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The Battered Wife's Dilemma: To Kill or To Be Killed

By Loraine Patricia Eber*

It is well documented that wife battering is an extremely widespread and serious problem. Because wife beating goes largely unreported, exact statistics on the number of incidents are unavailable; however, it is estimated to affect as many as forty million women. In California, for example, fifty percent of all married women will be assaulted by their husbands during the course of their marriages. Even the California Legislature acknowledges that hundreds of thousands of women in California are regularly beaten. Furthermore, wife beating often is perpetuated from gen-

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1. This Note addresses the problems of wife battering rather than spousal abuse in general. Husband beating presents somewhat different issues from wife beating and does not have the same historical acceptance as wife beating. Although this Note does not discuss the problem, its existence should be acknowledged. See San Francisco Chronicle, Oct. 28, 1980, at 6, col. 1.
3. Meyers, Battered Wives, Dead Husbands, Student Lawyer, March 1978, at 47 (notes estimates that range from 3,000,000 to 40,000,000). Cf. California Advisory Comm'n on Family Law, Domestic Violence app. F, at 119 (1st report 1978) [hereinafter cited as Domestic Violence] (sets figure at 1,000,000); Remedies For Abused Women, supra note 2, at 136-37 (cites figures ranging from 1,000,000 to 28,000,000). These figures vary considerably because they involve approximations of the number of unreported incidents.

[895]
eration to generation and is common to all socioeconomic classes. Despite the fact that wife beating is such a critical problem, the law has all but ignored it.

This Note first explores the historical acceptance of wife beating, with particular emphasis on the traditional concepts of marital privacy and wives as their husbands’ property. Next, sociological studies dealing with why men beat their wives are discussed to demonstrate that because science is unable to predict which men will become wifebeaters, such beatings cannot be prevented. Similar studies with regard to why battered women stay with their abusive husbands help explain why leaving is not a viable option for these women.

6. “Boys who have seen their fathers beat their mothers . . . are likely to grow up to become battering men also.” HANDBOOK, supra note 4, at 3. See also D. MARTIN, BATTERED WIVES 51 (1976) [hereinafter cited as MARTIN]; BATTERED WOMEN 60, 77 (M. Roy ed. 1977) [hereinafter cited as Roy]; 1978 Hearings, supra note 2, at 70 (testimony of Judge Norbert Ehrenfreund, Superior Court of San Diego).

7. A study done in Norwalk, Connecticut, a predominantly middle class community, revealed that police there receive roughly the same number of wife abuse complaints as do law enforcement officials in a Harlem district of comparable size. Barden, Wife Beaters: Few of Them Ever Appear Before a Court of Law, New York Times, Oct. 21, 1974, at 38, col. 1. A 1970 study concluded that the middle class is more prone to commit the offense of assault than the poor. Stark & McEvoy, Middle Class Violence, PSYCHOLOGY TODAY, Nov. 1970, at 30-31. The reasons for not reporting domestic violence differ depending on where the victim lives. According to one author, women in cities do not report domestic violence because they think that the police will do nothing and because they fear retaliation, while women who live in the suburbs do not call the police because they do not want their neighbors to learn of the violence. Note, Does Wife Abuse Justify Homicide?, 24 WAYNE L. REV. 1705, 1707 n.17 (1978).

8. The seriousness of wife beating is illustrated by recent crime statistics. In 1978, murders between husband and wife and between boyfriend and girlfriend accounted for approximately 13% of all murders. FBI, CRIME IN THE U.S. 1978, at 9 (1978). One out of every five murder victims is related to the offender. Id. at 13. The figure may actually be higher because the relationship was unknown in 30.1% of the murders. Id. at 9. See also Roy, supra note 6, at 153-54. According to 1975 statistics, the wife is the victim in 52% of spouse murders.

9. For example, police departments usually do not keep separate statistics on wife battering, indicating the low priority assigned to the problem. See Domestic Violence, supra note 3, at 122; Eisenberg & Micklow, The Assaulted Wife: “Catch 22” Revisited, 3 WOMEN’S RTS. L. REP. 138, 140 (1977) [hereinafter cited as Eisenberg & Micklow]; Potential Defense, supra note 2, at 213. See also MARTIN, supra note 6, at 10-11 (police officers responding to domestic disturbances often do not file reports).

10. See generally T. DAVIDSON, CONJUGAL CRIME (1978); MARTIN, supra note 6; Eisenberg & Micklow, supra note 9; Parnas, Judicial Response to Intra-Family Violence, 54 MINN. L. REV. 585 (1970); Truninger, Marital Violence: The Legal Solutions, 23 HASTINGS L.J. 259 (1971) [hereinafter cited as Truninger]; BANNON, LAW ENFORCEMENT PROBLEMS WITH INTRA-FAMILY VIOLENCE (1975) (transcript of speech given at American Bar Association Convention) [hereinafter cited as BANNON].
The remainder of the Note evaluates the manner in which the legal system has evaded its responsibility to treat this critical problem as a crime against society. Generally, the criminal remedies that are theoretically available to redress the problem are ineffective because of the reluctance of the police and district attorneys to get involved in family violence. Other remedies, such as temporary restraining orders, diversion programs, and shelters provide some aid to battered women, but their effectiveness could be improved.

Finally, the Note concludes that the sociological and legal acceptance of wife beating must be considered in cases where battered women are charged with the killing of their husbands and are pleading self-defense. More specifically, all of these circumstances are relevant to an evaluation of the battered woman’s perception of the immediacy of the danger and the necessity of using deadly force.

Historical and Sociological Background

Historical Acceptance

Historically, because of the concepts of marital privacy11 and wives as their husbands’ property,12 the law has refused to step in and attach criminal penalties for wife beating. The rationale has been that protecting the privacy of the marital relationship should take precedence over any concern for the wife’s safety. Additionally, the property notion that husbands can treat their wives as

11. See Eisenberg & Seymour, The Self-Defense Plea and Battered Women, Trial, July 1978, at 35; Potential Defense, supra note 2, at 214; Remedies For Abused Women, supra note 2, at 135-36. For a good historical perspective on the problem, see generally T. Davidson, CONJUGAL CRIME 95-130 (1978); Roy, supra note 6, at 2-23.

12. See, e.g., 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at 444 (1765) (“For as he [the husband] is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or his children.”). Sentiments such as this one codified by Napoleon illustrate the extent of this historical acceptance: “Women, like walnut trees, should be beaten every day.” Warrior, Battered Lives, in HOUSEWORKER’S HANDBOOK 16 (1975). See also Eisenberg & Micklow, supra note 9, at 138 (“A wife isn’t a jug . . . she won’t crack if you hit her a few times.”—Old Russian proverb). A concept somewhat analogous to the concept of wives as their husbands’ property is the “marital merger of identity”—that a wife loses her identity to her husband at marriage. See Powers, Sex Segregation and the Ambivalent Directions of Sex Discrimination Law, 1979 Wis. L. Rev. 55, 74-75. The author also mentions that husbands are immunized from rape prosecutions by their wives in most states. Id. at 75 n.9.
they see fit historically has caused the legal system to ignore wife battering. The following cases illustrate the way in which courts have used the concepts of marital privacy and wives as their husbands' property to ignore the problem of wife beating.

Legal recognition of the criminal nature of wife abuse came slowly. In 1824, the Mississippi Supreme Court held that a husband may be convicted for an assault upon his wife, in contravention of established common law. However, the court continued to allow a husband to beat his wife when circumstances warranted: "let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehavior, without being subject to vexatious prosecutions . . . ." The Mississippi court used a privacy rationale to allow the husband to inflict "moderate chastisement." Any real consideration of the physical harm suffered by the married woman was outweighed by the court's desire to keep private what happened within the confines of the marital home. In short, the court was willing to ignore the wife's physical injuries to uphold the value of marital privacy.

In State v. Rhodes, the Supreme Court of North Carolina reiterated this theme, holding that a husband would not be convicted for "moderate correction" of his wife. Again, the court weighed "the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber" against the infliction of "moderate" force upon the wife and held that the interest of protecting marital privacy was paramount.

As late as 1874, the North Carolina court, although clearly stating that a husband had no legal right to chastise his wife under

14. Id. at 158.
15. Id. "Family broils and dissentions cannot be investigated before the tribunals of the country, without casting a shadow over the character of those who are unfortunately engaged in the controversy." Id. The court reasoned that the vexatious prosecution would result in the "mutual discredit and shame of all parties concerned." Id.
16. 61 N.C. (Phil. Law) 445 (1868).
17. Id. at 450. The court defined "moderate correction" in terms of situations in which "permanent or malicious injury" is not inflicted or threatened. Id. at 448. In Rhodes the court found that the attack by the husband was unprovoked. Id. at 446.
18. Id. at 448. The court stated that "family government is recognized by law as being complete in itself as the State government is in itself . . . ." Id.
any circumstances, accepted a similar privacy argument. Stating that it would not “listen to trivial complaints,” the court preferred to “draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.”

Although it is clear that husbands no longer enjoy a legal privilege to beat their wives, the concepts of marital privacy and wives as their husbands’ property continue to influence the attitudes of police departments and prosecutors and to militate against the recognition that wife beating is a criminal offense. These misconceptions also affect battered women’s perceptions of themselves and their possible options in the battering situation.

**Why Men Beat Their Wives**

It is easy to theorize that men beat their wives simply because they have been socialized to use violence to solve problems and their wives provide a convenient, relatively risk-free outlet for their frustrations. Cultural conditioning, however, fails to explain fully why some men beat their wives while others do not. Several studies have postulated interesting, but highly questionable, explanations.

Two of the earliest analyses of the problem place the blame with the wives or mothers rather than with the wife beaters. One study, conducted by three psychiatrists, described the wives as “aggressive, efficient, masculine and sexually frigid,” while they termed the husbands “shy, sexually ineffectual, reasonably hard working, ‘mother’s boys.’” The study’s conclusion centered around these husband-wife personality types:

The periods of violent behavior by the husband served to release

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19. State v. Oliver, 70 N.C. 60, 61 (1874). The court also criticized the “rule of thumb” that allowed a husband to beat his wife with a switch as long as it was no thicker than his thumb. *Id.*

20. *Id.* at 61-62. This triviality argument was also raised in State v. Rhodes, 61 N.C. (Phil. Law) 445, 448 (1868).

21. The United States Supreme Court specifically subordinated this marital privacy interest in Trammel v. United States, 445 U.S. 40 (1980), holding that an accused husband may not invoke the privilege against adverse spousal testimony so as to exclude the voluntary testimony of his wife.

22. See text accompanying notes 64-91, 97-105 infra.

23. See text accompanying notes 38-46 infra.


25. *Id.* at 111.
him momentarily from his anxiety about his ineffectiveness as a man, while, at the same time, giving his wife apparent masochistic gratification and helping probably to deal with the guilt arising from the intense hostility expressed in her controlling, castrating behavior.\textsuperscript{26}

Apparently, the researchers assumed that simply because the wives did not possess stereotypical female traits, they enjoyed being beaten. Although this study is revealing as far as the bias of the doctors is concerned, it offers no rational analysis of the wife battering syndrome.\textsuperscript{27}

Similar results were reached in another study.\textsuperscript{28} The assailants' mothers were characterized as "domineering" and "rejecting."\textsuperscript{29} The researcher hypothesized that when an assailant married he transferred his dependence from his mother to his wife. When his dependency needs were not met, the man responded with violence.\textsuperscript{30} Again the wives were labeled as "masculine, outspoken, domineering women."\textsuperscript{31} Just as in the study conducted by the psychiatrists, the women were blamed for not fitting into the stereotypical passive, dependent female role.

More recent analyses of why men beat their wives have centered on identifying factors that tend to instigate the violence rather than on a psychological analysis of the wife beater.\textsuperscript{32} Factors that have been recognized as precipitants of domestic violence include: arguments over money,\textsuperscript{33} jealousy,\textsuperscript{34} sexual problems,\textsuperscript{35} alcoholism, and drug addiction.\textsuperscript{36}

\begin{thebibliography}{99}
\item 26. Id.
\item 27. The fallacy of this "masochistic gratification" argument is evident when the analysis is applied to child abuse. The argument would be that the abused child is relieved from guilt caused by his or her hostility toward the parents while the parents are released from their anxiety as inadequate parents when the child is beaten. The rationale is no less ludicrous in the battered wife setting.
\item 28. Schultz, The Wife Assaulter, 6 J. Soc. THERAPY 103 (1960). Leroy Schultz, a probation officer, conducted this study of four men who had been convicted of assaulting their wives with intent to kill. Id.
\item 29. Id. at 107.
\item 30. Id. at 108.
\item 31. Id.
\item 32. In one such study, Maria Roy analyzed a sample of 150 women who called Abused Women's Aid in Crisis (a New York service program for battered women) in 1976. The data was derived from intake questionnaires and supplemented by followup interviews. Roy, supra note 6, at 25.
\item 33. Id. at 40-41.
\item 34. See Martin, supra note 6, at 58-61; Eisenberg & Micklow, supra note 9, at 144.
\item 35. Roy, supra note 6, at 41.
\end{thebibliography}
hol or drugs, and disputes over children.

Many elements thus coalesce to create an environment conducive to wife battering. The question of why men beat their wives will remain essentially unanswered, however, until more is understood about personality development. Because potential wife beaters cannot be identified in advance, it is virtually impossible to prevent the onset of the violence. Therefore, effective remedies to curtail the beatings as soon as possible are of critical importance.

Why Battered Women Stay

Just as there is no ready, simplistic reason why men beat their wives, there is no easy answer to why battered women stay with their abusive husbands. Emotional dependency has been suggested as a primary reason. Often a battered woman is not only emotionally dependent on her assailant but also on the marriage itself. The sex-role conditioning that leads wives to bear the burden for the success of the marriage often causes the battered wife to feel guilty about the beatings and to give her husband innumerable second chances.

Low self-esteem and fear of their husbands frequently characterize battered women and force them to stay with their battering husbands. Some women even feel that somehow they must deserve the beatings. Shame is a common emotion among battered women and keeps them from taking the steps necessary to extricate themselves from the situation. Others are trapped in the abusive environment because they do not feel confident enough to reach out to persons who may be able to help them with their problems. Moreover, many wives justifiably fear reprisals from their angry

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36. See Martin, supra note 6, at 56; Eisenberg & Micklow, supra note 9, at 144.
37. Roy, supra note 6, at 42. Roy also found that 81.1% of the husbands who battered their wives had experienced or witnessed violence in their homes as children. Id. at 30-31.
38. Martin, supra note 6, at 82. See also Handbook, supra note 4, at 4; Roy, supra note 6, at 115.
39. Martin, supra note 6, at 81-82. See also T. Davidson, Conjugal Crime 63-64 (1978) (wives as caretakers).
40. Roy, supra note 6, at 81-82. See also Handbook, supra note 4, at 4 (wife believed that she was at fault and had no personal worth). But see Eisenberg & Micklow, supra note 9, at 144 (75% of the wives said that they had done nothing to deserve the beating).
husbands if they leave or even call the police.\textsuperscript{42}

Economic dependency often eliminates any possibility of leaving. Many married women have no marketable skills, particularly if they have been raising children for many years.\textsuperscript{43} One study found that seventy-five percent of battered wives who had left their husbands were unemployed.\textsuperscript{44} Some of these women may have small children and be unable to work because child care is not available. In addition, economic dependency can arise because many women do not have access to the family bank accounts.\textsuperscript{45}

Battered women give assorted reasons for not leaving their husbands.\textsuperscript{46} Because these women are emotionally dependent, they may hold the false hope that their attackers will reform. Some are afraid to leave because they fear for their safety or the well-being of their children. Others have no money of their own so they hesitate to leave, particularly with their children. Finally, some women simply have no place to go because they have no money and are unaware of the availability of shelters or other free lodging for women in their situation.

Wife beating remains a very serious problem and a difficult one to solve. A long history of legal and social legitimization of men beating their wives is hard to overcome. The absence of any firm understanding of why men beat their wives makes it impossible to identify potential wifebeaters in advance and help them before they resort to violence. The reasons battered women stay with their husbands are similarly complex and difficult to comprehend, particularly because emotional dependency is often involved.

\section*{Criminal Remedies}

One possible option for a battered wife is to have her husband arrested and prosecuted for his beatings. All states have criminal statutes that could conceivably be invoked to punish husbands who beat their wives. In a typical jurisdiction such as California, a

\textsuperscript{42} See Martin, supra note 6, at 76, 78; Eisenberg & Micklow, supra note 9, at 144-45; Note, Does Wife Abuse Justify Homicide?, 24 Wayne L. Rev. 1705, 1710 (1978).
\textsuperscript{43} Gingold, supra note 41, at 52. See also Handbook, supra note 4, at 4; Martin, supra note 6, at 83-85.
\textsuperscript{44} Note, Does Wife Abuse Justify Homicide?, 24 Wayne L. Rev. 1705, 1709 (1978).
\textsuperscript{45} Martin, supra note 6, at 84.
\textsuperscript{46} Roy, supra note 6, at 31.
wifebeater could be prosecuted for assault,\textsuperscript{47} battery,\textsuperscript{48} assault with a deadly weapon,\textsuperscript{49} mayhem,\textsuperscript{50} disturbing the peace,\textsuperscript{51} burglary,\textsuperscript{52} and possession of a deadly weapon with intent to assault.\textsuperscript{53} In addition, the California Penal Code contains a section entitled “inflicting corporal injury resulting in traumatic condition upon spouse or person with whom one is cohabiting,” which pertains specifically to wife beating.\textsuperscript{54} As demonstrated below, however, these laws do not work effectively to punish or prevent wife beating.

**Misdemeanor Assault and Battery**

Assaults and batteries are misdemeanors,\textsuperscript{55} and in California, a peace officer can arrest on such charges only if a warrant has been issued or the act was committed in the officer’s presence.\textsuperscript{56} If a felony has been committed, a peace officer can arrest even without a warrant if the officer has “reasonable cause” to believe that a felony has taken place and that the person to be arrested has committed it.\textsuperscript{57} In most instances of wife abuse, the police will not actually see the beating. The violence is over by the time the police

\textsuperscript{47} CAL. PENAL CODE § 240 (West 1970). An assault is defined as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Id.

\textsuperscript{48} Id. § 242. “[A]ny willful and unlawful use of force or violence upon the person of another” constitutes a battery. Id.

\textsuperscript{49} Id. § 245.

\textsuperscript{50} Id. § 203.

\textsuperscript{51} Id. § 415 (West Supp. 1980).

\textsuperscript{52} Id. § 459 (West 1970).

\textsuperscript{53} Id. § 467 (West 1970).

\textsuperscript{54} Id. § 273.5 (West Supp. 1980). California is exceptional in that no other state has a felony wife beating statute. In Ohio, the crime of domestic violence is a misdemeanor. OHIO REV. CODE ANN. § 2919.25 (Page Supp. 1979). Additionally, the Washington Code lists crimes that constitute domestic violence. WASH. REV CODE ANN. § 10.99.020 (West Supp. 1980).

\textsuperscript{55} The punishment for assaults and batteries in California is a fine not exceeding $500 and/or imprisonment in the county jail for up to six months. CAL. PENAL CODE §§ 241, 243 (West Supp. 1980). Assault and battery charges are the most common criminal actions arising out of domestic violence. HANDBOOK, supra note 4, at 19.

\textsuperscript{56} CAL. PENAL CODE § 836 (West 1970). In Michigan, however, police officers can make warrantless arrests for domestic violence even if they do not witness the misdemeanor. MICH. COMP. LAWS ANN. § 764.15a(1) (West Supp. 1980). In Ohio, police officers are empowered to make arrests for the misdemeanor of domestic violence if they have reasonable cause to believe that the person to be arrested has committed the crime. OHIO REV. CODE ANN. § 2935.03 (Page Supp. 1979).

\textsuperscript{57} CAL. PENAL CODE § 836 (West 1970).
arrive; therefore, no misdemeanor arrest can be made. Although a misdemeanor arrest could nonetheless be made if a warrant is on file, that option is generally foreclosed because the filing of a warrant would have required a trip to the district attorney's office to file a complaint prior to the incident. When these restrictions are examined in light of police reluctance to arrest in domestic violence cases, the ineffectiveness of misdemeanor statutes in preventing or punishing domestic violence becomes apparent.

Felony Wife Beating

California Penal Code section 273.5 is a felony statute specifically addressed to the problem of domestic violence. The existence of this statute indicates that the California Legislature recognizes wife beating as a critical problem with which the legal system should be concerned. The statute provides:

Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person of the opposite sex with whom he or she is cohabiting, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in a state prison, or in a county jail for not more than one year.\(^{58}\)

Unfortunately, the prohibition against "inflict\[ing\] . . . corporal injury resulting in a traumatic condition" is not well defined in the statute. In People v. Burns,\(^{59}\) however, the court defined "corporal injury" as the "touching of the person of another against his will with physical force in an intentional, hostile, and aggravated manner, or projecting of such force against his person."\(^{60}\) The term "traumatic condition"\(^{61}\) was defined as "[a]n abnormal condition of the living body produced by violence," or "an injury or wound."\(^{62}\) The requirement that the physical force cause an injury

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58. Id. § 273.5(a) (West Supp. 1980). Section 273.5, which was enacted in 1977, changed the previous requirement that the parties be married in order for the law to apply. The wife beating statute was originally enacted in 1945 as § 273d. See Cal. Stat. 1945, ch. 1312, § 1, at 2462.


60. Id. at 873, 200 P.2d at 137.

61. Id. at 874, 200 P.2d at 138. The term "traumatic condition" was held to require court definition as it is a legal term not within the knowledge of jurors. Id.

62. Id. at 874, 200 P.2d at 137-38. Although the court did not explicitly adopt a definition of "traumatic condition" it did indicate approval of the definition stated in the text. In People v. Stewart, 188 Cal. App. 2d 88, 91, 10 Cal. Rptr. 217, 219 (1961), the court adopted a similar definition: "a wound or other abnormal bodily condition resulting from some exter-
or wound is often problematic because many women are unaware of the need to document the evidence of physical abuse. Further, wifebeaters often hit their wives in places where bruises are not readily visible; thus the chances that others would have seen the bruises and could testify as to their existence are very slight.

The statutes discussed above could be effective tools for dealing with the problem of wife beating. The attitudes of those charged with the responsibility of enforcing such laws, however, restrict their effectiveness and thus largely eliminate criminal remedies as an option for battered women.

Inadequacies of Existing Criminal Remedies

Police Reluctance to Arrest

Police are reluctant to arrest wifebeaters and to get involved in family disputes for a variety of reasons. Family violence monopolizes police time, and responding to these calls can be very dangerous for police officers. Additionally, many police officers believe that family disputes are private matters that should not involve the police. The historical attitude that because wives are the property of their husbands, wife beating should be ignored, also partially accounts for police reluctance to get involved. Furthermore, many police officers feel uncomfortable responding to wife beating calls because they “do not know how to cope with them.” Most police officers receive no training in handling domestic force.”

64. See generally Parnas, Police Discretion and Diversion of Incidents of Intra-Family Violence, 36 LAW & CONTEMP. PROB. 539, 542-43 (1971) [hereinafter cited as Parnas].
65. See, e.g., Domestic Violence, supra note 3, at 119 (in a six month period in 1970, Oakland police officers responded to 16,000 family disturbance calls); 1975 Hearings, supra note 5, at 101 (testimony of Del Martin) (an estimated 60-80% of all calls received by Sacramento police departments involve domestic violence).
66. Thirty percent of all assaults on police officers and 10.7% (10 of 93) of police fatalities in 1978 occurred while responding to disturbance calls, which include family quarrels, person-with-gun calls, and bar fights. FBI, CRIME IN THE U.S. 1978, at 301, 307 (1978).
67. Parnas, supra note 64, at 542-43. Professor Parnas contends that “[a]lmost all police officers dislike intervening in family incidents.” Id.
68. See text accompanying notes 11-23 supra.
69. BANNON, supra note 10, at 2-3. Professor Bannon postulates that the police are the worst possible choice of persons to intervene in domestic disputes. “Of all non-athletic occupations none is so absorbed with the use of physical coercive force as that of police. Nor are any more thoroughly socialized in their masculine role images.” Id. at 3.
mestic violence;\textsuperscript{70} as a result they are unable to alleviate the tense situation and fear for their own safety. They often blame the victim for causing her own beating\textsuperscript{71} and consequently seldom arrest the wifebeater.\textsuperscript{72}

Another reason for police reluctance to arrest wifebeaters is that police officers know the chances of the cases actually being prosecuted are very small.\textsuperscript{73} Although in some cases the victims voluntarily drop the charges, reliable evidence indicates that prosecutors and police officers encourage the husband and wife to resolve the situation outside the criminal justice system.\textsuperscript{74}

Citizens' arrests potentially could be used to circumvent the limitation on police power to arrest for misdemeanors and the general police reluctance to arrest in domestic violence situations. Citizens' arrest statutes typically authorize a private person to arrest another "[f]or a public offense committed or attempted in his presence."\textsuperscript{75} Again, however, the attitude of the police eliminates this potentially effective option for battered women. The police are reluctant to tell battered women about their right to make a citizen's arrest.

\textsuperscript{70} Some police officers are now trained in Family Crisis Intervention. See text accompanying notes 92-96 infra.

\textsuperscript{71} During the 1975 California State Hearings on Domestic Violence, the Assistant Recruit Training Officer for the San Francisco Police Academy observed that victims of domestic violence are often the "subject of scoldings or accusations" from the police and that the attitude often taken by the police as well as social service agencies is that the battered woman has done something to deserve the beatings. 1975 Hearings, supra note 5, at 50 (testimony of Officer Rackley).

\textsuperscript{72} James Bannon, Deputy Chief of the Detroit Police Department, "charitably" terms police attitudes toward battered wives "cavalier" but believes that a more accurate description would be "misfeasance." Bannon, supra note 10, at 4-5. Clement DeAmicis, Deputy Chief of Investigations for the San Francisco Police Department, acknowledged that the feeling of many law enforcement agencies about domestic violence is that it is a trivial matter. "We have a lot of other more important things to do." 1978 Hearings, supra note 2, at 111-12.

\textsuperscript{73} See 1978 Hearings, supra note 2, at 112-13 (testimony of Clement DeAmicis) (of 55 felonies only 12 made it to court, and of the 12 only 3 were tried as felonies). See generally Bannon, supra note 10, at 5 ("The attrition rate in domestic violence cases is unbelievable").

\textsuperscript{74} See Bannon, supra note 10, at 5 ("complainant harassment and prosecutor discretion"); Gingold, supra note 41, at 94 (author states that if the woman does not drop the charges she is made to feel that she is "vindictively" persisting with something that does not belong in the court system); Parnas, supra note 64, at 548.

\textsuperscript{75} Cal. Penal Code § 837 (West 1970). Section 837 also authorizes a citizens' arrest when the person arrested has committed a felony, although not in the private person's presence, and when a felony has in fact been committed and the individual has reasonable cause to believe that the person to be arrested has committed the felony. Id.
arrest\textsuperscript{76} and sometimes even prevent the women from making the arrest when they attempt to do so.\textsuperscript{77} The citizens' arrest device thus has been an ineffective alternative to police arrest.

The policy of nonarrest by the police has been characterized as an abuse of discretion\textsuperscript{78} because police consistently decide not to arrest wifebeaters, in contravention of their duty.\textsuperscript{79} In response to this situation, battered women have brought suit within the last few years to force the police to arrest in wife beating cases. The women have pursued several theories in support of their claims that the police have abused their discretion in consistently failing to arrest wifebeaters.

The first theory, asserted by twelve battered wives against the New York City Police Department, the Department of Probation, and the Family Court,\textsuperscript{80} alleged that in failing to protect battered women from assaults by their husbands, the police were violating their statutory duty to enforce the law.\textsuperscript{81} The New York Supreme Court, Special Term, refused to dismiss the suit, stating: "This Court has the power to compel the Police Department defendants to perform the duty imposed upon them by law to exercise their discretion, and to exercise it in a reasonable, nonarbitrary manner."\textsuperscript{82}

Subsequent to this ruling, the New York City Police Department entered into a consent decree with the plaintiffs which provided that the exercise of a police officer's discretion over whether to arrest a wifebeater would not be affected because: (1) the woman is married to the accused; (2) the woman has not sought or obtained an Order of Prosecution or Temporary Order of Protec-

\textsuperscript{76} See Martin, supra note 6, at 90-92; Handbook, supra note 4, at 5. See generally Truminger, supra note 10, at 271-73.

\textsuperscript{77} Martin, supra note 6, at 90. It is a misdemeanor for "any peace officer who has the authority to receive or arrest a person charged with a criminal offense" to "willfully" refuse to arrest the offender. Cal. Penal Code \textsection{} 142 (West 1970).

\textsuperscript{78} See, e.g., Domestic Violence, supra note 3, at 34-36 (recommending that the police be required to remain at the scene temporarily to terminate or prevent the commission of violence, to aid the victim in getting medical care, and to advise the victim of her legal rights).

\textsuperscript{79} Not surprisingly, law enforcement agencies strongly resist any proposals to limit their discretion with regard to when to arrest. See 1978 Hearings, supra note 2, at 110-22 (testimony of Clement DeAmicis, who advocates training but not mandatory arrests); id. at 141-48 (testimony of Neil Strachan).

\textsuperscript{80} Bruno v. Codd, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

\textsuperscript{81} Id. at 585-86, 393 N.E.2d at 977, 419 N.Y.S.2d at 902.

\textsuperscript{82} 90 Misc. 2d 1047, 1050, 396 N.Y.S.2d 974, 977 (1977).
tion; (3) the woman has chosen or may choose a particular court; or (4) the officer believes that it is preferable to reconcile the parties or mediate, or has attempted or undertaken to reconcile the parties or mediate, where the woman states her wish to have her husband arrested. The general effect of the decree was to force police officers to exercise their discretion in wife beating cases as they do in other cases and to prohibit officers from considering other factors relating to their own perceptions of the efficacy of mediation or referral instead of arrest.

Subsequently, the Appellate Division dismissed the case, holding that it did not state a justiciable cause and that a grant of broad relief would be "such a broad invasion of executive authority as to risk the danger of unconstitutional encroachment." The New York Court of Appeals reversed, holding that a cause of action had been stated.

Lawsuits in Ohio and California have proceeded on a different argument. The plaintiffs in those cases alleged that police failure to arrest husbands for beating their wives was a denial of equal protection. They urged that no rational basis exists for refusing to arrest a person who commits an assault simply because that person happens to be married to or cohabiting with the victim. The state interests in preserving the family and protecting marital privacy were urged not to be rationally related to the nonarrest posture because arrest avoidance often leads to the disastrous consequence of spouse killing. Whether the equal protection argument will be successful is still an open question; however, the ultimate issue was not reached in any of the cases because consent decrees

84. 64 A.D.2d 582, 583, 407 N.Y.S.2d 165, 167 (1978).
85. 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979). Nevertheless, the court affirmed the denial of relief based on the fact that the consent decree already in effect provided most of the relief requested by the plaintiffs. Id. at 589-92, 393 N.E.2d at 979-81, 419 N.Y.S.2d at 905-07.
88. Remedies For Abused Women, supra note 2, at 168. The Cleveland suit also raised due process and first amendment issues. See Raguz v. Chandler, No. 74-1064 (N.D. Ohio, filed Feb. 4, 1975).
89. This argument is discussed more fully in Remedies For Abused Women, supra note 2, at 168-71.
90. At least one author is skeptical of the chances of success of the equal protection argument. See id. at 171-72.
were adopted by the parties.91

**Family Crisis Intervention Training**

Some effort is being made to adapt police procedures to the problems of wife beating. Until the late 1960's most police officers received no training in the handling of family disputes. Since that time, family crisis intervention (FCI) training has become quite popular throughout the country.92 The philosophy underlying the FCI approach is “problem solving,” with an emphasis on referral rather than on arrest and prosecution.93 The goal is to achieve “lasting solutions” to the problems so as to avoid the need for “repeated police involvement.”94

Although the FCI approach is to be commended in that it teaches officers how to diffuse a tense situation rather than exacerbating it as they have often done in the past, it does not go far

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91. In Scott v. Hart, No. 76-2395 (N.D. Cal., filed Nov. 24, 1976), a consent decree that effected a “massive change in policy of the Oakland Police Department” was agreed to by the police. 1978 *Hearings, supra* note 2, at 88 (testimony of Eva Patterson, Attorney, San Francisco Lawyers Comm. for Urban Affairs). In Raguz v. Chandler, No. 74-1064 (N.D. Ohio, filed Feb. 4, 1975), the prosecutor agreed to a consent decree. *Remedies For Abused Women, supra* note 2, at 167.

92. For a comprehensive discussion of FCI programs, see generally Parnas, *supra* note 67, at 548-58. FCI programs are based on a model developed by Dr. Morton Bard, who acknowledges that the techniques were designed in order to protect the safety of police officers. *See Martin, supra* note 6, at 135. *See generally* Roy, *supra* note 6, at 172-92.

The following is an example of one FCI program. In January 1971, the Oakland Police Department instituted an experimental unit to deal with family disturbances. The unit was composed of two patrol cars of two persons each. 1975 *Hearings, supra* note 5, at 211-12. The FCI training given to the officers involved a one-day seminar with representatives from social service agencies. Parnas, *supra* note 67, at 557. The officers in the program were instructed to “sell” the referral and to arrest only as a last resort. 1975 *Hearings, supra* note 5, at 216. A syllabus of the Oakland program explains: “Frequently, when the attempt at problem-solving breaks down, one of the disputants asks, out of frustration, to have the other arrested. It is important to understand that an arrest in these instances does not usually contribute to solving the disputes . . . Therefore, the FCIU has tried to prevent such unnecessary arrests and to channel the disputants back into constructive problem-solving discussion.” *Id.* Although the report on the Oakland program concludes that a preliminary evaluation of the program showed it to be 82% successful, no concrete definition of “success” is offered. *Id.* at 217. Presumably, success refers to the couple’s utilization of referral agencies or decision not to call the police in the future. This “success” rate is only encouraging if it is assumed that curtailing police involvement in wife beating cases is a solution to the problem. Surely, it helps the police by freeing them to deal with other problems that may be less threatening to their safety. But, this is certainly not success from the point of view of the battered wife in need of protection.

93. Parnas, *supra* note 64, at 556.

94. 1975 *Hearings, supra* note 5, at 212.
enough. Temporary solutions are insufficient for long-term problems. The tense situation is quieted for the moment, but nothing is done to prevent its recurrence. Although referrals are made, little followup is done to see if the family is utilizing them. An additional problem with the FCI approach is that it seeks to treat criminal behavior as noncriminal. Unless wife beating is recognized as criminal conduct, with the social and legal stigma that such conduct entails, marital privacy and property concepts will continue to encourage wife beating. Perhaps in the rare case, involving an isolated incident of wife beating with no resulting injuries, prosecution may not be warranted, but it is irrational to assume that a victim of a violent assault does not want to prosecute. In fact, it seems much more reasonable to assume that, if the victim called the police, she wants her husband arrested.

The Failure of District Attorneys to Prosecute

Even if the battered wife succeeds in getting her husband arrested, her problems are far from over. As discussed above, the attrition rate in family violence cases is alarmingly high. Moreover, domestic violence cases are routinely given a low priority by prosecutors. District attorneys are burdened with heavy caseloads, which present the temptation not to prosecute difficult cases. They also may feel that prosecution is not warranted because domestic violence cases are of minor importance and should not be dealt with in the criminal justice system. Again, the attitudes of

95. See Parnas, supra note 64, at 556 (in the first 12 weeks of the program only 26 of 72 referrals completed their appointments).

96. One police official believes that crisis intervention may have been misguided in this regard. He speaks of the new philosophy of the San Francisco Police Department: "We have absolutely no argument that people who are abusers should be put in jail." 1978 Hearings, supra note 2, at 113 (testimony of Clement DeAmicis). "[I]f it is a repeated situation where the person knowingly and wantonly beats another person in the domestic scene . . . he should . . . be cited [and] put in jail." Id. at 114.

97. See note 73 & accompanying text supra. San Francisco statistics for the first six months of 1978 illustrate the magnitude of the problem. In that time, 230 police reports involving family violence were filed, yet only 12 of these cases survived long enough to go to court and only seven guilty findings were made, four of which were on reduced misdemeanor charges. 1978 Hearings, supra note 2, at 113 (testimony of Clement DeAmicis).

98. 1978 Hearings, supra note 2, at 48 (testimony of Burt Pines).

99. MARTIN, supra note 6, at 109.

100. See, e.g., Eisenberg & Micklow, supra note 9, at 158; Parnas, Prosecutorial and Judicial Handling of Family Violence, 9 CRIM. L. BULL. 733, 733-35; Remedies For Abused Women, supra note 2, at 149-50.
prosecutors may be influenced by historical concepts of wives as their husbands’ property. For all these reasons, district attorneys dislike handling domestic violence cases and try to discourage victims from following through with their complaints.

The victim nearly always bears the burden of going forward with the case. District attorneys, as well as the police and the battering husband, frequently pressure the victim into dropping the charges. The battered wife is made to feel that she will bear the responsibility for the assailant’s possible incarceration and loss of employment if she pursues the case. With this heavy psychological burden, it is not at all surprising that many battered women refuse to prosecute.

In view of the foregoing factors, the chances are extremely small that the battered wife will be able to overcome the reluctance of both the police and the district attorney to treat wife beating as a criminal offense. Even in the rare case where the wifebeater does get convicted, the victim may wonder whether it was worth the effort because her abusive husband is likely to be given no more than a light punishment.

**Other Remedies**

**Temporary Restraining Orders**

Temporary restraining orders (TRO’s) are the most common

101. See text accompanying notes 11-23 supra.
102. See BANNON, supra note 10, at 5. See generally 1978 Hearings, supra note 2, at 52 (testimony of Burt Pines); HANDBOOK, supra note 4, at 10; Eisenberg & Micklow, supra note 9, at 149.
103. See 1978 Hearings, supra note 2, at 50 (testimony of Burt Pines); Gingold, supra note 41, at 94.
104. See HANDBOOK, supra note 4, at 10; Parnas, Judicial Response to Intra-Family Violence, 54 MINN. L. REV. 585, 594 (1970); Truninger, supra note 10, at 273. But see Martin, supra note 6, at 94 (quoting Carol Murray, former director of San Francisco Neighborhood Legal Assistance Foundation, Domestic Relations Unit, as stating that she has never seen any statistics indicating that domestic violence victims drop charges more frequently than victims of other crimes. She suggests that the problem really is that there is just a single witness).
105. Few wifebeaters are ever sent to jail. See Parnas, Prosecutorial and Judicial Handling of Family Violence, 9 CRIM. L. BULL. 733, 747-50 (1973). Rather, most wifebeaters get off with a warning or probation. See generally HANDBOOK, supra note 4, at 114-18 (flow chart of the entire process); Eisenberg & Micklow, supra note 9, at 159; Remedies For Abused Women, supra note 2, at 15-52.
way that the legal system deals with domestic violence.\textsuperscript{106} Although TRO's are frequently used, traditionally they have been ineffective in protecting the battered wife. Police officers have almost universally refused to arrest offenders for violations of these orders\textsuperscript{107} even though the violation of a TRO is technically a misdemeanor.\textsuperscript{108} Most TRO's do not clearly specify the type of conduct that is prohibited,\textsuperscript{109} and police officers generally do not have the training necessary to decipher legal terminology.\textsuperscript{110} Even if the police did feel that the enforcement of TRO's in domestic violence cases was within their duties, they would still have a difficult time determining if the order had been violated. Lack of uniformity in the wording of the orders further exacerbates this problem. Finally, because the violation of a TRO is only a misdemeanor, the officers must actually witness the prohibited behavior before they may arrest.\textsuperscript{111}

The complex procedure necessary to obtain an enforceable TRO also may discourage many battered women from seeking this type of legal protection.\textsuperscript{112} The process typically requires a woman to retain an attorney, fill out a petition explaining why the order is necessary, file it with the court, get the order personally served on her husband by a specified time before the show cause hearing, and finally, testify at the hearing.\textsuperscript{113} As a consequence, obtaining a TRO is expensive unless the woman qualifies for legal aid or can

\textsuperscript{106} See, e.g., 1978 Hearings, supra note 2, at 62 (the domestic violence unit of Santa Clara County Legal Services obtains TRO's in 90\% of its active cases).

\textsuperscript{107} See 1978 Hearings, supra note 2, at 98, 139; Martin, supra note 6, at 105; Eisenberg & Micklow, supra note 9, at 154; Truninger, supra note 10, at 274.


\textsuperscript{109} 1978 Hearings, supra note 2, at 73, 140. See also Martin, supra note 6, at 107.

\textsuperscript{110} 1978 Hearings, supra note 2, at 138.

\textsuperscript{111} See text accompanying notes 56-57 supra.

\textsuperscript{112} A legal aid attorney related the experience of one of his clients attempting to enforce a TRO: "She called the police to seek assistance in enforcing this Restraining Order that she'd received. And the police officer's response was that this Restraining Order needs to be on file with our department before he will enforce it. The woman went to get the order on file and was told by the people at the department that she needed certified copies of the order before they would receive it for filing. She went back to the court and got her certified copies, and then when she went back to the police department was told that she would need proof of personal service of the orders before they would receive them for filing. After she got the proof of personal service of the orders and went back to the police department, the following time she was then told that these orders were not orders that had been issued under the new 527(b) and, therefore, could not be filed." 1978 Hearings, supra note 2, at 63-64.

\textsuperscript{113} See Martin, supra note 6, at 105; Truninger, supra note 10, at 267-68.
file in forma pauperis.\textsuperscript{114}

The California Legislature enacted the Domestic Violence Prevention Act, which became effective July 1, 1980, in an effort to address the problem of wife battering in a more comprehensive and effective fashion.\textsuperscript{115} Although the Act retains the usual cumbersome procedure for securing a TRO,\textsuperscript{116} it also contains unusual provisions that potentially could make TRO's more effective remedies for battered women. First, TRO's under the Act remain in effect for ninety days\textsuperscript{117} with the possibility of extensions up to one year.\textsuperscript{118} Furthermore, the Act requires that the TRO state the expiration date and contain the following statement: "NOTICE: These orders shall be enforced by all law enforcement officers in the State of California."\textsuperscript{119} Transmittal of a copy of the TRO to local law enforcement agencies is required by the Domestic Violence Prevention Act.\textsuperscript{120}

Under the Act, California courts also are empowered to make

\textsuperscript{114} Truninger, supra note 10, at 267. See also Martin, supra note 6, at 105.

\textsuperscript{115} Cal. Civ. Proc. Code §§ 540-543 (West Supp. 1980). The statute sets forth the following statement of purpose: "The purposes of this chapter are to prevent the recurrence of acts of violence by a spouse or household member against another spouse or other family or household members and to provide for a separation of the persons involved in such domestic violence for a period of time sufficient to enable such persons to seek resolution of the causes of the violence." Id. § 540. For TRO wife beating statutes in other states, see Ill. Ann. Stat. ch. 69, § 25 (Smith-Hurd Supp. 1980); Ohio Rev. Code Ann. § 2919.26 (Page Supp. 1979); Pa. Stat. Ann. tit. 35, §§ 10181-10190 (Purdon 1977).

\textsuperscript{116} The procedure is as follows: Any family or household member who was actually residing with the person at whom the order is directed can get a TRO without notice, upon a showing that irreparable harm would otherwise result and that the person to whom the order will be directed cannot be located or for some reason should not be given notice. If the TRO is granted without notice, a show cause hearing must be held within 15 days. Cal. Civ. Proc. Code §§ 527, 545, 546 (West Supp. 1980). The TRO can consist of an order: "(2) enjoining any party from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, or disturbing the peace of the other party, and, in the discretion of the court, upon a showing of good cause, other named family and household members" or "(6) enjoining a party from specified behavior which the court determines is necessary to effectuate orders under paragraph (2) . . . ." Cal. Civ. Code § 4359(a) (West Supp. 1980). Violation of a TRO is a misdemeanor. Id. § 4359(c).

\textsuperscript{117} Cal. Civ. Proc. Code § 548 (West Supp. 1980). A 1979 amendment to § 527(b) extended the duration of all other TROs from 30 to 90 days.

\textsuperscript{118} Id. § 548. The one year maximum extension period explicitly applies only to extensions by "mutual consent of the parties." This leaves open the possibility that on motion of a party the court could extend the TRO beyond the one year period. Id.

\textsuperscript{119} Id. § 552.

\textsuperscript{120} Id. § 550. The law enforcement agencies are required to make information on the status of TRO's available to "any law enforcement officer responding to the scene of reported domestic violence." Id.
the following types of orders: 121 (1) an order that restitution be paid for losses incurred as a direct result of physical abuse or for losses incurred as a result of an ex parte TRO later found to be unsupported by sufficient facts, 122 (2) an order requiring counseling where the parties so stipulate, 123 and (3) an order directing the payment of attorneys' fees and costs to the prevailing party. 124 Finally, the court has the discretionary power to appoint counsel for the plaintiff in TRO enforcement proceedings. 125

Diversion Programs

The difficulties encountered by battered women in getting their husbands prosecuted are further exacerbated by mandatory diversion programs. To deal with the overwhelming number of domestic violence cases, district attorneys and judges have set up special diversion departments. 126 This method of resolution typically involves "admonishing violators of the Penal Code to keep peace" and possibly a counseling referral, although referrals are not mandatory. 127 The usual outcome is as follows: "In most cases the complaint hearing resolves the matter to the satisfaction of all concerned persons. The need for filing formal criminal charges is usually avoided, saving time and expense of lawyers and courts." 128

121. These orders can only be issued with notice and a hearing. Id. § 547.
122. Id. § 547(c). Restitution for losses resulting from physical abuse includes compensation for loss of earnings and out-of-pocket expenses including, but not limited to, expenses for medical care and temporary housing. Restitution to a party injured by an unfounded TRO is limited to out-of-pocket expenses. Id.
123. Id. § 547(d).
124. Id. § 547(e).
125. Id. § 553(a). If the court does appoint counsel, the court may order the defendant to pay the plaintiff's attorneys' fees and costs. Id.
126. For example, the San Francisco Family Bureau is staffed by four investigators who perform crisis intervention work and hold citation hearings, as well as handle criminal complaints arising out of family situations. 1975 Hearings, supra note 5, at 72-74; Parnas, Prosecutorial and Judicial Handling of Family Violence, 9 Crim. L. Bull. 733, 737 (1973). The Bureau initially sends a complaint notice to the accused and then conducts an informal hearing at which the victim confronts the defendant and discusses the situation. Parnas, Prosecutorial and Judicial Handling of Family Violence, 9 Crim. L. Bull. 733, 737 (1973). The investigator is simply a fact finder and does not usually counsel the parties. 1975 Hearings, supra note 5, at 75.
127. 1975 Hearings, supra note 5, at 75.
128. Id. at 219. Prosecutors have been very successful in keeping these cases out of the court system. See 1978 Hearings, supra note 2, at 48 (in Los Angeles County, four times as many cases went through the office hearing system than the number of cases that proceeded to prosecution); Martin, supra note 6, at 110 (in 1973-74, only eight out of several thousand cases handled by the San Francisco Family Bureau led to prosecution).
It should be recognized, however, that the goal in wife beating cases should be to prevent future beatings and not solely to achieve judicial economy.

Although it is sometimes possible to bypass these special departments, it still remains difficult to have wifebeaters prosecuted. District attorneys believe that stringent proof must exist before seeking a warrant is justified. Two witnesses, a police report, and a history of previous attacks are considered the "fundamentals." These fundamentals are difficult to fulfill because usually there are no witnesses and often the police do not file reports; hence previous attacks frequently are not documented.

Another type of diversionary program is the Conciliation Court, which is a special branch of a county court set up to help spouses handle domestic problems. Although this diversionary program may be helpful for some battered women and their spouses, it is based on the assumption that domestic violence is not a criminal activity to be adjudicated in the courts, but rather a social problem that can be solved by discussion and referrals. Conciliation hearings can be "cruel hoaxes" because they divert the victims from pursuing criminal litigation and thus ignore the future safety of the woman. The informal hearing system also lacks the capacity for followup on referrals and for enforced counseling, because of the court’s inadequate staffing and financing.

Some prosecutors, however, are starting to acknowledge that wife abuse is a crime and should be treated as one. An important

129. For example, after San Francisco District Attorney Freitas took office in 1976, he yielded to pressure from feminists and set up a procedure whereby it is now possible for a battered woman to bypass the Family Bureau and proceed directly to prosecution. If the charge is a felony, it is assigned to the assault team, and if it is a misdemeanor, the general works division prosecutes the case. Martin, supra note 6, at 111.

130. Id. at 109-10.

131. Handbook, supra note 4, at 11. Conciliation courts existed in the following counties in California, as of 1978: Alameda, Fresno, Imperial, Los Angeles, Sacramento, Napa, San Bernadino, San Diego, San Joaquin, San Mateo, Santa Clara, Sonoma, and Contra Costa. Id. A fairly innovative program of this type has been established in San Diego by Judge Ehrenfreund. In his court, the battered woman can come in and make a statement, and a few hours later the judge may issue a TRO. No filing fee or attorney is required. 1978 Hearings, supra note 2, at 72.

132. Martin, supra note 6, at 113.

133. 1978 Hearings, supra note 2, at 126.

134. The Los Angeles City Attorney's Office has set up a domestic violence program with the understanding that "crimes of violence which occur between persons in a personal relationship are no less criminal than those involving strangers." Id. at 49. The established guidelines require that each case be evaluated by an attorney who must decide whether an
philosophical change is reflected in the attitude that domestic violence, like any other criminal activity, is an offense against the state. This attitude leads to the conclusion that it is the prosecution, not the victim, that bears the responsibility for litigating the case. Prosecutors who have accepted their responsibility in this area have found that formerly reluctant victims can become effective witnesses and that convictions can be attained.

Thus, diversionary programs, if used in combination with rigorous prosecution, can be an effective way to treat domestic violence. Unfortunately, the usual practice is an automatic diversion out of the criminal justice system, a practice that is based on the erroneous assumption that wife beating cases are not appropriate for criminal treatment.

Shelters and Victim-Witness Assistance Programs

One option increasingly available to battered women is the temporary use of a shelter. Shelters generally provide a range of services in addition to a place to stay, such as assertiveness training, child care, and legal assistance. All of these services can aid office hearing or a criminal complaint would be appropriate. The prosecutor, at least theoretically, evaluates the evidence as he or she would in a nondomestic violence case, and the investigating agency is expected to do a thorough job. Id.

135. See 1978 Hearings, supra note 2, at 50, 127.

136. Burt Pines, Los Angeles City Attorney, found that “once we have explained that it is our decision, that the woman doesn’t have to feel guilty about pressing the charges; many are willing to go forward.” 1978 Hearings, supra note 2, at 51. Alameda County Deputy District Attorney, Carol Corrigan, similarly found that “with proper support and counseling a reluctant witness will be able to gather the wherewithal to go into court and be an effective witness for the prosecution.” Id. at 127.

137. The idea of establishing places where women could stay temporarily with their children was fostered by Erin Pizzey, founder of Chiswick Women’s Aid in England. Martin, supra note 6, at 225. This refuge, which opened in 1971, is still unique in that not only does it provide temporary housing facilities, but “second stage” homes for more than 500 women and children have been set up to furnish longer-term housing. Search, Scream Quietly, Ms., Aug. 1976, at 96. Women’s Aid also offers special schooling for the children and training for the teenagers of these violent homes. Money for the “very special education” needed by these children was contributed by an anonymous donor. Id.


the battered woman who needs emotional support as well as prac-
tical advice.

Victim-Witness Assistance Programs can also provide practi-
cal help for battered women. The goal of these programs is to help
victims of violent crime negotiate the criminal justice system suc-
cessfully by explaining court procedures to them. Additionally,
the victim is furnished with transportation to court, aid in apply-
ing for state victim compensation benefits, child care, and refer-
als to community social services. Such projects are administered
by a variety of sources, including district attorneys’ offices, courts,
police departments, and local bar associations.

Although refuges and victim assistance programs provide some
temporary relief for some battered women, they are incomplete so-
lutions because they do nothing to ensure the future safety of
the victim or to punish the offender.

Fighting Back in Self-Defense

Self-Defense Requirements

The inadequacy of the remedies discussed above to solve the
problems of battered women must be considered as integral to a
woman’s perception of the danger inherent in her situation. In
other words, the battered wife’s perception of her situation is influ-
enced by the historical acceptance of wife beating, her emotional
and economic dependency on her husband, and the inadequate re-
sponse of the criminal justice system to the problem.

Attorneys have recently attempted to assert justifiable homi-
cide to exculpate women who fight back in self-defense. Insanity and diminished capacity are also possible pleas for the battered wife but are not entirely appropriate in this context because the woman's mental capacity to entertain the requisite intent is not impaired. Rather, because of the circumstances, the battered wife rationally concludes that she must defend herself or she will be killed by her husband.

The traditional prerequisites of self-defense are: (1) the defendant used a reasonable amount of force, and (2) the defendant reasonably believed that she or he was in immediate danger and

144. Other women have pleaded insanity or have been given reduced manslaughter charges. See generally E. Schneider & S. Jordan, Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault 21-24 (1978), reprinted in 4 Women's Rts. L. Rep. 149 (1978) [hereinafter cited as Schneider & Jordan]; Potential Defense, supra note 2, at 223-26.

145. Reports of the success rates of the self-defense plea vary. See, e.g., Levine, Battered Lives, The Continuing Trials of Bernadette Powell, The Village Voice, Dec. 24, 1979, at 29 (quotes Dr. Lenore Walker, an expert witness in these cases, as saying that "there is a new standard of justice for self-defense being offered."); Lewin, Self-Defense For Battered Women—When Victims Kill, The National Law Journal, Oct. 29, 1979, at 11 (quotes Professor Schneider: "[W]e've already seen a lot of acquittals on self-defense."); Scheier, Did Pat Evans Kill Her Husband in Self-Defense?, Chicago Law., Oct. 1979, at 3 (stating that the self-defense plea seems to be largely unsuccessful and pointing to the results of a survey of attorneys who have used the plea; most say that their clients were convicted). See generally Schneider & Jordan, supra note 147, at 4 n.3 (contains a list of cases in which battered women committed homicide and the dispositions of those cases).

146. For a discussion of insanity as a defense in a criminal trial, see generally W. LaFave & A. Scott, Handbook on Criminal Law § 36, at 268 (1972). There are basically two tests for insanity. The first test was formulated in M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843): "To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from a 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." The second is the Model Penal Code formulation: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." Model Penal Code § 4.01(1) (1962). The Model Penal Code test was specifically adopted in United States v. Brawner, 471 F.2d 569 (D.C. Cir. 1972).

147. See generally 30 Vand. L. Rev. 213 (1977) (discussion of diminished capacity in California). See also B. Witkin & J. Levin, 1 California Crimes § 147A at 127-35 (Supp. 1978). The following definition of diminished capacity is given: In certain circumstances "[m]ental illness not amounting to legal insanity may negative the existence of a particular mental state which is an element of the crime charged." Id. at 127.

148. In some states the person attacked is required to retreat if he or she can do so safely before resorting to deadly force. See generally Note, Limits on the Use of Defensive Force to Prevent Intramarital Assaults, 10 Rut-Cam. L.J. 643, 653-57 (1979).
that the force used was necessary to avoid the danger.149 Moreover, deadly force can be used only if the person reasonably believes that the other is about to inflict unlawful death or serious bodily harm.150 There is a split of authority as to whether the defendant’s belief as to the need to use deadly force and the immediacy of the danger is evaluated by an objective or subjective standard.151 Regardless of which standard a particular state follows, all of the aforementioned circumstances should be considered when determining whether the battered wife acted in self-defense. Under the subjective standard, these circumstances are relevant to the woman’s own belief in the necessity of using self-defense. Under the objective standard, on the other hand, the jury must consider these


151. W. LaFave & A. Scott, Handbook on Criminal Law § 53, at 391 (1972) states the objective standard: “One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.” R. Perkins, Criminal Law 993-94 (2d ed. 1969) criticizes the subjective standard: “At the other extreme is an occasional holding to the effect that if the other requirements are satisfied, the defender will be excused if he acted from an honest belief in the greatness and imminence of his peril. This was too broad a position and hence the limitation was added that his belief must be based upon reasonable grounds. The reasonable belief of the defender under the circumstances as they appear at the moment is both necessary and sufficient for this aspect of the privilege of self-defense. The question is not whether the jury believes the force used was necessary in self-defense, but whether the defendant, acting as a reasonable man had this belief.” 40 Am. Jur. 2d Homicide § 154 (1968) states that the subjective standard is the minority position: “The rule adopted in a few states, and what seems to have been the common-law rule, is that when a person is assaulted and kills his assailant in self-defense, the question to be determined is whether the slayer, under all the circumstances as they appeared to him, honestly believed that he was in imminent danger of losing his life, or of suffering great bodily harm, and that it was necessary to do what he did in order to save himself from such apparent threatened danger, and it is not whether a reasonable man, or a man of reasonable courage, would have so believed. The rule followed by most of the courts is that the apprehension of danger and belief of necessity which will justify killing in self-defense must be a reasonable apprehension and belief, such as a reasonable man would, under the circumstances, have entertained.” The Model Penal Code adopts the subjective standard: “[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.” Model Penal Code § 3.04(1) (Tent. Draft No. 8, 1958). The Comments explain: “The formulation thus requires that the actor believe that the circumstances create the necessity for using some protective force and that the force that he employs does not exceed what he believes to be essential to relieve his peril.” Id. § 3.04, Comment 1.
circumstances in order to determine if the woman's belief in the necessity of using self-defense was reasonable.

In applying the elements of self defense to a situation in which a battered wife kills her husband, the problems that most often arise are whether the woman reasonably believed that deadly force was necessary and whether she reasonably believed that she was in immediate danger. The historical acceptance of wife beating, the wife's economic and emotional dependency, and the inadequate response of the criminal justice system to wife beating are all crucial elements of the battered wife's perception of her need to use self-defense.

The Woman's Perception of the Danger

All the Surrounding Circumstances Must be Considered

The success of the self-defense plea in battered women cases depends on presenting the battered wife's overall perception of the situation to the jury.152 Because few self-defense cases involving battered women or closely analogous situations have reached the appellate court level, there is very little case law on the subject. The leading case in this developing area of the law is State v. Wanrow,153 a 1977 plurality decision of the Washington Supreme Court. Yvonne Wanrow was not a battered woman but her perception of danger was similar to that experienced by a battered woman, as will be discussed in detail later. The Washington court reversed Ms. Wanrow's conviction for second-degree murder and first-degree assault, in part because of error by the court with regard to self-defense jury instructions.154

According to the court, a misstatement of law was contained in jury instruction 10, which read in part:

To justify killing in self-defense, there need be no actual or real danger to the life or person of the party killing, but there must be, or reasonably appear to be, at or immediately before the killing, some overt act, or some circumstances which would reasonably indicate to the party killing that the person slain, is, at the time, endeavoring to kill him or inflict upon him great bodily

152. See generally SCHNEIDER & JORDAN, supra note 144, at 11-21.
153. 88 Wash. 2d 221, 559 P.2d 548 (1977).
154. Id. at 224, 559 P.2d at 550. The other ground for reversal involved the admission of a tape recording into evidence. Id. at 226-33, 559 P.2d at 551-55.
harm.\textsuperscript{155} The Washington Supreme Court focused on the phrase “at or immediately before the killing,” stating that it impermissibly narrowed the scope of the jury’s inquiry into the surrounding circumstances: “It is clear that the jury is entitled to consider all of the circumstances surrounding the incident in determining whether [the] defendant had reasonable grounds to believe grievous bodily harm was about to be inflicted.”\textsuperscript{156}

In Wanrow, “all of the circumstances surrounding the incident” included Ms. Wanrow’s knowledge that Wesler, whom she had killed, was a child molester, had once been committed to a mental hospital, and had recently pulled her son off his bicycle and dragged him into a house. Wanrow also knew that the daughter of a friend had identified Wesler as having sexually molested her.\textsuperscript{157}

The fact situation in Wanrow is very similar to that present in the wife battering situation. In both cases the women are intimately familiar with the man’s past history of violent attacks. These attacks represent a continuous course of conduct over time and serve to keep the woman constantly on-guard. In Wanrow, as in most wife battering cases, the police had been called previous to the attack in question but had declined to do anything to resolve the situation. The size difference between the woman attempting to defend herself and her attacker is another common element. Ms. Wanrow was 5’4” and using a crutch, whereas Wesler was 6’2”.

Often battered women are reticent to leave the dangerous situation because they fear for the safety of their children, as did Ms.

\textsuperscript{155} Id. at 234 n.7, 559 P.2d at 555.
\textsuperscript{156} Id. at 236, 559 P.2d at 556 (quoting State v. Lewis, 6 Wash. App. 38, 41, 491 P.2d 1062, 1064 (1971)). The Wanrow court held that Instruction 12, which advised the jury to “consider the words and actions of the deceased prior to the homicide . . . together with any and all factors which in your judgment may bear upon [self-defense]”, did not cure the defect. 88 Wash. 2d at 238, 559 P.2d at 557.
\textsuperscript{157} 88 Wash. 2d at 224-25, 559 P.2d at 550-51. In addition, the following information about Wesler had been related to Ms. Wanrow by her friend Ms. Hooper: (1) Wanrow’s son had told Hooper that a man had tried to pull him off his bicycle and drag him into a house. A few minutes after the child related this to Hooper, Wesler appeared on her porch claiming that he “didn’t touch the kid.” (2) At the same time, Hooper’s daughter, who had been molested and contracted veneral disease several months previously, identified Wesler as her assailant. (3) According to Hooper’s landlord, Wesler tried to molest a young boy who had lived in the house Hooper now occupied, and Wesler had been committed to Eastern State Hospital for the mentally ill. (4) Hooper had called the police and asked them to arrest Wesler, but they said that they could not arrest him until Monday morning. (5) A week earlier, Hooper had noticed a prowler around her house and two days before that someone had slashed the window screen. Hooper suspected Wesler of being the prowler. Id.
Wanrow whose children were present when the deadly confrontation took place. Finally, the wifebeater is often intoxicated, just as Wesler was in this case. Because of the similarity of the fact situations, the legal reasoning can be analogized as well.

The Wanrow court's statement that the "jury is entitled to consider all of the circumstances surrounding the incident in determining whether [the] defendant had reasonable grounds to believe grievous bodily harm was about to be inflicted" seems to apply to the requirement that the woman who claims self-defense believe that she was in immediate danger. But, somewhat later in the opinion, the court emphasizes the "crucial importance" of the jury's consideration of Wanrow's knowledge of Wesler's reputation for violence. This information would be useful to the jury in determining the "degree of force which . . . a reasonable person in the same situation . . . seeing what [s]he sees and knowing what [s]he knows, then would believe to be necessary." This statement of the court seems to apply to the self-defense requirement that only a reasonable amount of force be used. The conclusion that can be drawn is that a consideration of all of the circumstances surrounding the incident relates to the perception of both the immediacy of the danger and the reasonableness of the amount of force used.

The Wanrow court's standard reflects the general rule that the jury is entitled to consider the reputation of the attacker, including incidents of past beatings, when the defendant claims to have acted in self-defense. The rule has been stated as follows:

[A]fter laying the proper evidentiary foundation, [the defendant] may introduce evidence of the turbulent and dangerous character of the deceased . . . to show that the circumstances were such as would have naturally caused a man of ordinary prudence to believe that he was, at the time of the killing, in imminent danger of losing his life or of suffering great bodily harm.

*People v. Bush,* a case involving a battered woman pleading self-defense to the murder of her husband, held even more explicitly than *Wanrow* that prior threats and beatings must be consid-

158. *Id.* at 236, 559 P.2d at 556.
159. *Id.* at 237-38, 559 P.2d at 557 (quoting State v. Dunning, 8 Wash. App. 340, 342, 506 P.2d 321, 322 (1973)).
160. See, e.g., 40 AM. JUR. 2d Homicide §§ 303-309 (1968) (citing cases); 1 A.L.R.3d 571 (1965).
161. 40 AM. JUR. 2d Homicide § 302 (1968).
ered in evaluating the woman’s perception of the situation. In Bush, the lower court had given jury instructions emphasizing self-defense in terms of “imminent danger” and “immediate circumstances,”¹⁶³ but had refused the defendant’s request for a jury instruction regarding prior threats by the decedent. The California Court of Appeal held that because the trial court’s emphasis on “immediate circumstances” may have diverted the jury’s attention from previous threats, it was reversible error to refuse to give the requested instruction.¹⁶⁴ This instruction advised the jury that a person who has received threats against her life by another “is justified in acting more quickly and taking harsher measures for her own protection . . . than would be a person who had not received such threats.”¹⁶⁵

Although the Wanrow court did not explicitly go as far as the Bush court in explaining the effect of prior threats on the woman’s perception, such reasoning is implicit in the decision. Wanrow’s and Bush’s consideration of all of the surrounding circumstances also arguably includes the frustration engendered by past efforts on the part of battered women to get police officers to arrest their attackers¹⁶⁶ and prosecutors to pursue their cases.¹⁶⁷ The surrounding circumstances also include the historical acceptance of wife beating and the inadequacy of the criminal and civil remedies. All of these factors influence the battered wife’s perception of her limited options and her need to use self-defense.

Size and Strength Differences Must Be Considered

The second paragraph of the Wanrow jury instruction was

¹⁶³. Id. at 303, 148 Cal. Rptr. at 436.
¹⁶⁴. Id.
¹⁶⁵. Id. at 303 n.2, 148 Cal. Rptr. at 435-36. The full text of the instruction provided: “One who has received threats against her life or person made by another is justified in acting more quickly and taking harsher measures for her own protection in the event of assault either actual or threatened, than would be a person who had not received such threats; and if in this case you believe from the evidence that the deceased made threats against the defendant and that the defendant because of such threats made previously to the transaction complained of had reasonable cause to fear greater peril in the event of an altercation with the deceased than she would have otherwise, you are to take such facts and circumstances into your consideration in determining whether the defendant acted in a manner in which a reasonable person would act in protecting her own life or bodily safety.” Id.
¹⁶⁶. See text accompanying notes 64-91 supra.
¹⁶⁷. See text accompanying notes 97-105 supra.
found to be equally prejudicial:

However, when there is no reasonable ground for the person attacked to believe that his person is in imminent danger of death or great bodily harm, and it appears to him that only an ordinary battery is all that is intended, and all that he has reasonable grounds to fear from his assailant, he has a right to stand his ground and repel such threatened assault, yet he has no right to repel a threatened assault with naked hands, by the use of a deadly weapon in a deadly manner, unless he believes and has reasonable grounds to believe, that he is in imminent danger of death or great bodily harm.168

The error in this part of the instruction was that it did not clearly indicate to the jury that Wanrow’s “subjective impressions” were the measure of the reasonableness of her conduct.169 According to the court, the use of the male pronoun eight times in the paragraph gave the jury the impression that the objective standard to be applied was that applicable to a fight between two men of comparable size. Because Wanrow was 5'4” and using a crutch while Wesler was 6'2” and intoxicated, it would be unreasonable, according to the court, to expect Wanrow to fight off an attack by Wesler without the use of a weapon.170 This analysis is pertinent to the reasonableness of the force element.

Traditionally, the courts have allowed guns to be used in self-defense only when the attacker also had a gun.171 However, the majority rule now is that “the relative size and strength of the accused and deceased are proper considerations in determining whether there was reasonable apprehension of danger and whether the slayer used more force than was necessary to defend himself against the threatened danger.”172 In People v. Reeves,173 another battered wife self-defense case, the court stated: “It is a firmly established rule that the aggressor need not have a weapon to justify one’s use of deadly force in self-defense . . . and that a physical beating may qualify as such conduct that could cause great

168. 88 Wash. 2d at 239, 559 P.2d at 558.
169. Id. at 240, 559 P.2d at 558.
170. Id. This error was not cured by Instruction 12, which advised the jury to consider “the relative size and strength of the persons involved.” Id. at 246 n.11, 559 P.2d at 561 n.3 (Hamilton, J., dissenting).
171. See SCHNEIDER & JORDAN, supra note 144, at 14, 18.
bodily harm.”

Subjective Perceptions of Women That Result From Sex Discrimination Must Be Considered

The *Wanrow* court also held that “[t]he persistent use of the masculine gender” in the jury instruction violated *Wanrow*’s right to equal protection of the law,\(^\text{175}\) in that “the respondent was entitled to have the jury consider her actions in light of her own perceptions of the situation, including those perceptions which were the product of our nation’s ‘long and unfortunate history of sex discrimination.’”\(^\text{176}\) This language sweeps very broadly and could have far-reaching implications. Because women, unlike most men, have never been trained in fist-fighting techniques, when a woman is threatened by a serious attack from a man, the only way that she can defend herself is by resorting to a weapon.\(^\text{177}\) The *Wanrow* court thus implied that women should be permitted to resort to a weapon under circumstances in which men would not be so permitted, because in such circumstances men would be able to defend themselves with their fists. The court acknowledged that sex discrimination has both created the impression that it is improper for women to engage in fist-fighting and in many cases denied women exposure to fist-fighting techniques.

By implication, the court’s language also includes any other perceptions of the battered wife that are the result of sex discrimination. Logically, this would include such things as the battered wife’s emotional and economic dependency on her husband. All of these considerations, from the battered wife’s point of view, effectively eliminate the option of leaving her husband and make striking out in self-defense her only alternative.

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174. *Id.* at 411, 362 N.E.2d at 13.

175. The equal protection argument is technically dictum and is not well explained by the court. For one hypothesis, see Note, *Women’s Self-Defense Under Washington Law*, 54 Wash. L. Rev. 221, 225-28 (1978).


The court’s holding in *Wanrow* thus mandates that in order to comply with the equal protection clause, the reasonableness of the woman’s belief in the necessity of using deadly force and in the immediacy of the danger are to be evaluated in light of her own subjective perceptions of the situation. More specifically, *Wanrow* recognized that additional considerations are present in the battering situation that are absent from the traditional man-on-man self-defense scenario. These added factors include the battered wife’s dependency which prevents her from leaving her husband, the sex discrimination inherent in traditional attitudes of wives as their husbands’ property that still affect the response of police and prosecutors, the frustration caused by the inadequacy of the present legal remedies, and traditional notions that women are not supposed to engage in physical confrontations.

*The Immediacy Problem*

One remaining problem that arises in battered wife self-defense cases, not addressed in *Wanrow*, is the issue of whether the battered wife reasonably believed that she was in immediate danger and that the force used was necessary to avoid the danger. This issue arises when the battered wife kills her husband during a lull in the beatings.

For example, in *People v. Lucas*,78 a battered wife killed her husband before her husband performed an act which, in the court’s opinion, would have induced a reasonable belief that bodily injury was about to be inflicted. The facts of *Lucas* show that Ms. Lucas had been choked two or three times a month during the marriage and that her husband had threatened to kill her on several occasions.79 The court held that “threats alone, unaccompanied by some act which induces in defendant a reasonable belief that bodily injury is about to be inflicted, do not justify a homicide.”80 Danger cannot be imminent, according to the *Lucas* court, in the absence of an act on the part of the attacker.81

A hypothetical will be used to illustrate how the immediacy

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79. Id. at 307, 324 P.2d at 934.
80. Id. at 310, 324 P.2d at 936. The court ignores the fact that even according to its version of the events, the decedent “came with his arms out” at his wife. Id. at 307, 324 P.2d at 934.
81. Id. at 310, 324 P.2d at 936.
problem arises. Suppose a woman has been subjected to physical and sexual abuse during the course of a twenty year marriage. The woman's husband leaves her but continues to threaten to kill her and often follows her. On the day in question, the woman sees her estranged husband standing outside her apartment building and shoots and kills him. The husband is found to be unarmed.

In a situation such as the one outlined above, the legal problem is with the immediacy element because the husband was not threatening or attacking the wife when she killed him. The issue presented is whether the woman reasonably believed that she was in immediate danger. Under present law she would not prevail on a self-defense plea because the immediacy element of the self-defense standard would not be met.182

However, an argument can be made, founded on an understanding of the battered wife syndrome, that these actions did constitute self-defense. The syndrome has been described as being made up of three phases.183 During the first phase tension builds and minor abuse occurs. The woman will try to make peace with her husband to lessen her fear of more serious abuse that she knows will follow. She may even blame herself for her husband's conduct. Acute battering is characteristic of phase two, during which the woman feels powerless to do anything to stop her husband. When this stage ends the victim feels relieved that the violence is over, at least temporarily, and she forgives her assailant. This is phase three; the calm, loving time.184

Evidence of the battered wife syndrome would be relevant in states that follow the objective test for immediacy as well as in states that use a subjective standard.185 In a state that applies the

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182. W. LaFave & A. Scott, HANDBOOK ON CRIMINAL LAW § 53, at 394 (1972), sets out the traditional immediacy test and rationale: "Case law and legislation concerning self-defense require that the defendant reasonably believe his adversary's unlawful violence be 'imminent' or 'immediate.' If the threatened violence is scheduled to arrive in the more distant future, there may be avenues open to the defendant to prevent it other than to kill or injure the prospective attacker; but this is not so where the attack is imminent." See also MODEL PENAL CODE § 3.04 (Tent. Draft No. 8, 1958) (referring to Appendix A for a list of states' immediacy standards).


184. K. Ridolfi & C. Arguedas, WOMEN'S SELF-DEFENSE CASES: JURYWORK AND LEGAL STRATEGY 4-5 (1979). When Lenore Walker has testified or trained others to do so, 70-80% of the women have been acquitted. Levine, BATTERED LIVES, THE CONTINUING TRIALS OF BERNADETTE POWELL, The Village Voice, Dec. 24, 1979, at 29.

185. The Model Penal Code uses a subjective immediacy standard: "the use of force
objective immediacy standard, an expert could testify as to the existence of the battered wife syndrome so that the jury could use this information in determining whether the woman's belief in the immediacy of the danger was reasonable. In a state that applies the subjective immediacy standard, such testimony could be used to show the woman's subjective belief in the immediacy of the danger.

The battered wife syndrome analysis indicates that during the first two stages, particularly in the second one, the woman is consumed by fear and feels powerless to do anything to end the violence. This state has been termed "cumulative terror"\textsuperscript{188} by some writers, and one attorney who represents battered women has called the husband's constant battering "murder by installment."\textsuperscript{187} These terms accent the fact that the battered wife is constantly in a heightened state of terror because she is certain that one day her husband will kill her during the course of a beating. The battered wife thus is literally faced with the dilemma of either waiting for her husband to kill her or striking out at him first.\textsuperscript{188}

On the basis of this three stage analysis, an argument can be

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\textsuperscript{187} Eisenberg & Seymour, The Self-Defense Plea and Battered Women, TRIAL, July 1978, at 41.

\textsuperscript{188} See, e.g., SCHNEIDER & JORDAN, supra note 144, at 8 ("In this context, a woman who kills a man is not insane; she may be saving her own life."); Levine, Battered Lives, \textit{The Continuing Trials of Bernadette Powell}, The Village Voice, Dec. 24, 1979, at 29 (asked by the District Attorney why she did not leave her husband sooner, Powell—a battered wife who had killed her husband—replied: "I was scared he'd do worse, sir. Kill me even. Beat me to death."); Lewin, Self-Defense for Battered Women—When Victims Kill, The National Law Journal, Oct. 29, 1979, at 10 (quotes Professor Schneider: "Many of these women are literally killing to avoid being killed."); Schier, \textit{Did Pat Evans Kill Her Husband in Self-Defense?}, CHICAGO LAW., Oct. 1979, at 19 (quotes Pat Evans: "He [her husband] told me that he was gonna stay with us until the divorce was final and on that day kill us all. I really felt he was gonna do us in." Also quotes Public Defender McCulloch: The battered woman is "protecting herself against what she perceives as a present or future life-threatening act... her perceptions say that the only way to save her life is to strike out, whether against the beating she is in the middle of or against the next one that will inevitably come.").
made that the facts of the hypothetical fulfill the immediacy requirement of self-defense. Even though in the hypothetical the woman’s husband no longer lived with her, the woman was in a state of cumulative terror because her husband continually threatened to kill her. The past behavior of the husband indicated that he was not bluffing, but was perfectly capable of carrying out his threat. The woman’s constant terror, like that of any battered wife, is heightened by her negative experience with the legal system. The typical battered wife has called the police on several occasions and chances are that they have done little more than tell her husband to walk around the block to cool off or advised the wife to spend the night at a friend’s house. If the battered wife has been able to convince the police to arrest her husband, then she has been burdened with the district attorney’s pressure to drop the charges or a mandatory diversion to the family bureau. If her case has survived to trial and conviction, her husband probably received only a light punishment. Perhaps the battered wife has gone through all the paperwork and expense of getting a TRO only to have the police tell her that they cannot enforce the order because it is a civil matter.

It is easy to argue that all a battered wife has to do is to leave her husband and her constant terror would end. But, emotional and economic dependency as well as practical obstacles preclude this easy option for some women. Furthermore, often the husband’s threats and beatings do not end when the woman moves out. With all this in mind, the woman in the hypothetical knew that she had exhausted her options and had to face the terrifying reality that her husband was going to kill her eventually unless she struck out first.

Thus, from the perspective of the battered wife, the danger is constantly “immediate.” Given this perspective, it makes little sense for the law to excuse the wife’s killing if it occurs while she is being beaten, but to find her guilty of murder if she kills during a temporary respite between beatings. In both instances the motive may be the same—to prevent the eventuality of the wife’s husband killing her.

Apparently recognizing the fallacious reasoning behind a rigorous immediacy requirement, the Model Penal Code demands something less than traditional immediacy. The Comments explain: “The actor must believe that his defensive action is immediately necessary and the unlawful force against which he defends
must be force that he apprehends will be used on the present occasion, but he need not apprehend that it will be immediately used. In the hypothetical, the woman's actions would probably not come within the Model Penal Code's definition of immediacy, because she did not necessarily apprehend that her husband was going to use force on the particular occasion on which she killed him. She just knew that eventually he would kill her, but she did not know when. Nevertheless, the Model Penal Code formulation of the rule does indicate a loosening of the traditional immediacy standard, because under the Model Penal Code the actor must only apprehend that force will be used on the occasion in question, but not necessarily that force will be used "immediately."

Reactions to the Defense

Some commentators have predicted that a self-defense analysis like the one outlined above will lead to "open season on men." Others believe that it is a simple recognition of the battered wife's perspective of the necessity of killing in order to avoid being killed herself.

The assumption that this self-defense analysis will encourage women to kill their husbands is an over reaction. These women are only killing their husbands because they realize that there is no other way to end the abuse. Battered women are not likely to kill motivated by the assumption that they will be able to get away

190. See Meyers, Battered Wives, Dead Husbands, STUDENT LAW., March 1978, at 47 (comment attributed to an attorney at a battered wife's trial). See also A Killing Excuse, TIME Nov. 28, 1977, at 108 (quotes a sheriff: "I wonder if these people know what they're doing. If they get their way, there's going to be a lot of killings."); Scheier, Did Pat Evans Kill Her Husband in Self-Defense?, CHICAGO LAW., Oct. 1979, at 19 (quotes a New York University law professor: "Acquittals encourage people to use killing as a remedy to their problems rather than seek other means.").
191. See notes 186-87 & accompanying text supra. See also SCHNEIDER & JORDAN, supra note 144, at 5 ("The crucial point to be conveyed . . . is that, due to a variety of societally based factors, a woman may reasonably perceive imminent and lethal danger in a situation in which a man might not."); Eisenberg & Seymour, The Self-Defense Plea and Battered Women, Trial, July 1978, at 42 ("To punish someone for obeying natural law and protecting oneself seems to us to be highly hypocritical."); King, Right of Women to Self-Defense Gaining in Battered Wife Cases, New York Times, May 7, 1979, at A18 ("[F]eminists and others contend that acquittals in such cases constitute a simple recognition by jurors that the use of force, even deadly force, is justified to ward off a beating when a pattern of repeated abuse is established."). See generally Note, Battered Wives Who Kill, Double Standard Out of Court, Single Standard In?, 2 L. & HUMAN BEHAVIOR 133, 157-65 (1978).
with it. This self-defense analysis is a simple recognition of the battered wife’s perspective of her situation.

**Conclusion**

The battered wife syndrome is very complex and does not yield to simple solutions. Many factors coalesce to foreclose to the battered woman the obvious option of leaving her attacker. Historically, wife beating was viewed as the marital privilege of the husband and at times even considered his duty. Slowly, this prerogative has faded, but vestiges of it remain in the attitude that marital privacy is to be preserved even at the cost of the wife’s safety. The attitude is reflected in police and prosecutor nonarrest and non-prosecution strategies. Such prejudices, which are the product of sex discrimination, are also evident in the battered wife’s perception of herself—her low self esteem and her feeling that her sole role is as a wife and mother.

Although sex discrimination and all that it causes can never justify a battered wife killing her husband, the law of self-defense must recognize the impact of such discrimination on the battered wife’s perception of her options. Therefore, in determining the reasonableness of the battered wife’s conduct when she kills her husband, all of the surrounding circumstances, including those perceptions that derive from sex discrimination, must be evaluated.