Resolved: It is morally permissible for victims to use deadly force as a deliberate response to repeated domestic violence.
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INTRODUCTION

Greetings!

Hopefully you are enjoying your break from school and gearing up for the second semester's LD debates on a very challenging and controversial topic. I would like to discuss some basic topic issues, give some background information on a few of the controversies inherent in the debate and then walk you through the positions in the file.

The January/February topic asks whether the use of deadly force is morally permissible in response to repeated instances of domestic violence. There are a few approaches that other debaters may take with the topic, so I have tried to cover as many bases as possible. Let us begin by discussing the core issue of the topic: the context in which a killing of an abuser takes place. There are two primary designations for when a killing can occur: in a confrontational setting and a non-confrontational setting. In the former, a victim of domestic violence kills her attacker during a violent episode brought on by her attacker and the victim of the deadly force. This type of killing easily conforms with a classical model of self-defense killing. The decision to use deadly force met all of the objective requirements for the justification: imminence (there was no time to appeal to a legitimate authority like the police), proportionality (the victim/killer reasonably feared for they would suffer death or great physical injury, and necessity (entirely incapacitating the attacker through death was the only way to stop the attack).

These types of killings are not controversial; there is a near-universal consensus (those who preach non-violence notwithstanding) that lethal self-defense is morally permissible. It is for that reason (as well as the fact that the topic stresses in response to repeated attacks rather than something like as protection against a domestic violence attack) that I believe such killings are not what the topic aims to debate about. Rather, non-confrontational killings (such as when the attacker is sleeping, passed out or otherwise incapacitated) that occur in between repeated episodes of violence are the heart of the topic. Nancy Wright explains:

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p.lexis

More often, however, the murder of an abuser by a DAS victim occurs in a situation which does not conform to the usual self-defense model, such as when the homicide occurs between attacks while the batterer is passive or asleep. For example, in State v. Gallegos, the New Mexico Court of Appeal reversed a battered wife’s conviction of voluntary manslaughter where she shot and stabbed her husband while he was lying in bed after he had been drinking. Earlier in the day, the husband had sexually abused her and threatened to kill her. Moreover, in the past, he had beaten her and thrown her against a wall, causing the premature birth of their second child.

As a result, the key issues to this topic are not whether self-defense is morally legitimate, but rather it is whether we should expand the criteria for self-defense to encompass (and thus morally permit) these killings in non-confrontational settings.

The first affirmative position deals with the core issue of necessity. It argues that the decision by victims of domestic abuse to kill their attacker are not only done as a last resort, but is truly the only course of action they have to escape the terror, anguish and constant threat of death they live with when trapped in an abusive relationship. Many killers typically try leaving or notifying law enforcement, but their needs are denied. Additionally, leaving is often impossible because of financial dependence and the psychological entrapment that many victims experience (akin to a prolonged hostage situation). Finally, because of size and strength disparities, killing the attacker when they are somehow incapacitated or not alert is necessary to avoid egregious harm and possible death. The second position argues that the self-defense standard should be expanded to encompass scenarios where legitimate provocation has occurred. Repeated attacks create deep wells of justified rage and moral cruelties that can only be corrected through lethal self-help. The final position argues that, even if affirming self-help killings creates social vigilantism, that is a good thing and those who stand up and kill their attacker should be celebrated by society.
On the negative side, the first position argues that focusing on the issue of deadly force, rather than the causes of domestic violence, only reinforces a moral order of violence that is to blame for the existence and persistence of domestic violence in the first place. If we justify killings, it reinforces the larger culture of masculinist violence that believes killing is the only legitimate response to problems beyond our control. The second position argues that encouraging self-help destroys the rule of law and the social fabric. Saying that killings are legitimate in instances where a victim cannot get their way legally would set a dangerous precedent for much of society. The third position attempts to offer a counter-proposal for addressing the issue of killings without necessarily justifying them or saying they are morally permitted. In order to accomplish this, this position argues we should not try to justify the act but rather excuse the actor. There are also several cards that elaborate on the moral and legal difference between a justification and an excuse.

All things considered, this is an interesting topic with a lot of different angles to cover. Hopefully this book will give you a quality springboard to aid your own research efforts and case development.

Good luck in your debates!
AFFIRMATIVE POSITION ONE: THE USE OF DEADLY FORCE IS NECESSARY

1. THE MURDER OF A CHRONIC ABUSER SHOULD BE EXCUSED, OTHERWISE IT LOCKS VICTIMS INTO SITUATIONS THEY CAN NEVER ESCAPE


The implications of regarding provocation in domestic abuse cases as never more than a mitigating consideration or a partial excuse are also unpalatable. Those classifications imply that the woman's action was criminally wrong, though (somewhat) less culpable than deliberate planned murder. Had she simply remained in her situation and done nothing, her action would have received no criminal denomination or penalty at all. The implication seems to be that such women simply have to put up with their situations if there is no way of escaping them short of taking fatal action, because taking such action will be regarded by the law as a substantial criminal offence.

2. THE USE OF LETHAL FORCE IS NECESSARY BECAUSE THERE IS NO METHOD OF ESCAPE FROM THE CYCLE OF TERROR AND VIOLENCE

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p. lexis

One cannot rest on this counterargument alone, however, because this objection does raise a subsidiary question about the consideration the law should give to the possibility of flight in a situation where the woman has an opportunity to flee. As discussed earlier, part of what first struck me about Norman was the conviction that Ms. Norman did not have a realistic alternative to her lethal action, that the only way she could really be safe was to kill her husband. J. T. Norman's abuse of his wife was prolonged and vicious. Over the years, whenever he was drunk, he brutal beat her, often inflicting serious injuries. He used his fists, bottles, ashtrays, and even a baseball bat. Mr. Norman forced his wife to prostitute herself to support him. When she was pregnant he kicked her down the stairs, causing the premature birth of her child. When she ran away, he tracked her, caught her, and beat her. He frequently threatened to kill her.

3. THE USE OF DEADLY FORCE IS A NECESSARY RESPONSE BECAUSE OF DISPARITIES IN SIZE, STRENGTH AND EMOTIONAL CONTROL


To some, the death of the abuser may seem an inappropriate or excessive way for the battered woman vigilante to punish her abuser and repair the social order. Deadly force on the part of the battered woman, however, may be justified in several ways. First, death may be necessary because lesser degrees of force may be insufficient. The battered woman may not be able to confront the batterer without a deadly weapon because of disparities in size, strength or emotional control. The lower degree of force a woman typically exerts upon a man may have little or no impact on a physically stronger abuser. Indeed, a woman's lesser degree of force may only incite a vicious retaliation by the abuser.
AFFIRMATIVE POSITION ONE: THE USE OF DEADLY FORCE IS NECESSARY cont’d

4. THERE IS NOT AN EXTREME RATE OF DEADLY FORCE AGAINST ABUSERS -- THE NUMBER OF CASES IS VERY LIMITED

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Faced with the inevitable prospect of escalating physical violence, often accompanied by sexual and psychological abuse, some of these women and children decide that the only escape from their imprisonment is to kill their abusers. Every year, almost 500 battered women murder their abusive spouses or partners. Although less frequent, studies show that about 2% of all homicides in the nation, or approximately 400 killings each year, are committed by children against their parents. Although not all of these homicides are committed by children who have suffered domestic violence, according to some estimates, more than 90% of the children who commit parricide have been abused by the parent. In situations like these, the tables are turned, and it is the battered women or children who decide that the only way out of their agony is to kill their abusers.

5. JUSTIFYING DEADLY USE OF FORCE IN RESPONSE TO REPEATED DOMESTIC VIOLENCE IS THE ONLY WAY TO GIVE VICTIMS JUSTICE FROM THE TRAP OF VIOLENCE AND TERROR

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

When victims of domestic abuse are charged with the murder of their abusers, they frequently claim that they acted in self-defense. Attorneys for these victims of domestic abuse ask courts to admit expert testimony regarding various "syndromes" to describe the devastating psychological impact of a lifetime of severe physical, sexual and psychological violence, as part of the self-defense plea. These various syndromes, detailed below, are referred to collectively in this article as "domestic abuse syndrome" (or DAS) whether the victim is a battered woman or a battered child. Without the opportunity to present this expert testimony, victims of domestic abuse syndrome will not be able to demonstrate to the jury the reasonableness of their perceptions of imminent danger or the concomitant reasonableness of their use of lethal force to defend themselves. Unless all victims of domestic abuse syndrome are able to present this evidence, it is likely that their already broken lives will be completely shattered by a murder conviction, and they will once again find themselves trapped with no ability to escape; only this time it will be in a prison cell.

6. IN THE MOST EXTREME CIRCUMSTANCES, OPTIONS ARE SO LIMITED THAT KILLING IS NECESSARY

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p. lexis

The point of this gristy recitation is not to demonstrate that Mr. Norman deserved to be killed because of his past misdeeds, nor to provide substance for a "battered women's syndrome" defense, which would focus on the impact this abuse had on Ms. Norman’s psyche. Rather, the narrative lends credence to the notion that, given this history, a reasonable person could have believed that the only way to stop Mr. Norman from killing or greatly harming his wife was to kill him. Other than the use of lethal force, Ms. Norman’s options were limited. One choice was to do nothing -- to sleep on the floor as her husband commanded her and to await whatever lay ahead. Another option was to arm herself and wait until the next attack before killing her husband. Yet another was to call for help. Finally, she could have just fled into the night. Each of these choices carried a realistic chance of great harm or death to Ms. Norman. Given her husband’s past behavior and threats, doing nothing offered an assurance that she would suffer at least great bodily harm during one of his drunken attacks.
AFFIRMATIVE POSITION ONE: THE USE OF DEADLY FORCE IS NECESSARY

7. WOMEN WHO HAVE TO KILL NEVER DO SO AFTER THE FIRST INSTANCE OF ABUSE AND HAVE EXHAUSTED ALL AVAILABLE REMEDIES

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p.lexis

Much more is known today than a few decades ago about the battering of women and about women who kill their batterers. Unfortunately, much of the current knowledge teaches that much of what Ms. Norman was forced to endure is all too common in this society. Like Ms. Norman, other women who kill their batterers almost never kill in response to a single instance of battering; instead, they usually kill after a long history of physical abuse. The batterers commonly use weapons as well as their fists and commonly cause serious injuries. Alcohol is frequently involved. The batterer often combines threats to kill or maim with other abuse. Forced sex of one sort or another is frequent, as are assaults during pregnancy. When a woman kills her batterer, the abuse almost always will have escalated both in frequency and intensity in the period immediately preceding the killing. Almost all of the women kill only after unsuccessfully seeking some other solution -- escape, requests for assistance to the police or other outside agencies, or both.

8. THE FORCE MUST BE DEADLY BECAUSE LEAVING IS NOT AN OPTION


In addition to believing that a lesser degree of force will be insufficient, many women may believe that leaving is not possible. Those that do attempt to leave report that their abusers follow them, continuing the harassment and violence. Thus, if one accepts the premise advanced by BWS that battered women are, for a variety of reasons, unable to leave the batterer, and are often weaker than their abusers, then death may be the only means by which battered women can escape the abuse.

9. HOMICIDE AGAINST AN ATTACKER DOESN'T HAVE TO PROPORTIONAL TO THE MOST RECENT ATTACK BUT CAN TAKE INTO CONSIDERATION THE ENTIRE LIFE-TIME OF ABUSE


The extension allows for cases of 'last straw' provocation, where an action which in itself appears insufficient to generate an angry response can be understood, in light of the cumulative effects of earlier provocation, as enough to overcome a defendant's self-control. The extension may be significant because it could make available a defence to women in some situations of serious but non-escalating abuse. A plea of self defence usually requires that the defendant have some (reasonable) perception of a heightened level of intensity and danger on the specific occasion where self defence is pleaded, in order to set that occasion apart from earlier encounters where defensive action was correctly judged not necessary. That defence works best in a situation of escalating abuse. But repeated physical abuse and attack of a steady or even fluctuating sort can itself have extra (not wholly predictable) cumulative effects, and women subjected to these may well be driven to kill their abusers through such compounded effects. Commonly such killings would be regarded as much less culpable than deliberate or first degree murders. A doctrine of cumulative provocation would then have the merit of providing a vehicle to excuse such conduct in a way that accords with our common moral judgements.
AFFIRMATIVE POSITION ONE: THE USE OF DEADLY FORCE IS NECESSARY cont’d

10. THE ONLY ALTERNATIVE TO JUSTIFYING SPOUSAL ABUSE HOMICIDE IS TO DECLARE THE KILLER MENTALLY INSANE, AN EVEN WORSE OPTION

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Prior to the late 1970s, battered women who killed their abusers tended to rely on insanity to prove excuse for the homicide. When a battered woman pled insanity she claimed that, because of her mental condition at the time of the murder, she was not guilty, either because she did not know what she was doing or because she did not know that she did anything wrong. The insanity defense was usually a "complete" defense, in the sense that the woman would not be legally responsible for the homicide. However, it soon became clear that insanity was not an appropriate defense in most cases involving self-defense by a battered woman. As the Oklahoma court noted in Bechtel v. State, "[b]ased upon our independent review of the available resources on the subject, we believe that the [battered woman] syndrome is a mixture of psychological and physiological symptoms, but is not a mental disease in the context of insanity". Moreover, if battered women were acquitted based on insanity, they were often committed to mental institutions for indefinite periods of time. Because of this harsh result during the late 1970s, defense attorneys began to explore defending battered women charged with killing their abusers on the basis that their homicides were justified rather than excused.

11. HOMICIDES THAT OCCUR DURING THE MIDDLE OF A SPOUSAL ATTACK ARE UNDOUBTEDLY JUSTIFIED BECAUSE THEY ARE REASONABLE AND PREVENT IMMINENT DANGER***

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Traditionally, a homicide is justifiable providing the defendant can "show reasonable ground[s] to apprehend a design to do some great bodily injury," and "imminent danger of such design being accomplished." The circumstances surrounding the murder of a batterer by a DAS victim may, of course, satisfy these traditional requirements if the homicide occurs during an abusive attack. For example, in State v. Lynch, the Louisiana Supreme Court reversed the manslaughter conviction of a nineteen-year-old woman who shot her middle-aged husband while she was trying to retreat from his physical attack and after warning him three times that she was going to shoot. There is little doubt that her fear for her life was justified since her husband had previously beaten her twenty to thirty times, including hitting her so hard with a baseball bat that she was unable to walk for several weeks.
UNDERVIEW: LEAVING IS NOT AN OPTION

1. ESCAPE ISN’T POSSIBLE BECAUSE VICTIMS KNOW THAT TRYING TO ESCAPE OR SEEK HELP WILL ONLY CAUSE WORSE VIOLENCE TO OCCUR

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

As the Oklahoma Court of Criminal Appeal explained in Bechtel, "cultural characteristics of women influence the battered woman's belief that if she could only do something to help her abuser, then the bad part of him will go away" leading the woman "to develop coping skills rather than escape skills and [to] develop[ed] a 'psychological paralysis' and 'learned helplessness.'" The "etiology of this aspect" was described by the Smullen court as follows: "Through experience, the victim learns that when she attempts to defend herself -- by reaching out to others or trying to leave -- that she will be the victim of more severe violence. The batterer blames the abusive relationship on her inability to respond to his ever-increasing demands so that the most effective short-term method of reducing incidents of violence is to be more sub servient."

2. ARGUING THAT WOMEN CAN ALWAYS ‘JUST LEAVE’ REQUIRES EXTREME HARDSHIP ON THE PART OF THE VICTIM- IT IS HARDLY JUST

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p. lexis

Take the analysis one step further, however, and assume that Ms. Norman could have escaped safely from her house and fled to Alaska, where she could change her identity and live happily, and safely, ever after. If society required her to do this, the end result most likely would be one less dead body, a result not always possible when the aggressor is coming after the victim at the moment she kills in self-defense. The simple answer to this proposition is that society does not now, nor has it ever, required completely innocent people to behave in this fashion. No matter how clear it was to Gary Cooper that somebody would end up dead if he did not leave before the train carrying his enemy arrived at "High Noon," our culture allows him to stay in town and affords him the right to kill in self-defense when the bad guys come after him. Even when retreat is required, which is not all that often, one must only physically move to a place of temporary safety. Renunciation of personal and family identity is not demanded.

3. LEAVING CREATES AN EXTREME RISK AND IS THE MOST DANGEROUS SITUATION A VICTIM CAN FACE

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p. lexis

As with her other options, calling for help or flight carried a serious risk of death or great bodily harm. Newspaper and television news reports are filled with stories of spurned men who often go to extraordinary lengths to pursue the women who reject them, who often hurt these women and sometimes kill them. The professional literature recently has developed evidence to support the contention that a woman who is already being battered by an abusive man, and who tries to leave or get help, is placing her life at risk. In fact, the time of most danger for the woman is when she attempts to leave; women are often killed when, and because, they attempt to escape. Efforts to involve outside agencies, including the police, similarly escalate the risk to the woman. Threats may turn into force, and non-deadly force into deadly force. As for Ms. Norman, her husband had told her explicitly that he would maim her or kill her if she tried to alter the situation, and can one honestly maintain that she was unreasonable in believing him?
UNDERVIEW: LEAVING IS NOT AN OPTION  cont’d

4. ESCAPE IS ALMOST NEVER AN OPTION -- DOMESTIC VIOLENCE VICTIMS ARE KEPT CUT OFF AND ENSLAVED TO NECESSITY

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

The women and children who are domestically abused by their spouses or parents are among the most marginalized members of American society, trapped in abusive relationships from which they can see no escape. They are often trapped by their abusers, who isolate them from family and friends who might otherwise provide them with assistance and support in leaving. They are frequently trapped by poverty, making retreat from the abusive situation a financial impossibility. And they are virtually always trapped by the unremitting violence, which not only batters them physically but emotionally as well, making leaving the abusive situation a psychologically unrealistic option.

5. PSYCHOLOGICAL DAMAGE CREATES MENTAL ENTRAPMENT, MAKING VICTIMS FEEL RESPONSIBLE FOR THE VIOLENCE AND IMPOSSIBLE TO ESCAPE

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Often battered women lack self-confidence and feel responsible for the abusive relationship. In fact, "[c]ommon characteristics of battered women [include] low self-esteem, denial of anger and fear, feelings of guilt, social isolation, depression and the belief that no one can help them." Although some battered women make efforts to stop or mitigate the abuse, because of this learned helplessness many other "victims of repeated abuse will eventually abandon any efforts to leave the abusive situation." For example, in State v. Allery, a battered wife stayed with her husband despite the fact that he "struck her on the head with a tire iron" causing her to be hospitalized and engaged in a "consistent pattern of physical abuse" including "periodic whippings, assaults with knives and numerous beatings from [his] fists throughout their marriage." The Washington Supreme Court opined that a battered woman, like Mrs. Allery, who suffers from learned helplessness, "is psychologically locked into her situation due to economic dependence on the man, an abiding attachment to him, and the failure of the legal system to adequately respond to the problem."

6. EMOTIONAL AND FINANCIAL DEPENDENCY LACK VICTIMS INTO THE CYCLE OF ABUSE

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Similarly, in what the Kansas Supreme Court described in Hundley as a textbook case of the battered wife, . . . Betty Hundley had survived her husband's brutal beatings for ten years. 'Her bones had been broken, her teeth knocked out and repeated bruises inflicted, but she did not leave him. She called the police occasionally but would continue to stay with Carl Hundley. The mystery, as in all battered wife cases, is why she remained after the beatings. [T]here is no easy answer to why battered women stay with their abusive husbands. Quite likely emotional and financial dependency and fear are the primary reasons for remaining in the household. They feel incapable of reaching out for help and justifiably fear reprisals from their angry husbands if they leave or call the police. The abuse is so severe, for so long a time, and the threat of great bodily harm so constant, it creates a standard mental attitude in its victims."
UNDERSHOOT: REPEATED DOMESTIC VIOLENCE IS A UNIQUE CASE

1. DOMESTIC VIOLENCE CAN EASILY ESCALATE TO MURDER AND IS OFTEN A FATE WORSE THAN DEATH, SUBJECTING VICTIMS TO EXTREME PAIN AND TORTURE

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

The incidence of domestic violence against women is also shockingly high. According to the Kansas Supreme Court in State v. Hundley, the physical abuse of women is "extremely widespread" with the court "estimating that it affects between four and forty million women." In fact, the American Medical Association estimates that "one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner during their lifetime." Moreover, according to the Wyoming Supreme Court in Witt v. State, battered women frequently suffer other forms of abuse as well, such as "humiliation, denial of power, name calling, sexual abuse, threats of violence, and deprivation of food, sleep, heat, shelter and/or money." In addition, 30% of domestic violence incidents involve the use of a weapon and the injuries that battered women receive are at least as severe as those suffered in 90% of violent felonies. In fact, each year approximately two million of these women suffer severe beatings at the hands of their spouses or partners. Unfortunately, over three women every day are murdered by their husbands; frequently experiencing "prolonged, brutal deaths after years of violence."

2. DATA SHOWS THAT WOMEN ALMOST ALWAYS ARE DRIVEN TO KILL AS A RESPONSE TO A PRESENT OR IMMINENT ATTACK, CONTRARY EXAMPLES NOT WITHSTANDING

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p. lexis

All of the facts thus far recited clearly are relevant to a self-defense claim. Prior abuse, threats, and unsuccessful attempts to escape (retreat) or to get help all would support a claim of self-defense even under the existing law as long as the woman killed the batterer while the attack was ongoing. The problem for Ms. Norman was that only after her husband was asleep did she go to her mother's house, where she found her husband's gun in her mother's pocketbook (her mother had removed it from the Norman house earlier in the day because of Mr. Norman's threats). Instead of waiting for Mr. Norman to wake up and batter and threaten her again, she returned immediately to her own house with the gun and shot her sleeping husband three times, with the desired fatal result. There is currently a debate about how frequently women kill their batterers in such "non-confrontational" situations, i.e., in situations where the woman is not responding to a present attack by the batterer. Until recently, the conventional wisdom was that women who killed their batterers most often killed, as did Ms. Norman, during a lapse in the confrontation. In a recent article, however, Professor Maguigan, relying on a survey of reported appellate decisions, argues that most women kill in response to a present, i.e., imminent attack.

3. SEVERE DOMESTIC VIOLENCE, ESCALATING TO THE LEVEL OF MURDER IS A GRAVE AND SERIOUS PROBLEM


It is unclear how many women are affected by domestic violence. While statistics on the number of battered women are alarming, they vary wildly. The National Coalition Against Domestic Violence, for example, estimates that more than twenty-seven million women will experience violence in their marriage and that eighteen million women are battered repeatedly every year. However, the National Family Violence Survey shows that men's violence against women decreased by forty-three percent between 1985 and 1992. Whether or not the incidence of domestic violence has decreased, the National Family Violence Study, sponsored by the National Institute of Mental Health, estimates that 188,000 women per year are battered severely enough to require medical attention. Moreover, the Federal Bureau of Investigations (FBI) estimates that 1,400 women, about six percent of all murders, were killed by their spouses or partners in 1992 alone. The problem of battered women, while perhaps not accurately quantifiable, is grave.
UNDERVIEW: REPEATED DOMESTIC VIOLENCE IS A UNIQUE CASE cont'd

4. BATTERY CREATES A CYCLE OF HELPLESSNESS THAT CANNOT BE ESCAPED

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis
The abuse suffered by both adult women and children, who are victims of DAS, can be divided into three main categories: physical injury, sexual abuse and psychological maltreatment. Whichever types of domestic violence are suffered by the abused women or children, the battering follows a cyclical pattern consisting of three phases: tension building, acute explosion and loving contrition. The psychological impact of domestic abuse is the same on all of the victims of DAS. Both women and children display "hypervigilance" in monitoring the abuse and "learned helplessness" in trying, usually unsuccessfully, to cope with the battering. Moreover, many of the women and children who are victims of DAS are impoverished, which exacerbates the psychological effects of their abuse.

5. REPEATED DOMESTIC VIOLENCE CAN EASILY ESCALATE -- IT CAN BE SO DEBILITATING THAT ESCAPE IS IMPOSSIBLE

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis
Like Nelly Rodriguez, the wife in the case of State v. Hennum also suffered multiple episodes of horrendous physical violence, at the hands of her husband, throughout their thirteen year marriage. For example, on one occasion, she suffered a punctured lung when her husband hit her in the ribs and on another occasion she suffered a broken nose and severe lacerations on her face after her husband hit her in the face with a beer bottle. On another occasion, her husband kicked her with steel-toed boots, which caused the rupture, and subsequent removal of her spleen. On the final day that he abused her, he pinned her to the floor with his hands on her throat, pulled out chunks of her hair, tore the door off of a closet and threw it at her, hurled a piece of firewood at her, tossed a car part at her and, when she tried to protect herself by hiding under the kitchen table, he grabbed a rocking chair and threw it at her, causing the chair to break. That night, while he was sleeping, the wife shot her husband to death to end the abuse once and for all.
AFFIRMATIVE POSITION TWO: SELF-DEFENSE SHOULD INCLUDE PROVOCATION

1. THE STATUS QUO’S NOTION OF SELF-DEFENSE IS INSUFFICIENT BECAUSE VICTIMS HAVE NO WAY TO DEFEND THEMSELVES IN COURT UNDER THE TRADITIONAL CONCEPT


   A woman may be justified in killing under the law of self-defense when she has a reasonable belief in the necessity of force and the imminence of danger. Many battered women who kill their batterers, however, have had difficulty justifying their crime under traditional self-defense laws. One response to the unique problem posed by battered women who kill their abusers has been the promulgation of BWS. BWS is not a defense in and of itself; rather, it is a means to prove the reasonableness of the battered woman's belief that she was in imminent danger of death or serious bodily injury.

2. WE NEED TO EXPAND THE LEGITIMACY FOR THE USE OF DEADLY FORCE BEYOND SELF DEFENSE TO ENCAPSULATE THE FULL RANGE OF REACTIONS TO DOMESTIC VIOLENCE


   Let me sum up the advantages of the provocation defence that I have outlined. Provocation, so understood, would apply to killings by women of their abusive partners which acts are attributable to anger or rage rather than to fear of deadly attack. The plea would apply to different temporal points in the abuse cycle than those covered by self defence. The plea could get a foothold in cases of non-escalating but persistent domestic abuse provided the abuse was itself serious enough, and could apply to actions of killing which had the appearance of self-control but were very likely the result of residual intense anger, rage or frustration. The plea could be appropriate in situations where a woman's tolerance had reached the breaking point.

3. PROVOCATION DOCTRINES NEED TO BE BROADENED IN ORDER TO ACHIEVE JUSTICE FOR VICTIMS OF BATTERY


   Provocation, as now legally understood, would at best offer a partial excuse for an intentional killing of an abusive partner. However, there are cases of provoked killings by abused women which simply do not fit well the idea of a seriously culpable but partially excused killing. Some such acts, whether done out of anger or fear or some combination of these, are not only understandable but defensible responses to an genuinely intolerable persisting situation. To treat these acts as being only partially excused fails to acknowledge the reasonableness of many battered women's reactions and decisions to act as they did. Even if we think that such homicides merit excuse but not justification because what was done was 'the kind of thing that should not be done', we may also think that some of these acts merit a strong or complete excuse. It is particularly difficult to swallow the claim that provocation in the form of physical abuse can do no more than partly excuse homicide when our law allows that defence of property can justify taking life-threatening acts that turn out to be fatal, and does not rule out acts of killing. Violent assaults to one's person are much more serious than threats to one's property, and should be reasonable grounds for stronger angry or fearful responses.
AFFIRMATIVE POSITION TWO: SELF-DEFENSE SHOULD INCLUDE PROVOCATION cont'd

4. THE PROVOCATION DOCTRINE IS AN EFFECTIVE RECOGNITION FOR THE JUSTIFICATION OF DEADLY FORCE AS A RESPONSE TO DOMESTIC VIOLENCE AND DOESN’T RUN THE RISK OF ERODING PROTECTIONS AGAINST HOMICIDE


After the decision by the Supreme Court of Canada in Lavallee, Canadian women who are victims of serious domestic abuse have been able to invoke an 'enlarged' conception of self-defence to exonerate some acts of killing abusers. While concern remains about Lavallee, this judgement broke important ground in insisting on a more sensitive account of the actual experience of abused women, and in giving recognition to the reasonable fears that such women have for their lives. However, other than self-defence, there is no criminal law defence or plea that has been effective as a (partial) excuse or justification for killings by abused women. In this paper, I will consider the potential for a plea of provocation to serve such a role. Provocation has acquired some standing in other jurisdictions as a defence for abused women who kill but it has not as yet been effectively used in Canada. I will look at the appropriateness of provocation as a plea in some abuser homicides. The paper will discuss some ways in which the plea of provocation could be enlarged in scope and in normative power; the paper will also examine some shortcomings of the current understanding of provocation to serve a defence for women who kill. Since homicides by women make up a small fraction of all homicides, even a reformed defence of provocation would be rarely used. But the more important question is whether a plea which has been available to men for several centuries should not also be (much more) available to women who kill, and whether closer attention to the situations and perspectives of women in abusive relationships yields good grounds for thinking some kill as excusable or reasonable responses to serious provocation. The underlying concern is an equality concern; that women have equal access to suitable defences for their putative breaches of the criminal law, and that standards of reasonableness operative in criminal case deliberation be as responsive to women’s experience and women’s values as they are to men’s.

5. REPEATED DOMESTIC VIOLENCE CLEARLY QUALIFIES AS PROVOCATION THAT INVITES A LETHAL RESPONSE


There are a number of reasons why, even with the availability of self defence, provocation would be appropriate as a plea in conjunction with bodily injury or killing by a woman of her abusive partner. Most obviously, the kind of physical abuse to which these women are subjected is both harmful to their physical well being and a wrong -- a violation of their right to security of the person -- by the common standards of our society. This is true of each incident of abuse, and true also of a pattern of regular abuse, in the sense that the unacceptability of the behaviour is not diminished by the fact that it occurs repeatedly. The actions of battering partners are considered to be wrongful, whether they are actually treated as illegalities or criminal assaults. These attacks on women certainly satisfy the traditional legal requirements for provocation: that the provoker should make a physical assault or threat, and that their action should be immoral or unlawful. In fact, they seem to be much clearer examples of serious provocation than do the traditional favourites which were held to extenuate male homicide, such as learning of a wife's infidelity or being exasperated by a screaming child.
AFFIRMATIVE POSITION TWO: SELF-DEFENSE
SHOULD INCLUDE PROVOCATION cont’d

6. DEADLY FORCE IS MORALLY JUSTIFIED AS A RETRIBUTIVE THEORY OF PUNISHMENT THAT CORRECTS THE MORAL BALANCE


Finally, death may be justified under a retributive analysis in which the battered woman is seen as punishing the batterer. Regardless of whether one morally approves of capital punishment, it has been sanctioned by the Supreme Court and many states. If the battered woman is stepping in where the state has failed, then she should be permitted to exercise the same powers as those possessed by the state. While the punishment may not seem to fit the crime, other, less extreme, forms of punishment or force may not be available to the battered woman. Other forms of violence -- Lorena Bobbit’s maiming, drawing and quartering and torture -- are not permissible under this rationale because they are not state-sanctioned punishments. While it may seem odd to advocate killing and not other forms of force, this is a decision made by the states and accepted by a large portion of American society. The death of the batterer, therefore, is a permissible solution for battered women.

7. THE PSYCHOLOGICAL IMPACT OF REPEATED ABUSE IS VERY PROVOCATIVE AND TRIGGERS A JUSTIFIABLE RESPONSE THAT CAN MOTIVATE DEADLY FORCE


Secondly, there is no denying that the typical actions of abusive partners are genuinely provocative in their psychological impact. They arouse strong emotions of fear, terror, anger, humiliation, along with survival instincts. These emotions/instincts are of the sort that naturally motivate rapid responsive action directed at conduct perceived as inviting or warranting such responses. Such emotions and subsequent responses may not actually be warranted, but from the respondent's perspective they are characteristically regarded as appropriate or necessary. In other words, the behaviour of battering partners not only satisfies the normative requirements of being a serious provocation, but it also fits with the idea that provocation can be a causally influential factor in the subsequent actions of the provoked person.

8. THE PROVOCATIVE NATURE OF DOMESTIC VIOLENCE REDUCES THE CULPABILITY OF A HOMICIDAL RESPONSE


Thirdly, it is easy to understand how the provocation of a battering episode could reduce the culpability of a homicidal response. Even if the homicidal act were intentional, it would not exhibit the calculated or cool deliberation of first degree murders, and could often be explained as being done under the influence of strong emotions. Furthermore, the abusive spouse would usually be thought to bear some responsibility for the ensuing act, since he created a risk of violent response through his initial assault. Similarly, evidence of a prior pattern of abuse would normally be held to reduce the culpability of an otherwise criminal wrong by the abused person, provided that there was reason to think that their action was an outcome of the abuse.
AFFIRMATIVE POSITION TWO: SELF-DEFENSE SHOULD INCLUDE PROVOCATION cont’d

9. WE SHOULD RECOGNIZE THE LEGITIMACY OF RAGE AND ANGER THAT VICTIMS OF VIOLENCE FACE -- A PROVOCATION DOCTRINE IS NECESSARY


Unfortunately, such legitimate feelings of frustration and anger may go unrecognized. The reasons for this are complex. They have to do with women's socialization and our cultural understandings of gender, among other reasons. One consequence of this is that women themselves have eschewed anger and rage as distinctively 'male' emotions. Another, not unrelated, reason for lack of recognition of anger is that theoretical descriptions of domestic abuse have made use of explanatory terms (such as "learned helplessness" and "battered women's syndrome") which suggest or else lend themselves to a falsely homogeneous picture of passive dependency and incapacity as the psychological stance of women who find themselves in abusive relationships. Undoubtedly such accounts offer important insights about how women are often psychologically compromised by being subjected to regular physical abuse. But the picture created can also be misleading in a number of ways. One of these is its tendency to construe as matters of the defendant's psychology features which may actually be part of the defendant's objective circumstances. As a result, some behaviours which are the product of realistic and sensible judgements about situational constraints on women's pursuit of certain values come instead to be viewed as expressions of incapacitating fear or neurosis. Also, even where the intention of expert testimony was introduced expressly to recognize women's different experiences in order to help juries to evaluate the reasonableness of their actions, there is some evidence that courts have unintentionally subverted that intention by focussing on the passive, victimized aspects of such women's experiences rather than on circumstances which could explain the homicide as a necessary choice to save her own life.

10. LETHAL FORCE IS JUSTIFIED BECAUSE THE ABUSE CREATES A DEEP WELL OF SUPPRESSED RAGE THAT AFFECTS JUDGMENT AND CULPABILITY


A further reason why feelings of anger are not recognized in discussions of domestic abuse is that on the occasions when it would be natural for women to express them in a domestic conflict, they usually consider it necessary to suppress them. Because women are usually physically weaker than men, they often know the futility and the risks of expressing their anger (both verbally and physically) in a physical fight. They are also socialized to be disinclined to fight, and they have little experience of how to fight effectively. So they contain their anger, disallowing any immediate expression of it. But unexpressed anger is not therefore unexperienced anger. Anger or rage suppressed in this way often does not subside but can continue to burn strongly for a period of time after the physical encounter is ended. Indeed, the frustration of being unable to give effective immediate physical release to angry feelings can intensify those very feelings, leaving a repository of potent anger that can affect judgement and action for some time. It is interesting to note that these psychological realities about many women's experience of anger in violent domestic situations have not been acknowledged in the historical development of the plea of provocation. It emphasized the need for the provoked action to be done in the heat of passion, before the blood cools, and this has been interpreted as requiring an immediate or almost immediate response to the provoking act. Such an interpretation fits well those male-male conflicts which make up the vast majority of homicides, but ignores conflicts between physically (and socially) unequal parties including conflicts between men and women, where the weaker party may be obliged to suppress any immediate angry response.
UNDERVIEW: PROVOCATION IS A SOUND DEFENSE

1. A PROVOCATION DOCTRINE IS EXPANSIVE ENOUGH TO EXCUSE HOMICIDE IN RESPONSE TO REPEATED INSTANCES OF VIOLENCE


One advantage of having a plea of provocation for domestic abuse killings is that the plea of provocation is expandable. A plea of provocation is conceptually able to cover not only single, stand-on-their-own provoking events but also the cumulative effects of a pattern of objectionable provocative behaviour directed towards the defendant. To date, Canadian law has narrowly interpreted provocation to consist in a single 'sudden' or 'immediate' provoking event, but there is no reason why the idea of provocation need be so confined. An extension of this sort has already taken place in Canada’s law of self defence where both a woman’s gender and her experience of continued abuse are considered to be central in determining the reasonableness of her belief in the need for self defence. The 1994 Government Consultation Paper called for a reformed defence of provocation which showed compassion for women by reducing a murder charge to manslaughter when "provoked by prolonged and severe domestic abuse or oppression," acknowledging the "slow-building effects of such abuse." Such cumulative effects have already been recognized in Australian law, which permits a time interval between the final provoking event and the killing; the New South Wales Crimes Act of 1990 incorporated an amended provocation provision that was sensitive to domestic violence in saying that provocative conduct is relevant whether it "occurred immediately before the act or omission causing death or at any previous time." Cumulative provocation has also been recognized in practice by some United Kingdom courts that will, in a case of long standing provocation, take the slightest 'new' act on the part of the victim as "allowing the entire train of events to be included." There is already, therefore, some movement in other jurisdictions to extend the scope of provocation to accommodate the experience of domestic abuse, and there is some precedent in our recent law of self defence for such an extension.

2. PROVOCATION JUSTIFICATIONS ARE SUFFICIENTLY FLEXIBLE TO COVER MANY SCENARIOS WHERE THE USE OF DEADLY FORCE IS JUSTIFIED


G. R. Sullivan raises a more subtle objection to the use of provocation as a plea in domestic abuse killings. He perceptively observes that an excuse based on anger as outrage seems "to miss the mark" in relation to some domestic homicides, those where defendants were "acting, understandably, to terminate an intolerable and continuing state of affairs. Killing was, or was perceived to be, the only course of action which would afford relief." I think his point is that such actions are motivated more by a desire to end or escape from a terrible situation than by angry retaliation directed at their provoker. It is true that these intentions do inform some cases of homicide of abusing partners. However, it is less clear that provocation is unsuitable to cover or capture at least some of these cases. It likely will be necessary for there to be some precipitating context for such actions if they are to have a chance of being excused (or justified); the need for a fatal pre-emptive strike in order to escape from an intolerable situation is not likely, simply on its own, to be legally admissible as a mitigating consideration. A serious act of provocation could provide that precipitating context. Secondly, we could argue that provocation in the form of a further violent confrontation could arouse not only anger, but other emotions such as frustration, renewed revulsion at one’s situation, and sudden snapping of patience. This would allow provocation to embrace a wider range of responses, and perhaps make it better able to represent some of the aims that Sullivan identifies. Sullivan himself countenances the possibility of extending the scope of provocation itself, along with that of developing other heads of defence which women might use.
3. PROVOCATION DEFENSES CAN ADEQUATELY DISTINGUISH BETWEEN KILLINGS IN AN ABUSIVE CONTEXT FROM THOSE THAT ARE CALCULATED METHODS OF ENDING A RELATIONSHIP


Either of these approaches would enable courts to avoid some of the rigidities imposed by the existing plea of provocation with its attendant encrustation of restrictive interpretation. Reforming the law would be far more quick and efficient than trying to relax existing interpretations through judicial action. The first of these reforms could allow provocation to accommodate other emotions than anger, frustration or limits to toleration; perhaps despair, or strong desires to protect others, might be included amongst the motivations that could be provoked. Cumulative effects of chronic abuse would be frankly acknowledged. The role of provocation could still serve to distinguish cases of killings issuing from an abusive context from killings deliberately planned and undertaken as a necessary means of ending the relationship.
UNDERVIEW: JURY NULLIFICATION IS AN EFFECTIVE MECHANISM

1. WE AS CITIZENS SHOULD EMBRACE THE POWER OF WOMEN WHO KILL


The power of the jury is evident in the case of Judy McBride, discussed supra in Section I. McBride arranged for a friend to "hurt" her batterer and he was found stabbed thirty-eight times. A journalist covering the story said, "[the jury] hated her. They were very unforgiving. They somehow didn't buy the battered woman thing. Crowds would be waiting at the courthouse door to yell things like, "I hope you hang.'" In 1982, a jury convicted McBride of conspiracy to kill her husband and sentenced her to life in prison with no opportunity for parole. Rather than hate, as manifested by this community through its jury, the justice system should urge compassion for battered women who kill. Such compassion should be manifested in the form of jury nullification.

2. JURIES SHOULD REFUSE TO CONVICT WHEN JUSTICE AND THE LAW ARE AT ODDS


The Supreme Court observed that "'one of the most important functions any jury can perform' in exercising its discretion is "to maintain a link between contemporary community values and the penal system.'" Jury nullification is "not a "defense' recognized by the law, but is rather a mechanism by which a jury, acting as the community conscience, effectively is permitted to disregard the letter of the law by determining that applying it to a particular case would not be justified." Juries, while finding that a defendant is technically guilty, may nonetheless refuse to convict. For example, jurors may be willing to regard acts that are excessive or punitive as self-defense. Some call this an expansive view of self-defense, others call it the popular acceptance of vigilantism. Whatever the label, juries should be encouraged to refuse to convict when law and justice conflict.

3. JURIES CAN NULLIFY ACHIEVES JUSTICE WITHOUT RUNNING THE RISK OF SOCIAL CHAOS


One problem with jury nullification is that juries do not know that they have the power to reject the law as unjust. While jury nullification is both a common law and a Constitutional right, only Maryland and Indiana instruct the jury that it is free to reject the judge’s advice on the law. Proponents of a jury nullification instruction argue that "failing to inform the jury of its power to nullify usurps its basic function -- that is, to serve as the conscience of the community and to safeguard the individual citizen from unfair laws and oppressive prosecutorial practices." Critics of nullification, on the other hand, contend that a nullification instruction would lead to chaos and anarchy. Fears of juries running rampant are excessive. When carefully instructed, a jury should still act reasonably and with full respect for the law and its own power.
4. JURY NULLIFICATION EMBRACES VIGILANTISM IN THESE NARROW CIRCUMSTANCES


Most courts, believing it to be a threat to the law, do not permit attorneys to encourage juries to violate their oaths to follow a court's instructions. Technically, however, attorneys are allowed to argue both the evidence and any conclusions to be drawn from the evidence. One conclusion logically drawn from the evidence may be that convicting the defendant would be unjust. Moreover, if the right of jury nullification is part of the law, then attorneys should be able to argue it. In other words, they should not be restricted to arguing only the law of the crime with which their client is charged. Whether in the form of an instruction from the judge or an attorney's closing argument, juries should be informed of their nullification power, especially in cases where battered women have killed their abusers. While a battered woman may have technically violated the law, the jury should be permitted to reflect the community's conscience and the possible belief that the battered woman may have been morally justified in her action. This is not to say that all juries must absolve all battered women who kill. Rather, juries must be informed of, and allowed to exercise, their prerogative to choose justice over the law. Encouraging jury nullification for battered women is not a radical proposal. Indeed, there are signs that juries have been more lenient with victims of abuse. The justice system, however, through instruction or argument to the jury, should encourage juries to act as the moral reflection of the community and acquit battered women who kill.
AFFIRMATIVE POSITION THREE: KILLING IS JUSTIFIED VIGILANTISM

1. WOMEN WHO HAVE NO CHOICE BUT TO RESORT TO KILLING ARE SPONTANEOUS VIGILANTES

Elisabeth Ayyildiz, J.D., Chicago-Kent College of Law, AMERICAN UNIVERSITY JOURNAL OF GENDER AND LAW, "When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman As Vigilante", 1995, p.3exis

Second, a distinction exists between organized and spontaneous vigilantism. That is, for some, organization is an essential part of vigilantism while for others, vigilantism occurs when "bystanders not only apprehend a criminal but also mete out punishment themselves." A spontaneous vigilante, thus, may be the actual or potential victim herself. The battered woman is by definition a victim, one who has not received justice, one who has not seen her batterer punished for the abuse he has heaped upon her. Thus, by killing her batterer, the battered woman becomes a spontaneous vigilante -- she apprehends a criminal that the law has failed to bring to justice and metes out the punishment he richly deserves.

2. CONTEMPORARY SOCIETY REFUSES TO ACKNOWLEDGE THAT WOMEN WHO KILL THEIR ATTACKERS ARE JUSTIFIED VIGILANTES

Elisabeth Ayyildiz, J.D., Chicago-Kent College of Law, AMERICAN UNIVERSITY JOURNAL OF GENDER AND LAW, "When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman As Vigilante", 1995, p.3exis

The treatment of male vigilantes stands in stark contrast to that of vigilante women. One woman who received extensive press coverage, Ellie Nesler, was at first lauded by the public and press for killing her son's abuser. Nesler shot her son's alleged abuser five times at a preliminary hearing to decide whether he would stand trial on molestation charges. At first, she "found herself a local darling and a beacon for people everywhere besieged by crime and frustrated at a porous legal system." She was embraced as a virtuous mother pushed over the edge. This image was quickly rejected when it was discovered that Nesler had a criminal record and methamphetamine in her blood at the time of the shooting. Ultimately, Nesler was found guilty of manslaughter and sentenced to ten years in prison. Nesler was rejected by the media and the public. She did not fit the archetypal image of the vigilante. Not only was Nesler a real, multidimensional human with problems, but she was a female, and as such, easily toppled from her pedestal. The lesson of Goetz and Nesler, then, is that mythical men are acceptable as vigilantes and multidimensional women are not.

3. BATTERED WOMEN WITH THE COURAGE TO KILL SHOULD BE CELEBRATED AS A LEGITIMATE REPRESENTATION OF JUSTICE

Elisabeth Ayyildiz, J.D., Chicago-Kent College of Law, AMERICAN UNIVERSITY JOURNAL OF GENDER AND LAW, "When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman As Vigilante", 1995, p.3exis

Much as the public rejected Nesler as a heroine, so too has it rejected battered women. Battered women are not seen as superheros; rather, they are seen as victims responsible for their own fate. A feminist view of battered women who kill, however, perceives the battered woman as a representation of justice. She is Lady Liberty, ever-vigilant, vanquishing the brutal male, striking a blow for parity between the sexes. She is avenging herself and society, righting the moral order and preventing social decay. The American public, therefore, should extend the same respect and sympathy to the battered woman vigilante as it does to the archetypal male vigilante.
AFFIRMATIVE POSITION THREE: KILLING IS JUSTIFIED VIGILANTISM cont’d

4. **KILLING A REPEATED ATTACKER IS JUSTIFIED BECAUSE IT IS A LEGITIMATE INSTANCE OF VIGILANTISM**


Under a retributivist, or repaired crimes analysis, a batterer gains unfair advantages over a woman every time he beats her; he gains domination, power and the right to disregard laws against battery. Thus, a woman who kills in self-defense removes these unfairly won advantages. "Arguing that the man's death corrects past wrongs may seem like vigilante justice. Indeed, those arguing that battered woman's syndrome is dangerous fear that it allows "a private right to impose the death penalty.' " But is this necessarily bad? If a "morally justified" person is one who acts after correctly evaluating all conflicting demands, can a woman be morally justified in killing her batterer? This paper first discusses battered women who kill their abusers and Battered Woman's Syndrome ("BWS") as an element of self-defense. Section II contends that BWS is not the justice system's only appropriate response to battered women who kill. Section II argues that battered women who kill their abusers are morally justified vigilantes. Section III of this paper concludes that since battered women's acts are morally justified, the justice system should encourage jury nullification for battered women convicted of killing their abusers.

5. **THE KILLING OF AN ATTACKER IS JUSTIFIED AND SHOULD BE RECOGNIZED AS LEGITIMATE VIGILANTISM**


BWS [Battered women's syndrome], therefore, is a lens through which jurors can understand the hell a battered woman suffers and how this impacts the reasonableness of her belief that she was in imminent danger. Unfortunately, expert testimony on BWS is unavailable for many battered women who kill their abusers. Some feminist scholars argue that current self-defense law is unable to deal fairly with battered women who kill because of underlying gender bias. That is, the paradigms of self-defense law are not responsive to the circumstances under which battered women kill. As a result of the bias inherent in the law and the myths held by society concerning battered women, such as the "she could have just left" stereotype, judges often exclude evidence concerning the woman's perceptions and circumstances. Moreover, even if there is not gender bias in the law itself, some commentators argue that judges do not admit the evidence of BWS because they believe it impossible that a woman who killed her abuser acted reasonably. Thus, even where BWS should have been available to a defendant, a judge may, in his or her discretion, refuse to admit it.

6. **VIGILANTISM IS NECESSARY AS A JUSTIFICATION BECAUSE SOME INSTANCES OF VIOLENCE DON'T FIT THE STEREOTYPE OF A BATTERED WOMAN**


A final problem with BWS is that, like self-defense law, which generally is not applicable to battered women, BWS excludes those women who do not fit the stereotype of a battered woman. Moreover, it is argued that BWS perpetuates images of women as helpless, passive or emotionally disturbed. Ironically, while BWS should emphasize the reasonableness of a woman's behavior, it actually connotes incapacity and insanity. Thus, BWS may be available only for women who either fit the stereotype of the battered woman or are willing to portray themselves as insane. The use of BWS as a legal defense, therefore, does not sufficiently address the needs of all battered women who kill. It may not be a viable option where the technical requirements of self-defense are not met, where a judge is influenced by myths and stereotypes, or where a woman is unable or unwilling to present herself as anything other than rational and reasonable.
AFFIRMATIVE POSITION THREE: KILLING IS JUSTIFIED VIGILANTISM cont’d

7. THE RECOGNITION OF KILLINGS AS LEGITIMATE VIGILANTISM IS THE ONLY WAY TO ACHIEVE JUSTICE AND MORALLY RECOGNIZE THE KILLER AS JUSTIFIED

Elisabeth Ayyildiz, J.D., Chicago-Kent College of Law, AMERICAN UNIVERSITY JOURNAL OF GENDER AND LAW, "When Battered Woman’s Syndrome Does Not Go Far Enough: The Battered Woman As Vigilante", 1995, p. lexis

BWS is but one moderate reaction of the judicial system to the plight of battered women. As discussed above, BWS may not reach far enough to help many women. It may not express the community’s sense of outrage at the violence done to women and its sanctioning of at last seeing justice done. Accepting the battered woman as a vigilante is one means by which the community and justice system can find a battered woman morally justified in killing her abuser.

8. SOCIETY NEEDS TO RECOGNIZE THE DESIRABILITY OF THE SPONTANEOUS VIGILANTISM OF A WOMAN WHO KILLS HER REPEAT ATTACKER

Elisabeth Ayyildiz, J.D., Chicago-Kent College of Law, AMERICAN UNIVERSITY JOURNAL OF GENDER AND LAW, "When Battered Woman’s Syndrome Does Not Go Far Enough: The Battered Woman As Vigilante", 1995, p. lexis

The last factor, society’s viewing of vigilantism as consistent with social values, is the most problematic for battered women. While vigilantism is generally viewed as consistent with social values in the United States, a 1985 Gallup poll conducted just after the Bernard Goetz incident showed that seventy-four percent of Americans believed vigilantism was "sometimes" justified while another eight percent believed it was "always" justified. The battered woman, however, has not gained the same popular support. This paper argues that she should. The battered woman who kills her abuser should be seen as a spontaneous vigilante, a defender of justice, one repairing the moral order where the state has failed to do so.

9. VIGILANTISM IS JUSTIFIED BECAUSE REPEATED PHYSICAL ABUSE IS A VIOLATION OF THE SOCIAL CONTRACT

Elisabeth Ayyildiz, J.D., Chicago-Kent College of Law, AMERICAN UNIVERSITY JOURNAL OF GENDER AND LAW, "When Battered Woman’s Syndrome Does Not Go Far Enough: The Battered Woman As Vigilante", 1995, p. lexis

Vigilantism as a permissible mode of self-help for battered women may be justified under social contract theory in two ways. First, the breakdown of the social compact occurs when the state fails in its obligation to protect the individual. This breakdown justifies the individual’s resort to self-help. Second, women were not part of the original contract and thus may not be required to adhere to its obligations. Some theorists argue that law and legal systems developed as a desirable alternative to private justice. Social contractarians, in particular, argue that the individual, in giving up the norm of private vengeance, is entitled to the state’s protection. Thus, the "central claim of contract theory is that contract is the means to secure and enhance individual freedom." Under social contract theory, if the state fails in its obligation to protect citizens, the government is considered dissolved and the people are entitled to provide for their own protection. One philosopher concludes that where the state fails to protect its citizens, protecting oneself is not considered civil disobedience or vigilantism. One may extrapolate this premise to conclude that vigilantism is morally justified by the state’s failure to uphold its end of the compact.
AFFIRMATIVE POSITION THREE: KILLING IS JUSTIFIED VIGILANTISM cont’d

10. THE REFUSAL TO ALLOW BATTERED WOMEN TO BE LEGITIMATE VIGILANTES IS BECAUSE OF A GENDER-BIASED LENS


One answer may be found in vigilantism’s uniquely male tradition. Vigilante groups in the nineteenth century were composed of most of the adult males in the community, with the wealthiest and most powerful men as leaders. Women, who were not part of the community’s civic life, were not members of vigilante groups. The modern bias towards the acceptance of the archetypal vigilante as male may be seen in their portrayal. The American public sees the vigilante as male. This male is a cartoon superhero who is larger than life, an acceptable myth. Vigilantes are the men portrayed in Death Wish and Rambo, movies that assuage feelings of helplessness, fear and rage that the public harbors towards crime and criminals. To be acceptable to the American public, therefore, the vigilante must be a male of mythic proportions.

11. THE AMOUNT OF SITUATIONS WE ARE DEALING WITH IS VERY NARROW AND WE SHOULD INSTEAD EMBRACE VIGILANTISM FOR THOSE WHO CAN SUCCESSFULLY KILL THEIR ATTACKERS


Carole Herriman’s story, mentioned at the beginning of this paper, would have ended differently had the jury been allowed to nullify the law. Instead of serving a twenty-five year to life sentence for killing the man who terrorized her for years, she would have been acquitted by the jury. Rather than being judged a villain, Herriman would have been perceived as a vigilante punishing a deserving felon. If one is worried that the preceding suggestions will cause large numbers of women to “get-off,” it is important to note that fewer than one percent of women surveyed in a Harris Poll claimed to have been beaten up, much less choked or threatened by their partners with a weapon. Thus, the number of people affected by extreme violence, the type of violence that leads women to kill their abusers, may not be very high. But just because the numbers may be relatively low does not mean the problem is not severe and a solution is not important for the women who are the victims of vicious abuse. Thus, in the exceptional instances where a battered woman kills her abuser and BWS evidence is somehow legally insufficient, the jury, as a reflection of the community’s sense of morality and outrage, should be encouraged to acquit.
UNDERVIEW: LIMITED VIGILANTISM IS A SOCIAL GOOD

1. BATTERED WOMEN WHO KILL ARE AN EXCELLENT FIT FOR VIGILANTISM -- THE KEY IS REFRAMING IT AS A POSITIVE


The phenomenon of vigilantism has been explored from many different angles. Several of these explications are helpful in defining battered women as vigilantes. First, while vigilantism has historically been related to groups, the modern vigilante is often an individual who is seen as a defender of justice against the law. This individual has a dual character; she is both a law-abiding hero and a law-breaking villain. The battered woman embodies this dual character. She has, often for many years, abided by the law, taking abuse without retaliation. She has often turned to the justice system for help, generally to no avail. Yet when she finally strikes and defends herself, it is she who becomes the villain, the pariah disrupting home and hearth. She is the murderous monster.

2. VIGILANTISM DOESN'T HAVE TO HAVE A NEGATIVE CONNOTATION -- WOMEN WHO KILL THEIR ATTACKERS SHOULD BE AFFIRMED AND CELEBRATED AS EMPOWERED PEOPLE


Vigilante is generally interpreted as a "pejorative word, and it is used to criticize or warn. It is a powerful word that suggests willful violence masquerading as justice. It is a delegitimizing term [that is both] a reproach and a warning." To some, vigilantism equates with racism. As with any term, however, these negative connotations are not the only ones possible. Vigilant, for example, is an adjective with positive connotations -- society respects a watchdog that is ever-vigilant. A neutral definition describes a vigilance committee as "a group of persons organized without legal authorization professedly to keep order and punish crime when ordinary law enforcement agencies apparently fail to do so." Vigilantism is thus equated with taking the law into one's own hands. In the context of battered women who kill, vigilante should be seen as a word connoting justice and empowerment.

3. VIGILANTISM DOESN'T NEED TO BE ILLEGAL -- IT OCCUPIES A SEMI-LEGAL SPACE WHERE KILLING THE ATTACKER REPAIRS THE MORAL ORDER


Third, "the line between self defense and vigilantism may be seen as both thin and negotiable." A vigilante, therefore, is not necessarily outside of the law. Rather, a vigilante may be one who does not wait for the state when a crime has been committed, when the "moral order" has been ruptured. The battered woman should be seen as operating within the law. Self-defense may be technically unavailable for the battered woman due to the reasons discussed above. Moreover, the battered woman has often waited for the state to repair the moral order and bring her abuser to justice, to no avail. Thus, rather than continue waiting for the state, all the while receiving beating after beating, the battered woman, by killing her abuser, repairs the moral order herself.
4. WOMEN WHO KILL THEIR ATTACKERS FIT ALL OF THE EXISTING PREREQUISITES FOR LEGITIMATE VIGILANTISM


Finally, one sociologist has posited that several conditions must be met before vigilantism emerges: 1) a violation of norms, 2) existing law enforcement agencies and the judicial system must be deemed unable to cope with the violation, and 3) vigilantism must be viewed as consistent with social values. For battered women, social norms have been repeatedly violated; criminal behavior violates social norms and battery is a crime. Law enforcement agencies are perceived as unable to cope with this violation. Forty-two percent of Americans in one poll responded that they had "not very much confidence" in the ability of police to protect them and eight percent replied that they had none at all. For women who have been physically abused and summoned the police to no avail, that number must be dramatically higher. Similarly, the judicial system often fails the battered woman. While statistics are unavailable, anecdotal evidence indicates that the number of batterers who are ultimately held accountable for their actions and serve time in prison is minute. In 1990, for example, the Illinois Task Force on Gender Bias in the Courts found that domestic violence offenders do not serve any time at all!
NEGATIVE POSITION ONE: JUSTIFYING VIOLENCE REAFFIRMS MASCULINIST DOMINATION

1. AFFIRMING THE UTILITY OF PROVOCATION WOULD REINFORCE GENDER ROLES THAT ARE MORE DAMAGING AND REINFORCE THE CULTURAL CAUSES OF VIOLENCE


There are several objections to admitting a plea of anger as understandable/defensible outrage, whether this is admitted as an excuse or something more powerful than that. The most important of these is one that has been pressed by feminists. They maintain that provocation has historically 'privileged' anger, often implicated in male killings, over other passions and dispositions (such as sympathy or fear) that are more characteristic of women's use of forceful action. They worry that recognizing justified or reasonable anger as part of a provocation plea to homicide will not only benefit far more men than women, but will also bolster the respectability of a disposition that has often been very damaging to women in its effects.

2. JUSTIFYING KILLINGS UNDER THE RUBRIC OF SELF DEFENSE IS ON BALANCE WORSE FOR VICTIMS OF DOMESTIC ABUSE BECAUSE IT UNDERMINES JUSTIFICATION DEFENSES, REPRESENTS WOMEN AS WEAK AND HELPLESS AND ALLOWS RETALIATORY MURDERS


The split of authority on the admissibility of expert testimony on the battered woman syndrome illustrates the concern that an unfortunate segment of the population not be punished twice: during the abusive relationship and for ending the abuse. Yet in attempting to protect these women, courts may have unwittingly hurt society and other women defendants. First, by allowing juries to continue stereotyping women as weak and vulnerable, and by licensing the use of deadly force by a specialized group, any "battered woman syndrome defense" ironically contradicts both the social equality sought by women and the basic aim of the criminal law. Second, the use of battered woman syndrome expert testimony with self-defense leads to the misapplication of the law of self-defense and a corrosion of justification defenses in general. The combination is deadly. It allows retaliatory acts under the guise of self-defense.

3. AFFIRMING RAGE CUTS BOTH WAYS, ENABLING MASCULINIST VIOLENCE AGAINST WOMEN


These worries are serious, and they are based on a number of historical patterns that are undeniable. It is true that the courts have for centuries recognized male anger as able to mitigate or excuse violent actions but have not until very recently understood or acknowledged many passions and motivations that are important in women's psychology and socialization and may explain women's use of violence in situations of domestic abuse. The courts' understanding of the dispositions and values that are influential in women's socialization and behaviour is still very incomplete, and it has resulted in lopsided legal conceptions of what rational and responsible agency requires. It is also true that because homicide is much more common among men than women, many more men than women will try to avail themselves of an 'enriched' provocation plea. In addition, women have been victimized and continue to be victimized by male anger in the forms of possessive rage, jealousy and the need to dominate and control relations. And far more women than men have been harmed or killed as a result of actions done by men out of anger or a sense of outrage.
NEGATIVE POSITION ONE: JUSTIFYING VIOLENCE REAFFIRMS MASCULINIST DOMINATION
cont’d

4. THEY CREATE AN 'ACCIDENT' THEORY OF SELF-DEFENSE THAT DESTROYS THE AGENT'S RIGHTS AND REINFORCES THE VICTIMS HELPLESSNESS AND LACK OF AGENCY


Further dilution of the law of self-defense occurs because expert testimony focuses on the battered woman’s plight rather than her right. One can view self-defense defined in statutes as creating a "right" to defend oneself. The effect of battered woman syndrome testimony is to emphasize the defendant's weakness and helplessness, overshadowing the battered woman’s right to defend herself, and encouraging jurors to adopt an "accident" theory of self-defense.

In a community analysis survey by the National Jury Project, people who would acquit a battered woman defendant on self-defense were divided into two groups: the accident theory group and the strict self-defense group. The accident theory group tended to perceive the battered woman, rather than the deceased, as the victim. The study stated that: This group saw Rachel Olsen as a helpless frightened victim. They believed her fear was reasonable because of the history of abuse. They emphasized the fact that she had no active intent to defend or protect herself but was acting out of terror.

5. WE SHOULD NOT CONFUSE THE HORROR OF DOMESTIC VIOLENCE WITH THE LEGITIMACY OF MURDERING A PERSON


In a civilized society, we should not accept spouse abuse or child abuse. But in a civilized society we also should not legitimize the battered woman’s act of killing her batterer as an escape from the battering relationship. The judicial system does have a role in ameliorating the reprehensible position of battered women in our society. However, courts should not assume the role of liberator for these unfortunate women by allowing expert testimony to distort the requirements of self-defense. Instead, courts should stem the tide of expert testimony on the battered woman syndrome to establish the legal elements of self-defense. Admitting such testimony in conjunction with self-defense is detrimental to the law, women, and society. "I couldn't take it anymore' has never been a legal defense."

6. JUSTIFYING AND PERMITTING VIOLENCE ONLY REINFORCES THE MASCULINIST CULTURE OF VIOLENCE THAT IS RESPONSIBLE FOR DOMESTIC VIOLENCE IN THE FIRST PLACE


Support for her claims is easily found. Ms. Magazine’s 1994 article by Ann Jones "Is This Power Feminism?" somewhat predictably condemns gun ownership and training in armed self-defense for women by concluding "I think it’s fair to say that when we took up the fight for women's rights the right to bear arms was not what we had in mind. We imagined a just country -- an egalitarian world. Idealistic? Yes. But it seemed to me, and still does, the only kind of world worth struggling for". The implication seems to be that feminism is more pure, more visionary, and more long-term than the quick-fix of self-defense training. Further, women who do engage in aggressive self-defense training are merely participants in the established male culture of violence. Such women see themselves as strong because they have bought into male ideas about what it is to be strong. Therefore, there is nothing usefully critical or revolutionary about self-defense training.
NEGATIVE POSITION ONE: JUSTIFYING VIOLENCE
REAFFIRMS MASCULINIST DOMINATION cont'd

7. SELF-HELP ONLY MAKES THE VICTIM RESPONSIBLE FOR THEIR SITUATION BY PUTTING THE ONUS ON THEM TO STOP THE VIOLENCE, MASKING SOCIETY’S ROLE IN PERPETUATING VIOLENCE


Never mind the obvious response that seems ready made to keep women in line: if a woman tried to resist a man he would just get angrier and probably kill her. Or if an equally trained man and woman went at it he would beat her based on strength alone. Evidence seems to contradict the former, and the latter seems a pointless "what if Superman fought Mighty Mouse" question. No, the real danger lies in even the slightest implication that women might be able to prevent men’s violence. It might even be true that a well-trained female populace could decrease the instances of random street violence. It might be true that if all women never left their homes at night, wore baggy clothes, never drank alcohol, etc. that these incidents would decrease as well. But can we envision a courtroom in which the defense argues that if a rape-victim really didn't want it she would have fought harder? (Of course, nothing keeps courtrooms from bringing in a woman's self-defense background now either, but feminists have been at least somewhat successful in pushing some kinds of background arguments impermissible.) Feminist activists, political organizations and publications have chosen their position for one primary legitimate reason: it attempts to shift any possible responsibility for men's violence away from the female victim. While it may be easy to criticize the utopian rhetoric of ridding the world of violence we have read above, the wisdom of the feminist movement in upholding the blamelessness of the victim is much harder to attack as it rests not only on gut feeling, but on the important distinction between what it prudentially advisable and what is morally advisable, what is blameworthy from what is merely bad judgement. Some have objected that emphasizing the actions of the perpetrator de-emphasizes the actions of the victim resulting in the classification of the victim as an object to be acted on rather than as an agent. However, the distinction between imprudent actions and blameworthy actions does not deny the victim agency, but situates blame firmly on the morally responsible agent.
NEGATIVE POSITION ONE: JUSTIFYING VIOLENCE REAFFIRMS MASCULINIST DOMINATION cont’d

8. ARGUING THAT JUSTIFICATION IS NECESSARY TO FULLY RECOGNIZE THE POWER OF WOMEN IS ERRONEOUS AND DANGEROUS TO THE SUCCESSFUL USE OF AN EXCUSE

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

Feminists argue that recognition of the woman’s act as justified rather than excused is crucial. Excusable self-defense would imply that her response was typically and idiosyncratically emotional. The doctrine would perpetuate the views that the woman could not have been rational in assessing the danger and that the legal system must compensate for her mental and physical weaknesses -- justification, on the other hand, would assume that society values a woman’s and a man’s lives equally, and thus considers women’s lives worthy of self-defense. It would recognize that a woman has the capacity to correctly and reasonably perceive that the act is warranted, legitimate, and justified. Justification would encourage, indeed would compel, a legal recognition that a woman’s capacity for reasonable judgment -- comparable to that of a man’s -- can be the basis for engaging in the "correct behavior" of self-defense. This doctrinaire insistence on treatment of the battered woman’s defense as a justification is unnecessary and may be fatal to widespread and successful use of the battered woman’s defense. Most battered woman’s defense cases involve situations in which the defendant was not, in fact, in imminent danger of death or serious bodily harm at her victim’s hands. The defense relies on persuading the jury that defendant suffered from an identifiable psychological syndrome that caused her to assess the dangerousness of the situation in a different manner than an average, ordinary person -- including a woman who does not suffer from battered woman syndrome. In other words, acquittal is dependent upon proving that defendant had, to use Robinson’s terminology, a disability that caused a mistaken, but reasonable, belief in the existence of circumstances that would justify self-defense. It is a theory of excuse rather than of justification. Because defendant responded to internal and external coercive pressures, for which she was not responsible but which were created by her social reality as a battered woman, she is not to blame for her conduct. A person who did not suffer from battered woman syndrome, however, would be culpable under identical external circumstances. Indeed, successful use of the battered woman’s defense theory depends in part on defense counsel’s ability to persuade the court and jury that a person who did not suffer from battered woman syndrome would not be justified under identical objectively identifiable circumstances. This, however, is inherently inconsistent with the concept of justification.

9. AN EXCUSE BASED APPROACH DOESN’T RUN THE RISK OF REPRESENTING WOMEN IN DISEMPOWERING WAYS -- IT IS ON FACE BETTER FOR WOMEN AND SOCIETY IN GENERAL

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

The fact that the battered woman’s defense is more consistent with excuse theory does not answer the feminist concern that excusing battered women who kill, in circumstances they believe create a right of self-defense, may perpetuate undesirable views that women are by nature irrational and that their lives are unworthy of self-defense against a man. First, however, these concerns are overblown. Treatment of the battered woman’s defense as an excuse does not preclude justifying women who kill men under objectively identifiable circumstances more akin to traditional self-defense. Second, for the same reasons that battered women should be excused for killing their spouses, men who kill under mistaken beliefs as to justifying circumstances should also be excused. Third, even if treatment of the battered woman’s defense as an excuse does lead to perpetuation of sex discrimination under the current law, it may be that the problem should be cured in a different manner than the feminists recommend. All self-defense should be treated as excused rather than justified conduct. Indeed, the difficulties that the courts and commentators have encountered with the battered woman’s defense vividly illustrate the need for such a reconceptualization of the defense. Excused self-defense would better meet the needs of battered women, of the criminal justice system, and of society in general.
UNDERVIEW: THERE ARE ALTERNATIVES TO DEADLY FORCE

1. THERE ARE MULTIPLE ALTERNATIVE METHODS OF ESCAPE A VICTIM CAN PURSUE

In addition, while Dr. Walker attributes the battered woman's inability to leave a batterer to learned helplessness, another authority, Lee Bowker, concludes that several systematic factors determine whether a battered woman will leave the relationship. Ms. Bowker’s book, Beating Wife-Beating, explores the ways that battered women remedied their abusive relationships. Battered women took several steps to relieve themselves of the problem. These steps included: (1) contacting the police, (2) going to a battered woman’s shelter, (3) obtaining counseling, (4) leaving the relationship permanently and obtaining a divorce, (5) convincing the battered to stop his violent behavior, by herself or with the help of others; and (6) fighting the abuser.

2. THE USE OF DEADLY FORCE IS ONLY JUSTIFIED IF IT IS A PROPORTIONATE RESPONSE TO THE HARM IT IS RESPONDING TO

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis
The proportionality requirement serves a similar function. Even when the threatened harm is immediate and no less harmful alternatives are available, the maximum harm that may be inflicted cannot exceed the threatened harm. For example, deadly force never can be used to protect against non-deadly force. If the harm inflicted exceeds the maximum limit, it is not the lesser evil and cannot be justified.

3. IT IS UNCLEAR THAT FINANCIAL DEPENDENCY IS A SIGNIFICANT CAUSE OF REPEATED DOMESTIC VIOLENCE

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis
It should be noted that there is "considerable dispute" about whether this "disproportionate occurrence reflects greater surveillance of low-income families, or greater stresses of poverty or other factors." Some researchers have concluded that the increased prevalence of abuse among poor families "may be due to the stress of poverty itself, as it places greater pressure on parents to cope with the daily challenges of raising children." The stresses of juggling the demands of daily life with little income are likely to put a significant strain on a couple's relationship, and these tensions may erupt into violence. On the other hand, poor families may simply have more contact with service professional who report the abuse, like emergency room physicians in a public hospital, whereas middle- and upper-income families may have the wherewithal to conceal the abuse, such as by using private doctors at a private hospital.
1. DESTROYING THE STRONG BASIS OF A SELF-DEFENSE JUSTIFICATION CAUSES US TO CONSIDER THE WRONG QUESTION ABOUT WHETHER THE KILLING WAS PERMISSIBLE


Expert testimony premised on the woman-as-victim reinforces the jurors' belief that the battered woman did not intend to kill her batterer, and promotes an accident theory of self-defense. The result is that, if jurors believe a woman intends to use a weapon, she intends to kill her batterer. This self-defense plea cannot be successful because it was not accidental. Consider, for example, the following comments of jurors: [One juror] understood the defense argument [to be] that Mrs. Olsen acted in self-defense, but was unable to distinguish the issue of intent. He assumed that Mrs. Olsen had intended to kill her husband and that self-defense was an excuse rather than a legal justification. Blair [another juror] could not see how one could use a deadly weapon [in this case a steak knife] without intending to inflict death. He never viewed the use of a deadly weapon in the context of the right to defend oneself against a life threatening attack. If some jurors believe that self-defense must be accidental in order for the defendant to be acquitted then jurors often debate the wrong question. For these jurors, a battered woman defendant’s case does not turn on whether she had the right to use deadly force, but whether the defendant accidentally used a deadly weapon.

2. DEBATING THE RIGHT TO VIOLENCE DISPLACES RESPONSIBILITY ONTO THE VICTIM OF DOMESTIC VIOLENCE, NOT THE AGGRESSOR’S WHO PERPETUATE IT


Why doesn’t the feminist movement unequivocally accept and even espouse women's self-defense in its crusade against violence against women? Aren’t the objectives of both groups the same, the security of women against male aggression? For the most part feminism has remained silent on this issue; though, when it has had something to say for the most part it has not been supportive. I submit that feminism cannot change this silent or non-participatory orientation on women’s self-defense because to do so would ultimately provide just one more way to shift the blame for violence against women away from the men who perpetrate it and make prevention once again the responsibility of the female victim.

3. LETHAL SELF-DEFENSE AGAINST DOMESTIC VIOLENCE IS NOT WARRANTED BECAUSE IT INCORRECTLY IDENTIFIES WHO IS RESPONSIBLE FOR THE SITUATION


If, on the other hand, we are to say that she "shouldn't" have been walking home drunk and alone and we mean by it that she is at least partially at fault for what occurred afterward then we have, at least to an extent, shifted blame from the perpetrator to the victim. We are free now to say that it was her moral obligation to avoid drinking, to avoid walking at night, and even to have learned some self-defense. Maybe now we would even say, along with Camille Paglia, that she should simply "accept the consequences and, through self-criticism, resolve never to make that mistake again" (281). Of course, in all probability, Rachel Newhouse will not be able to make that resolution. As women who engage in self-defense either through a martial art or through teaching self-defense courses, many of us genuinely believe that women should practice self-defense. But how are we using "should"? And are we willing to argue that if a woman chooses not to learn self-defense techniques that she is in some way morally responsible for what may befall her? I personally believe that every woman is well advised to take some self-defense training. I have felt its benefits in my strength and confidence. However, I am unwilling to join with Martha McCoughey in claiming that the political organizations which advocate for all women should be willing to promote self-defense as a preventative measure for stopping violence against women.
NEGATIVE POSITION TWO: SELF-HELP DESTROYS SOCIAL ORDER

1. ERODING THE NECESSITY OR PROPORTIONALITY REQUIREMENTS FOR DEADLY FORCE CREATES A SLIPPERY SLOPE TOWARDS FUTURE KILLINGS

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

The criminal law tends to apply these standards in a stringent manner in order to narrow the range of conduct that will be excepted from the normal prohibitions of the criminal law. The question is whether, on balance, the act was beneficial to society. A court that broadens the concepts of necessity or proportionality risks erroneous encouragement of harmful conduct. Moreover, because circumstances that are external to the actor define the justification, objective standards must prevail to determine whether the elements exist. A mistake regarding the existence of the triggering condition must be fatal to a claim of justification because it would destroy the balance of interests. Mistaken assessment of necessity or proportionality should lead to the same result. In either case, the balance of relative harms is upset. To hold, as the battered woman’s defense requires, that the actor’s own experiences and psychological makeup should be considered in determining whether an act is justified is entirely inconsistent with the theory that a justified act is either beneficial or not harmful to society.

2. ENDORSING MURDERS DONE BY ABUSE VICTIMS BLURS THE DISTINCTION BETWEEN A JUSTIFICATION AND AN EXCUSE


Another major problem with battered woman syndrome expert testimony in self-defense cases is that it blurs the justification-excuse distinction. This testimony emphasizes the defendant and her psychological characteristics. As stated earlier, an excuse emphasizes the actor, not the act. Under the doctrine of excuse, the illegal act goes unpunished "because some characteristic of the actor vitiates society's desire to punish him." Learned helplessness is one such characteristic. Because battered women suffer from learned helplessness, which impedes their escape from the relationship, some would argue that is seems unfair or unethical for society to "blame" battered women through criminal conviction for their act of self-preservation.

3. PERMITTING THE MURDER OF ATTACKERS QUICKLY SLIPS INTO JUSTIFYING NEEDLESS SELF-HELP AND REVENGE KILLINGS

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

Sharp debate has surrounded the battered woman’s defense ever since the theory’s inception. Much of the debate concerns the potential impact the defense may have on the ability of the criminal law to deter battered women from engaging in unnecessary self-help or from killing in revenge or retaliation. Others worry that the defense cannot be confined to battered women and will lead to an undesirable extension of the justification of self-defense to anyone who has a subjective belief that use of deadly defensive force is necessary. The position taken in the debate depends, at least to some extent, upon one’s opinion whether the battered woman’s defense is simply a specialized application of the rules of self-defense, an extension of the principles of self-defense to particular circumstances in which they otherwise would not be applicable, or an altogether new hybrid defense.
NEGATIVE POSITION TWO: SELF-HELP DESTROYS SOCIAL ORDER cont'd

4. JUSTIFYING THE KILLING OF AN ABUSER OUTSIDE OF A VIOLENCE EPISODE VIOLATES THE NECESSITY AND PROPORTIONALITY REQUIREMENTS OF THE SELF DEFENSE JUSTIFICATION


When a battered woman kills her abuser outside a violent episode, both necessity and proportionality are arguably absent. Expert testimony must create these two components to justify the killing in self-defense. This dangerous sleight of hand occurs when experts use the defendant's past experiences and psychological state to produce the reasonableness of both deadly force and the defendant's fear of imminent danger. If proportionality means that the battered woman could not have effectively protected herself with less force, then experts must show that the use of deadly force was the defendant's perceived last resort. Experts show this perception through the learned helplessness phenomenon. Because the defendant believes she is powerless to stop the abuse in any other way, using deadly force is the only way to end the abuse. The battered woman may have tried alternatives and failed. The battered woman may fear that anything less than deadly force would so enrage the batterer that he would kill her at that instant.

5. ERODING THE STRONG NEED FOR IMMINENT DANGER JUSTIFIES DEADLY FORCE IN SITUATIONS WHERE IT IS NOT NECESSARY

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p.lexis

Jurisdictions which define the terms narrowly refuse to permit self-defense instructions where a victim of domestic abuse syndrome kills his or her abuser during a pause in the violence, feeling that a narrow time frame best comports with the traditional policy that self-defense in a homicide case should only be allowed in the most dire circumstances. These courts opine that holding that the use of deadly force is justified by a danger of death or serious injury that is merely about to occur is equivalent to holding such force is justified even when it is not absolutely necessary. For example in Langley v. State, the Alabama Court of Criminal Appeals affirmed a wife’s conviction of second degree murder for shooting her drunken, abusive husband while he sat on a couch, despite the husband’s “cussing” her and demanding that she leave even if her “G damned feet have to go first.” In reaching this conclusion, the court noted that “[h]owever discreditable the victim’s conduct may have been on the occasion of his death, he did not by word or conduct pose immediate danger to the life or limb” of his wife.

6. JUSTIFYING MURDER THROUGH THE BATTERED WOMAN’S DEFENSE UNDERMINES THE EFFECTIVENESS OF SELF-DEFENSE JUSTIFICATION, THREATENING SOCIAL STABILITY


Expert testimony on the battered woman syndrome dilutes the law of self-defense in several ways. First, the testimony attempts to establish the elements of self-defense in certain cases where they do not exist. The attempts, if successful, turn self-defense, considered a justification, into an excuse. Second, the testimony depicts the battered woman as weak and helpless, thus encouraging jurors to adopt an accident theory of self-defense. As a result, jurors acquit a battered woman defendant only if they believe the killing was accidental. Third, allowing expert testimony to establish the elements of self-defense encourages both carelessness and inappropriate pleading by defense counsel, as well as the development of other victimization-syndrome defenses. Finally, the inherent inconsistency of permitting expert testimony describing a battered woman’s unhealthy mental state to establish the reasonableness of her act of self-preservation undermines the social goal of self-defense. The effect of finding reason in what is unreasonable is to cloak retaliation in self-defense.
NEGATIVE POSITION TWO: SELF-HELP DESTROYS SOCIAL ORDER cont’d

7. DISCOURAGING THE LEGITIMATE JUSTIFICATION DOCTRINE OF SELF-DEFENSE NECESSARILY EXPANDS THE LIKELIHOOD THAT MORE KILLINGS IN DIFFERENT CONTEXTS WILL OCCUR

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

As in unlawful force, the closer the courts adhere to the requirements of proportionality, necessity, and immediacy, the greater the certainty that some harm was sure to occur and that the defensive conduct constituted the least harmful alternative. Expanding these requirements risks more than deviation from the theoretical basis of justification. It means that self-help will be encouraged and condoned as an individual’s legal right in a greater variety of circumstances. This, in turn, increases the risk that mistakes will be made in evaluating whether circumstances give rise to a legal right to kill in self-defense and that more lives will be taken unnecessarily.

8. SELF-HELP IS CORROSIVE TOWARDS SOCIAL WELL-BEING AND BENEFITS ONLY THE KILLER

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

It is difficult to identify a positive benefit that accrues to anyone other than the killer from the taking of an aggressor’s life in self-defense. Thus, there is no reason for the law affirmatively to encourage such conduct. To the contrary, classification of self-defense as a justification may be detrimental to society. The early common law failed to recognize self-defense as either a justification or an excuse because self-help was inimical to the goal of creating respect for the rule of law and, in turn, for governmental authority. Although lack of respect for properly constituted legal authority is not generally a problem today, the law still serves a vital function of discouraging self-help.

9. ENCOURAGING SELF-HELP IN THE CONTEXT OF LETHAL FORCE DRAMATICALLY UNDERMINES RESPECT FOR THE RULE OF LAW

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

There are a number of reasons why self-help is contrary to the interests of modern society. Reliance on self-help tends to diminish respect for the rule of law. Self-help in the form of self-defense carries the additional problem of increasing the quantum of violence in an already violent society. More troublesome is the possibility that the more widespread resort to self-help becomes, the more often innocent people may be killed erroneously.

10. NO MATTER WHAT CRIMES THE DECEASED ARE GUILTY OF, THEIR DEATH IS STILL A LOSS TO SOCIETY AND HURTS EFFECTIVE CRIMINAL JUSTICE

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

It is troublesome even when a person who is guilty of a crime becomes the victim of proper self-help. The constant decline in the number of capital crimes throughout American history attests to the general view that only the most vicious of intentional killers deserve to die for their deeds. We cling to the hope that criminals can be reformed, or at least deterred, if only they are subjected to incarceration, institutionalization, or community corrections. Most persons killed in self-defense would not have been eligible for capital punishment if duly convicted of their threatened crimes. This is particularly true of many of the abusive husbands in battered woman's defense cases.
NEGATIVE POSITION TWO: SELF-HELP DESTROYS SOCIAL ORDER cont’d

11. THEIR MODEL OF JUSTICE ALLOWS FOR ANY KILLING WHEN THE INDIVIDUAL, NO MATTER THE CONTEXT, SUBJECTIVELY BELIEVES THAT THE LAW WILL NOT HELP THEM AND THEY MUST THEN TAKE MATTERS INTO THEIR OWN HANDS

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

Even more worrisome, however, is the assumption underlying the battered woman’s defense that self-defense is necessary in some situations -- even when the threatened attack is not imminent -- because the criminal justice system has not adequately protected women. This assertion supports the feminist demand that the concepts of imminence and necessity be broadened. Yet, it is exactly this notion that the law must suppress. For the logical corollary is that any person who believes, reasonably or unreasonably, that the criminal justice system does not offer adequate protection can resort to self-help even though there may have been sufficient time to summon the aid of lawful authority. Even when we understand the actor’s unusual need to resort to self-help, the actor’s behavior may still be dangerous to society. If self-defense is a justification and if justified conduct is conduct we consistently encourage because it benefits society whenever similar circumstances arise, the defense cannot rationally be expanded to encompass the battered woman’s defense. Indeed, it may be that if those who suffer from battered woman syndrome or other psychological trauma induced by their social reality are more likely to kill in self-help, the criminal law should be doing even more than it currently does to prevent them from doing so. Domestic abuse is a serious societal problem but promotion of vigilantism is certainly not the solution. Treatment of self-defense as an excuse allows the judge to make a determination that it would be unjust to convict the defendant while at the same time avoiding a determination that defendant did the right and just thing and the consequent risk of increasing the quantum of violence in an all too violent society.
UNDERVIEW: DISTORTING IMMINENCE/NECESSITY DESTROYS SELF-DEFENSE JUSTIFICATIONS

1. SELF-DEFENSE PROVIDES A JUSTIFICATION ONLY IN A SMALL CIRCUMSTANCE OF DOMESTIC ABUSE KILLINGS -- MANY KILLINGS ARE NOT JUSTIFIED BY EITHER IMMINENCE OR NECESSITY

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

One reason the resulting cases are difficult is that they do not fit neatly into the categories of good and evil drawn by the criminal law. Basically, intentional killing is bad unless it is justified. On occasion, the circumstances in which the battered woman killed clearly indicate that the killing was justified in self-defense. In such cases, the woman acted in response to an overt act of aggression by her husband that created an objectively reasonable fear of imminent death or serious bodily harm. Other cases, however, are more difficult. Despite the defendant's long-term victimization, she most likely would not have been killed or subjected to serious bodily injury on the occasion when she killed her abuser. Sometimes the problem arises because the woman perceived actual or threatened force to be deadly when, objectively, it was not. In other cases, the defendant killed in response to verbal threats unaccompanied by any contemporanous overt physical aggression. The most difficult cases arise when the defendant killed a sleeping or resting victim, or when the defendant engaged in other behavior inconsistent with self-defense.

2. DESTROYING THE IMMINENCE REQUIREMENT UNDERMINES THE ENTIRE JUSTIFICATION FOR LEGITIMATE SELF DEFENSE


While the use of a deadly weapon is more easily understood by jurors in a confrontation between the battered woman and her abuser, the use of a weapon occurs in non-confrontational circumstances for many battered women. Self-defense is the common plea of battered women who kill their abusers during a violent episode, in anticipation of a violent episode, after a violent episode, and while the abuser is asleep or otherwise incapacitated. Proponents attempt to introduce expert testimony in all of these cases. Where the killing occurs during a violent episode, self-defense is an appropriate plea which needs little adjustments by expert testimony at trial. But expert testimony is vital when the defendant kills her batterer outside a violent episode. The two areas of self-defense requiring expert opinion are the reasonableness of the degree of force used and the reasonableness of the battered woman's perception of imminent danger. In the non-confrontational killings by battered women, expert testimony attempts to create these elements of self-defense where they do not exist. The result is the destruction of self-defense as a justification and the substitution of an excuse for the justification.

3. AFFIRMING KILLINGS OUTSIDE OF CONFRONTATIONAL SITUATIONS DESTROYS THE ENTIRE FOUNDATION OF THE SELF-DEFENSE DOCTRINE


Experts attempt to establish the necessity of deadly force by showing the reasonableness of the battered woman's fear of imminent danger. They emphasize the severity and unpredictability of the batterings. The imminence requirement represents what Professor Robinson calls the temporal element of necessity. In the case of a battered woman who kills her abuser when he is of no present apparent threat, expert testimony to prove the reasonableness of her fear of imminent danger destroys the temporal element of necessity in self-defense. As one opponent of the expert testimony explains: the battered wife syndrome defense violates the existing criminal law by seeking to avoid the requirement of imminent present danger of death or great bodily harm and substituting certainty of future harm plus inadequacies of legitimate alternatives rationale, thereby bestowing upon the abused wife the unique right to destroy her tormentor at her own discretion. Admitting expert testimony in the trials of battered women who kill in a non-confrontational setting means that self-defense no longer satisfies the strict requirements of justification.
UNDERVIEW: DISTORTING IMMINENCE/NECESSITY DESTROYS SELF-DEFENSE JUSTIFICATIONS cont’d

4. THE MORAL DESIRABILITY OF THE SELF-DEFENSE DOCTRINE REQUIRES A STRICT LIMIT BE PLACED ON THE EXCEPTIONS THAT ARE PERMISSIBLE

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p.lexis

The theoretical implications are clear. One has a legal right to kill in self-defense. Moreover, such intentional homicides are encouraged because they are not harmful to society and may be beneficial. Yet the criminal law's general goal of reducing the amount of violence in society remains the same. To harmonize the principle that killings in self-defense are justified with the principle that human life is the highest value protected by the law, the range of defensive conduct that will be justified must be narrowly circumscribed. The result is a legal environment that is inhospitable to the battered woman's defense.

5. JUSTIFYING SELF-HELP MURDERS BY VICTIMS OF DOMESTIC VIOLENCE WOULD DRAMATICALLY UNDERCUT THE RULE OF LAW AND THE ABILITY FOR SOCIETY TO DISCOURAGE SELF-HELP

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p.lexis

Today, most American jurisdictions classify self-defense as a justification even though it traditionally developed as an excuse. As a result, principles of excuse have become merged with principles of justification in the law of self-defense. Consequently, results in some cases are illogical and inconsistent with basic principles of criminal law. The problem is particularly apt to arise when demands are made to justify self-help behavior that is harmful to society in instances where the actor cannot fairly be held blameworthy because of circumstances particular to that individual. Battered women who kill their abusers present the paradigm example of such cases. Although the defendant's conduct is understandable, and absolving her from moral blame is not difficult, we are hesitant to proclaim that the act was justified and therefore to be encouraged. Even in traditional cases, self-defense is, at most, permissible and tolerated. Treatment of all self-defense as an excuse would further the criminal justice system's interest in discouraging self-help, promote society's interest in preserving the sanctity of human life, and fulfill the feminist goal of absolving battered women who kill of guilt without proclaiming that such women are inferior to men.
UNDETVIEW: RULE OF LAW IMPACTS

1. JUSTIFICATIONS ARE ESSENTIAL TO UPHOLD AND PROTECT THE SOCIAL INTEREST


   Under justification, the law continues to recognize the harm caused by the act as wrong, but offers an exception to applying the criminal law. A successful justification defense requires acquittal because, by definition, no crime has occurred. Self-defense, according to some scholars, is the primary example of a justification. If committed in self-defense, an intentional killing is not a crime. The reason that the killing is not a crime is that the act avoids an even greater harm or furthers a more important interest of society. In self-defense cases, the balancing of harms is that "[s]ociety's interest in the right of bodily integrity, when combined with the physical harm threatened, outweighs the harm inflicted to deter such an aggressor." The balancing of harms in a justification case may be analyzed by dividing the act into several elements. Professor Paul Robinson analyzes the act under the following scheme: "triggering conditions permit a necessary and proportional response." Once triggered, the justifiable conduct must satisfy the two components of proportionality and necessity. The conduct is proportional if it causes a harm that is reasonable or not excessive in light of the harm avoided. The act is necessary if it protects or furthers a societal interest.

2. THE RULE OF LAW IS KEY TO SURVIVAL

   Robert Carn, Professor at University of Houston, JUDICIAL PROCESS IN AMERICA, 1996, p.9

   Some persons in history have believed that there should be no government (and hence no laws) at all. Such individuals, called anarchists, have argued that governments by nature make rules and laws and that such restrictions impinge on personal freedom. In the past anarchists have used violence to overthrow governments and have assassinated heads of state. Such attempts to abolish law and authority have resulted in much destruction of life and property and temporary reigns of terror, but they have never brought about the elimination of law or government. Instead of increasing personal freedom, a state of anarchy virtually destroys personal freedom for all but the most powerful and savage of individuals. Few would deny that in today's world if people are to live together amicably, law must be an essential part of life. As our population expands and modern transportation and communication link us all together, every action that each of us takes affects another either directly or indirectly and may even cause harm. When the inevitable conflict results, it must be resolved peaceably using a rule of law. Otherwise there is lust disorder, death, and chaos. We must have some common set of rules that we agree to live by—a rule of law and order.

3. WITHOUT LAW TERROR, WOULD RULE THE LAND

   Robert Carn, Professor at University of Houston, JUDICIAL PROCESS IN AMERICA, 1996, p.10

   NO matter how benign and loving people can be at time, altercations and disagreements are inevitable. How disputes are resolved between quarreling individuals, corporations, or governmental entities tells us much about the level and quality of the rule of law in a society. Without an orderly, peaceful process for dispute resolution there is either chaos or a climate in which the largest gang of thugs or those with the strongest fists prevail.

4. UNDERMINING THE RULE OF LAW DEVOLVES INTO VIGILANTISM AND CHAOS


   A lack of rule of law in a country can be a source of conflict in a number of different respects. Perhaps most obviously, the application of law favoring particular groups is likely to generate resentment amongst those slighted. Absent a productive means of channeling grievances (which ideally would involve the judicial system), disadvantaged groups may resort to more violent tactics. Vigilantism may be one extreme response where few alternatives exist aside from taking the law into one's own hands. Countries lacking the rule of law also often face economic disadvantage, which may become a source of conflict. Development experts often point to the importance of having clear statutes for the enforcement of contracts and the like as a precursor to attracting significant investment and consequently economic development.
UNDERVIEW: RULE OF LAW IMPACTS cont'd

5. VIGILANTISM CAUSES SOCIAL CHAOS, AS EVERYONE TAKES THE LAW INTO THEIR OWN HANDS

http://www.iss.co.za/PUBS/MONOGRAPHS/No72/Chap1.html
Vigilantism not only leads to an increase in the overall level of crime, but also influences how government responds to crime generally and most importantly, undermines the rule of law. The activities of vigilante groups like People Against Gangsterism and Drugs (Pagad) in the Western Cape and Mapogo-a-Mathamaga (referred to as 'Mapogo') in the Northern Province are cases in point. The activities of both these groups have seen a rise in gang related violence in the case of Pagad, and many instances of assault in the case of Mapogo. The brutal and illegal methods employed by vigilante groups have also forced reactions from the communities in which they operate, which in turn result in more crime. The emergence of Amampondomise Thieves Unit in Tsolo and Qumbu in the Eastern Cape in response to Umfelandawonye wa Bafuyi, Maputla re tla ja Kae in Mpumalanga in response to Mapogo and the Community Outreach Forum in response to Pagad in the Western Cape are some examples of such a reaction.

6. VIGILANTES INCREASE THE AMOUNT OF CRIME AND VIOLENCE, UNDERMINING THE SOCIAL FABRIC

http://www.iss.co.za/PUBS/MONOGRAPHS/No72/Chap1.html
The key concerns are that vigilante groups take on policing and justice functions, often using violent means to illicit confessions and mete out punishment. As such, they function in opposition to the formal criminal justice system and threaten the rule of law -- the foundation of any democracy. Moreover, instead of reducing crime, vigilante activities add to the workload of the police and courts. In South Africa, for example, vigilantes have assaulted alleged criminals, dropped them off at police stations and then refused to testify in court as a witness to the alleged crime.

7. MORALLY PERMITTING BATTERED-WOMAN'S KILLINGS RELAXES ALL OF THE REQUIREMENTS NECESSARY TO A STRONG RULE OF LAW

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis
The battered woman's defense requires relaxation of all of these requirements. Rather than limiting the determination of whether these elements of the defense have been met to very limited, objectively ascertainable circumstances, defenders of battered women ask the courts to consider circumstances that would be unknown to the casual observer. Factors such as relative strength, the defendant's physical training, and the defendant's prior experiences with and knowledge about her victim are neither external nor objectively identifiable. Consideration of such circumstances is not compatible with the notion of self-defense as behavior that is justified and should be encouraged.
8. THEIR BROAD MODEL OF SELF-HELP IS ENTIRELY INIMICAL TO THE SMOOTH FUNCTIONING OF A RULE-BASED SOCIETY

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p.lexis

Battered women who kill their abusers in perceived self-defense present a special challenge to the criminal justice system, especially to the evolution of the law of self-defense. Although self-defense first appeared in the common law as an excuse, in the twentieth century it has been classified as a justification. Justified conduct is otherwise criminal conduct that under particular external, objectively identifiable circumstances did not harm society. Under these circumstances it was the exact opposite of a discouraged criminal act; it was an encouraged desirable course of conduct. Few cases in which self-defense is claimed, however, fit the model of a justification. The problem is that self-defense constitutes self-help, and self-help is inimical to the rule of law.
NEGATIVE POSITION THREE: KILLINGS SHOULD BE EXCUSED, NOT JUSTIFIED

1. SELF-DEFENSE FOR BATTERED WOMAN SHOULD BE RECONCEPTUALIZED AS AN EXCUSE FROM BLAME, NOT A MORAL PERMISSIBILITY THAT SHOULD BE ENCOURAGED

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis
The solution to this dilemma is to return self-defense to its original theoretical basis as an excuse in all cases. Excuse recognizes that, even though self-help may not be desirable and may harm society, such conduct often results from a person’s understandable inability to choose an alternative course of action due to overwhelming external or internal pressures. Treatment of self-defense as an excuse accommodates the defensive needs of battered women and other individuals who act in subjectively reasonable fear given their social reality. It allows the fact-finder to consider the defender’s subjective beliefs without risking the possibility that all bona fide defensive acts, no matter how objectively unreasonable, will be condoned by the criminal law. Concomitantly, it furthers the criminal law’s goals of preserving life and discouraging self-help.

2. DESTROYING THE EXCUSE/JUSTIFICATION DISTINCTION IN THE CONTEXT OF BATTERED WOMEN CREATES A ‘UTILITY’ THEORY OF MURDER THAT MAKES KILLING A CONVENIENT METHOD TO EXIT A RELATIONSHIP

Herein lies the problem. While defendants would claim, under the doctrine of excuse, that it would be unfair or unethical for society to "blame" them by convicting and punishing them for their act, the defendants are pleading self-defense, a justification. The danger lies in the public, and other battered women, mistaking the acquittal by self-defense as an acceptance of homicide as justified, appropriate conduct for battered women who want to escape battering relationships. Acquittal by excuse still means that the act itself is condemned by society. Blurring the distinction between excuse and justification seems to imply a "social utility" Theory of self-defense for battered women, permitting the killing of the abuser not because it was necessary at that point in time, but because it appears "just" in the long run. Jurors who acquit the battered woman who kills in a non-confrontational setting by self-defense create a complete defense where an incomplete one has been presented.

3. THE SOLUTION TO THE QUANDARY OF DOMESTIC VIOLENCE KILLINGS DOESN’T LIE IN MORALLY PERMITTING THE KILLINGS THROUGH A JUSTIFICATION, BUT RATHER TO EXCUSE THEM

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis
These two diverse strains of legal developments of the past decade -- the very practical aspects of defending battered women who kill and the highly theoretical debate about the entire structure of the common law criminal defenses -- have much to offer one another. Categorizing self-defense as a justification rather than as an excuse causes the defense to be defined in narrow terms. This is detrimental to the needs of battered women defendants who kill in nontraditional self-defense situations. Accommodation of the conflicting needs of society and battered women who kill can be achieved by a system of criminal defenses based on a revived distinction between justification and excuse. Similarly, the very real demands battered women make on the criminal justice system illustrate the need to reform and systematize the law of criminal defenses.
NEGATIVE POSITION THREE: KILLINGS
SHOULD BE EXCUSED, NOT JUSTIFIED cont’d

4. WE SHOULD NOT PERMIT KILLINGS UNDER OUR CONVENTIONAL RUBRIC OF SELF-DEFENSE. INSTEAD, A NEW EVOLVED EXCUSE STANDARD SHOULD GOVERN OUR DECISION-MAKING ABOUT WHETHER A KILLER SHOULD BE PUNISHED

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

This Article proposes that classifying self-defense as an excuse will result in more justice for battered women who kill without threatening important values promoted by the criminal law, such as the suppression of private retaliation and the sanctity of human life. The Article will explore first the concepts of justification and excuse. Second, it will examine the historical development of the present law of self-defense, the doctrine’s general rules, and its classification as a justification. The discussion then will turn to a description of the battered woman’s defense and will evaluate how it has fared under the justification theory of self-defense. Finally, a case will be made for creation of a new defense of excused self-defense that will accommodate many battered women’s cases excluded by the justification theory without sacrificing the basic goals of the criminal law.

5. KILLINGS SHOULD NOT BE MORALLY JUSTIFIED, BUT EXCUSED TO A LOWER LEVEL OF HOMICIDE


When a battered woman kills her batterer during a violent attack, self-defense is a responsible plea. But if a battered woman kills in a circumstance in which her batterer did not attack her, the strict elements of this justification defense are not met. Because the crime of manslaughter "constitutes a sort of catch-all category which includes homicides which are not bad enough to be murder but which are too bad to be no crime whatever," manslaughter represents a compromise for those who fear increased homicides as an escape for battered women, and those who believe battered women have suffered enough and should not be punished further. This section illustrates several ways in which manslaughter is the appropriate result when a battered woman kills outside of a violent episode.

6. AN EXCUSE OF DEADLY FORCE IS MORE APPROPRIATE TO THE CIRCUMSTANCES OF ABUSE KILLINGS THAN A JUSTIFICATION

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

Most American jurisdictions treat a reasonable but mistaken belief that the circumstances necessary for self-defense existed as justified self-defense. Acceptance of a reasonable but mistaken belief that justificatory circumstances existed appears to be based on the theory expressed in Justice Holmes' oft-quoted statement that "[d]etached reflection cannot be demanded in the presence of an uplifted knife." Moreover, because even hindsight does not always reveal what options may have been available or whether the aggressor/victim actually would have carried out his threat, requiring absolute accuracy in assessing whether the defensive force was proportionate, necessary, and immediate is impossible. This rationale, however, is more consistent with excuse theory than justification theory. Because the threat creates coercive pressure that may limit freedom of choice, excuse analysis is appropriate. Justification cannot be the proper theoretical basis for the acquittal if there was no actual imminent unlawful deadly aggression.
NEGATIVE POSITION THREE: KILLINGS SHOULD BE EXCUSED, NOT JUSTIFIED cont'd

7. ELIMINATING THE OBJECTIVE CRITERION IN ORDER FOR A KILLING TO BE JUSTIFIED (LIKE NECESSITY OR IMMINENCE) INCREASES THE LIKELIHOOD THAT MISTAKEN JUDGMENTS IN CHOOSING TO KILL WILL BE ALLOWED

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p.lexis

Although there is nearly universal agreement that reasonable but mistaken beliefs are acceptable bases for defensive action, there is disagreement among American jurisdictions as to whether an objective or subjective standard of reasonableness should be used. Without resolving that issue, it is clear from the discussion above that justifying even reasonably mistaken defensive conduct under an objective standard is troublesome. Subjective standards inevitably increase the number of mistakes that will be held reasonable and therefore increase the extent of killings that will be justified on grounds of self-defense despite their incompatibility with the theoretical basis of justification. This creates difficulties because, although it is harmful, such conduct is nonetheless deemed justified under current law. Therefore, future actors confronted with the same circumstances have a legal right to do the exact same thing. The result may be to encourage self-help killings when the victim may be innocent or there may have been less harmful alternatives, perhaps including the preferred possibility of resort to the lawful processes of the criminal justice system.

8. EXPANDING STANDARDS OF REASONABLENESS, NECESSITY AND IMMINENCE WOULD INCREASE THE RISK OF KILLING IN TIMES WHERE IT IS NOT NECESSARY- AN EXCUSE DOCTRINE AVOIDS THIS DANGER

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To a large extent, the fear that accepting the battered woman's defense as justified self-defense may be interpreted as granting victims of domestic abuse a license to kill their abusers arises because the defense requires use of a subjective standard of reasonableness and a substantial expansion of traditional concepts of proportionality, necessity, and immediacy. Although the concern that the defense will be interpreted as a license to kill may not be legitimate, the pressure imposed by the battered woman's defense on the theoretical underpinnings of justified self-defense is very real. If self-defense was classified as an excuse, the battered woman's defense could be incorporated easily into the law of self-defense without raising these concerns.

9. JUSTIFYING THE LOSS OF LIFE AS MORALLY PERMISSIBLE CREATES ENORMOUS ETHICAL DIFFICULTIES THAT CAN ONLY BE AVOIDED BY AN EXCUSE APPROACH

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One of the most difficult problems confronted by legal theorists is the question of whether killing a legally insane aggressor in self-defense can be justified. Forfeiture theories of self-defense that rely on devaluing the aggressor's interest in life, freedom from aggression, or bodily integrity because of his wrongful conduct disintegrate in cases where the aggressor is not culpable. This problem is particularly acute in battered woman's defense cases. If we sympathize with the women as being victims of their social reality, we must sympathize with the batterers as well. Abusers are not entirely morally reprehensible. According to psychological and sociological literature, they also are victims of "disease" or of their social reality. This makes it even more difficult for the legal system to determine that the abuser's life is less valuable than his victim's. The most that can be said in battered woman's defense cases, as in all self-defense cases, is that society is neutral with respect to the killing. By treating such cases as instances of excuse rather than justification, the difficulties created by weighing qualitative values of human lives and according a lesser interest to a potentially "innocent" person can be avoided. An excuse analysis would lead to identical results -- acquittal -- but do so by focusing on the pressure confronted by the defendant and the lack of available options.
UNDERVIEW: NON-CONFRONTATIONAL KILLINGS NOT JUSTIFIED

1. THE EXISTENCE OF UNLAWFUL AGGRESSION IS NOT ENOUGH TO JUSTIFY DEADLY SELF-HELP --
PROPORTIONALITY, NECESSITY AND IMMINENCE MUST STILL BE IN EFFECT FOR A KILLING TO
BE MORALLY ALLOWED

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW
REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill",
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Even when the triggering condition for self-defense -- unlawful aggression -- is present, the common law
requirements of proportionality, necessity, and imminence must be met to achieve the proper balance of harm. The
amount of force employed by the defender must be proportionate to the threatened aggressive force. If deadly force
is used to defend against nondeadly force, the harm inflicted by the actor (death or serious bodily harm) will be
greater than the harm avoided (less than serious bodily harm). Even if deadly force is proportionate, its use must be
necessary. Otherwise, unlawful conduct will only be justified when it involves the lesser harm of two harmful
choices. If countering with nondeadly force or with no force at all avoids the threatened harm, defensive use of
deadly force is no longer the lesser evil of only two choices. Alternatives involving still less societal harm are
available. Indeed, in many cases it may have been possible to avoid unlawful conduct altogether. The same
consideration underlies the imminency requirement. The resort to deadly force must be a last resort; there must be
no time left to summon police or other aid, or for the aggressor to change his mind. If the aggression has already
occurred, the force will be vengeful or punitive rather than defensive and cannot be justified.

2. THE KILLINGS THAT OCCUR IN A NON-CONFRONTATIONAL SETTING ARE NOT REASONABLE AND
THUS CANNOT BE MORALLY JUSTIFIED

Mira Mihajlovich, no qualifications available, INDIANA LAW JOURNAL, "Does Plight Make Right: The Battered

This testimony is inconsistent, however, with the true mental state of battered women. In her comprehensive study
of 403 cases of battered women, Dr. Walker predicted battered women would be at high risk for depressive
disorders. The results of psychological testing bore out this prediction. Another study compared the personality
characteristics of battered wives to non-battered wives, and found that battered wives tend to be "generally more
maladjusted, with higher scores on psychosis, personality disorder, and neurosis factors." Battered wives were
psychologically more unhealthy, and possessed personality characteristics which indicated they were overexcitable,
unstable women. In fact, overexcitable battered women can become hypersensitive to clues of violence to follow,
and as a result beat the batterer to the attack. A short example illustrates this point. If a batterer customarily calls
home from work to make sure his target is home on days when he is going to beat her, and the woman shoots him as
he enters the door after calling from work, she might have what one psychiatrist describes as "signal anxiety" -- a
"fear triggered by danger signs from an attacker." If this woman claimed self-defense, experts would try to show
how this anticipatory act was "reasonable." The danger is that what mental health experts define as a "reasonable"
survival skill developed by the battered woman is not "reasonable" in the legal sense.
UNDERVIEW: EXCUSE APPROACH IS SUPERIOR

1. AN EXCUSE DOCTRINE IS ABLE TO ACCESS ALL THE POSITIVE VALUES ASSOCIATED WITH A JUSTIFICATION APPROACH

   Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p.lexis

   Excuse theory allows the fact-finder to consider the whole individual and to evaluate whether, under the circumstances, her life experience enabled her to choose between criminal and noncriminal conduct. If her inability to choose was reasonable or understandable, she is not culpable. The conclusion that she had no real choice is not necessarily the equivalent of a determination that the defendant was mentally incompetent. Rather, it is a recognition that each person’s life experiences are different and that consequently each person’s reasonable reaction to the same set of external circumstances will differ.

2. AN EXCUSE APPROACH RECOGNIZES THAT THE KILLER WAS PLACED UNDER EXTREME DURESS AND WAS NOT ABLE TO CHOOSE FREELY OR RATIONALLY

   Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p.lexis

   Similarly, both authors propose criteria to limit claims of excuse. Robinson concludes that, to be excused, the actor must suffer from a disability that causes an excusing condition. A disability is a mental condition of the actor at the time of the offense that lessens the possibility that the harmful act was a product of the actor’s meaningful choice. The condition may be permanent or temporary, internal or external, but it must have observable symptoms apart from the conduct in question. The disability need not be a mental abnormality. It may be caused simply by a lack of information when the actor cannot be blamed for failing to obtain the information. Fletcher calls for a similar limiting criteria that he terms a "limited temporal distortion of the actor’s character." The authors’ shared disability requirement serves a variety of functions. The requirement limits the instances of excuse, provides evidence that the actor’s free will actually was impaired, and shifts blame from the actor to the disability. Additionally, if an actor is perceived to be abnormal or the victim of abnormal pressures, the actor is excepted from the criminal law without undermining the law’s general condemnatory and deterrent functions.

3. MANSLAUGHTER, NOT A SELF-DEFENSE JUSTIFICATION, IS THE CORRECT CHARGE THAT PEOPLE WHO KILL THEIR ATTACKERS IN A NON-CONFRONTATIONAL CONTEXT SHOULD BE GIVEN


   Expert testimony previously has been directed to the reasonableness of a defendant’s fear of imminent danger in both confrontational and non-confrontational settings. In a non-confrontational self-defense claim, the courts should, where this testimony is admissible, permit it only to establish elements of manslaughter in a murder case. Manslaughter is the appropriate crime for the homicides committed by battered women outside of an acute battering incident. As stated earlier, there is an inherent inconsistency in admitting expert psychological or psychiatric testimony describing the depressed, helpless state of the battered woman, who is unable to perceive the reality of her situation, to prove the legal reasonableness of her act. If a diminished mental capacity is part of the battered woman syndrome, or if battered women are incapable of effectively understanding the outcome of their actions, then manslaughter due to imperfect self-defense or diminished capacity is the proper result. If anxiety and apprehension permeate the battered woman’s psyche, manslaughter by provocation or irresistible impulse is the appropriate defense.
UNDERVIEW: VIGILANTISM IS AN ACCEPTABLE LAST RESORT

1. VIGILANTISM IS THE ONLY JUSTIFIED ACTION THAT VICTIMS CAN TAKE BECAUSE THE STATE REFUSES TO PROTECT THEM


For the courts, evenhanded distribution of justice is paramount in maintaining the justice system and preventing the arrival of a state of anarchy wherein normally law-abiding citizens become vigilantes. While society may have revoked the individual’s right of private vengeance, when the justice system fails, the individual may still have a "fundamental, natural yearning to see justice done the urge for retribution." The Supreme Court, however, leaves abuse victims without recourse. While the Court discourages vigilantism, it also holds that the United States Constitution provides no protection for victims of abuse: Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. This absence of any affirmative duty by states to protect individuals against private violence, makes vigilantism one of the few viable options for victims of domestic violence.

2. ABUSE VICTIMS HAVE BEEN TURNED AWAY BY THE PROTECTIVE REACHES OF THE STATE TIME AND TIME AGAIN -- THEY HAVE NO ALTERNATIVE


Stories about battered women are replete with failed appeals to police, courts, social service agencies, churches, friends and neighbors. Take, for example, Judy McBride, a victim of battering who repeatedly called the police only to be told that they would not get involved because hers was a domestic violence case. She tried calling a family therapy organization, but the telephone number was not in service. A Catholic social service group told her to try and work things out with her husband. McBride’s husband continued tormenting her after she filed for legal separation. Ultimately, McBride hired someone to hurt her abuser. The abuser was killed and McBride was sentenced to life in prison without parole. The failure of the criminal justice system, where the state does not or will not enforce the law, is one reason vigilantism continues to garner sympathy from contemporary America. One author notes, "the American tradition has been for citizens to trust themselves more than they trust the government." Why then is not this same sympathy extended to victims of domestic abuse who become vigilantes?
TOPIC ANALYSIS: A JUSTIFICATION IS MORALLY DISTINCT FROM AN EXCUSE

1. A JUSTIFICATION IS A STRONGER DECLARATION THAN AN EXCUSE BECAUSE IT HOLDS THE ACT LEGALLY AND MORALLY PERMISSIBLE WHEREAS AN EXCUSE RECOGNIZES THE ACT IS WRONG, BUT EXCUSES THE AGENT FROM CRIMINAL PUNISHMENT

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

When victims of DAS are prosecuted for killing their abusers, they frequently claim that they acted in self-defense. Self-defense, in the case of both battered women and battered children, is based on the principle that a person "who is unlawfully attacked by another and who has no opportunity to resort to the law for his defense, should be able to take reasonable steps to defend himself [or herself]." A homicide committed in self-defense is classified as a "justifiable homicide" as opposed to an "excused homicide." Justification "declares the allegedly criminal act legal," and therefore only requires "an objective evaluation of the criminal act." On the other hand, "excuse admits the act’s criminality, but declares the criminal actor not to be worthy of blame," and therefore, requires only "a subjective evaluation of the criminal actor’s state of mind." Excuses for homicide include insanity, accident, sufficient provocation and an honest, but unreasonable belief in the need for self-defense.

2. THE DISTINCTION BETWEEN JUSTIFICATION AND EXCUSE LIES ON HOW SOCIETY MORALLY EVALUATES THE ACTION


Most jurisdictions treat the defense of self-defense as a "pure justification," although modern interpretation may include self-defense under the doctrine of excuse. The distinction between justification and excuse is often unclear, because the result of a jury finding justification or excuse can be the same -- lack of criminal responsibility. The importance of distinguishing the two concepts lies in how society perceives the unpunished act. Justification defenses, such as self-defense, focus on the act rather than the actor, while excuse emphasizes the actor, not the act.

3. ESTABLISHING THE LINES OF A JUSTIFICATION IS INHERENTLY A QUESTION OF MORAL PERMISSIBILITY BECAUSE IT FINDS AN EXCEPTION FOR A PARTICULAR ACT, RULING THAT IT IS LEGAL AND IN THE INTERESTS OF THE SOCIAL ORDER TO ALLOW

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

The prohibitory criminal law suffers from the infirmity of always being overinclusive or underinclusive. For example, the law can prohibit undesirable intentional killings in one of two ways. The law can either condemn all intentional homicides, including those that are beneficial to society, or the law can identify all the specific circumstances that make intentional killings unacceptable to society. Experience has shown this latter method is bound to be underinclusive. In a society that highly values concepts of fair notice and unambiguous statutory statements of criminal law, the first option must prevail in the contest between overinclusiveness and underinclusiveness. Consequently, we draw our criminal law in an overly general fashion and compensate by permitting those who commit criminal acts to defend themselves with claims of justification. Justification defenses identify objectively determinable external circumstances that render otherwise criminal acts acceptable to society. The conduct is paradigmatically wrong but, due to compelling circumstances and proper motive, the case is exceptional and the conduct should not be punished. The act is legal because the circumstances invalidate the normal rules of criminal liability. Consequently, an exception must be made to the prohibitory criminal law.
TOPIC ANALYSIS: A JUSTIFICATION IS MORALLY DISTINCT FROM AN EXCUSE cont’d

4. A JUSTIFICATION IS THE SAME AS MORAL PERMISSIBILITY BECAUSE IT RULES THAT THE EXISTENCE OF CERTAIN FACTS MADE AN ACT SOCIALLY GOOD OR AT LEAST NOT HARMFUL

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p.lexis
Each justification defense is defined by a particular set of circumstances under which it is appropriate to disregard the criminal law’s prohibition against acting. The law assumes that, when the circumstances that define the justification exist, the defendant has accomplished a socially desirable objective by committing the act or, at least, has not harmed society. Thus, a determination that certain circumstances create a justification constitutes a decision that any person who commits the act under similar circumstances will be justified as well. Indeed, the criminal law desires and encourages justified conduct. In a situation of conflict, the justified act is the act that should prevail.

5. AN EXCUSE IS WEAKER THAN A JUSTIFICATION. IT RELIEVES PEOPLE OF CRIMINAL ACCOUNTABILITY WHILE STILL RECOGNIZING WHAT THEY DID WAS WRONG

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p.lexis
Justified conduct is conduct that will be encouraged or, at least, tolerated under objectively identifiable circumstances that are not exclusive to the defendant. In contrast, excuse focuses on the actor’s subjective perceptions. An excused actor has committed a harmful act that the criminal law seeks to prevent. Unlike a justified act, the excused act did not avoid a greater societal harm or further a greater societal interest. The actor is excused despite the harmful act because, due to internal or external pressure, she was not morally blameworthy. Under the circumstances in which the harmful act was committed, the actor did not have a fair opportunity to choose meaningfully whether to inflict the harm.

6. AN EXCUSE IS DISTINCT AND WEAKER THAN MORAL PERMISSIBILITY BECAUSE IT RECOGNIZES THE KILLING IS DUE TO A COERCIVE ENVIRONMENT

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p.lexis
Because Anglo-American law presumes free will, one who cannot exercise a voluntary choice whether to obey or violate the criminal law is not an appropriate subject of criminal punishment. Consequently, excuses will apply only when the wrongful conduct is substantially more attributable to coercive influences than to free will. Because the act was not voluntary, commission of the wrongful act is not determinative of the actor’s moral blameworthiness. Therefore, the excused actor cannot be punished solely on the basis of performing the act. Instead, the relevant question is whether the particular actor can fairly be blamed for having succumbed to overwhelming pressure.
7. IN ORDER FOR A JUSTIFICATION TO HOLD, SEVERAL PREREQUISITE CONDITIONS MUST FIRST BE MET

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

The criminal law normally penalizes those who intentionally inflict or attempt to inflict physical harm. There is general agreement, however, that intentional infliction of physical harm upon another is not culpable when it is inflicted in self-defense. Thus, a person who kills in self-defense will be acquitted of homicide. Although exceptions persist, most American jurisdictions define self-defense in a similar manner, with a few common variations. The definition of self-defense is designed to permit a person to use self-help against an unlawful aggressor when there is no opportunity to resort to the criminal justice system for protection. Not surprisingly, the elements of self-defense correspond to the components of all justification defenses that Robinson has identified. An intentional killing will be justified when the following requirements are met: 1. An actor can only defend herself against what she reasonably believes is unlawful force. 2. The amount of force must be proportionate to the threatened force. Deadly force may not be used unless the actor reasonably believes that she is protecting herself against infliction of death or serious bodily harm. 3. The actor must reasonably believe that it is necessary to use force to prevent the threatened harm. 4. The actor must reasonably believe that the adversary's threatened use of force is imminent.
ANSWERS TO: "ALTERNATIVES TO DEADLY FORCE EXIST"

1. THE MURDER OF A CHRONIC ABUSER SHOULD BE EXCUSED, OTHERWISE IT LOCKS VICTIMS INTO SITUATIONS THEY CAN NEVER ESCAPE


The implications of regarding provocation in domestic abuse cases as never more than a mitigating consideration or a partial excuse are also unpalatable. Those classifications imply that the woman's action was criminally wrong, though (somewhat) less culpable than deliberate planned murder. Had she simply remained in her situation and done nothing, her action would have received no criminal denomination or penalty at all. The implication seems to be that such women simply have to put up with their situations if there is no way of escaping them short of taking fatal action, because taking such action will be regarded by the law as a substantial criminal offence.

2. THE USE OF LETHAL FORCE IS NECESSARY BECAUSE THERE IS NO METHOD OF ESCAPE FROM THE CYCLE OF TERROR AND VIOLENCE

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p.lexis

One cannot rest on this counterargument alone, however, because this objection does raise a subsidiary question about the consideration the law should give to the possibility of flight in a situation where the woman has an opportunity to flee. As discussed earlier, part of what first struck me about Norman was the conviction that Ms. Norman did not have a realistic alternative to her lethal action, that the only way she could really be safe was to kill her husband. J. T. Norman's abuse of his wife was prolonged and vicious. Over the years, whenever he was drunk, he brutally beat her, often inflicting serious injuries. He used his fists, bottles, ashtrays, and even a baseball bat. Mr. Norman forced his wife to prostitute herself to support him. When she was pregnant he kicked her down the stairs, causing the premature birth of her child. When she ran away, he tracked her, caught her, and beat her. He frequently threatened to kill her.

3. THE USE OF DEADLY FORCE IS A NECESSARY RESPONSE BECAUSE OF DISPARITIES IN SIZE, STRENGTH AND EMOTIONAL CONTROL


To some, the death of the abuser may seem an inappropriate or excessive way for the battered woman vigilante to punish her abuser and repair the social order. Deadly force on the part of the battered woman, however, may be justified in several ways. First, death may be necessary because lesser degrees of force may be insufficient. The battered woman may not be able to confront the batterer without a deadly weapon because of disparities in size, strength or emotional control. The lower degree of force a woman typically exerts upon a man may have little or no impact on a physically stronger abuser. Indeed, a woman's lesser degree of force may only incite a vicious retaliation by the abuser.
ANSWERS TO: "ALTERNATIVES TO DEADLY FORCE EXIST" cont'd

4. THERE IS NOT AN EXTREME RATE OF DEADLY FORCE AGAINST ABUSERS -- THE NUMBER OF CASES IS VERY LIMITED

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Faced with the inevitable prospect of escalating physical violence, often accompanied by sexual and psychological abuse, some of these women and children decide that the only escape from their imprisonment is to kill their abusers. Every year, almost 500 battered women murder their abusive spouses or partners. Although less frequent, studies show that about 2% of all homicides in the nation, or approximately 400 killings each year, are committed by children against their parents. Although not all of these homicides are committed by children who have suffered domestic violence, according to some estimates, more than 90% of the children who commit parricide have been abused by the parent. In situations like these, the tables are turned, and it is the battered women or children who decide that the only way out of their agony is to kill their abusers.

5. JUSTIFYING DEADLY USE OF FORCE IN RESPONSE TO REPEATED DOMESTIC VIOLENCE IS THE ONLY WAY TO GIVE VICTIMS JUSTICE FROM THE TRAP OF VIOLENCE AND TERROR

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

When victims of domestic abuse are charged with the murder of their abusers, they frequently claim that they acted in self-defense. Attorneys for these victims of domestic abuse ask courts to admit expert testimony regarding various "syndromes" to describe the devastating psychological impact of a lifetime of severe physical, sexual and psychological violence, as part of the self-defense plea. These various syndromes, detailed below, are referred to collectively in this article as "domestic abuse syndrome" (or DAS) whether the victim is a battered woman or a battered child. Without the opportunity to present this expert testimony, victims of domestic abuse syndrome will not be able to demonstrate to the jury the reasonableness of their perceptions of imminent danger or the concomitant reasonableness of their use of lethal force to defend themselves. Unless all victims of domestic abuse syndrome are able to present this evidence, it is likely that their already broken lives will be completely shattered by a murder conviction, and they will once again find themselves trapped with no ability to escape; only this time it will be in a prison cell.

6. IN THE MOST EXTREME CIRCUMSTANCES, OPTIONS ARE SO LIMITED THAT KILLING IS NECESSARY

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p. lexis

The point of this grisly recitation is not to demonstrate that Mr. Norman deserved to be killed because of his past misdeeds, nor to provide substance for a "battered women's syndrome" defense, which would focus on the impact this abuse had on Ms. Norman's psyche. Rather, the narrative lends credence to the notion that, given this history, a reasonable person could have believed that the only way to stop Mr. Norman from killing or greatly harming his wife was to kill him. Other than the use of lethal force, Ms. Norman's options were limited. One choice was to do nothing -- to sleep on the floor as her husband commanded her and to await whatever lay ahead. Another option was to arm herself and wait until the next attack before killing her husband. Yet another was to call for help. Finally, she could have just fled into the night. Each of these choices carried a realistic chance of great harm or death to Ms. Norman. Given her husband's past behavior and threats, doing nothing offered an assurance that she would suffer at least great bodily harm during one of his drunken attacks.
ANSWERS TO: "ALTERNATIVES TO DEADLY FORCE EXIST" cont’d

7. WOMEN WHO HAVE TO KILL NEVER DO SO AFTER THE FIRST INSTANCE OF ABUSE AND HAVE EXHAUSTED ALL AVAILABLE REMEDIES

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p.lexis

Much more is known today than a few decades ago about the battering of women and about women who kill their batterers. Unfortunately, much of the current knowledge teaches that much of what Ms. Norman was forced to endure is all too common in this society. Like Ms. Norman, other women who kill their batterers almost never kill in response to a single instance of battering; instead, they usually kill after a long history of physical abuse. The batterers commonly use weapons as well as their fists and commonly cause serious injuries. Alcohol is frequently involved. The batterer often combines threats to kill or maim with other abuse. Forced sex of one sort or another is frequent, as are assaults during pregnancy. When a woman kills her batterer, the abuse almost always will have escalated both in frequency and intensity in the period immediately preceding the killing. Almost all of the women kill only after unsuccessfully seeking some other solution -- escape, requests for assistance to the police or other outside agencies, or both.

8. THE FORCE MUST BE DEADLY BECAUSE LEAVING IS NOT AN OPTION


In addition to believing that a lesser degree of force will be insufficient, many women may believe that leaving is not possible. Those that do attempt to leave report that their abusers follow them, continuing the harassment and violence. Thus, if one accepts the premise advanced by BWS that battered women are, for a variety of reasons, unable to leave the batterer, and are often weaker than their abusers, then death may be the only means by which battered women can escape the abuse.

9. HOMICIDE AGAINST AN ATTACKER DOESN’T HAVE TO PROPORTIONAL TO THE MOST RECENT ATTACK BUT CAN TAKE INTO CONSIDERATION THE ENTIRE LIFE-TIME OF ABUSE


The extension allows for cases of 'last straw' provocation, where an action which in itself appears insufficient to generate an angry response can be understood, in light of the cumulative effects of earlier provocation, as enough to overcome a defendant’s self-control. The extension may be significant because it could make available a defence to women in some situations of serious but non-escalating abuse. A plea of self defence usually requires that the defendant have some (reasonable) perception of a heightened level of intensity and danger on the specific occasion where self defence is pleaded, in order to set that occasion apart from earlier encounters where defensive action was correctly judged not necessary. That defence works best in a situation of escalating abuse. But repeated physical abuse and attack of a steady or even fluctuating sort can itself have extra (not wholly predictable) cumulative effects, and women subjected to these may well be driven to kill their abusers through such compounded effects. Commonly such killings would be regarded as much less culpable than deliberate or first degree murders. A doctrine of cumulative provocation would then have the merit of providing a vehicle to excuse such conduct in a way that accords with our common moral judgements.
ANSWERS TO: "ALTERNATIVES TO DEADLY FORCE EXIST" cont’d

10. **THE ONLY ALTERNATIVE TO JUSTIFYING SPOUSAL ABUSE HOMICIDE IS TO DECLARE THE KILLER MENTALLY INSANE, AN EVEN WORSE OPTION**

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Prior to the late 1970s, battered women who killed their abusers tended to rely on insanity to prove excuse for the homicide. When a battered woman pled insanity she claimed that, because of her mental condition at the time of the murder, she was not guilty, either because she did not know what she was doing or because she did not know that she did anything wrong. The insanity defense was usually a "complete" defense, in the sense that the woman would not be legally responsible for the homicide. However, it soon became clear that insanity was not an appropriate defense in most cases involving self-defense by a battered woman. As the Oklahoma court noted in Bechtel v. State, "based upon our independent review of the available resources on the subject, we believe that the [battered woman] syndrome is a mixture of psychological and physiological symptoms, but is not a mental disease in the context of insanity". Moreover, if battered women were acquitted based on insanity, they were often committed to mental institutions for indefinite periods of time. Because of this harsh result during the late 1970s, defense attorneys began to explore defending battered women charged with killing their abusers on the basis that their homicides were justified rather than excused.

11. **HOMICIDES THAT OCCUR DURING THE MIDDLE OF A SPOUSAL ATTACK ARE UNDOUBTEDLY JUSTIFIED BECAUSE THEY ARE REASONABLE AND PREVENT IMMINENT DANGER***

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Traditionally, a homicide is justifiable providing the defendant can "show reasonable ground[s] to apprehend a design to do some great bodily injury," and "imminent danger of such design being accomplished." The circumstances surrounding the murder of a batterer by a DAS victim may, of course, satisfy these traditional requirements if the homicide occurs during an abusive attack. For example, in State v. Lynch, the Louisiana Supreme Court reversed the manslaughter conviction of a nineteen-year-old woman who shot her middle-aged husband while she was trying to retreat from his physical attack and after warning him three times that she was going to shoot. There is little doubt that her fear for her life was justified since her husband had previously beaten her twenty to thirty times, including hitting her so hard with a baseball bat that she was unable to walk for several weeks.
1. **EVEN IF THE VICTIM SHARES SOME RESPONSIBILITY WITH THEIR SITUATION, THAT IS NOT A REASON TO DEPRIVE THEM OF THEIR RIGHT OF SELF DEFENSE**

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p. lexis

One could dispute whether this window of knowledge and opportunity exists. Even assuming that it does, however, and even assuming further that there is an identifiable point in time when a "reasonable person" would recognize that window and act accordingly, there is no reason why that should deprive someone like Ms. Norman of the right to self-defense. To decide otherwise would be to confuse responsibility with fault. Gary Cooper certainly was responsible for the showdown at high noon. He had already resigned his marshall's job and was on his way out of town with his new wife. Aside from their threat to him, the desperadoes did not seem to present any present threat to others in the town. Cooper could have taken everyone's advice and just kept on going, but he did not, and four men ended up dead. As responsible as Cooper was, however, he was not at fault. He had a right to stay in town, to reclaim his marshall's badge for one more day, and no pardoned killer or his cohorts had the right to make him leave.

2. **ESCAPE IS NOT VIABLE -- BATTERERS CREATE PSYCHOLOGICAL AND EMOTIONAL DEPENDENCIES THAT MAKE LEAVING DIFFICULT, IF NOT IMPOSSIBLE**

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Each of the three phases of abuse is characterized by specific behavior patterns on the part of the batterer. According to the Smullen court, during the first tension-building phase, "minor incidents of physical, sexual or emotional abuse" occur and the "batterer begins to express hostility toward" the victim though he or she "is not severely abused". The second acute explosion phase consists of "an acute battering incident, in which the batterer 'typically unleashes a barrage of verbal and physical aggression that can leave the [victim] severely shaken and injured.'" During the last loving-contrition phase "the batterer apologizes, seeks forgiveness, and promises to change." In State v. Richardson, an expert witness testified that the loving-contrition or honeymoon phase is "very seductive to the battered woman for staying in the abusive relationship." The "apparent transformation of the abuser back into a loving partner. . . 'provides the positive reinforcement for remaining in the relationship.'" In Richardson, the abusive husband's behavior during the loving contrition phase contrasted markedly with the acute explosion phase when he "kicked her, attempted to choke her and threatened to kill her." It is also during the contrite phase of the violence cycle that battered women and children become hopeful that the abuse will cease. They pin their hopes on the profuse apologies and fervent promises, often accompanied by gifts. Ironically, this emotional attachment to the batterer also helps to explain why victims of domestic violence may not leave an abusive relationship. Unfortunately, their hopes are soon dashed, and rather than diminishing over time, the cycle of abuse often "gets more intense, more repetitive, more frequent and more violent and consequently more lethal."
ANSWERS TO: "KILLERS ARE RESPONSIBLE FOR THEIR SITUATION" cont'd

3. VICTIMS HAVE A RIGHT TO ENJOY THEIR HOME FREE OF VIOLENCE -- THEY ARE NOT AT FAULT WITH THEIR SITUATION

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p. lexis

Fault involves culpability, blameworthiness. Was Ms. Norman culpable for staying to raise her kids and grandchildren? Should she have abandoned them to her husband? Did she not, like Marshall Kane, have people to protect and a job to do? Is she blameworthy for trying to make a marriage work, for trying to convince her husband to get help, for not running away? Certainly many women would leave at the first hint of physical abuse. Perhaps it can be said that one who does not choose this course has some responsibility for the ever-worsening situation. That does not, however, render culpable one who remains, whether for love or for lack of other options. A difficult choice among many difficult choices, even one that, in hindsight, turns out to be wrong, is not necessarily a culpable choice. Comparison to the retreat doctrine is instructive here. Even in jurisdictions that generally require retreat, the law recognizes that necessity sometimes must be tempered by lack of fault and other policy considerations. The law does not require people to retreat in their homes, even if they can do so in complete safety, because they have a right to be there. This is a right that society does not allow an aggressor to usurp. Likewise Ms. Norman had a right to live in her house, in her town, and with her family.

4. VICTIMS OF REPEATED DOMESTIC VIOLENCE ARE UNABLE TO LEAVE THEIR BATTERER BECAUSE OF EMOTIONAL DEPENDENCE

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Domestic violence victims, after years of forced social isolation, may perceive no superior alternative than remaining with their abusers. This result occurs when the woman’s efforts to improve the relationship or extract herself from the situation prove futile, she learns she cannot escape the relationship because of her financial status or fear of retribution, and she abandons her efforts." Most battered women have sought help unsuccessfully from police or other protective agencies. One study of women in Philadelphia, who died at the hands of their abusive spouses, estimated that 64% of the women were known by the police to have been physically abused before their deaths. In fact, some commentators suggest that, rather than suffering from learned helplessness, battered women are survivors whose "help seeking efforts are largely unmet" and who most need "the resources and social support that would enable them to become more independent and leave the batterer."

5. FINANCIAL DEPENDENCY LOCKS VICTIMS INTO ABUSE AND MAKES LEAVING THE RELATIONSHIP DIFFICULT -- ABUSE IS MORE LIKELY TO EFFECT WOMEN IN POVERTY

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Data also suggests that women living in households with lower annual incomes experience higher rates of domestic violence than more affluent women. For example, according to one study, during the period from 1993 until 1998, women living in households with annual incomes of less than $7,500 were almost seven times more likely to suffer domestic violence than women living in households with an annual income of $7,500 or more. Other studies have shown that 20% to 30% of women receiving welfare assistance suffered domestic violence within the past two years and over 50% reported that they had been subjected to physical abuse by their male spouse or partner at some time in their adult lives. In one ten-city study of 777 homeless parents, the majority of whom were mothers, 22% said that they had left their homes because of domestic violence.
ANSWERS TO: "KILLERS ARE RESPONSIBLE FOR THEIR SITUATION" cont’d

6. FINANCIAL LIMITATIONS ALSO TRANSULATE INTO LIMITATIONS ON THE ABILITY TO COPE WITH REPEATED VIOLENCE OR TO ESCAPE

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

There is no dispute, however, that the challenges faced by abusive families are likely to be "more difficult to cope with when they have fewer resources." The stress engendered by poverty sometimes leads to one or both of the parents developing depression, drug or alcohol dependencies or mental health disabilities. For example, one study of welfare recipients demonstrated that women who were victims of domestic violence at some point in their lives suffered from drug and alcohol abuse, post traumatic stress disorder and physical health problems at higher rates than welfare recipients who had never been abused. Another study, conducted only seven years ago, revealed that approximately 26% of the children residing in families with low incomes (defined as families with incomes below 200% of the federal poverty threshold) lived with a mentally ill parent. By comparison, only 10% to 11% of children residing in high income families lived with a mentally ill parent. Depression is also more prevalent among low income families. The proportion of poor parents reporting depressive symptoms fluctuated between 10% and 13% between 1998 and 2003. Coping with depression and trying to maintain low-wage work can "make it difficult for parents to adequately care for their children".

7. VICTIMS CANNOT LEAVE THE RELATIONSHIP BECAUSE THEY FEAR RETALIATION AGAINST CHILDREN OR OTHER FAMILY MEMBERS

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Another reason that women don’t leave abusive relationships is called "separation abuse," meaning that the battered woman fears retaliation towards herself, her children, other family members, friends or even co-workers. For example, in Koss, the battered wife testified that her abusive husband threatened to kill her children unless she dropped a domestic violence complaint she had filed against him. Fears of retaliatory abuse appear to be well-founded since the most frequently and seriously battered women are those who are separated or divorced from their abusers. Although only 10% of women are separated or divorced, they account for 75% of all victims of domestic violence and are fourteen times more likely to be battered than women who are still cohabiting. Unfortunately, it is also accurate that, if the abuser is unable to locate the battered woman, he may seek revenge on other people who are important in her life.

8. FINANCIAL DEPENDENCY IS ESPECIALLY ACUTE FOR THOSE VICTIMS WHO HAVE OTHER DEPENDENTS THEY MUST ESCAPE WITH, LIKE CHILDREN

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Obviously, poverty also has a devastating effect on the ability of all DAS victims to successfully escape from an abusive relationship. Lack of economic resources makes leaving very difficult for many abused women, especially those with children to support. Batterers frequently control all of the couple’s finances, and only the abusive spouse’s name may be on many or all of their accounts. If the battered woman has never had telephone, electric or gas services in her own name, she will need to give each of the utilities an initial deposit of as much as $ 100.00. Although that may not seem like much, for a woman in extreme poverty, trying to live on about $ 25.00 per day, it may well be money that she simply does not have. For domestic violence victims who live in poverty, even one deposit can be the difference between the battered woman and her children moving on to safety and self sufficiency or returning in defeat to the batterer. As an expert witness in the Humphrey case testified: "It really is the physical control of the woman through economics and through relative social isolation combined with the psychological techniques that makes her so dependent."
9. **LACK OF FINANCIAL INDEPENDENCE MAY DRIVE VICTIMS BACK TO THEIR ABUSER EVEN IF THEY ARE ABLE TO ESCAPE AT FIRST**

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Moreover, even if a woman does set up an independent household, her limited economic resources will likely have a major impact in enabling her to maintain her resolve to remain away from her abusive partner. One study of 800 women found that the most important factors for women making the decision whether or not to return to the abuser all involved financial concerns, including access to an independent income, child care and transportation. By comparison, only 16% of battered women who had their own income planned to return to their batterers.

10. **FINANCIAL CONSTRAINTS CAN BE SO SEVERE THAT THE CHOICE IS BETWEEN RETURNING TO THE ABUSE OR ENTERING A HOMELESS SHELTER**

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

The inability of impoverished a woman to meet her monthly bills by herself often leaves the woman with no choice for herself and her children but to either go to a homeless shelter or return to her abuser. Shelters for victims of domestic violence are only meant to be short term and they are not designed to provide long-term housing. Many abused women who seek temporary refuge in emergency shelters, ultimately return to their spouses, in large part because they have no other source of income. Thus, it is not long before the battered woman and her children are once again faced with the Hobson’s choice of unremitting poverty and homelessness or unremitting abuse.
1. MOST KILLINGS OCCUR DURING CONFRONTATIONAL SETTINGS WHEN THERE IS A LEGITIMATE SELF-DEFENSE CLAIM

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

It is estimated that about 75% of the cases involving a battered woman killing her abusive spouse occur in a confrontational setting "where the [homicide] victim was usually the initial aggressor who provoked the final confrontation that ended up lethal." In these cases, even if a court admits expert testimony regarding DAS, it would do so only to establish the woman or child's subjective honesty in believing that he or she was in danger of grievous bodily harm at the time of the homicide. However, the court would not admit the expert testimony to establish the objective reasonableness of the woman or child's defensive actions. As the North Dakota Supreme Court explained in State v. Leidholm, "an objective standard of reasonableness requires the factfinder to view the circumstances surrounding the accused at the time he used force from the standpoint of a hypothetical reasonable and prudent person." Ordinarily, under such a view, the unique physical and psychological characteristics of the accused are not taken into consideration in judging the reasonableness of the accused's belief.

2. THERE ARE LEGAL JUSTIFICATIONS FOR THE USE OF DEADLY FORCE THAT EXIST OUTSIDE OF CONTEXTS OF SELF-DEFENSE


Moreover, the use of deadly force is legally permissible in circumstances other than self-defense. In California, for example, deadly force is permitted by any person, not just a police officer, if necessary to apprehend any person for any felony. In these situations, a citizen must also have a reasonable fear that his or her life is in danger. While this law has most often been applied to persons who have shot intruders entering their homes, such reasoning is broad enough to include battered women. Battered women should be seen as apprehending the batterer for committing a felony, the battery itself.

3. EVEN IF A HOMICIDE CANNOT BE JUSTIFIED BY THE SELF DEFENSE DOCTRINE, IT CAN BE EXCUSED AS A RESPONSE TO PROVOCATION


These three points -- about the moral or normative status of the abuse as provocation, its causal efficacy and psychological impact, and its relevance to culpability -- give some reason to think that a defence of provocation might well fit some cases of abuser killings by abused spouses and partners. Of course, very similar reasons based on similar aspects of violence in domestic abuse settings can be given for regarding some acts of killing by abused partners as acts done in self-defence. Since self defence is now available in Canadian law as a strong defence for women who kill their abusers, is there then any reason why we should make a further defence such as provocation available to such women? There are several reasons for doing do. Firstly, because self defence operates as a justification but not as an excuse, and provocation historically has served as a partial excuse or mitigation for murder, making available a plea such a provocation would make it possible for some such homicides to be excused even if they were not considered to be justified. Secondly, we can be confident that the variety of circumstances in which homicidal acts against abusive partners/spouses occur is more diverse than can be recognized under any single justifying defence, and sufficiently diverse to make it desirable to have both excusing and justifying defences available to women who kill their partners. Thirdly, provocation would most likely have application at a different temporal point in a episode of domestic violence than would self defence. Self defence, drawing as it does on a reasonable fear of an impending life-threatening attack, makes sense where an assault is anticipated, while provocation makes sense after an assault has taken place, in relation to certain responses that occur in its aftermath.
4. KILLINGS THAT OCCUR IN THE MOMENT OF AN ATTACK ARE JUSTIFIED CASES OF SELF DEFENSE

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Killing in self-defense is permitted when there is "reasonable ground" to believe that great bodily injury or death is threatened and there is "imminent danger" of the threat "being accomplished." Thus, self defense requires that the defendant have an actual (or "genuine" or "honest") belief of imminent danger of death or great bodily injury, that the defendant's acts were necessary to prevent the harm and that "a reasonable person in the same circumstances would have had the same perception and done the same acts." In the traditional confrontational setting, a majority of jurisdictions apply an objective standard of reasonableness in establishing justification for homicide and reject a purely subjective standard whether the defendant has been the prior victim of abuse by the decedent or not. In most cases involving DAS victims who kill their abusers in a confrontational setting, this standard of reasonableness is sufficient to assure that the battered women or children can establish a self defense plea.

5. THE USE OF DEADLY FORCE IN A CLASSICAL CONFRONTATIONAL CONTEXT IS CLEARLY JUSTIFIED EVEN WITHOUT RECURS TO EXPLANATIONS LIKE 'BATTERED PERSON SYNDROME'

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

In a traditional confrontational context, an objective standard of reasonableness is usually sufficient to assure that domestic abuse syndrome victims can establish their self-defense pleas. The California Supreme Court explained in Humphrey why expert testimony regarding BWS (and, by analogy, BCS) might not be necessary in this type of setting: In many circumstances, BWS will be irrelevant to the question of objective reasonableness because the facts raise a traditional and therefore readily assessable self-defense claim, for example, when the victim threatens or approaches the defendant with a gun or knife or when the two struggle over a weapon following a threat or other hostile act by the victim. In such "classic" confrontations, "[f]ear is a common human emotion within the understanding of a jury and hence expert psychiatric explanation is not necessary."

6. WE SHOULD EXTEND THE TIMEFRAME FOR THE IMMINENCE OF AN ATTACK BECAUSE VICTIMS MUST LIVE IN A WORLD WHERE VIOLENCE IS CONSTANTLY IMMEDIATE

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Similarly, in Bechtel v. State, the Oklahoma Court of Criminal Appeals applied a broad time frame in a case where a battered woman shot her drunken husband following an argument. The shooting was preceded by at least twenty-three abusive incidents in which her husband "threw her into the windshield of his boat", "pound[ed] her head on the ground, wall, door, cabinet or other available object" and grabbed her head by the hair and slammed her into the [car] window." In applying an expanded time frame, the Bechtel court explained: "The battered wife is constantly in a heightened state of terror because she is certain that one day her husband will kill her during the course of a beating. Thus from the perspective of the battered wife, the danger is constantly immediate."
ANSWERS TO: "VIGILANTISM DESTROYS THE RULE OF LAW"

1. REPEATED DOMESTIC VIOLENCE CREATES A 'STATE OF NATURE' THAT EXISTS OUTSIDE OF THE PARAMETERS OF LAW


Besides the familiar accounts of justification just given, sometimes a breach of law is defended by saying that the situation was of an exceptional sort that the law was not designed to govern. For instance, it has been argued in some cases of necessity that the situation is analogous to a 'state of nature between the parties,' meaning that the constraints of society and the law were not designed to apply to a case such as this, so it should be thought of as falling outside the legitimate scope of the law. There are several respects in which situations of domestic abuse seem to fall outside the legitimate scope of the criminal law. Firstly, the law against murder was surely intended to protect life in situations far removed from those existing in abusive domestic relationships. Secondly, cases of domestic abuse tend to fall outside the reach of the law for the different reason that they are cases where legal resources when appealed to have been unable to protect the woman from further abuse or to change the terms of the abusive relationship effectively. Court orders and promises of legal protection have failed to save women threatened with death by their husbands from being killed, and attempts to flee the relationship have frequently resulted in women being found by their abusers and killed. Where the law has been ineffective in protecting women from continuing physical abuse, it can be argued that the state's claim to a monopoly of authority over enforcing the criminal law against such women is weakened. These women may well have good reasons to believe that limited help can be given by the law, and may see themselves as needing to fall back on their own resources. These beliefs of women appear to be well founded, even if we cannot expect the state to abandon its claims to be the authoritative and supreme enforcer of the law against homicide.

2. ALLOWING ABUSE VICTIMS TO KILL THEIR ATTACKERS DOESN'T RUN THE RISK OF ANARCHY OR VIGILANTISM RUNNING AMOK


Vigilantism raises the specter of anarchy, of society run amuck. As applied to the battered woman, however, vigilantism may be more palatable because concerns about control, accountability and racism are not applicable. One concern with vigilantism is the lack of control over a group's activities. This concern is not applicable to a battered woman who will presumably kill only once. As a one-time offender, she is not likely to form a group whose purpose is to search out and punish batterers. In fact, most battered women who kill have no history of prior violent behavior and have far less extensive criminal records than other women charged with homicides.

3. RECOGNIZING VIGILANTISM IN THIS INSTANCE DOES NOT RUN THE RISK OF DESTROYING SOCIAL OR CRIMINAL ACCOUNTABILITY


Accountability is another concern for those opposed to vigilantism. Because it is no mystery who killed when a battered woman kills her abuser, the battered woman will be held socially, if not criminally, responsible; she does not escape unknown or unacknowledged. Moreover, the battered woman has already been punished for years by her batterer. She will continue to be punished for killing her abuser in so far as the stigma, guilt and shame will haunt her for years.
4. RECOGNIZING VIGILANTISM FOR BATTERED WOMEN DOESN'T RUN THE RISK OF LEGITIMIZING LYNCH MOB OR RACIAL MOB RULE


Racial concerns are similarly not applicable to the battered woman vigilante. While the term vigilantism connotes the lynch mobs of the South, domestic violence begins and ends with the abuser and the abused. It may be that there are instances where a white woman kills her black abuser; however, the impetus for most vigilante behavior is not race but the battered woman’s need to save her own life. Indeed, this proposal may actually help more black women than white since all-white police forces traditionally ignore black-on-black violence. A black woman may justifiably have less faith in the police than a white woman and may be more justified in resorting to self-help.

5. VIGILANTISM CAN BE RECOGNIZED IN A LIMITED FASHION WITHOUT JUSTIFYING VIOLENCE IN BROADER CONTEXTS


Finally, the proposal in this paper would be strictly limited to battered women and children who kill. It would not extend to anti-abortion activists who kill abortion providers, to anti-vivisectionists or to any others who claim to be defending those who cannot defend themselves. The key for allowing the vigilantism proposed herein is that the battered woman knew her victim; that she had personally suffered years of abuse at his hands; that she therefore knew there was a real threat of present and/or future violence. Others who claim to act for society, such as the recently convicted murderer Paul Hill, do not know and were not personally abused by their victim. Thus, they could not claim to be a vigilante as proposed by this paper.

6. JUST BECAUSE OTHER PEOPLE MAY TRY TO DISTORT THE PRINCIPLES WE AFFIRM DOES NOT MEAN THE INSTANCES OF LETHAL FORCE WE EXCUSE ARE ILLEGITIMATE OR UNETHICAL


A second response to these worries is to say that what our society and our law should be paying more attention to is when, if ever, angry action that seriously harms or kills others is defensible, and when it is not. After all, anger (either as outrage or as loss of self-control) does not of itself mitigate or excuse resultant conduct, and an expanded provocation defence does not imply that all the claims made in its name are correct. It is important to remember that a more adequate conception of the grounds of anger and its forms does not tend to show that anger can or should do more than excuse associated conduct. It is necessary for us to look more closely at what conditions, if any, could and should justify or excuse actions threatening death or serious bodily harm. The important questions about provocation are the underlying normative ones -- about when we think an accused could or could not fairly be expected to control an impulse to kill or when if ever we think an act of angry retaliation could be (partly) defensible. The merits of reactive responses and associated actions in individual situations may need to be evaluated directly for reasonableness by juries and courts. From a normative or moral perspective, angry homicidal action from persons who have been subject to repeated physical abuse from which they are unable to escape looks more defensible than similar action stimulated by rejection by another or affronts to sexual dignity or pride. Many attempts by men to defend their homicidal acts are not very compelling, and are certainly less compelling than the grounds that some abused women can give to excuse or warrant their acts of killing their abusers.
ANSWERS TO: "KILLINGS DESTROY THE IMMINENCE REQUIREMENT"

1. IMMINENCE REQUIREMENTS SHOULDN'T BE INTERPRETED AS RIGID -- A FLEXIBLE ONE IS NECESSARY TO ACHIEVE JUSTICE

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p.lexis

At a deeper level, however, the decision is disturbing. It is difficult to imagine that Ms. Norman had any choice but to act as she did in order to avoid a grave risk of death or serious harm at the hands of her husband. By relying on the imminence requirement, the North Carolina Supreme Court never answered the question whether it was necessary for Ms. Norman to kill her husband to avoid great bodily harm or death. And is not this the proper question that should be addressed in Norman and similar cases? If it is true, as the evidence at trial tended to show, that either a call to the police or an attempt to run away would have resulted in a risk of death or further torture, then is it proper for society to brand Ms. Norman, and others similarly situated, as criminals? If waiting for her husband to attack her again would have put her at great risk, society should not require her to wait before acting. This Article addresses whether an unbending imminence requirement is essential to satisfy the concerns underlying the law of homicide and self-defense. If it is indeed essential -- if failing to require it in every self-defense case would distort or undermine the core values of substantive criminal law or if eliminating it would have a seriously negative impact on the administration of the law -- then justice must be found elsewhere in a case like Norman. If, however, a rational and effective self-defense doctrine can exist without total adherence to the requirement of imminence, then a consideration of whether to modify this requirement is not only worthwhile, but essential.

2. A STRICT IMMINENCE REQUIREMENT LEAVES VICTIMS THE ONLY CHOICE OF TAKING EXTREME RISKS THAT MAY LEAVE THEM DEAD

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p.lexis

Similarly, it does not strain the imagination to calculate the risk Ms. Norman would have taken had she decided to wait until the next attack before wielding her weapon. Perhaps she would have been able to extract the gun from its hiding place in time to protect herself. Perhaps she would have been able to shoot her husband before he reached her. Perhaps the first shot would have been effective enough to stop him. Unless all three of these conditions were met, however, she could easily have been a dead woman.

3. SELF-DEFENSE KILLINGS THAT HAPPEN OUTSIDE OF AN ATTACK FULFILL THE IMMINENT REQUIREMENT BECAUSE DOMESTIC ABUSE VICTIMS CAN SENSE WHEN A NEW ATTACK WILL COME

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p.lexis

Obviously, when a murder occurs in a non-confrontational setting, victims of domestic abuse often encounter formidable obstacles in proving that there were "reasonable grounds" for believing that they were in "imminent" danger. In The Battered Woman, Dr. Walker helped provide abused women with the objective proof they needed to justify their self-defense pleas in a non-confrontational setting. In her book, Walker explained how the three stage pattern of domestic abuse allows the battered women to anticipate when physical violence is imminent. Dr. Walker also described the psychological reactions of hypervigilance and the learned helplessness manifested by battered women, which helps to explain why battered women may be objectively justified in killing their passive abusers.
ANSWERS TO: "KILLINGS DESTROY THE IMMINENCE REQUIREMENT" cont'd

4. DOMESTIC ABUSE FOLLOWS A REGULAR CYCLE -- VICTIMS CAN PREDICT WHEN VIOLENCE IS IMMINENT

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p.lexis

Domestic abuse of both women and children typically occurs in "recurring patterns," consisting of three-stage cycles. Dr. Walker described the phases of these cycles, in the context of a battered woman, as follows: The first phase is the 'tension-building' period. The second stage is the 'acute explosion' period when the abuse takes place. The third stage is the 'loving, contrition' period. It is during the tension-building period that the battered woman develops a heightened sensitivity to any kinds of cues of distress. Thus, because of her intimate knowledge of her batterer, the battered woman perceives danger faster and more accurately as she is more acutely aware that a new or escalated violent episode is about to occur.

5. WE SHOULD CREATE A HYBRID STANDARD OF REASONABILITY TO JUSTIFY THE USE OF DEADLY FORCE IN A NON-CONFRONTATIONAL SETTING

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p.lexis

However, in a non-confrontational setting, such as where the abusers are passive or asleep, a hybrid standard of reasonableness, which combines both a subjective prong and an objective prong, is essential to assure that the psychological effects of DAS can be properly considered by a jury. The subjective prong of the hybrid standard assures that the jury can understand the perception of DAS victims when evaluating whether they were justified in killing their abusers. The objective prong provides an external criterion against which the reasonableness of the defensive actions of DAS victims can be measured. In addition, in a non-confrontational setting, the time frame in which DAS victims must fear grievous bodily harm in order to plead self defense must be broadly construed. The use of an expansive time frame enables the jury to consider the unique ability of DAS victims to anticipate severe attacks by their abusers when evaluating whether the danger from the abuser was immediate or imminent.

6. VICTIMS ARE HYPER-SENSITIVE ABOUT THE CYCLES OF VIOLENCE THAT EFFECTS THEM -- ATTACKS CAN BE IMMINENT EVEN IF THEY ARE NOT ABOUT TO OCCUR

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p.lexis

Even if the Alabama court was correct that the abused wife was not endangered at that very moment, what the court failed to recognize is abuse victims can recognize the signals from their abuser that mean they will be in danger at the very next moment. As Justice Brown pointed out in his concurring opinion in Humphrey, "even if the woman kills her husband when he is only threatening her, rather than actually beating her, she knows from past experience that he is not merely making idle comments but is fully capable of carrying out his threats. Thus, the battered woman may reasonably fear imminent danger from her husband when others unfamiliar with the history of abuse would not." He concluded that, on "the basis of her experience, a battered woman may thus be 'better able to predict the likely degree of violence in any particular battering incident' and in turn may more precisely assess the measure and speed of force necessary to resist." Justice Brown's conclusion would be equally applicable even if the abuser was asleep or incapacitated. As previously noted, victims of domestic abuse syndrome "have a unique ability to predict when abusive behavior is imminent and may be able to recognize the subtle signs that usually precede a severe beating."
1. A PROVOCATION DOCTRINE AVOIDS THE PROBLEMS OF SIMPLIFYING THE REASONS WHY VICTIMS CHOOSE TO RESPOND WITH LETHAL FORCE


Another advantage of the defence of provocation arises from the association of provocation with expressions of anger, rage, indignation or affront, and in more recent times with loss or impairment of self-control. For the moment I want to consider the first and more traditional use of provocation associated with anger. By making that plea available to women who kill their batterers, one widens the range of factors which women could cite as motivating them to take action against their abusers. It is my belief that this would be a move in the direction of acknowledging the real-life complexity of the kinds of reasons that abused women can have for killing their partners. At the present time, the primary form of exculpation for female homicide of abusive partners is via the defence of self defence. But it is hard to credit the idea that women are always driven solely by fear or terror when they kill or risk such killing, although this is a dominant emotion in many homicides and one that is almost always operative to some degree and so almost always has some explanatory relevance. Yet it is implausible to think that self defence captures all the legitimate grounds for extenuation or exoneration which makes many of these cases undeserving of a murder verdict.

2. PROVOCATION FULLY ENCOMPASSES THE RANGE OF EMOTIONS A VICTIM FEELS AND DOESN'T CAST THEM AS BEING PASSIVE OR LACKING AGENCY


Are there grounds for thinking that some homicides in domestic abuse situations are the result of anger or rage? I think so. There is first of all the fact that many women who find themselves in such situations show by their behaviour that they regard their situations as unacceptable, and are prepared to take steps themselves to rectify or change them. They report abuses, they sometimes fight back, they seek refuge in shelters, they threaten to leave the relationship, and throughout they devise strategies for survival and family protection while remaining in their homes and at their places of work. Not all of these acts need to be or are best understood as being done (solely) out of fear -- they can express other commitments and values, such as sound self-respect, concern for their children, and desire to improve their relationships. Even where women suffer psychological damage and loss of self-esteem due to a battering situation, some continue to try to implement these values in the relationship. As well, there is ample evidence that many women find themselves trapped, for a combination of social and physical reasons over which they have little control, in relations which they know to be violently abusive and unjust but from which they are unable to escape; and that knowledge is bound to express itself at times in anger, rage, and frustration. Any of us would find infuriating at times the kind of relentless and unwarranted cycle of violence these women are subjected to.
3. PROVOCATION DEFENSES DO NOT UNDERMINE VICTIM AGENCY BECAUSE THEY RECOGNIZE THE RATIONAL LIMITS THAT ALL HUMANS FACE


It is of course possible for feelings of anger, frustration and desperation to be warranted without the acts to which they give rise being warranted. We may think some of these homicidal acts to be wrong even though they arose from reasonably provoked rage or anger. Still, many may also think that some such homicidal acts themselves are understandable responses that could be made by normal persons of average self control when confronted with a similar context of history, circumstances, responsibilities, and the like. If so, then it is not the case that the actors in these situations failed to exhibit a level of self-control that would be expected of ordinary citizens. There is no weakness or infirmity to complain about in their actions in particular. It is not that their behaviour merits excuse because of some internal mental shortcoming or failure of agency; it merits excuse because the difficulty of complying with the law was so great that it would be unduly severe to blame them for non-compliance. The reason for excuse is not correctly described as being a "concession to human infirmity" or to "human weakness" -- unless by that is meant that some natural limit of normal human control or self-restraint has been reached. If this is how we are to understand the references to the defence of provocation as 'making a concession to human infirmity or weakness' -- and it is hard to find another reading of these claims that is plausible -- then these phrases provide more support for regarding the resulting actions as excusable than for regarding them as acts of (seriously) culpable homicide. It looks unfair to treat as culpable homicide an action which results when limits to normal human endurance or tolerance are exceeded.

4. PROVOCATION CAN RECOGNIZE THE OUTRAGE THAT VICTIMS SOMETIMES EXPRESS THROUGH KILLING THEIR ABUSER WITHOUT FALLING INTO A MODEL OF A LOSS OF SELF CONTROL


In Provocation and Responsibility, Jeremy Horder has recently developed a historical account of provocation which recognizes two categories of excusing or mitigating anger, anger as outrage and anger as loss of self-control. Horder argues that the early modern law of provocation was built on the Aristotelian idea of angry or outraged action as an appropriate emotional (hot blooded) response to a loss or injury sustained through a provocative wrongdoing, and that only in the eighteenth and nineteenth centuries did there develop a conception of anger as a kind of loss of self-control that was incompatible with the exercise of reason. Horder’s classification of different conceptions of anger is a useful corrective to the dominant 'loss of self-control' model that governs contemporary legal discussions of provocation.
ANSWERS TO: "NON-CONFRONTATIONAL KILLINGS AREN'T JUSTIFIED"

1. EMOTIONAL RAGE CAN AFFECT JUDGEMENT EVEN IF THE MURDER DOES NOT OCCUR IN THE 'HEAT OF THE MOMENT'


Provocation could be interpreted to include actions resulting from more sustained as well as immediate expressions of anger. It should be so interpreted if it is to serve as a useful plea in domestic homicides. Here again, Australian courts have espoused a liberal interpretation of the requirement of immediateness which can accommodate slow-burning rage and its effects on self-control. In response to the concern that a liberal interpretation fails to distinguish preplanned or calculated killings from those done in the heat of passion, it has been held that it is not intention or deliberation that separates passionate killings from calculated or malicious ones, but the matter of whether the planning issued from an agent "in full command of mind and will."

2. LIVING UNDER THE CONSTANT THREAT OF REPEATED ATTACKS TURNS THE VICTIMS LIFE INTO A HOSTAGE SITUATION -- THEY COULD BE KILLED AT ANY INSTANT AND DEADLY FORCE IS NECESSARY

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

The Oklahoma Supreme Court in Bechtel graphically explained the necessity of allowing a broad time frame in a non-confrontational context by analogizing the life of a victim of domestic abuse syndrome to the "classic hostage situation in that the battered [person] lives under long-term, life-threatening conditions in constant fear of another eruption of violence." The court described a scenario where the captor threatens to kill the hostage in three days, and the hostage is able to kill the captor on the first day when an opportunity arises. The court concluded that a "literal application of the requirement that the threat be imminent would prevent the hostage from using deadly force until the captor is standing over him with a knife." The court made it clear that the perspective of a hostage is similar to the perception of a battered person; in that "the next attack, which could be fatal or cause serious bodily harm, is imminent." To require battered women and children to wait for a deadly assault before they can act in self-defense would, indeed, amount to sentencing all victims of DAS to "'murder by installment'" at the hands of their abusers.

3. BECAUSE OF STRENGTH DISPARITIES, LONG TIMEFRAME INTERVALS BETWEEN ATTACKS AND THE KILLING OF THE ATTACKER IS NECESSARY

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Moreover, the jurisdictions that require a narrow time frame fail to recognize that it is only when the abuser is incapacitated that a battered person may have an opportunity to fight back. This is especially true of abused children, who are "generally unable to protect themselves during a confrontation, because of obvious physical and less apparent psychological reasons. If they are to be able to relieve themselves of their plight, the most inappropriate time may be during a beating." It is only by using a broad time frame that a jury can consider a child's history of abuse and the build-up of fear and terror that culminate in the need to commit parricide before the violence escalates and the child becomes the homicide victim.
4. THE REPETITIVE NATURE OF VIOLENCE CREATES A UNIQUE CONFRONTATIONAL ENVIRONMENT WHERE DANGER IS ALWAYS IMMINENT

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Indeed, the "confrontational nature of an incident where a battered woman kills her abuser might only become apparent when viewed in the context of a pattern of violent behavior rather than as an isolated incident." As the Bechtel court made clear "the meaning of imminent must necessarily envelope the battered woman's perceptions based on all the facts and circumstances of her relationship with the victim. And so, the issue is not whether the danger was in fact imminent but whether, given the circumstances as she perceived them, the defendant's belief was reasonable that the danger was imminent."

5. HOMICIDES OF ABUSERS ARE JUSTIFIED EVEN IF IT IS COMMITTED AT A LONG INTERVAL BETWEEN THE ACTIVE ABUSE AND THE KILLING

Nancy Wright, Law Professor at Santa Clara University School of Law and a former Visiting Law Professor at Stanford Law School, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers", Spring 2009, p. lexis

Indeed, the build-up of terror and fear, coupled with the ability of DAS victims to predict the future behavior of their abusers, may make a homicide justifiable even if it is committed after a prolonged interval between the active abuse and the killing. In Janes, the Washington Supreme Court made it clear that even if "the triggering behavior and the abusive episode are divided by time [that] does not necessarily negate the reasonableness of the defendant's perception of imminent harm." The Janes court explained that, to a battered child, "[e]ven an otherwise innocuous comment which occurred days before the homicide could be highly relevant when the evidence shows that such a comment inevitably signaled the beginning of an abusive episode." Thus, when the defendant is a victim of DAS a broad definition of the time frame is essential to permit the jury to consider the ability of a battered person to anticipate grievous harm from the abuser in the future.
ANSWERS TO: "PROVOCATION JUSTIFIES RAGE/REVENGE KILLINGS"

1. **A RAGE MOTIVATED KILLING CAN BE JUSTIFIABLE IN RESPONSE TO AN EXTREME ENOUGH PROVOCATION**


His discussion reminds us of something that is missing from the 'loss of self-control' model that dominates current legal thinking about provocation. It reminds us that sense can be made of an angry response that does not manifest some failure or loss of self control but instead is considered to be a justifiable or reasonable response to unjustified provocation. The idea of anger as outrage opens up the possibility that provocation could encompass cases of anger or outrage as reasonable or appropriate responses to certain sorts of wrongful antecedent provocation, which could therefore serve to excuse or even exonerate the offence done in anger. Some commentators have thought that such a plea fits better the circumstances of some domestic killings by women of persons who have persistently inflicted violence on them than does an 'anger as loss of self-control' model. In fact, one might think that if ever there were a persuasive case for a justified or warranted angry response to a wrong done, the situation of some battered women would supply it.

2. **WE SHOULD EXPAND OUR UNDERSTANDING OF PROVOCATION TO ENCOMPASS NOT ONLY LOSING SELF-CONTROL BUT ALSO ALLOWING FOR THE EXPRESSION OF RAGE THROUGH EXERCISING VIOLENCE**


Expanding the plea of provocation to encompass anger as an appropriate response alongside anger as a manifestation of loss of self-control seems to fit better with our ordinary social understandings of provocation. J.L. Austin thought that provocation is an ambivalent plea which hovers uncertainly between excuse and justification. "When we plead, say, provocation, there is genuine uncertainty or ambiguity about what we mean -- is he partly responsible, because he roused a violent impulse or passion in me, that it wasn't truly or merely me acting 'of my own accord' (excuse)? Or is it rather that, he having done me such an injury, I was entitled to retaliate (justification)?" Joshua Dressler also thinks that a careful analysis of common law cases of heat of passion killings shows "uncertainty whether the defence is a sub-species of justification or excuse." There is no doubt that the element of external provocation by a wrongful act is not adequately represented in the 'loss of self-control' model, although it is a necessary element in explaining provocation's role in reducing culpability. It is unfortunate that the prevailing legal interpretation of provocation forces all expressions of anger to be construed as failures of self-control, and excludes the use of the plea to support angry responses that are considered defensible.

3. **JUST BECAUSE THE ANGER OF WOMEN HAS BEEN MARGINALIZED IN THE PAST IS NO REASON TO CONTINUE THAT MARGINALIZATION**


These are not in themselves a reason to deny women legal recognition for powerful angry feelings they may experience, or for situations in which such feelings and associated responses may be thought reasonable. It is important to inform our ideas of reasonable conduct, including those operative in the law, by a more complete understanding of the complexities of human motivation, acknowledging the relevance of gender-specific experience and cultural norms to an understanding of reasonable motivations for action. The fact that women's anger, and its possible legitimate grounds, have not been legally acknowledged in the past is no reason to continue to ignore them now. There is also evidence that as the social position of women has improved, they have increasingly been more prepared to express their anger in action. This assertion of more equal power could be recognized by an expanded provocation defence.
1. **VICTIMS SHARE A STAKE OF RESPONSIBILITY IN THEIR SITUATION BECAUSE THEY CHOSE THEIR SPOUSE**

Richard A. Rosen, Professor of Law and Director of Clinical Programs, University of North Carolina School of Law, NORTH CAROLINA LAW REVIEW, "On Self-Defense, Imminence, And Women Who Kill Their Batterers", January 1993, p. lexis

Although the preceding section assumes that Ms. Norman was an innocent victim, some might disagree with that assumption. While a kidnapping victim presumably has no responsibility whatsoever for being kidnapped, some would argue that a woman who stays with an abusive man has contributed, at least in some tangential way, to the development of a life-threatening situation. Under this view, even if flight carries an unacceptable risk of death at the time of the killing (or even for an appreciable period of time beforehand), there well may be some period of time when the woman could leave without risk of death or serious injury and should perceive that remaining in the relationship would be dangerous. Should not the law require that she leave at this point rather than allow her to kill at some later time?

2. **THE LIFE OF THE DECEASED, NO MATTER HOW REPUGNANT THEY WERE, IS STILL EQUALLY IMPORTANT AND SHOULD NOT BE DEVALUED**

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

The difficulty in devaluing the life of the aggressor is particularly acute in some battered women's cases. Many men who abuse their spouses never display aggressive or violent behavior outside the confines of their homes. Certainly, perpetrators of domestic violence are not nice people. Yet, it is doubtful that anyone seriously could argue that ridding society of people merely because they are not nice benefits all. Feminists assert that the abuser's intent to kill or seriously injure his wife makes his death nonharmful rather than his character as a wife-beater. A victim of battered woman syndrome, however, may be mistaken as to the true nature of her spouse's threats on a particular occasion. Even if the mistake is reasonable or if there is no mistake, the difficulty with the calculus remains. Proponents of the battered woman's defense sympathize so much with the defendant that they have a tendency to focus exclusively on the psychological and physical harm suffered by the woman while forgetting the abuser. His right to life, though, is equally important as the woman's.
ANSWERS TO: "PROVOCATION JUSTIFIES KILLING"

1. PROVOCATION IS NOT STRONG ENOUGH TO MORALLY JUSTIFY AN ACTION LIKE KILLING


At the same time, it is probably unreasonable to regard provocation as ever giving a full justification for killing another. To justify such an action, it would be necessary to show not only that there was no culpability attaching to it but also that it was in some sense the right or proper thing to have done. There are four standard grounds that have been given for justifying an action that would otherwise be prohibited by law. These are: (1) that the actor has an affirmative legal or moral right to protect a moral interest by this action, (2) that the interests of the defendant outweigh in this case the interests protected by the criminal law, so that the action is supported by the principle of lesser harm, (3) that the 'victim' has by a wrongful act forfeited his or her claim to legal or moral protection, and (4) that an otherwise wrongful act is permissible when done by a public official in execution of certain public duties. With respect to reasons (1) and (2), the state will rightly be loathe to recognize other values and interests that outweigh the value of life and its protection, beyond those (a right of self defence) where fatal action is believed necessary to preserve oneself or loved ones from imminent attack. The third reason, together with the importance of the security rights at stake in domestic abuse situations, helps to explain why we think killings by abused women are less wrongful than many intentional killings, and why the victim may shoulder some responsibility for the final action. But as a principle of justification, forfeiture is open to serious objections.

2. PROVOCATION ONLY MITIGATES CULPABILITY FOR THE KILLING -- IT DOES NOT MAKE IT PERMISSIBLE


In current law, provocation is at best a partial excuse, reducing murder to manslaughter but not removing criminal culpability or the stigma of a criminal sanction. It cannot exonerate a defendant, much less justify that person's action. The action done continues to be thought of as wrong, and criminally wrong. Also, provocation is understood to excuse by showing loss of self-control. This appears to be construed as a kind of defect or 'infirmity' of the defendant which prevents him or her from being able to effectively comply with the law. As such, provocation is a plea which implicitly impugns the rationality or reasonableness of the action it modifies. The conception of provocation as arousing reasonable or warranted outrage is now considered an outdated and gender-biased idea which privileges male anger over emotional dispositions such as care of the young or sympathy, which are more commonly implicated in illegal acts committed by women.

3. PROVOCATION IS A MINOR EXCUSE THAT CAN REDUCE THE PUNISHMENT FOR MURDER, BUT IT DOES NOT JUSTIFY IT


These are salient features of our law of provocation which should be closely scrutinized, because they limit the usefulness of the plea for battered women who kill. The only defence now available to such women that can serve to acquit them is by a finding that their action was reasonable or justified in self defence. All other legally available pleas have either at best doubtful standing as defences to murder (provocation, necessity), or else operate by establishing a partial excuse reducing murder to manslaughter (provocation, diminished responsibility, necessity). The best these can do is to remove a verdict of murder while leaving a judgement of culpable homicide (manslaughter) intact. This means that the only avenues of excuse for such killings have to fit the parameters of one or other of these pleas, and that there is no way of securing an acquittal against a charge of murder through evidence of a strong excuse. Both of these features of our law are problematic.
ANSWERS TO: "PROVOCATION JUSTIFIES KILLING" cont'd

4. PROVOCATION DEFENSES DO NOT COVER KILLINGS BECAUSE IT ASSUMES A LOSS OF SELF-CONTROL, BUT MOST ARE CALCULATED DECISIONS


A second limitation of using provocation as a plea in abuser homicides turns on the fact that the modern plea of provocation uses the idea of "loss of self-control" as its guiding explanation for the defendant's conduct. To plead provocation successfully, the defendant must have acted on the strength of provocation that was itself sufficient to deprive an ordinary or reasonable person of self-control; yet even where the plea succeeds, the defendant is held to have acted unreasonably, and to remain guilty of a seriously culpable form of homicide. As Don Stuart sums up the plea, it makes "a limited concession to human infirmity" and extenuates by recognizing the conduct as a lesser form of murder. One United Kingdom commentator says that the essence of the defence is revealed in "rash conduct, conduct which the ethically well-disposed agent will subsequently regret but for which sympathy, even on occasion empathy, may be attracted."
**ANSWERS TO: "BATTERED WOMEN'S JUDGMENTS ARE COMPROMISED"**

1. **MURDERS DO NOT OCCUR BECAUSE OF A LAPSE IN JUDGMENT OR SELF CONTROL -- THEY ARE CALCULATED RESPONSES**


   The "loss of self-control" model seems too narrow to capture some homicides in domestic abuse situations, or to capture them without distortion. Some women may have been so angered, enraged or frightened by the latest assault that they may, for example, have acted too hastily or rashly, or overestimated the wrongness or dangerousness of the assault or the need for extreme action. They may have been unable to think clearly under the influence of slow-burning fury or feelings of frustration. But in other cases, the decision to kill their abusers looks to be a reasonable choice of someone who is angered by her desperate circumstances. The anger or fury they experience has a reasonable basis. Neither their emotional reaction, nor the action it results in, would be considered 'rash'. They may have tried, without success, a variety of strategies to modify or change the volatile character of the relationship, they may have attempted numerous ways to escape and found that none worked, they may have lacked the economic or social resources to leave the relationship while meeting family responsibilities, and so on. Their anger may express a reasonable reaction to being trapped in an intolerable situation of continuing abuse. They are not acting in the grip of some powerful emotion which impairs their ability to think clearly or sensibly.

2. **THERE IS A PRIMA FACIE CONTRADICTION BETWEEN SAYING THAT WOMEN ARE REASONABLY JUSTIFIED IN KILLING BUT ALSO THAT THEY KILLED BECAUSE THEY WERE IN AN UNHEALTHY MENTAL STATE**


   One final objection to the use of expert testimony in conjunction with self-defense is the inherent inconsistency of describing the battered woman's unhealthy mental state to show the reasonableness of her belief of imminent danger, and, consequently, the reasonableness of her act of self-defense. Expert testimony by psychiatrists and psychologists traditionally was introduced at trial when the defendant pleaded insanity. The testimony involved whether the defendant, at the time of the criminal act, so suffered from a diseased mind or defect of reason that he did not comprehend the nature and consequences of his act. But in the case of battered woman syndrome expert testimony, these experts testify not that the woman is unreasonably mentally ill, but rather that the woman acted as a reasonable battered woman would. For instance, these experts testify as to the psychological effects of prior beatings, such as learned helplessness and clinical depression. Testimony proceeds in this fashion because the claim of self-defense requires proof of reasonableness, or rationality, behind the homicidal act.

3. **BATTERED WOMAN'S SYNDROME IS SELF-CONTRADICTORY BECAUSE IT SAYS THE KILLER MAKES A RATIONAL DECISION FROM AN IRRATIONAL STATE OF MIND**


   Applying a broader interpretation of reasonableness to battered women self-defense cases presents two questions. (1) Does the defendant have the mental ability to make a reasonable decision to use deadly force? (2) If so, should the law protect this specific group of defendants? Those who propose a battered woman self-defense theory emphasize the debilitating effect of abuse on the battered woman's mental state. But this debilitating effect indicates the possibility of diminished ability to make a rational decision. This possibility should not be ignored in the judgment of whether the killing is a justified act committed by a mentally competent woman. Because women suffering from learned helplessness are unable to discern what actions will change the reality of their situation, it seems that some form of diminished capacity is the proper plea. The rationality and reasonableness of the homicidal act are arguably absent. Testimony on the battered woman syndrome, furthermore, has been offered in insanity trials. The combination of expert testimony on the battered woman syndrome and self-defense pleas in a non-confrontational setting, therefore, cannot and should not be reconciled.
1. **EVEN IF ANGER AND RAGE IN RESPONSE TO ABUSE ARE JUSTIFIED, IT DOES NOT EXCUSE WHAT PEOPLE DO WITH THAT RAGE, SUCH AS KILLING**


Taking up the second of these first, a 'reasonable response' may refer either to the experiencing of some emotional reaction or response, or to some action that is done on the strength of that emotional reaction. An emotional response of outrage or deep anger may be fully justified or reasonable as a reaction to the injury or wrong occasioning it, but there may be limits to what we are entitled to do on the strength of that emotional response, both in the particular case and in general. An action done on the strength of justifiable anger may (or may not) itself be appropriate or reasonable or justified. Therefore, it does not follow from the fact that our anger or outrage is an appropriate response that our resulting actions are exonerated or even excused. With respect to homicidal actions the distinction is of some importance, because we do not generally accept that actions of serious injury or death to another can be defended as right or justified expressions of deep anger, no matter how legitimately the anger may have been aroused. Therefore, the account of anger as a justified or reasonable response to an injury or wrong suffered should be understood as applying mainly to emotional experiences rather than to the ensuing actions.

2. **ANGER, EVEN IF JUSTIFIED AND A REASONABLE RESPONSE TO PROVOCATION, DOESN'T EXCUSE VIOLENCE**


Suppose that we could expand the defence of provocation so that it could have increased excusing power and could encompass reasonable angry responses as well as those arising from understandable loss of self-control. What are the objections to this expanded role for provocation in domestic abuse killings? Numerous difficulties can be and have been raised. Some objections centre on the question of just what provocation entails by way of angry response, and whether such responses fit well the aims or purposes of some domestic abuse killings for which the plea is proposed. Other objections focus on whether we should permit a plea of 'warranted anger/rage' as any kind of defence for serious assault or killing, in view of its likely social implications and legal uses. What does provocation entail by way of angry response? Some have suggested that an angry response to provocation must consist in actions that are retributive or retaliatory in intent. But although some reactions to provocation have this character, it does not seem to be necessary for them to do so. A reactive response could simply express angry rejection or denial of some element(s) in the provoking situation, or, in the case of a repeated pattern of provocation, a defiant refusal to tolerate it any longer.
1. **BATTERED WOMAN'S DEFENSE IS NOT SUFFICIENT TO JUSTIFY MURDER AND SHOULD BE EXCLUDED**


As previously noted, expert testimony on the battered woman syndrome should be inadmissible because it fails both the first and third prongs of the Dyas test. The first prong, that the subject matter of the expert testimony is beyond the comprehension of the average juror, is an uncertain tenet. Juror attitudes are presumed under a misplaced reliance on Dr. Walker's writings and testimony, not explored through a thorough voir dire. The third prong, a sufficiently developed state of the art, fails because the veracity of Dr. Walker's hypotheses, based on faulty methodology, belies the development of the state of the art. Finally, while expert testimony is designed to clarify issues for jurors and aid them in their deliberations, expert testimony on the battered woman syndrome often diverts juror attention from legitimate issues and confuses them with stereotypes that specific battered women defendants may not fit.

2. **BATTERED WOMAN'S SYNDROME RELIES ON A QUESTIONABLE METHODOLOGY AND THE CONCLUSIONS HAVE BEEN REJECTED BY MANY COURTS**


In addition to disagreement concerning the first prong of the Dyas test, whether the subject matter is beyond the juror's ken, there is disagreement as to whether the state of the art or science is sufficiently developed to permit testimony by an expert. A second reason for rejecting expert testimony on the battered woman syndrome, therefore, is the veracity of the conclusions made by Dr. Walker and others based on questionable methodology. The concurring opinion in Ibn-Tamas II provides an excellent argument for rejecting Dr. Walker's testimony, her own misgivings. The concurrence referred to the following comments by Dr. Walker. "I think this research has raised more questions for me than it has answered. As a trained researcher, I felt uneasy about stating some of my conclusions in this book. They seemed too tentative to write down in the positive manner which I have used." In rejecting battered woman syndrome expert testimony, the Wyoming Supreme Court, in Buhrlke, also relied on this passage.

3. **THE GENERALIZATIONS BASED ON BATTERED WOMAN'S SYNDROME ARE NOT SCIENTIFICALLY SOUND OR TESTED**


A more damning observation by Dr. Walker is that "the women were not randomly selected, and they cannot be considered a legitimate data base from which to make specific generalizations." Yet when Dr. Walker takes the stand for the defense, she attempts to persuade the jury that her generalizations relating to learned helplessness and the cycle theory of violence should be accepted by the jury, and applied to the specific defendant. The psychological community, while accepting interviewing as a appropriate way to obtain data, discards conclusions that are not based on a random sample. Because Dr. Walker's methodology did not include random selection, her conclusions should not be accepted.
4. BATTERED WOMAN'S SYNDROME CREATES A STEREOTYPICAL PROFILE OF WOMEN THAT IS DISEMPowering


Finally, the veracity of Dr. Walker's theories as they apply to battered women who kill is unclear. It is questionable whether there is any significant difference between a woman in a battering relationship and one who has terminated that relationship by killing her batterer. Learned helplessness, for example, supposedly accounts for the inability of a particular defendant to leave her abuser. This theory of powerlessness does not account for the actions taken by battered women to control specific instances of acute battering and to extend the honeymoon phase. In the animal studies, the passivity and inactivity, or loss of will to escape when they could, was complete. In battered women, the analogy is not so convincing. In addition to manipulating the phases of battering, battered women often hold jobs and run households. When expert testimony about learned helplessness is introduced at trial, the jury is asked to ignore the ways a woman is competent and efficient, due to her highly developed survival skills, and to focus instead on the totality of the learned helplessness. This stereotyping can actually hurt battered women defendants who are, for example, professionals, or women who have left the batterer in the past, or taken other positive steps to end the battering -- women who are an exception to the battered woman profile.

5. BATTERED WOMAN'S SYNDROME IS TOO PREJUDICIAL AND DESTROYS THE RIGHTS OF THE DECEASED


Not only does expert testimony divert the jurors' attention from the proper inquiry of whether the defendant had a right to defend herself, it further undermines self-defense by motivating jurors to blame the deceased batterer for his death. By emphasizing the repeated physical beatings and psychological dominance, the jury is encouraged to sympathize with the defendant. Blaming the deceased batterer is critical in achieving an acquittal for a battered woman defendant. In the end, expert testimony confuses the jury as to who the real victim is when a batterer is killed. While the defendant may have been the victim during the battering relationship, the deceased is surely the victim of her escape through homicide. Expert testimony circumvents the jurors' responsibility to try a self-defense case. The testimony is cumulative, confusing, and prejudicial. Even if the testimony would be admissible under the Dyas test, it should be rejected because of its confusing and prejudicial impact.

6. BATTERED WOMAN'S DEFENSE IS NOT A MORAL JUSTIFICATION FOR DEADLY FORCE BECAUSE IT USES THE DEFENDANTS COMPROMISED MENTAL STATE AS AN EXCUSE FOR ACTION

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

The problem is that such an inquiry is inconsistent with the theory of justification which assumes that anyone who does the same act under the same external circumstances has done the right thing. By including a certain psychological trait of the individual in the circumstances, we have moved closer to the theory of excuse than to justification. Nonetheless, the feminist theory is based on the premise that explanation of the reasonableness of defendant's belief that use of deadly force was proportionate and necessary will establish that the woman's act was justified rather than excused.
7. BATTERED WOMAN'S SYNDROME IS TOO NARROW OF A MECHANISM IN THE STATUS QUO BECAUSE IT IS DISQUALIFIED FROM A WIDE VARIETY OF SITUATIONS


Even if a judge admits evidence on BWS, a narrow interpretation of the self-defense theory may preclude the use of BWS for some women. There may be a technical immanency problem. While some courts accept that immanency need not equate with immediacy, others have rejected evidence of BWS where the abuser was asleep or the battered woman hired a third party to commit the crime. Moreover, deadly force may be seen as an unreasonable and thus unjustifiable response to a non-deadly threat. That is, using deadly force against an abuser who attacks with his fists, makes verbal threats or is sleeping may be seen as excessive and, therefore, unreasonable.
ANSWERS TO: "NO SPILLOVER TO OTHER CONTEXTS"

1. MISCONSTRUING ABUSE KILLINGS AS JUSTIFICATIONS INCREASES THE RISKS THAT ALL KILLINGS WILL SOON BECOME JUSTIFIED

Cathryn Jo Rosen, Assistant Professor of Criminal Justice, Temple University, AMERICAN UNIVERSITY LAW REVIEW, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill", Fall 1986, p. lexis

Efforts to characterize artificially the battered woman's defense as a justification must ultimately lead to some of the current misapprehensions as to its nature and the fears that its adoption will ultimately lead to justification of all killings that the defendant subjectively believed were necessary and proportionate. Conversely, it may explain, in part, the tendency to incorrectly view battered women as bearing a special right to self-defense based on their victimized status alone. Recognition that the defense is categorized properly as an excuse rather than a justification may enhance the ability of battered women who kill to win acquittals. To present a complete defense, a defendant would still have to show that her belief that justificatory circumstances existed was subjectively reasonable. Because the defendant is excused rather than justified, however, there would be no chance that the conduct will be encouraged.

2. CARVING OUT ONE EXCEPTION IN THE DEADLY USE OF FORCE WILL ENCOURAGE SIMILAR VICTIMIZATION EXCEPTIONS


Two additional ways in which expert testimony weakens self-defense law are the overreliance on the testimony by defense counsel and the stimulation of similar self-defense victimization exceptions. First, this testimony is used in repugnant cases. The explosion of battered woman self-defense cases and the success of the use of expert testimony encourages shoddy work by attorneys. Rather than thoroughly examining the ramifications of the plea and expert testimony, defense lawyers have jumped on the bandwagon. Defense lawyers often delegate their own work to experts on the battered woman syndrome. This behavior can lead to conviction for a woman who has a legitimate self-defense plea, but does not quite fit the stereotyped battered woman.

3. ALLOWING KILLINGS OF BATTERERS SETS A DANGEROUS PRECEDENT ALLOWING KILLINGS IN A WIDE VARIETY OF CONTEXTS


Second, the theory of victimization as a legitimate reason for retaliation cloaked in self-defense is not limited to battered women. By acquitting battered women who are properly guilty of manslaughter, juries set a dangerous precedent. Soon, abused children, the elderly abused in nursing homes or at the hands of relatives, or any other victim of repeated assaults or other crimes, may be able to claim self-defense based upon a victimization-syndrome.
ANSWERS TO: "NO SPILLOVER TO OTHER CONTEXTS" cont'd

4. PROTECTING A NARROW LIMIT ON WHAT COUNTS AS SELF DEFENSE IS VITAL BECAUSE THE RAMIFICATIONS QUICKLY EXPAND TO ENCOMPASS NEW SITUATIONS WHERE KILLING IS ALLOWED

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Because the ramifications of an acquittal on grounds of self-defense extend far beyond the particular case under adjudication, the law of self-defense is designed to ensure as closely as possible that the justificatory grounds exist. To be justified, the defensive act must cause less societal harm than the harm that the victim/aggressor threatened. The requirement that the victim's threatened aggression be unlawful permits the devaluation of the aggressor's life and interest in bodily integrity relative to the defender's. If the victim's aggression was not unlawful, the victim's interest in life cannot be devalued. The comparative harms will be equal and the defensive act will not be justified. Thus, a killing in self-defense by an actor who mistakenly believes that the threatened aggression is unlawful should not be a justified act. Expanding the prerequisites of self-defense to allow reasonable mistakes regarding the unlawfulness of aggressive force increases the risk that taking of innocent lives will be encouraged.
ANSWERS TO: "KILLINGS SHOULD CARRY NO CRIMINAL PUNISHMENT"

1. MANSLAUGHTER IS A MORE APPROPRIATE CLASSIFICATION FOR SUCH KILLINGS AND STRIKES A COMPROMISE BETWEEN HOLDING THE KILLER ACCOUNTABLE AND ACCEPTING THE DIFFICULT CIRCUMSTANCES OF IT

Voluntary or intentional manslaughter is defined as a "homicide resulting from an intent to kill or to do grievous bodily harm which would be murder but for extenuating circumstances." The defendant's status as a battered woman could be considered an extenuating circumstance, particularly if it can be argued that battered women suffer from some psychological or emotional state which inhibits their capacity to form the intent or similar mens rea requirement necessary to sustain a murder charge. This strategy could be shaped in several ways for the battered woman defendant, all designed to conform with the requirements of manslaughter. First, the typical circumstances of manslaughter are that the deceased provoked the defendant who acted before a cooling off period had expired. The battered woman defendant would try to prove that the history of abuse, culminating with the last acute battering incident, provoked her. In such a situation, the defendant's loss of self-control must be reasonable. In such a scenario, expert testimony would be admitted in court to establish that the battered woman killed the deceased within the cooling off period. Since research indicates that battered women live in a state of anxiety and almost constant apprehension, the battered woman defendant probably would have an exaggerated cooling off period.

2. MANSLAUGHTER CORRECTLY ENCAPSULATES THE EXPERIENCE OF THE KILLER WITHOUT MORALLY JUSTIFYING THE KILLING

A second reason why manslaughter is appropriate is that it permits the battered woman to incorporate in her defense the true emotions of fear and anger, emotions which experts deny in the hypothesis of learned helplessness. The battered woman's homicidal act may be triggered by anger over past abuse, in fear and anticipation of future abuse, or a combination of both. Because the anger over past abuse and fear of future harm can arise out of the same provocation the following two scenarios are possible. The provocation element of manslaughter is met if the woman kills in response to past abuse, while the provocation element of imperfect self-defense is met if she kills in anticipation or apprehension of a future harm. On the other hand, it is not logical to argue that the battered woman's fear and anger are justified by her immediate circumstances as required by self-defense, unless she kills during a violent attack. Manslaughter, therefore, more correctly reflects the reality of the battered woman who kills the batterer when she is not in imminent danger.

3. KILLERS SHOULD HAVE THEIR CHARGES REDUCED TO MANSLAUGHTER BECAUSE IT RECOGNIZES THE EXTENUATING CIRCUMSTANCES

The final manner in which a battered woman can reduce a murder charge to manslaughter is to plead a form of diminished capacity. This plea is available in certain jurisdictions as an extenuating or mitigating circumstance that would reduce murder to manslaughter. The defendant would argue that her psychological state from years of abuse prevents her from forming the intent or alternative mental element required for murder. This option was recognized by an expert's sworn statement to a Missouri court of appeals that diminished mental capacity is an attribute of the battered woman syndrome, and that the battered woman defendant would be incapable psychologically of fully and completely considering her actions.
1. THERE IS A STRONG DIFFERENCE BETWEEN EXCUSING SOMEONE FROM BLAME FOR KILLING THEIR ATTACKER AND SAYING THEY WERE MORALLY JUSTIFIED IN DOING SO

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Battered woman's defense cases are illustrative of this policy conflict. Often battered women use deadly force in self-defense under external circumstances where their act is not objectively reasonable. The woman's status as a battered woman makes her resort to deadly force understandable; it is subjectively reasonable. It is, therefore, easy to conclude that the woman is not to be blamed for her actions and should not be convicted of homicide. To hold that she acted in self-defense, however, is a determination that her act was justified. To justify such conduct may result in the encouragement of self-help as the preferred solution to domestic abuse. On the other hand, to convict or to excuse women who act in self-defense is to treat women as inferior to men whose defensive acts are justified.

2. AN ACT IS ONLY JUSTIFIED AS A MORAL EXCEPTION TO THE LAW IF IT PREVENTS A GREATER EVIL AND IF THE USE OF FORCE WAS NECESSARY

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Paul Robinson, a leading proponent of systematization of criminal law defenses, has identified three categories of justification defenses: (1) lesser evils; (2) authorized use of defensive force; and (3) authorized use of aggressive force. All three categories are premised on a balancing notion. An act is justified if the societal harm avoided outweighs the societal harm inflicted. Lesser evils justifications involve relatively easy tasks of balancing the relative importance of the physical harm threatened with the physical harm inflicted. The weighing required for authorized use of defensive and aggressive force is more difficult. Usually, the physical harms are equal -- the taking of human lives. Robinson tips the balance in the defender's favor, however, by emphasizing the importance of weighing more than the comparative physical injuries. Society also has an interest in the right to bodily integrity. When society's interest in the right to bodily integrity and in protection against physical injury are combined, they outweigh society's interest in protecting the aggressor from physical harm.

3. A JUSTIFICATION LEVEL OF EXCUSE REQUIRES THE EXISTENCE OF COMPLETE NECESSITY FOR THE USE OF LETHAL FORCE -- THERE COULD HAVE BEEN NO OTHER ALTERNATIVE

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Robinson identifies a uniform internal structure shared by all justification defenses. If certain triggering conditions occur, a necessary and proportionate response is permitted. The necessity requirement has two aspects. First, it requires immediacy of the triggering conditions. One can act only when there is no time to use any method other than criminal conduct to protect or further the interest at stake. Second, the defender may act only to the extent necessary to protect the threatened interest. That is, if nonharmful (i.e., noncriminal) or less harmful alternatives for avoiding the threatened harm are available, the infliction of criminal harm is not necessary or justified. Both aspects of the necessity requirement further the same goal. If justified conduct is noncriminal because it constitutes the lesser evil, the availability of a noncriminal alternative to avoiding the threatened harm defeats the claim. Because the justified conduct still causes a societal harm, it will be exculpated only if the greater harm was certain to occur and if no less harmful alternative was available. Otherwise the justified conduct will not be the lesser harm.
1. THE NARROW REQUIREMENTS FOR JUSTIFIED SELF-HELP ARE ESSENTIAL TO AVOID TOTAL SOCIAL CHAOS AND THE DESTRUCTION OF THE RULE OF LAW

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The proportionate force, necessity, and imminence prerequisites for self-defense are designed to quiet the law’s uneasiness about encouraging self-help. The requirement that deadly force only be used to counter deadly force is geared to ensure that the aggressor, in fact, will commit an intentional homicide if not met with defensive force. One must suffer nondeadly harm if use of deadly force would be the only way to avoid it. The necessity rule seeks to limit the use of self-help to circumstances in which there is absolutely no other alternative to striking back against the aggressor. It is intended to encourage the defendant to seek, in the first instance, nonviolent or nondeadly defensive means. By requiring strict necessity, it is hoped that use of deadly force in self-defense will be considered only as a last resort. Finally, the imminence requirement is meant to restrict self-defense to those situations where there is no time to turn to actors in the criminal justice system to do their designated job and save the defendant from the need to resort to self-defense. Relaxation of any of these strict, narrow requirements raises the spectre of justifying, and thus encouraging, self-help -- conduct that the law and society prefer to discourage.

2. SELF-DEFENSE KILLINGS ARE ONLY JUSTIFIED IF THERE IS NO GREATER SOCIAL HARM THAT IS CREATED.

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Justification requires that the actor chose to violate the criminal law only because it was the lesser of a necessary choice of evils. Classification of self-defense as a justification, therefore, requires that the defender’s interest in life be regarded as superior to that of the unlawful aggressor’s. The act is accordingly one that is encouraged because it was beneficial to society or at least created no harm. The qualitative balancing act required to justify killings in self-defense, however, is not easy to perform.

3. JUSTIFIED KILLINGS SHOULD BE RESERVED ONLY FOR THE MOST CLEAR-CUT AND IMPORTANT INSTANCES

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The law’s prohibition against intentional killing coincides with contemporary society’s emphasis on the importance of human life as the most valuable interest protected by the criminal law. Clearly, however, there are also circumstances when intentional killing is justified because of the benefit it confers upon society as a whole. The intentional killings originally justified by the criminal law illustrate such situations. For example, one who kills a military enemy in battle is justified, as is the officer who kills to prevent an act of terrorism or to apprehend a person who has taken others hostage. Similarly, if we assume for the moment that capital punishment is acceptable, the executioner’s act of killing the condemned is certainly justified. In all of these circumstances (the list is not exclusive), one life is taken to save many lives and to enhance the power of the rule of law. And, except in the instance of war, arguably the person whose life has been taken already has been shown to be dangerous and a threat to society as a whole.
1. This position is essential to an affirmative victory. If the negative wins convincingly that there are alternatives to the use of deadly force, it becomes very difficult to win moral permissibility. There is a good argument to be made about changing the imminence requirement, but not the necessity requirement.

2. As I suggested in the introduction, a key area to focus on when debating this topic is the nature of repeated domestic abuse. How does that change the moral dynamics as opposed to one isolated attack?

3. Provocation is traditionally a defense associated with manslaughter or 'passion-killings'. This position expands the provocation defense and suggests we should include it as a part of self-defense. This block gives you good options for going in a critical direction by offering a mechanism for affirming the agency of victims of domestic violence.

4. The key to winning this position is to control two levels of argument. First, vigilantism is only viewed negatively in terms of abuser-killings because of a gender bias and, second, the extent to which voting affirmative would justify vigilantism is very narrow and confined to this particular context.

5. The strategic utility of this block is that gives you a way to skirt around the issue of the nastiness of domestic violence, robbing the affirmative of one of their more rhetorically and emotionally powerful arguments. Yes, we can agree that domestic violence is atrocious but disagree on the solution the affirmative posits.

6. Along with #5, this allows us to turn the tables on the affirmative and argue 'domestic violence is clearly bad, but why are we not discussing the reasons society allows it to happen in the first place?'

7. It is extremely difficult to win that self-defense is not justified, so the negative needs to hammer the affirmative on the danger of expanding the doctrine to non-confrontational contexts.

8. While there is no evidence for this claim on this block, a great argument to make that will extend this impact for you is to argue that a world without the legitimate rule of law would also likely be a world where more domestic violence and violence against women occurs and has no check or protection.

9. This is a core issue when debating this topic: what exactly is moral permissibility and how is that expressed in the law or society? While there is not a consensus that an 'excuse' doesn’t touch on moral responsibility, I think there is a strong argument to be made that it doesn't. Of course, this is all up for debate and you may find that the excuse approach could work for you on the affirmative as well. All things considered, this means it is a tough topic to go negative on.

10. This position is essential to an affirmative victory. If the negative wins convincingly that there are alternatives to the use of deadly force, it becomes very difficult to win moral permissibility. There is a good argument to be made about changing the imminence requirement, but not the necessity requirement.

11. The argument this card makes (the fear of retaliation against family or children) is incredibly powerful because it bypasses common negative responses to the inability to leave, which mostly focus on financial or psychological reasons why leaving is difficult. Those things are important factors as well, but the retaliation argument is tough to deal with.
12. This block touches on an important question: was the killing a way to end or terminate the relationship, or was it a way to protect oneself? Perhaps it is some of both. The key issue for debate is whether there is a meaningful difference created by intent and what affirming that intent might justify in a broader context.

13. BWS will undoubtedly fit into many of your debates. I have tried to build the affirmative and negative in a way that it doesn’t have to deal with the topic in order to be as flexible as possible, but this block gives you evidence to deploy in a variety of ways if people argue in favor of BWS.