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The Battered Wife Syndrome: A Potential Defense to a Homicide Charge

I. INTRODUCTION

Society has become increasingly aware of and concerned with the tragic results of marital and domestic violence. As a result of such violence and the concurrent breakdown of the family, there has been an increasing burden placed on law enforcement and welfare agencies.¹ Statistics grimly show that one-fourth of all murders are within the family unit and one-half of such murders involve husband-wife killings.² The wife is the victim in fifty-two percent of these killings.³

The incidence of wife beating is difficult to estimate because there are no separately recorded national or state statistics.⁴ Yearly estimates range from three to forty million separate incidents.⁵ While there are more police calls involving family violence than any other criminal activity, the FBI and other law enforcement experts consider wife beating to be the most under-reported crime in the country.⁶

The high incidence of marital violence should be a cause for concern among those in the legal profession, particularly those in the field of criminal law. This comment will initially attempt to give an overview of the manner in which the legal system is currently handling marital violence, particularly wife beating, and whether that method is effective. The next section will discuss

1. R. LANGLEY & R. LEVY, *WIFE BEATING: THE SILENT CRISIS* (1977) [hereinafter cited as LANGLEY & LEVY]. A study conducted in Chicago concluded that police calls involving family conflicts total more in number than all other criminal incidents combined. *Id.* at 5.

2. D. MARTIN, *BATTERED WIVES* 14 (1976) [hereinafter cited as MARTIN] (1973 statistics); Truninger, *Marital Violence: The Legal Solution*, 23 *HASTINGS L.J.* 259, at 259 (1971) [hereinafter cited as Truninger, 23 *HASTINGS L.J.* 259 (1971)] (1969 statistics).

3. MARTIN, *supra* note 2, at 14.

4. LANGLEY & LEVY, *supra* note 1, at 2.

5. Meyers, *Battered Wives, Dead Husbands*, *STUDENT LAWYER*, March, 1978, at 47 [hereinafter cited as Meyers, *STUDENT LAWYER*, March, 1978].

6. *L.A. Times*, March 5, 1978, Part II, at 6, col. 1. *But see The Battered Husbands*, *TIME*, March 20, 1978, at 69 (indicates that husband, not wife, beating should be considered the most unreported crime).

evidence indicating that self-help may be the most feasible remedy for battered wives to use against their husbands. This will be followed by a section exploring the current legal perspective on intra-familial homicide. The final section will analyze a potential defense for the battered wife who has killed her husband that recognizes the cumulative impact of the many beatings she may have suffered at the hands of her husband. This comment will discuss California law exclusively, except when otherwise indicated.

II. THE BATTERED WIFE IN THE CURRENT LEGAL SYSTEM

Old English Common Law doctrine permitted wife beating for correctional purposes.⁷ In early American law, this doctrine was modified to allow only beatings with a stick no larger around than a man's thumb.⁸ Prior to the Civil War, the courts expressed a reluctance to become involved in the chastisement of a wife by her husband. During the era marked by the passage of Married Women's Acts in several states, many wives began to accept more responsibility and exercise more freedom from their husbands' dominance.⁹ Although wife beating was prohibited by criminal sanctions, the doctrine of spousal immunity, which prevented the wife from taking private civil action against her husband, was not overturned in California until 1962.¹⁰ Still, it was not until 1975 that Section 5101 of the California Civil Code was repealed, ending exclusive recognition of the husband as the head of the family.¹¹

The private nature of the relationship between husband and wife continues to foster the reluctance of society to intervene on behalf of the wife in cases involving marital violence. Society's attitude toward wife abuse is about where it was ten years ago on child abuse.¹² It is still commonly felt that events happening in the privacy of one's home are not to be the concern of the general public, the police, or the legal system. In short, the public seems to care more for the protection of the right to privacy in the home than for the protection of the woman's right to be free from abuse.¹³

7. MARTIN, *supra* note 2, at 31.

8. *Id.*

9. LANGLEY & LEVY, *supra* note 1, at 38-39. Chapter three of this book gives a detailed social and legal history of wife beating.

10. *Self v. Self*, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962).

11. CAL. CIV. CODE § 5101 (West Supp. 1978) (repealed by 1973 Cal. Stats., c. 987, p. 1898).

12. LANGLEY & LEVY, *supra* note 1, at 7.

13. *Id.* at 158-59.

A battered wife first comes in contact with the legal system when she approaches the police and/or district attorney. The police, however, often lack the training to properly deal with the situation, or are trained to merely restore order, and avoid arrest and the filing of charges where possible.¹⁴ Among the reasons given for the reluctance of the police to become involved in domestic disputes are that, if arrested, an angry husband, released on bail, could return home to seriously injure the wife, and/or that the wife will fail to press criminal charges.¹⁵ It has been estimated that the wife will fail to press charges in approximately ninety-five percent of all incidents.¹⁶

The fact that the police are subject to a relatively high degree of danger in domestic disturbance calls provides another reason for police noninvolvement. Between 1965 and 1974, 149 officers were killed while responding to domestic disturbance calls.¹⁷ Twenty-seven percent of all police deaths resulted from responses to domestic violence.¹⁸ Recently, in Oakland and New York, there have been efforts experimenting with the creation of specialized units that handle domestic disturbances.¹⁹ Despite these and other efforts, the attitude of the agencies responsible for implementing the various legal provisions dealing with marital violence continues to be oriented toward nonenforcement.²⁰

A New York case recently gave indication of a potential change in the attitude of the legal system toward battered wives seeking redress through the system. In *Bruno v. Codd*²¹ dozens of battered wives were given the right to bring an action for declaratory and injunctive relief against the police department, probation department, and family court of New York City for failure to provide them with protection and assistance after they were assaulted by their husbands. The complaint alleged that (1) the police refused to arrest or assist in domestic disputes without the issuance of a protective order from the family court, (2) that probation officers failed to advise the wives of their immediate right to petition for

14. L.A. Times, Feb. 20, 1978, Part IV, at 8. col. 1.

15. Truninger, 23 HASTINGS L.J. 259 (1971), *supra* note 2, at 271.

16. *Battered Wives: Now They're Fighting Back*, U.S. NEWS & WORLD REPORT, Sept. 20, 1976, at 48 (Maryland statistics).

17. *Id.* (from 1974 Uniform Crime Report).

18. L.A. Times, Feb. 20, 1978, Part IV, at 1, col. 2.

19. Truninger, 23 HASTINGS L.J. 259 (1971), *supra* note 2, at 272.

20. *Id.* at 275.

21. 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (1977).

such protective orders, and (3) that family court clerks failed to give wives the necessary immediate access to judges.²² New York Supreme Court Justice Gellinoff stated, "For too long, Anglo-American law treated a man's physical abuse of his wife as different from other assault, and, indeed, as acceptable practice."²³ The court concluded that the battered wives are entitled to the same manner of protection owed to any citizen injured by another's assault.²⁴ This case offers new hope to the battered wife in need of assistance from the legal system.²⁵

III. CURRENT STATUTORY REMEDIES AVAILABLE TO THE BATTERED WIFE

A. Criminal Assault and Battery

The battered wife that has been able to obtain assistance from the police and district attorney may find some protection in the criminal statutes available for her to use against her husband. Criminal assault²⁶ and battery²⁷ are punishable by fines not exceeding five hundred²⁸ and one thousand²⁹ dollars, respectively, and/or up to six months in the county jail. The punishment for assault with a deadly weapon or with force likely to produce great bodily injury is a fine not exceeding the sum of five thousand dollars and/or from two to four years in the state prison or up to one year in the county jail.³⁰ However, the effectiveness of the penalties for simple assault and battery is significantly reduced by their misdemeanor status. A prerequisite for an arrest for any misdemeanor is that the act occur in the presence of a police officer or that a complaint be sworn out by the victim in the district attorney's office. Thus, prosecution of these crimes has been hampered by the improbability of police presence at a beating, by

22. *Id.* at 1048, 396 N.Y.S.2d at 976.

23. *Id.* at 1048, 396 N.Y.S.2d at 975.

24. *Id.* at 1050, 396 N.Y.S.2d at 977.

25. *But cf.* Hartzler v. City of San Jose, 46 Cal App. 3d 6, 120 Cal. Rptr. 5 (1975). The court concluded that, in a wrongful death action, the California Tort Claims Act gave absolute immunity from tort liability to a public entity when its police department failed to promptly respond to a wife's request to come to her residence to protect her from her husband, who later killed her. Despite a finding that the police responded twenty times previously and arrested the husband once for assault, the court concluded that the police did not induce the wife's reliance on a promise to provide protection, which would have abrogated their immunity. *Id.* at 10, 120 Cal. Rptr. at 7.

26. CAL. PENAL CODE § 240 (West 1970).

27. *Id.* § 242.

28. *Id.* § 241 (West Supp. 1978).

29. *Id.* § 243.

30. *Id.* § 245(a).

the wife's fear of reprisal, or by her lack of knowledge of the availability of these statutory remedies.

B. *The Peace Bond*

The peace bond³¹ is a quasi-criminal³² remedy that is similar to a restraining order. It requires that a husband put up five thousand dollars as a security and deterrent against further abuse of his wife. If he fails to post such a bond he may be sentenced to a prison term.³³ However, current thought indicates that an indigent husband may object to this measure as an unconstitutional violation of his right to equal protection if he were to be incarcerated solely because of an inability to pay.³⁴

The peace bond can act as a deterrent keeping the husband from beating his wife by incarcerating him and/or fining him, but it may be a disadvantage to the family by reducing income during the husband's imprisonment or by depleting the available family funds to pay a fine or bond premium. In situations involving poverty-stricken families, the wife may choose to endure the beatings rather than forego the money needed to sustain her family.

C. *Felony Wife Beating*

Presently, California is one of the few states treating wife beating as a felony. "Any husband who willfully inflicts upon his wife corporal injury resulting in a traumatic condition is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison, or in the county jail for not more than one year."³⁵ As a felony, this provision in the California Penal Code authorizes a police officer to make an arrest based on probable cause without actually witnessing the beating. However, the requirement that there be "corporal injury resulting in a traumatic condition" would appear to indicate that a simple assault of the wife will not result in a felony arrest of the husband. Indeed, in *People v. Burns*³⁶ the court allowed instructions defining "cor-

31. *Id.* § 706 (West 1970); see also 22 CAL. JUR. 3d *Criminal Law* § 3046, at 181 (1975).

32. *In re Way*, 56 Cal. App. 2d 814, 133 P.2d 637 (1943).

33. CAL. PENAL CODE § 707 (West 1970).

34. See Truninger, 23 HASTINGS L.J. 259 (1971), *supra* note 2, at 266.

35. CAL. PENAL CODE § 273.5 (West Supp. 1978). Although this statute was added by 1977 Cal. Stats., c. 908, p. 2694, § 2, the felony of wife beating has been codified since 1945 in former CAL. PENAL CODE § 273d.

36. 88 Cal. App. 2d 867, 200 P.2d 134 (1948).

poral injury" as the "touching of the person of another against his will with physical force in an intentional, hostile and aggravated manner, or projecting of such force against his person."³⁷ In light of the controversy surrounding the meaning of the word, "traumatic",³⁸ the *Burns* court consolidated several definitions ultimately recognizing that trauma would be found where there was an abnormal condition of the body caused by external violence, such as a wound or injury. In order to apply the wife beating statute, one writer indicates that nothing short of visible bruises and injuries would suffice.³⁹

The felony charge may also have a detrimental effect on the family in as much as the financial problems resulting from the higher bail and longer periods of imprisonment will, in borderline cases, impose more serious hardships than the misdemeanor charges discussed above. Furthermore, the husband may be more willing to contest a felony charge, thereby exacerbating an already strained and violent marital relationship.

D. Civil Remedies

With the abolition of spousal immunity,⁴⁰ the wife may now maintain a civil action for assault and battery⁴¹ against her husband. Again, however, the fear of private retaliation is likely to inhibit the employment of this private remedy.

Another civil remedy, that of a protective or restraining order,⁴² is available primarily to wives who have decided to divorce their husbands. An ex parte order can enjoin a husband from disturbing his wife and can exclude him from the family dwelling where there is a showing that physical or emotional harm may result. Unfortunately, the procedure that must be followed to obtain and enforce such an order is cumbersome and ineffective. The retention of an attorney, the expensive filing fees and costs, and time-consuming petitions, hearings, and contempt procedures may take up more time and money than the wife can afford. In addition, the husband may be incited to further abuse his wife throughout the entire process preceeding the issuance of a contempt citation or restraining order. The willful disobedience of a court order is classified as a misdemeanor,⁴³ which can be en-

37. *Id.* at 873, 200 P.2d at 137.

38. *Id.* at 874, 200 P.2d at 138.

39. Truninger, 23 HASTINGS L.J. 259 (1971), *supra* note 2, at 263.

40. *See*, note 10 *supra*, and accompanying text.

41. CAL. CIV. CODE § 43 (West 1954).

42. *Id.* § 4359 (West Supp. 1978).

43. CAL. PENAL CODE § 166(4) (West 1970).

forced only if the conduct constituting contempt transpires in the presence of a police officer.

Divorce is often considered an undesirable step for many battered wives. Logically, it would appear that a permanent separation would provide the easiest way to avoid further incidents of abuse. There are, however, several reasons why the battered wife is reluctant to take such a final step. They include: (1) a poor self-image; (2) a belief that the husband will reform; (3) economic hardship; (4) the need of the children for their father's economic and emotional support; (5) the wife's apprehension about surviving on her own; (6) a belief that divorce is stigmatized; (7) the difficulty for women with children to find work; (8) the shame and fear involved in making the abuse known to friends and relatives; and (9) a continuing love for the husband.⁴⁴

IV. SELF-HELP: A NEW REMEDY FOR THE BATTERED WIFE

Statistics from the National Commission on the Cause and Prevention of Violence indicate that women commit fewer homicides than men, but when they do kill they are more likely to kill their husbands than any other category of person.⁴⁵ Other homicide statistics indicate that many wife-beating husbands end up in the morgue.⁴⁶ The accumulated frustration that a wife encounters in attempting to resolve her dilemma will often drive her to take the law into her own hands.⁴⁷

Recently, the attention of the public has been focused on battered wives who have killed their husbands and sought to defend themselves in the subsequent murder trial with the assertion that their conduct was justified by their prior record of beatings.⁴⁸ This defense has enjoyed mixed success⁴⁹ as a mitigating factor

44. LANGLEY & LEVY, *supra* note 1, at 114.

45. MARTIN, *supra* note 2, at 107.

46. LANGLEY & LEVY, *supra* note 1, at 196.

47. See Meyers, *STUDENT LAWYER*, March, 1978, *supra* note 5, at 47. The author states that over a single weekend three Chicago women shot their husbands to death claiming that years of merciless beatings forced them into the act. A survey of Cook County Jail found forty percent of all women held for homicide were accused of killing their husbands or boyfriends after being beaten by them.

48. See *A Killing Excuse*, *TIME*, November 28, 1977, at 108 [hereinafter cited as *TIME*, Nov. 28, 1977].

49. See *Santa Ana Register*, May 11, 1978, Part A, at 2, col. 1. A Detroit woman who claimed she was a battered wife drew a ten to twenty year sentence for the second degree murder of her husband whom she set on fire and clubbed with a baseball bat. See also *L.A. Times*, Jan. 10, 1978 Part I, at 2, col. 4. A Bremerton,

in the murder trial of a battered wife. In Waupaca, Wisconsin, Jennifer Patri ordered a twelve-gauge shotgun after repeated threats by her abusive husband. A month later, during an argument, she shot him in the back and head, buried his body in a nearby smokehouse, and set the house on fire.⁵⁰ Her prosecution for first degree murder resulted in a manslaughter conviction,⁵¹ after she gave evidence of repeated physical abuse. She was sentenced to the maximum ten year term because the sentencing judge thought that "[p]robation would unduly depreciate the seriousness of this crime."⁵²

There are other instances where an established record of beatings has proven to be a major factor in the acquittal of a battered wife who has killed her husband. In Lansing, Michigan Francine Hughes killed her sleeping husband by igniting gasoline that she had poured around his bed. The introduction of evidence demonstrating years of repeated physical abuse led the jury to acquit her on a finding of temporary insanity.⁵³ In Orange County, California Evelyn Ware entered a plea of self-defense after shooting her abusive husband five times. The jury absolved her of guilt after considering evidence of habitual beatings⁵⁴ and disregarded a judicial instruction on manslaughter. In Shasta County, California the judge in a non-jury trial ruled that Wanda Carr was innocent of the murder of her husband after she testified that he repeatedly attacked her over an extended period of time.⁵⁵ Mrs. Carr stated that she shot her husband when she "felt" that he was about to attack her again.

V. CURRENT LEGAL CONCEPTS ON HUSBAND-WIFE HOMICIDE

Can the current concepts and standards in criminal homicide be adequately applied to the battered wife who kills? Must a new and different conceptual approach be created to handle this problem? This comment will briefly look at the present state of homicide law in California, and then turn to an exploration of the potential for expanding the "cumulative effect" theory as a defense for battered wives who kill.

Washington woman was convicted for the second degree murder of her husband of twenty years. She received the mandatory five to twenty year sentence, even though her supporters claimed she was the ultimate example of the battered wife. She remained free without bond, pending appeal.

50. *TIME*, Nov. 28, 1977, *supra* note 48, at 108.

51. Santa Ana Register, Feb. 23, 1978, Part A, at 2, col. 5.

52. *Id.*

53. *TIME*, Nov. 28, 1977, *supra* note 48, at 108.

54. *Id.*

55. L.A. Times, Dec. 10, 1977, Part I, at 34, Col. 1.

A. *Excusable Homicide*

Homicide, in California, is excusable in the following two circumstances:

1. When committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.
2. When committed by accident and misfortune, in the heat of passion, upon sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.⁵⁶

The essential element of an excusable homicide is "accident and misfortune." Otherwise, the act is regarded as either murder or manslaughter, depending on the circumstances.⁵⁷ Generally, there is no finding of accidental death in the situation where a battered wife kills her husband. In most situations of this nature, excusable homicide is not an appropriate defense.

B. *Justifiable Homicide*

A more feasible defense for the battered wife who kills her husband is a plea of justifiable homicide.

Homicide is also justifiable when committed by any person in any of the following cases:

1. *When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,*
2. *When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,*
3. *When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily harm, and imminent danger of such design being accomplished . . .*⁵⁸

At first glance, it would appear that the statute making wife beating a felony,⁵⁹ when coupled with the statute making homicide justifiable while defending oneself against one harboring felonious intent,⁶⁰ would create a reasonable defense for the battered wife. *People v. Jones*⁶¹ dispelled this notion by asserting

56. CAL. PENAL CODE § 195 (West 1970).

57. 20 CAL. JUR. 3d *Criminal Law* § 1763, at 284 (1975).

58. CAL. PENAL CODE § 197 (West 1970) (emphasis added).

59. *Id.* § 273.5 (West Supp. 1978).

60. *Id.* § 197 (West 1970).

61. 191 Cal. App. 2d 478, 12 Cal. Rptr. 777 (1961).

that the rule creating justifiable homicide is limited to preventing the commission of felonies involving a danger of great personal harm.⁶² "In creating the statutory felony of wife beating the purpose of the legislature was not to issue a license for a wife to kill her husband."⁶³ The *Jones* court concluded that the marital status should foster an additional reason to forego a resort to homicide.⁶⁴ *Jones* indicated that a battered wife, in apprehension of another personal assault by her husband, is not justified in resorting to homicide, despite the felonious and threatening nature of his act. The legislative provision for punishment of the crime prevented is an incorrect test to use in determining if the homicide is justifiable. The character of the crime and its manner of perpetration are the only appropriate tests to use.⁶⁵

Self-defense can be employed by the wife to justify the killing of her husband. Unlike excusable homicide, an intent to kill does not destroy this defense.⁶⁶ In order to justify a killing committed in self-defense, the danger defended against must have reasonably appeared to exist at the time of the homicide. A belief that the danger was about to come into existence, or that it would exist at some time in the future, is insufficient.⁶⁷ This limitation diminishes the availability of the defense to a frustrated and battered wife who kills her husband at a time when there is no present danger of abuse, or to a wife who kills in revenge or to prevent further beatings.

The concept of self-defense is based on a reasonable appearance of impending and immediate peril of death or serious bodily injury.⁶⁸ As long as the wife acts on a reasonable and honest belief that she is in danger of immediate serious bodily harm, the danger need not be real, but can be apparent.⁶⁹ The California Penal Code customarily applies the reasonable man standard in a determination of whether a person's fear of imminent danger is sufficient to justify the killing of another.⁷⁰ A subjective standard

62. *Id.* at 481, 12 Cal. Rptr. at 780.

63. *Id.* at 482, 12 Cal. Rptr. at 780.

64. *Id.*

65. *Id.*

66. 20 CAL. JUR. 3d *Criminal Law* § 1777, at 298 (1975).

67. *People v. Lucas*, 160 Cal. App. 2d 305, 310, 324 P.2d 933, 936 (1958). A wife who had been choked by her husband two to three times a month for the past five years shot her unarmed husband five times after he made repeated threats to her. Although indicted for murder, the jury found her guilty of manslaughter. *See also* *People v. Taylor*, 4 Cal. App. 3d 37, 87 P. 215, 218 (1906).

68. *People v. Beyea*, 38 Cal. App. 3d 176, 190, 113 Cal. Rptr. 254, 262 (1974).

69. *People v. Wyatt*, 22 Cal. App. 3d 671, 679, 99 Cal. Rptr. 674, 679 (1972).

70. "But the circumstances must be sufficient to excite the fears of a reasonable man, and the party killing must have acted under the influence of such fears alone." CAL. PENAL CODE § 198 (West 1970).

evaluating the perceptions of the particular individual cannot be properly used.⁷¹ The application of the reasonable man standard would require a reasonable person in the same situation to be in fear of imminent danger before anyone would be entitled to resort to homicide in self-defense. However, there is no reason why a finding of self-defense should not consider the mental state of a reasonable person who has suffered repeated previous beatings at the hands of the victim. It could be argued that a reasonable person in such a circumstance may react to signs of imminent danger more quickly than one who has never been beaten by a spouse before.

The character of the victim is a material consideration in a determination of whether the battered wife is justified in a self-defense killing of her husband. The wife, claiming self-defense, may initially attempt to show that the dangerous nature of her husband's character, known to her at the time of the killing, created an apprehension of danger in her.⁷² "[T]he law recognizes the well-established fact in human experience that the known reputation or character of an assailant as to violence and turbulence has a material bearing on the degree and nature of apprehension of danger on the part of the person assaulted."⁷³ The California Evidence Code specifically allows for the admission of evidence of the victim's character in the form of opinion, reputation, or specific instances of previous conduct to prove conduct in conformity with such character.⁷⁴ After presenting evidence of prior beatings at the hands of her husband the battered wife should be able to maintain a strong claim of self-defense based on the apprehension of an imminent danger caused by her husband's otherwise trivial or seemingly innocuous conduct.

C. *Murder vs. Manslaughter*

If the wife is unable to get an acquittal based on a defense of excusable or justifiable homicide,⁷⁵ she still has an opportunity to have the killing mitigated to homicide of a lesser degree. Mur-

71. *People v. Cisneros*, 34 Cal. App. 3d 399, 418, 110 Cal. Rptr. 269, 282 (1973).

72. B. WITKIN, *SUMMARY OF CALIFORNIA LAW*, *Cal. Evid.*, § 333, at 294 (2d ed. 1966).

73. *People v. Brophy*, 122 Cal. App. 2d 638, 647, 265 P.2d 593, 599 (1954); *see also* *Annot.*, 1 A.L.R.3d 571 (1965); *Annot.*, 64 A.L.R. 1029 (1929) (both deal with the use of the victim's character as evidence in a self-defense situation).

74. CAL. EVID. CODE, § 1103(1)(a) (West Supp. 1978).

75. CAL. PENAL CODE § 199 (West 1970).

der⁷⁶ in the first degree⁷⁷ is punishable by death or confinement in the state prison for life with or without the possibility of parole.⁷⁸ Murder in the second degree, which includes all murders not of the first degree,⁷⁹ is punishable by imprisonment in the state prison for five, six, or seven years.⁸⁰ Manslaughter,⁸¹ voluntary or involuntary, is punishable by imprisonment in the state prison for two, three, or four years.⁸² Absent a production of mitigating evidence by the prosecution, the defendant has the burden of proving mitigating circumstances.⁸³

Malice, a requisite to murder, is found where one deliberately commits an act likely to cause injury or death to another, or where wanton disregard for human life is exhibited.⁸⁴ Premeditation and deliberation may be found where one reflects on the course of action he or she is taking prior to proceeding to commit the homicide. It is possible for a person to premeditate, deliberate, and intend to kill his victim and still be guilty of only voluntary manslaughter if the act lacks the required element of

76. "Murder is the unlawful killing of a human being . . . with malice aforethought." *Id.* § 187 (West Supp. 1978).

77. All murder which is perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288 [committing lewd or lascivious acts upon the body of a child under 14] is murder in the first degree. . . .

Id. § 189.

78. *Id.* § 190.

79. *Id.* § 189.

80. *Id.* § 190.

81. Manslaughter is the unlawful killing of a human being without malice

. . .

1. Voluntary—upon a sudden quarrel or heat of passion.

2. Involuntary—in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

. . . .
Id. § 192 (West 1970).

82. *Id.* § 193 (West Supp. 1978).

83. Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof of the part of the prosecution tends to show that the crime only amounts to manslaughter, or that the defendant was justifiable or excusable.

Id. § 1105(a).

84. *People v. Sedeno*, 10 Cal. 3d 703, 722-23, 518 P.2d 913, 923-24, 112 Cal. Rptr. 1, 13-14 (1974); *People v. Fusselman*, 46 Cal. App. 3d 289, 299, 120 Cal. Rptr. 282, 288 (1975).

MALICE DEFINED. Such malice may be expressed or implied. It is express when there is a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

CAL. PENAL CODE § 188 (West 1970).

malice.⁸⁵ The battered wife who can sustain the burden of producing evidence showing that she lacked malice when she killed her husband will face only the punishment for voluntary manslaughter.

One way to show that malice was lacking is by proving that the killing was done upon a sudden heat of passion.⁸⁶ Passion need not be rage or anger; it may be any violent, intense, or enthusiastic emotion.⁸⁷

[T]he fundamental of inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed by some passion [as would naturally be aroused in the mind of an ordinary reasonable person under the given facts and circumstances]—not necessarily fear and never, of course, revenge—to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than judgment. . . . And this heat of passion may result from terror as well as anger and jealousy. . . . [I]t is not alone the fear of great bodily injury which will reduce homicide to the grade of manslaughter.⁸⁸

If the battered wife's record of repeated beatings is deemed adequate to provoke a reasonable person to strike back with an intent to kill, but without the abandoned and malignant heart of implied malice,⁸⁹ the homicide should only be viewed as voluntary manslaughter.

One problem that battered wives encounter with the use of the "heat of passion" defense is that there may have been a cooling off period between the husband's last provocation and the subsequent killing. The wife may wait several hours, perhaps days, after a beating before seizing an opportunity to kill her husband. Cooling time is measured by a standard evaluating what a reasonable person would have done under like circumstances.⁹⁰ An excessively long waiting period may prevent the wife from using heat of passion as a mitigating factor. However, the court in *People v. Berry*⁹¹ required a voluntary manslaughter instruction to be given where the heat of passion was generated by a long course of provocatory conduct, even though there was a twenty hour cool-

85. *People v. Fusselman*, 46 Cal. App. 3d 289, 299, 120 Cal. Rptr. 282, 288 (1975); see also *supra* note 81 for the statutory definition of manslaughter as homicide without malice. See also R. PERKINS, PERKINS ON CRIMINAL LAW 52 (2d ed. 1969).

86. CAL. PENAL CODE § 192(1) (West 1970).

87. *People v. Borchers*, 50 Cal. 2d 321, 329, 325 P.2d 97, 102 (1958).

88. *People v. Logan*, 175 Cal. 45, 49, 164 P. 1121, 1122-23 (1917).

89. CAL. PENAL CODE § 188 (West 1970); see text at note 84 *supra*.

90. *People v. Golsh*, 63 Cal. App. 609, 617, 219 P. 456, 459 (1923).

91. 18 Cal. 3d 509, 556 P.2d 777, 134 Cal. Rptr. 414 (1976) (involved a husband who strangled his unfaithful wife).

ing off period prior to the actual killing.⁹² It might, therefore, be reasonable to assert that the cumulative effect of a series of provocative events may sustain a finding of manslaughter on the theory that there is a continuing heat of passion followed by a period in which there is no appreciable cooling off.

In *People v. Conley*⁹³ the court held that a showing of diminished capacity, as established by the *Wells-Gorshen*⁹⁴ rule, could also demonstrate a lack of malice required for murder. According to California case law, the term, "diminished capacity" is used to refer to an inability to achieve the state of mind necessary for the commission of the crime and a lack of such capacity need not amount to insanity.⁹⁵ The *Conley* court stated that "[i]t has been long settled that evidence of diminished mental capacity, whether caused by intoxication, *trauma*, or disease, can be used to show that a defendant did not have the specific mental state essential to an offense."⁹⁶

If the capacity of a person is so diminished as to indicate a lack of both malice and intent, the killing can only be construed as involuntary manslaughter.⁹⁷ If it can be shown that a record of prior beatings caused a "traumatic" condition in a battered wife and the condition diminished her capacity to harbor malice, she should be convicted of nothing more than manslaughter. It has been noted in many instances that a battered wife who kills her husband has a good argument for such a "diminished capacity" defense, even though she appears quite normal after the killing.⁹⁸

VI. THE "LAST STRAW" DEFENSE FOR THE BATTERED WIFE WHO KILLS

While there is very little case law on the subject, a few decisions have recognized the cumulative effect that a string of provocative acts can have on an individual. In *People v. Borchers*⁹⁹ the jury found the defendant guilty of the second degree murder

92. *But cf.* Meyers, *STUDENT LAWYER*, March, 1978, *supra* note 5, at 48. The author quotes some attorneys as taking a position in support of the statement: "To in any way advocate, even tacitly, that someone should use deadly force at any other time than the time when the wife is in immediate danger, to allow a time lag, would be to condone murder."

93. 64 Cal. 2d 310, 318, 411 P.2d 911, 916, 49 Cal. Rptr. 815, 820 (1966).

94. *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949); *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959).

95. *McGuire v. Superior Court*, 274 Cal. App. 2d 583, 595, 79 Cal. Rptr. 155, 161 (1969).

96. 64 Cal. 2d at 316, 411 P.2d at 914, 49 Cal. Rptr. at 818 (emphasis added).

97. *People v. Rupert*, 20 Cal. App. 3d 961, 970, 98 Cal. Rptr. 203, 207 (1971).

98. Meyers, *STUDENT LAWYER*, March, 1978, *supra* note 5, at 48-49.

99. 50 Cal. 2d 321, 325 P.2d 97 (1958).

of his mistress, but the superior court judge reduced the verdict to manslaughter, concluding that the defendant did not have the required malice. Although he was found to be sane, the cumulative effect of his mistress' infidelity, her suicidal thoughts, her urging of him to shoot her, her child, and himself, and her taunting just prior to the killing caused the defendant to shoot her in the back of the head.¹⁰⁰ The evidence, viewed in a single context, was sufficient for the court to conclude that "defendant was roused to a heat of 'passion' by a series of events over a considerable period of time."¹⁰¹

In *People v. Berry*, previously mentioned as a case that required manslaughter instructions after a showing of a long course of provocatory conduct by the victim, the defendant's testimony indicated that the victim's repeated abusive conduct transpired over a two week period.¹⁰² Psychiatric testimony was admitted to show that, as a result of a cumulative series of provocations, the defendant was in a state of uncontrollable rage and completely consumed by the heat of passion.¹⁰³ Although the prosecution argued that the twenty hour period prior to the killing should have been sufficient for the defendant to cool off, the court concluded that the provocation reached the culmination point immediately before the killing, when the victim began screaming.¹⁰⁴ This was sufficient to create the potential "heat of passion" defense.

In *Commonwealth v. McCusker*,¹⁰⁵ the Pennsylvania Supreme Court allowed the admission of psychiatric evidence showing that the defendant acted in the heat of passion in the killing of his wife, reversed a conviction of second degree murder, and granted a new trial. Although the court recognized that provocation is based on an objective standard, it also concluded that "[i]n making the objective determination as to what constitutes sufficient provocation reliance may be placed upon the cumulative impact of a series of events."¹⁰⁶

The convictions given in another cases indicate that the triers of fact may have taken the record of prior beatings suffered by the

100. *Id.* at 326-27, 325 P.2d at 102.

101. *Id.* at 328, 325 P.2d at 102.

102. 18 Cal. 3d 509, 515, 556 P.2d 777, 780-81, 134 Cal. Rptr. 415, 418 (1976).

103. *Id.* at 514, 556 P.2d at 780-81, 134 Cal. Rptr. at 418.

104. *Id.* at 516, 556 P.2d at 781, 134 Cal. Rptr. at 419.

105. 448 Pa. 382, 292 A.2d 286 (1972).

106. *Id.* at 389, 292 A.2d at 290.

wife into consideration in reaching a verdict. In *People v. Lucas*,¹⁰⁷ the appellate court concluded that the evidence warranted a conviction of a greater offense; yet the jury found the battered wife guilty of mere manslaughter for killing of her husband. In *People v. Jones*,¹⁰⁸ the defendant wife was convicted of manslaughter instead of murder after she testified to numerous prior beatings. In *People v. Welborne*,¹⁰⁹ a battered wife was convicted of voluntary manslaughter, instead of murder, after shooting her husband four times with a twenty-two caliber rifle. Although she had an apparent intent to kill, the decedent's drinking, belligerent behavior, and physical abuse of his wife were sufficient to place her in a highly emotional state and mitigate the killing to manslaughter.¹¹⁰

In this type of domestic situation, it may be argued that an otherwise inadequate provocative act should be viewed as the proverbial "straw that broke the camel's back." As an example, it is generally recognized that mere threatening or insulting words or gestures provide insufficient reason to reduce murder to manslaughter.¹¹¹ However, if a battered wife can show that her beatings are preceded by verbal abuse and insults from her husband, evidence of the husband's abusive nature¹¹² and the cumulative effect of prior beatings should be given considerable weight in determining whether she has reached a state of sufficient passion to mitigate the homicide to manslaughter. Taunts of cowardice¹¹³ and screaming verbal abuse¹¹⁴ by the victim have already been viewed as sufficient provocation to kill, and have resulted in a finding of manslaughter. Threats by the husband to kill the wife, which have caused her to kill him first, have also resulted in a finding of manslaughter.¹¹⁵

The battered wife syndrome can often create a situation where the "cumulative effect" or "last straw" defense could be applied. While problems may remain regarding the application of the reasonable man standard to an evaluation of either the "heat of passion" condition or the existence of a cooling off period, it must be remembered that the reasonable person is to act as if he or she

107. 160 Cal. App. 2d 305, 310, 324 P.2d 933, 936 (1958); see text at note 67 *supra*.

108. 191 Cal. App. 2d 478, 479-80, 12 Cal. Rptr. 777, 779 (1961).

109. 242 Cal. App. 2d 668, 51 Cal. Rptr. 644 (1966).

110. *Id.* at 671-72, 51 Cal. Rptr. at 646-47.

111. *People v. French*, 12 Cal. 2d 720, 744, 87 P.2d 1014, 1026 (1929); *People v. Dixon*, 192 Cal. App. 2d 88, 91, 13 Cal. Rptr. 277, 279 (1961).

112. See text at note 73 *supra*.

113. *People v. Borchers*, 50 Cal. 2d 321, 329, 325 P.2d, 97, 102 (1958).

114. *People v. Berry*, 18 Cal. 3d 509, 516, 556 P.2d 777, 781, 134 Cal. Rptr. 415, 419 (1976).

115. *People v. Jones*, 191 Cal. App. 2d 478, 479, 12 Cal. Rptr. 777, 778 (1961); *People v. Lucas*, 160 Cal. App. 2d 305, 307, 324 P.2d 933, 934 (1958).

was acting in the battered wife's situation. Triers of fact may find that an environment of repeated verbal and physical abuse could cause the reasonable person to be caught up in the heat of passion, whether it be fear, desperation, or rage, for a longer period than it would normally take him or her to cool off in another environment.

VII. CONCLUSION

The current legal system, with its statutory remedies, has been slow to recognize and solve the increasingly prominent problems of marital and domestic violence. The incidence of wife beating is found in all classes, races, and socio-economic groups¹¹⁶ and should be a cause for concern to all of society. The lack of utilization of the currently available remedies has largely been due to society's preference for noninvolvement in domestic matters. Current remedies also fail inasmuch as they are often financially and socially impractical for the battered wife. An increasing social awareness of marital and domestic violence should help to create a greater degree of responsiveness from the legal system, making it easier for the battered wife to receive assistance.

The current criminal legal concepts relating to homicide make allowances for mitigating factors that will reduce the punishment given to one who kills. There is authority recognizing the cumulative effect of prior provocative events that culminate in a homicide. Evidence of repeated verbal and physical abuse should be viewed as a valuable component in the battered wife's defense. The emotional stress and strain caused by repeated abuse may allow the battered wife to justifiably resort to violence as an expedient resolution of the problem facing her more quickly than would otherwise be allowed. While society cannot condone an intentional killing, evidence of the battered wife syndrome, with the resulting cumulative heat of passion, may reasonably be used to reduce the punishment for such an act.

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116. LANGLEY & LEVY, *supra* note 1, at 43.

