POLICY

# The "Abuse Excuse": Limits of the Child Abuse Defense

*This article is taken from the plenary session of APSAC's Third National Colloquium, in Tucson, Arizona, on Friday, June 9, 1995. The speakers include Jacquelyn Campbell, RN, PhD, the Anna D. Wolf Professor of Nursing at Johns Hopkins University, and one of the nation's leading experts in homicide cases in which battered women kill their batterers. Jon R. Conte, PhD, is Professor of Social Work at the University of Washington. In addition to voluminous writing, lecturing, and teaching, Dr. Conte has testified for the defense and for the prosecution in battered person cases. John E. B. Myers, JD, one of the nation's leading experts in child abuse law, is Professor of Law at the McGeorge Law School at the University of the Pacific, in Sacramento.*

**Jacquelyn Campbell**

## Battered women who kill

Cases in which battered women have killed were the first cases in which a prior history of abuse was used as a criminal defense. I am speaking from my experience as an expert witness in such cases. The legal ramifications of this defense have been evolving over time. Right now, different jurisdictions and different judges are using expert testimony about prior abuse in different ways. All would like to be more consistent. To ensure fairness for the defendant for whom past abuse is a relevant issue, some are trying to develop a notion of a "battered person" syndrome that can be used in a variety of cases.

***I thought this was surely a travesty of justice. But my legal colleagues explained that in this case self-defense did not apply because this woman was not necessarily in imminent danger.***

I first got into this area by doing a research study of homicide by women in Dayton, Ohio. Here's an early case I confronted:

> A woman had been battered for many years in a marriage. The couple had four children and the police had been called to that home for domestic violence 54 times: 40 times before she divorced her husband, and another 14 times afterwards. Her husband kept visiting the home, saying he wanted to see the kids, and beating her up every time he visited. She had a long record of hospitalizations related to the abuse. She tried to get protection from the police, but this was back in the 1970's and the police never arrested him. Finally, this woman went out and bought a gun, which she kept in her bedroom. One night her ex-husband came to the house, knocked on the door, and was let in by one of the kids—an adolescent who verified his mother's version of these events. She was coming down the stairs, but when she saw her ex-husband turned around and went back upstairs to avoid yet another confrontation. Swearing and yelling, he came after her. She went into the bedroom, slammed and locked the door; he broke down the door and came after her. She got the gun out of the dresser drawer, and shot once into the floor. When he continued to charge at her, she shot and killed him. She was convicted of second degree murder and was sentenced to 30 years.

I thought this was surely a travesty of justice. But my legal colleagues explained that in this case self-defense did not apply because this woman was not necessarily in imminent danger: he had not yet laid a finger on her in that particular confrontation, and he was not armed. Therefore, when she took the gun out of the dresser drawer, she escalated that conflict. In this particular case, the law reasons, there was also the possibility of her escaping: perhaps she could have gotten around him, and run downstairs.

## The reasonable man

One of the problems around current self-defense laws is that they are based on the premise of a "reasonable man," indeed a reasonable *grown* man. They were first developed in medieval times, when men (assumed to be of comparable size, strength, and ability to fight) might kill each other over minor altercations that would start with fists and end with knives or bludgeons. Thus the law is that the person who is defending herself can't brandish a weapon more lethal than that of the aggressor and should not be able to escape: her back is to be literally "against the wall."

After several fruitless appeals, former Governor Celeste, of Ohio, pardoned this woman when he left office. Out of jail now, she did 18 years of time for that homicide. Hers was a case in which testimony about "battered person syndrome" could help a jury understand that this woman had a reasonable fear for her life: she had been beaten severely before, unable either to escape or to protect herself with her bare hands.

## The battered woman defense

As we developed the battered woman syndrome as a defense, it started to rest more and more on the idea that the woman had some mental problems. Increasingly, expert witnesses tried to convince juries that this was a poor, pathetic victim, someone with diminished capacity, who could *misperceive* the situation and *feel* like her life was in danger, even though she had not actually been hit or confronted with a weapon. This argument is an outgrowth of the "reasonable man" standard. It would be fairer and more accurate to develop a different standard, one that reflected the fact that women are less physically capable of protecting themselves without a weapon. The woman's perception that she must have a weapon, that her assailant can indeed beat her to death because he is bigger and stronger, is *reasonable*.

As we develop the battered woman syndrome as a defense, I have been called as a witness in several cases. I try not to do this very often because

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I'm not wonderfully good at it, and I'm not a psychologist. But in some cases the health issues are prevalent and need to be brought into play, as when the abuse occurs during pregnancy. I was involved in several cases in Detroit in which public defenders were trying to defend battered women from murder charges. These were generally inner city women, mostly African American, all of them poor. The case of a woman named Marva is also illustrative:

> Marva had been beaten up many times by her boyfriend, who had been living with her until the beatings got so bad that she kicked him out. Unfortunately, he kept a key, and one night he let himself into the apartment and raped her. Like many raped women, she did not report this to the police. Knowing that they had had sex many times, that she had kicked him out before and then invited him back in, she was afraid the police would think she had invited him back one more time. She did, however, get an order of protection and change the locks. But he came over one night saying he wanted to talk to her, that he really loved her and wanted to get back together again. As it turned out, what he wanted most was money. When she refused to give him the money, he hit her a few times—as the prosecutor said later,"He only hit her a couple of times." And then he took her car keys and walked out the door. Now in the self-defense annals, he's de-escalating: he's leaving, he's getting out of the situation. However, her new apartment keys were also on that car key ring, so he was not only taking her car, he was also taking access to her house. She also knew that he had a gun in his glove compartment. As he left, he told her that he was going to come back and blow her away. According to several witnesses, she ran out of the house in front of him, got the gun out of his car, and turned around and screamed, "Give me the car keys." He called her names, refused to give her the keys, and she killed him.

***This is an issue that triggers great emotion and strong cultural values and biases and premises, all of which lead to irrationality. I worry that people may make decisions about other child abuse issues on the basis of feelings engendered by the "abuse excuse."***

In some of the prior altercations between this couple, Marva was arrested as well as her her boyfriend. Hospital emergency room records revealed that Marva had once thrown an ashtray at him, causing a wound that required stitches. She also had passed a few bad checks in her career, and outweighed her boyfriend. She does not fit the "helpless victim" profile. As the prosecutor said, she could have tackled her boyfriend as he went out the door. But Marva's experience was not going around tackling people: tackling him didn't occur to her. She just desperately wanted to get that gun.

Two issues regarding testimony about the "battered woman's" psychological state: first, we use the word "helplessness" to indicate a state of mind in which apathy and difficulties in problem solving might lead the woman to misperceive the situation. We also use the notion of "PTSD" to explain hypervigilance and flashbacks to prior abuse situations. Marva qualified as having a major depression when I administered the Beck Depression Inventory. But the way she talked about it, she was depressed because she had killed somebody. She felt terrible that she had killed him. She was desperate about what this was doing to her life, and she felt that a great deal of the depression had to do with that. When she talked about intrusions of memory, she talked about nightmares about having killed him. Her trauma seemed to result as much from having killed someone as from having been battered for years.

**Legal complications**

Marva's case raises two major issues.

The case was in Detroit Municipal Court, and the jurors, who were missing days and days of work, very much wanted to get on with it. During my testimony there were eleven sidebars. At each sidebar the jury had to be excused, and each time they walked out and walked back in I could tell they were really upset with me; I was winning no points for sympathy by having problems come up in my testimony about the battered woman syndrome where the prosecutor and defense attorney could not agree, and the judge had to make a decision on what was and was not admissible. Different courts admit different kinds of testimony. In some courts judges let me talk about the individual case; in others, the judges only let me talk about the battered woman syndrome in general or PTSD in general. Part of the limitation of using the battered person syndrome as a defense is that these issues around admissibility and case law are just being developed, and the jury can have a tough time making sense of these matters as the trial goes on. The inconsistency in use from court to court and from state to state is troublesome.

The other major issue is that generally the juries are instructed to make a black and white decision: either they can find that it's a justifiable homicide by reason of self-defense or, as the prosecutor said it in his summing up, you can throw out all of this "feminist bleeding heart abuse-excuse mumbo-jumbo" and find her guilty. Although testimony regarding the battered person syndrome is sometimes used to lessen the sentence or the charge, generally it is presented to the jury as requiring an all or nothing decision. These are two problems that need to be addressed by the judicial system. I hope that Dr. Conte or Professor Myers has some ideas about how we can get there.

**Jon R. Conte**

### Importance of the issue

I am pleased to have an opportunity to start a

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discussion with you, my colleagues, about the "abuse excuse." In many ways this is a critical matter for us to think about, talk about, and probably argue about, and then take some leadership in responding to, because it holds a lot of danger for our field. I am a child of the '60's, so I am prone to thinking in terms of conspiracies and great dangers. But the furor surrounding the abuse excuse is probably as dangerous as that around the false memory issue, which I think also has profound implications for our field. Depending on how "the abuse excuse" is resolved in the public's mind, it could have a negative impact on many aspects of child abuse practice.

This is an issue that triggers great emotion and strong cultural values and biases and premises, all of which lead to irrationality. I worry that people may make decisions about other child abuse issues on the basis of feelings engendered by the "abuse excuse." Second, these cases, which are inherently complex, generate a lot of negative P.R. They involve acts and behaviors which most of us find very difficult to understand. The media tend to treat complex issues in a simplistic way; dissemination of information is often partial and skewed. This presentation certainly affects the way people react to child abuse issues in general. Third, the "abuse excuse" debate is prone to hidden agendas. We have to be sure that as a field, and I hope as a society, we are confident of the true issues involved in this debate. I would like to offer a few thoughts about how to focus the debate correctly.

**Timing of the debate**

*There is an escalating feeling for individual responsibility, a determination to hold people accountable even though we withhold vitally needed social benefits, especially for the underprivileged.*

One of the interesting questions to address is, "Why now?" Why has this issue come to the fore now? Certainly high visibility cases like the Susan Smith and Menendez brothers trials have captured public attention, and Court TV has played a role. Also, unfortunately, some defense attorneys and hired experts have created notoriety for the issue by applying some "abuse excuse" ideas in cases which most of us would consider inappropriate, such as the "Twinkie defense" in California. Although we may have some disagreement about appropriate applications of the abuse defense in particular cases, we probably agree that a key element is violence, especially violence in childhood, its impact on development, and how that might be associated with violent crime.

**The split between offender and victim policy**

Another reason this issue has surfaced has to do with how you and I as professionals in this field, and to some extent society, have managed the emotionality that is associated with child abuse. We have a tendency to split victim from offender, and in doing so, in many ways we split the field. The victim and offender literatures are quite separate; to some extent we have even split our professional discussions, although certainly APSAC has tried to have material that is relevant to both victims and offenders at our conferences and in the *Advisor*, etc. But we've had a tendency as a field to split our feelings and think about victims and offenders separately. So on the one hand we focus on victims, an area where we at least talk about being empathetic and concerned and providing protection. On the other hand we have the offenders, for whom control, consequences, accountability, and even punishment are primary concerns.

In that splitting we have failed to deal adequately, either emotionally or conceptually, with the overlap between some victims and some offenders. Sometimes, offenders are also victims, in the past and/or in the present. We have not thought about this problem in quite the right way; we tend to argue for very different social policies for how we should respond to victims and how we should respond to offenders. In many cases that argument probably is well placed; but when a victim hurts another person, the split in social policy becomes problematic. This problem is cast into greater relief in an era when public rhetoric is increasingly mean-spirited and anti-rehabilitation. There is an escalating feeling for individual responsibility, a determination to hold people accountable even though we withhold vitally needed social benefits, especially for the underprivileged. I think this phenomenon is part of a search for a fantasy time of the past when things were simpler and people behaved responsibly and violence wasn't a problem. Cases in which the "abuse excuse" applies challenge views about families and society and what goes on in families in ways that make us feel very uncomfortable.

**Major elements of the abuse excuse**

I want to briefly outline what I think are the main elements of the "abuse excuse." The "abuse excuse" book, by Alan Dershowitz, simply argues that the "abuse excuse" is a lawless invitation to vigilantism, that it is an abrogation of social responsibility, and that it uses essentially a historical rationale, i.e., a history of extreme violence, especially in childhood or in a marital relationship, to mitigate or excuse responsibility for violent behavior. The book terms "abuse excuse" to be essentially, and I quote, "junk science," and argues that the premise is seriously flawed: since the vast majority of people with abuse histories don't commit violent crimes, a history of abuse neither explains nor justifies violence. The final thrust of the book—and I think this is the element that bothers people about the "abuse excuse"—is that the defendant had options other than extreme violence. No matter how undesirable those options might have been, people who commit these crimes, even though they have

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extreme abuse histories, do have options, or so the argument goes. For example, they can seek police protection.

**"Junk science"**

The "junk science" notion applies to part, but not all, of what has been offered in "abuse excuse" defenses. There is not, at least in my reading of the research, a whole lot of support for the coercive impact of eating Twinkies, at least on psychological functioning over a short period of time. I would submit to you, however, that the evidence for the battered person syndrome is a fundamentally different issue; that we have an ample body of research and clinical experience dating from Freud to the present that suggests that violence, especially chronic and extreme violence, primarily in childhood and particularly in intimate relationships, has a profound impact on development. While there may not be equal research support for every aspect of the battered person syndrome, there is certainly empirical evidence suggesting that hypervigilance is a major problem. It is clear that depression and learned helplessness have a profound impact on a person's ability to recognize alternatives. For example, when we are traumatized, we tend to see our tormentor as more powerful than ourselves. This tends to limit our behavioral alternatives. I think those effects and others are pretty clear in the literature.

***The fact that more victims don't go out and commit bad acts is good news; it hardly eliminates the importance of understanding abuse and its relationship to anti-social or hurtful acts.***

Now, anyone who studies the effects of abuse would agree that we need a great deal more research in many areas. One of the most intriguing questions with forensic implications regards the difference between extreme fear and anger. I would submit to you that at high levels of arousal, the difference between fear and anger may be more an attribution after the fact than while the person is experiencing that high level of arousal. Yet the difference between fear and anger is critical in a legal context. More research can help us better understand such matters. However, a fair and accurate look at existing empirical research in this field negates the idea of it being a "junk science."

**Universal vs. individual response**

Dershowitz's other argument—that some victims are not violent, therefore the violence of others is never justified—is worthless. It does nothing to help us understand an individual who has committed a violent act who has a history of abuse. No response to victimization is universal. Researchers who study abuse effects are constantly impressed with the fact that individuals respond differently to childood victimization. It is an intriguing empirical and clinical question, the combination of factors that seems to produce extreme violence. The fact that more victims don't go out and commit bad acts is good news; it hardly eliminates the importance of understanding abuse and its relationship to antisocial or hurtful acts.

**Explanation vs. justification**

Finally, I think Dershowitz argues that explanation is not justification. This is very important for us; indeed, as I see it, it is the crux of the matter. As a field, we have to unlink the moral question from the scientific and mental health question. It is a serious public policy matter how much weight society should give to historical or mental health variables in determining criminal culpability. What do we as a society do with the knowledge that there may be a causal link between some historical factors like child abuse and some contemporary behavior such as extreme violence in marital relationships? This is a moral and ethical question that has very little to do with the science. The science might inform it, and might help us demonstrate the existence of battered person syndrome, but what to do about it is a very different kind of question.

Is killing another person ever justified? Under what conditions? Does the presence of any mental health condition mitigate behavior that is harmful to others? I am not sure that we should think differently about that question when it is applied to extreme, deplorable, frightening acts such as homicide, and when it is applied to a parent who exposes a child to chronic drug abuse, or a parent who, because of an abuse history, is dissociative or addicted and therefore unavailable to that child at critical stages of the child's personality development.

We have to separate the the moral and ethical questions from the empirical or scientific and the mental health questions. These ethical questions are going to be exceedingly difficult to deal with because they directly confront the current values and trends I mentioned earlier: anti- rehabilitation, pro-individual responsibility, the desire to ignore social conditions which affect an individual's ability to conform to the ideal.

This is an issue that inherently involves ideals and prejudices and psychological processes which are often disguised, and so I would plead with everyone to "undisguise" the debate. We are debating moral and ethical questions, and need to confront them as moral and ethical questions. I hope very much that in our discussions, and certainly in future APSAC conferences, we will begin to see papers discussing moral/ethical/social-policy questions for what they are, and disentangling them from the other papers, also very important, that describe the effects of chronic and severe abuse, especially within the family.

**John E.B. Myers**

I am going to take a risky course in my remarks by being rather theoretical and doctrinal in terms of what the law is. This is risky because it has a

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tendency to be quite tedious and boring. But I think it's essential when we talk about the use, in court, of a history of abuse to have an understanding of what the technical legal rules have been and how they have changed, so that we can see where we think we need to go from here. So, with the risk that I may bore you, I will proceed.

I will do so in the context of the two cases that I think brought you to the meeting this morning: the situation in which a woman kills her batterer or a child does the same. The child kills a person who has battered him, sexually abused him, or both. Throughout my remarks I will echo three terms that both Dr. Campbell and Dr. Conte used: "justification," "excuse," and "litigation." These are highly technical legal terms that need to be parsed out and understood not only by those in the legal community but by professionals who work with abused and neglected children and adults as well, so that they can understand how an abuse history fits into the legal framework.

**Legal relevance**

The ultimate question in terms of the law becomes, "When is evidence of an abuse history relevant?" As we use it in the law, the term "relevant" means that a piece of information has any tendency, no matter how slight, to make something that is important in the lawsuit more or less likely. A piece of evidence, whether it's a gun, or a knife, or a history of abuse, is relevant if it has any tendency, no matter how slight, to make some element which is important in the litigation more or less likely.

***What do we as a society do with the knowledge that there may be a causal link between some historical factors like child abuse and contemporary behavior such as extreme violence in marital relationships? This is a moral and ethical question that has very little to do with science.***

Evidence can be relevant at two phases of a criminal case. It can be relevant at the guilt phase, what we think of as the trial: Is this person guilty or not? Second, it can be relevant at the sentencing phase: If the person is guilty, what should we do by way of sentencing or punishment?

Let's focus our attention primarily on the guilt phase, since it seems to me the question at sentencing—and we'll come back to it momentarily—is quite obvious. At the guilt phase of the trial, evidence of an abuse history is relevant to some defense. That's *when* it's relevant. When a woman kills her batterer or a child does the same, and the killer is accused of homicide, a history of abuse is virtually always relevant to some kind of defense.

**Possible defenses**

**Case in chief defenses**

What kind of defenses do we have to crime? We have several. The first can be dispensed with rather quickly. These are called "case-in-chief" defenses. The contention is, simply, that it didn't happen; or if it did happen, I didn't do it; or if it did happen and I did it I didn't have the necessary criminal intent. Those are the three case-in-chief defenses: there wasn't a crime; or if there was, I was out of town when it happened, so I didn't do it; or even if I did do it I didn't have what lawyers would call the *mens rea*, the guilty mind. Because every crime we're concerned with today has three components: the guilty act, the guilty mind, and the whodunit. You've got to have all three. If one of those three is not present, of course that is a defense. But think about it for a minute: evidence of an abuse history doesn't come up with any of those.

First of all, in the case of a dead person, we virtually always know that *somebody* did it, that there was a crime. (Most of time we can rule out suicide.) "It didn't happen," is not a defense in homicide cases. Moreover, the identity claim, "I didn't do it," is not a defense very often either, because if the defense is, "I didn't do it," you wouldn't be worried about an abuse history. You'd just be saying, "I was in Albuquerque so I couldn't have done it." So that's not a defense in "abuse excuse" cases. Now, you might say, "Well gee, for the crime of homicide you have to have a guilty mind, the *mens rea*. Couldn't a history of abuse be relevant to that?" Well, in homicide cases, the guilty mind is, in essence, an intent to kill. If you think about it for just a moment, you can clearly see that the history of abuse is virtually never going to be a defense in that regard, because the person who kills her batterer *intends* to kill her batterer. It is an intent to kill at the time, or at least to do serious bodily injury. So you see, evidence of an abuse history will not be helpful to the defendant there, either.

So evidence of an abuse history will not be relevant to case-in-chief defenses, which argue, "It didn't happen, "I didn't do it," or, "I didn't have the criminal intent."

**Justification defenses**

An abuse history is relevant in two situations, one of which is called "justification" and the other of which is called "excuse." I need to briefly explain these terms. "Self-defense" is a "justification" defense. In the standard definition of self-defense, a person is justified in using deadly force in self-defense when she *reasonably* believes such deadly force is necessary to combat an *imminent*, unlawful, deadly attack. Self-defense has these two key components: it must be *reasonable* and it may be invoked only in the case of an *imminent* attack. There must be no reasonable alternative to the use of deadly force in self-defense.

Now, with self-defense we're dealing with what the law calls an "objective standard." What would "the reasonable person" do? Would the reasonable person act with self-defense? What is a reasonable person? Dr. Campbell is absolutely right,

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it used to be a reasonable man. What would a reasonable man, of reasonable male strength, do under these circumstances? Fortunately, the law has progressed, at least somewhat, and now we use the concept of the reasonable person. Moreover, when we're considering whether a person acted in an objectively reasonable way, the law permits us to take into consideration the person's size, how much they weigh, how strong they are, and so forth. The law does permit the relative disparity between male and female strength and size to be considered in the case of self-defense.

***Allowing self defense in non-confrontation cases, it seems to me, would encourage vigilantism, which I don't think as a society we want to encourage. It would, it seems to me, allow preemptive strikes which the law has traditionally not permitted.***

Self-defense is considered to be a *justification*. "Justification" is a highly technical term in the law, but one worth understanding. First of all, justification is used when we have an act, like killing, which is usually unlawful but which, given the circumstances of this particular case, is not only *not* unlawful, it is morally and legally right. You are justified in your act because of the circumstances. Killing someone in self-defense in the eyes of the law is not wrong, it is right. It is the lesser of two evils. It is better that an innocent person about to be attacked with deadly force kill the aggressor than be attacked. Self-defense is a justification defense in which society says that if, under the objective circumstances existing at the time, the defendant acted to combat an imminent, unlawful, deadly attack, she did the right thing. She is completely acquitted of the crime. Justification defenses set the defendant free.

The law is a teacher. And it is a teacher that sets moral and social standards. It may not always set them at the correct mark, but we would agree, I think, that the law is a teacher that sets the moral and social standards that we abide by in our society. Self-defense is one of those moral standards which allows you to take somebody else's life. It allows you to violate that principle which we hold dear that life is precious, even the life of people who haven't led particularly good lives themselves.

Evidence of abuse history can be relevant in terms of self-defense, and we'll come back to that in a minute. I'd like to switch gears from *justification*, self-defense being the principle justification defense that we're concerned about, to *excuse*, which is another legal term. It is very important for us to understand the difference between justification and excuse.

**Excuse defenses**

Remember that justification means that an act that is usually unlawful is committed under circumstances which make it the correct, right, morally defensible thing to do. Excuse is different. When we have an excuse for a behavior, we don't say that it's right to engage in the behavior. It's not right, it's wrong. But the actor who performed that wrongful act is not fully morally accountable for his or her behavior, so the behavior is excused. We don't say what he or she did is right; we say that the actor is not fully morally accountable.

With excuse defenses, we don't employ an objective standard, we employ a subjective standard. What is it about this particular individual, his or her subjective makeup and history, which led the person to engage in this behavior? What might excuse this morally reprehensible behavior? The principal excuse defense is the insanity defense, which we've all of course heard about and I won't go into. But the insanity defense is an excuse for a crime. You kill somebody, you raise the insanity defense, and if you prevail society doesn't say that killing that person was the right thing to do: "I'm glad you killed that person while you were psychotic, society thinks that was good." No, we still think it was bad, but because you were so crazy that you couldn't conform your conduct to the requirements of the law, we excuse you.

With excuses, we do not simply let the person go free. If you're found not guilty by reason of insanity, you're going to go to a mental hospital, where you'll be involuntarily or civilly committed.

The other principle excuse in the law is "imperfect self-defense." It gets confusing: "Wait a minute," you say, "I thought you just said that self-defense was a justification! Now you've got it listed under excuse! What's going on here?" Well, "perfect" self-defense, in which the defendant "gets all the way off," is a justification. But "imperfect" self-defense goes something like this: a person kills when she truthfully and honestly believed that she was killing in self- defense, but she was wrong. Her belief was *not* reasonable. Remember, *objectively* reasonable. But you can clearly see many circumstances where a person thinks honestly that she has to kill in self-defense, but no objective person would think that that was the correct interpretation of the defendant's predicament. In those circumstances, called "imperfect self- defense," we don't justify the act. (This defense, by the way, does not exist in every state.) We say "Gee, it's too bad you killed that person when there was no objectively reasonable reason to do it; but your state of mind at the time was such that we excuse your behavior. We're not going to let you off, by the way; instead, we're going to convict you of a lesser crime." In homicide cases, it's usually manslaughter but not murder. Again, with excuses you don't walk out the back of the courtroom door.

"Diminished capacity" is a form of excuse. Diminished capacity is a complicated subject that I'm not going to dwell on, first of all because it exists in very few states anymore. It's the idea that you do have the capacity upstairs to form criminal intent,

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but you were so mentally unbalanced at the time that you could barely form it. So the decision is, again, to convict, but of a less serious crime.

Finally, there are the "heat of passion" and "provocation" defenses. These are based on an ancient legal doctrine that we can't go into in any depth, but the idea is that the circumstances simply provoked a reasonable person. It employs an objective standard. A reasonable person would have been so outraged by the circumstances that she would have killed somebody: because we know that humans are frail, we're willing not to justify but to excuse behavior committed in the heat of passion; we reduce the crime from murder to manslaughter.

Those are the justification defenses and the excuses that exist in our law.

### Uses of criminal defenses

#### Confrontation cases

With that legal primer in mind, let's come back to the subject of the woman who kills her batterer and the child who does the same. I'll take you through how I think the law does and ought to look at these difficult cases. First of all, I think, a line needs to be drawn. It's the line between what I call "confrontation cases" and "non-confrontation cases" in the guilt phase. By "confrontation cases" I mean the case where the woman or the child is in a confrontation right now with the batterer: Dr. Campbell's first case, in which the woman had called the police fifty-four times and was confronted with a man who has broken down her door.

***Society has not reached a consensus that it is justifiable to shoot a sleeping batterer in the head.***

The second case she raises is much more difficult—the case with clear abuse, the guns in the glove compartment, the guy goes out with the car keys maybe to get the gun, maybe not. She goes and gets the gun first. We'll come back to that one. That may be a confrontation case or not, I don't know.

At any rate, in a confrontation case, generally speaking, it seems to me that self defense should be available to a battered woman or a battered child. Evidence of an abuse history is clearly relevant in the legal sense of the word in many confrontation cases to give the jury insight into the defendant's belief that she was about to be subjected to an imminent, unlawful, and deadly attack. The abuse history, the hyper-vigilance, the picking up on subtle clues from a lifetime of abuse, all these things can be relevant in the legal sense of the word. Why? Because they make a fact which is important—i.e., that this woman or child acted reasonably under the circumstance—more probable. Her abuse history makes it more likely, more understandable, that she acted reasonably. And I'm here to tell you that the law permits that. Not always, as Dr. Campbell said; you know judges can be variable. But by and large the law is moving clearly in the direction of permitting evidence of a history of abuse in the confrontation cases. And I think quite correctly so.

#### Non-confrontation cases

Now let's look at the non-confrontation scenario. I'll take a typical case—a woman who has suffered a lifetime of abuse, her husband is asleep on the couch, and she shoots him and kills him, while he is asleep. Now, we might well spend the day arguing about whether that's a confrontation case or not. Suppose he said, "As soon as I wake up, you're history." That is clearly often the precipitating factor. But let's agree that we're talking about a case in which there is clearly not a confrontation that we as objective outsiders could see. I maintain that evidence of abuse history should be *in*admissable in such cases, because it is irrelevant. I take this position for a number of reasons.

First of all, evidence of an abuse history in a non-confrontation case has the danger of transforming this objective standard of self defense into a purely subjective standard. With that transformation go other dangers. One danger is to erode the protection for human life which is a basic policy that the law tries to protect. No matter how bad the person, we still think that human life is an important value. Allowing self defense in non-confrontation cases, it seems to me, would encourage vigilantism, which I don't think as a society we want to encourage. It would, it seems to me, allow preemptive strikes which the law has traditionally not permitted. And perhaps most important, allowing self defense in the non-confrontation cases would encourage retaliatory killings. These, I think, are all realistic possibilities. Only, I think, by insisting on an objective standard of imminence can society be sure that self-defense claims are based on necessity rather than on retribution. And if you think about it, way back in the cave person days, we invented the law to try and get a handle on revenge and retribution. That's what the law of the crimes is all about. We are in danger of slipping back into retaliatory killings if we let the standard of self-defense get broadened too much.

So, I would say that in a non-confrontation scenario, the *justification* defense should not be available. But *excuses* clearly should be. Remember, although justification is an objective standard, excuse is a subjective standard. With excuse we do look at the unique attributes of this particular person, and it seems to me we might well say that an abuse history would be relevant in a non-confrontation case not to justify, but to excuse. In the imperfect self-defense scenario I can well envision a case in which no objective juror would believe that a woman's killing her husband while he sleeps is an objectively reasonable thing to do. However, because of the woman's history, this act that is wrong from an objective point of view might be right from her own point of view. I would not

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## The "Abuse Excuse"

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exculpate her from all liability, but would convict her, not of murder, but of some lesser crime.

### Limits of justification

Let me come back to Dr. Campbell's two cases and stop there. It seems to me that in the case of the fifty-four police calls, we have a confrontation case. The woman in that case in a court today would be able to put on Dr. Campbell as an expert under the law as I think it pretty clearly exists, and that woman could raise a very strong self-defense claim on the basis of justification. In Marva's case, the shooting on the front stoop, that's one of the tough ones. And I don't pretend to be smart enough to know the answer to it. But let me close with the thought that I think Dr. Conte was making and that David Finkelhor made in his keynote address when this conference began: there is a real danger, it seems to me, of a very serious backlash if those of us concerned about victims take too far the notion of getting people out of trouble for acts they have committed because they have an abuse history. A backlash is very likely to occur, Dr. Finkelhor said, when our practice exceeds societal consensus. And it seems to me that society has not reached a consensus that it is justifiable to shoot a sleeping batterer in the head.

# CHILD PROTECTIVE SERVICE

## The Mental Health Needs of Children Entering the Child Welfare System: A Guide for Case Workers

—by Joshua Kendall, Grady Dale, and Steve Plakitsis

### Introduction

A Child Protective Services worker removes a ten-year old girl, "Tonya," from her home following allegations of sexual abuse by her mother's boyfriend. Tonya's four siblings still live with her mother. In court, Tonya also alleged that her father molested her at age five or six. Whatever the actual extent of the sexual abuse by the two alleged perpetrators, Tonya has clearly had to endure a series of traumatic events. She is a fifth grader who has been receiving special education services since the third grade.

Tonya, who received a mental health screening at the Health Clinic in Baltimore in April, 1995, is typical of the abused and/or neglected children who enter the child welfare system and are eventually placed in-out-of-home care. At first glance, the case worker might be led to assume that all Tonya needs is protection from the alleged perpetrators and sufficient time to process the shock of being removed from her mother's home. This assumption, though rooted in common sense, fails to take into account the long-term impact of Tonya's traumatic childhood on her psychosocial functioning.

The empirical research accumulated over the last two decades suggests that children like Tonya tend to have complex mental health needs that go beyond the material needs of a clean and safe home environment. For example, her mental health screening revealed considerable impairment in her visual-motor and cognitive skills. Furthermore, because of her history of maltreatment, she remains at high risk for developing both serious emotional problems such as depression and serious academic problems that could block her path to a self-sustaining adulthood.

This article offers a guide for case workers to the specific mental health needs of abused and neglected children entering the child welfare system. Though they are expected to help children suffering from particularly acute and complicated clinical problems, few workers have academic backgrounds in psychology or social work.[1] Furthermore, case workers typically receive little on-the-job training in the developmental needs of traumatized children. Baltimore workers, for example, simply undergo a five-day training course. In addition, as Dugger (1992) notes in her report on the what she characterizes as New York City's "ill-trained case workers," workers are typically burdened with heavy caseloads and do not receive adequate administrative support and guidance. Faced with the challenge of repeated crisis management, it is no wonder that workers tend to lose sight of the long-term effects of traumas and losses for children.

In this article, we will present a brief synopsis of the empirical literature on the mental health status of abused and neglected children entering the child welfare system. This literature review features a recent study on children entering out-of-home care in Baltimore that describes the typical mental health problems among these at-risk children. We then raise some critical policy and service delivery issues, and highlight the implications of this discussion for case workers.

### The literature on children entering the child welfare system

As a result of the society-wide blindness to child abuse and neglect, few investigators focused on children entering the child welfare system until the late 1970s. Fanshel & Shin (1978) conducted the pioneering research that first drew attention to the long-term psychosocial difficulties faced by children in foster care.

Research has since systematically demonstrated the high prevalence of cognitive and academic problems (e.g., Fox & Arcuri, 1980; Runyan & Gould, 1985a), behavioral or delinquency problems (e.g., Runyan & Gould, 1985b) as well as

*[1]As Dugger (1992) reports, at present, only New Mexico and North Dakota require workers to have social work degrees, whereas in most of the country, a bachelor's degree in any field is sufficient. Dugger suggests that states do not set stricter guidelines because of the difficulty in recruiting candidates for this highly stressful line of work for which the remuneration is often inadequate. Not surprisingly, the turnover among caseworkers is high.*

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