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Beyond the Battered Woman Syndrome:
An Argument for the Development of
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by Deborah Kochan*

In the past twelve years, feminist legal scholars and attorneys increasingly have mounted challenges to the law of self-defense. Beginning in 1977 with State v. Wanrow,¹ attempts have been made to modify the law of self defense to accommodate women's experiences. What has become known as women's self-defense work² is now an established part of both feminist litigation and legal literature. The courts most frequently have addressed issues of women’s self-defense in the context of battered women charged with killing men who battered them.

Although modifications to the law of self-defense have focused on accommodating the experiences of battered women who kill their abusers, these modifications have produced very few real gains in reflecting the needs and realities of battered women who kill. This comes as no surprise when one considers that the law continues to see women as men see women, because it is men who have shaped, defined, and interpreted the law. Professor Catharine MacKinnon has observed that one of our problems in using law as a tool for social change is that invoking law usually means having to fit a woman’s complaint, or understanding of an interaction or of an

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1. 88 Wash. 2d 221, 559 P.2d 548 (1977).

2. The term "women's self-defense work" has been used to describe legal work on issues of sex bias in the law of self-defense and criminal defenses generally. The term was first used as the name of a project jointly sponsored by the Center for Constitutional Rights and the National Jury Project.
injury, into existing legal definitions. These legal definitions, however, rarely have been crafted with women’s experience in mind, and they often do not match women’s experiences of harms.

Moreover, the principles and presumptions underlying these legal definitions often are overlooked. These principles and presumptions, created by and for men to reflect their experiences, continue to work against women, even when existing legal definitions are expanded. Thus, the need to go beyond simply expanding existing statutory or common law definitions has emerged from women’s self-defense work, as well as from the areas of sexual harassment, equality in the workplace, rape, and pornography. Professor Lucinda Finley aptly characterizes this need to go beyond simply expanding statutory and common law definitions as an "urgent project."

We must start to grapple with the nature of law itself, to understand the extent to which it is male defined, and the extent to which its language and its process of reasoning are built on male conceptions of problems and of harms—and on male, or epistemologically "objective" and "neutral," methods of analysis. . . . We must challenge standards of credibility that often make women’s accounts suspect because they do not comport with a conventional wisdom that was based on the invisibility of women’s experience and we must question the inclusiveness of the stance of legal reasoning . . . which privileges abstract analogic reasoning over experiential understandings . . . .

The extent to which those charged with implementing and applying the law continue to rely on existing underlying principles will be reflected in the degree to which the law continues to fail initially to protect women from harm, and to give women a fair trial when they must resort to self-help.

This Comment will discuss, in general terms, ways in which the law of self-defense fails to accommodate the experiences of women. This is not to say that the law fails all women in the same way, or


to the same degree. Nor does the law treat all men of all races and classes equally. Indeed, "[o]ur legal system rests on an ethnocentric, androcentric, racist, Christian, and class-based vision of reality and human nature, all of which makes it inherently flawed." Practically speaking, of course, these factors are intertwined, but for the purposes of this Comment, I will focus on the inherently sex-biased nature of the law.

Although I am limiting my examination of the law of self-defense to a discussion of its androcentric nature, the task of challenging the underlying principles and presumptions in the law of self-defense remains overwhelming. Not only must the law of self-defense be scrutinized, but all of the systems and influences that create and perpetuate the law also must be questioned. That men have controlled and defined knowledge is evidenced by the fact that their point of view is defined as "objective truth," and is at the heart of the legal system's failure to adequately protect women and to adequately represent women when women are forced to protect themselves. That even notions of moral reasoning and ethics have been formulated from a male perspective leaves one wondering where we should begin in our attempt to discover who women "are," much less how the law can truly and accurately reflect women's experiences.

This Comment evaluates the success of attempts to extend the existing law of self-defense to reflect women's experiences. I will argue that the law, as conceived and applied within the framework of an ethic of principles, limits our ability to treat women fairly and humanely in situations where a woman would feel compelled to defend herself with deadly force. In Part I, I discuss the traditional law of self-defense as derived from an ethic of principles. This ethic of principles is contrasted with an alternative view, a feminine approach to ethics—an ethic of caring. In Part II, I discuss attempts

5. Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3, 10 (1988). Professor Leslie Bender notes that the priorities and needs of women from various racial, cultural, and economic environments differ, even though we all feel the oppression of patriarchy. Although it is not enough for the law simply to recognize and accommodate broad distinguishing factors such as gender, that it has barely begun to accomplish even this is indicative of the inability of the law to accommodate factors such as race, culture and class.

6. See infra text accompanying notes 8-16.
to expand statutory and common law definitions of the law of self-defense through the use of expert testimony on battered woman syndrome. In Part III, I discuss the limitations of this approach and its ultimate failure, which result from conceptualization and application within the framework of an ethic of principles. In Part IV, I discuss the need for a reconceptualization of the law of self-defense. This reconceptualization, including the development and incorporation of a feminine approach to ethics, is necessary in order to counter the inherently male bias of the law--a law founded on an ethic of principles.

I

Traditional Law of Self-Defense as Founded on an Ethic of Principles

As lay persons, many of us have the notion that law is the vehicle through which justice is achieved. Although we understand that the law, by its mere existence, cannot guarantee that nothing "wrong" or "bad" will happen, we believe that at least to some extent, the law can "right" a "wrong" after the "wrong" has occurred. As a law student (if not before) one learns just how naive this perspective is. We read case after case, whether in criminal law, contracts, civil procedure, family law, or constitutional law, that illustrates that even supposedly correct application of the law can result in outcomes that are counter intuitive, unjust, and sometimes downright unconscionable. This is confusing particularly because the law, with all of its attendant moral reasoning and underlying presumptions, invariably is presented as "objective truth." When one understands that the law is built upon and sustained by an "ethic of principles," it becomes clear how the law can be so grossly inadequate as a vehicle for dispensing justice.

7. The term "objective" as it is used in the law is inherently misleading and confusing. By definition, the term is synonymous with unbiased, open-minded, and neutral. The law is full of so-called objective standards--standards created by and for men to reflect their experiences. By presenting these standards as objective (which is also, by the way, synonymous with the male-identified qualities "detached," "rational," and "reasonable") we create and perpetuate a framework in which an abstract principle is frequently more "relevant" than so-called subjective factors that describe the concrete situation at issue.
In her groundbreaking book, Professor Nel Noddings explores a view of ethics that begins with the moral attitude of longing for goodness, not with moral reasoning. She contrasts an "ethic of principles," which starts from the presumption that the basis of moral action is an altruism acquired by the application of rigid rules and principles, with an "ethic of caring," which starts from the presumption that the basis of moral action is caring and the memory of being cared for.

Ethics, the philosophical study of morality, has concentrated for the most part on moral reasoning. Ethical argumentation has frequently proceeded as if it were governed by the logical necessity characteristic of geometry. It has concentrated on the establishment of principles and that which can be logically derived from them. One might say that ethics has been discussed largely in the language of the father; in principles and propositions, in terms such as justification, fairness, justice.

An ethic of principles places principles (i.e., you can only kill if "necessary" to save your life, which is the exception to another principle: thou shalt not kill) above any set of subjective facts that corresponds to real people and real situations. Moral behavior is defined according to whether or not the principle has been violated, and if violated, whether the violation comes within another principle that circumscribes the exception.

A presumption also exists that moral principles are, by their very nature as moral principles, universifiable. Those whose circumstances are "different" are profoundly disadvantaged by this presumption. As Professor Noddings notes:

... the principle of universifiability seems to depend, as Nietzsche pointed out, on a concept of "sameness." In order to accept the principle, we should have to establish that human predicaments exhibit sufficient sameness, and this we cannot do without abstracting away from concrete situations those qualities that seem to reveal the sameness. In doing this, we often lose the very qualities or factors that gave rise to the moral question in the situation. That condition which makes the situation different and thereby induces genuine moral puzzlement cannot be satisfied by

9. Id. at 1.
the application of principles developed in situations of sameness.\textsuperscript{10} Thus, that which makes you or your circumstances different is excluded so that \textit{by definition} your behavior is classified as immoral and in violation of the law. The only way to be moral and lawful under the existing system is to behave as much as possible like those who made the standards and rules--men.

Professor Noddings contrasts the existing approach to moral reasoning--an ethic of principles--with a feminine approach to ethics--an ethic of caring. She argues that the feminine approach perceives human caring, and the memory of caring and being cared for, as the foundation of ethical response. According to Noddings ethical caring arises out of natural caring--that relation in which we respond as "one-caring"\textsuperscript{11} out of love or natural inclination. She identifies the relation of natural caring as the human condition that we, consciously or unconsciously, perceive as "good."

It is that condition toward which we long and strive, and it is our longing for caring--to be in that special relation--that provides the motivation for us to be moral. We want to be moral in order to remain in the caring relation and to enhance the ideal of ourselves as one-caring.\textsuperscript{12}

Noddings describes her work as "an essay in practical ethics from the feminine view."\textsuperscript{13} This does not imply that all women will accept it or that men will reject it; indeed, there is no reason why men should not embrace it. It is feminine in the deep classical sense--rooted in receptivity, relatedness, and responsiveness. It does not imply either that logic is to be discarded or that logic is alien to women. It represents an alternative to present views, one that begins with the moral attitude or longing for goodness and not with moral reasoning.\textsuperscript{14}

\textsuperscript{10} \textit{Id.} at 85.

\textsuperscript{11} Professor Noddings, in order to establish a firm conceptual foundation free of equivocation, uses "one-caring" and "cared-for" to identify the two parties of the relation. For the purposes of her work, relation is taken as ontologically basic and the caring relation as ethically basic. "Relation" is thought of as a set of ordered pairs generated by some rule that describes the affect--or subjective experience--of the members.

\textsuperscript{12} N. NODDINGS, \textit{supra} note 8, at 5.

\textsuperscript{13} \textit{Id.} at 3.

\textsuperscript{14} \textit{Id.} at 2.
Professor Noddings posits that women, in particular, approach moral problems by placing themselves in concrete situations and assuming personal responsibility for the choices to be made. They define themselves in terms of caring and work their way through moral problems from the position of "one-caring."

Professor Noddings distinguishes an ethic of principles from an ethic of caring in that an ethic of caring does not embody a set of universal moral judgments. She notes that morality typically has been explored through the consideration of moral judgments.

The long-standing emphasis on the study of moral judgments has led to a serious imbalance in moral discussion. In particular, it is well known that many women--perhaps most women--do not approach moral problems as problems of principle, reasoning, and judgment. If a substantial segment of humankind approaches moral problems through a consideration of the concrete elements of situations and a regard for themselves as caring, then perhaps an attempt should be made to enlighten the study of morality in this alternative mode.\footnote{15} Indeed, I will argue that an attempt should be made to enlighten the legal system in this alternative mode as well. As will be explored in more detail in Part IV, the law of self-defense, enlightened in this alternative mode, would proceed from a subjective approach. Instead of proceeding deductively from principles superimposed on situations, we would seek to gather as many facts as possible about the situation and about the individuals involved in a move toward concretization.

Professor Noddings asserts that an important difference between an ethic of caring and other ethics is its foundation in relation.\footnote{16} The recognition of and longing for relatedness forms the foundation of the ethic of caring. This distinction is especially interesting when examined in the context of the conditions under which women kill. Although, as compared to men, women rarely kill,\footnote{17} it is significant that when women do kill, they frequently kill men whom they knew.

\footnote{15} \textit{Id.} at 28.
\footnote{16} \textit{Id.} at 6.
well, often husbands or lovers. As victims, men almost always are killed by other men, and as compared to homicides by females, victim and offender are often strangers to each other. It has been said that female homicide is so different from male homicide that women and men may be said to live in two different cultures, each with its own "subculture of violence." If this is true then it should come as no surprise that laws created to address male homicide, and applied within the framework of an ethic of principles, do not adequately address circumstances under which women kill. The implications for women of a legal system founded exclusively on an ethic of principles--an ethic not founded in relation--will be explored more fully in Part III. First, however, we need to understand how the traditional law of self-defense, with its explicit elements and implicit presumptions, is founded on, and serves to reinforce, an ethic of principles.

The law of homicide, as founded on an ethic of principles, has as its overriding principle that it is wrong (immoral) to kill. But as with all principles, there are exceptions, the conditions under which we can violate the principle and still, supposedly, be moral. The law of self-defense, as an exception to the principle that it is immoral to kill, defines the conditions under which killing would be moral. "(N)ecessity is the pervasive theme of the well-defined conditions . . . the law imposes on the right to kill or maim in self-defense." 

19. Id. at 1680 n.4.
20. M. WOLFGANG & F. FERRACUTI, THE SUBCULTURE OF VIOLENCE: TOWARDS AN INTEGRATED THEORY IN CRIMINOLOGY 140, 158 (1967) (concluding on the basis of analyses of homicidal behavior that there exists a "subculture of violence" with an "existing complex of norms, values, attitudes, material traits" and "interlocking value elements shared with the dominant culture").
21. See S. KADISH, S. SCHULHOFER, & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 721
22. Coming from the perspective of an ethic of caring, we reject the notion that our morality, guilt, or righteousness hinges on whether or not we conform to, or fall within the exception to, a particular principle. The absurdity of hinging something like guilt or morality on whether or not we conform to a principle is revealed when we realize that much of the fighting and killing going on in the world today is often done in the name of principle.

23. Id.
The traditional formulation of a claim of self-defense is: (1) there must have been a threat, actual or apparent, of the use of deadly force against the defender; (2) the threat must have been unlawful and immediate; (3) the defender must have believed that he was in imminent peril of death or serious bodily harm; and (4) that his response was necessary to save himself.24

The elements of self-defense define the boundaries of necessity. Although this definition of necessity is presumed to be universal and has invariably been presented as if it were objective truth, in reality necessity has been contemplated from a strictly male point of view. The traditional elements of self-defense are based on the paradigm of an encounter between two men of roughly equal physical size and ability. The traditional model anticipates a one-time attack/defense. The defendant is threatened with an attack that could potentially result in serious bodily harm or death and therefore is justified in protecting himself. This model presumes that the authorities will step in at the first possible opportunity;25 therefore, the defendant only need defend himself as far as is necessary, at that moment, to keep the aggressor at bay.

This model, as will be explored in more detail in Part III, does not accommodate a scenario that includes repeated attacks over time (battering), nor does it need to because men are not, in significant numbers, subjected to repeated and vicious physical abuse during the course of their everyday lives. This definition of "necessity"26 does not contemplate having to live in an environment dominated by regular, vicious, physical abuse without the possibility of intervention or recourse to the law.27 Since necessity does not

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25. This is never explicit; however, implicit in every law is its enforcement. When you defend yourself against an unlawful threat, therefore, it is presumed that the authorities will step in to stop the aggressor.
26. The term "necessity," as used throughout this Comment will refer to the traditional male-conceived notion of self-defense.
27. Much has been written about the failure of the police and courts to intervene in domestic disputes. See D. MARTIN, BATTERED WIVES 87-118 (1976); Eisenberg, An Overview of Legal Remedies for Battered Women-Part I, TRIAL, Aug. 1979, at 28; Eisenberg & Micklow, The Assaulted Wife: "Catch-22" Revisited, 3 WOMEN'S RTS. L. REP. 138, 159 (1977); Fields, Representing Battered Wives or What to Do Until the Police Arrive, 3 FAM. L. REP. 4025, 4027-
contemplate living with such physical abuse, the possibility of a fundamental right to a life free from abuse never enters into the equation that balances the rights of the attacker against the rights of a woman to preserve her physical integrity.

What if after repeated efforts by yourself and others to stop the abuse, your husband continues to inflict regular, vicious beatings? Might you have some ethical obligation to yourself (and to your children) to preserve yourself as one-caring? The argument that one has a fundamental right to a life free from abuse includes moral and ethical issues that the time-honored notion of necessity, as perceived from a male perspective within a framework of an ethic of principles, never confronts.

Recognizing the sharp contrast between masculine and feminine approaches to ethics, we must ask how society can continue to hold women accountable to an ethic which does not reflect women's approach to moral reasoning. Moreover, how can we logically and rationally hinge violation of the principle on a definition of necessity that does not take into account the realities of women's lives and the circumstances that force women to defend themselves?

II
Expansion of the Law of Self-Defense Through Expert Testimony on Battered Woman Syndrome

Women have been disadvantaged severely in their attempts to gain acquittal on the grounds of self-defense because a woman's reasonable response to physical violence is likely to be different from a man's because of her size, strength, and lack of social and economic power. Even more problematic is the fact that the traditionally male-conceived notion of necessity does not include the kind of circumstances that women face in the context of a battering relationship. Women are subjected to qualitatively and quantitatively different types of violence than the traditional self-defense model.

anticipates. It is, therefore, not surprising when their reasonable response does not always fall neatly within the circumscribed boundaries of the existing model. That a woman could kill under circumstances outside traditional elements of self-defense, and still be acting morally, is never a possibility under the law as founded on an ethic of principles.

Historically, the standard for determining whether the defendant used a reasonable amount of force and whether the defendant reasonably believed that he was in immediate danger was that of the "reasonable man." Beginning in 1977 with *State v. Wanrow*, women's self-defense work has developed the perspective that traditional self-defense requirements of reasonableness, imminent danger and equal force are sex-biased. In *Wanrow*, the defendant, Yvonne Wanrow, was convicted of second-degree murder for shooting a man she knew to be a child molester when he came up behind her after approaching the child of a friend. The trial court instructed the jury to consider only the events immediately preceding the killing. Additionally, the jury instructions used the male pronoun "he," creating the impression that "the standard to be applied was that applicable to an altercation between two men." The court of appeals reversed the trial court and the Washington Supreme Court affirmed, holding that the traditional self-defense standard completely failed to take into account the perspective of women. The court held that Wanrow, who was five-feet-four-inches tall and on crutches at the time of the shooting, was not to be judged as if she were on roughly equal footing with her six-feet-two-inch tall, intoxicated male adversary, whose violent and molesting behavior she knew about before the shooting.

Although the *Wanrow* case represented a step forward in recognizing the sex-biased nature of the elements of self-defense, standing alone it did little to counter the long-held views of women as inherently unreasonable, or to counter myths and misconceptions.

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29. 88 Wash. 2d at 240, 559 P.2d at 558.
30. See Comment, supra note 18, at 1690-91. In 1873, a unanimous American court found that the common-law reasonableness standard would not apply to a twenty-year-old female tort defendant:
concerning battered women.

Research on battered woman syndrome emerged from an effort to counteract myths and misconceptions that women initiated, provoked, and enjoyed the violence (i.e., why did she stay in the relationship if it was really so bad; why didn’t the woman just leave?). Expert testimony on battered woman syndrome was developed to explain the common experiences of, and the effect of repeated abuse on, battered women.

Dr. Lenore Walker, the leading researcher in this field, identified a three-stage cycle of violence: a tension-building stage characterized by discrete abusive events; an acute battering stage characterized by uncontrollable explosions of brutal violence by the batterer; and a loving respite stage characterized by calm and loving behavior and pleas for forgiveness. Battered woman syndrome includes a description of the psychological impact of the common social and economic problems that battered women face. These problems include: failure of the police and the courts to protect women from

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(T)he incompetency indicated by her age and sex—without evidence (of which there was none) of any unusual skill or experience on her part—was less in degree, it is true, than in the case of a mere child; but the difference is in degree only, and not in principle.

Daniels v. Clegg, 28 Mich. 32, 42 (1873). As recently as 1981, one writer wondered "as to what law might be involved in the law of the reasonable woman, we follow precedent and venture no opinion . . . leaving open the question of whether conjoining 'reasonable' and 'woman' creates a contradiction in terms." Weber, Some Provoking Aspects of Voluntary Manslaughter Law, 10 ANGLO-AM. L. REV. 159, 175 n.15 (1981).

31. There are commentators that question the existence of these myths because of what they characterize as a lack of empirical research. See Acker & Toch, Battered Women, Straw Men, and Expert Testimony: A Comment on State v. Kelly, 21 CRIM. L. BULL. 125, 139 (1985); and Note, The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent, 72 VA. L. REV. 619, 629 n.46 (1986)(authored by David Faigman). I find it persuasive, however, that in case after case the prosecutor takes advantage of these myths in an (often successful) attempt to discredit the defendant. Long before battered woman syndrome was conceived of, prosecutorial strategy revolved around the "failure" of the woman to leave the battering relationship. Generally speaking, neither the prosecution nor the defense asks a question or brings up an issue that is potentially damaging to their side unless they believe it will do more good than harm. That the prosecution consistently "risks" the potential damage and raises this issue, and even specifically asserts that the defendant could have left or must have liked the abuse, is indicative that the myths do exist in the minds of the judge and juror.

abuse; that battered women may not be able to leave their mates because they may have no job, child care, adequate housing or community social services; that battered women suffer severe isolation and shame which strengthens their belief that they have no safe alternative; and that the lack of alternatives and the cycle of battering in which the men promise to reform leads women to cling to the illusion that the men will change.

The purpose of expert testimony on battered woman syndrome was to educate the judge and jury about the common experiences of battered women, and to explain the context in which an individual battered woman acted, so as to lend credibility to her explanation of her actions. At its best, expert testimony on battered woman syndrome has served to counteract stereotypes of battered women as solely responsible for the violence. At its worst, expert testimony on battered woman syndrome has been presented, heard, and misheard as depicting battered women as helpless victims, which fails to describe the complexity and reasonableness of why battered women act.

From the beginning the phrase "battered woman syndrome" was intended to simply describe common psychological and social characteristics of battered women. That it has been heard to communicate an implicit but powerful view that battered women are all the same, that they are suffering from a psychological disability, and that this disability prevents them from acting

33. See supra note 27.
35. See supra note 34.
36. Eber, supra note 34, at 901; Robinson, supra note 34, at 165-66, 173; Schneider, supra note 34, at 626; Walker, Thyfault & Browne, Beyond the Juror's Ken: Battered Women, 7 VT. L. REV. 1, 11 (1982); Note, 35 VAND. L. REV., supra note 34, at 743, n.13.
37. L. Walker, supra note 32, at 532.
"normally," is reflective not of the work itself, but of the intransigent, unchallenged, underlying presumptions in the law. As Professor Elizabeth Schneider notes:

\[\text{... (t)he question which the expert testimony cases squarely pose is this: if battered women's experiences are explained as different, can they ever be genuinely incorporated into the traditional standard and understood as equally reasonable? Are these different experiences inevitably perceived as inferior, as "handicaps?" If so, is it necessary to alter the traditional standard?}^{39}\]

The short answer to that question is yes! As will be explored in more detail in Part III, expert testimony on battered woman syndrome fails to integrate women's experiences into the law of self-defense because it never really challenges the underlying model of moral reasoning, with its attendant presumptions upon which the elements of self-defense are based. Although the \textit{Wanrow} holding and the admissibility of expert testimony on battered woman syndrome represents a shift toward a more subjective standard, the basic elements of self-defense, as conceived of within the framework of an ethic of principles, continue to work against women forced to defend themselves in situations not contemplated by the traditional law.

III

\textbf{The Failure of Expert Testimony on Battered Woman Syndrome as a Function of Application Within an Ethic of Principles}

In theory, expert testimony on battering is the logical extension of the trend, beginning with \textit{Wanrow}, to overcome sex-bias in the law of self-defense and to equalize treatment of women in the courts. In fact, however, the expert testimony cases "pose troubling questions about the degree to which these goals have been realized."^{40} Although women's self-defense work has resulted in the

\begin{itemize}
  \item \textit{Id.} at 214.
  \item \textit{Id.} at 197.
\end{itemize}
acknowledgment of the different circumstances under which women kill, these different circumstances and experiences must still be accommodated within the same standard of self-defense.

The law of self-defense as founded on an ethic of principles fails to accommodate a feminine approach to moral reasoning. As such, the law ignores the possibility that a woman might be forced to kill in order to maintain herself as one-caring, even though the requirement of imminent danger has not been met.

The traditional underlying ethic dictates that killing another is morally wrong except in cases of extreme necessity as circumscribed by the elements of the self-defense doctrine. An ethic of principles, by its construction, does not allow for truly subjective evaluations. The principle comes first and subjectivity is allowed only to the extent that it fits within the principle.

The traditional self-defense scenario requires us to choose whether the killing of the attacker or the killing of the defendant is more morally acceptable in a situation where one of the two must die. The defendant's actions will be considered ethical, and hence justifiable self-defense, only if the elements of self-defense are strictly adhered to. The presumption of a one-time attack/defense with intervention by the authorities at the first possible opportunity results in a principle that never addresses the issue the typical battered woman confronts. Indeed, the traditional elements of self-defense do not make sense and cannot be applied fairly to a situation that does not involve a one-time attack/defense and intervention by the authorities.

The traditional law of self defense does not address situations in which a woman has suffered repeated, regular, vicious beatings, over a substantial period of time, without recourse to the law. Our defendant may have been burned, cut up, kicked in the stomach and suffered miscarriage, received broken jaws, legs, and arms, and be bruised so badly and so repeatedly that she never completely heals. She may have called the police on many occasions and then have had to convince them that she really wanted her attacker to be arrested, and then finally gotten a temporary restraining order (TRO) only to have it not enforced. She may have moved again and again only to have her attacker follow her and continue his abuse. Yet the principle of self-defense maintains that unless he was...
threatening her with death or something very near it at the time she killed, she was not justified in her action.

What if somehow our defendant knows that her abuser will catch up with her again next week and that this time he will "only" break her jaw and cause her to need fifteen stitches in her face? And what if she also knew that there was no escaping this man and that the only way to avoid further abuse was to kill him? Isn't this necessity?

When our defendant kills, her ethical ideal is diminished, of course, because she is no longer behaving as one-caring. Even though she is acting for the purpose of maintaining the quality of the ethical ideal for herself and other remaining cared-fors (i.e., her children), her action is not without its effects on herself, the one-caring. Her ethical ideal begins to diminish the moment she begins to withdraw from her husband. When caring must consciously exclude particular persons "the ideal is diminished, that is, quantitatively reduced." Morally,

(s)he must meet the other as one-caring until he is, intentionally, a positive threat to her physical or ethical self. If the one no longer cared-for violates her withdrawal, increases his threat, and persists in his malicious approach, she is justified in acting to prevent further abuse. Acting to prevent further abuse is, of course, guided by the ethic of caring.

41. This observation brings up another thought-provoking distinction between an ethic of principles and an ethic of caring. Within the law as founded on an ethic of principles, behavior which is exculpatory is divided into two categories: justified behavior and excused behavior. Justified behavior focuses on the act in that it deems that the act itself was "right" because the circumstances were so compelling as to invalidate the normal rules of criminal conduct. Excused behavior, on the other hand, focuses on the actor. The act is deemed "wrong" or harmful to society, however, the actor's behavior is excused due to internal or external pressures which render her morally not blameworthy. Under an ethic of caring, the distinction between justification and excuse is blurred. We focus on the actor (the defendant) to the extent that we recognize that she has acted against her ethical ideal (which sounds like excuse). We examine our defendant's act, however, keeping in mind the compelling nature of the circumstances and her need to kill in order to maintain herself as one-caring (which sounds like justification). Professor MacKinnon has noted that "feminism tends to collapse the distinction [between justification and excuse] by telescoping the universal and the individual into the mediate, group-defined, social dimension of gender." MacKinnon, Book Review, 34 STAN. L. REV. 703, 717 n.73 (1982).

42. N. NODDINGS, supra note 8, at 114.

43. N. NODDINGS, supra note 8, at 115 (emphasis added).
A feminine view of ethics recognizes that our defendant, in order to act morally, does not have to refuse to kill out of blind obedience to principle. She might have to kill, and although this is admittedly under the guidance of a sadly diminished ethical ideal, the test of ultimate blame or blamelessness lies in how the ethical ideal was diminished. Did she choose the degraded vision out of greed, cruelty, or personal interest? Or was she driven to it by unscrupulous others who made the ethical ideal impossible to sustain?44

A feminine view of ethics recognizes that "right" and "wrong" differ with the situation. That is not to say that this feminine view of ethics is a form of situational ethics in which the emphasis is on the consequences of our acts. The consequences of our acts are not, of course, irrelevant. A feminine view of ethics, however, perceives morality as located primarily in the pre-act consciousness of the defendant.46 With respect to the battered woman who kills, central to our inquiry are her attempts to continue to meet her attacker as one-caring. Did she try to enlist lawful relief for her suffering? As noted above we would want to know whether she chose to kill, and degrade her ethical ideal, out of greed, cruelty, or personal interest, or whether she was driven to it by unscrupulous others who made the ethical ideal impossible to sustain.47

The Wanrow court took a step forward in recognizing that the "reasonable man" standard was overtly sexist. Converting the "reasonable man" to a "reasonable person" or even "reasonable woman" did not exorcise the sexism, however, but instead embedded it.48 The Wanrow court did go beyond simply substituting the neutral word "person" for "man" by also recognizing that the standard failed to account for a woman's relative size, strength, and experience. This resolution of the standard's sexism, however, failed to recognize or counter the underlying ethic and presumptions of the law of self-

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44. This includes, obviously, the batterer as well as those who had the power and authority to intervene but failed to do so.
45. See N. NODDINGS, supra note 8, at 102.
46. See N. NODDINGS, supra note 8, at 28.
47. See supra note 45.
48. See Bender, supra note 5, at 22.
defense.

The explicit limitation of the *Wanrow* holding is indicative of the court’s reluctance to challenge the underlying presumptions in the law of self-defense. In *Wanrow*, the court limited its holding by refusing to hold that the trial court abused its discretion by not allowing an expert witness to testify about the effects of Wanrow’s Native American culture on her perceptions and actions. The Washington Supreme Court held that a female defendant might be entitled to a self-defense instruction that included her gender as a subjective factor, but defendants of particular races or classes could not receive similar "special" instructions. Gender is an allowable subjective factor, however, only to the extent that it serves to conform women’s experiences to those of men so that the same standard can be applied. Subjective factors are not allowed for the purpose of showing and explaining how the traditional elements cannot be fairly applied, which is what testimony concerning the effects of Wanrow’s Native American culture would have accomplished. Thus, although the term "reasonable man" has been replaced by "reasonable person" or "reasonable woman," the male-conceived notion of necessity is still the controlling factor. The modern "reasonable person" or even "reasonable women" standard simply serves to mask a profoundly gender-based and race-specific standard.

Within the law, in a substantive way, men are the measure of all things. Women are measured according to their correspondence or lack of correspondence with men. As explored in more detail below, the attempt to gain maternity benefits for women reveals the implicit male norm. Men do not get pregnant (an experience fundamental to the female experience), therefore, maternity benefits have traditionally not been part of the employment benefits package for men. Women, therefore, are also not entitled to maternity benefits. The male perspective is viewed as objective truth. This framework perpetuates the problem that an "equal recognition of difference is termed the special benefit rule or special protection rule legally, the double standard philosophically."49

Wanrow would have us apply an "objective" standard to men from all backgrounds, while allowing women to benefit from a more "subjective" standard. This reinforces the notion that women are less reasonable when they act in self-defense. We give women the "benefit" of a more "subjective" standard and thus supposedly remove their "handicaps." Yet we retain the male-conceived notion of necessity and traditional elements of self-defense, against which we continue to measure women. This contributes to the perception that the subjective standard is another example of a special benefit or special protection, or just a plain double standard.

Given a case where the traditional elements of self-defense could be applied fairly (i.e., the circumstances were of the type contemplated by the traditional self-defense scenario), we still are confronted with the possibility of conflicting definitions within the elements of self-defense. For example, who gets to define "harm?" We may accept the notion that the defendant's history of abuse should be admitted only to the extent that it appears "relevant" to the reasonableness of the defendant's perception of imminent "harm" at the time of the killing, but who gets to define "relevant?" We will never come close to achieving "justice" if we continue to rely on definitions that do not include women's perceptions of harm and relevance. This problem is vividly illustrated by the following comments:

Often the reaction of the battered wife is delayed and occurs at an uncommonly serene moment. At other times—as in the case analyzed here—the prior beatings are offered to explain the wife's perception of the husband's seemingly innocuous (or certainly non-life threatening) behavior as creating imminent danger.

50. The term "handicaps" was used by the Washington Supreme Court to describe the effect of sex discrimination. State v. Wanrow, 88 Wash. 2d 221, 240, 559 P.2d 548, 559 (1977). Professor Elizabeth Schneider notes that: "the court's use of the word . . . played on the stereotype of victimized and mistreated women that has historically limited women's claims for equal treatment and suggested that the court's responsiveness to Yvonne Wanrow's claim was shaped by patriarchal solicitude." See Schneider supra note 38, at 214.

51. See infra text accompanying notes 52-55.

52. Acker & Toch, supra note 31, at 125.
The case that the authors are referring to is *State v. Kelly*.\(^5\) The "seemingly innocuous" or "certainly non-life threatening" behavior to which the authors are referring consists of the husband charging toward the defendant with his hands raised, just minutes after choking her by pushing his fingers against her throat, punching and hitting her in the face, and biting her leg. The defendant, Ms. Kelly, stated that after two men from a crowd that had gathered stopped her husband from beating her, she went looking for her daughter, whom she feared had been pushed around in the crowd. After finding her daughter, Ms. Kelly observed Mr. Kelly running toward her with his hands raised. Unsure of whether he had armed himself while she was looking for their daughter, and thinking that he had come back to kill her (Mr. Kelly had beaten Mrs. Kelly almost weekly throughout their marriage and had often threatened to kill her and cut off parts of her body if she ever left him), she grabbed a pair of scissors from her pocket book to scare him away, and ended up stabbing him instead.

The above commentators' perspective illustrates the need to challenge the abstract notion that defending oneself against imminent harm is justifiable, but that being charged at by someone who has repeatedly beaten you, and just minutes before had choked you to the point that you almost passed out, is "seemingly innocuous" or "certainly non-life threatening behavior."

At least one commentator, while recognizing that "(t)he unique circumstances surrounding battering relationships require a flexible and perhaps unique application of the elements of the self-defense claim," is concerned that the "four elements of self-defense should not be stretched into oblivion."\(^5\) In order to prevent the extinction of the traditional elements, the woman's history of abuse is to be admitted only in "those cases where it appears relevant to the reasonableness of her perception of imminent harm at the time of the killing."\(^5\) This suggestion fails to recognize the issues raised by the imminence requirement when applied to the battering context. If the woman is faced with the choice of either being subjected to


\(^{54}\) Note, *supra* note 31, at 646.

\(^{55}\) *Id.*
a future of regular, vicious abuse or killing her tormentor, she might respond morally (although under a sadly diminished ethical ideal) by killing even when not threatened with imminent death. Under an ethic of caring, testimony as to the history of abuse and failure of the authorities to stop the abuse would be relevant to show that she made every effort to meet the other as one-caring. If her ethical ideal (i.e., ability to maintain herself as one-caring) was being diminished under the continual abuse she suffered, acting to prevent further abuse is guided by the ethic of caring.

Although there has been a move toward a more subjective standard of reasonableness, the ethic and presumptions underlying the subjective standard have not been challenged. The subjective standard admits factors such as a woman's relative size, strength, and lack of training in defending herself. It also allows testimony as to the history of abuse to the extent that this shows the reasonableness of the woman's fear that she is faced with imminent death or serious bodily harm. These subjective factors are allowed, however, only to the extent that they are relevant to the traditional elements of self-defense.

The attempt to accommodate women's experiences in the law of self-defense through admissibility of expert testimony on battered woman syndrome suffers from the same fatal flaw as did the attempt to gain maternity leave benefits for women in the workplace. Since the male experience or perspective is presented as the norm or objective truth, women get what men have to the extent that we are like them. However, women are different! We can bear children! Since men do not get pregnant, maternity leave was not built into the system. Since women only get what men get, women do not get the benefit of maternity leave. Asking for it now is treated as if we were asking for something special or extra.

Similarly, since men are not subjected to battering during the course of their everyday lives, the law does not have standards that contemplate the need for self-defense in this context. Women get the benefit of self-defense only to the extent that our actions conform to the traditional model. If women act to prevent future pain and suffering (even after exhausting other options) but cannot claim and prove that they reasonably believed their lives to be in imminent danger, they simply cannot claim self-defense. Asking that
the law recognize the "need" to kill in self-defense without strict adherence to the male-defined notion of necessity is treated as if we were asking for a special standard or rule.

Attempts have been made to accommodate women with respect to maternity leave by treating pregnancy as an illness or a disability. Treating pregnancy as a disability or an illness not only obscures the needs of a pregnant woman that disability or illness benefits do not accommodate, it also, not surprisingly, contributes to the problem of women being devalued in the workplace. Furthermore, it ignores the underlying problem, which is the validity of a principle that places profits before people.

Similarly, attempts to accommodate women's experiences into the law of self-defense have revolved around ultimately requiring women to fit into the same old definition of necessity. This works to delegitimatize or obscure the real circumstances under which women act--circumstances which take them out of the realm of the male-defined concept of necessity.

The expert testimony cases are the natural result of the "differences" approach in that the goal of the expert testimony is to explain the context of battered women's different experiences and perceptions so that juries can fairly apply the same legal standards to them. What we are doing in these cases is, once again, only allowing women to claim reasonableness to the extent that their experiences are analogous to men's experiences. The battered woman syndrome has been applied in such a way that it serves to repackage women's experiences so that they more closely comport with those of men. In so doing, these different experiences inevitably are perceived as inferior or as "handicaps."56 Moreover, the very factors that make the situation different and help to explain the reasonableness of the woman's act are lost.

The time-honored notion of necessity incorporates the requirement of a "fair fight." Thus, commentators and courts often get bogged down in applying the law of self-defense to a situation where a woman kills her battering spouse at a time other than during the course of a beating, when he is characterized as "defenseless." The law of self-defense does not contemplate the need

56. See supra note 50.
to defend oneself within a battering relationship, in which the woman's situation, for all practical purposes, resembles that of a prisoner of war. We don't require that the prisoner of war confront his jailor head on. We can see clearly the bars that keep the prisoner locked up and we know better than to hope for some outside force to intervene on behalf of the prisoner. The prisoner must use whatever tactics are available, even those that in other circumstances might seem unfair, in order to have a chance to escape.

Although this is admittedly an extreme example, I maintain that it is fundamentally analogous to the experience of many women in battering relationships, and hence goes much further towards elucidating the reasonableness of their actions. Despite the fact that there are usually no bars keeping a woman imprisoned in the battering relationship (although there are certainly numerous cases where during the course of the battering relationship the woman was at some time, if not frequently, tied up, locked up, or both), a woman's lack of economic and emotional support often renders her so isolated and powerless that she is effectively behind bars.57

Allowing the consideration of subjective factors, such as women's relative size, strength, and history of abuse, presumably works by putting women and men on "equal footing" with respect to the law of self-defense. The law can then, supposedly, protect and accommodate them both equally. What this approach fails to confront, however, is that the ethic underlying the law of self-defense serves to reinforce the male perspective of reality while ignoring the reality of women.

57. See supra notes 34, 36.
IV
Towards the Development of New Standards and Definitions and the Incorporation of a Feminine Approach to Ethics

I can already hear the protests, "but how can you say that you are claiming self-defense for these women, after all, you are rejecting the application of the elements of self-defense." To this protest, I owe my new found response to Professor Noddings. My response goes something like this: Ah, yes. But, after all, I am a woman, and I was not party to that definition.

Then there will be those who, recognizing that the system is far from perfect, still refuse to reject the traditional elements of self-defense for fear of ending up on the "slippery slope." They take comfort in the "bright lines" and the clear-cut categories that the traditional approach affords.

All I know for sure is that the system is not working. Women, in significant numbers, are subjected to repeated, vicious abuse by their husbands and "lovers." The system fails to help women maintain themselves as one-caring and then, when finally some of them act under the guidance of a sadly diminished ethical ideal, the system fails them again by holding them accountable to a definition of necessity which does not contemplate circumstances within the battering context.

How would we define self-defense if we approached it from the perspective of an ethic of caring? What factors would we use as guidelines to determine whether a woman acted morally, in self-defense, although under an admittedly diminished ethical capacity? How would we distinguish killings that were motivated by cruelty, personal interest, or retributive impulses?

As we have already discovered, women, in general, enter the domain of moral action through a different door than men.

It is not the case, certainly, that women cannot arrange principles hierarchically and derive conclusions logically. It is more likely that we see this process as peripheral to, or even alien to, many

58. N. Noddings, supra note 8, at 95.
problems of moral action. Faced with a hypothetical moral dilemma, women often ask for more information. We want to know more, I think, in order to form a picture more nearly resembling real moral situations. Ideally, we need to talk to the participants, to see their eyes and facial expressions, to receive what they are feeling. Moral decisions are, after all, made in real situations; they are qualitatively different from the solution of geometry problems. Women can and do give reasons for their acts, but the reasons often point to feelings, needs, impressions, and a sense of personal ideal rather than to universal principles and their application.59

This suggests that we would want to take into account as many factors surrounding the act as possible. We would want to consider, as a factor, whether the woman was significantly disadvantaged as a result of a lack of economic and political power. We would want to know if the woman sought help, and if not, why not. We would want to know if she had good reason to believe that if she did not succeed in killing her abuser she would be subjected to additional (and because of her attempt to fight back), more vicious attacks. After consideration of all of these factors, we might determine that the killing was simply an act of preservation of the woman’s physical and ethical self. The imminence factor is no longer central to our inquiry because we acknowledge the possibility of the "necessity" of killing as motivated by the need to maintain oneself as one-caring.

We would want to recognize that the system does not protect all people in all situations equally. Women’s experiences are far removed from the self-defense scenario which presumes that the authorities will "step in," thereby limiting the necessity for self-help. Women collectively experience a sense of learned helplessness in that we traditionally have been unable to assert control over our environment within the framework of the law. Women’s everyday experiences reinforce the reality of our lack of power: we have no recourse from constant sexual harassment from strangers on the street; we face a high incidence of rape with a corresponding low conviction rate of rapists; we are sexually harassed in the workplace as well, and although the law has very recently addressed this, the problem is far from resolved. All of this is in addition to the very

59. N. Noddings, supra note 8, at 96.
specific problems that many battered women experience in trying to use the law to stop their batterers: unresponsiveness of police; inability to get TROs; inability to have those TROs enforced once they are obtained; and the ultimate ineffectiveness of a TRO with respect to the behavior of the abuser. The battered woman often comes to the conclusion that she alone has to protect herself. She learns, from her everyday experiences as a woman, and her specific experiences as a battered woman, that the law provides her with no real recourse nor with any measure of control. For all practical purposes women’s reality corresponds more closely to the conditions faced by prisoners of war than with the conditions contemplated in the traditional self-defense scenario.

I am not advocating that we reject the ideal that it is immoral to kill. Indeed, an ethic of caring recognizes that "when one intentionally rejects the impulse to care and deliberately turns her back on the ethical, she is evil, and this evil cannot be redeemed." What I am saying is that in determining whether or not one is guilty of a crime and whether or not one has acted ethically, the traditional elements are simply factors to guide us. As factors, and not rigid requirements, they will not always be central to our inquiry. It is the relationship that will be central to our inquiry; the interaction of the one-caring and the cared-for, and the effort by the one-caring to maintain herself as one-caring without diminishing her ethical ideal. We will need to consider as many factors as possible in order to put ourselves, as nearly as possible, in the position of the defendant.

An ethic of caring has far-reaching implications in that since we will not have absolute principles to guide us in our attempt to meet the other morally, everything depends upon the nature and strength of the ideal.

Since we are dependent upon the strength and sensitivity of the ethical ideal--both our own and that of others--we must nurture that ideal in all of our educational encounters. . . . The primary aim of all education must be nurturance of the ethical ideal. 61

60. N. NODDINGS, supra note 8, at 115.
61. N. NODDINGS, supra note 8, at 6.
I recognize that challenging our ethic of principles to some extent calls into question the entire legal system. This in and of itself will undoubtedly cause some to automatically reject the challenge. I am reminded, however, that "[w]e are limited in our thinking by too great a deference to what is, and what is today is not very attractive."62

With a legal system that incorporates an ethic of caring, we might just move closer toward achieving a kind of justice.

And then all that has divided us will merge
And then compassion will be wedded to power
And then softness will come to a world that is harsh and unkind
And then both men and women will be gentle
And then both women and men will be strong
And then no person will be subject to another's will
And then all will be rich and free and varied
And then the greed of some will give way to the needs of many
And then all will share equally in Earth's abundance
And then all will care for the sick and the weak and the old
And then all will nourish the young
And then all will cherish life's creatures
And then all will live in harmony with each other and the Earth
And then everywhere will be called Eden once again

Judy Chicago63

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62. N. NODDINGS, supra note 8, at 180.