

**More**

**BATTERED WOMEN,**

**Than**

**THE SYNDROME SOCIETY,**

**Victims**

**AND THE LAW**

**DONALD ALEXANDER DOWNS**

# *ore Than Victims*

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THE SYNDROME SOCIETY,  
AND THE LAW

DONALD ALEXANDER DOWNS

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Things become clear . . . if, following Hegel, we find in consciousness itself a fundamental hostility toward every other consciousness; the subject can be posed only in being opposed—he sets himself up as the essential, as opposed to the other, the inessential, the object. . . . But the other consciousness, the other ego, sets up a reciprocal claim. . . .

It is nonsense to assert that revelry, vice, ecstasy, passion, would become impossible if man and woman were equal in concrete matters; the contradictions that put flesh in opposition to the spirit, the instant to time, the swoon of immanence to the challenge of transcendence, the absolute of pleasure to the nothingness of forgetting, will never be resolved; in sexuality will always be materialized the tension, the anguish, the joy, the frustration, and the triumph of existence . . . mutually recognizing each other as subject, each [man and woman] will yet remain for the other an *other*. The reciprocity of their relations will not do away with the miracles—desire, possession, love, dream, adventure—worked by the division of human beings into two separate categories; and the words that move us—giving, conquering, uniting—will not lose their meaning.

— SIMONE DE BEAUVOIR, *The Second Sex*

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PART

I

*The Syndrome Society*



## *The Syndrome Society: Justice or Illegitimate Excuse?*

This is a book about the uses and abuses of the new type of “syndrome” excuses for criminal actions that have gripped criminal law and justice for better than a decade. Dramatized in 1993 by the famous Menendez brothers murder trial in Beverly Hills and in 1994 by the Lorena Bobbitt trial in Virginia, which relied, respectively, on battered child syndrome (BCS) and battered woman syndrome (BWS), victimization syndrome defenses promise new ways of considering the legal responsibility and culpability of individuals who lash out against their abusers in contexts that do not always conform to the traditional standards of self-defense or duress.

The law of self-defense is based on a rather strict presence of necessity: it requires that the defender use deadly force only if the threat of death or great bodily harm is imminent or presently impending, and that the response be reasonable, apportioned to the extent or quality of the threat. In addition, the intent must be to defend oneself, not to inflict retribution or gain a personal victory or advantage over the other.<sup>1</sup> Duress (or coercion) arises when a victimizer forces a victim to commit a crime by threats to the safety of the victim or someone else. It involves a “person’s unlawful threat (1) which causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law, and (2) which causes the defendant to engage in that conduct.”<sup>2</sup>

Such victimization syndromes as BCS and BWS are designed to account for the omnipresent pressures and dangers that plague oppressive domestic environments—dangers that can defy the relatively narrow confines of the traditional laws of self-defense and duress, which were formulated without knowledge or recognition of such situations of captivity and abuse.<sup>3</sup> Advocates of syndrome defenses maintain that because of power differences, victims of domestic abuse often need to use defensive force outside the state of imminent danger, such as when the op-

pressor is sleeping or when a lull in the violence exists.<sup>4</sup> I will call such situations “nonconfrontational” cases of deadly force.

Since human victimization is unjust, victimization syndromes by their very nature signal the justice of using deadly force outside the confines of traditional self-defense law. At the same time, the new syndromes also embody evidence of mental states caused by psychological stress and trauma that differ from more traditional or established notions of mental disorder or incapacity: trauma induced by specifiable human oppression. As Judith Herman remarks in *Trauma and Recovery*, a work to which I will often refer, “The syndrome that follows upon prolonged, repeated trauma needs its own name.”<sup>5</sup> Consequently, victimization syndromes have also been used to show insanity and diminished capacity. Legal insanity, a complete defense, normally means that the defendant lacked the mental capacity (in terms of cognitive and/or volitional capacity) to conform his or her behavior to the law.<sup>6</sup> Diminished capacity is a partial defense. It can be used to negate the “specific” intent element of a crime (usually premeditation or deliberation), especially in murder cases, in which it can reduce the charge to manslaughter. In battered woman cases, for example, the defendant could use diminished capacity to argue that all the years of abuse have made her mentally unstable, if not “insane,” thereby rendering her incapable of forming the specific intent required to make her fully legally responsible. A Missouri court has recognized this claim in a case involving a battered woman who claimed to suffer from BWS.<sup>7</sup> As we proceed, I will call such excuses as insanity and diminished capacity “incapacity excuses.”

Victimization syndromes in criminal law also include Vietnam War veteran syndrome (VS), rape-trauma syndrome (RTS, used more by the prosecution than the defense), and hostage syndrome (afflicted in situations of violent captivity and kidnapping). All these victimization syndromes are, essentially, species of post-traumatic stress disorder (PTSD), which the American Psychiatric Association designated an official disorder in the third edition of its Diagnostic and Statistical Manual in 1980.<sup>8</sup> Such organically based conditions as gambler’s and premenstrual syndrome have also arisen, but they do not deal with victimization at human hands.

Syndrome logic represents a new way of thinking—a new worldview—that has contributed to understanding and justice in ways I will explore as we proceed. But it is also ridden with pitfalls that call for examination. On the positive side, the syndrome defenses make us aware of the special fears and anxieties of individuals subjected to violence and related forms of abuse on a sustained basis. They shake us out of our states of denial, and compel us to construe the needs of self-defense in a new light. In addition, they foster a more complex or subtle understanding of the psychological ramifications of domestic violence. Individuals subjected to such abuse do suffer trauma and psychic wounds. Any adequate and just accounting of criminal responsibility must take the mental states engendered by such abuse into consideration.

On the negative side, syndromes are formulaic and politicized in ways that pay insufficient heed in their own rights to the subtleties of reality and individual cases, and unnecessarily compromise the presumption of individual responsibility upon which legal justice and equal citizenship rest. The *Menendez* case represents the *coup de grâce* of syndrome logic in these regards: nonculpability regardless of the absence of any conceivably meaningful presence of danger to the defendants when the two brothers killed their mother and father. I will show below that justice in domestic violence cases can be achieved without sacrificing the presumptions of reason and responsibility, and without ignoring important factual differences that distinguish individual cases. Even though victims of domestic violence often suffer psychic wounds, they also often know precisely what is going on with their oppressors, and when they resort to deadly force, there is often good reason to do so.

Surprisingly, trauma and reason can coexist. Much of the literature concerning battered women depicts this coexistence, explicitly or implicitly. But confusion surrounds the understanding of the relationship between these mental states, confusion that has befogged the entire debate. On the one hand, psychologists highlight the mental strains and defects battered women suffer. Lenore Walker, the creator of the term “battered woman syndrome,” states, “The process of learned helplessness [a key component of BWS] results in a state with deficits in three specific areas: in the area where battered women think, in how they feel, and in the way they behave.”<sup>9</sup> This trauma and associated incapacity is potentially relevant to certain behaviors of the victims of domestic violence, including the inability to liberate themselves from their tormentors.

On the other hand, the literature is replete with a counterassumption: *that when it comes to the key issue in self-defense law, the presence of imminent or impending danger, the victims of domestic violence often discern their mates’ readiness to inflict violence with acute perceptive powers—powers forged out of the painful and intense experiences that characterize many relationships in this context.* Far from blunting the mind, fear and trauma sharpen it in this domain. Julie Blackman, an honored researcher and scholar in the field of domestic violence, maintains that testimony about the situations and dangers battered women confront will help jurors and society to fathom the *heightened reason* with which battered women perceive impending danger:

[These sources] explain the reasonableness of a battered woman’s perception of danger as an alternative form of reasonableness. That is, battered women are construed as reasonable in a relational framework and with a sense of history that is quite explicitly different from the traditional, legal standard of reasonableness. . . . Careful attention to the battered woman’s past experiences with her husband’s or partner’s violence enhances one’s capacity to understand her attack against him as reasonable or not. A true

standard of reason is best approximated when all relevant factors that bear on good judgment are considered.<sup>10</sup>

Blackman's point about battered women's reason will prove to be Archimedean for my analysis. It receives support from other well-known advocates of battered women. For example, in *When Battered Women Kill*, Angela Browne wondered if the relationships of battered women who resorted to deadly force against their mates differed from the relationships of other battered women. Comparing samples of the two groups, she found that the abusers of battered women who kill are more likely than the mates of other battered women to have abused drugs and alcohol, to have used deadly or dangerous violence, threats, and sexual assault more frequently, and to have threatened children. "As the assaults became more brutal and the abusers seemed increasingly unconcerned about the harm they were inflicting, the women's focus shifted from attempts to understand to an emphasis on survival."<sup>11</sup> This logic, like Blackman's, points toward situational factors and accurate perceptions of danger rather than to psychological incapacity in the form of a syndrome. In other words, it seems to fit the standards of self-defense rather than the logic of psychological incapacity. Indeed, I will show below that syndrome logic in the form of BWS actually undercuts battered women's self-defense claims at many turns.

One of my interviewees, Nora Cashen, a former victim of domestic violence who has worked closely with battered women in Wisconsin, provided the clearest statement about the presence of situational reason within an environment of trauma. She depicted battered women as exhibiting

[a] lot of hyper-vigilant behavior, monitoring his behavior to know all the time what he is up to. They become experts of his cues, very externally motivated, they don't think of themselves. They monitor their own behavior to see what they can do to maintain control over the situation . . .

I wouldn't phrase it as diminished capacity. It is someone whose survival has been so focused on maintaining peace, their energy is so channeled, they lose their ability to have perspective. It's like anything else—a job with long hours, you lose your social skills. So there is diminished capacity in this sense.<sup>12</sup>

If so, the key to justice in domestic violence self-defense cases lies in applying the standards of self-defense with an understanding of the special circumstances and pressures that battered women confront. Such practical reasoning differs from relying on a "syndrome," which signals incapacity to employ reason, and which fails to draw lines concerning responsibility based on the facts of cases. Battered women are victims, but they normally do not surrender reason in their desperation, at least when it comes to the single most important issue in self-defense cases: the

reasonable perception of imminent danger. Many commentators we will encounter in our inquiry leave no doubt about their commitments to giving battered women justice, yet express deep reservations about the “syndrome connection” as the preferred way to deal with battered women’s defense claims. The syndrome connection portrays the victims of abuse as incapable of exercising reason and responsibility. Can we not achieve justice in this domain without asking these victims to shed the very attributes that make equal citizenship possible?

We will see that the battering relationship can be very complex, and that battered women develop distinct mental states concerning different aspects of the relationship. Trauma can compromise mental competence or functionality when it comes to such things as assessing the destiny of the relationship or the feasibility of extricating oneself from the clutches of violence. But trauma often has the opposite effect on other perceptions, including discerning the inclinations, needs, and potential violence of the batterer to whom the woman is “traumatically bonded” (see below). The more we understand the intersubjectivity of such bonding, the more we come to appreciate the counterintuitive link between trauma and heightened rationality concerning the need for self-defensive maneuvers.

In the end, the main problem with syndrome logic is that it ineluctably undermines the logic of self-defense, which is a logic of reason. This shortfall gives rise to the central thesis of this book: *that the reality of domestic violence requires the criminal law to pay great heed to the defense claims of battered women and children, but that the syndrome connection is a problematic way to accomplish this task.*

Syndrome defenses pose related problems as well, each of which extends from the confusion of reason and unreason just discussed. To begin, I must stress a very general point. More and more people are growing disenchanted with the proliferation of “syndromes” and “abuse excuses” in society. In the next chapter I will portray this proliferation, which goes way beyond the prominent syndromes mentioned above. In the early 1980s social and political pressures led to serious limitations of the insanity defense, especially after the verdict of “not guilty by reason of insanity” in John Hinckley’s trial for attempting to assassinate President Reagan. If a backlash against syndrome and abuse defenses were to arise, it would be a great injustice if the valid self-defense claims of the victims of domestic abuse were to go down with the syndrome ship. Relying upon the syndrome connection as the key to legal defenses in such cases threatens this very result. It is time to consider prying such legal defenses away from the already leaky syndrome connection.

Next, syndromes’ rigidity is often intellectually disingenuous, and it can compromise the prospects of defendants who do not fit the stereotype of the syndrome. The very term “syndrome” denotes uniformity rather than difference. Webster’s International Dictionary defines syndrome as “a group of signs and symptoms that occur together, and characterize a disease.”<sup>13</sup> This problem is exacerbated when

the syndrome is construed in medical or pathological terms as a form of mental disorder.<sup>14</sup>

We will see that many women's characters, situations, and reactions to stress simply do not fit the BWS mold, especially if the women do not conform to images of womanhood prevalent in the white middle class; but this lack of fit should not in any way compromise their right to defend themselves from danger. Sharon Angella Allard contends that BWS encourages unprincipled racial stereotyping: "The theory incorporates stereotypes of limited applicability concerning how a woman would and, indeed, should react to battering. To successfully defend herself, a battered woman needs to convince a jury that she is a 'normal' woman—weak, passive, and fearful. . . . Race certainly plays a role in the cultural distinction between 'good' and 'bad' woman. The passive, gentle white woman is automatically more like the 'good' fairy princess stereotype than a [b]lack woman, who as the 'other' may be seen as the 'bad' witch."<sup>15</sup>

Along these same lines, by signifying mental incapacity, syndrome logic ineffectually "labels" its recipients as unable to bear the obligations of citizenship. Being found "mentally ill" has consequences for how one is perceived by others. As many of those who have reflected on the legal issues surrounding victimization excuses have observed, the forms in which we legally construct defendants have consequences for equal citizenship.<sup>16</sup>

The concept of responsibility is in many important respects indivisible.<sup>17</sup> If a person is labeled (or officially pronounced) incapable of being responsible in one context, that person will often surrender the benefits that accrue to bearing responsibility in another context. Below we will encounter a telling example: battered women found to have been afflicted by BWS have fared badly in hearings concerning custody of children. Courts have rendered justice in such cases only by *abandoning* BWS in favor of a logic that considers battered women's trying circumstances rather than their psychological syndromes. Once again, situational analysis proves preferable to syndromic speculation.

BWS presumes that most or all battered women react in similar fashion to their victimization; they lack the *will* that characterizes distinctive individuals. We will look at many cases below in which Lenore Walker testified that battered women defendants were "women without wills," and we will see that there *are* generalities that characterize battering relationships, but that battered women also often salvage heroic capacities to cope. Patti Seeger, spokeswoman for the nationally recognized Dane County Advocates for Battered Women, located in Madison, Wisconsin, denounced the theory of "learned helplessness" in an interview which I will draw on in a later chapter. Seeger proclaimed that she "disagreed totally" with this theory. "Rather than being helpless, battered women adopt survival skills."<sup>18</sup>

Hence, battered women embody a paradox: they *are* victimized, but they also

often possess more capacity for judgment than a defense based on learned helplessness acknowledges. Seeger's "survivor" logic, which is now the predominant logic in the literature outside of the judicial system (which relies on BWS), is consistent with the norms of situational reason defended by Blackman and Browne above, not with the standards of incapacity excuse. In addition, we will see that each case must still be dealt with on its own merits because of individual variance. We will also see that the manner in which this tension is resolved has powerful implications for political theory and citizenship.

Accordingly, syndromes' formulaic quality also obscures the diversity of situations in which victims resort to violence or commit allegedly criminal acts. Some kill in response to imminent danger, while others strike back at their tormentor while he is asleep or otherwise indisposed. Others hire third parties to kill the batterer at an indefinite time in the future. In addition, many victims suffer greater abuse than other sufferers do. In some cases abuse is directly related to the resort to lethal force, whereas in other cases it is an important background fact rather than a precipitating factor. Though abuse is always unjustifiable, the relevance of being victimized to the standards of self-defense law varies in each of these situations. Adjudication of self-defense cases vindicates the maxim that "God lies in the details." But syndrome logic ignores erstwhile important details. It provides no means by which to draw distinctions that are usually important in the criminal law. *And unlike the insanity defense, which by its very nature applies only in rare cases, syndrome incapacity is presumed to be "typical" of individuals who are exposed to the wide continuum of oppressive harms at issue.* PTSD is premised on this assumption. The syndrome defenses stake out a territory of unprecedented scope.

Another problem stems from the fact that in criminal trials victimization syndromes use inconsistent claims of excuse based on mental incapacity and justification. Generally speaking, criminal acts are "justified" in law if self-defense or defense of others is involved or if the larger social good would be promoted more by committing the act than by not committing it (for example, trespassing to save a baby from crawling into a swimming pool). Criminal acts are "excused" if the defendant is under "duress" or lacks the mental or emotional capacity to be blameworthy. Though the lines that distinguish justification and excuse are not always clear (as I will show later in the book), justification "speaks to the rightness of the act; an excuse to whether the actor is accountable for a concededly wicked act."<sup>19</sup> Thus, self-defense is considered a right thing to do because of the defensive rights of the original target and the wickedness of the original aggressor. Excused acts are wrong in themselves, but we deem the perpetrator less blameworthy because of the extraordinary situational pressures he or she confronted (duress) or because of mental or related impairment (insanity). Self-defense and duress also involve a standard of reason that is lacking in incapacity excuses.