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Equal Rights to Trial for Women: Sex-Bias in the Law of Self-Defense

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

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Self-defense claims by battered women charged with homicide have attracted national attention.[1] Much of the resulting literature ignores the sex bias these women face in court and views their assertions of self-defense as requests for special treatment.[2] The assertions are, however, pleas for equal treatment. This Article examines how sexual stereotypes of women and the male orientation built into the law prevent judges and jurors from appreciating the circumstances of battered women's acts of self-defense and their perceptions.

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[1] Meyers, *Battered Wives, Dead Husbands,* STUDENT LAW. March, 1978, at 46; Quindlen, *Women Who Kill Their Spouses: The Causes, the Legal Defenses,* N.Y. Times, Mar. 10, 1978, § B, at 4, col. 1 [hereinafter cited as Quindlen]; Rensberg, *The Case of Patricia Gross,* FAM. CIRCLE, Apr. 24, 1979, at 58; *The Right to Kill,* NEWSWEEK, Sept. 1, 1975, at 69; *Wives Who Batter Back,* NEWSWEEK, Jan. 30, 1978, at 54; *Right of Women to Self-Defense Gaining in "Battered Wife" Cases,* N.Y. Times, May 7, 1979, § A, at 1, col. 1; *A Killing Excuse,* TIME, Nov. 28, 1977, at 108; *Battered Wives and Self-Defense,* Wash. Post, Dec. 4, 1977, § A, at 1, col. 2.

[2] *See* Quindlen, *supra* note 1 (Wisconsin attorney believes that the battered wife syndrome defense is "the wave of the future"). *See also* Note, *The Battered Wife Syndrome: A Potential Defense to a Homicide Charge,* 6 PEPPERDINE L. REV. 213, 226 (1978) [hereinafter cited as Note, *The Battered Wife Syndrome*]; Comment, *Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?,* 2 LAW & HUMAN BEHAVIOR 133, 141 (1978) [hereinafter cited as Comment, *Battered Wives Who Kill*]. Recognition of the battered-woman status has been seen by some as sex-discriminatory. Casenote, *Does Wife Abuse Justify Homicide?,* 24 WAYNE L. REV. 1705, 1726 n.164 [hereinafter cited as Casenote, *Does Wife Abuse Justify Homicide?*].

This Article develops a theory of sex bias for application in a homicide case involving a woman defendant, typically the victim of battering by a husband or lover.[3] Section I analyzes how social stereotypes of women affect the attitudes of triers of fact. Section II examines prejudices that, built into the law, restrict a woman's claim of self-defense. Section III argues that the law of self-defense should be applied in a sex-neutral, individualized manner that will lead to equal treatment of all defendants claiming self-defense.

I. MYTHS ABOUT BATTERED WOMEN

A. Social Attitudes toward Battered Women

Woman abuse[4] has recently been recognized as a serious problem.[5] It is estimated that one-third to one-half of all women who live

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[3] Most persons killed by women were men with whom the women had had relationships "within the context of the family"; the killings were "often in self-defense or in a victim-precipitated interaction." C. SMART, WOMEN, CRIME AND CRIMINOLOGY 17 (1976). *See* M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 217 (1958) [hereinafter cited as M. WOLFGANG]; Pokorny, *Human Violence: A Comparison of Homicide, Aggravated Assault, Suicide, and Attempted Suicide,* 6 J. CRIM. L.C. & P.S. 488, 496-97 (1965); Ward, Jackson & Ward, *Crimes of Violence by Women,* in CRIMES OF VIOLENCE 117, 867 (D. Mulrihill, M. Tumin & L. Curtis eds. 1970) [hereinafter cited as Ward, Jackson & Ward]; Wolfgang, *Victim-Precipitated Criminal Homicide,* in THE SOCIOLOGY OF CRIME AND DELINQUENCY 569, 574-75 (2d ed. M. Wolfgang, L. Savitz & N. Johnston eds. 1970). One study claimed that male homicide victims contribute to their deaths in approximately 94% of the cases. D. LUNDE, MURDER AND MADNESS 10 (1975).

[4] One author suggests that

> [t]he naming of the problem [of men beating women] . . . reflects one's view of the causes of the problem, and it restricts one's perception of the nature of the problem. None of the terms currently used to name the problem are satisfactory. The violence is not confined to acts by husbands against wives. Women who are not married may also be subjected to violence by the men in their lives so terms like wife-abuse and wife-assault are under-inclusive. The terms woman-abuse, woman-assault and woman-battering all focus on the woman and ignore the man, who is, after all, the problem.

Woods, *Litigation on Behalf of Battered Women,* 5 WOMEN'S RIGHTS L. REP. 7, 8 (1978) [hereinafter cited as Woods].

[5] *See generally,* R. DOBASH & R. DOBASH, VIOLENCE AGAINST WIVES (1979); R. GELLES, THE VIOLENT HOME (1972) [hereinafter cited as R. GELLES]; R. LANGLEY &

with male companions experience such forms of brutality as threats of severe harm, degradation, beatings or torture.[6] This abuse may result in mental health problems, broken bones, disfigurement, miscarriage or death.[7] Yet women who commit homicide in defending themselves against such brutality are seldom understood. Many people mistakenly believe that the police provide adequate protection for women who are battered, that battered women voluntarily participate in and enjoy battering relationships, or that the beatings suffered by these women are justified by their behavior.[8]

R. LEVY, WIFE BEATING (1977) [hereinafter cited as R. LANGLEY & R. LEVY]; D. MARTIN, BATTERED WIVES (1976) [hereinafter cited as D. MARTIN]; E. PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR (1974) [hereinafter cited as E. PIZZEY]; S. STEINMETZ, THE CYCLE OF VIOLENCE (1977); U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN (1978) [hereinafter cited as U.S. COMM'N]; VIOLENCE IN THE FAMILY (S. Steinmetz & M. Straus eds. 1974); L. WALKER, BATTERED WOMEN AND LEARNED HELPLESSNESS (1979) [hereinafter cited as L. WALKER]; Barden, *Wife Beaters: Few of Them Ever Appear Before a Court of Law,* N.Y. Times, Oct. 21, 1974, § 2, at 38, col. 1 [hereinafter cited as Barden]; Durbin, *Wife-Beating,* LADIES HOME J., June, 1974, at 62 [hereinafter cited as Durbin]; Eisenberg & Michlow, *The Assaulted Wife: "Catch-22" Revisited,* 3 WOMEN'S RIGHTS L. REP. 138 (1977) [hereinafter cited as Eisenberg & Michlow]; Straus, *Wife-Beating: How Common and Why?,* 2 VICTIMOLOGY 443 (1978) [hereinafter cited as Straus]; Woods, *supra* note 4, at 8.

[6] *See generally* R. LANGLEY & R. LEVY, *supra* note 5. One out of two American married women may become a victim of her husband's violence, Langley and Levy have contended, *id.* at 12, but the beatings may go seriously underreported, Durbin, *supra* note 5, at 64; Guthrie, *The Battered Wife: A Victim of Most Underreported Crime,* Cleveland Press, Nov. 3, 1976, § C, at 4, col. 3; Martin, *Overview—Scope of the Problem, in* U.S. COMM'N, *supra* note 5, at 207; Schulman, *Poor Women and Family Law,* 14 CLEARINGHOUSE REV. 1069, 1070n.14 (1981); Woods, *supra* note 4, at 8n.9.

The abuse is equally pervasive in all classes and races. M. BARD, THE STUDY AND MODIFICATION OF INTRA-FAMILIAL VIOLENCE 154 (1971); Martin, *Overview—Scope of the Problem,* in U.S. COMM'N, *supra* note 5, at 207. In fact, a 1968 Harris poll concluded that marital violence is more accepted by the highly educated than by the uneducated. Start & McEnvoy, *Middle Class Violence,* PSYCH. TODAY, November, 1970, at 31-32.

[7] *See generally* R. LANGLEY & R. LEVY, *supra* note 5; D. MARTIN, *supra* note 5, at 10-24; Steinmetz, *Wifebeating, Husbandbeating—A Comparison of the Use of Physical Violence Between Spouses to Resolve Marital Fights,* in BATTERED WOMEN 63 (M. Roy ed. 1977).

[8] *See generally* M. PAGELOW, BLAMING THE VICTIM (19??).

In fact, the law enforcement system fails to protect women from abuse.[9] The police often fail to respond to domestic disturbance calls.[10] When they do respond, arrest is unlikely;[11] police policy and training manuals stress mediation of domestic disputes rather than arrest.[12] One study reports that in 85 percent of domestic violence cases, the police had been summoned at least once within the two-year period before the homicide occurred.[13] The dead person was usually the woman. Forty-one percent of all women killed are killed by their husbands.[14] The reluctance of law enforcement officers to intervene and arrest has led a police commander in Detroit to acknowledge: "You can readily understand . . . why the women ultimately take the law into their own hands or despair of finding relief at all."[15]

Women derive no pleasure from battering relationships, but they are unable to see any alternative to continuing, often escalating, violence.[16]A woman who leaves her husband may be without employment, child care or adequate housing. There are few shelters for her.[17]

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[9] D. MARTIN, *supra* note 5, at 87–118; Barden, *supra* note 5, at 38; Eisenberg, *An Overview of Legal Remedies for Battered Women—Part I,* TRIAL, August, 1979, at 28; Eisenberg & Micklow, *supra* note 5, at 159; Fields, *Representing Battered Wives, or What to do until the Police Arrive,* [1977] 3 FAM. L. REP. (BNA) 4025, 4027–28 [hereinafter cited as Fields]; Truninger, *Marital Violence: The Legal Solutions,* 23 HASTINGS L.J. 259, 262 (1971) [hereinafter cited as Truninger]; Woods, *supra* note 5, at 9–11.

[10] Woods, *supra* note 5, at 9–11.

[11] Fields, *supra* note 9, at 4027; Eisenberg & Micklow, *supra* note 5, at 156–57; Woods, *supra* note 5, at 10–11.

[12] Eisenberg & Micklow, *supra* note 5, at 156–57; Truninger, *supra* note 9, at 272; Woods, *supra* note 5, at 9–10.

[13] POLICE FOUNDATION, DOMESTIC VIOLENCE AND THE POLICE 10–18 (1977) [hereinafter cited as POLICE FOUNDATION]. In 50% of the cases the police had been called at least five times within a two-year period before the killing. *Id.*

[14] Wolfgang, *A Sociological Analysis of Criminal Homicide,* in STUDIES IN HOMICIDE 15, 23 (M. Wolfgang ed. 1967).

[15] D. MARTIN, *supra* note 5, at 114.

[16] *Id.* at 83–86; Eisenberg & Micklow, *supra* note 5, at 145; Straus, *supra* note 5, at 449; Note, *The Case for Legal Remedies for Abused Women,* 6 N.Y.U. REV. OF L. AND SOC. CHANGE 135, 140 (1977) [hereinafter cited as Note, *Legal Remedies*].

[17] PRESIDENT'S COMM'N ON MENTAL HEALTH, REPORT OF THE SPECIAL POPULATIONS SUBPANEL ON MENTAL HEALTH OF WOMEN (1978) [hereinafter cited as MENTAL HEALTH]. Shelters serve a critical function in providing a temporary safe home for women, but they are only a short-term alternative to a violent home. The Presi-

The woman often must leave young children behind or uproot her children and separate them from their father, friends and school. The extreme isolation the typical battered woman feels is the result of her shame and her efforts to hide her situation, her husband's active attempts to separate her from friends and relatives and the unwillingness of friends and relatives to intervene. The isolation strengthens her belief that she has no alternative to remaining with the violent man.[18] If she manages to leave, her husband may follow her, even across state lines, and force her to return.[19]

Her lack of alternatives leads the battered woman to cling to the illusion that her man will change. Her illusion is often reinforced by the man's promises to reform.[20] When the violence recurs and escalates, the battered woman realizes she lacks control over the situation.[21] She lives with "learned helplessness,"[22] expecting more severe and increasingly unpredictable beatings.[23]

The assumption that battered women deserve their beatings has a historical background that will be discussed in the following section.

B. The Legal Origins of Woman Abuse

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

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dent's Commission on Mental Health Problems of Women has recommended the establishment of a nationwide network of shelters to protect abused women who are forced to flee one city after another. *Id.* at 327. But as Judge Lisa Richette of Philadelphia said at the United States Civil Rights Commission Hearings on Domestic Violence in January, 1978, "all the shelters in the world would not provide support for women unless all society is reorganized to end sexism." 46 U.S.L.W. 2421 (1978).

[18] Hilberman & Munson, *Sixty Battered Women,* 2 VICTIMOLOGY 460, 462 (1977-78) [hereinafter cited as Hilberman & Munson].

[19] MENTAL HEALTH, *supra* note 17, at 327 (1978). The violent attacks usually take place in the home; the wife who flees the attack may have to leave young children behind, possibly endangering later custody claims. Fields, *supra* note 9, at 4026.

[20] L. WALKER, *supra* note 5, at 532.

[21] R. LANGLEY & R. LEVY, *supra* note 5, at 114-25; D. MARTIN, *supra* note 5, at 72-86; POLICE FOUNDATION, *supra* note 13, at 10-11.

[22] L. WALKER, *supra* note 5, at 532.

[23] E. PIZZEY, *supra* note 5, at 41.

[24] WOMEN AND THE EQUAL RIGHTS AMENDMENT 241 (C. Stimpson ed. 1972).

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-

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[25] Broverman, Broverman, Clarkson, Rosencrantz & Vogel, *Sex-Role Stereotypes and Clinical Judgments of Mental Health,* 34 J. OF CONSULTING & CLINICAL PSYCH. 1, 4-5 (1970).

[26] *Id. See generally* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 990-1036 (1975); Bardwick, *Ambivalence: The Socialization of Women, in* READINGS ON THE PSYCHOLOGY OF WOMEN 52-58 (J. Bardwick ed. 1972); Hoffman-Bustamente, *The Nature of Female Criminality,* 8 ISSUES IN CRIMINOLOGY 117, 123 (1973).

[27] P. CHESLER, WOMEN AND MADNESS 294 (1972) [hereinafter cited as P. CHESLER].

[28] Consentino & Heilbrun, *Anxiety Correlates of Sex-Role Identity in College Students,* in READINGS ON THE PSYCHOLOGY OF WOMEN 59-65 (J. Bardwick ed. 1972).

[29] 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (R. Welsh & Co. ed. 1897) [hereinafter cited as W. BLACKSTONE].

[30] "For too long, Anglo-American law treated a man's physical abuse of his wife as different from any other assault and, indeed, as an acceptable practice." Bruno v. Codd, 90 Misc. 2d 1047, 1048, 396 N.Y.S.2d 974, 975 (Sup. Ct. 1977), *rev'd in part, appeal dismissed in part,* 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd,* 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

[31] Dobash & Dobash, *Wives: The "Appropriate" Victims of Marital Violence,* 2 VICTIMOLOGY 426 (1977-78).

[32] *Id.*

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.

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[33] 4 W. BLACKSTONE, *supra* note 29, at 1602.

[34] Husband and wife, in the language of the law, are styled *baron* and *feme*. The word baron, or lord, attributes to the husband not a very courteous superiority. But we might be inclined to think this merely an unmeaning technical phrase, if we did not recollect that if the baron kills his feme it is the same as if he had killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime, as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king. And for every species of treason . . . the sentence of women was to be drawn and burnt alive.

1W. BLACKSTONE, *supra* note 29, at 418 n.103. *See also* H. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 224 (1965).

[35] *See* text accompanying note 39 *infra*.

[36] W. RYAN, BLAMING THE VICTIM 1-11 (rev. ed. 1976).

> It is common for people to hold the attitude that the woman probably asks for it and deserves it.[37]

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*,[38] 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."[39]

Given such attitudes, it is not surprising that insanity has been the traditional defense of women who have killed their husbands.[40]

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.[41] A defendant who claims self-defense asks the trier of fact to find that a homicide was justified.[42] Justified behavior is correct and appropriate,[43] not

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[37] Affidavit of Virginia Jacobson in support of motion for jury questioning and expert testimony, State v. Brinker, No. 30842 (Minn. Dist. Ct. Oct. 3, 1978).

[38] No. 30842 (Minn. Dist. Ct. Oct. 3, 1978).

[39] Affidavit of Pat Murphy in support of motion for jury questioning and expert testimony, State v. Brinker, No. 30842 (Minn. Dist. Ct. Oct. 3, 1978).

[40] *See* note 78 and accompanying text *infra*.

[41] W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 371 (1972) [hereinafter cited as W. LAFAVE & A. SCOTT]; R. PERKINS, CRIMINAL LAW 93–94 (2d ed. 1969) [hereinafter cited as R. PERKINS].

[42] Some commentators have analyzed self-defense as containing aspects of both justification and excuse. G. FLETCHER, RETHINKING CRIMINAL LAW 855 (1978) [hereinafter cited as G. FLETCHER]; Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U. CAL. L.A. L. REV. 266, 275 (1975) [hereinafter cited as Robinson]. At common law the difference between justifiable and excusable homicide was the difference between a killing for which one had to be acquitted and a killing for which one could be convicted and pardoned. R. PERKINS, *supra* note 41, at 1001.

[43] G. FLETCHER, *supra* note 42, at 855; Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 916 (1975).

only tolerated by the law but encouraged.[44] 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.[45] 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.[46]

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 force[48] 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 adver-

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[44] Robinson, *supra* note 42, at 274.

[45] G. FLETCHER, *supra* note 42, at 857; Robinson, *supra* note 42, at 274.

[46] Fletcher, *The Individualization of Excusing Conditions,* 47 S. CAL. L. REV. 1269, 1269-71 (1974) [hereinafter cited as Fletcher, *Individualization*].

[47] Robinson, *supra* note 42, at 275.

[48] W. LAFAVE & A. SCOTT, *supra* note 41, at 393. The use of a deadly weapon against an unarmed person may be sufficient evidence for the jury to conclude that the defendant acted with malice. King v. State, 249 Ind. 699, 234 N.E.2d 465 (1968).

[49] W. LAFAVE & A. SCOTT, *supra* note 41, at 394. "The word imminent means . . . threatening to occur immediately, near at hand, impending." State v. Huett, 340 Mo. 934, 950, 104 S.W. 2d 252, 262 (1937).

[50] W. LAFAVE & A. SCOTT, *supra* note 41, at 293.

saries 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 herself[55] intending to ward off an attack by only threatening to use the weapon, but either because of lack of familiarity with the weapon[56] or because frightened by a sudden move by the man, [57] she shoots or stabs him.

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[51] *See generally* Hoffman-Bustamente, *supra* note 26, at 123.

[52] *Id.*

[53] Note, *Legal Remedies, supra* note 16, at 135 n.1 (1977); POLICE FOUNDATION, supra note 13, at 9. *See also* People v. Giacalone, 242 Mich. 16, 217 N.W. 758 (1928); questionnaire concerning People v. Powell, No. 78-63 (Tompkins County Ct., N.Y. Mar. 22, 1979) (on file with the Women's Self-Defense Law Project).

[54] Ward, Jackson & Ward, *supra* note 3, at 867, 871. Moreover, 67% of women who committed homicide were deemed to have committed nonviolent homicide, defined as involving a single stab wound, blow or gunshot. M. WOLFGANG, *supra* note 3, at 85, 160. Violent men tended to hit, push or struggle, while women were likely to pick up hard objects within reach or use weapons such as knives. R. GELLES, *supra* note 5, at 73, 80.

[55] Questionnaires filed with the Women's Self-Defense Law Project concerning State v. Hutchinson, No. 78-693-CF-A-01 (Marion County Cir. Ct., Fla. Mar. 27, 1979); State v. Childers, No. S 78-69 (Enton Cir. Ct., Ind. Dec. 14, 1978); Commonwealth v. Tallini, Crim. No. 78-5722 (Middlesex Country Super. Ct., Mass. Mar. 30, 1979); State v. Gibbs, No. 969-77 (Middlesex County Ct., N.J. May 17, 1979); State v. Phillips, No. 78 CrS 104018 (Mecklenburg County Super. Ct., N.C. Mar. 8, 1979).

[56] Questionnaires filed with the Women's Self-Defense Law Project concerning State v. Childers, No. S 78-69 (Enton Cir. Ct., Ind. Dec. 14, 1979); Commonwealth v. Tallini, Crim. No. 78-5722 (Middlesex County Super. Ct., Mass. Mar. 30, 1979); State v. Hornbuckle, No. 9401 (Whatcom County Super. Ct., Wash. Mar. 10, 1977).

[57] Questionnaires filed with the Women's Self-Defense Law Project concerning State v. Hutchinson, No. 78-693-CF-A-01 (Marion County Cir. Ct., Fla. Mar. 27, 1979); State v. Gibbs, No. 969-77 (Middlesex County Ct., N.J. May 17, 1979); State v. Phillips, No. 78 CrS 104018 (Mecklenburg County Super. Ct., N.C. Mar. 8, 1979); State v. Thomas, No. 37171 (Cuyahoga County Ct. of C.P., Ohio June 20, 1978).

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.

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[58] Easterling v. State, 267 P.2d 185 (Okla. Crim. App. 1954) (conviction reversed because trial court erroneously instructed jury to apply the equal force requirement); Kress v. State, 176 Tenn. 478, 144 S.W.2d 735 (1940) (trial court erred in not instructing jury that woman could use deadly weapon against her assailant). *But see* People v. Davis, 33 Ill. App. 3d 105, 337 N.E.2d 256 (1975) (affirmed trial court's finding that defendant did not act in self-defense because "a belief that the decedent unarmed might kill or greatly injure the defendant while she had a loaded gun was unreasonable").

[59] *See, e.g.*, CALJIC No. 5.12 (1979); Minn. CRIMJIG No. 7.05 (1977); North Carolina Pattern Jury Instruction-Crim. 308.10 (1975); WISJI Criminal 805 (1971).

[60] Supplemental Brief for Appellant at Appendix A (Court's Instructions to the Jury—Instruction 20½), State v. Crigler, 23 Wash. App. 716, 598 P.2d 739 (1979).

[61] Most jurisdictions do not allow the use of deadly force to prevent assault and battery when there is no threat of serious bodily harm. *See, e.g.*, DEL. CODE ANN. tit. 11, § 464 (1974); HAWAII REV. STAT. § 703-304 (1976).

[62] W. LAFAVE & A. SCOTT, *supra* note 41, at 396. The present majority rule allows a defender to stand his or her ground and use deadly force, but a substantial minority of jurisdictions allow deadly defensive force only if the defender cannot safely retreat. Note, *Limits on the Use of Defensive Force to Prevent Intramarital*

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.[63]

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.[64] 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.[65] 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.[66] 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,

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Assaults, 10 RUT.-CAM. L.J. 643, 654 (1979). Most of the minority jurisdictions do not require the assailed to retreat from his or her own home, *e.g.,* People v. McGrandy, 9 Mich. App. 187, 190–91, 156 N.W.2d 48, 49–50 (1967), even when the defender is attacked by a cooccupant. Note, *Limits on the Use of Defensive Force, supra,* at 655. For descriptions of marital assaults within the family dwelling, see, *e.g.,* Hutchinson v. State, 180 Ala. 27, 54 So. 119 (1910); State v. Leeper, 199 Iowa 432, 200 N.E. 732 (1924); People v. Lentzevich, 394 Mich. 117, 220 N.W.2d 298 (1975); People v. Stallworth, 364 Mich. 528, 111 N.W.2d 742 (1961); State v. Grantham, 224 S.C. 41, 77 S.E. 291 (1953).

[63] *See, e.g.,* State v. Trombino, 352 So. 2d 682 (La. 1977); State v. McMillian, 223 La. 96, 64 So. 2d 856 (1953); People v. Giacalone, 242 Mich. 16, 217 N.W. 738 (1902); Wallace v. State, 44 Tex. Crim. 300, 70 S.W. 756 (1902). *See also* Beale, *Retreat from a Murderous Assault,* 16 HARV. L. REV. 567 (1903).

[64] Hoffman-Bustamente, *supra* note 26, at 123; Ward, Jackson & Ward, *supra* note 3, at 119; Comment, *Battered Wives Who Kill, supra* note 2, at 160.

[65] J. TOTMAN, THE MURDERESS 46–47 (1978).

[66] Hilberman & Munson, *supra* note 18, at 467.

the jury is unable to understand why the woman believed herself to be in danger.[67]

B. The Reasonable Man Standard

Social mores determine when self-defense is reasonable.[68] Defensive force is generally tolerated when honor, property or family must be protected.[69] It is usually considered appropriate to engage in self-defense during fistfights or barroom brawls. Because these are not the situations in which women are likely to exert self-defense, the reasonableness of a woman's act may be difficult to establish in court. Widespread adherence to the sex-biased "reasonable man" standard compounds women's problems: "in all that mass of authorities which bears upon this branch of the law [the reasonableness standard], there is no single mention of the reasonable woman."[70]

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[67] Some courts have so held. *See* People v. Moore, 43 Cal. 2d 517, 275 P.2d 485 (1954); People v. Bush, 84 Cal. App. 3d 294, 148 Cal. Rptr. 430 (1978); People v. Torres, 94 Cal. App. 2d 146, 210 P.2d 329 (1949).

[68] G. FLETCHER, *supra* note 42, at 242–56, 855–70.

[69] Thus, a self-defense claim was often deemed appropriate when a man found his wife with her paramour and killed the paramour. *See, e.g.,* Blackerby v. Commonwealth, 200 Ky. 832, 255 S.W. 824 (1923); State v. Kidd, 24 N.M. 572, 175 P. 772 (1917); Pickett v. State, 40 Okla. Crim. 289, 268 P. 732 (1928). A special statutory justification defense existed in some states for the paramour situation. *See* "The Unwritten Law as a Defense," 1963 N.M. Laws ch. 303, § 2–4 (repealed 1973); "Adultery as Justification," TEX. PEN. CODE art. 1220 (1925) (repealed 1973).

Adultery committed by a woman has also been recognized as a separate category of legally sufficient provocation when asserted by a man. *See, e.g.,* State v. Will, 18 N.C. 121, 169 (1889) ("of all the provocations which can excite a man to madness, the law recognizes it as the highest and strongest"). *See generally* Note, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man,* 106 U. PA. L. REV. 1021, 1023 (1958).

The law has also recognized a special "honor" defense that took the technical form of an insanity defense. The defense allowed admission of evidence of "all the prior relationships between the adulterer and the accused's wife to show [the accused's] state of mind" but led to complete acquittal, not commitment. *See generally* Roberts, *The Unwritten Law,* 10 KY. L.J. 45 (1922); Comment, *Recognition of the Honor Defense Under the Insanity Plea,* 43 YALE L.J. 809 (1934).

[70] A. HERBERT, MISLEADING CASES IN THE COMMON LAW 18 (1930).

Being female renders a successful self-defense claim unlikely. Female traits have been viewed as the antithesis of reasonableness;[71] women were considered incapable of meeting the standard required of a reasonable man.[72] Rationality has been considered a male characteristic; women have been viewed as "disabled" by their lack of logic.[73] This sex stereotype and the atypical self-defense settings in which women act have made it difficult for them to appear reasonable and demonstrate the reasonableness of their acts.[74]

C. The Impact of Sex Bias in the Law of Self-Defense

Sex bias in the law of self-defense has two effects. First, sex-stereotyped attitudes and the sex bias inherent in the legal rules of self-defense often cause the judge to exclude evidence of an individual woman's circumstances and perceptions. The woman is thus unable to present her case fully and is denied a fair trial. Second, sex-stereotyped attitudes make it more likely that the trier of fact will excuse the woman on grounds of incapacity rather than declare her act of self-defense justified.

1. Exclusion of Evidence

Using the equal force and imminent danger rules, trial courts have excluded or limited evidence proving grave danger to the woman

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[71] Collins, *Language, History and the Legal Process: A Profile of the Reasonable Man,* 8 RUT.-CAM. L.J. 311, 323 (1977).

[72] *Id.* at 315-20.

[73] This association is reflected in the law. Legal textbooks still consider problems relating to women in the sections devoted to idiots and lunatics. *See* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 238-42 (1953); S. BAILEY, THE LAW OF WILLS 74-77; T. CHESIRE & C. FIFOOT, THE LAW OF CONTRACTS 394-97 (1969).

The device of the equitable trust was developed as a remedy to protect married women's property rights although "until its application to married women, it had been associated with the protection of infants and idiots." Being a woman has effectively meant being viewed by the law as functioning with an "impaired mental state." L. KANOWITZ, WOMEN AND THE LAW 39-40 (1969).

[74] *See generally* Johnston & Knapp, *Sex-Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U. L. REV. 674 (1972); Mahoney, *Sexism in Voir Dire: The Use of Sex Stereotypes in Jury Selection,* in WOMEN IN THE COURTS 114 (W. Hepperle and L. Crites eds. 1978); Nagel & Wetizman, *Women as Litigants,* 28 HAST-

defendant, including evidence of past abuses suffered by her and threats made to her.[75] Moreover, evidence of her assailant's reputation for violence has been excluded or limited.[76] The woman is denied equal protection of the laws when the sex bias of such rules burdens the presentation of her case.[77] She is denied a fair trial when she cannot put before the jury all the relevant facts,[78] and the jury is unable to fulfill

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INGS L.J. 171 (1971); Soler, *A Woman's Place . . . Combatting Sex Based Prejudices in Jury Trials Through Voir Dire,* 15 SANTA CLARA LAW. 535, 538 (1978).

[75] For cases in which the appellate courts reversed trial courts' exclusion of evidence of past abuse or threats, see State v. McMillian, 223 La. 96, 64 So. 2d 15 (1953); People v. Stallworth, 364 Mich. 528, 111 N.W.2d 742 (1961); People v. Giacalone, 242 Mich. 16, 217 N.W. 738 (1928); Wallace v. State, 44 Tex. Crim. 300, 70 S.E. 756 (1902); State v. Crigler, 23 Wash. App. 716, 598 P.2d 739 (1979).

In People v. Reeves, 47 Ill. App. 3d 406, 362 N.E.2d 9 (1977), the appellate court reversed the trial judge's decision to reject a woman defendant's claim of self-defense and to convict her for manslaughter. The judge had not properly applied the state's burden of proving the absence of self-defense. The appellate court stated that "the evidence clearly shows that the defendant, who was well aware of the deceased's ability to inflict great bodily harm from past experience, was reasonable in her belief that a danger of great bodily harm to herself was threatened by the deceased. . . . Her use of deadly force was justified." *Id.* at 412, 362 N.E.2d at 14.

In Commonwealth v. Helm, 485 Pa. 548, 402 A.2d 500 (1979), the Pennsylvania Supreme Court reversed a trial judge's finding of manslaughter on the same ground. The court stated:

> The uncontradicted evidence revealed that the stabbing occurred during an argument in which the victim pursued appellant throughout her apartment, beat her, knocked her down several times, choked her, and repeatedly hit her head against the floor—all of this at a time when appellant was 6 months pregnant. At no time did appellant state that she did not think herself in danger of serious injury or death. Given these facts, we are unable to conclude beyond a reasonable doubt that appellant could not have reasonably believed that she was in danger of death or serious bodily injury.

[76] *See, e.g.,* State v. Jacoby, 260 N.W.2d 828 (Iowa 1977); State v. Trombino, 352 So. 2d 682 (La. 1977); State v. McMillian, 223 La. 96, 64 So. 2d 856 (1953); People v. Stallworth, 364 Mich. 528, 111 N.W.2d 742 (1961); People v. Giacalone, 242 Mich. 16, 217 N.W. 758 (1928); Wallace v. State, 44 Tex. Crim. 300, 70 S.W. 756 (1902); State v. Crigler, 23 Wash. App. 716, 598 P.2d 739 (1979).

[77] *See* text accompanying notes 89–90 *infra.*

[78] *E.g.,* People v. Giacalone, 242 Mich. 16, 217 N.W. 758, 760 (1928); Easterling v. State, 267 P.2d 185, 189 (Okla. Crim. App. 1954); State v. Crigler, 23 Wash. App. 716, 598 P.2d 739, 741 (1979).

its function when it is prevented from considering crucial issues in the case.[79]

2. *Excuse Rather than Justification*

Sex-bias increases the probability that the trier of fact will prefer to excuse the woman, seeing her act as "unreasonable" self-defense.[80] Two strains of excuse theory have been used to excuse women acting in self-defense. First, women have been excused for acting in the heat of passion or under provocation. Second, women have been excused on grounds of insanity or limited intellectual capacity.[81] In the past, women charged with homicide have usually relied on these excuses; insanity has been seen as a perfect plea for women because it emphasizes their mental weaknesses.[82] These excuse defenses have had a serious impact on women because acquittal on these grounds often leads to involuntary commitment to mental health institutions.[83]

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[79] *See* Hickory v. United States, 151 U.S. 303, 313 (1893); State v. Riveira, 59 Hawaii 148, 153, 577 P.2d 793, 797 (1978).

[80] "Unreasonable" self-defense is now commonly treated as manslaughter. *See* People v. Flannel, 25 Cal. 3d 668, 603 P.2d 1, 160 Cal. Rptr. 84 (1979); People v. Odum, 3 Ill. App. 3d 538, 279 N.E.2d 12 (1972).

[81] Schneider & Jordan, *Representation of Women Who Defend Themselves Against Physical or Sexual Assault,* 4 WOMEN'S RIGHTS L. REP. 149, 157, 159 (1978). Note, *The Battered Wife Syndrome, supra* note 2, at 221; Casenote, *Does Wife Abuse Justify Homicide? supra* note 2, at 1722, 1724.

[82] A. JONES, WOMEN WHO KILL 158-66 (1980).

A study of 27 women convicted of murder or manslaughter showed "the tendency to use a defense of mental impairment, normally diminished responsibility. Despite circumstances that could well ground a defense of self-defense, in only one case was self-defense argued." Letter from Wendy Bacon and Robyn Lansdowne, University of Sydney, Department of Social Work, February 20, 1980, to author (on file with the Women's Self-Defense Law Project).

[83] Since women are generally viewed as unreasonable even under normal circumstances, a woman trying to establish an insanity defense may be forced to prove she was "really crazy and hysterical" before jurors will excuse her. Of course, this defense may win the woman defendant commitment to a mental health institution. The attitude of jurors toward the "impaired mental state" defense was shown in a recent survey that found that 71% of those interviewed thought that "the plea of insanity [was] a loophole allowing too many guilty men to go free." Bronson, *On the*

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"[84] 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.[85] 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,"[86] reflect resistance to individualization.[87]

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.[88] 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.[89] However one resolves the

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Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. COLO. L. REV. 1, 8 (1970). *See generally* R. SIMON, THE JURY AND THE DEFENSE OF INSANITY (1967). For a discussion of women who are hospitalized for psychiatric reasons, see generally P. CHESLER *supra* note 27.

[84] G. FLETCHER, *supra* note 42, at 512.

[85] *See* text accompanying notes 50–74 *supra*.

[86] Fletcher, *Individualization*, *supra* note 46, at 1290.

[87] *Id.* at 1299.

[88] *Id.* at 1293.

[89] *See generally* Gertner, *Bakke on Affirmative Action for Women: Pedestal or Cage*, 14 HARV. C.R.-C.L. L. REV. 173, 185 (1979).

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.[90] Many jurisdictions have accepted some formulation of this standard.[91]

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.[92] 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.[93] The circumstances in which they commit homicide differ.[94] These differences must be recognized as a proper basis for differentiation.

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[90] [T]he use of force upon or toward another person is justified when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." MODEL PENAL CODE § 3.04 (1) (proposed official draft 1962).

[91] W. LAFAVE & A. SCOTT, *supra* note 41, at 392; 40 C.J.S. *Homicide* §§ 124-26 (1944); 40 AM. JUR. 2d *Homicide* §§ 152-54 (1968). *See* Coleman v. State, 320 A.2d 740 (Del. 1974), in which the court held that it was reversible error to instruct that the defendant must have had a reasonable belief that defensive force was necessary; Delaware's new criminal code had adopted the Model Penal Code's more individualized approach. For older cases applying an individualized standard, see Heglin v. State, 236 Ind. 350, 140 N.E.2d 98 (1957); Eaton v. State, 200 Miss. 729, 28 So. 2d 230 (1946); Rubidaux v. State, 116 Tex. Crim. 432, 23 S.W.2d 863 (1931).

[92] *See* text accompanying notes 50-67 *supra.*

[93] *See* text accompanying notes 26-28 *supra.*

[94] *See* text accompanying notes 67-70 *supra.*

B. The Cases

Recognizing that sex bias permeates the law of self-defense, a plurality of the Washington Supreme Court, in *State v. Wanrow*,[95] explicitly acknowledged the need for more individualized consideration of self-defense claims made by women. *Wanrow* involved the self-defense claim of a Native American woman who shot a man she believed was a child molester. He had entered her babysitter's home uninvited while she and her children were there.[96] The defendant was convicted of second-degree murder.[97] The trial court instructed the jury to consider only the circumstances "at or immediately before the killing" when evaluating the gravity of the danger the defendant faced[98] and to apply the equal force rule.[99]

The Washington Supreme Court reversed Wanrow's conviction.[100] Four of the eight justices ruling on the case voted to reverse on the ground that the trial court's instructions had violated Washington law in three ways.[101] First, the instruction that limited the jury's consideration to circumstances "at or immediately before the killing" [102] misconstrued Washington law. Properly construed, the state law allowed consideration of Wanrow's knowledge of the deceased's reputation for aggressive acts and all other prior circumstances, even if that knowledge was gained long before the killing.[103]

Second, the instruction concerning equal force misstated state law and denied Wanrow equal protection:

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[95] 88 Wash. 2d 221, 559 P.2d 548 (1977) (the author was cocounsel on appeal). For discussion of *Wanrow* see Comment, *Battered Wives Who Kill, supra* note 2; Note, State v. Wanrow, 13 GONZAGA L. REV. 278 (1977); Note, *Women's Self-Defense Under Washington Law*—State v. Wanrow, 54 WASH. L. REV. 221 (1978).

[96] 88 Wash. 2d at 226, 559 P.2d at 551.

[97] *Id.* at 224, 559 P.2d at 550.

[98] *Id.* at 234, 559 P.2d at 555.

[99] *Id.* at 239, 559 P.2d at 558.

[100] *Id.* at 224, 559 P.2d at 550.

[101] *Id.* at 241, 559 P.2d at 559. The conviction was reversed by a vote of five to three on the ground that the trial court had improperly admitted a tape recording of Wanrow's telephone conversation with the Spokane police.

[102] *Id.* at 234, 559 P.2d at 555.

[103] *Id.* at 236, 559 P.2d at 557.

> The impression created—that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defense, unless the jury finds her determination of the degree of danger to be objectively reasonable—constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent's right to equal protection of the law.[104]

Third, the trial court erred by failing to direct the jury to consider the reasonableness of Wanrow's act from Wanrow's perspective, "seeing what [s]he sees and knowing what [s]he knows."[105] Not only did the Supreme Court recognize the importance of the individual defendant's perception, but it also understood the importance of social factors in that perception:

> The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's "long and unfortunate history of sex-discrimination." . . . Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.[106]

A number of other courts have recognized the appropriateness of the individualized approach when battered women assert claims of self-defense. In *People v. Giacalone,*[107] for example, the Michigan Supreme Court reversed a trial court ruling that had prevented the defendant, a battered woman, from presenting evidence about the cir-

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[104] *Id.* at 240, 559 P.2d at 558–59.

[105] *Id.*, 559 P.2d at 557.

[106] *Id.* at 240–41, 559 P.2d at 559.

[107] 242 Mich. 16, 217 N.W. 758 (1928).

cumstances surrounding her fatal shooting of her husband.[108] The trial judge had refused to admit evidence "of threats made by deceased to defendant shortly before the shooting, of assaults made by him upon her, of her physical injuries, and of his brutal and violent treatment of her for some time prior to the event in question."[109] The trial court's exclusion of evidence was based on the absence of an overt act by the deceased toward the defendant at the immediate time of the killing.[110] However, as the Michigan Supreme Court noted, the defendant reasonably believed that the deceased's earlier threats were still in force.[111]

In *Easterling v. State,*[112] the Oklahoma Criminal Court of Appeals recognized that the particular physical attributes of an individual defendant might justify her use of a dangerous weapon to repel an unarmed attacker.[113] The defendant, a battered woman, had used a pocket knife to fend off her common-law husband, after he had grabbed her by the hair, beat her about the head, choked her, and threatened to kill her.[114] While the trial court had instructed the jury that no person has the right to use a deadly weapon to repel "a simple assault without weapons,"[115] the appellate court held that the jury instruction had "denie[d] the accused the plea and right of self-defense, which the evidence on her behalf tended to establish."[116] The appellate court said:

> There may be such a difference in the size of the parties involved or disparity in their ages or physical condition which would give the person assaulted by fists reasonable grounds to apprehend danger of great bodily harm and thus legally justified in repelling the assault by the use of a deadly weapon. *It is conceivable that a man might be so brutal in striking a woman with his fists as to cause her death.*[117]

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[108] *Id.* at 22, 217 N.W. at 760.
[109] *Id.* at 19, 217 N.W. at 759.
[110] *Id.*
[111] *Id.* at 22, 217 N.W. at 760.
[112] 267 P.2d 185 (Okla. Crim. App. 1954).
[113] *Id.* at 188.
[114] *Id.* at 187.
[115] *Id.*
[116] *Id.* at 189.
[117] *Id.* at 188 (emphasis added).

Easterling suggests that a battered woman may have a particular need for a rule of self-defense that allows a jury to compare the deceased's and the defendant's sizes and strengths. Application of the equal force rule without reference to the physical disparities between an aggressor and his victim may make it almost impossible for a battered woman to prove that her use of a lethal weapon was an act of self-defense.

Despite the individualized treatment recognized in some cases involving battered women who have claimed self-defense, individualization has neither been pervasively nor consistently incorporated into the law of self-defense. Most courts, following traditional norms and legal rules, have refused to recognize it; others apply it only in part.[118] Judicial modification of the "reasonable man" standard to the person's own perspective and of rules governing admission of evidence of individual circumstances has been the exception, not the rule.[119]

IV. USING THE INDIVIDUALIZED APPROACH DURING TRIAL

If women are to achieve equality in court, they must be allowed to present to juries evidence about their perspectives and about the circumstances of their acts of self-defense. The relevance of these individual perspectives and circumstances must also be incorporated into jury instructions.

A. Admission of Evidence

The jury can understand the defendant's perceptions only if evidence revealing those perceptions is admitted. Both lay and expert witnesses can provide relevant evidence.

1. Lay Evidence

The defendant should be allowed to present evidence that she and the deceased had contact before the homicide, and that the prior con-

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[118] *See* State v. McMillian, 223 La. 96, 64 So. 2d 15 (1953).

[119] Fletcher, *Individualization, supra* note 46, at 1299.

tact influenced her evaluation of the situation at the time of the killing. Evidence of threats or earlier acts of violence by the deceased and of his reputation for violence is crucial to the jury's understanding of the circumstances of the act and the defendant's perceptions.

Such evidence has been admitted by some courts. In *Cook v. Gisler*,[120] for instance, the Washington Supreme Court said that a woman's past experiences with her husband should be considered by the trier of fact.[121] The Washington Court of Appeals suggested in another case that a battered woman claiming self-defense in a homicide trial was denied due process when she was prevented from placing before the jury evidence of "all the surrounding circumstances which had occurred during the several months preceding the slaying."[122]

2. Expert Testimony

Expert testimony has sometimes been useful in helping jurors understand the circumstances of the act. An expert may also be able to focus the attention of the trier of fact on its own sex-biased attitudes by answering unarticulated questions about whether the woman provoked the violence and why she submitted to beatings. Experts can testify about characteristics of battered women in general or about the make-up of the individual battered woman defendant. The expert in *State v. Hutto*[123] was a psychologist who could testify about both.

In *State v. Thomas*,[124] the Ohio Court of Appeals held erroneous the trial court's refusal to admit the testimony of the defendant's expert witness:

> Where a woman charged with murder of her spouse presents evidence of an ongoing battering situation and asserts self-defense as justification for the homicide (in the absence of expert testimony on the unique psychological state of the battered woman) a jury would be unable to properly con-

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[120] 20 Wash. 2d 677, 582 P.2d 550 (1978) (action to quiet title to a home owned by the deceased and his wife, who claimed she had shot him in self-defense).

[121] *Id.*

[122] State v. Crigler, 23 Wash. App. 716, 719, 598 P.2d 739, 741 (1979).

[123] No. 79-GS-10-453 (Charleston County Ct. of Gen. Sess., S.C. Apr. 20, 1979).

[124] No. 37171 (Cuyahoga County Ct. of C.P., Ohio June 20, 1978).

> sider the self defense claim, since it would not have a sufficient comprehension of the defendant's state of mind at the time of the homicide. Expert testimony in such a case is critical to an understanding of the defendant's state of mind at the time she committed the homicide and as to the reasonableness of her act.[125]

In *Ibn-Tamas v. United States*[126] the District of Columbia Court of Appeals remanded a murder case because the trial court had failed to state an appropriate ground for excluding expert testimony.[127] The trial court had been concerned that the expert witness, a clinical psychologist, would invade the province of the jury by speaking to the ultimate issue of whether the defendant reasonably believed she was in danger when she committed the homicide or by addressing "matters which 'the jury itself is just as competent' to consider."[128] The appellate court stated that the witness would have supplied background information and an interpretation of the facts different from the lay interpretation presented by the prosecution.[129]

Despite the recognition in *Ibn-Tamas* and *Thomas* of the value of expert testimony dealing with battered women in general, expert testimony not clearly tied to the individual woman defendant's circumstances and perspective should be used with care. Such testimony may suggest to the trier of fact that there is a "battered woman's syndrome" defense, which could encourage sexual stereotyping. Thus, the use of expert witnesses is often prudently foregone, especially where the defendant is credible and articulate.[130]

B. Jury Instructions

Jury instructions must focus the jury's attention both on the woman defendant's circumstances and on her perspective. Some

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[125] *Id.* (slip opinion at 23).

[126] 407 A.2d 626 (D.C. App. 1979).

[127] *Id.* at 632–40.

[128] *Id.* at 632.

[129] *Id.* at 632–34.

[130] *E.g.*, State v. Childers, No. S78-69 (Benton Cir. Ct., Ind. Dec. 14, 1978); State v. Gibbs, No. 969-77 (Middlesex Cir. Ct., N.J. May 17, 1979). In both cases attorneys with the Women's Self-Defense Law Project decided not to use expert testimony because they believed that the juries would react negatively to experts and because the women were strong witnesses.

instructions have focused juror attention on past circumstances that affected the woman's appraisal of the imminence of danger.[131] Instructions have also directed the jury to consider not only size and strength differences between the woman and her assailant but also differences in socialization and access to training.[132]

In other cases, courts have instructed juries to consider women defendants' perspectives in evaluating self-defense claims. In *State v. Allan,*[133] the court instructed the jury to use as a standard what the woman of ordinary intelligence and prudence would have done in the circumstances faced by the defendant at the time of the alleged offense. Instructions that direct the jury to consider the imminence of harm as it appears to the woman have also been given.[134]

CONCLUSION

Sex bias in the law of self-defense prevents battered women asserting self-defense claims from receiving full and fair consideration by juries. The male assumptions contained in legal doctrine and the manifestation of those assumptions in court rulings on exclusion of evidence and jury instructions deny to women an opportunity equal to that of male defendants to present their claims of self-defense. A more individualized approach, which permits consideration by the trier of fact of the particular circumstances and perceptions under which a battered woman kills her assailant, will correct the sex bias in the law that disadvantages such women defendants.

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[131] *See, e.g.,* Jury Instructions in State v. Lemons, No. 78 CR 8654 (Rodingham Super. Ct., N.C. June 7, 1979); State v. Tallini, Crim. No. 78-5722 (Middlesex County Super. Ct., Mass. Mar. 30, 1979).

[132] *See* jury instructions in cases cited at note 131 *supra.*

[133] Nos. 77-4381 & 77-4382 (Middlesex County Super. Ct., Mass. Mar. 9, 1978).

[134] A jury instruction in State v. Lemons, No. 78 CR 8654 (Rodingham County Super. Ct., N.C. June 7, 1979), directed the jury to consider whether

> the circumstances as they appeared to Carole Lemons at the time were sufficient to create the belief in her mind that she was about to suffer death or great bodily harm. The necessity of taking the actions the defendant took may be either real or apparently necessary to her. It is for you the jury to put yourselves in place of the defendant, in order to see the point of view which he had at the time of the tragedy and view the conduct of the deceased Roger Lemons, with all its pertinent sidelights as Carole Lemons was warranted in viewing them.