

Restatement Second of Torts

§ 63. Self-Defense by Force Not Threatening Death or Serious Bodily Harm

(1) An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.

(2) Self-defense is privileged under the conditions stated in Subsection (1), although the actor correctly or reasonably believes that he can avoid the necessity of so defending himself,

(a) by retreating or otherwise giving up a right or privilege, or

(b) by complying with a command with which the actor is under no duty to comply or which the other is not privileged to enforce by the means threatened.

Restatement Second of Torts

§ 65. Self-Defense by Force Threatening Death or Serious Bodily Harm

(1) Subject to the statement in Subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that

(a) the other is about to inflict upon him an intentional contact or other bodily harm, and that

(b) he is thereby put in peril of death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force.

(2) The privilege stated in Subsection (1) exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by

(a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or

(b) permitting the other to intrude upon or dispossess him of his dwelling place, or

(c) abandoning an attempt to effect a lawful arrest.

(3) The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by

(a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or

(b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.

See Reporter's Notes.

Comment:

a. As to the meaning of the words "serious bodily harm," see § 63, Comment *b.* The word "ravishment" is used not only to describe rape but includes any form of carnal intercourse which is criminal in character as, for example, sodomy.

EQUAL RIGHTS TO TRIAL FOR WOMEN: SEX BIAS IN THE LAW OF SELF-DEFENSE

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15 Harv. C-R C-L L Rev 623 (1980)

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Women have historically been viewed as male property.²⁴ At early common law women had no autonomous existence. It was and still is assumed that women have men to protect them and need not be able to defend themselves. "Healthy" women are expected to be dependent, passive and submissive; "healthy" men are encouraged to be aggressive, competitive and dominant.²⁵ Women are discouraged from learning how to defend themselves because such behavior is "unfeminine";²⁶ they are also taught to avoid engaging in violence.²⁷ As a result, when placed in a situation in which self-preservation requires physical violence, women suffer a great deal of anxiety.²⁸

The historic sanction of woman abuse within marriage derives from the husband's ownership of his wife and his right to chastise her.²⁹ Anglo-American law treats a husband's assault upon his wife as an "acceptable practice."³⁰ Woman abuse results from a patriarchal legacy that allots a dominant role to husbands and a submissive role to wives. Accordingly, wives have been called the appropriate victims of violence.³¹

In sharp contrast to the sanction accorded woman abuse within marriage, husband killing has historically been viewed as a crime against the state—a form of treason.³² Blackstone explained that since the husband was lord of his wife, her killing him was treachery analo-

gous to murdering the king.³³ Husband killing struck at the root of all civil government.³⁴ This is not surprising. If the exercise of merely defensive force by women challenges traditional views of appropriate female conduct, the use of *deadly* force by a woman against a man who has abused her must contradict social stereotypes and threaten a basic conception of traditional society.³⁵

Social misconceptions of battered women often blind the trier of fact to the reasonableness of a battered woman's use of defensive force. Since the law has historically permitted woman abuse, judges and jurors do not see it as serious or life threatening. A history of beatings may further reduce her chances of success. Even if judges and jurors accept the severity of the abuse, they assume she deserved the brutality and fault her for not ending the relationship.³⁶ A counselor who works with battered women and who has spoken frequently on their problems has said:

Even today most people are still asking the question, "Why do they stay"? Very often I hear the view that if she didn't like it she would get out of the situation. Also people say that the [women] must like it and if they do leave the guy, they will just go to another guy who will do the same thing. It is common for people to hold the attitude that the woman probably asks for it and deserves it."

When a woman charged with homicide explains her use of force as a reasonable and necessary response to abuse in the home, jurors are threatened more deeply than in the case of a male defendant who claims to have killed in self-defense. In *State v. Brinker*,³⁷ an affidavit submitted to the court in support of jury questioning and expert testimony explained that juror denial of the problem of woman abuse is common because denial "allows a person to continue to hold on to the image of the family as an institution of love, nourishment, and protection."³⁸

Given such attitudes, it is not surprising that insanity has been the traditional defense of women who have killed their husbands.³⁹

II. THE LAW OF SELF-DEFENSE

Self-defense, the most broadly recognized defense to an intentional homicide, rests on the view that a person may take reasonable

steps to defend himself or herself from physical harm." A defendant who claims self-defense asks the trier of fact to find that a homicide was justified.⁴¹ Justified behavior is correct and appropriate,⁴² not only tolerated by the law but encouraged.⁴³ Inquiries about justification focus on the act rather than on the actor. A finding of justification is a finding that the act was right because of the circumstances of the act. By contrast, an excusable act is one that, although wrong, should be tolerated because of the actor's characteristics.⁴⁴ The actor claiming excuse says, "I didn't mean to do it" or "I couldn't help myself;" the focus of excuse is on the actor's inability to avoid committing the offense.⁴⁵

An act committed in self-defense was justified given the individual actor. The trier of fact must understand the circumstances of the act and identify with the actor. In examining the circumstances of the act, the fact finder applies substantive rules that reflect a standard of reasonableness. If the circumstances of the act claimed to be in self-defense do not justify the act, the jury shifts its focus to excuse and examines the defendant's mental or emotional state. The law looks at excuses only after justification fails.⁴⁷

A. Legal Rules Governing Reasonableness

A number of legal rules have been developed to determine the reasonableness of self-defense claims. A person has the right to use deadly force in self-defense when he or she has been attacked with deadly force⁴⁸ and is in imminent danger of death or serious bodily harm.⁴⁹

1. Equal Force Rule

Under the equal force rule, deadly force may be used only to repel deadly force.⁵⁰ The rule rests on the assumption of two adversaries equal in size, strength and physical training. However, few women have the size or strength of a male assailant or the training in physical combat necessary to protect themselves.⁵¹ In addition,

women, socialized not to use physical force, are reluctant to defend themselves without weapons.⁵² A battered woman's past efforts to defend herself with only her own strength may have reinforced this view since her efforts probably triggered increased violence against her.⁵³ As a result, women usually commit homicide with guns, knives or household implements instead of by physical force alone.⁵⁴ The woman believes, usually correctly, that her husband is capable of severely injuring or killing her without a weapon. In many cases, the woman arms herself⁵⁵ intending to ward off an attack by only threatening to use the weapon, but either because of lack of familiarity with the weapon⁵⁶ or because frightened by a sudden move by the man,⁵⁷ she shoots or stabs him.

The deadly force rule is particularly troublesome for a battered woman. Although she may have no alternative but to defend herself with a weapon, the traditional interpretation of the deadly force rule can render her use of a deadly weapon unreasonable. The application of the rule has kept the woman's claim of self-defense from being properly submitted to the jury or has restricted jury consideration of the claim.⁵⁸

Instructions on the reasonableness of force allowed can be highly prejudicial. Jury instructions about self-defense normally state that deadly force is only appropriate when the defendant reasonably believes she is threatened with death or great bodily harm.⁵⁹ *Great bodily harm* is usually defined as "an injury of a graver and more serious nature than an ordinary hitting or striking with the fists or hands."⁶⁰ But the ordinary injury suffered by a man in a fist fight with another man is different from the ordinary injury suffered by a woman being abused by a man. An instruction telling the jury that "ordinary hitting or striking with fist or hands" is not enough to cause great bodily injury restricts a woman's claim of self-defense.⁶¹

In most jurisdictions, a woman threatened in her own home with great bodily harm need not retreat before using deadly force against a cooccupant.⁶² A duty to retreat would require her to abandon her children to a man in a violent rage.

2. Imminent Danger Rule

The imminent danger rule presupposes a one-time adversarial encounter. As such, it focuses on the circumstances immediately before the incident and does not take into account harm threatened in the past or future.⁶¹

This focus puts women defendants at a disadvantage. Homicides committed by battered women frequently occur with a time lag, while the man is asleep or while his back is turned.⁶² Typically, the man beats the woman, sometimes threatening to kill her, until he passes out or falls asleep. Fearing that when he awakes he will beat her more severely or act on his threat, she attacks him while he sleeps.

Battered women usually believe that the incident that resulted in their homicide was more severe or life-threatening than prior incidents.⁶³ Studies suggest that battered women have learned to be attentive to signs of escalating violence and to modify their behavior in response to these danger signals in order to pacify violent husbands.⁶⁴ Subtle motions or threats that might not signify danger to an outsider or to the trier of fact acquire added meaning for a battered woman whose survival depends on an intimate knowledge of her assailant. When the imminent danger rule is interpreted to preclude admission of evidence of the prior relationship and the abuse a woman has suffered, the jury is unable to understand why the woman believed herself to be in danger.⁶⁵

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III. INDIVIDUALIZATION

A. The Theory

The impact of sex bias on a woman claiming self-defense can be reduced if judge and jury consider fully the circumstances surrounding the defendant's act and the defendant's perspective. The theory of individualized inquiry in criminal law has been most fully developed by George Fletcher. Individualization involves "a full consideration of individual differences and capacities"⁶⁶ when determining whether a defendant should be held accountable for a particular crime. A defendant is robbed of a fair trial when a jury cannot give her this individual consideration.⁶⁷ Fletcher notes that both strict adherence to legal rules

that keep from the jury significant facts about the defendant's circumstances and the "reasonable man" standard, which is a "substitute for inquiries about the actor's character and culpability,"⁶⁸ reflect resistance to individualization.⁶⁹

The argument in favor of individualization reflects a deep tension in criminal law theory between individualized treatment and legal rules, a tension Fletcher has characterized as the law's "distinctive anxiety" about individualized treatment.⁷⁰ Greater individualization within the criminal law also raises the difficult problem of whether acknowledgement of and compensation for differences caused by discrimination will perpetuate or even strengthen the very stereotyping at the root of discrimination—a problem that has been particularly troubling in the area of sex discrimination.⁷¹ However one resolves the problem, it is clear that greater individualization is necessary to provide equal treatment for battered women raising self-defense claims.

Although Fletcher does not address the applicability of individuality to self-defense, his theory can easily be applied to battered women's cases. Any thorough evaluation of a self-defense claim requires a study of both the circumstances of the act and the characteristics and perceptions of the individual defendant.

An individualized analysis of self-defense claims has been recommended in some proposals and used by some courts. The Model Penal Code, for example, looks at reasonableness from an individual's own perspective.⁷² Many jurisdictions have accepted some formulation of this standard.⁷³

Without individualization, the trier of fact may be unable either to overcome his stereotypical attitude toward the circumstances surrounding the woman's act or to understand the inapplicability of traditional legal rules.⁷⁴ In such situations, the judge or jury may misinterpret the defendant's act. When the judge or jury ignores the effects of the sex of the defendant and tries to equate her with a man, it places a burden on her that her male counterpart is not asked to bear. The law can equalize the positions of male and female defendants by recognizing their differences. The attitudes of men and women toward self-defense may differ because of internalized sex stereotypes.⁷⁵ The circumstances in which they commit homicide differ.⁷⁶ These differences must be recognized as a proper basis for differentiation.

23 Wash.App. 716

The STATE of Washington, Respondent,

v.

Sharon Josie CRIGLER, Appellant.

No. 3188-II.

Court of Appeals of Washington,
Division 2.

July 13, 1979.

Defendant appealed from order of the Superior Court, Pierce County, James V. Ramsdell, J., denying her motion for new trial following jury verdict which found her guilty of crime of first-degree manslaughter. The Court of Appeals, Petrie, J., held that: (1) erroneous instruction that defense of self-defense was not available to defendant unless, at or immediately before killing, victim had committed some overt act which would have reasonably indicated to defendant that victim was attempting to inflict great bodily harm upon her so deprived defendant of due process of law that manifest justice required remand for new trial, and (2) in defense of a charge of assault or a homicide on grounds of self-defense, a defendant's action is measured by the subjective determination of how reasonable the situation appeared to him at the time he acted in view of all the facts and circumstances.

Reversed and remanded for new trial.

PETRIE, Judge.

Sharon Josie Crigler appeals from an order denying her motion for new trial following a jury verdict which found her guilty of the crime of first-degree manslaughter and also found that she was armed with a firearm at the time of the commission of the crime.

At trial she acknowledged that she fired a .22 caliber weapon through the door of her apartment while the victim was on the other side of the door rattling keys in the lock. She asserted the homicide was justified as an act of self-defense. We hold the jury was not properly instructed on the law of self-defense. Accordingly, we reverse and remand for new trial.

If believed by a jury, the following fact pattern supportive of her theory of the case would emerge. Ms. Crigler, age 21, and the victim, Keith Rolland, age 24, had lived together in an apartment for several months prior to May 10, 1977. Their life together was often stormy; and, when provoked, he brutally beat her on several occasions. On May 10, following one of the more stormy occasions in which he punched her repeatedly about the mouth, he moved into another apartment complex several miles away.

On May 13, ostensibly to effect a reconciliation, she went to his apartment, found another woman in his bed, and, in his absence, stuck her foot through one of his paintings, flipped his stereo set upside down, and dumped garbage on the floor. Ms. Crigler then returned to her apartment. She notified the police that Rolland was about to assault her, that he had a gun, and the warrants for his arrest on traffic violations were outstanding. The police arrested Rolland; he bailed out; and, she testified, the police told her they did not find his gun. Shortly after 2 a. m. on May 14, he obtained keys to Crigler's apartment from the apartment manager and was attempting to unlock the door when she shouted, "Keith, if it's you, get away, back off." Hearing no response, she shot blindly through the door. The projectile passed through his aorta and he died of acute hemorrhage within minutes.

The trial court's primary instruction on self-defense told the jury:

To justify a killing in self-defense, there must be, or reasonably appear to be, at or immediately before the killing some overt act, or some circumstances which would reasonably indicate to the slayer that the deceased is, at the time, attempting to kill or inflict great bodily harm upon the slayer.

The right of self-defense is given only in emergencies to enable persons who are attacked, and to whom it may reasonably appear that their lives are endangered or their bodies are in danger of great physical injury, to defend themselves. The

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Cite as, Wash.App., 886 P.2d 728

right is limited to the emergency, and ends when the emergency ceases. The right is based upon what a reasonable man or woman, having due regard for human life and safety, would do under similar circumstances.

A killing is not justified when made for the purpose of avenging insults, abuse or a previous assault which has ended, or for the purpose of settling an argument not involving physical safety.

(Emphasis added.)

[1] The clear import of this instruction is that the defense of self-defense was not available to Ms. Crigler unless at or *immediately before the killing*, Rolland committed some overt act which would reasonably indicate to her that he was attempting to inflict great bodily harm upon her. The lead opinion in *State v. Wanrow*, 88 Wash.2d 221, 559 P.2d 548 (1977), asserted that in evaluating the gravity of the danger to the slayer, the jury must not be limited to a consideration *only* of those acts and circumstances occurring at or immediately before the killing. Likewise, the dissent in *Wanrow* also criticized the instruction which so limited the jury's understanding of the law of self-defense. The dissent, however, found no prejudicial error because another instruction cured the error. *State v. Wanrow*, *supra*, at 246, 559 P.2d 548.

In the case at bench, we find no curative instruction. Indeed, the prosecution in its brief candidly acknowledges that Ms. Crigler's contention, as asserted on appeal, is supported by considerable authority. See *State v. Bradley*, 20 Wash.App. 152, 578 P.2d 1316 (1978); *State v. Ellis*, 30 Wash. 369, 70 P. 963 (1902). Instead, the prosecution asserts the precise flaw in the instruction was not pointed out to the trial court, either before it was presented to the jury or at the post-trial motion for a new trial. We find that assertion to be factually correct but not determinative of the issue. The gravity of the danger to Ms. Crigler must most certainly be measured by all the surrounding circumstances which had occurred during the several months preceding the slaying. That was the essence of her de-

fense; without it, she had no defense. We hold that under the facts of this case, most of which are uncontested, the erroneous instruction so deprived her of due process of law that manifest justice requires that we remand this case for new trial.

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State v. Stewart

Supreme Court of Kansas, 1988.
243 Kan. 639, 763 P.2d 572.

TYLER LOCKETT, JUSTICE.

... Peggy Stewart fatally shot her husband, Mike Stewart, while he was sleeping. She was charged with murder in the first degree. Defendant pled not guilty, contending that she shot her husband in self-defense. Expert evidence showed that Peggy Stewart suffered from the battered woman syndrome. Based upon the battered woman syndrome, the trial judge instructed the jury on self-defense. The jury found Peggy Stewart not guilty.

The State stipulates that Stewart "suffered considerable abuse at the hands of her husband," but contends that the trial court erred in giving a self-defense instruction since Peggy Stewart was in no imminent danger when she shot her sleeping husband. We agree that under the facts of this case the giving of the self-defense instruction was erroneous. We further hold that the trial judge's self-defense instruction improperly allowed the jury to determine the reasonableness of defendant's belief that she was in imminent danger from her individual subjective viewpoint rather than the viewpoint of a reasonable person in her circumstances. ...

Following an annulment from her first husband and two subsequent divorces in which she was the petitioner, Peggy Stewart married Mike Stewart in 1974. Evidence at trial disclosed a long history of abuse by Mike against Peggy and her two daughters from one of her prior marriages. Laura, one of Peggy's daughters, testified that early in the marriage Mike hit and kicked Peggy, and that after the first year of the marriage Peggy exhibited signs of severe psychological problems. Subsequently, Peggy was hospitalized and diagnosed as having symptoms of paranoid schizophrenia; she responded to treatment and was soon released. It appeared to Laura, however, that Mike was encouraging Peggy to take more than her prescribed dosage of medication.

In 1977, two social workers informed Peggy that they had received reports that Mike was taking indecent liberties with her daughters. Because the social workers did not want Mike to be left alone with the girls, Peggy quit her job. In 1978, Mike began to taunt Peggy by stating that Carla, her 12-year-old daughter, was "more of a wife" to him than Peggy.

Later, Carla was placed in a detention center, and Mike forbade Peggy and Laura to visit her. When Mike finally allowed Carla to return home in the middle of summer, he forced her to sleep in an un-air conditioned room with the windows nailed shut, to wear a heavy flannel nightgown, and to cover herself with heavy blankets. Mike would then wake Carla at 5:30 a.m. and force her to do all the housework. Peggy and Laura were not allowed to help Carla or speak to her.

When Peggy confronted Mike and demanded that the situation cease, Mike responded by holding a shotgun to Peggy's head and threatening to kill her. Mike once kicked Peggy so violently in the chest and ribs that she

required hospitalization. Finally, when Mike ordered Peggy to kill and bury Carla, she filed for divorce. Peggy's attorney in the divorce action testified in the murder trial that Peggy was afraid for both her and her children's lives.

One night, in a fit of anger, Mike threw Carla out of the house. Carla, who was not yet in her teens, was forced out of the home with no money, no coat, and no place to go. When the family heard that Carla was in Colorado, Mike refused to allow Peggy to contact or even talk about Carla.

Mike's intimidation of Peggy continued to escalate. One morning, Laura found her mother hiding on the school bus, terrified and begging the driver to take her to a neighbor's home. That Christmas, Mike threw the turkey dinner to the floor, chased Peggy outside, grabbed her by the hair, rubbed her face in the dirt, and then kicked and beat her.

After Laura moved away, Peggy's life became even more isolated. Once, when Peggy was working at a cafe, Mike came in and ran all the customers off with a gun because he wanted Peggy to go home and have sex with him right that minute. He abused both drugs and alcohol, and amused himself by terrifying Peggy, once waking her from a sound sleep by beating her with a baseball bat. He shot one of Peggy's pet cats, and then held the gun against her head and threatened to pull the trigger. Peggy told friends that Mike would hold a shotgun to her head and threaten to blow it off, and indicated that one day he would probably do it.

In May 1986, Peggy left Mike and ran away to Laura's home in Oklahoma. It was the first time Peggy had left Mike without telling him. Because Peggy was suicidal, Laura had her admitted to a hospital. There, she was diagnosed as having toxic psychosis as a result of an overdose of her medication. On May 30, 1986, Mike called to say he was coming to get her. Peggy agreed to return to Kansas. Peggy told a nurse she felt like she wanted to shoot her husband. At trial, she testified that she decided to return with Mike because she was not able to get the medical help she needed in Oklahoma.

When Mike arrived at the hospital, he told the staff that he "needed his housekeeper." The hospital released Peggy to Mike's care, and he immediately drove her back to Kansas. Mike told Peggy that all her problems were in her head and he would be the one to tell her what was good for her, not the doctors. Peggy testified that Mike threatened to kill her if she ever ran away again. As soon as they arrived at the house, Mike forced Peggy into the house and forced her to have oral sex several times.

The next morning, Peggy discovered a loaded .357 magnum. She testified she was afraid of the gun. She hid the gun under the mattress of the bed in a spare room. Later that morning, as she cleaned house, Mike kept making remarks that she should not bother because she would not be there long, or that she should not bother with her things because she could not take them with her. She testified she was afraid Mike was going to kill her.

Mike's parents visited Mike and Peggy that afternoon. Mike's father testified that Peggy and Mike were affectionate with each other during the visit. Later, after Mike's parents had left, Mike forced Peggy to perform oral sex. After watching television, Mike and Peggy went to bed at 8:00 p.m. As Mike slept, Peggy thought about suicide and heard voices in her head repeating over and over, "kill or be killed." At this time, there were two vehicles in the driveway and Peggy had access to the car keys. About 10:00 p.m., Peggy went to the spare bedroom and removed the gun from under the mattress, walked back to the bedroom, and killed her husband while he slept. She then ran to the home of a neighbor, who called the police.

When the police questioned Peggy regarding the events leading up to the shooting, Peggy stated that things had not gone quite right that day, and that when she got the chance she hid the gun under the mattress. She stated that she shot Mike to "get this over with, this misery and this torment." When asked why she got the gun out, Peggy stated to the police:

"I'm not sure exactly what ... led up to it ... and my head started playing games with me and I got to thinking about things and I said I didn't want to be by myself again. ... I got the gun out because there had been remarks made about me being out there alone. It was as if Mike was going to do something again like had been done before. He had gotten me down here from McPherson one time and he went and told them that I had done something and he had me put out of the house and was taking everything I had. And it was like he was going to pull the same thing over again."

Two expert witnesses testified during the trial. The expert for the defense, psychologist Marilyn Hutchinson, diagnosed Peggy as suffering from "battered woman syndrome," or post-traumatic stress syndrome. Dr. Hutchinson testified that Mike was preparing to escalate the violence in retaliation for Peggy's running away. She testified that loaded guns, veiled threats, and increased sexual demands are indicators of the escalation of the cycle. Dr. Hutchinson believed Peggy had a repressed knowledge that she was in a "really grave lethal situation."

The State's expert, psychiatrist Herbert Modlin, neither subscribed to a belief in the battered woman syndrome nor to a theory of learned helplessness as an explanation for why women do not leave an abusive relationship. Dr. Modlin testified that abuse such as repeated forced oral sex would not be trauma sufficient to trigger a post-traumatic stress disorder. He also believed Peggy was erroneously diagnosed as suffering from toxic psychosis. He stated that Peggy was unable to escape the abuse because she suffered from schizophrenia, rather than the battered woman syndrome. ...

The question reserved is whether the trial judge erred in instructing on self-defense when there was no imminent threat to the defendant and no evidence of any argument or altercation between the defendant and the victim contemporaneous with the killing. We find this question and the related question of the extent to which evidence of the battered woman

syndrome will be allowed to expand the statutory justification for the use of deadly force in self-defense are questions of statewide importance.

The State claims that under the facts the instruction should not have been given because there was no lethal threat to defendant contemporaneous with the killing. The State points out that Peggy's annulment and divorces from former husbands, and her filing for divorce after leaving Mike, proved that Peggy knew there were non-lethal methods by which she could extricate herself from the abusive relationship.

Under the common law, the excuse for killing in self-defense is founded upon necessity, be it real or apparent. . . . In *State v. Rose*, 30 Kan. 501, 1 Pac. 817 (1883), we approved an instruction on self-defense which stated in part: "[B]efore a person can take the life of another, it must reasonably appear that his own life must have been in imminent danger, or that he was in imminent danger of some great bodily injury from the hands of the person killed. No one can attack and kill another because he may fear injury at some future time." The perceived imminent danger had to occur in the present time, specifically during the time in which the defendant and the deceased were engaged in their final conflict.

These common-law principles were codified in K.S.A. 21-3211, which provides:

"A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's imminent use of unlawful force."

The traditional concept of self-defense has posited one-time conflicts between persons of somewhat equal size and strength. When the defendant claiming self-defense is a victim of long-term domestic violence, such as a battered spouse, such traditional concepts may not apply. Because of the prior history of abuse, and the difference in strength and size between the abused and the abuser, the accused in such cases may choose to defend during a momentary lull in the abuse, rather than during a conflict. However, in order to warrant the giving of a self-defense instruction, the facts of the case must still show that the spouse was in imminent danger close to the time of the killing.

A person is justified in using force against an aggressor when it appears to that person and he or she reasonably believes such force to be necessary. A reasonable belief implies both an honest belief and the existence of facts which would persuade a reasonable person to that belief. A self-defense instruction must be given if there is any evidence to support a claim of self-defense, even if that evidence consists solely of the defendant's testimony.

Where self-defense is asserted, evidence of the deceased's long-term cruelty and violence towards the defendant is admissible. In cases involving battered spouses, expert evidence of the battered woman syndrome is relevant to a determination of the reasonableness of the defendant's perception of danger. Other courts which have allowed such evidence to be

introduced include those in Florida, Georgia, Illinois, Maine, New Jersey, New York, Pennsylvania, Washington, and Wisconsin. However, no jurisdictions have held that the existence of the battered woman syndrome in and of itself operates as a defense to murder.

In order to instruct a jury on self-defense, there must be some showing of an imminent threat or a confrontational circumstance involving an overt act by an aggressor. There is no exception to this requirement where the defendant has suffered long-term domestic abuse and the victim is the abuser. In such cases, the issue is not whether the defendant believes homicide is the solution to past or future problems with the batterer, but rather whether circumstances surrounding the killing were sufficient to create a reasonable belief in the defendant that the use of deadly force was necessary.

In three recent Kansas cases where battered women shot their husbands, the women were clearly threatened in the moments prior to the shootings. *State v. Hundley*, 236 Kan. 461, 693 P.2d 475, involved a severely abused wife, Betty Hundley, who shot her husband, Carl, when he threatened her and reached for a beer bottle. Several weeks prior to the shooting, Betty had moved to a motel. Carl continued to harass her and threaten her life. On the day of the shooting, Carl threatened to kill her. That night he forcibly broke into Betty's motel room, beat and choked her, painfully shaved her pubic hair, and forced her to have intercourse with him. Thereafter, he pounded a beer bottle on the night stand and demanded that Betty get him some cigarettes. Betty testified that he had attacked her with beer bottles before. She pulled a gun from her purse and demanded that Carl leave. When Carl saw the gun he stated: "You are dead, bitch, now." Betty fired the gun and killed Carl.

In *State v. Osbey*, 238 Kan. 280, 710 P.2d 676 (1985), Osbey was convicted of first-degree murder of her husband. On the day of the shooting, the husband had a gun and had communicated threats to kill Osbey both to her and others. He had shown the gun to a friend of Osbey's who warned Osbey. After an argument, when the husband was moving out, Osbey threw his chair towards his van. Osbey's husband said, "I'm sick of this shit," picked up some record albums from inside the van, and started towards the house. Osbey ran inside, loaded a gun, and told her husband to stay back because she did not want to hurt him. Her husband said he did not want to hurt her, either, and reached behind the albums he was carrying. Fearing he was reaching for his gun, Osbey shot him.

In *State v. Hodges*, 239 Kan. 63, 716 P.2d 563 (1986), on the night of the shooting, the husband attacked Hodges and beat her head against a doorjamb twenty times. He then said he was going to kill her. Hodges was then kicked and beaten before making her way into another room. When her husband said, "God damn you. Get in here now!" she grabbed a gun, ran to the doorway, and shot him.

On appeal, none of these cases raised the issue of the propriety of the self-defense instruction. Each case involved a threat of death to the wife and a violent confrontation between husband and wife, contemporaneous

with the shooting. Here, however, there is an absence of imminent danger to defendant: Peggy told a nurse at the Oklahoma hospital of her desire to kill Mike. She later voluntarily agreed to return home with Mike when he telephoned her. She stated that after leaving the hospital Mike threatened to kill her if she left him again. Peggy showed no inclination to leave. In fact, immediately after the shooting, Peggy told the police that she was upset because she thought Mike would leave her. Prior to the shooting, Peggy hid the loaded gun. The cars were in the driveway and Peggy had access to the car keys. After being abused, Peggy went to bed with Mike at 8 p.m. Peggy lay there for two hours, then retrieved the gun from where she had hidden it and shot Mike while he slept.

Under these facts, the giving of the self-defense instruction was erroneous. Under such circumstances, a battered woman cannot reasonably fear imminent life-threatening danger from her sleeping spouse. We note that other courts have held that the sole fact that the victim was asleep does not preclude a self-defense instruction. In *State v. Norman*, 89 N.C.App. 384, 366 S.E.2d 586 (1988), cited by defendant, the defendant's evidence disclosed a long history of abuse. Each time defendant attempted to escape, her husband found and beat her. On the day of the shooting, the husband beat defendant continually throughout the day, and threatened either to cut her throat, kill her, or cut off her breast. In the afternoon, defendant shot her husband while he napped. The North Carolina Court of Appeals held it was reversible error to fail to instruct on self-defense. The court found that, although decedent was napping at the time defendant shot him, defendant's unlawful act was closely related in time to an assault and threat of death by decedent against defendant and that the decedent's nap was "but a momentary hiatus in a continuous reign of terror."

There is no doubt that the North Carolina court determined that the sleeping husband was an evil man who deserved the justice he received from his battered wife. Here, similar comparable and compelling facts exist. But, as one court has stated: "To permit capital punishment to be imposed upon the subjective conclusion of the [abused] individual that prior acts and conduct of the deceased justified the killing would amount to a leap into the abyss of anarchy." *Jahnke v. State*, 682 P.2d 991, 997 (Wyo.1984). Finally, our legislature has not provided for capital punishment for even the most heinous crimes. We must, therefore, hold that when a battered woman kills her sleeping spouse when there is no imminent danger, the killing is not reasonably necessary and a self-defense instruction may not be given. To hold otherwise in this case would in effect allow the execution of the abuser for past or future acts and conduct.

One additional issue must be addressed. In its *amicus curiae* brief, the Kansas County and District Attorney Association contends the instruction given by the trial court improperly modified the law of self-defense to be more generous to one suffering from the battered woman syndrome than to any other defendant relying on self-defense. We agree and believe it is necessary to clarify certain portions of our opinion in *State v. Hodges*, 239 Kan. 63, 716 P.2d 563.

Here, the trial judge gave the instruction approved in *State v. Simon*, 231 Kan. 572, 575, 646 P.2d 1119 (1982), stating:

"The defendant has claimed her conduct was justified as self-defense.

"A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's imminent use of unlawful force. Such justification requires both a belief on the part of the defendant and the existence of facts that would persuade a reasonable person to that belief."

The trial judge then added the following:

"You must determine, from the viewpoint of the defendant's mental state, whether the defendant's belief in the need to defend herself was reasonable in light of her subjective impressions and the facts and circumstances known to her."

This addition was apparently encouraged by the following language in *State v. Hodges*, 239 Kan. 63, 716 P.2d 563:

"Where the battered woman syndrome is an issue in the case, the standard for reasonableness concerning an accused's belief in asserting self-defense is not an objective, but a subjective standard. The jury must determine, from the viewpoint of defendant's mental state, whether defendant's belief in the need to defend herself was reasonable."

The statement that the reasonableness of defendant's belief in asserting self-defense should be measured from the defendant's own individual subjective viewpoint conflicts with prior law. Our test for self-defense is a two-pronged one. We first use a subjective standard to determine whether the defendant sincerely and honestly believed it necessary to kill in order to defend. We then use an objective standard to determine whether defendant's belief was reasonable—specifically, whether a reasonable person in defendant's circumstances would have perceived self-defense as necessary. In *State v. Hundley*, 236 Kan. at 467, 693 P.2d 475, we stated that, in cases involving battered spouses, "[t]he objective test is how a reasonably prudent battered wife would perceive [the aggressor's] demeanor."

Hundley makes clear that it was error for the trial court to instruct the jury to employ solely a subjective test in determining the reasonableness of defendant's actions. Insofar as the above-quoted language in *State v. Hodges* can be read to sanction a subjective test, this language is disapproved. . . .

HAROLD HERD, JUSTICE, dissenting:

... The cumulative effect of Mike's past history, coupled with his current abusive conduct, justified appellee's belief that a violent explosion was imminent. As he slept, appellee was terrified and thought about suicide and heard voices in her head repeating over and over, "kill or be killed." The voices warned her there was going to be killing and to get away.

She went to the spare bedroom and removed the gun from under the mattress, walked back to the bedroom, and fatally shot Mike. After the first shot, she thought he was coming after her so she shot again and fled wildly outside, barefoot, wearing only her underwear. Ignoring the truck and car outside, although she had the keys in her purse inside, she ran over a mile to the neighbors' house and pled with them to keep Mike from killing her. She thought she had heard him chasing her. The neighbor woman took the gun from appellee's hand and gave her a robe while her husband called the sheriff. The neighbor testified appellee appeared frightened for her life and was certain Mike was alive and looking for her.

Psychologist Marilyn Hutchinson qualified as an expert on the battered woman syndrome and analyzed the uncontroverted facts for the jury. She concluded appellee was a victim of the syndrome and reasonably believed she was in imminent danger. In *State v. Hodges*, 239 Kan. 63, 716 P.2d 563 (1986), we held it appropriate to permit expert testimony on the battered woman syndrome to prove the reasonableness of the defendant's belief she was in imminent danger. Most courts which have addressed the issue are in accord.

The majority implies its decision is necessary to keep the battered woman syndrome from operating as a defense in and of itself. It has always been clear the syndrome is not a defense itself. Evidence of the syndrome is admissible only because of its relevance to the issue of self-defense. The majority of jurisdictions have held it beyond the ordinary jury's understanding why a battered woman may feel she cannot escape, and have held evidence of the battered woman syndrome proper to explain it. The expert testimony explains how people react to circumstances in which the average juror has not been involved. It assists the jury in evaluating the sincerity of the defendant's belief she was in imminent danger requiring self-defense and whether she was in fact in imminent danger.

Dr. Hutchinson explained to the jury at appellee's trial the "cycle of violence" which induces a state of "learned helplessness" and keeps a battered woman in the relationship. She testified appellee was caught in such a cycle. The cycle begins with an initial building of tension and violence, culminates in an explosion, and ends with a "honeymoon." The woman becomes conditioned to trying to make it through one more violent explosion with its battering in order to be rewarded by the "honeymoon phase," with its expressions of remorse and eternal love and the standard promise of "never again." After all promises are broken time after time and she is beaten again and again, the battered woman falls into a state of learned helplessness where she gives up trying to extract herself from the cycle of violence. She learns fighting back only delays the honeymoon and escalates the violence. If she tries to leave the relationship, she is located and returned and the violence increases. She is a captive. She begins to believe her husband is omnipotent, and resistance will be futile at best.

It is a jury question to determine if the battered woman who kills her husband as he sleeps fears he will find and kill her if she leaves, as is usually claimed. Under such circumstances the battered woman is not

under actual physical attack when she kills but such attack is imminent, and as a result she believes her life is in imminent danger. She may kill during the tension-building stage when the abuse is apparently not as severe as it sometimes has been, but nevertheless has escalated so that she is afraid the acute stage to come will be fatal to her. She only acts on such fear if she has some survival instinct remaining after the husband-induced "learned helplessness."

Dr. Hutchinson testified the typical batterer has a dichotomous personality, in which he only shows his violent side to his wife or his family. A batterer's major characteristic is the need to blame all frustration on someone else. In a typical battering relationship, she said, the husband and wife are in traditional sex roles, the wife has low self-esteem, and the husband abuses drugs or alcohol. The husband believes the wife is his property and what he does to her is no one's business. There is usually a sense of isolation, with the woman not allowed to speak with friends or children. Overlying the violence is the intimation of death, often created by threats with weapons.

It was Dr. Hutchinson's opinion Mike was planning to escalate his violence in retaliation against appellee for running away. She testified that Mike's threats against appellee's life, his brutal sexual acts, and appellee's discovery of the loaded gun were all indicators to appellee the violence had escalated and she was in danger. Dr. Hutchinson believed appellee had a repressed knowledge she was in what was really a gravely lethal situation. She testified appellee was convinced she must "kill or be killed." ...

The majority claims permitting a jury to consider self-defense under these facts would permit anarchy. This underestimates the jury's ability to recognize an invalid claim of self-defense. Although this is a case of first impression where an appeal by the State has been allowed, there have been several similar cases in which the defendant appealed on other grounds. In each of these cases where a battered woman killed the sleeping batterer, a self-defense instruction has been given when requested by the defendant.

The most recent case on this issue is *State v. Norman*, 89 N.C.App. 384, 393, 366 S.E.2d 586 (1988), which held the trial court erred in refusing to instruct on self-defense where a battered wife shot her husband as he slept. The court stated:

"[W]ith the battered spouse there can be, under certain circumstances, an unlawful killing of a passive victim that does not preclude the defense of perfect self-defense. Given the characteristics of battered spouse syndrome, we do not believe that a battered person must wait until a deadly attack occurs or that the victim must in all cases be actually attacking or threatening to attack at the very moment defendant commits the unlawful act for the battered person to act in self-defense. Such a standard, in our view, would ignore the realities of the condition. This position is in accord with other jurisdictions that have addressed the issue."

There are other cases in which the defendant has been held to have the right to a jury instruction on self-defense where the victim, although not sleeping, was not directly attacking the defendant. . . .

The majority bases its opinion on its conclusion appellee was not in imminent danger, usurping the right of the jury to make that determination of fact. The majority believes a person could not be in imminent danger from an aggressor merely because the aggressor dropped off to sleep. This is a fallacious conclusion. For instance, picture a hostage situation where the armed guard inadvertently drops off to sleep and the hostage grabs his gun and shoots him. The majority opinion would preclude the use of self-defense in such a case. . . .

The majority disapproves *State v. Hodges*, 239 Kan. 63, 716 P.2d 563, where we adopted the subjective test for self-defense in battered wife cases. We adopted the subjective test because there is a contradiction in the terms "reasonably prudent battered wife." One battered into "learned helplessness" cannot be characterized as reasonably prudent. Hence, the *Hodges* modification of *State v. Hundley*, 236 Kan. 461, 693 P.2d 475, was necessary and properly states the law. . . .

**ELIZABETH SCHNEIDER, DESCRIBING AND CHANGING:
WOMEN'S SELF-DEFENSE WORK AND THE PROBLEM
OF EXPERT TESTIMONY ON BATTERING**

9 Women's Rights Law Rptr. 195, 198-200, 208, 210-212, 214-218, 220-222 (1986).

Examination of the expert testimony cases involving battered women underscores the complexity of the task of expanding defense options for battered women faced with homicide or assault. These cases reveal the tenacity of sex-stereotyping for, despite the purpose for which this legal strategy was conceived, old stereotypes of incapacity are replicated in a new form. Judicial opinions suggest that lawyers who have submitted expert testimony have had this testimony focus primarily on the passive, victimized aspects of battered women's experience, their "learned helplessness," rather than circumstances which might explain the homicide as a woman's necessary choice to save her own life. Even if lawyers are not emphasizing this aspect, judges are hearing the testimony in this way. For both lawyers and judges the term "syndrome" and the psychological description of battered women that predominates in battered woman syndrome descriptions appears to conjure up images of a psychological defense—a separate defense and/or an impaired mental state defense. Moreover, although the rationale for admission of expert testimony on battered woman syndrome was to counteract stereotypes of battered women as solely responsible for the violence, testimony is being presented, heard and sometimes misheard, that goes to the other extreme of depicting battered women as helpless victims and failing to describe the complexity and reasonableness of why battered women act. Courts are reflecting these perspectives in opinions on expert testimony on battered woman syndrome that resonate with familiar stereotypes of female incapacity.

Judicial perceptions of battered woman syndrome as a form of incapacity have problematic consequences for defense of battered women. The critical defense problem in representing battered women who kill and assert self-defense is how to explain the woman's action as reasonable. The woman's experience as a battered woman and her inability to leave the relationship—her victimization—is the context in which that action occurs. When battered woman syndrome is present-

ed or heard in a way that sounds like passivity or incapacity, it does not address the basic fact of the woman's action and contradicts a presentation of reasonableness. Indeed, the overall impact of the battered woman syndrome stereotype may be to limit rather than expand the legal options of women who cannot conform to these stereotypes. Judges are not likely to recognize the need for expert testimony in those cases where the woman's actions significantly depart from both the traditional "male" model of self-defense and the passive "battered woman" model. If they do admit the testimony they may see its relevance in terms that, even unwittingly, conform to or reinforce these stereotypes.

For feminist theorists and practitioners the issue of expert testimony is also important because it highlights a broader problem that we face in many different contexts. How do we describe and name a legal problem for women—describe it in detail, in context—and translate it to unsympathetic courts in such a way that it is not misheard and, at the same time, does not remain static? How do we develop legal theory and practice that is not only accurate to the realities of women's experience but also takes account of complexity and allows for change?

The expert testimony cases manifest this problem on the issue of the characterization of battered women's experience in terms of victimization, for battered woman syndrome has been presented, interpreted and heard as victimization. Yet the expert testimony cases by definition pose the dilemma of how we describe *both* victimization and agency in women's lives. How do we translate women's experiences honestly to courts without falling into extremes of victimization or fault that can be misheard? In describing what has appeared to be an accurate picture of battered women in order to remedy sex-bias, have we emphasized the victimized, passive, helpless aspects of the battered woman's experience in order to counteract the disabling stereotypes that solely blame her for the violence? In so doing, have we permitted courts to limit the utility of women's self-defense and constrained its theoretical impact as well? ...

In *State v. Kelly*, the New Jersey Supreme Court held that expert testimony concerning battered woman syndrome was admissible. The court ruled that the testimony was relevant under New Jersey's standard of self-defense,⁷² and that the testimony met the standards of New Jersey's rules for admissibility of expert testimony. ... *Kelly* exemplifies contradictory themes in the development of the issue of expert testimony. The Supreme Court's opinion reveals both the severity and tenacity of the problem of sex-bias in the law of self-defense. The court acknowledges the importance of this testimony to explain, not merely the woman's "subjective" honesty, but also the "objective" reasonableness of her response. At the same time, the Supreme Court seems to perceive the testimony as primarily relevant to the issue of why Gladys

72. *State v. Kelly*, 97 N.J. 178, 197, 478 A.2d 364, 373 (1984). ...

Kelly did not leave, rather than the reasonableness of why she acted.

...

Certainly the court is correct that the question of why the battered woman did not leave (so as to avoid the possibility of death) is a threshold issue in the jury's mind. Her failure to leave raises the question of whether the woman was really battered (for if she was, why did she stay?), as well as the question of whether, by staying, she had in a sense "assumed the risk" of death. However, these questions only present the first issue for the jury. The second issue (and the more pressing one in many cases) is the reasonableness of the battered woman's belief that she was in particular jeopardy at the time that she responded in self-defense. A battered woman who has been the victim of abuse for many years and has survived it before must credibly explain why it was necessary to act on that occasion. Expert testimony, admitted for the purpose of explaining why the battered woman did not leave, does not help the jury answer the question whether she was reasonable in acting violently in order to save her life. It thus does not address the basic defense problem that the battered woman faces. Indeed, if the testimony is limited, or perceived as limited to the issue of why the woman does not leave, it highlights a contradiction implicit in the message of battered woman syndrome—if the battered woman was so helpless and passive, why did she kill the batterer? ...

The reasonableness of the woman's fear and the reasonableness of her act are *not* issues which the jury knows as well as anyone else. The jury needs expert testimony on reasonableness precisely because the jury may not understand that the battered woman's prediction of the likely extent and imminence of violence is particularly acute and accurate.

The court's lack of emphasis on this aspect of the relevance of the testimony is puzzling. ... One possible explanation is that the court finds it easier to focus on those aspects of the testimony which characterize the woman as passive and helpless (i.e., her inability to leave) rather than active and violent but reasonable. This highlights the dilemma of battered woman syndrome: explanation of the battered woman's actions from a solely victimized perspective cannot fully explain why she believed it was necessary to act. ...

Perhaps the fact that the substance of the proffered testimony submitted in many courts has been on battered woman syndrome and "learned helplessness" has unwittingly allowed even sensitive courts to emphasize individual psychological incapacity by admitting the testimony but then perceiving its relevance in a more limited way. Courts appear to be willing to recognize the importance of expert testimony when the rationale for admission is women's individual and collective psychological "weakness." Judicial willingness to find the battered women's perspective acceptable may relate to the fact that the perspective that courts are hearing and to which they are responding is that of damaged women, not of women who perceive themselves to be, and may

in fact be, acting competently, assertively and rationally in light of the alternatives. ...

Description of the battered women's common experiences has become encapsulated in the phrase "battered woman syndrome." ... "[B]attered woman syndrome" carries with it stereotypes of individual incapacity and inferiority which lawyers and judges may respond to precisely because they correspond to stereotypes of women which the lawyers and judges already hold. Battered woman syndrome does not mean, but can be heard as reinforcing stereotypes of women as passive, sick, powerless and victimized. Although it was developed to merely *describe* the common psychological experiences and characteristics which battered women share, and it is undoubtedly an accurate description of these characteristics, battered woman syndrome can be misused and misheard to enshrine the old stereotypes in a new form. This repeats an historic theme of treatment of women by the criminal law—women who are criminals are viewed as crazy or helpless or both. Thus the description of battered women's "different" experiences, although purely categorical in intent, carries with it the language and baggage of familiar stereotypes of female incapacity. ...

Self-defense as justification focuses on the act of defending oneself; it rests on a determination that the act was right because of its circumstances. In contrast, a finding of excuse, like insanity or heat of passion, focuses on the actor; it is a finding that the act, although wrong, should be tolerated because of the actor's characteristics or state of mind. Traditionally, since women's acts of violence could not be viewed as reasonable, the inquiry shifted to excuse; women were viewed as incapable. Women's self-defense work has attempted to redraw the lines between justification and excuse, to challenge the stereotypes which might prevent women, lawyers, and judges from viewing the woman's acts as justified. The goal of expert testimony is also to challenge these stereotypes and make it possible for the jury to identify with and understand the circumstances of the act and to thereby see the act as reasonable.

However, the danger of the battered woman syndrome approach is that it revives concepts of excuse. Even the New Jersey Supreme Court's thoughtful and comprehensive analysis of battered woman syndrome in *Kelly* has elements of a classic excuse description; it focuses on the woman's defects, the woman subject to the "syndrome." It implies that she is limited because of *her* weakness and *her* problems. It does not appear to affirm the circumstances of her act. The opinion seems to suggest that admission of expert testimony is primarily important because the battered woman "suffers" from the syndrome and could not be expected to leave her home, not because it is relevant to the reasonableness of her act. The court is willing to extend its "protection" and admit the testimony because the battered woman is perceived as weak. Although the purpose of expert testimony on battered woman syndrome is to explain the reasonableness of the

woman's action, the psychological aspect of the description sounds like incapacity and excuse.

By emphasizing a strain of excuse, battered woman syndrome tends to rigidify other dichotomies which, as others have suggested, are roughly correlated with excuse and justification. Excuse suggests that the act is personal to the defendant, a private act, in contrast with a more public and common sense of rightness which justification reflects. Excuse suggests a sense of the subject, while justification implies a more objective statement. Redrawing the boundaries of justification and excuse means recasting the boundaries of the private/public and subjective/objective oppositions, making women's experiences generally, and battered women's experiences and perceptions specifically, more public and legitimate, and also more objective.

The notion of battered woman syndrome contains the seeds of old stereotypes of women in new form—the victimized and the passive battered woman, too paralyzed to act because of her own incapacity. From a defense standpoint, this perspective is potentially counterproductive in that it explains why the woman did not leave but not why she acted. It is in tension with the notion of reasonableness necessary to self-defense since it emphasizes the woman's defects and incapacity. It also does not adequately describe the complex experiences of battered women. The effect is that women who depart from this stereotype, because of their own life situations or because the facts of their cases do not fit this perspective, are not likely to be able to take advantage of judicial solicitude. This has already presented serious defense problems in several cases. The stereotype of the reasonable battered woman who suffers from battered woman syndrome creates a new and equally rigid classification, which has the potential to exclude battered women whose circumstances depart from the model and force them once again into pleas of insanity or manslaughter rather than expanding our understandings of reasonableness. It thus reinforces and rigidifies the traditional boundaries of justification and excuse, rather than redrawing them.

From the standpoint of the jury's determination of whether the woman acted reasonably in self-defense, the explanation of battered woman syndrome is only partial. Giving commonality to an individual woman's experience can make it seem less aberrational and more reasonable. Yet, to the degree that the explanation is perceived to focus on her suffering from a "syndrome," a term which suggests a loss of control and passivity, the testimony seems to be inconsistent with the notion of reasonableness, and the substance of the testimony appears to focus on incapacity.

In addition, battered woman syndrome has sounded to many lawyers and judges like either a separate defense or a defense akin to impaired mental state. Some courts have assumed that expert testimony on battered woman syndrome was being proffered as relevant to an impaired mental state defense. This is undoubtedly not merely the

problem of the term itself—which, again, intends to be simply descriptive—but of the stereotypes that it triggers for lawyers and judges. Courts are more likely to hear and respond to a perception of women as damaged than as reasonable, so presentation of testimony on battered woman syndrome responds more to and plays on patriarchal attitudes which courts have exhibited toward women and women defendants generally. ...

Many courts have accepted the need for expert testimony. But consider what judicial acceptance of this testimony implies. It emphasizes the profound gap between the experiences of battered women and those of the rest of society; it reaffirms the notion of a woman's viewpoint *and* separate experience. It suggests that psychological and social factors are interrelated and that individual experience is necessarily shaped by group identity. It also suggests that women's own description of their experiences lacks credibility, because these experiences differ from the male norm, and because women generally are not viewed as believable.

Courts are effectively recognizing that an expert, a professional, someone not a battered woman, is needed to translate the experiences of large numbers of women in this society to the rest of society's representatives. It is arguable that expert testimony may be necessary only for a transitional period, until women's voices are strong enough to be heard on their own. But experience with the use of experts in the women's movement suggests that there may be risks. Courts may find experts particularly useful in cases involving women not as a complement to, but as a substitute for, women's voices.

On a theoretical level, judicial acceptance of expert testimony has a profound impact because it affirmatively recognizes the substantive experience and content of sex discrimination and validates a "woman-centered" perspective. This collapses the dichotomy between individual experience and group experience by describing the experience as not just the individual's, but that of all battered women generally. At the same time, it is disturbing, for it suggests that only experts can bridge the gap between the individual and collective experience of women and counsel jurors and society that an individual woman's experience has a social validity and commonality and might be reasonable. ...

Over the last several years, victimization has increasingly become a powerful, pervasive and seductive theme in the women's movement and the women's legal rights movement. It is a theme that has had wide appeal. While I believe that women are victims, and that this perspective on women's experience is important and useful, particularly on issues concerning violence against women, the virtually exclusive focus on victimization by the women's movement in recent years has been problematic. Portrayal of women as solely victims or agents is neither accurate nor adequate to explain the complex realities of women's lives. It is crucial for feminists and feminist legal theorists to understand and explore the role of both victimization and agency in women's lives, and

to translate these understandings into the theory and practice that we develop. ...

Other feminist theorists and legal thinkers have questioned the women's movement's reliance on victimization in a range of contexts, including divorce and pornography. In the specific context of battered women, Susan Schechter has emphasized the dangers of an analysis premised on victimization. She suggests that the characterization of victim has been viewed as posing a complicated political problem for the battered women's movement:

because the focus on victimization helps to blur the insight that the struggle for battered women's rights is linked to the more general fight for women's liberation. When activists view battering as victimization rather than as an aspect of oppression, they have a tendency to see individual problems rather than collective ones.

In addition, she observes that "victim" may be a label that battered women reject because "it fails to capture their complexity and strength."

At the same time, a notion of the importance of women's agency without a social context of victimization is equally unsatisfactory. The notion of agency carries with it assumptions of liberal visions of autonomy, individual action, individual control and mobility that are also inadequate and incomplete. But women do act, we have acted in history, we act to make choices and shape our lives, we act even when there are few and terrible options. Sometimes, like battered women who kill, we act if only in order to survive.

In the battered woman context, recognition of the need to transcend the dichotomy and exclusivity of characterizations of victim versus agent and develop a theory and practice which encompasses both has consequences for the way we approach and handle the use of expert testimony in battered women's cases. Defense efforts should focus on the battering experience as well as the reasonableness of the woman's actions. Expert testimony on battering should be proffered and admitted, but lawyers should be sensitive to the way in which they understand, characterize and explain the testimony and its relevance, and they should not rely on it to the exclusion of other defense strategies. Battered women who kill need not be portrayed solely as victims with the focus on the battering, but as actors and survivors whose acts are reasonable. The psychological mechanisms that battered women develop, as in battered woman syndrome, can be explained as ways for battered women to cope and survive. If killing in self-defense can be understood as a reasonable act in terms of the context of victimization and other options, both the victimization and agency aspects of battered women's experiences are included. If battered women who kill are described as women who are victims but have fought back in order to survive, their actions in killing their batterers may be more effectively understood as reasonable.

Defense lawyers and experts must emphasize the common experiences of battered women, but must describe both the particular experiences of the individual woman and be sensitive to the sex-stereotypical implications of the testimony. Defense lawyers and experts should emphasize the common aspects of the battered women's experience, both her helplessness and her behavioral adjustments that allow her to survive, her desperate coping, her unique insight and ability to know and anticipate the degree of violence she faces, and her painful understanding of the paucity of alternatives available to women in this culture. This fuller description of battered women's experiences is both more accurate and better explains to judges and juries why a battered woman doesn't leave the house *and* why she kills to save her own life.

Explanation of aspects of both victimization and agency makes it possible for expert testimony to more accurately describe the complexity of battered women's experiences, respond to the hard defense problems presented in these cases, and allow for change by transcending static stereotypes. Feminist legal work must *both* describe *and* allow for change. As lawyers for battered women we must take account of battered women's experiences in being acted upon *and* acting. Our work must simultaneously capture the reality of battered women's lives, translate this reality more fully and effectively to courts, and push toward transforming this reality.

Duncan Kennedy, 1990 Torts Exam

Question III one third credit 1,000 words

A was a divorced woman of 40, a college graduate with no children, living in her own house in a suburb. She took a job with X corporation, for \$28,000 per year, as executive secretary to VP, Vice President for Manufacturing, also divorced. She lived on a very tight budget because of large mortgage payments and a very small settlement from her former husband.

She was unaware that each of her three predecessors in the job had quit after a few months. The first, S1, had written a letter to B, the vice president in charge of personnel, soon after resigning. The letter was very short: "You should know that A forced me into a sexual relationship and physically abused me repeatedly and severely." There was no return address.

B was the person designated in the personnel procedures to hear complaints of sexual harassment of employees. Since 1984, the employee handbook issued to each new employee had stated that "X corporation will not tolerate or condone sexual harassment of employees, and any employee found to have engaged in this practice will be sanctioned according to the severity of the offense." Between 1984 and the time of these events, there had been three complaints of harassment (X corporation has 1,000 employees), and all had been resolved informally.

B found that S1 had moved from the address in her personnel file, without leaving a forwarding address, that she was not listed in the metropolitan area phone book, and that her few acquaintances at the company had no leads as to her whereabouts. B had met her while she was still with the corporation, and he would testify that she had struck him as disorganized and "hysterical."

B made a lunch date with VP, his peer in the corporate hierarchy, and showed him the letter. VP denounced it as a lie, and said that S1 had left because she had realized she wasn't up to the job. B had the letter put in S1's personnel file, which was then sent to storage with other files of terminated employees.

S2 and S3, A's next two secretaries, quit without explanation. When lawyers contacted them after the events about to be described, S2 said that she had left because VP had persistently, though politely, asked her to have sex with him. S3 said she had slept with VP once, "without coercion," but that he had slapped her face hard later in the evening, and that she had quit to escape the relationship.

A initially liked VP very much. They dated, went drinking together, and began an affair. They spent weekends at A's house. He soon began to abuse her. The pattern was that about once a month after an evening of drinking and making love he would pick a fight with her and beat her. She was bruised and debilitated after these episodes, but she never went to a hospital or a doctor, nor did she miss work.

The severity of the beatings was confirmed by C, a neighbor who was on friendly terms with A, and chatted with her over the back fence on Sunday nights. A and C had exchanged keys to their houses several years earlier, "just in case," but no occasion had arisen for their use.

About six months into her relationship with VP, A applied to X corporation for transfer to a job in the Sales Division that paid \$38,000 per year. After Personnel informed her that the job had gone to someone else, VP told her that they had asked his opinion, and that he had told them that, while she was perfect in her present job, he doubted that she was up to the promotion.

He then threatened that if A applied for another transfer, or left him, or reported the abuse, he would fire her, and prevent her from getting another job in the area, or that he would kill her. A purchased a gun and hid it in the living room.

On a Saturday night a month after the last beating, and a year after she had been denied her transfer, A and VP went out to dinner and then for a few drinks. Driving back to A's in VP's car, they quarreled. Fearing a beating, A slipped into the house ahead of VP and locked him out. She then called the local police station. She was told that they were very busy, and that no crime seemed to have been committed, but that a detective would eventually come around to hear her report.

VP went next door and demanded that C give him her key. She was frightened of him, and complied. He returned to A's house, and put the key in the lock. She yelled at him to go away. He entered, yelled at her, "You bitch, I'll kill you," and moved toward her. She fled across the living room; he caught her and threw her to the ground, and began to beat her. He broke her jaw and ruptured her spleen. He then left her lying on the living room floor and sat down in an armchair. She reached under a sofa cushion, pulled out her gun, and shot him in the chest.

She heard a noise behind her, and turned, pointing the gun at C, her neighbor, who had come to A's door, rung the bell repeatedly, and then walked in just before A shot VP. Seeing the gun pointed at her, C staggered backward and fell over a glass coffee table, which shattered and cut her severely. There was no manufacturing defect in the coffee table. C weighed 100 pounds. The police arrived a few minutes later, and took A, VP and C to the hospital.

VP recovered from his wound and eventually went to jail for assault, but has no assets. His insurance company is subrogated to his claim for medical expenses and sues A (assume that the subrogation is unproblematic; whatever medical expenses claim VP might have against A can be asserted by the insurance company). A refuses X corporation's offer of re-employment after her convalescence, and is unemployed for a number of months. She sues X corporation. C sues M, the manufacturer of the coffee table. What issues will arise in these lawsuits?