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The Battered Woman Syndrome and the Kentucky Criminal Justice System: Abuse Excuse or Legitimate Mitigation?

BY SUE E. MCCLURE*

INTRODUCTION

Charlotte's husband beat her with an iron pipe while her daughter watched from the closet. Johnette's husband nailed her and their children inside the house. Martina's mate told her that he did not know why anyone would want her. Traci's father broke her kneecaps with a baseball bat. All four of these women killed their abusers and all four received prison sentences for their actions.¹

The four women described above characterize the escalating social problem of domestic violence.² Our society has permitted the marriage license to function as a license to abuse;³ and then, if the victim kills the abuser and submits evidence of abuse as a justification for the homicide, society has dismissed this defense as the "abuse excuse." Society has historically played a role in facilitating abuse and today may be beginning to recognize the need to understand and consider the effects of this abuse

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¹ Tape of Female Inmates Seeking Clemency from Gov Brereton Jones (on file with the Kentucky Dep't of Public Advocacy). Gov Jones granted clemency to all four of these women. See infra notes 141-55 and accompanying text.

² It is questionable whether domestic violence is escalating or is just receiving more notoriety in today's society. See LENORE E. WALKER, THE BATTERED WOMAN ix, 11 (1979) (explaining that "[t]he problem of battered women has only come into the limelight in the past few years" and that "[w]ife abuse has an ancient history") [hereinafter WALKER, THE BATTERED WOMAN].

³ Id. at 13.
on its victims. This Note evaluates Kentucky’s response to battered women who have committed homicide by killing their abusers.

Initially, this Note will provide a description of the underlying psychological state of the abuse victim in order to later explain the purpose of the current law in Kentucky pertaining to victims of domestic violence who have become criminal defendants. Female victims of domestic abuse often share a set of characteristics—this common experience is known as the battered woman syndrome. The battered woman syndrome is an important conceptual tool for abuse victims who have become criminal defendants: it attempts to describe and explain the state of mind experienced by these particular defendants prior to and at the time they struck back at their abusers.

It remains unclear whether Kentucky law permits an abuse victim to introduce evidence of battered woman syndrome to defend herself against the charge that she committed a violent crime against her abuser. While Kentucky statutes permit the consideration of domestic violence in mitigation of certain offenses, there is an unfortunate lack of reported case law and legislative history explaining the application of these statutes. In order to bridge that gap and provide a fundamental understanding of the purpose and application of these laws, the author has conducted interviews with many of the critical parties, except the abuser and the abused defendant, involved in processing a case through the criminal justice system. Through these interviews emerges an understanding of the perspectives with which the judges, prosecutors, defense attorneys, experts, and the parole board approach these cases. These parties are diametrically opposed on some issues, but clearly each

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5 This Note does not attempt to describe the perspectives of all judges, attorneys, experts, and members of the parole board. The intent is to describe the author’s understanding of the comments offered by those people interviewed for this Note as a representative sample of the parties involved in the criminal justice system’s treatment of domestic violence cases resulting in homicide.
embraces the subject with passion and recognizes the need for the law to adequately address the role of domestic violence as mitigation evidence. This Note, therefore, explains the battered woman syndrome and attempts to describe its status under Kentucky law.

I. THE BATTERED WOMAN SYNDROME

The laws dealing with domestic violence victims who have become criminal defendants cannot be fully appreciated without a fundamental understanding of the individuals to whom these laws apply. The term “battered woman syndrome” is a legal term, not a medical diagnosis. It is a “vehicle to assist women in explaining their experiences in the context of a criminal trial dealing with a woman’s use of force in self-defense.” Lenore Walker, the pioneer researcher of the battered woman syndrome, defines a battered woman as “a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights.”

There is a trend in the field of psychology to redefine the battered woman syndrome. This trend is an attempt to expand the original concepts identified by Walker to account for the numerous ways in which battered women respond to the abuse. The syndrome, as originally defined, has proved confusing to the legal system and has caused a backlash by some feminists. Medically, a syndrome is merely a “group

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6 Interview with Dr. Sara Young, Psy. D., Private Practice, Center for Psychological Health, in Lexington, Ky. (Mar. 22, 1996).
8 Walker, THE BATTERED WOMAN, supra note 2, at xv. A further prerequisite to being classified as a battered woman is experiencing the battering cycle a minimum of two times. Id.
10 See Dowd, supra note 7, at 577 (explaining that feminists view the use of the term “syndrome” as causing battered women to be labelled abnormal, thus “absolv[ing] society of any responsibility for the battered woman’s situation by placing the blame on the victim”).
of symptoms which characterize [sic] a disorder.” One expert believes that the battered woman syndrome should be viewed as “the responses and characteristics of a normal woman who finds herself in a defective or dysfunctional relationship, surrounded by the realities of life confronting a woman today.” This refocuses the blame for the abuse on the relationship, the batterer, and society, and not the victim. As a legal term of art the “battered woman syndrome” refers to the use of expert testimony to explain the acts of the victim of abuse to the jury, and to convey to the jury her state of mind as created by her experiences as a battered woman.

Who are these battered women? What leads them to abusive relationships and keeps them there? What causes some of them to kill their abusers? The stereotypical battered woman is “a small, fragile, haggard person who might once have been pretty. She has several small children, no job skills, and is economically dependant on her husband.” She is assumed to live in poverty, belong to a minority group, come from a violent background, and be both fearful and passive. This stereotype is a myth. She is more likely to be your boss, your neighbor, your secretary, your doctor. If you are female, there is a fifty percent chance that she is you.

Dr. Walker’s work developed the framework for the initial description of the “themes” associated with domestic violence. Most battered women studied by Dr. Walker were intelligent, well-educated — or at least more educated than their batterer. They were competent women.

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11 Id. at 577-78; see also Lenore E.A. Walker, Understanding Battered Woman Syndrome, TRIAL, Feb. 1995, at 30, 32 (defining a syndrome as a collection of symptoms).
12 Dowd, supra note 7, at 578.
13 Id.
14 See id. at 574.
15 The author acknowledges that women are not the only victims of domestic violence and does not mean to diminish the pain and suffering experienced by men who are subjected to such abuse. This Note refers to domestic violence victims with female pronouns merely in an attempt at clarity, consistency, and readability. The abuse of any individual, regardless of gender, is a blight on society, and this author does not intend to minimize the suffering of any class of victims.
16 Walker, THE BATTERED WOMAN, supra note 2, at 18.
17 Id.
18 Id. at 19.
19 Interview with Dr. Sara Young, supra note 6.
20 LENORE E. WALKER, BATTERED WOMAN SYNDROME 10, 16 (1984)
Many of the women held jobs in which they were delegated some measure of responsibility. Many battered women come from middle-class families, not all have children, and many are successful career women.

Their demographic profiles are diverse, with battered women found in all age groups, races, ethnic and religious groups, educational levels, and socioeconomic groups. The battered woman may have low self-esteem, hold traditional views about the woman's role in the home, believe she is responsible for the batterer's conduct, and deny the anger she feels toward the batterer. She may also have the strength to manipulate her environment in order to postpone the violence and prevent, or delay, the abuser from killing her. She may believe that she alone can help herself to escape her predicament. Battered women may live a dual existence. They may put a capable, confident face forward in their public lives and at home slip into a passive role over which their batterer has uncanny control. These are, of course, generalities with no one woman fitting all of the characteristics described. However, this general description serves to effectively dispel the false stereotype of the battered woman and to help demonstrate that battered women are people with whom everyone might identify in some way.

Dr. Sara Young, a clinical psychologist whose practice involves the treatment of victims of abuse who have survived their abusive relationships, explains that there are numerous variations on the themes associated with abusive relationships. Each individual's experience must be evaluated and understood in the context in which it has occurred and not by comparison to some rigid standard or list of criteria.

Dr. Walker's research also developed a fundamental profile of the batterer. The batterer probably learned his violent behavior over a long period of time. He typically grew up in an environment where he was exposed to violence and was rewarded for his inability to control his anger and the resultant violent behavior. He suffered few consequences because of his behavior and he generally gained whatever it was he

[hereinafter Walker, Battered Woman Syndrome].

Id. at 10.

Walker, The Battered Woman, supra note 2, at 18-19.

Id. at 19.

Id. at 31.

Interview with Dr. Sara Young, supra note 6.

Id. See generally Dutton, supra note 9, at 1191 (redefining battered woman syndrome and delineating a unique evaluative approach for examining the various responses women exhibit to domestic violence).

Walker, Battered Woman Syndrome, supra note 20, at 7
sought to gain by his violence. He may suffer from low self-esteem, hold traditional views about the male role in the home, blame others for his actions, be extremely jealous, and believe his violence should not invoke negative consequences. He, like his victim, may present a different face to society than he assumes with his family; although more recent research shows that many of these men exhibit violent behavior against people or objects other than their mates. Generally, the batterer knows that his conduct is unacceptable to society. He may feel guilt and shame about his inability to control his actions and Dr. Walker posits that if he were able to stop himself, he would.

A large number of battering incidents occur during the heat of summer, on weekends between six o’clock p.m. and midnight. The violence generally takes place in the home, most frequently in the living room or bedroom, and lasts for several hours with the most intense battering occurring over a fifteen to thirty minute period. Eighty percent of the physical violence is accompanied by verbal abuse. The majority of the women do not respond with violence. This Note focuses on some of those women who do.

The battering relationship is characterized by a cycle of violence. This cycle was first documented by Dr. Walker and has been labeled the Walker Cycle of Violence. There are three phases to this cycle. The first is the tension building phase. It is characterized by nonviolent hostility toward the woman and placating of the batterer by the woman. This phase is thought to result in training the woman to think that she is incapable of controlling the ultimate outcome by her responses to the

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28 Id. Dr. Walker reports that 81% of batterers grew up in an environment where they committed violent acts, witnessed violent acts and/or were the victims of violent acts themselves. Id. at 35.
29 WALKER, THE BATTERED WOMAN, supra note 2, at 36.
30 Id.
31 WALKER, BATTERED WOMAN SYNDROME, supra note 20, at 35.
32 WALKER, THE BATTERED WOMAN, supra note 2, at 57
33 Id. at 26.
34 WALKER, BATTERED WOMAN SYNDROME, supra note 20, at 24-25.
35 Id. at 25.
36 Id. at 27
37 Id. at 26.
38 Id.
39 Id. at 95.
40 Id. at 95-96.
It is during this phase that the woman learns to predict when the physical violence is likely to occur "by recognizing specific predictive cues emitted by the batterer." Phase two is the acute battering incident. This phase is rarely triggered by the victim's behavior and is more commonly triggered by an external event. During this phase there is a sharp decrease in the pent-up tension which in itself is a source of reinforcement for the entire cycle. The third and final phase is one of calm and loving respite. This period of contrition is when the batterer feels remorse and promises never to batter again. He mobilizes all of his charm and family support to convince the victim that he can and will change. He exudes care and loving kindness. Dr. Walker finds that this period of contrition completes the process of victimization.

To most observers it is perplexing that these women do not just leave their abusers. Dr. Walker has concluded that this is due to complex psychosocial reasons and has termed this psychological paralysis "learned helplessness." Dr. Walker's theory is that a combination of societal influences and control techniques by the batterer combine to convince the abuse victim that there is no way out of the abusive relationship. Society sends messages to the woman that she should be passive, complacent, and submissive and then neither provides protection through the police, courts, or hospitals nor a safe haven when her home becomes violent. The batterer uses social and economic isolation combined with threats against the safety of the woman, and her friends and family, to keep the woman with him. All of these forces combine to teach the woman that she does not have control of her life. The fact that the beatings continue no matter what she does to stop them decreases her

41 Id. This sequence of events has been termed the "unpredictable non-contingency response/outcome pattern" and contributes to a state of learned helplessness. Id. at 95. See infra notes 48-63 and accompanying text.
42 Walker, Battered Woman Syndrome, supra note 20, at 102.
43 Id. at 96.
44 Walker, The battered Woman, supra note 2, at 60.
45 Walker, Battered Woman Syndrome, supra note 20, at 96.
46 Id. at 95-96.
47 Id., see also Walker, The Battered Woman, supra note 2, at 65.
48 Walker, The Battered Woman, supra note 2, at 43.
49 Id. at 42-52.
50 Id. at 43.
51 Id. at 51-52.
52 Id. at 52.
motivation to try to change her circumstances. She begins to focus on techniques of survival rather than escape skills. This narrowed focus causes the battered victim to misperceive opportunities for escape. Eventually the period of contrition reoccurs and the woman convinces herself that it was her fault, the batterer is really a good man and he will stop beating her. Then the cycle begins again. Nothing short of terminating the relationship will end the violence, and some women terminate the relationship by killing the abuser.

There are experts who feel that the term “learned helplessness” is a misnomer and has done more harm than good. The criticism of learned helplessness focuses on the contradiction between the idea of helplessness and the real actions of the victim. This contradiction may cause disbelief of an expert who claims that the woman was unable to leave the abusive setting. For instance, the victim of abuse might repeatedly bail the abuser out of jail or resist police intervention after the police are summoned to the scene of the abuse. These women who are supposedly helpless are seen taking action in various aspects of their lives, giving an appearance which is inconsistent with their label. It is ultimately difficult to understand how one labelled as helpless can respond to her tormentor with force, sometimes deadly force.

The experts who criticize the term “learned helplessness” embrace instead the concept of “traumatic bonding” as an explanation for why these women do not leave their abusive relationships. Traumatic bonding is considered by these experts to be a more accurate description of the dynamics which keep the victim of abuse in the relationship. The components of traumatic bonding are: (1) an inequity of power, for example either physical and/or economic, causing the victim to be dependent on her abuser, and (2) intermittent abuse and affection. These two components combine to create a more powerful bond between

53 Id. at 45.
54 WALKER, BATTERED WOMAN SYNDROME, supra note 20, at 33.
55 Id.
56 Id. at 8.
57 Interview with Dr. Sara Young, supra note 6.
58 Id.
59 Id.
60 Id., see also CHARLES P EWING, BATTERED WOMEN WHO KILL 19-20 (1987) (stating that traumatic bonding is a psychological explanation of why battered women fail to leave their batterers).
61 Interview with Dr. Sara Young, supra note 6.
62 Id., EWING, supra note 60.
the batterer and the victim than results from constant affection because
the effect is to cause the woman to believe she can shape the responses
of the man, and she is constantly trying to do so.63 This belief that she
can change her circumstances combined with her dependency on the
abuser are what hold the victim of abuse in the abusive relationship.

Those victims of abuse who ultimately kill their tormentors are
frequently those that suffer the most violent abuse64 and who, therefore,
perceive the most danger in their relationship. They kill, perhaps, because
of the isolation and the failure of the system to help them find a way out,
and because of a feeling that they alone must fend off the brutal
attacks.65 They have become trapped and sense that this time the batterer
intends to carry out his mortal threats.66 The battered woman alone is
best able to understand the level of violence of which her abuser is
capable and when that violence is about to escalate to extreme levels.67
Her violence is a desperate last attempt to protect herself.

II. KENTUCKY LAW

A. Cases

Kentucky case law on the admissibility of battered woman syndrome
is sparse. There are six cases which mention the issue,68 only four of
which raise battered woman syndrome in the context of a claim of self-
defense.69 Only Dyer v. Commonwealth,70 Commonwealth v. Craig,71

\[\text{References:}\]

63 Interview with Dr. Sara Young, supra note 6.
64 EWING, supra note 60, at 34-35.
65 WALKER, BATTERED WOMAN SYNDROME, supra note 20, at 40.
66 Id. at 42.
67 Dowd, supra note 7, at 574; Interview with Dr. Sara Young, supra note 6.
68 Dyer v Commonwealth, 816 S.W.2d 647 (Ky. 1991); Commonwealth v Craig, 783 S.W.2d 387 (Ky. 1990), overruled by Dyer v Commonwealth, 816 S.W.2d 647 (Ky. 1991); Commonwealth v Rose, 725 S.W.2d 588 (Ky. 1987), cert. denied, 484 U.S. 838 (1987), overruled by Commonwealth v Craig, 783 S.W.2d 387 (Ky. 1990); Pruitt v Commonwealth, 700 S.W.2d 68 (Ky. 1985); Lucas v. Commonwealth, 840 S.W.2d 212 (Ky. Ct. App. 1992), rev. denied, (Dec. 9, 1992); Ford v. Commonwealth, 720 S.W.2d 735 (Ky. Ct. App. 1986).
69 Craig, 783 S.W.2d at 387; Rose, 725 S.W.2d at 589; Lucas, 840 S.W.2d at 213; Ford, 720 S.W.2d at 736.
70 Dyer v Commonwealth, 816 S.W.2d 647 (Ky. 1991).
71 Commonwealth v. Craig, 783 S.W.2d 387 (Ky. 1990), overruled by Dyer
and *Commonwealth v. Rose* discuss this issue in any depth. An analysis of the results in those cases reveals somewhat inconsistent treatment of expert testimony on battered woman syndrome. The women who raised the battered woman syndrome to establish a claim of self-defense in response to a murder charge were ultimately convicted of manslaughter either in the first or second degree and were sentenced to five to ten years in prison. The inconsistency surfaces in the courts’ attempts to define battered woman syndrome. Is it profile evidence? Is it evidence of state of mind? Is it a medical condition or diagnosis?

In *Rose*, all seven justices of the Kentucky Supreme Court agreed that "as a general proposition, evidence of [battered woman syndrome] is admissible after a proper foundation has been provided by evidence that this is a mental condition constituting a recognized scientific entity and that the witness is qualified to testify about it." The high court agreed with the trial court that the expert testimony was properly admissible on this issue but should be limited in this case to an explanation or discussion of the syndrome. Ultimate conclusions or opinions were excluded because the expert was a registered nurse and thus not qualified to diagnose mental conditions.

Three years later, the Kentucky Supreme Court split four to three and reversed its conclusions in *Rose*, finding that the battered woman syndrome was not "medical in nature." The court grappled with the word "syndrome" and its intended implications, concluding that it represented a “set of concurrent things (as emotions or actions) that usually form an identifiable pattern a characteristic pattern of behavior [or] the emotional and behavioral characteristics of a person.” The court went on to remand the case, instructing the trial court not only to permit testimony by a social worker on the "characteristics and consequences of the battered wife syndrome" but also to permit the

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v Commonwealth, 816 S.W.2d 647 (Ky 1991).

72 Commonwealth v. Rose, 725 S.W.2d 588 (Ky. 1987), overruled by Commonwealth v Craig, 783 S.W.2d 387 (Ky. 1990).

73 Rose, 725 S.W.2d at 591 (emphasis added).

74 Id.

75 Id.

76 Commonwealth v. Craig, 783 S.W.2d 387, 388 (Ky. 1990), overruled by Dyer v Commonwealth, 816 S.W.2d 647 (Ky. 1991).

77 Id. at 388.

78 Id. at 389.
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social worker to be qualified as an expert, thus allowing evidence of the social worker’s conclusions and opinions.79

Twenty months after Craig, the Kentucky Supreme Court, in Dyer v. Commonwealth, again discussed the battered woman syndrome, this time in the context of a sodomy case.80 The conclusion of this plurality opinion is less clear than the court’s decisions in Rose or Craig. The court seemed at one point to equate evidence of battered woman syndrome with mere profile evidence.81 Subsequently, the court identified battered woman syndrome as evidence of a mental condition requiring qualified expert testimony to establish “that the condition is a recognized scientific entity, and then tying the accused to this mental state.”82 Dyer expressly overruled Craig on this point.83 After Dyer, the position of the court appears to be that battered woman syndrome is a medical condition. Conclusions that the defendant fits within this syndrome shall be admitted only if the witness qualifies as an expert (clinical psychologist or psychiatrist) and can establish that battered woman syndrome is recognized by the scientific community as a condition or diagnosis.

This discussion of the case law indicates the confusion caused in the courts by the “syndrome” label. While the courts treat battered woman syndrome as a psychiatric condition, experts in psychology currently understand the issue in a broader context. Although there has been some inconsistency among the experts themselves about what is encompassed by the “syndrome,”84 there appears to be a trend to redefine the battered woman syndrome.85 It is conceded that a relabelling at this late date would generate further confusion;86 therefore, the trend is to redefine what is meant by the label “battered woman syndrome.” As a result of

79 Id.
80 Dyer v Commonwealth, 816 S.W.2d 647 (Ky 1991).
81 Id. at 653-54.
82 Id. at 654.
83 Id.
84 Dr. Walker alternately refers to battered woman syndrome as a “clinical syndrome,” a method of describing the “dynamics of the battering relationship,” a “collection of symptoms” requiring “mental health providers who testify as experts [to] incorporate these symptoms into whatever diagnostic system they use,” a subcategory of Post Traumatic Stress Disorder, and a separate listing in the International Classification of Disease publication. Walker, supra note 11, at 32.
85 See supra notes 9-14 and accompanying text.
86 Dowd, supra note 7, at 577
research which has continued since the label was first coined by Dr. Walker, battered woman syndrome is intended to refer to a group of responses to abuse with their numerous variations. The label is intended to be a way to put the woman’s actions in context so that they may be explained to a jury. It is urged that battered woman syndrome must be redefined because: “(1) testimony concerning the experiences of battered women refers to more than their psychological reactions to violence, and (2) battered women’s diverse psychological realities are not limited to one particular ‘profile.’” The expert testimony could more accurately be referred to as concerning battered women’s “experiences” in order to reflect the range of information it typically encompasses. Unlike insanity, battered woman syndrome is neither a disorder nor a defect. It is merely a reference to the battered woman’s defense. It is a term referring to evidence of the context of the crime and the circumstances of the battered woman’s life which have groomed her responses to the violence. It is an attempt to prove to the jury that she has acted reasonably, under the circumstances, by using force in self-defense.

**B. Statutes**

This Note examines the following five statutes:


(2) Kentucky Revised Statutes section 533.060. “Probation or Conditional Release; Effect of Use of Firearm; Other Felonies.”

(3) Kentucky Revised Statutes section 439.3401. “Parole for Violent Offenders; Applicability of Section to Victim of Domestic Violence or Abuse.”

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87 Interview with Dr. Sara Young, supra note 6.
88 Dowd, supra note 7, at 574.
89 Dutton, supra note 9, at 1195.
90 Id. at 1196.
91 Dowd, supra note 7, at 577
92 Id. at 574.
93 KY. REV STAT. ANN. § 503.050 (Baldwin 1995).
94 KY. REV STAT. ANN. § 533.060 (Baldwin 1995).
95 KY. REV STAT. ANN. § 439.3401 (Baldwin 1995).


These statutes are relevant to a criminal case in which the defendant is a victim of domestic abuse charged with (or convicted of) a violent crime against her abuser. The Kentucky self-protection statute, section 503.050, contains the traditional elements of a self-defense claim.98 The defendant must prove: (1) she had a belief that physical force was necessary for self-protection against an unlawful attack; (2) that the force used was believed to be necessary to avoid imminent danger; and (3) the force used was not in excess of that believed necessary to repel unlawful attack.99 Furthermore, the statute justifies the use of deadly physical force if the defendant "believes that such force is necessary to protect [herself] against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat."100 If the requirements of the statute are met, its application has been limited in only a few discrete contexts.101 The problem for battered women has been fitting their circumstances and conduct within the traditional self-defense requirements.

Kentucky's self-defense statute is a traditionally male-oriented statute applying best to situations typical of how two male adversaries respond to each other when one threatens physical violence. The statute presumes that if their physical strengths are comparable, the aggressor's threat is generally met head on. When the violence involves a man against a woman, the response is typically a different one. Women are generally physically no match for a male aggressor and they are conditioned by society to be meek and to restrain their aggressions. Furthermore, in the domestic violence context they have experienced past physical abuse by

96 KY. REV. STAT. ANN. § 439.3402 (Baldwin 1995).
97 KY. REV. STAT. ANN. § 403.720 (Baldwin 1995).
98 KY. REV. STAT. ANN. § 503.050 (Baldwin 1995).
100 KY. REV. STAT. ANN. § 503.050(2) (Baldwin 1995).
101 Use of force in self-defense is not justified if the defendant was: (1) resisting arrest by a peace officer; (2) the initial aggressor without intent to kill or seriously harm the victim; or (3) provoking another as an excuse to kill or seriously harm them. Id. § 503.050 commentary by Kentucky Crime Commission and Legislative Research Commission (1974).
the aggressor demonstrating what he is both willing and capable of doing to them. Therefore, women in general, and abused women in particular, respond differently than men to threats of physical violence. Because, generally, the abused woman is no match for her abuser in a direct physical confrontation, she finds an indirect way to defend herself. For these reasons, the justification of self-defense has not provided sufficient protection to female victims of domestic violence who have indirectly lashed out with violence in response to abuse.

Section 503.050 has undergone several changes beginning in 1974. The 1974 amendments removed the requirement that the defendant prove the reasonableness of her belief in the need to use force. "The fact that unlawful force is not actually being threatened, that the amount of force used is actually excessive, or that the individual's beliefs are unreasonable does not strip [her] of the defense provided by this section."\(^{102}\) Section 503.050, however, is modified by section 503.120 which makes the self-protection defense unavailable if a lesser mental state, such as wantonness or recklessness, is sufficient to establish culpability, which is the case with the crime of homicide.\(^{103}\) The effect of this change is that if the defendant's belief is honest, but unreasonable, she can claim the justification of self-protection only to a crime in which intent is a prerequisite to culpability. The justification is not available to exonerate her from "a lesser degree of criminality if [her] conduct based upon that belief constitutes wantonness or recklessness."\(^{104}\) This may explain why many battered women claiming self-defense in the homicide of their abuser are convicted of manslaughter. If a jury determines that a battered woman was unreasonable in deciding that she needed to defend herself with force or in determining the amount of force she needed to employ, a claim of self-defense will not preclude a conviction based on a lesser mental state. The question then is what is the standard for determining the reasonableness of the defendant's belief?

In 1992 a third subsection was added to section 503.050 providing that "[a] ny evidence presented by the defendant to establish the existence of a prior act or acts of domestic violence and abuse as defined in

\(^{102}\) Id.

\(^{103}\) KY. REV STAT. ANN. § 503.120 (Baldwin 1995).

\(^{104}\) Id. commentary by Kentucky Crime Commission and Legislative Research Commission (1974). One acts wantonly when she "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." KY. REV STAT. ANN. § 501.020(3) (Baldwin 1995). One acts recklessly when she "fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstances exists." Id. § 501.020(4).
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[Kentucky Revised Statutes section] 403.720 by the person against whom the defendant is charged with employing physical force shall be admissible under this section.105 Certainly the reasonableness of the defendant's belief was intended to be determined in the context of the violence in which the defendant lived day-to-day. If not, there is no point in admitting the evidence of abuse under section 503.050(3). It would also seem appropriate that the jury be instructed to consider evidence offered pursuant to section 503.050(3) in determining if her belief was reasonable. Perhaps an instruction referring to the reasonable battered woman or the reasonable victim of domestic abuse or violence would be in order.

There is an absence of case law to explain the application of this newest amendment. It raises some interesting questions. What effect, if any, does this subsection have on the traditional elements required to establish a claim of self-defense? Are victims of domestic violence still required to establish that they acted out of fear and that there is a causal link between their act of violence and the abuse to which they were subjected at the hands of their victim? On its face, the amendment appears to be a rule of evidence mandating the admissibility of any evidence of domestic abuse or violence proffered by the defendant. Was that rule the intent of the legislature? Is that how it would be applied in reality? How broadly is this rule to be interpreted? Will evidence of any prior act of domestic violence be admitted or is there some temporal requirement? Will the court permit expert testimony to establish a causal relationship between the history of violence suffered by the defendant and their own act of violence in order to explain the battered woman's state of mind? Will the court instruct the jury that the evidence of abuse can be taken into consideration in evaluating the imminence of the threat and the reasonableness of the defendant's actions? These were among the queries posed to the subjects of the interviews discussed in the next portion of this Note.106

Also relevant to this topic is the statute which delineates the eligibility of violent offenders for probation.107 In general, a defendant found guilty of a Class A, B, or C felony which involved the use of a

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105 KY. REV STAT. ANN. § 503.050(3) (Baldwin 1995). Domestic violence and abuse is defined as "physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple." Id. § 403.720(1).

106 See infra Part III.

107 KY. REV STAT. ANN. § 533.060 (Baldwin 1995).
firearm is not eligible for probation, shock probation, or conditional discharge. There is one exception to this rule. If the defendant proves that the person against whom the firearm was used "had previously or was then engaged in an act or acts of domestic violence and abuse against either the person convicted or a family member of the person convicted," she is exempt from the application of this statute. The statute further requires that upon a claim of exemption by the convicted defendant, "the trial judge shall conduct a hearing and make findings to determine the validity of the claim and applicability of this exemption."

In effect, this statute seems to provide a second bite at the apple to violent offenders who are also victims of domestic abuse. If they are unsuccessful in establishing a claim of self-defense, they can try for probation under the exemption provided by section 533.060. How is this statute applied? Will the judge be required to hold a separate hearing on the issue of domestic abuse? What type of findings is the court required to make? What type of evidence will be admitted and required to support the defendant's claim? Will one act of violence suffice? Once again, will there be a requirement of a temporal link between the abuse and the defendant's violent act? What is the intended breadth of this subsection? Does it encompass siblings killing on behalf of an abused sibling? Does the exemption automatically apply if its applicability is established?

Failure to establish a claim of self-defense or eligibility for probation leaves the defendant who is also a victim of domestic abuse one final avenue for relief. Section 439.3401 provides the guidelines for eligibility of violent offenders for parole. While the general parole rules provide that the defendant must serve twenty percent of her sentence before becoming eligible for parole, section 439.3401 requires that violent offenders must serve additional time before they are considered for parole. Under a 1992 amendment to section 439.3401, however,
defendants who are victims of domestic violence are treated differently. This amendment, subsection (4), provides an exception to the parole rules governing violent offenders. Subsection (4) states that the additional time requirements for violent offenders do not apply to victims of domestic abuse. In other words, violent offenders who are determined by the court to be victims of domestic abuse are removed from the violent offender parole rules and are eligible for parole after serving twenty percent of their sentence. Thus the special parole rules for violent offenders are not applicable to one adjudged to be "a victim of domestic violence or abuse with regard to the offenses involving the death of the victim or serious physical injury to the victim."  

Section 439.3401 was enacted on July 15, 1992, and was made retroactive to July 15, 1986.114 Defendants convicted during this window of time who were victims of domestic abuse can now petition the court for a ruling that they were a victim of domestic violence and therefore eligible for parole after serving twenty percent of their sentences rather than fifty percent. Section 439.3402 outlines in detail the procedure which the court must employ upon motion by the offender seeking application of the exemption contained in section 439.3401(4).

It is the application and interplay of the above mentioned statutes with which this Note is concerned. The interpretation of these laws should reflect the current legal view of domestic violence and its victims. Are victims of domestic abuse being sent the message that they will not be held accountable for the consequences of their actions? Is it such a bad thing to give these defendants several opportunities to plead their case of justification? Are the laws belatedly beginning to recognize and address a real and pervasive problem in our society, the problem of domestic violence? Has the legislature gone to the other extreme over the domestic violence issue? These are the questions addressed in the remainder of this Note, with various perspectives provided by the judges, prosecutors,
defense attorneys, experts, and parole board members who deal with these cases.

III. INTERVIEWS

The author interviewed nine Kentucky circuit court judges, an Assistant Commonwealth's Attorney from Fayette County, an Assistant Public Advocate, the chairperson of the Kentucky Parole Board, and a clinical psychologist who treats victims of domestic abuse. The information collected from the interviews conducted is, of course, the result of a non-scientific study and the results will be reported in a like manner. The responses of the nine judges interviewed will be reported as a group, rather than individually. The comments of the judges are the product of their general legal expertise because none had heard a case raising these specific statutes in the context of domestic violence. Therefore, none had been fully briefed on the issues.

The majority of the judges interviewed felt that section 503.050, in effect, expands the concept of self-defense. Although the requirements of the defense are the same — fear, resulting in the belief that use of force is required; reasonableness of the belief; imminence of the danger; appropriateness of the amount of force used — section 503.050(3) alters these requirements by allowing them to be considered in the context of domestic violence and from the perspective of a victim of such violence. One judge commented that the effect of section 503.050(3) is to give the status as a victim of abuse more weight through statutory recognition. The general consensus of the judges was that this subsection provides some form of additional consideration for this class of defendants in establishing a claim of self-defense. This conclusion is consistent with the statutory definition of "imminent" which provides expressly for this additional consideration. "Imminent" is defined as "impending danger, and, in the context of domestic violence and abuse belief that danger is imminent can be inferred from a past pattern of repeated serious abuse." This additional consideration allows battered women who kill to establish a claim of self-defense despite the absence of an immediate threat of danger if they know, from past experience, that the violence is about to erupt.

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115 Interviews with Kentucky circuit court judges (Feb. 29 - Mar. 27, 1996).
116 KY. REV. STAT. ANN. § 503.010 (Baldwin 1995).
117 Id.
The Fayette County Commonwealth's Attorney's office viewed section 503.050(3) in much the same way. Although stating that this subsection did not result in changing the requirements of a self-defense claim, specifically the requirement of an imminent threat of danger, Assistant Commonwealth's Attorney Tamra Gormley proceeded to express the view that battered women can fit under the self-defense statute. She acknowledged that it is unfair to ask a woman to wait until she is attacked by her abuser to respond with force in order to meet a rigid definition of what constitutes imminent danger. The Assistant Commonwealth's Attorney pointed out that section 503.050(3) does not change the presentation of a claim of self-defense because all of the evidence admissible under that subsection could have been brought in without the mandatory language in the statute because it goes to the mental state of the defendant.

Linda Smith, an attorney with the Department of Public Advocacy ("DPA") agreed that the elements of a claim of self-defense are unaltered by section 503.050(3). She stated, however, that the effect was to allow the requirements, and the defendant's state of mind, to be evaluated in the context of domestic violence.

Many of the judges bristled at the inquiry as to whether section 503.050(3) was a rule of evidence mandating admissibility of prior acts of domestic violence or abuse by the victim of the crime which is presented by the defendant. Seven of the nine judges concluded quickly that this was not a rule of evidence. They said that admissibility of this evidence was subject to the Kentucky Rules of Evidence, specifically Rules 403 and 404, and the discretion of the court. It was pointed out that judicial discretion is fundamental and, that without it, all

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118 Interview with Tamra Gormley, Esq., Assistant Commonwealth's Attorney for Fayette County, in Lexington, Ky. (Mar. 21, 1996).
119 Interview with Linda A. Smith, Esq., Assistant Public Advocate with the Department of Public Advocacy, in LaGrange, Ky. (Mar. 29, 1996).
120 Interestingly, this mandate of admissibility seemingly contradicts KY. REV STAT. ANN. § 403.780 (Baldwin 1995) that prohibits the admission of testimony from a domestic abuse hearing in a subsequent criminal proceeding involving the same parties. The result of the hearing (i.e., an Emergency Protective Order) would presumably be admissible, but what result if the testimony given in the hearing is contradicted to the detriment of the defendant in a subsequent criminal proceeding? Which statute controls — section 503.050 mandating the admissibility of the testimony as evidence of abuse or section 403.780 prohibiting the admission of the same evidence? This interesting dilemma was posed by one of the judges during his interview for this Note.
that is needed is an administrator to blindly apply the law and that the source of protection from abuse of this discretion is the electoral process. Several of these judges explained that the Kentucky Rules of Evidence provide for broad admissibility of the mental state of the defendant and that this evidence is frequently allowed in. However, to be so admitted, the evidence must be competent, relevant, and substantiated. One judge speculated that a preliminary hearing on the admissibility of evidence of domestic abuse would be required.

One judge read section 503.050(3) literally, concluding that it mandated admissibility and that it was up to the jury to determine the relevance of the evidence. This judge's view was that life is not lived in a vacuum; therefore, even an old incident of domestic violence may have affected the defendant's state of mind at the time of the crime. This judge had faith that the jury would be able to disregard evidence that was not pertinent to the claim of self-defense.

Another judge never expressed his view about how he read this statute. He did predict that it would be applied in as many different ways as there were judges who applied it, with the final interpretation being determined by a higher court on appeal.

It was suggested by more than one judge that section 503.050(3) creates a separation of powers issue due to the encroachment of the legislature on an issue reserved to the judiciary. It was further explained that the court gets jealous when the legislature gets involved in the rules of court and that the apparent attempt of section 503.050(3) to interfere with the court's discretion is an example of perceived inappropriate legislative action. The court has a constitutional basis for this jealousy. The Kentucky Constitution provides for the division of "[t]he powers of the government into three distinct departments." Furthermore, it is provided that "[n]o person being of one of those departments, shall exercise any power properly belonging to either of the others." The power to prescribe the "rules of practice and procedure for the Court of Justice" is exclusively vested in the Supreme Court of the state. The concept of comity among the different branches of government provides

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121 KY. CONST. § 27
122 Id. § 28.
123 Id. § 116; O'Bryan v Hedgespeth, 892 S.W.2d 571, 576 (Ky. 1995) (holding that statute mandating admission of evidence of collateral source payments violated constitutional separation of powers); see also Kupron v Fitzgerald, 888 S.W.2d 679 (Ky. 1994) (discussing the constitutionality of the Jefferson Family Court project and the appointment of district judges to hear dissolution actions).
for "judicial adoption of a rule unconstitutionally enacted by the legislature 'not as a matter of obligation, but out of deference and respect.'" 124 Generally, comity is only given to an unconstitutionally enacted statute when it enhances, rather than impairs, the judicial function. 125 The overwhelming majority of judges interviewed felt that the effect of section 503.050(3) was an impairment of the court's discretion in determining the relevance and admissibility of evidence, an issue of practice and procedure exclusively reserved to the judicial branch of government.

Ms. Gormley, the Assistant Commonwealth's Attorney, observed that the language of section 503.050(3) appears to be mandatory, but that was in effect irrelevant because this type of evidence is generally admitted since it goes to the defendant's state of mind. 126 Ms. Smith, with the Department of Public Advocacy, retorted that whether all of the evidence establishing the defendant's state of mind is admitted depends on the court, and that the effect of section 503.050(3) is to ensure that the evidence does get admitted. 127 Noting that the statute mandates the admissibility of "any evidence," Ms. Smith concluded that admissibility of the evidence is taken out of the judge's discretion and furthermore, that this language includes testimony by an expert witness on the issue of domestic violence and abuse. 128

The prevailing view of the judges on the issue of expert testimony on battered woman syndrome was that such testimony is probably prohibited by the Kentucky Supreme Court. It was thought by most of those interviewed that the inadmissibility was due to the fact that the syndrome has not been scientifically substantiated and accepted. Most of the judges recognized the usefulness to the jury of expert testimony on the issue of the effect of domestic violence on the mental state of the defendant but stated that they would not admit testimony on the battered woman syndrome. Perhaps, if the question had been posed to the judges omitting the word "syndrome," more would have found the expert testimony admissible. Several conceded that they would allow evidence of the abuse and its effects, for instance, by the defendant's treating physician. One judge concisely stated that allowing in the evidence and allowing

124 O'Bryan, 892 S.W.2d at 577 (quoting BLACK'S LAW DICTIONARY 242 (5th ed. 1979)).
125 Id.
126 Interview with Tamra Gormley, supra note 118.
127 Interview with Linda A. Smith, supra note 119.
128 Id.
testimony on the concept are two different things entirely. Only one judge felt that expert testimony was not needed in domestic violence cases.

The view of the Assistant Commonwealth’s Attorney was that expert testimony on the battered woman syndrome was a valid method of establishing a claim of self-defense, but that it was unclear what the position of the Kentucky Supreme Court would be on the issue.129 There have not been any reported cases in Kentucky on this issue since 1991. As yet unanswered is the effect on the admissibility of battered woman syndrome under the more flexible standard for the admission of expert testimony developed in Daubert v. Merrill Dow Pharmaceuticals.130

It was unanimous among all those interviewed that the traditional self-defense instructions would be given to the jury without alteration despite the admission during the trial of evidence of domestic abuse of the defendant by the victim. The reasons offered for this result included the belief that an instruction would not be required for the jury to link the abuse with the defendant’s state of mind. In addition, it was stated that adding any instructions regarding the evidence of abuse would further complicate the self-defense instructions, which are already too complicated. Furthermore, if additional instructions were to be given by the court, the prosecution would argue that the result would be undue emphasis on the issue of domestic violence or battered woman syndrome.131 It is curious to the author that evidence would be admitted to establish the defendant’s state of mind and the context in which the crime occurred but that no instruction would be given to direct the jury to evaluate the claim of self-defense from the perspective of a victim of domestic violence.132

Domestic violence victims convicted of violent crimes receive consideration for probation under section 533.060. The statute directs the court to hold a hearing to determine the validity of the domestic violence claim. The judges were asked if they would conduct a separate hearing for these purposes. If the issue of domestic violence had not been raised in the guilt phase of the trial, most judges said that they would hold a

129 Interview with Tamra Gormley, supra note 118.
130 Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993). In Daubert, the U.S. Supreme Court rejected the Frye test, which required that an expert’s testimony have general acceptance in the scientific community to be admissible. The Court established a more flexible test based on the methodology and validity of the scientific evidence as well as the level of scrutiny and acceptance by the scientific community.
131 Interview with Tamra Gormley, supra note 118.
132 See supra notes 98-105 and accompanying text.
separate hearing. The general consensus was, however, that the credibility of the defendant’s claim of being a victim of domestic abuse would be compromised by the failure to raise the issue during the guilt phase of the trial. The hearing would be held before final sentencing, and one judge noted that the defendant would have to establish her victim status by a preponderance of the evidence. It is likely that the prosecution would argue that the burden of proof should be clear and convincing evidence.\(^{133}\)

If the issue of domestic violence was raised in the guilt phase of the trial, about half of the judges questioned would still hold a separate sentencing hearing. During this hearing they would consider the evidence admitted during the guilt phase as well as any additional evidence relevant to the issue of whether the defendant was a victim of abuse by the person against whom the defendant used violence. The other half of the judges would consider the evidence produced at trial without conducting a separate sentencing hearing on the issue.

One judge suggested that he would submit the determination of the defendant’s status as a victim of abuse to the jury if the evidence had been presented at trial. If the jury verdict was that the defendant was abused by her victim, then the exemption would apply. If the jury returned a verdict that the defendant was not a victim, then that judge would hold a separate hearing for a determination of the issue by the court.

It was thought by the judges that the trial court would be required to make findings of fact on the issues of whether the alleged violence and abuse actually occurred and were directed at the defendant, causing the defendant to be a “victim” of such abuse. Most of the judges stated that a broad range of evidence would be admitted in this hearing since it was after the guilt phase of the trial and would pertain to the defendant’s state of mind. One problem anticipated by the judges was the ability of the prosecution to refute this evidence if the defendant’s abuser was dead. One judge expressed the opinion that expert testimony would not be needed at this stage, and of course those not holding a separate hearing would only consider that evidence of abuse admitted during the guilt phase of the trial.

The interviewees expressed no opinion about what quantity of evidence would be required to establish victim status. Helen Howard-Hughes, the chairperson of the Kentucky Parole Board, commented that she has seen a disparity in the amount of evidence required, with some

\(^{133}\) Interview with Tamra Gormley, _supra_ note 118.
women found to be victims of domestic violence based on one piece of evidence and others who presented substantial evidence of abuse found by the court not to be a victim of domestic violence.\textsuperscript{134}

Upon establishing her claim of being a victim of abuse at the hand of her own victim, the defendant is not automatically probated. She now comes within the exception stated in section 533.060 and it is within the court’s discretion to grant or deny probation. The Assistant Commonwealth Attorney speculated that the judge probably would not grant probation either because the defendant failed to raise the issue in the guilt phase, thus diminishing the credibility of the evidence, or the defendant did raise the issue of abuse but the jury did not buy it. Therefore, the judge was not likely to be convinced, either.\textsuperscript{135}

At first blush the breadth of the exception contained in section 533.060 seems excessive. As written, the statute permits a defendant to come within the exception even if the defendant was not the victim of abuse. The exception applies if the defendant committed his or her act of violence on behalf of a family member who was the victim of abuse. This breadth did not disturb any of those interviewed. It was recognized that this generally is a natural reaction — to act to protect one’s family — and the statute merely permits the court to exercise its discretion as the circumstances require in deciding whether to grant probation. It was noted, of course, that knowledge of the abuse must be established if the defendant herself was not a victim of the abuse.

Section 430.3401 did not spark as much debate during the interviews. Everyone agreed that the statute applied to those offenders convicted before July 14, 1992, and after July 15, 1986. These violent offenders can petition the court for a hearing on the issue of their status as a victim of domestic violence and eligibility for parole after serving twenty percent of their sentence.

If the offender was convicted after 1992, and the issue of domestic abuse was raised during their trial and the court made a finding that they were not a victim, then if they are a violent offender they must serve the statutory minimum required by section 439.3401 before becoming eligible for parole. If the court found the defendant to be a victim of abuse but the jury determined that the defendant did not establish her claim of self-defense and the court did not grant probation, the defendant is within the exception in section 430.3401(4) and will be eligible for parole after serving twenty percent of her sentence.

\textsuperscript{134} Interview with Helen Howard-Hughes, Chairperson of the Kentucky Parole Board, in Frankfort, Ky. (Mar. 22, 1996).
\textsuperscript{135} Interview with Tamra Gormley, \textit{supra} note 118.
The result is less clear if the evidence of domestic violence was not raised during any phase of a trial conducted after the enactment of the 1992 amendments facilitating consideration of evidence of domestic violence. Can this violent offender subsequently petition the court for a hearing to establish her status as a victim of abuse, therefore becoming eligible for parole after serving only twenty percent of her sentence? One judge felt that a hearing on the issue would not be available to the defendant at this point. The Assistant Public Advocate maintained that a post-conviction motion for a hearing on whether the defendant was exempt from section 439.3401 was appropriate and consistent with the language of the statute.136

When asked for their thoughts on the intent behind the 1992 amendments to the above-mentioned statutes, the judges agreed that the legislature must have intended to place defendants who are victims of domestic violence in a separate class. This class of defendants is provided multiple opportunities to raise the abuse in mitigation of their criminal conduct. Most of the judges agreed that the legislature had the power to do this and probably had done so in response to public clamor about the prevalence of domestic violence today.

Very few of those interviewed felt that domestic violence has received unduly favorable treatment in the law. One judge expressed the view that the special protections afforded this class of defendants by the statutes risk portraying all women as weaklings in need of protection. The interviewee also commented that the battered woman syndrome sends the message, without directly saying so, that women are of diminished capacity and cannot take care of themselves. Undoubtedly, some battered woman do fit this description, but this judge feared that the rest of the female gender would be hurt by the image created. Ms. Gormley surmised that overuse or extreme emphasis on domestic abuse does risk diminishing the credibility of legitimate victims of abuse who become defendants in the criminal justice system.137 For the most part, the judges felt that the statutes permit flexibility and case-by-case determinations which are required in these fact-specific cases.

A final topic that consistently came up during these interviews was the recent grant of clemency by former Governor Brereton Jones to several Kentucky female inmates. By June 1995, eighty-eight battered women in twenty-one states had been granted clemency by a state

136 Interview with Linda A. Smith, supra note 119.
137 Interview with Tamra Gormley, supra note 118.
On December 11, 1995, his last day in office, Governor Brereton Jones granted clemency to nine battered women serving time in Kentucky prisons. The position of the Fayette County Commonwealth’s Attorney’s Office regarding this grant of clemency is that it circumvented the criminal justice system. It was pointed out that the jury had heard all of the admissible evidence and still rendered a guilty verdict. The effect of the clemency hearings was to substitute the judgment of the Parole Board, Governor, Department of Public Advocacy, and Commission on Women for that of the jury following a one-sided presentation of the evidence of domestic abuse on behalf of the offender.

The Department of Public Advocacy initially sought pardons from the Governor for the women, but the Parole Board would not support them in this petition. When asked why the 1992 amendments to Kentucky’s self-defense and violent offender laws did not help these women establish justification for their crime, the DPA responded with a laundry list of reasons why the system did not work for these battered women. Some of the women pled to a lesser offense out of fear that the jury would not believe that domestic violence was a factor in their crime. One actually was disbelieved despite presenting overwhelming evidence of the abuse she had suffered at the hands of her victim. Others were counseled by their attorneys that it would be futile to raise the abuse in mitigation of their crime, or they raised a defense other than self-defense, such as an accidental shooting defense, eliminating the need to present the evidence of abuse.

The Parole Board held victim hearings on each woman to allow testimony from the victim’s family and the Commonwealth’s Attorney’s Office in that particular case. The Parole Board was able to consider

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139 Interview with Helen Howard-Hughes, supra note 134; see also Judy Mann, A Patchwork of Pain — and Hope, WASH. POST, Jan. 10, 1996, at D17 (discussing Gov. Jones’s decision to grant clemency).
140 Interview with Tamra Gormley, supra note 118.
141 Id.
142 Interview with Helen Howard-Hughes, supra note 134; Interview with Linda A. Smith, supra note 119.
143 Interview with Linda A. Smith, supra note 119.
144 Id., Interview with Helen Howard-Hughes, supra note 134.
145 Interview with Linda A. Smith, supra note 119.
146 Interview with Helen Howard-Hughes, supra note 134.
all of the evidence of abuse, including that evidence not admissible at trial, giving the Board what Ms. Howard-Hughes referred to as "the bigger picture." Governor Jones commuted part of the sentences of eight of the nine women, bringing these women within the exception in section 439.3401(4). The effect was to take these women out of the violent offender act and make them eligible for parole after serving twenty percent of their sentence, which these eight women had already done. The remaining woman released had previously been determined to fall within this exception but had not yet served twenty percent of her sentence. The Parole Board exercised their power to call this woman for early consideration for parole and then granted her early parole.

CONCLUSION

A few of those interviewed expressed the opinion that not all Kentucky courts will take the issue of domestic violence seriously and enforce the statutes providing battered women additional protection. It was alleged that in some areas domestic violence may be viewed as a way of life and the battered woman will be told by participants in the criminal justice system to go home and be a good wife. Hopefully this prediction is inaccurate. If not, it is a clear indication of the need for education in this area of the law. Certainly, at this time, the statutes and case law do not interrelate well. It is the intent of the legislature to liberally and consistently admit evidence of domestic abuse in these cases. In reality, admissibility will depend on the discretion of the court before whom the evidence is presented.

Tamra Gormley, who is clearly an advocate for victims of domestic violence, said that battered women who kill must be charged by the state. It is not up to an individual Commonwealth’s Attorney to decide that the defendant’s conduct was justified. It is up to the jury to decide the validity of the alleged abuse of the defendant and to what

147 Id.
148 Id.
149 Id.
150 Id.
151 Id.
152 Gormley has been appointed as the director of the Victims Advocacy Division of Kentucky’s Attorney General’s Office. Short Tales: Gormley to Head Victims Advocacy Division, THE HERALD-LEADER (Lexington), Sept. 4, 1996, at B3.
153 Interview with Tamra Gormley, supra note 118.
extent her circumstances dictate a finding that she acted in self-defense. The risk is that juries will not believe the evidence of abuse and the effect it can have on the battered woman. Linda Smith contends that juries rarely do believe the evidence, especially if there is a time lag between the abuse and the criminal conduct. She attributes this at least in part to the societal norm that women are not allowed to be violent and are viewed by society as abhorrent if they are. They are not expected to respond to anything with force and when they do they are punished disproportionately to males, and if they are black women, "they really get smacked" by the system.

Kentucky is in the forefront of developing legislation dealing with domestic violence. Education is still needed on the issue of domestic violence and on the laws in place to deal with it. Judges, attorneys, and the public all need exposure to this information. Dr. Sara Young shared that her clients have told her of some of the most "mind-blowing acts of abuse on God's earth." When the readers hear of violence of this nature they should stop and remind themselves of what they have learned about what keeps the abuse victim in the relationship, because the knee-jerk reaction when hearing of this abuse is to question why the victims stay. Dr. Young suggests that we open our minds to the information instead of assuming that we know all that there is to know about domestic violence and its victims. She also suggests that we view the abuser's conduct outside the context of the home and recognize it for what it is — criminal behavior. Domestic violence is a crime and should be treated as such. Dr. Young advises that courts must face the fact that counselling is generally ineffective in dealing with this criminal behavior and that the abuser usually cannot be rehabilitated through counselling except in the earliest stages and in the least severe cases.

Battered women do not have a license to kill and they do not need a defense separate from that of self-protection. What they do need is a system that is responsive to their predicament and a system that permits them to effectively present their case to the jury in order to explain the experiences which have culminated in their criminal conduct. Kentucky

154 Id.
155 Interview with Linda A. Smith, supra note 119.
156 Id.
157 Id.
158 Interview with Dr. Sara Young, supra note 6.
159 Id.
160 Id.
161 Id.
has the necessary laws in place to allow this to happen. The challenge is to become familiar with these laws and the contexts in which they apply and to use them to prevent victims of abuse from being subsequently abused by the legal system.