relationship between poverty and violence through the "strain theory."[136]

The "strain theory" hypothesizes that crime is a result of a criminal's inability to legally obtain property.[137] As a result of this inability, the criminal experiences "strain" between his goal of achieving the American dream and the viability of his means of obtaining it.[138] The strain is presumably caused by society's portrayal of wealth as a measure of success.[139] Thus, the only way to obtain material items which society flaunts is to resort to

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130. U.S. DEP'T OF JUSTICE, STATISTICAL ABSTRACT OF THE UNITED STATES 396 (1994). The unemployment rate for whites for 1993 was 6%, as compared to 12.9% for blacks. *Id.*

131. *Id.* at 464. The median income for blacks in 1992 was $18,660 as compared to the white median income of $32,368. *Id.*

132. ALEXANDER THOMAS, M.D. & SAMUEL SILLEN, PH.D., RACISM AND PSYCHIATRY 67 (1972).

133. CARL HUSEMOELLER NIGHTINGALE, ON THE EDGE: A HISTORY OF POOR BLACK CHILDREN AND THEIR AMERICAN DREAMS 2-3 (1993).

134. THOMAS, *supra* note 110, at 138 (stating that the poverty-causes-crime theory has been uncritically accepted).

135. *Id.* at 213.

136. *Id.* at 136-37.

137. *Id.*

138. *Id.*

139. SILBERMAN, *supra* note 111, at 89 (discussing theories of sociologist, Robert Menton).

crime. The result is to pity rather than to punish the poverty-stricken individual who turns to crime because somehow society has let him down.[140]

B. The Combination of Factors Causing Black Rage

The lack of opportunities in education, economics and employment are interconnected. Lack of education leads to unemployment, which in turn leads to greater poverty. The ultimate result is that many African-Americans live in substandard conditions and resort to crime. Some African-Americans view this cyclical oppression as part of a white conspiracy created to insure that blacks remain inferior.[141]

According to the conspiracy theory, an African-American who successfully breaks the barriers of racial oppression and achieves social and political clout will be discredited and destroyed by the white government eager to maintain the status quo.[142] In a 1990

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140. *Id.*

141. SYKES, *supra* note 75, at 213-14.

142. *Id.* The conspiracy theory is so strong that African-American public officials accused of misconduct have used the conspiracy theory and played the card of racism to gain support to justify their misconduct rather than to condemn it. A prime example is the conduct of Marion Barry, Mayor of Washington, D.C. Barry was videotaped smoking a pipe full of crack cocaine in a hotel room at the Vista Hotel. Charles C. Lemey, *The Barry Tape, Yes and No*, WASH. POST, July 4, 1990, at A18. Immediately after being charged, Barry sought to escape liability by claiming that the FBI videotape was a setup and ultimately, a "racist plot to topple a prominent black leader." *Washington's Mayor Barry: Hypocrite to the End*, NEWSDAY, Aug. 15, 1990, at 54. However, as a result of the videotape and subsequent drug conviction, Barry was not perceived by African-Americans as a "drug addict" but rather, as a victim of a white conspiracy. SYKES, *supra* note 103, at 211.

Shortly after the drug charges, Barry attended a National Conference of Black Mayors in New Orleans. *Id.* Although the focus of the conference was on drug prevention, Barry was welcomed with a standing ovation and hailed as an African-American hero. *Id.* Ironically, after serving a six month jail sentence, Barry was reelected mayor. Lois Romano, *Walsh Comes to Shove*, WASH. POST, Nov. 11, 1994, at D3. However, Barry currently faces new legal troubles. The FBI is currently investigating reports of illegal use of campaign funds and alleged attempts made to silence witnesses by providing jobs. Ronald J. Ostrow & Robert L. Jackson, *Inquiry into Campaign Funds Use Adds to Barry's Woes*, L.A. TIMES, Apr. 13, 1995, at A12. Barry's new problems arise from allegations that his wife illegally converted campaign funds for use by a relative. *Id.*

The defense team in the O.J. Simpson trial also seeks to blame the "white conspiracy" for murder charges brought against the former football star. David Margolick, *Tales of Racism on the Simpson Jury*, N.Y. TIMES, Apr. 14, 1995, at A1. Simpson's attorneys proffered evidence that the Los Angeles Police Department engaged in a conspiracy to frame Simpson by planting evidence and dousing exhibits with Simpson's blood. *Id.* As a result, Johnnie Cochran, Jr.'s closing argument made sweeping charges of racism and asked the jury to stand up and send a message to police-abetted racism. Douglas J. Kmiec, *Dissecting the 'Trial if the*

New York Times/CBS poll of 1,047 New Yorkers, 77% of blacks surveyed stated that there might be truth to the notion that the government deliberately seeks to discredit black officials.[143] In the same poll, 60% of blacks reported that it may also be true that the government deliberately makes drugs easily accessible in black ghettos in order to harm black people.[144] Further, 29% indicated a belief that government deliberately created AIDS in order to wipe out black society.[145]

Proponents of the black rage theory assert that because of continued oppression by white Americans, the African-American defendant feels aggression toward his tormentor.[146] In order to survive, the African-American develops "cultural paranoia" in which every member of the white race is a possible enemy.[147] Cultural paranoia in turn results in an African-American acting on his fear and committing violence against white members of society.

Sociologists use the "frustration-aggression" theory to describe the process by which oppression leads to aggression.[148] First, the oppressed party must suffer from shame and alienation.[149] Shame involves emotions of separation and hurt includ-

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Century', CHI. TRIB., Oct. 4, 1995, at 19. On October 3, 1995, the Simpson jury consisting of nine Africa-Americans returned a verdict of not guilty after only three hours of deliberation. Howard Witt, *Jury Acquits O.J. Simpson*, CHI. TRIB., Oct. 3, 1995, at 1. Many African-Americans gathered outside of the courthouse cheered the verdict finding it a victory for African-Americans against the "conspiracy" and portrayed Simpson as a hero. *Id.* Simpson's heroism is evidenced by the fact that Simpson made more money during the year he was on trial than he had the prior year before when he was a free man. H.G. Bissinger, *The Verdict the Whole World Was Watching*, CHI. TRIB., Oct. 8, 1995, at 1.

The Simpson case is not the only case in which African-Americans have fought back against the "white conspiracy." In July 1995, a Baltimore jury consisting of eleven African-Americans acquitted Davon Neverdon despite the testimony of four eyewitnesses who saw Neverdon kill a man in a robbery attempt. *Color Blinded? Race Seems to Play an Increasing Role in Many Jury Verdict*, WALL ST. J., Oct. 4, 1995, at A1. A note from the jury room prior to the Neverdon verdict suggested that "Race may be playing some part in the jury's decision-making." *Id.*

Likewise, in the 1990 Darryl Smith case, a Washington all-black jury acquitted Smith of murder charges. *Id.* A juror anonymously sent a letter to the superior court stating the "didn't want to send anymore Young Black Men to Jail." *Id.* According to jury commentator's, this is not unusual; perhaps African Americans are "getting even" for past white oppression. *Id.*

143. SYKES, *supra* note 75, at 213-14.

144. *Id.*

145. *Id.*

146. THOMAS & SILLEN, *supra* note 132, at 54-55.

147. *Id.*

148. Brendan Gail Rule, *The Hostile and Instrumental Functions of Human Aggression*, *in* ORIGINS OF AGGRESSION 121 (W.W. Hartup & J. DeWit eds., 1979). Aggression is often defined as behavior in which the goal is to injure the person toward whom it is directed. *Id.*

149. THOMAS J. SCHEFF & SUZANNE M. RETZINGER, EMOTIONS AND VIOLENCE:

ing insult, rejection, disapproval and humiliation.[150] One experiences alienation when he ignores his feelings of shame, causing him to feel separated and hurt.[151] Because shame-anger chains can last longer than a lifetime, and hatred can be transmitted from generation to generation in the form of racial prejudice,[152] humiliation experienced by blacks can compound over several generations. Hence, long chains of shame and anger increase resentment between African-Americans and white Americans and lead to blind rage, hatred and ultimately, lethal violence.[153] The frustration-aggression theory is one theory as to why an African-American becomes so enraged as to attack his white enemy because of generations of humiliation.[154]

Although the aggression-frustration theory seeks to explain how oppression can lead to aggressive behavior, the theory does not go so far as to claim that the violent individual suffers from any sort of psychosis.[155] Therefore, a defendant suffering from aggression-frustration is not legally insane. Additionally, although the theory suggests the possibility of oppression leading to anger and aggression, it does not suggest that aggressive behavior is always the end result of frustration. According to the theory, aggression results only if the individual represses his frustration.[156] In short, the theory does not seek to justify criminal conduct but merely to explain the development of intense anger.

SHAME AND RAGE IN DESTRUCTIVE CONFLICTS xix (1991).

150. *Id.* at 65.

151. *Id.*

152. *Id.* at 105.

153. *Id.* at 65-66. The complete theory of aggression proposes that one party causes shame and alienation in another. *Id.* Then, if this shame is repressed, the other person reciprocates with increased attack. *Id.* Finally, tension between the two parties grows and resentment increases, thus leading to rage and violence. *Id.*

154. SYKES, *supra* note 75, at 213-14. Criminologists have found that increased disparity between the races in America correlate strongly with rates of "expressive" homicide among African-Americans, reflecting their levels of frustration. *Id.*

155. In *State v. Alexander*, an African-American defendant was found guilty of two counts of murder for shooting two white Marines who allegedly referred to the defendant as a "black bastard." 471 F.2d 923, 926-27 (D.C. Cir. 1972). The defendant asserted that he suffered from a "rotten social background," because he grew up in a single-parent household in the Watts section of Los Angeles, with little money, love, or attention. *Id.* at 957-58. During the trial, psychiatrists testified that every man is influenced by his background, but that the defendant did not suffer from a recognizable psychiatric disease. *Id.* at 958-59. Ultimately, the defendant's response was not a psychotic reaction but an emotional response. *Id.* This is not an abnormal condition of the mind to meet the threshold of insanity. *Id.* Similarly, a defendant claiming black rage may become angry and enraged at white prejudice and racism. However, based on the findings in *Alexander*, it is assumed that a defendant claiming black rage does not suffer from psychosis.

156. SCHEFF & RETZINGER, *supra* note 149, at 5.

C. Comparison of Black Rage to PTSD and BWS

Assuming, *arguendo*, that PTSD and BWS are acceptable mitigating or exonerating legal defenses, it is important to compare black rage to both excuses. The following analysis compares and contrasts black rage against PTSD and BWS and concludes that black rage resembles neither.

1. Post Traumatic Stress Disorder

Proponents of the PTSD defense argue that while the defendant may not meet the elements of insanity (the inability to determine right from wrong),[157] he can show that a traumatic event, or series of events, is responsible for his diminished capacity. Thus, PTSD operates like a secondary defense to the traditional defense of insanity. Black rage, like PTSD, does not meet the strictures of insanity, because the defendant understands his acts and interprets them as wrong.[158] Instead, a defendant claiming black rage attempts to establish post traumatic stress disorder-type symptoms but falls short. Therefore, as PTSD acts as a secondary defense to insanity, black rage appears to be a secondary defense to PTSD, stretching almost beyond recognition the traditional defense of insanity.

PTSD and black rage differ in two primary aspects. First, it is possible to trace criminal behavior arising out of PTSD to a single person or occasion. Second, criminal conduct committed by a person suffering from PTSD is unanticipated and occurs in response to recurrence of the traumatic event.

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157. Considering the controversy over the proper insanity instruction, for purposes of this section it is assumed that the test for insanity is simply the *M'Naghten* test despite modifications made by different jurisdictions. *M'Naghten* requires the defendant to act under a defect of reason from a mental illness, thus causing him not to understand the nature or quality of his acts. See *supra* Part I(B) and note 30 for a discussion of *M'Naghten*. In other words, the defendant is unable to distinguish right from wrong. It is important to note that federal courts apply a stricter variation of *M'Naghten*. See *supra* notes 44-45 for variations in federal law made by the Comprehensive Crime Control Act.

158. Goldberg, *supra* note 81, at 40. In order to qualify for insanity, a defendant must suffer from a recognizable mental disease or defect. *Id.* Psychiatrists who examined Colin Ferguson after the shooting incident found that Ferguson suffered from paranoid personality disorder. Maureen Fan, *Judge: Ferguson Must Be at Ruling*, NEWSDAY, Dec. 10, 1994, at A4. The psychiatrists stated that paranoid personality disorder is not a psychotic disorder and does not involve a loss of reality and, therefore, is not legal insanity. *Id.*

Furthermore, evidence in the Ferguson trial shows that Ferguson understood the severity of his actions immediately after they occurred. Ferguson allegedly made a statement to the police saying, "I've done a bad thing." *Id.* His statement seems to indicate that he understood his actions and perceived them to be wrong. Thus, Ferguson was not legally insane.

PTSD requires the defendant to experience an event that is outside the realm of usual human experience and that would be distressing to anyone who experienced such an event.[159] The severity of the trauma is measured against perceptions of the average person of like "socio-cultural" values.[160] For instance, a pregnancy is more distressing to one who did not plan the pregnancy than to one who planned to conceive a child.[161] However, the severity of the trauma is the determinative characteristic of a PTSD diagnosis, not one's vulnerability to a certain stressor.[162]

In order to qualify under a diagnosis of PTSD, the traumatic experience must be of a degree to cause the individual person intense fear and anxiety.[163] Examples of traumas sufficient for PTSD include: a brutal rape or sexual assault; a severe national disaster; a threat to one's life; a serious threat to an immediate family member or friend; or witnessing another person being injured, killed, or tortured.[164]

It is debatable whether a person suffering from black rage has experienced an event of such unusual and traumatic magnitude as to meet the threshold of PTSD.[165] Unfortunately, discrimination is not a new phenomenon in society and is experienced, at one time or another, by nearly every member of society. People face discrimination based not only on race but also on religion, gender, sexual orientation, economic status, intelligence, employment, height, weight and even fashion sense or hair style. Thus, discrimination is not an unusual experience for individuals to face.

Some may argue, however, that African-Americans have been subjected to much greater amounts of racism and oppression than other members of society. However, other groups of individuals have also endured significant amounts of racism and oppression. For example, women have faced generations of discrimination and unequal opportunity in education and employment. More concrete examples include the oppression of Jews in Nazi Germany and of

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159. DSM-IIIR, *supra* note 67, at 250.

160. *Id.* at 19.

161. *Id.*

162. *Id.*

163. *See, e.g.,* Romaguera v. Piccadilly Cafeterias, 648 So. 2d 1000, 1006 (La. Ct. App. 1994) (holding that shooting victim may recover damages for post traumatic stress disorder).

164. DSM-IIIR, *supra* note 67, at 248. The stressor must be an immediate, obvious, severe, life-threatening incident of such a high caliber that the victim has no perceptual control. United States v. Kozminski, 821 F.2d 1186, 1207 (6th Cir. 1987).

165. *See e.g.*, People v. Thomas, 647 N.E.2d 983, 991 (Ill. 1995) (determining that evidence of low IQ and abusive childhood is not sufficient to warrant post traumatic stress disorder).

Cambodian refugees during the 1980s. Hatred toward these groups resulted in torture and slaughter, yet these groups do not claim "Jewish rage" or "Cambodian rage" as justification for violence or criminal conduct.[166]

Moreover, criminal conduct resulting from PTSD directly results from recurrence of the traumatic event or stimuli closely associated with the event. The defendant appears relatively calm and suddenly loses control of his actions when he experiences stimuli he associates with the past traumatic occasion. For example, a Vietnam veteran may adversely react when within earshot of a backfiring automobile or helicopter, because the sound "throws him back" into the conditions of the Vietnamese jungle.[167]

When a defendant alleges black rage, however, he makes a blanket accusation of racism; there is not one particular crisis on which he blames his crime. He simply professes that he is a victim of a rotten society[168] and finds no other explanation for it but racism. Further, it is questionable whether the defendant's accusations of racism are well-founded. While a defendant perceives his lack of education or employment to be the result of racism, his assumptions are not necessarily accurate. Many factors aside from racism play a role in achieving education and employment.

The reader should bear in mind that this Note does not con-

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166. It is not debated, however, that the events endured and witnessed by the Jews and Cambodians are of the proper caliber to warrant a diagnosis of post traumatic stress disorder. Specifically, survivors of the Nazi death camp are one example of a victims prone to post traumatic stress disorder. United States v. Kozminski, 821 F.2d 1186, 1206 (6th Cir. 1987). See also *supra* Part II(A) for a full analysis of factors warranting a diagnosis of post traumatic stress disorder.

167. *Kozminski*, 821 F.2d at 1206.

168. A similar defense to black rage, that of rotten social background, was contemplated in *Alexander*, 471 F.2d 923, 957-65 (D.C. Cir. 1973). The defendant sought to introduce evidence of socioeconomic deprivation as a mitigating factor against charges of murder. *Id.* at 957-65. The district court excluded evidence of a "rotten social background" and the appellate court affirmed. *Id.* at 958. The court reasoned that there is no option but to hold each individual criminally liable for his own actions because rotten social background is not a workable test. *Id.* at 964. Although psychosis may be an irrational test for criminal responsibility, it has recognizable symptoms. *Id.*

The rotten social background defense is similar to black rage in the sense that the defendant blames his anger on his poor socioeconomic status. However, the rotten social background defense appears to justify crime against any individual whether yellow, black, or white. Black rage, on the other hand, specifically seeks to excuse black-on-white offenses, focuses more on the length of discrimination, and happens also to encompass one's substandard environment. *But see* Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQUALITY 9 (1974) (arguing rotten social background can be an acceptable criminal defense).

tend that African-Americans cannot legitimately rely on a PTSD defense when appropriate. Certainly, it is not unlikely that an African-American may witness a murder of a friend or loved one, especially in urban ghettos.[169] Undoubtedly, this is a traumatic event which may fall under the definition of PTSD.[170] However, should the eyewitness to this tragedy be an African-American and should it lead to some adverse act, this is not black rage. Black rage develops from years of racial oppression, not from witnessing a murder. Regardless of the color of his skin, the eyewitness simply suffers from PTSD.

Additionally, even if a defendant claiming black rage actually suffers from white oppression, some event would necessarily have to occur in order for the defendant to "relive" his horrors of racism. In the case of Colin Ferguson,[171] for example, there was no evidence of racially hostile actions performed by the white passengers which would have prompted Ferguson to shoot them. The passengers sat quietly in their seats reading their newspapers when an unprovoked Ferguson opened fire upon them.[172]

Therefore, black rage shares none of the distinctive characteristics of PTSD. Discrimination does not appear to be an incident outside the realm of usual human experience and is not as traumatic as threats to life and limb. Additionally, the black rage theory relies on blanket accusations of oppression which cannot be linked to one traumatic occurrence. According to the theory of black rage, everyone is a possible victim of retaliation. For all of these reasons, black rage is significantly different than PTSD.

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169. A recent 1991 study revealed that at some point in their lives, 39% of middle class Detroit citizens were exposed to a traumatic event identifiable under post traumatic stress disorder. N. Breslau et al., *Traumatic Events and Post Traumatic Stress Disorder in an Urban Population of Young Adults*, 48 ARCHIVES GEN. PSYCHIATRY 216-22 (1991). Of those exposed to traumatic events, 25% proceeded to develop post traumatic stress disorder. *Id.*

170. The requisite traumatic nature of an event is based upon the perceptions of an average person of like socio-cultural values as the defendant. DSM-IIIR, *supra* note 67, at 18-19. It is debatable, however, whether an individual exposed to a high frequency of violent occurrences may continue to categorize such occurrences as traumatic to qualify under post traumatic stress disorder. *Id.* Therefore, it may be that an individual may become so "immune" as not to qualify under post traumatic stress disorder. *Id.*

171. Due to the lack of other examples, this section uses the case of Colin Ferguson to illustrate a possible scenario in which black rage may apply. See *supra* notes 14-15 for details of the Ferguson case.

172. John T. McQuiston, *In the Bizarre L.I.R.R. Trial, Equally Bizarre Confrontations*, N.Y. TIMES, Feb. 5, 1995, at 13LI (quoting a passenger who stated he was merely sitting on the train anxious to get home to his family when Ferguson began shooting).

2. Battered Woman Syndrome

Black rage is also distinguishable from BWS. The two syndromes are similar in that in both, defendants perceive themselves as victims and retaliate against their perceived assailants. Additionally, both theories claim that their sufferers have no alternative to escape their assailant's wrath and, therefore, are acting in self-defense or as a result of provocation. Despite these likenesses, two important dissimilarities distinguish the two defenses.

First, a battered woman is physically abused by her husband, lover, or boyfriend. Similarly, an African-American defendant is psychologically abused by white Americans. However, when a battered woman strikes, she strikes out against the root of abuse — her abuser. An African-American experiencing black rage retaliates against perceived oppression and racism, and attacks any white person. The attacked person, however, is not necessarily the root of the attacker's oppression. In fact, the African-American may never have had any prior contact with his particular victim. The black defendant is, in essence, retaliating against white society as a whole.

Second, when a battered woman wounds or kills her abuser, she isolates herself from future violence from her assailant. However, when a victim of black rage "retaliates" against a particular white individual, he does not extinguish racism nor oppression against African-Americans. Therefore, black rage significantly differs from BWS.

In conclusion, the comparison of black rage to PTSD and BWS reveals several dissimilarities. These differences greatly outweigh the similarities between black rage and the traditionally accepted defenses. The courts' acceptance of PTSD and BWS does not require them to accept the defense of black rage.

IV. ARGUMENTS AGAINST VALIDITY AND ACCEPTANCE OF BLACK RAGE

Critics advance several arguments against the acceptance of black rage as a legitimate defense. First, they argue that significant factors other than racism are responsible for the inequality between African and white Americans in education, unemployment and poverty. Second, opponents question whether African-American oppression actually leads to increased violence toward white Americans. Third, they contend that historically, other religious and ethnic groups have been subjected to similar, if not more severe, discrimination and prejudice, yet have not fallen into an uncontrollable rage. Finally, critics conclude that black rage should not be accepted because it promotes the revival of self-help

and vigilantism.

A. Arguments Against the Theory Behind Black Rage

Although racism plays a role in sustaining inequality of opportunity between African-Americans and white Americans, supporters of the black rage theory fail to recognize other pertinent factors which also contribute to the disparity in educational achievement and hindering employment. Increasing evidence shows that the roots of inequality stem from the breakdown in traditional black families[173] rather than from racism itself.[174] According to a 1989 study by the National Research Council, intact (two-parent) black families earned nearly three times the median income of single-parent black families.[175]

Moreover, implications of the breakdown of the black family unit extend beyond economics and education. The same National Research Council study indicated that in areas of standardized tests, educational achievement, occupational status and income, black children from two-parent families greatly outperformed their counterparts from one-parent families.[176] Additionally, the study revealed that children raised in one-parent households experienced more teenage pregnancies, earlier marriages and higher divorce rates[177] than those raised in two-parent homes. Contrary to the claims of supporters of black rage, the National Research Council study suggests that racism is not the sole basis for inequality between blacks and whites.

Critics of black rage also discredit the "strain theory"[178] as an explanation for poverty causing crime.[179] At best, they concede that the strain theory may explain an increase in property crime as people may be apt to steal in order to obtain material goods.[180] However, the desire to obtain material items does not explain the rise in all types of crime in ghetto areas, especially violent crimes against the person such as rape and murder. Thus,

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173. SYKES, *supra* note 75, at 236. The number of African-American families headed by a single-parent has increased significantly throughout the past decades. For instance, in 1960, 22% of African-American families were headed by a single-parent as compared to 75% of African-American families in the mid-1980s. NAT'L RESEARCH COUNCIL, A COMMON DESTINY 276 (1989).

174. *Id.* at 109. The sociologist James Coleman found family background to be the most important factor for educational success and achievement. *Id.* Coleman further reported that despite African-American parents' reports of high interest in their child's education, this interest did not translate into support. *Id.*

175. *Id.* at 236.

176. *Id.*

177. *Id.*

178. See *supra* Part III(A)(3) for a complete explanation of the "strain theory."

179. THOMAS, *supra* note 110, at 141.

180. *Id.* at 138-40.

critics of black rage oppose the strain theory on the basis of an insufficient nexus between African-American poverty and crime.[181]

Opponents of black rage also contend that shortsighted decision-making, and not racism, is the primary cause of poverty among many blacks.[182] An example of this detrimental shortsightedness is the decision to increase one's present economic status by commencing work immediately after leaving high school, rather than to postpone financial success until after college.[183] According to critics of black rage, this type of decision-making, and not racism, is responsible for the lack of education and thus poverty.[184]

Additionally, critics of black rage question whether white oppression of blacks actually leads to increased violence toward white Americans. In support of this position, they maintain that current crime statistics indicate an increase in black-on-black violence rather than an increase in black-on-white violence.[185] This evidence runs contrary to the black rage supporters' position that continued white oppression leads to increased black-on-white violence.

Finally, proponents of black rage find that oppression endured by African-Americans in the United States is comparable to that of Jews of the Holocaust.[186] If this were true, one would expect that in the same manner in which blacks seek vengeance against whites, Jews would seek revenge against Germans. However, "Jewish rage" has not yet been asserted to seek excuse for criminal conduct in the United States.

Skeptics dismiss the validity of black rage with their contention that racism is not the sole cause of inequality between American blacks and whites. Rather, they submit that a combination of factors, including high illegitimate birth and school drop out rates,

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181. *Id.*

182. *Id.*

183. *Id.* at 139. Other examples of shortsighted decision-making include: the decision to have a child out of wedlock, to forgo education, to quit work before obtaining a replacement position, or a combination of any of these alternatives. *Id.*

184. THOMAS, *supra* note 110, at 139.

185. *Id.* at 214. The conception that black crime is a result of racial retribution is discredited by the fact that most crimes committed by African-Americans are committed against African-Americans. *Id.* For example, in 1991 African-American criminals murdered 691 white Americans and 5035 African-Americans. *Id.*

186. SYKES, *supra* note 75, at 82-83. The French writer and black power advocate Albert Memmi created the theory of "total" oppression. *Id.* at 81. With slight hesitation, Memmi added African-Americans to his list of certified oppressed victims, thus comparing oppression of African-Americans to that of Jews and women. *Id.* Memmi went to the extreme position of warning African-Americans to beware that some day white Americans would do to African-Americans what Germans did to the Jews. *Id.*

and an increase in the number of single-parent households, is the cause of social and economic disparities between blacks and whites.[187] Further, crime statistics measuring the frequency of black-on-white and black-on-black crime indicate that the rise in black violence is not necessarily motivated by black vengeance.[188] Finally, other groups who have faced significant oppression have not resorted to violence against their oppressors.[189]

In sum, the contention by supporters of black rage that racism is the sole cause of inequality between black and white Americans cannot be justified. Social and environmental factors in addition to racism contribute to racial inequality. Additionally, proponents of black rage have not clearly demonstrated any causal connection between oppression by whites and reactive violence by blacks. These factors, combined with the lack of vengeful acts by historically oppressed groups, expose fundamental weaknesses in the black rage theory that militate against its use as a legitimate legal defense.

B. Arguments Against the Acceptance of Black Rage as a Legal Defense

In the area of criminal law, courts excuse certain individuals from acts which would otherwise be punishable. For example, individuals who act in self-defense or who suffer from diminished capacity or insanity are granted legal mitigation. However, to allow African-Americans to "carve out" a special defense based upon years of alleged oppression derived from discrimination and poor environmental conditions would be detrimental to maintaining order in society. The harm would be two-fold. Granting a special defense for African-Americans who act violently against white Americans because they are "fed up" with racial prejudices would open the floodgates for an endless stream of discrimination-based defenses. Also, acceptance of black rage as a criminal defense would insult tens of millions of law-abiding African-Americans.[190]

Acceptance of black rage as a legal defense would lead criminal defendants of all ethnicities to assert similar defenses based

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187. THOMAS, *supra* note 110, at 139.

188. *Id.* at 214.

189. See *supra* note 186 for a discussion of other groups subject to discrimination.

190. Rev. Michael Bell, a black minister, was insulted by the assertion of urban survival syndrome in the case of Daimian Osby. Lori Montgomery, *New Inner-City Legal Strategy May Change Rules of Justice*, TIMES-PICAYUNE, Oct. 24, 1994, at A6. Rev. Bell was outraged because such a defense suggests that the African-American community is so enveloped with violence that everyone has to carry a gun. *Id.*

upon blanket claims of discrimination. As noted above, everyone is a victim of discrimination or prejudice. Individuals face discrimination because they are black, white, Chinese, Asian, Mexican, American Indian, Japanese, Jewish, Catholic, short, tall, fat, thin, freckled, rich, poor, disabled; there is virtually no end. Therefore, the courts would be faced with the impossible task of determining which defendants suffered "enough" of the "right kind" — whatever that is — of discrimination to warrant a "rage defense."

Acceptance of these proposed rage defenses would ultimately condone self-help and vigilantism. Anyone would be justified in killing anyone else provided they could prove that at some point in their life they were victims of prejudices. The end result would not be to remove discrimination or prejudices from American life, but rather would increase them, because one particular race would be granted special treatment over another, thus perpetuating anger toward violent criminal defendants from that particular race.

Finally, acceptance of black rage would insult the majority of African-Americans who are law-abiding citizens. Acceptance of black rage as a criminal defense would further increase racial tensions, because African-Americans would be portrayed as a group granted special privileges; ultimately prejudices could increase.

CONCLUSION

The black rage defense does not warrant legal acceptance as it does not parallel the traditional defenses of self-defense or insanity, nor does it resemble accepted abuse defenses. If racism were the only factor leading to inequality, then perhaps black rage would be a valid defense. However, the overall situation indicates a state of confusion, perhaps misery or unhappiness with one's current stead in life, rather than a state of rage. Everyone, regardless of skin color, is faced with difficult obstacles in their lifetime. To condone violence as a way to escape environmental pressures is in direct conflict with the societal goal to lessen hatred and violence. The black rage defense and similar defenses which trace their roots to blanket accusations that society has somehow failed them must not be accepted, for to do so opens the door to exonerate everyone.

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