Legal Alternatives for Battered Women Who Kill their Abusers

JOEL DVOSKIN, M.A.*

Recently, attention has been focused on battered women who kill their abusers. This paper will discuss the current tendency of American juries to find such women justified. Throughout the discussion references will be made to the following hypothetical case:

> Mrs. X had been married to Mr. X for ten years. She was 28 years old and the mother of three young children. During their ten years of marriage, Mr. X had beaten his wife at least once a month; lately the beatings had increased in frequency (to about once a week) and severity. Mrs. X generally hid her bruises out of shame and embarrassment. However, on five occasions she called the police for help. On each occasion the police came to the home, found things had calmed down, and left, refusing to arrest the husband. Mr. X was much larger physically than his wife, and worked full-time, providing all of the family income. Mrs. X maintained the home and raised the children. She had no marketable job skills.
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> The week in question had been particularly violent for the X family. Mr. X had beaten his wife four days in a row. On Wednesday night he came home intoxicated and without a word began to beat her brutally. He then lay down on the couch, saying, "I've got more of the same for you when I get up." Mr. X then fell asleep. His wife grabbed a kitchen knife and stabbed him, causing his death.

What crime, if any, did Mrs. X commit? Was the homicide excusable or justifiable? Should she be punished?

Clearly Mrs. X is a sympathetic, tragic figure. Her defense lawyer could reasonably expect a sympathetic jury to acquit his client. His task, then, is to be sure that his case reaches the jury. This paper will deal with all of the elements of the hypothetical case, attempting to answer each question in terms of current law.

We will conclude that it is arguable that Mrs. X acted in self-defense. Whether the jury believes the self-defense argument depends upon Mrs. X's perceptions and whether or not the jury regards them as reasonable.

It is the purpose of this inquiry to pose the appropriate legal issues. Some will be fairly resolved only when additional data are collected about family violence. One hopes that this paper will suggest specific questions to which

*Mr. Dvoskin is a Ph.D. candidate in Clinical Psychology at the University of Arizona. Address reprint requests to him at 2725 N. East Gate Dr., Tucson, AZ 85712.

future researchers can address themselves.

An Historical Perspective

The feminist movement of today is fighting a long tradition of subjugation of women, especially in the institution of marriage. Just how long a tradition is a matter for debate, but as Elizabeth Cady Stanton observed in 1895, it was a tradition explicitly set forth in the Bible nearly two thousand years ago:

> The Bible teaches that woman brought death and sin into the world, that she precipitated the fall of the race, that she was arraigned before the judgment seat of heaven, tried, condemned and sentenced. Marriage for her was to be a condition of bondage, maternity a period of suffering and anguish, and in silence and subjection she was to play the role of a dependent on man's bounty for all her material wants, and for all the information she might desire on the vital questions of the hour, she was commanded to ask her husband at home. Here is the Bible position on woman briefly summed up . . . .[1]

Religion continued its role of supporting such degradation on into the middle ages. "Men were exhorted from the pulpit to beat their wives and wives to kiss the rod that beat them. . . . The deliberate teaching of domestic violence, combined with the notion that women by nature could have no human rights, had taken such a hold by the late middle ages that men had come to treat their wives worse than their beasts."[2]

The consummate threat to this tradition, and the threat to which it rose with horrifying violence, was husband-murder. Consider the case of young Anna Whale. In 1752, this 21-year-old woman was burned alive in England. She was accused of "the most heinous crime of all in masculist eyes – complicity in the death of her own husband." Anna Whale was an innocent young girl who was so brutally treated by her husband that a neighbor, Sara Pledge, protested and pleaded with the husband to treat Anna less violently. This only made the husband more angry and brutal toward Anna. Wife-torture being no crime, Sara decided to take matters into her own hands. A few days later Mr. Whale suddenly died. The suddenness of the death and the common knowledge that Anna had good reason to wish her husband dead aroused the suspicion of the local coroner. His examination revealed large amounts of arsenic in the body of the deceased. So, on August 14, 1752, Anna Whale was burned alive at the stake, suffering an agonizing, undeserved death. For Sara Pledge had admitted murdering Mr. Whale unassisted, Sara was sentenced to death by hanging. She was spared the torture suffered by Anna Whale because the victim had not been *her* husband.[3]

The abuse of this vast power over women was a subject of concern to John Stuart Mill, who decried the unfortunate state of women in the late nineteenth century:

> The power [of men over women] is a power given not to good men, or to decently respectable men, but to all men: the most brutal, the most criminal . . . the vilest malefactor has some wretched woman tied to

him, against whom he can commit any atrocity except killing her – and even that he can do without too much danger of the legal penalty. How many men are there who . . . indulge the most violent aggressions of bodily torment towards the unhappy wife who alone of all persons cannot escape from their brutality; towards whom her very dependence inspires their mean and savage natures, with a notion that the law has delivered her to them as their *thing,* to be used at their pleasure . . . The law compels her to bear everything from him . . . Even though it be his daily pleasure to torture her, even though she feels it impossible not to loathe him, he can claim from her and enforce the lowest level of degradation of a human being: that of being the instrument of an animal function against her wishes.[4]

In 1865, Mill had been elected to Parliament and was ready to champion the rights of women. "A petition was prepared, and in 1867 Mill proposed in Parliament that the word 'man' be omitted from the People's Bill and the word 'person' be substituted. The amendment was rejected, 196 to 83."[5] Clearly, the rights of women was not a popular cause in nineteenth century England.

Similar limitations of human rights existed in the United States from its beginnings. Black slaves were not the only Americans to be treated as less than equals, even by so great a libertarian as Thomas Jefferson, who commented:

> Were our state a pure democracy, there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men.[6]

Lest American women should suffer from uncertainty about their ordained role, the United States Supreme Court obliged them with a concise and certain statement of woman's role in America in 1872, when it affirmed an Illinois regulation barring women from admission to the bar solely on the basis of sex. In so doing, the Court took upon itself the task of interpreting not only the Federal law, but the *divine* law as well:

> . . . [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the creator.[7]

In *State v. Rhodes,*[8] the subject of wife-beating is dealt with clearly, and the result is a clear victory for the privacy and sovereignty of the family. Justice Reade described family government as being as complete in itself as the state government, though subordinate to it, and ruled that the State will not interfere in the family unless there is permanent or malicious injury. He

went on to say that a husband cannot be convicted of battery upon his wife for moderate correction without provocation. Let it be added in Justice Reade's defense that at least this view applies equally to both sexes, as he says that the courts would be equally loath to interfere where a wife beat her husband. Still, the point remains that under the rule a beaten spouse would have no recourse under the law until such time as his wounds were permanent or malicious.

Later, the North Carolina court strongly reiterated the doctrine of non-interference in domestic matters, but it changed the standard so that even where no actual harm was produced, a woman was to be protected from "malicious outrage or dangerous violence." In that case a man had been restrained by neighbors while attempting to stab his wife with a large knife.[9] Again the court was saying that it had no desire to decide whether wife-beating was right or wrong; only that the court did not want even to know about it unless it was of a certain magnitude and severity.

For centuries, the common law notion had been that a wife could not sue unless she was joined by her husband,[10] a concept which rendered it impossible for a woman to sue her husband to recover damages from a battery. By 1910 the District of Columbia, like most states, had given wives the right to sue separately, at least in some cases.[11] Despite this new statute, in *Thompson v. Thompson,*[12] the United States Supreme Court went back to the language of *Rhodes* in holding that a wife could not sue her husband to recover damages from an assault and battery. Once again, the Court cited the inadvisability of opening up the curtains of domesticity to the sharp eyes of public scrutiny. This reluctance to extend the emancipation of the American woman as a separate legal entity from her husband to the field of personal torts against him was predicated on a belief that such litigation would "consume in an instant the conjugal bond, and bring on . . . an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty and murders."[13] Clearly the courts were unwilling to relinquish an idealized vision of the American home as a place of peace and productivity.

The Current Situation

Such has been the history of the rights of women. Of course, in our modern enlightened age such legal positions are assumed to be relics of days long past. But such notions die hard. It was not until 1962, for example, that the State of California ruled that a woman can sue her spouse for damages resulting from an assault and battery.[14] More generally, American judges have been evaluated as to various types of sex discrimination, and according to the research of two law professors, have been found wanting: ". . . by and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable."[15] The courts are not the only ones who have sought to draw the curtain on domestic violence. Until the 1970s, there was virtually no professional literature on domestic violence.[16]

As in the courts, the lack of willingness to shatter the image of the ideal American home is ubiquitous in America. The home is assumed to be both a refuge from the outside world and a vehicle for perpetuating the values of society through the production and training of new members.[17] Similarly,

the members of the family have been idealized *via* a variety of myths and assumptions about the various roles of husband, father, son, daughter, and mother. The social role most strongly dictated by these myths and assumptions, however, has been that of the woman in marriage – the wife:

> In our day, social custom restricts the independence of both spouses more firmly than do legal injunctions, yet both types of restrictions fall more heavily on women than men in several particulars. First, there is the matter of marriageable age . . . Second, a woman customarily changes her name for that of her husband upon marriage . . . Third . . . in most states when a woman marries, her husband's domicile automatically supercedes her own.[18]

The institution of marriage is thus one which by its very nature has served to deprive the women entering it of certain social and legal rights. Not only has this been an Anglo-American tradition, but, according to the United Nations Commission on the Status of Women, it is true in a great number of countries:

> In the field of private law an unmarried woman generally enjoys the same rights as a man. Marriage, however, has in a great number of countries the effect of depriving the woman of a great number of important rights, personal rights as well as property rights. This is due to the fact that, traditionally and for centuries, the husband has been considered as the head of the family, vested with the exercise of marital and parental authority, over the person and over the property of his wife and children.[19]

The preceding cases and quotations expose an American pattern of attitudes which has led to a tacit condonation of wife-battery. The traditional Biblical view of a woman's role in marriage and a general willingness to perpetuate an idyllic image of the family have combined to blind judges as well as psychologists, lawyers as well as sociologists, legislators as well as the press, prosecutors as well as police; and, worst of all, to blind American women themselves to the stark reality that women may be less safe in their homes than they are in the streets.[20]

There is enormous difficulty in determining the incidence of wife-beating in America. A Delaware study compared reports of marital violence in the general population with a random sample of 57 families. The magnitude of underreporting shown by this study suggests that only about 1 out of 270 incidents of wife-beating is ever reported to the authorities.[21] Predictions by Gelles and Straus have estimated that the number of couples who experience marital violence may be as high as 50-60% of American couples.[22]

Keeping in mind the vast degree of underreporting of home violence, some police and FBI statistics become even more provocative. In St. Louis, a husband or wife was found to be the victim of a spouse in 11% of all aggravated assaults.[23] Gelles concludes from various studies that familial assaults constitute perhaps 20 to 25% of all aggravated assaults.[24] In homicide, the figures are equally imposing. The FBI reports that 27% of all

homicides in 1976 were within the family.[25]

Palmer found that in 1960, 29% of all murders were intrafamilial.[26] Martin reports Kansas City police statistics from 1971 which show an astonishing 40% of all homicides to be interspousal. Ironically, in almost 50% of these cases, police had been summoned five or more times within a two-year period before the murder occurred.[27]

Despite the long legal, Biblical, and cultural tradition which tends to condone wife-beating, the law has long since abandoned the reasoning in *Rhodes* and has rejected the corporal punishment of wives by their husbands. The Alabama Supreme Court explicitly rejected a husband's right to strike his wife, except in self-defense.[28] In Mississippi, the husband's right to inflict corporal punishment upon his wife is rejected, even if it is done in moderation for purposes of correction.[29] The Colorado Supreme Court cut deep to the heart of the notion of the wife's being the possession of her husband by holding that husbands have no right to use physical force to control the acts and wills of their wives.[30] In Kentucky, mere provocation or disobedience does not justify the infliction of corporal punishment by a husband against his wife.[31] Neither will a wife's failure to contribute to the peace and happiness of the home be considered justification for corporal punishment.[32]

In essence, American courts have ruled that there is no justification for a husband's committing assault and battery on his wife. Such assault and battery is a crime, notwithstanding the marriage relation.[33] In short, the battered wife is, under American law, the victim of a crime – specifically assault and battery – just like any other victim of that same crime.

Some of these wives have responded with violence. Specifically at issue are women who kill their battering husbands. Kathleen Begley of the Chicago *Daily News* has noted a trend in America whereby judges are finding women who kill their abusive husbands justified. "The basic change is not the number of women killing husbands or assailants but the number of juries that are voting that such homicides are justifiable."[34]

Murder and Manslaughter

Before turning to the various justifications for homicide, one must look to the courts and statutes for a definition of the varieties of murder:

1) Intent-to-kill murder
2) Intent-to-do-serious-bodily-injury murder
3) Depraved heart murder, and
4) Felony murder.[35]

For the purpose of this inquiry we will focus only on intent-to-kill and intent-to-do-serious-bodily-injury murders, for those are the two crimes likely to be committed by abused women who strike back at their husbands. Two elements are required for each of these crimes. The first is an act (or omission) and the second is intent.[36] Intent to kill must ordinarily be inferred from the circumstances surrounding the act that caused death. "One is presumed to intend the natural and probable consequences of his acts."[37] For example, use of a weapon may justify a presumption of an intent to kill.

Even in such a clearcut case, however, the defendant is still free to argue to the jury an alternative inference from his use of a weapon.

The battered wife who shoots or stabs her sleeping husband has clearly fulfilled the first requirement of intent-to-kill murder by performing an act which resulted in the death of her husband. As to the question of intent, La Fave distinguishes between intent as desiring a certain result and the mere knowledge of a nearly certain result of the act.[38] It could be reasonably argued that while such a woman clearly has knowledge that her husband's death would result from her stabbing or shooting him, she may not have desired this result. Her desire, she may argue, was for him to stop beating her. In any event, the revised Federal Criminal Code and the Revised Arizona Criminal Code have both eliminated the distinction. Both now require either intention (desired result) or knowledge (of a nearly certain result).[39]

Clearly, our hypothetical husband-killer has satisfied the two requirements for intent-to-kill murder of her husband, in that she has knowingly acted in such a way as to cause the death of her spouse. One must now look to the question of degree (in most jurisdictions), which hinges on premeditation.[40] Premeditation can be conceptualized in three ways. The first is demonstrated in two Pennsylvania cases. This view essentially renders meaningless the distinction between first and second degree intent-to-kill murder. The essential difference between first and second degree murder, under *Commonwealth v. Carroll,* is that murder in the first degree requires only specific intent to take the life of another human being.[41] Since intent is a general requirement of intent-to-kill murder, this view would see all intent-to-kill murders as being in the first degree. Further, it was held in *Commonwealth v. Tyrrell* that the intent may be inferred from the intentional use of a deadly weapon upon a vital part of the body of another human being.[42]

The second view of premeditation might be termed the quantitative view. This view is represented by a California case which directly refuted the holding in *Carroll,* saying that a mere intent to kill is not the same as a deliberate and premeditated intent to kill.[43] Under this view, the jury is instructed that an appreciable time is required between formation of intent to kill and the act, but the jury is allowed to decide the issue of exactly how long a time is required. It is clear that no specific length of time is required under this view, but the time must be long enough for the act to become deliberated and premeditated.[44]

The third view might be termed the qualitative view, and is represented by two California cases that reaffirm the legislative intention to differentiate between first and second degree murder.[45] *People v. Anderson* also refuted the holding in *Carroll,* asserting that if premeditation were construed as requiring no more reflection than mere intent to kill, the legislative classification of murder into two degrees would be meaningless.[46] Likewise, *People v. Wolff* required more understanding and comprehension than was necessary for the mere intent to kill.[47]

This view goes further than the quantitative view. Not only is the time required to be sufficient, but also what goes on during the interval must be considered. Premeditation requires a cool mind capable of reflection.[48] *Wolff* held that in determining degree of murder, a court must consider the extent

to which the defendant could maturely and meaningfully reflect upon the gravity of his act.[49]

Further, it is not enough that there were time and the capacity to reflect. In fact, it must be shown that the accused did in fact deliberate, at least for a short time, before the act of killing.[50] This requirement is crucial, since the capacity to premeditate and deliberate can be prevented by emotional upset,[51] by intoxication, by feeble intellect, or by terror.[52] Thus, it is appropriate to introduce evidence showing that, following the latest in a long series of beatings, and given the overwhelming probability of subsequent beatings, our hypothetical husband-killer would experience terror sufficient to prevent her use of any intervening time to deliberate. Further, although we can presume intent from the use of a weapon, there is no presumption of premeditation and deliberation. The prosecution must introduce affirmative evidence of these factors in order to sustain a conviction for first degree murder.[53]

The Model Penal Code proposes to do away entirely with degree distinctions, on the theory that there are an infinite number of types of murder, each with a gravity of its own. The Model Penal Code suggests as an alternative a series of aggravating and mitigating factors to be used in assessing punishment for murder.[54]

Where the prosecution fails to prove premeditation, the killing will be murder in the second degree in states using the degree distinction, unless the act falls into the category of manslaughter. The principal circumstances constituting manslaughter are that the accused was in a state of passion at the time of the act and that the state of passion was engendered by reasonable provocation by the victim.[55] Although the defense must raise evidence of such provocation in order to reduce the crime from murder to manslaughter, the burden is typically on the prosecution to prove lack of such reasonable provocation beyond a reasonable doubt in order to sustain a charge of murder.[56] The passion required is usually rage, but may be other types of emotional state such as terror[57] or "wild desperation."[58] Provocation has been a more problematic concept. LaFave conceptualizes reasonable provocation as provocation which would cause a reasonable man to lose his normal self-control – not to the point where a reasonable man would kill, but at least to where a homicidal reaction is understandable.[59] Further, the act must have come before a reasonable person would have had time to cool off, even if the accused is of a temperament which made him unable to cool off in such time.[60] How long a time should be required is generally a question for the jury to decide[61] from the circumstances of the case, such as the extent to which passions were aroused and the nature of the act which aroused the passions.[62]

Such are the crimes our husband-killer will be accused of committing. We now turn to the issues of excuse, justification and mitigation – that is, defenses.

Defenses

What defenses will be permitted to reduce or avoid liability for harm done? What conditions will excuse, justify, or mitigate otherwise criminal behavior?[63] This section will look to the subject of defenses, as specifically

relating to the woman who kills her abusive husband.

Six defenses are, on their faces, particularly relevant to this inquiry. Provocation and passion have already been treated in the section of this paper dealing with manslaughter. The other five will be treated separately in this section. They are insanity, duress, necessity, prevention of crime, and self-defense.

INSANITY

The first defense to be discussed is insanity. In several ways, this is a unique defense. Unlike other defenses, which when successfully asserted result in acquittal of the defendant, a successfully pled insanity defense will result in a special verdict – not guilty by reason of insanity – which is usually followed by the accused's being committed to a mental institution.[64] An equally negative consequence of this defense is the fact that "characterization of a man as insane is stigmatic – sometimes even more stigmatic than the charge of being a criminal . . . ." [65] Thus insanity is different from other defenses, and is in many ways very much like a substantive offense in itself.[66]

At this point, a general discussion of insanity is in order. As was pointed out earlier, commission of murder requires both act and intent. One who suffers from insanity of the requisite kind and degree during the commission of an offense is incapable of entertaining the necessary criminal intent.[67] Such a person cannot be held criminally responsible or punished,[68] although many regard the commitment which often follows as punishment.* The law requires not that the defendant show complete loss of his facilities,[69] but only that he demonstrate mental illness which rendered him unable to form the required criminal intent.[70] The accused must also show that the insanity existed at the time of the commission of the act charged?[71]

Four tests have been used to determine the requirements for an insanity defense. Most commonly employed has been the "M'Naghten test," which comes out of the 1843 case of Daniel M'Naghten.[72] A jury found M'Naghten not guilty of murder. The House of Lords, in reaction to this verdict, put certain questions to the judges. Their answers, rather than the case itself, became the "M'Naghten rule," which required that "at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong."[73]

Regarding the wife who kills her abusive spouse, it is clear that the conditions in our hypothetical do not support a finding of not guilty by reason of insanity under *M'Naghten.* As will be shown in the section on self-defense, such a woman is responding to her *reasonable* perception of her situation. She reasons thusly: "My only alternative to suffering a serious battery when my husband awakens is to kill him." That premise will

*In some jurisdictions, commitment is mandatory. Such a practice is, however, constitutionally questionable on both due process and equal protection grounds. The view in most jurisdictions is that commitment is to be ordered only if it is found that the defendant's insanity continues or that the person is dangerous. LaFave, *supra,* p. 317-322.

logically lead to killing her abusive spouse.

If the jury finds her original premise to be reasonable, then, as will be shown, no crime has been committed under the doctrine of self-defense. If the jury finds her basic premise to be unreasonable (there is no requirement for accuracy, only reasonableness), then the woman is guilty of either murder or manslaughter.

Further, the woman in our hypothetical case is suffering from no disease of the mind. It is likely that she has both an intellectual as well as a moral awareness that it is wrong to kill, even though her terror and the perceived necessity of the act may prevent her from attending to the rightness or wrongness of the act. At any rate, her possible lack of attention to right or wrong in that situation would be due not to a disease of the mind, as the M'Naghten rule requires, but to immediate environmental stimuli.

What exactly is a "mental disease or defect?" The definition has never been clear or consistent. It seems that the required mental state might include any mental abnormality, be it psychosis, neurosis, organic brain disorder, or intellectual deficiency, so long as it has caused an inability to know the nature and the quality of the act and to know that the act was wrong.[74] The only disorder likely to result from the circumstances of our hypothetical would be neurotic depression, which is accompanied by no thought disorder or reality-testing difficulties.

The judges in *M'Naghten* also discuss persons laboring under "partial delusions," and hold them to be responsible for their acts only "as if the facts in respect to which the delusions exist were real."[75] This rubric will likewise fail to include the woman of our hypothetical case, even if the jury were to find her perception of her lack of alternatives to be grossly inaccurate; for an insane delusion is held to be an "unreasoning and incorrigible belief in the existence of facts which are at least impossible under the circumstances of the individual . . . and it [an insane delusion] is not to be confounded with an opinion, even where the opinion results from hasty conclusions from incomplete data."[76] Clearly, under *M'Naghten,* which is the predominant rule in the United States,[77] the insanity defense is inappropriate for the purpose of our hypothetical. The next test is used in some United States jurisdictions to supplement M'Naghten,[78] and has been called the "irresistible impulse" rule.[79] It applies to a person whose mental disease kept him from controlling his conduct. Two arguments reject its applicability to our hypothetical case: (1) the mental disease requirement runs into the same difficulties as under *M'Naghten*, and (2) it would be easy to show that having endured numerous similar prior beatings, the woman had shown an ability to control her conduct by refraining from killing.

Two other insanity tests remain. The "Durham" test[80] provided that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. This test, however, has been overruled in the District of Columbia, and is no longer a viable test.[81]

The last insanity test is that adopted by the American Law Institute in its Model Penal Code. Under that test, a person is not responsible for otherwise criminal conduct if, "as a result of mental disease or defect, he lacks substantial capacity to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law."[82] This

test likewise renders insanity inapplicable to our hypothetical case in its requirements of mental disease or defect.

Finally, there is the notion of "temporary insanity." Rather than being a separate doctrine, this notion is part and parcel of the requirement that insanity is at issue only at the time of the commission of the act. *Duthey v. State* states the law clearly:

> Nothing is more certain in the law than that the question of insanity as a defense to crime relates to the moment of the offense. . . However sane at all other times, if actually insane within the legal definitions at the time he committed the criminal act, he is not responsible.[83]

The key phrase in the above quotation is "insane within the legal definitions." This sends the analysis back to the insanity tests which have been shown to be inapplicable to the battered woman.

A summary of the insanity defense reiterates its inappropriateness as a defense for our hypothetical woman who murders her abusive husband. The primary failure of all four insanity tests is their common requirement that the accused suffer from some mental disease or defect.

NECESSITY AND DURESS

There is no sharp distinction between the necessity situation, prevention of crime, duress, and self-defense. In all four situations the defendant has a choice of either (1) permitting commission of the crime, thus suffering harm (in our hypothetical case, the crime to be committed is the infliction of harm upon the defendant) or (2) committing what would otherwise be a crime.[84]

Necessity is inapplicable to our discussion except perhaps where the woman reasonably fears for the life of someone else (*e.g.*, her child) in addition to her own.* Necessity differs from duress in that the pressure to act usually comes from physical forces of nature rather than from other human beings and is regarded as presenting the defendant with a choice of evils. The law prefers that the defendant avoid the greater evil by bringing about the lesser evil.[85] Unfortunately, this defense is unavailable to our hypothetical defendant, since it has been held that one who intentionally kills another to save himself is guilty of murder.[86]

Duress is also an inappropriate defense for our hypothetical defendant,[87] as it has been held unavailable where there was no offer to show that anyone demanded or requested that the defendant commit the crime in question.[88] Further, most of the statutes that exist on duress do not allow this defense where the crime is homicide.[89]

CRIME PREVENTION

The privilege to use force to prevent commission of a crime overlaps somewhat with the privilege of self-defense,[90] and where they do overlap, "the defendant is entitled to the benefits of both [defenses] if he acted for

*The Model Penal Code suggests applicability of necessity when a person intentionally kills one person to save two or more lives; thus the harm avoided must be greater than the harm which the defendant's action has occasioned.

both purposes."[91] The general rule is that a person can use whatever force (short of deadly force) appears to be necessary to prevent a crime[92] which he reasonably believes is being committed or is about to be committed.[93]

Under common law, when all felonies were punishable by death, deadly force was allowed in the prevention of any felony.[94] The modern rule, however, permits deadly force to be used only in the prevention of felonies involving violence or surprise.[95]

The crime prevention defense is clearly relevant to our hypothetical defendant. As a practical matter, however, it may be superfluous, in that a successful showing of crime prevention as a defense will usually establish self-defense, which is the most direct and powerful assertion of exculpability. There is, however, one possible reason that crime prevention could be a more attractive defense than self-defense. A perusal of cases dealing with crime prevention as a defense turned up no mention of imminence or immediacy. If there is no temporal requirement for this defense, then it may be a broader defense than self-defense.

SELF-DEFENSE

A person may use force to defend himself from an unlawful attack under certain conditions which will excuse his conduct on the grounds of self-defense. The requirements of this defense vary widely. One homicide case held the essential elements to be (1) that the defendant does not provoke the difficulty and (2) that there must be impending peril (3) without convenient or reasonable mode of escape.[96] Another homicide case required that (1) the slayer must not be the aggressor, (2) the slayer must retreat as far as is reasonable and safe . . . except when at his home or business, (3) the slayer must actually and honestly believe that he is in imminent danger of death, bodily harm, or some felony, (4) that it is necessary to take the life of his assailant to save himself, and (5) that the slayer had reasonable grounds for these beliefs.[97] The beliefs must be such as a person of average prudence would entertain under similar circumstances.[98] A person assailed may employ the right to defend himself from apprehended danger to any extent which to him was apparently necessary when he acted in a reasonable manner.[99]

The jury, then, is faced with some difficult determinations of reasonableness. The first of these is a reasonable apprehension of danger. In our hypothetical case we are dealing with more than mere threats, since the abusive husband has battered his wife on numerous occasions. Furthermore, his severe beatings are of the nature that were he in the course of beating his wife, there could be little doubt that he was placing her in fear of great bodily harm, or even for her life.[100] The difficulty there lies in the fact that at the time the woman acts, her husband has completed beating her (for the time being), threatened her with more beatings, and fallen asleep. How can a sleeping man present an imminent or impending threat? We must look to a definition of these terms. Imminent means threatening, menacing, perilous, or full of danger.[101] It was held in a murder case, on the issue of self-defense, that the accused is entitled to act as long as, from his standpoint, the danger is imminent, even though the act which demonstrates the imminence of danger was transpired.[102] In our hypothetical case, the woman's homicide is justifiable not on the basis of the last beating – then

the slaying would be revenge – but rather on the basis of the woman's reasonable perception of the promise of a future beating. The law recognizes the right of self-defense for the purpose of preventing, but not revenging, an injury to the person of the accused.[103] The last beating would merely serve to demonstrate the imminence of the danger.

Furlow v. State specifically distinguished "imminent" from immediate in a homicide case, defining "imminent" as meaning "mediate, rather than immediate," and reversing a conviction because the court's jury instruction on self-defense required that the danger be "immediate," rather than "imminent."[104] Although this still leaves room for interpretation as to the meaning of imminence, it is clearly room enough to get the question to the jury. In determining the reasonableness of the woman's fear of imminent or impending danger, "the jury should determine the question from the standpoint of the accused at the time he acted and under his surroundings at the particular instant of time and may also take into consideration threats, if made by the deceased against the accused."[105] An Arkansas case held that it is only necessary that the defendant honestly believed, without fault or carelessness, that killing was necessary to save his own life or prevent bodily harm, and it is not essential that the killing should appear necessary to the jury.[106] Many jurisdictions, however, use an objective "reasonable man" standard.[107] This "reasonable man" standard was attacked recently in *State v. Wanrow,* which held to be a violation of equal protection the persistent use of the male gender in self-defense instruction, holding that such instructions implied that a woman's conduct in defending herself be measured against that of a reasonable male.[108] Justice Holmes clearly supported the subjective test, rejecting the detached "man of reasonable prudence" test, by saying that "detached reflection cannot be demanded in the presence of an upraised knife."[109]

Even under the stricter objective "reasonable man" standard, one can make a convincing case for a reasonable belief of imminent and impending danger in our hypothetical case. A woman, beaten many times, has been promised more of the same. If the defendant can convince the jury that her fear of imminent or impending danger was reasonable, she must then satisfy the next requirement, retreat.

It is generally agreed that one need not retreat before using non-deadly force,[110] so the question of retreat becomes a problem only when deadly force is used in self-defense.[111] The jurisdictions are split on the question of retreat, but even in those jurisdictions which require retreat, the defendant need not retreat unless he knows he can do so in complete safety.[112] The battered woman fears reprisals for running to neighbors for help, for if she does manage to escape, her husband will often stalk her like a hunted animal.[113] Without money, the battered wife might be unable to flee to a hotel, and her calls to the police often worsen her plight. Consider the plight of Roxanne Gay, who says that sometimes when she called police after a beating from her pro-football player husband, the police ended up sitting around talking football with him.[114]

Another large exception to the retreat rule is that a person need not retreat from his home.[115] This is especially important to the battered woman, who is often advised *not* to leave her home, as in the following

quotation from *The Woman's Handbook:*

> . . . there are two golden rules that apply in housing matters to all women. First, stay in the home. Don't leave it if this is at all possible unless a solicitor advises you or a court orders you to do so. Possession is sometimes said to be nine-tenths of the law and it is certainly true that a woman in possession of a home is in a stronger position to assert

State v. McMillan, the court held that evidence of prior difficulties between the defendant and the victim was admissible to show the reasonableness of the defendant's fear of an impending attack or of suffering great bodily harm.[127] *State v. Wanrow* enlarges the scope of this ruling by allowing the defendant to justify her acts in light of all the facts and circumstances known to the defendant, even those known substantially before the killing.[128]

It seems likely that our hypothetical defendant can make an arguable case for self-defense. It is uniformly held that she must start matters by introducing some evidence of her defense, but the burden of disproving this defense falls on the prosecution. In light of *Winship's* requirement that the prosecution must convince the trier of all essential elements of guilt beyond a reasonable doubt as a matter of due process,[129] it is clear that the prosecution in our hypothetical must disprove self-defense beyond a reasonable doubt.

Why Does She Stay?

Having heard all of the preceding arguments, the jury must determine whether the defendant has acted in self-defense according to the law. In a general sense, one question might be left dangling in the minds of the jurors — "Why does she stay?" Of the many reasons women give for staying in abusive situations, the most common is fear.[130] Abused wives are usually so afraid of their husbands that they don't have the courage to flee.[131]

The battered woman has four primary needs. They are: (1) protection, (2) accomodation, (3) financial support, and (4) psychological support.[132] Although legal remedies to protect the wife from her abusive husband may exist in the abstract, such remedies may be difficult to obtain because of the opinions and attitudes of law officials. The battered wife might find barring her way the "stereotypical ideas of marriage, of appropriate behavior within marriage, and of marital violence which are held by the law officials with whom she must deal." An injunction to restrain the husband from assaulting his wife, or to force him to leave the home, might take as long as four days — potentially very dangerous days for the woman.[133] The procedure for obtaining a restraining order to be served on the husband is complex, expensive, and of questionable value. The woman must retain an attorney, fill out questionnaires, file petitions, and prepare herself for anxiety-provoking hearings. Once she finds out what is involved, the woman may decide to abandon the whole idea.[134]

Procedures and attitudes of police officers and courts often create a situation where, unless she gets killed, a battered woman gets minimal attention.[135] Police argue that they don't have time to deal with family disputes, since they need to attend to "more serious crime problems." The methods police have traditionally used to deal with domestic violence have been unsatisfactory in that no relief or assistance is provided for the individuals involved.[136]

Thus the first of the woman's primary needs, protection, is unlikely to be met if she leaves. If the husband in his anger chooses to carry out his threats, he will track her down, with his anger probably exacerbated by his wife's "rebellious" decision to leave.

Equally problematic to the woman seeking freedom from beatings is that she may have no place to go. Home is usually the place where people keep their clothing, checkbooks, food, money, and children.[137] Even if a woman leaves, she will likely return. A London survey of 100 battered women found that 81 of the women had left home and subsequently returned to further beatings. Forty-four of these women (over half) cited as their reason for returning either (1) their husband's threats of future violence, (2) safety of their children, or (3) lack of anywhere else to go.[138]

The typical inter-spousal violent situation is in the home, usually on a weekend during the evening or late evening. These facets of the situation contribute to a trapped feeling of having no place to go for both victim and offender. "If the bars are closed, or one's parents do not live nearby, and the family has few, if any, close friends to turn to, where does one flee to – especially women? In addition, the typical violent family is isolated from its neighbors through the violent family's own actions and through the neighbor's desire not to get involved."[139]

Of course, if the woman has children, her problems are all greatly intensified. It is one thing to ask a friend for a meal and a place to sleep – even on the floor – for a night or two. It is quite another to impose herself and perhaps several frightened children on a neighbor who is in little better financial shape than she is. How many households have enough space, clothing, and food for a second family? The abused woman has no idea how long it will be necessary to impose before she can safely go home or seek alternatives outside the home. Perhaps most inhibiting of all is the prospect of subjecting one's friends or neighbors to the wrath of the outraged husband.[140]

Finances are another seemingly insurmountable problem. Del Martin reports finding that violent husbands generally handle all the money, leaving the battered wife virtually penniless on her own.[141] Her immediate situation seems impossible – nowhere for her and her children to sleep, and no money with which to eat. Worse yet, even if she manages to solve these immediate needs, she will need to establish some system for supporting herself until she permanently resolves her situation. Ironically, public assistance likely will not be available because the woman ostensibly has a home to go to and a husband to support her and her children.[142] Earning a living poses its own difficulties, especially for women who have little in the way of job skills and higher education. The fewer such resources a woman has, the more likely she will feel "trapped" at home, and the less likely she will be to seek outside assistance or divorce after being beaten.[143]

The last of the four primary needs to be mentioned was psychological support. Again the irony is striking, for the person to whom tradition, society, the Bible, and the media dictate a woman should turn for support and succor has become the force from which she needs to escape. As one woman explained, "He, who was the cause of my despair, was the only available human being, the only person I felt close to."[144] In a society which has long fostered dependency in women, the prospect of being alone can be devastating.

If the woman has children and would like to leave, she is faced with two unpleasant alternatives. She can (1) leave her children home with a violent,

angry man whose only mode of hurting his wife is by hurting her children, or (2) she can try to cope with the life of the single parent.

A full discussion of the problems of the single parent is beyond the scope of this inquiry. However, a few words on the issue are in order. Single mothers are likely to feel overburdened by all of the decisions, tasks, and tensions of raising children. She will likely have little time to call her own. If she works, she will be faced with a lack of adequate child-care facilities and persistent earning differentials based on sex. With no one to take over the kids, the mother is faced with no escape. Her resulting anger will often strain relationships with her children. Discipline becomes a bigger and bigger problem. While on one hand the mother's anger makes her short-tempered, she may be reluctant to set limits for her children, due to her guilt.[145] The woman who has left home is likely to feel guilty because her kids now come from a "broken home." It is a devastating realization for the abused woman that in a very real sense her children's situation may have worsened by her decision to leave.

Conclusion

Under the law, it is arguable that a woman who kills her sleeping husband following one in a series of batteries may be justified as acting in self-defense. It is clear that she must show the jury that her intent was to prevent future beatings rather than to avenge previous ones. She must show that it was her *reasonable* perception that she had no safe alternative to suffering such future battery other than killing her spouse. (In most jurisdictions she has no duty to retreat from her own home.) Once again, the key element to such a defense is a lack of alternatives reasonably perceived. If a woman sees her choices as either killing her husband or suffering serious injury or death *via* battery, and if a jury finds this perception reasonable, it must find the woman not guilty. Certainly, in showing necessity, a woman who has called the police and gotten no help is in a much stronger position than a woman who merely doubted they would help her.[146]

Murder of their husbands is not a desirable avenue of escape for battered women. Is it not reasonable that they would welcome alternatives that would not only remove the necessity of their committing homicide, but would also remove the necessity of their suffering abuse of their persons in the first place? If the government wishes to criminalize such killing, it must remove the self-defense justification by providing real alternatives for abused women, and educate women about the existence of such alternatives.

Many suggestions have been published as to how such alternatives can be provided.[147] Murray Straus has summarized these exceptionally well, including broad sweeping societal changes, specific legal and policy changes, and personal changes women can make by and for themselves.[148] It is in all of our interests to create a climate whereby a woman will never again have to feel that homicide is her only way out of an abusive situation.

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