Spring 1978

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I. INTRODUCTION

Women have always had to defend themselves against physical and sexual assaults by their husbands, lovers, friends, or strangers. Recently, however, women are consciously refusing to accept this abuse and the public is increasingly aware of the failure of courts and police to protect women who face these assaults. Women charged with homicide in response to abuse formerly pled guilty or pled insanity and were routinely convicted. They are now speaking out about their circumstances, describing the reasons for their actions, and asserting an equal right with men to defend themselves.

National attention on women "fighting back" first focused on Inez Garcia and Joan Little, who killed assailants following sexual assault.[1] But women who defend themselves against wife-assault[2] or who, like Yvonne Wanrow, defend their children against sexual or physical abuse, have also attracted national attention.[3] These women have become the subjects of con-

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The authors are indebted to the many people who contributed to the analysis set forth in this article, most significantly among them, Nancy Stearns, staff attorney at the Center for Constitutional Rights and co-counsel on the Yvonne Wanrow appeal, and Beth Bochnak, Education Director at the Center for Constitutional Rights for her invaluable editorial and analytic assistance.

1. Inez Garcia was acquitted in 1977, after being convicted at a first trial, and winning a retrial on appeal, People v. Garcia, Cr. No. 4259 (Superior Court, Monterey County, Cal. 1977); Joan Little was acquitted in 1975. State v. Little, 74 Cr. No. 4176 (Superior Court, Beaufort County, N.C. 1975).

2. Although the term "wife assault" is used throughout this article, the problem is equally applicable to unmarried women living with violent men.

3. The Washington Supreme Court reversed Yvonne Wanrow's felony-murder conviction from her first trial, State v. Wanrow, 88 Wash.2d 221, 559 P.2d 548 (1977) and she is awaiting retrial, State v. Wanrow, No. 20876 (Superior Court, Spokane County, Wash., 1977). Other cases of which the authors are aware include the following: Marlene Roan Eagle (South Dakota, battered wife, acquitted of murder on grounds of self-defense); Miriam Grieg (Montana, battered wife, acquitted of murder on grounds of self-defense); Evelyn Ware (California, battered wife, acquitted of murder on grounds of self-defense); Janice Hornbuckle (Washington, battered wife, acquitted of murder on grounds of self-defense); Janet Hartwell (Michigan, battered and sexually-abused wife, acquitted of murder on grounds of self-defense); Eva Mae Heygood (Wisconsin, battered wife, acquitted of murder on grounds of self-defense); Sharon McNearney (Michigan, battered wife, acquitted of murder on grounds of self-defense); Gloria Maldonado (Illinois, abuse of child by husband, state's attorney ruled insufficient evidence to warrant prosecution); Francine Hughes (Michigan, battered wife, acquitted of murder by reason of insanity); Betty Jean Carter (Wisconsin, battered wife, murder charge reduced to self-defense manslaughter, granted probation with no incarceration); Lea Murphy (Washington, abuse of child by husband, convicted but given five-year deferred sentence); Shirley Martin (Minnesota, battered wife, convicted of manslaughter); Christina Pratt (New York, convicted of manslaughter for killing rapist, served several years, was granted executive clemency); Gloria Timmons (Washington, battered and sexually-abused wife, convicted of manslaughter, served several years, recently paroled on 20-year sentence); Jennifer Patri (Wisconsin, battered and sexually-abused wife, convicted); Hazel Kontos (Alabama, battered wife, convicted and sentenced to life imprisonment); Carolyn McKendrick (Pennsylvania, battered woman, convicted of murder for shooting her boyfriend, a professional boxer); Mary McQuire (Oregon, battered wife, convicted of soliciting someone to kill her husband, sentenced to five years); Dessie X. Woods (Georgia, convicted of shooting attempted rapist); Beverly Ibn-Thomas (Washington, D.C., battered wife, con-

[*Women's Rights Law Reporter, Volume 4, Number 3, Spring 1978*]

0085-8269/78/0601 – 149 $5.00

siderable controversy, largely because they challenge historically accepted notions of women's roles.[4]

For lawyers representing women charged with these homicides, the legal and political problems posed by the outspoken statement of women's self-defense are complex. The task for the lawyer is one of evaluating the facts of the case free from bias and sex-stereotyping, and then constructing and presenting a defense in the courtroom that is likewise free from bias and sex-stereotyping. Unfortunately, even lawyers sensitive to the problems of sex discrimination in other areas share these biases.

This article is intended to aid attorneys representing women who have committed homicides after they have been physically or sexually assaulted or after their children have been molested or abused. As criminal defense lawyers who have been involved in the representation of women who assert their right to defend themselves against such abuse, the authors have explored the particular problems which arise in these cases. As women involved in the women's movement, our thinking and approach reflect an analysis of women's experience as understood and developed by feminist theory. Our interest is in developing a legal analysis which incorporates women's experiences and perspectives into existing concepts of criminal law.

Our analysis assumes that an act of homicide by a woman is reasonable to the same extent that it is reasonable when committed by a man. We do not argue for a separate legal standard for women. We do argue however, that sex-biased stereotypical views of women, especially women who act violently, and the male orientation built into the law prevent an equal application of the law.

The approach we present identifies and seeks to remove from the trial and defense process myths and misconceptions held about women. The goal of this analysis is the presentation to the jury of the defendant's conduct as reasonable. The crucial point to be conveyed to judge and jury 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. This perception will justify for her, as it would for a man who perceives such danger, recourse to deadly force. Not only has this approach been successful, but failure to apply it has resulted in unnecessaary convictions.[5]

In representing women who commit what they believe to be acts of justifiable homicide, choice of defense and implementation of that defense in the courtroom are the two fundamental problems. First, the facts must be thoroughly explored and evaluated, and the defendant's perception of her actions understood. Choice of defense must be based on the defendant's and lawyer's perceptions of these actions together with an analysis of available legal defenses. Analysis of the woman's case must take into account her circumstances and her reasons for committing a homicide. This will give the lawyers insights into her state of mind, as well as how to translate it to the jury. It will affect every aspect of the courtroom presentation, including voir dire, jury selection, education of the judge, use of expert witnesses, and jury instructions.

We believe that a self-defense approach should be thoroughly explored as a first step. The traditional view of women who commit violent crimes is that their action was irrational or insane. Consequently, an impaired mental state defense [6] has often been relied on automatically. We start from the premise that a woman who kills is no more "out of her mind" than a man who kills. Our work has shown that the circumstances which require a woman to commit a homicide in these cases can demonstrate that her act was reasonable and necessary. Accordingly, if possible, the homicide should be defended as self-defense, although an impaired mental state defense may be appropriate in a given case.

This article will discuss the historical, social, and legal context of the problem, and the issues and implications involved in choosing a defense. We will also explore the strategic problems of implementing the defense in the courtroom. An understanding of each of these areas is necessary in order to incorporate the woman defendant's perspective into the trial process.

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victed for murder); Mary Melerine (Louisiana, battered wife, awaiting trial); Evelyn Graham (Florida, battered wife, awaiting trial); Maxine Waltman (Oklahoma, battered wife, awaiting trial). More information on these cases may be found by contacting the National Communication Network, 584 Grand Avenue, St. Paul, Minnesota 55102. *See also Wives Accused in Slayings Turning to Self-Defense Pleas*, Washington Post, Dec. 4, 1977, at A1.

4. Indeed it has been suggested that acquittals in these cases would result in an "open season on men." Greenberg, *Thirteen Ways to Leave Your Lover*, NEW TIMES, Feb. 6, 1978, at 6. *See also A Killing Excuse*, TIME, Nov. 28, 1977, at 108; *The Right to Kill*, NEWSWEEK, Sept. 1, 1975, at 69; *Wives Accused of Slayings Turning to Self-Defense Pleas*, Washington Post, Dec. 4, 1977, § A at 1; *Wives Who Batter Back*, NEWSWEEK, Jan. 30, 1978, at 54.

5. Both Inez Garcia and Yvonne Wanrow were convicted at their first trials, when the jury apparently rejected pleas of impaired mental state. Upon retrial, Inez Garcia asserted a self-defense explanation of her actions and she was acquitted, People v. Garcia, Cr. No. 4259 (Superior Court, Monterey, Cal. 1977). Yvonne Wanrow won a reversal of her conviction on two grounds. *See* State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977). *See* Section III. C. *infra.*

6. Impaired mental state defenses include insanity, temporary insanity, diminished capacity, and other defenses asserting a less than normal emotional and mental makeup. *See* Section IV. *infra.*

II. Historical, Social and Legal Background

Women who commit violent crimes have been almost completely ignored by criminologists, lawyers, penologists, and social scientists.[7] While these women may figure mythically in American culture,[8] only recently have they commanded any serious attention.[9] Historically, criminological literature portrayed women who commit violent crimes as "more terrible than the male," with propensities for evil "more intense and more perverse" than their male counterparts.[10] The criminologists' view that these women "somehow betray their womanhood by venturing out into a reserve of men,"[11] has continued in current literature.[12]

One result of this view is the notion that increasing numbers of women are committing violent crimes because of the improved status of women. Information available on women criminal offenders, however, bears out neither the historical portrait nor the assertion that killing by women is on the rise. Of all homicide arrests, the number of women arrested has remained at a stable 15%.[13] It appears, however, that convictions of women arrested are increasing.[14] Women who are convicted are thought to be more dangerous than men and are often sentenced to longer jail terms.[15] Women usually kill men, not women,[16] and women charged with homicide have the least extensive prior criminal records of any female offenders.[17] In fact, the homicides women commit frequently arise out of "domestic disturbances" in which they are forced to defend themselves.[18] Indeed, a recent study found that 40% of the women incarcerated in Chicago's Cook County jail for homicide had killed their husband or lovers as a result of physical abuse.[19] In spouse killings, wives are motivated by self-defense almost seven times as often as are husbands.[20] In this context, a woman who kills a man is not insane; she may be saving her own life.

Women are forced to defend themselves against abuse because they do not receive adequate protection from the courts or from the police.[21] The legal system provides almost no protection for a woman abused by her husband. Similarly, the chance of securing a conviction for a rape is small. Women's need to protect themselves, therefore, must be understood in the context of the failure of judicial and law enforcement authorities to protect abused women.

Inadequate treatment of rape victims by the judicial system and law enforcement agencies has been well-documented.[22] Although rape is inherently a violent

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7. The dearth of material in the area of women and crime has been noted by many current commentators. *See e.g.*, R. Simon, Women and Crime 1 (1975) [hereinafter cited as Simon].

8. For a study of women who committed homicides in another country, see M. Hartman, Victorian Murderesses (1977).

9. *See e.g.* Simon, *supra* note 7; C. McCormick, *Battered Women* (Cook County Dep't of Corrections, Chicago, Ill., 1977).

10. Rasche, *The Female Offender as an Object of Criminological Research*, in The Female Offender 17 (1974) (citing C. Lombroso & W. Ferrero, The Female Offender (1958 ed.)).

11. *Id.* at 24 (citing O. Pollak, The Criminality of Women (1950)). *See also* Klein, *The Etiology of Female Crime: A Review of the Literature*, Issues in Criminology, Vol. 8, No. 2, 1973, at 10.

12. F. Adler, Sisters in Crime at 30 (1975). *See Critics Assail Linking Feminism with Women in Crime*, N.Y. Times, Mar. 14, 1976, at 48.

13. Simon, *supra* note 7, at 40. *Accord* Price, *The Forgotten Female Offender*, Crime and Delinquency, Apr. 1977, at 103. *But see also Critics Assail Linking Feminism with Women in Crime*, N.Y. Times, Mar. 14, 1976, at 48 (female homicide rate has been stable at 10% for years).

14. Simon, *supra* note 7, at 57. *Accord* Rottman & Simon, *Women in the Courts: Present Trends and Future Prospects*, 23 Chitty's L. J. 24, 25 (1975).

15. F. Adler, Sisters in Crime at 179 (1975) (citing Temin, *Discriminatory Sentencing of Women Offenders: The Argument for ERA in a Nutshell*, 11 Am. Crim. L. Rev. 355 (1973). *See also* L. Kanowitz, Women and the Law (1969). *Accord* Price, *The Forgotten Female Offender*, Crime and Delinquency, Apr. 1977, at 110.

16. 11 Crimes of Violence, Staff Report to the National Commission on the Causes & Preventions of Violence 209-10 (1969). [hereinafter cited as Crimes of Violence].

17. 13 Crimes of Violence, *supra* note 16, at 903.

18. *See* 11 Crimes of Violence, *supra* note 16, at 232-34.

19. C. McCormick, Battered Women (Cook County Dep't of Corrections, Chicago, Ill., 1977). For a period of 18 months the author interviewed every woman arrested in Cook County for murder, involuntary manslaughter, or manslaughter eliciting information regarding the person killed, the weapon used, the length of marriage or relationship, reasons for beatings, preventative measures utilized prior to the murder, and the reasons for remaining in the home.

20. 11 Crimes of Violence, *supra* note 16, at 360.

21. This problem of lack of police protection also extends to child molestation. *See* De Francis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, 35 Fed. Probation 15, 16 (1971); Rush, *The Sexual Abuse of Children*, in Rape: The First Sourcebook for Women (N. Connell & C. Wilson, eds. 1974).

22. *See, e.g.*, S. Brownmiller, Against Our Will (1975); Queens Bench Foundation, Rape: Prevention and Resistance (1976); Rape: The First Sourcebook for Women (N. Connell & C. Wilson, eds. 1974); St. Louis Feminist Research Project, The Rape Bibliography: A Collection of Abstracts (1976); Berger, *Man's Trial, Woman's Tribulations: Rape Cases in the Courtroom*, 77 Col. L. Rev. 1 (1977); Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 Jud. 390 (1975) [hereinafter cited as Bohmer & Blumberg]; Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 Jud. 303 (1974); Eisenberg, *Abolishing Cautionary Instructions in Sex Offense Cases:* People v. Rincon-Pineda, 12 Crim. L. Bull. 58 (1976) [hereinafter cited as Eisenberg]; Hibey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent and Character*, 11 Am. Crim. L. Rev. 309 (1973); Mathiasen, *The Rape Victim: A Victim of Society and the Law*, 11 Williamette L. J. 36 (1974); Comment, *Rape and Rape Laws: Sexism in Society and the Law*, 61 Cal. L. Rev. 919 (1973) [hereinafter cited as *Rape Victim*]; Note, *If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases*, 10 Val. U. L. Rev. 127 (1975).

crime,[23] it is not treated with the same seriousness as other violent crimes.[24] While rape has increased by 226.3%, the highest percentage increase of any crime against the person since 1960,[25] it also has the highest rate of acquittal or dismissal,[26] with only one out of seven reported rapes resulting in conviction.[27]

The rape victim is often treated callously by law enforcement authorities. She is seen not as a legitimate victim of crime, but as a temptress precipitating rape.[28] Beginning with the decision to prosecute,[29] this view infects every stage of the process. Evidentiary requirements,[30] jury instruction,[31] and jurors'[32] and judges'[33] attitudes reflect the biased treatment of the rape victim. Women filing rape charges know that they will have to subject themselves to the "initial emotional trauma of submitting to official investigatory processes, . . . subsequent humiliation through attendant publicity and embarrassment at trial through defense tactics which are often demeaning."[34]

Women who are the victims of wife-assault are also without remedy from the police or courts.[35] Neither the police nor the family courts will interfere with domestic violence. A marriage license is viewed as giving a husband permission to do what he wants with and to his wife. Police enforcement of those court orders which do issue against husbands is non-existent or meaningless.[36] This inadequate protection has serious consequences for women, since it is estimated that one third to one half of all married women experience brutality at the hands of their husbands.[37] These incidents of domestic violence commonly result in serious physical injury or death for the woman.[38] In many of these cases police had been summoned at least once before the killing occurred.[39] This high and deadly incidence of wife-assault must be viewed with an understanding that many women are forced to remain with their husbands out of economic necessity or fear of retaliation. These problems are compounded by the shamefully few resources available to shelter battered women.

The problem of lack of police protection is greatly exacerbated for poor and minority women. While sexual and physical assaults plague women from all economic and racial backgrounds, the judicial and law enforcement systems are even less responsive to women from minority and poor communities. These com-

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23. "Rape is widely recognized as among the most serious of violent crimes . . . [in which] often the victim suffers serious physical injury." Furman v. Georgia, 408 U.S. 238, 458-59 (1976) (Powell, J., dissenting). *See also* People v. Ceballos, 12 Cal. 3d 479, 526 P.2d 241, 116 Cal. Rptr. 233 (1974).

24. *See generally* note 22 *supra*.

25. *See, e.g.*, U.S. DEP'T OF JUSTICE FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 1976, at 15-17.

26. *See id.*, Table 54 at 217.

27. In 1976, police charged 2,418 persons with forcible rape; 33 were found guilty, *id.* In addition, these figures do not reflect the fact that rape has been grossly underreported, making the disparity between occurrence of the crime and conviction rate even larger. *See id.* at 16.

28. *See generally* S. BROWNMILLER, AGAINST OUR WILL (1975); Bohmer & Blumberg, *supra* note 22; RAPE VICTIM, *supra* note 22.

29. Frequently the police will more readily disbelieve a rape victim's report of a crime than a report from a victim of some other kind of assault. *See, e.g., Police Discretion and the Judgment That A Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277 (1968).

30. In some jurisdictions, the rules of evidence permit the victim to be questioned regarding her prior sexual conduct and the crime itself requires corroborative evidence. *See, e.g.*, Bohmer & Blumberg, *supra* note 22, at 395; Eisenberg, *supra* note 22, at 70-72; Hibey, *The Trial of a Rape Case: An Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309, 310-21, 325-28 (1973); *Rape Victim, supra* note 22, at 934-36; Note, *If She Consented Once, She Consented Again —A Legal Fallacy in Forcible Rape Cases*, 10 VAL. U. L. REV. 127, 129-36 (1975).

31. It has been customary to give juries "cautionary" instructions in rape cases warning them to be skeptical of the victim's testimony since the crime of rape is "easily alleged and difficult to prove." *See* Eisenberg, *supra* note 22.

32. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966); J. MACDONALD, PSYCHIATRY AND THE CRIMINAL 235 (1969).

33. *See* Bohmer, Judicial Attitudes Toward Rape Victims, 57 JUD. 303, 304 (1974); Bohmer & Blumberg, *supra* note 22, at 398.

34. People v. Rincon-Pineda, 14 Cal.3d 864, 880, 538 P.2d 247, 258, 123 Cal. Rptr. 119, 130 (1975).

35. *See generally* D. MARTIN, BATTERED WIVES (1976) [hereinafter cited as MARTIN]; Eisenberg & Micklow, *The Assaulted Wife: "Catch-22" Revisited*, 3 WOMEN'S RTS. L. REP. 138 (1977); R. LANGLEY & R. LEVY, WIFE BEATING: THE SILENT CRISIS (1977).

36. MARTIN, *supra* note 35. *See also* Bruno v. Codd, 90 Misc.2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977) and Scott v. Hart, 76 Civ. 2395 (N.D. Cal. 1976). Plaintiffs in *Bruno* are 12 married women beaten by their husbands and refused assistance by the Family Court or by the police or by both. The women are suing the New York City Police Department and the clerks and Probation Department employees of Family Court to enforce the defendants' legal obligations to protect battered wives; trial is pending following the court's denial of class action certification. *Scott* presents a similar situation. Pleadings and briefs for both lawsuits are available from the National Clearinghouse for Legal Services, 500 North Michigan Avenue, Suite 2220, Chicago, Illinois 60611.

37. R. LANGLEY & R. LEVY, WIFE BEATING: THE SILENT CRISIS at 3-4 (1977). For statistics on the severity and prevalence of wife battery, see MARTIN, *supra* note 35, at 11-14.

38. Records from Boston City Hospital show that 70% of the assault victims it receives are women who have been attacked by their husbands. MARTIN, *supra* note 35, at 12. Moreover, in California, in 1971, one third of all female homicide victims were murdered by their husbands. *Id.* at 14.

39. In one city it has been shown that in 85% of the cases, when a homicide occurred in the course of domestic violence, the police had been summoned at least once before the killing occurred, and in 50% of the cases the police were called five or more times before the actual murder. DOMESTIC VIOLENCE AND THE POLICE: STUDIES IN DETROIT AND KANSAS CITY (1977).

munities suffer from severely reduced services.[40] As a result, women from these communities have greater difficulty in getting a police officer to respond to a "domestic disturbance" call. If the woman does succeed in processing a complaint, she is likely to be treated even less responsively than other abused women. The class and racial biases of the judicial and law enforcement systems will compound their already hostile attitude toward abused women.

Thus, lack of adequate police protection creates a situation in which a woman may feel it necessary to respond in self-defense to a potentially lethal battery or sexual assault. Ironically, the same court and law enforcement system will prosecute her for responding in the only manner left open to her.

III. Choice of Defense—Self-Defense

Choice of defense is the threshold issue in representing abused women charged with homicides. This process can only begin, however, when the stereotypes and implications of available defenses are understood. Stereotypes of these defenses may even subconsciously control fundamental information elicited which form the basis of choice of defense.

Although in any given case there may be many legal and factual defenses available, we have limited the focus of this article to two major categories of legal defenses: self-defense and impaired mental state. Our work and experience is in the area of self-defense, but we believe an exploration of the general law and social implications involved in both defenses will provide a useful framework for analysis of proper choice of defense.

A. The Theory of Justifiable Homicide and Its Intrinsic Sex Bias

All homicides are not punished. The law has always excused certain killings, calling them justifiable homicides. Persons who kill in defense of their own lives, the lives of others, or in defense of their property are entitled to a determination that the killing was justifiable.

Homicide itself is not a crime, but a class of offenses, graded according to the mental state and turpitude of the defendant.[41] Generally, the class is divided into first and second degree murder, voluntary and involuntary manslaughter.[42] Proof of a killing in the sudden heat of passion upon sufficient provocation generally reduces a killing to manslaughter.[43] A successful plea of self-defense is a complete defense and results in an acquittal.[44]

Standards of justifiable homicide have been based on male models and expectations. Familiar images of self-defense are a soldier, a man protecting his home, family, or the chastity of his wife, or a man fighting off an assailant. Society, though its prosecutors, juries, and judges, has more readily excused a man for killing his wife's lover than a woman for killing a rapist. The acts of men and women are subject to a different set of legal expectations and standards. The man's act, while not always legally condoned, is viewed sympathetically. He is not forgiven, but his motivation is understood by those sitting in judgment upon his act, since his conduct conforms to the expectation that a real man would fight to the death to protect his pride and property. The paramour laws which permitted a husband to kill another man he caught in flagrante delicto with his wife are an explicit expression of societal sympathy for such an act.[45] The law, however, has never protected a wife who killed her husband after finding him with another woman. A woman's husband simply does not belong to her in the same way that she belongs to him.[46]

The law clearly does not permit a woman to protect herself to the same extent that a man may protect himself. Case law, for example, allows the use of deadly force to prevent forcible sodomy between

40. *See generally* G. Lerner, Black Women in White America (1972); U.S. Comm'n on Civil Rights, Hearings Held in Chicago, Illinois (1974); Wright, *Poverty, Minorities, and Respect for Law*, 1970 Duke L.J. 425 (1970).

41. *Cf.* W. LaFave & A. Scott, Handbook on Criminal Law 528 (1972) [hereinafter cited as LaFave & Scott].

42. *See, e.g.*, Conn. Gen. Stat. Ann. §§ 53a-54 to 56 (West 1958); Ga. Code §§ 26-1101 to 1103 (1972); Idaho Code §§ 18-4003, 4006 (1947); Ill. Ann. Stat. ch. 38 §§ 9-1 to 3 (Smith-Hurd 1972); Ind. Code Ann. §§ 35-13-4-1 to 2 (Burns 1975); Iowa Code Ann. §§ 690.1 to .3, 10 (West 1950); N.M. Stat. Ann. §§ 40A-2-1 to 2-3 (1953); N.C. Gen. Stat. §§ 14-17, -18 (1969); Ohio Rev. Code Ann. §§ 2903.02 to .04 (Page 1975); Or. Rev. Stat. §§ 163.005 to .125 (1977); Wash. Rev. Code §§ 9A.32.010 to .070 (1977).

43. LaFave & Scott, *supra* note 41, at 572.

44. Although the defendant bears the burden of producing evidence as to defenses of self-defense and insanity, courts have been divided as to which side bears the burden of persuasion once these defenses are put in evidence. LaFave & Scott, *supra* note 41, at 47-48. Mullaney v. Wilbur, 421 U.S. 684 (1975), however, arguably requires the prosecution to bear the persuasion burden in both situations, and has generally thrown the issue of burden of proof into confusion. *See, e.g.*, Frazier v. Weatherholtz, 411 F. Supp. 349 (W.D. Va. 1976); Wright v. State, 29 Md. App. 57, 349 A.2d 391 (1975).

45. *See* The "Unwritten Law" as a Defense, ch. 303, § 2-4, 1963 N.M. Laws (repealed 1973); Adultery as Justification, arts. 1102, 1103, Tex. Pen. 1916 (Vernon) (repealed 1973).

46. The concept that a wife "belongs to" her husband is illustrated by the fact that a man cannot commit rape by having sexual intercourse with his wife even if he does so by force and against her will. R. Perkins, Criminal Law at 156 (2d ed. 1969) [hereinafter cited as Perkins].

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Three women who have defended themselves and their children. Top center: Joan Little; bottom left: Inez Garcia; bottom right: Yvonne Wanrow and children.

males,[47] but has not yet sanctioned a woman's right to use deadly force to repel a rape. Underlying this distinction is the belief that the invasion of a man's body is a more egregious offense than the invasion of a woman's body. Conceptions of why a woman kills a rapist are also laden with sex-based stereotypes. The juror's statement in Inez Garcia's first trial that "you can't kill someone for trying to give you a good time" [48] demonstrates the separate standard of justifiable homicide for men and women.

As presently applied, the law of self-defense does not take into account women's perspectives and circumstances. The law reflects and embodies society's biases and its expectations of women. Thus, while the courts have begun to acknowledge the subtlety of

47. *See* People v. Collin, 189 Cal. App. 2d 575, 11 Cal. Rptr. 504 (1961); State v. Robinson, 328 S.W.2d 667 (Mo. 1959); Commonwealth v. Lawrence, 428 Pa. 188, 236 A.2d 768 (1968).

48. Juror's statement following the Garcia trial. The Garcia defense team informally gathered information from the jurors following the trial. All subsequent citations to jurors' statements are from these interviews.

sex discrimination in other areas,[49] the law of self-defense has barely begun to reflect this change.[50]

B. Sex Bias in the Perception of Imminent Danger and the Use of Deadly Force

Homicide is justifiable in self-defense if the act can be shown to be reasonable. There must be a "reasonable ground to apprehend a design on the part of the person slain to commit a felony to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished." [51] The act must be reasonable on two counts. The person claiming self-defense must have a reasonable *apprehension* of danger and a reasonable perception of the *imminence* of that danger. While divisible into two aspects, the standard is often expressed as reasonable grounds to apprehend imminent death or grievous bodily harm.[52] Although the standard to be applied in evaluating reasonableness differs from state to state, it is generally defined as the perception of both apprehension and imminent danger from the individual's own perspective.[53]

In several aspects, the law of self-defense allows the defendant to have been reasonable but wrong. Thus, in determining reasonableness, the law takes into account the effect of danger and fear on a person's perception of the situation. As Justice Holmes said, "The law does not require detached reflection in the presence of an upraised knife." [54] The law of self-defense also applies when the danger, although reasonably perceived, is not borne out by events. For example, when confronted by an attacker who is known to carry a weapon and appears to be reaching for it, a person may reasonably believe herself to be in imminent danger, even if the attacker turns out to be unarmed.[55]

Legally, for self-defense purposes, there are two kinds of force: [56] force which could produce death or serious injury (deadly force) and force which could not. Generally, like force can only be used against like force.[57] Deadly force cannot be used against non-deadly force. A person may respond to an attack with equal and opposite force and nothing greater. Traditionally this is true even if a person is jumped on the street by an unknown assailant or if the person is weaker than her attacker. However, if the attacker uses a weapon or his greater physical strength to render his victim helpless, and the victim has reason to believe that death or serious injury is imminent, the victim may respond with deadly force.

The law of self-defense does not take into account women's perspectives and the circumstances under which women are forced to respond. The attorney considering a defense of self-defense must therefore explore and understand these problems. This will affect both the advisability of such a defense and the jury's ability to understand and perceive the woman's actions as reasonable. This presentation is the crux of a self-defense justification. Views of self-defense which prevent the woman's actions from appearing as reasonable as a man's must be eliminated from the trial process.

Sex bias permeates the legal doctrine regarding the perception of imminent and lethal danger. The law assumes that both the attacker and the victim have approximately equal capacities. While a man is assumed to have the ability to perceive danger accurately and respond appropriately, a woman is viewed as responding hysterically and inappropriately to

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49. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7 (1975) (different age of majority for males and females under Utah child support statute violates equal protection); Taylor v. Louisiana, 419 U.S. 522 (1975) (systematic exclusion of women from jury panels violates defendant's right to representative jury); Frontiero v. Richardson, 411 U.S. 677 (1973) (different dependency requirements for male and female spouses of members of the armed services violates equal protection).

50. For example, the trial judge in Inez Garcia's first trial repeatedly stated in front of the jury that "rape has nothing to do with this homicide prosecution."

51. *See, e.g.*, WASH. REV. CODE ANN. § 9.48.170 (1977).

52. *See, e.g.*, State v. Lewis, 6 Wash. App. 38, 491 P.2d 1062 (1971).

53. For states that adopt this standard, *see, e.g.*, CONN. GEN. STAT. ANN. § 53a-19(a)(West 1958); GA. CODE ANN. § 26-902(a) (Supp. 1976); IND. CODE ANN. § 35-41.3.2(a) (Burns Supp. 1977); LA. REV. STAT. ANN. § 14.20(1) (West 1974); WASH. REV. CODE ANN. § 9A.16.050(1)(1977). The traditional legal characterization of this standard as either subjective or objective is confusing. In fact, the standard generally applied is an amalgam of both a subjective and objective test. It includes the individual's perception of both apprehension and imminent danger from the individual's own perspective, but involves an objective view by the jury of these circumstances. Thus the law will consider how the individual perceived her male assailant as he came at her, but will apply an objective judgment to the circumstance. Although including the woman's perspective is obviously easier where the more subjective standard is applied, the woman's perspective should be incorporated even where the standard is the "reasonable person," since that too must include women. *See* text accompanying notes 51-52 *supra* & notes 54-57 *infra*.

54. Brown v. United States, 256 U.S. 335, 343 (1921).

55. For an excellent analysis of the law of self-defense, see J. Curtin & K. Kates, Rape: Legal and Practical Aspects of Armed Self Defense (1977) (unpublished paper, St. Louis University Law School).

56. There are a number of other aspects of self-defense law pertinent to a defense of self-defense, such as inapplicability of self-defense to an aggressor, defense of others, and defense of a dwelling, which are not discussed in this article.

57. The crimes viewed by the law as involving deadly force may reflect its underlying biases. Thus, it is not established whether a rape, classified as a violent crime, but not accompanied by deadly force, could be defended against with deadly force. Similarly, although it has been legally established that deadly force may be used to repel a dangerous felony, at least one court has failed to place the felony of wife assault in that category. See People v. Jones, 191 Cal. App. 2d 478, 482, 12 Cal. Rptr. 777 (1961).

physical threat. However, certain factors relevant to women's experiences are not taken into account. For example, women are less likely to have had training or experience in hand-to-hand fighting. Socially imposed proscriptions inhibit their ability to fend off an attacker. The fact that women generally are of slighter build also gives a male assailant an advantage. All of these conditions will have an impact on the reasonableness of a woman's perception of an imminent and lethal threat to her life such as would justify the use of deadly force. These factors, however, have not usually been considered during the trial.

C. Presenting the Woman's Perspective

Even where the standard of self-defense is that of the person's own perception of the circumstances, it is difficult to apply this standard to the woman defendant.[58] Not only are the circumstances under which women are forced to defend themselves entirely different from those which cause men to commit homicides, but the woman's state of mind is different as well. Presenting the individual woman's perspective in the trial means educating the judge and jury about the incidence and severity of the problems of rape, wife-assault, and child abuse and molestation to the extent that they explain the defendant's conduct. It also means educating them about the lack of judicial and social alternatives available to women in these situations and combating specific myths, for example, that a woman who kills a man is insane or that women enjoy rape.

State v. Wanrow[59] is an example of successful implementation of this strategy. In appealing Yvonne Wanrow's conviction for felony-murder and first-degree assault, counsel challenged the lower court's self-defense jury instruction on the ground that it did not fully include the woman's perspective.[60] This was argued on two separate grounds.[61] First, counsel argued that the instruction failed to direct the jury to apply correctly the Washington standard of self-defense. This standard would require the jury to consider the defendant's action "seeing what (s)he sees and knowing what (s)he knows," taking into account all the circumstances as she knew them at the time.[62] Second, counsel argued that the failure to apply this standard was particularly prejudicial to a female defendant. The tone of the instruction and the persistent use of the masculine gender left the jury with the impression that the standard to be applied was that applicable to a fight between two men rather than a small woman facing a large man.

In a landmark decision, the Supreme Court of Washington in *Wanrow* reversed the conviction on both grounds.[63] Acknowledging the threat to equal protection inherent in the failure to include a woman's perspective in the law of self-defense, the court noted:

> [This instruction] leaves the jury with the impression the objective standard to be applied is that applicable to an altercation between two men. The impression created—that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defense, unless the jury finds her determination of the degree of danger to be objectively reasonable —constitutes a separate and distinct mis-statement of the law and, in the context of this case, violates the respondent's right to equal protection of the law. The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination.'

58. Although this section focuses on the "person's own perspective" standard of self-defense, the "reasonable person" standard can be made to include the woman's own perspective in the same manner as described herein.

59. 88 Wash. 2d 221, 559 P.2d 548 (1977).

60. The instruction read as follows:

> 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 harm.
>
> 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 ground 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.

Quoted in id. at —, 559 P.2d at 558.

61. *See* Supplemental Brief for Respondent Reply to Petition for Rehearing for Respondent, State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977). These briefs are available from the Center for Constitutional Rights, 853 Broadway, New York, New York 10003.

62. State v. Dunning, 8 Wash. App. 340, 342, 506 P.2d 321, 322-23 (1973).

63. State v. Wanrow, 88 Wash.2d 221, —, 559 P.2d 548, 559 (1977). Self-defense instructions based on this opinion were also used in the successful trials of Inez Garcia (People v. Garcia, Cr. No. 4259 (Superior Court, Monterey County, Cal. 1977)); and Janice Hornbuckle, *see* note 3 *supra*. The decision on the self-defense instruction in *Wanrow* was reached by a divided court. Four of the eight justices ruling on the case voted to reverse the conviction on this ground. The conviction was reversed by a vote of five-to-three on the ground of improper admission of a tape recording of Wanrow's telephone conversation with the Spokane police.

> Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in the light of the individual handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.[64]

This application of a woman's perspective to the law of self-defense is a watershed in judicial recognition of women's right to self-defense. The court in *Wanrow* clearly validated the argument that equal protection of the law requires that the jury consider a defendant's actions "in the light of her own perceptions of the situation." [65] The specific aspects of the woman's perception mentioned by the court in *Wanrow* need to be particularly addressed by defense counsel in future cases.

D. Defense Issues

1. *Women's perceptions of danger*

The "role-typing which society has long imposed" [66] has relegated women to a position of second-class status with respect to their abilities to defend themselves. Women have been denied equal opportunity and access to physical training and athletics.[67] They have been discouraged from learning how to defend themselves physically because such behavior would be "unfeminine." Women are socialized to be less active physically, not to display physical aggression, and to be more afraid of physical pain than men.[68] These problems are exacerbated by the fact that most women are physically smaller than men.

Women who have learned to associate femininity with being weak and helpless experience great anxiety when confronted with a situation where they must display aggression.[69] Relative size, socialized self-perceptions about helplessness, and generally poor physical training influence women's perceptions of danger. These circumstances must be included, as noted by the *Wanrow* court, within the standard of self-defense.[70]

2. *Women's need to use weapons*

Traditional legal theory virtually ignores the problem of how a small unarmed woman, or anyone without self-defense skills, can cope with an attack by a large unarmed man whom she perceives as threatening her life. The legal response has been couched within a male standard of physical equals: deadly force can only be used to meet deadly force.[71] When perceived by a woman, however, the fist or the body of the large male may itself be the deadly weapon. The woman who feels ill-equipped to defend herself with her fists may feel that her only resort is use of a weapon. The Washington Supreme Court implicitly recognized this fact. Its ruling against the challenged instruction was based, in part, on the fact that the instruction in *Wanrow* left the jury with the impression that a small, encumbered woman could legally defend against a large intoxicated man only if she did so without employing weapons.[72]

The special circumstances which may require a woman to use a weapon must be fully explained in the trial. The jury must be allowed to consider the relative size of the woman, her lack of access to self-defense training, and her possible need to resort to a weapon when faced with an unarmed assailant. This approach equalizes the application of the law to women by incorporating the woman's perspective into the deadly force standard and other standards of self-defense.

3. *Provocation and time restrictions*

The court in *Wanrow* recognized that a narrow time restriction wrongfully limits the jury's consideration to the events immediately preceding the homicide.[73] Restriction of this kind violates the rule that all the circumstances should be taken into account, even those that precede the incident by a long period of time.[74] A victim's conduct preceding a homicide is generally viewed as relevant to explain the reasonableness of the defendant's actions. In a woman defendant's self-defense case the events of recent moments, days, weeks, and months may be admissible to show that the defendant was provoked into the homicidal act.

The relevance and admissibility of the decedent's acts preceding the homicide are not limited to showing provocation. Their effect on the defendant's own perception of the situation may also be demonstrated.

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64. *Id.* at —, 559 P.2d at 559 (citations omitted).
65. *Id.*
66. Stanton v. Stanton, 421 U.S. 15, 15 (1977).
67. *See generally*, B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 990-1036 (1975).
68. Bardwick, *Ambivalence: The Socialization of Women*, in READINGS ON THE PSYCHOLOGY OF WOMEN 52-58 (J. Bardwick ed. 1972).
69. Consentino & Heilbrun, *Anxiety Correlates of Sex-Role Identity in College Students*, in *id.* at 59-65.
70. The Washington Supreme Court stated in State v. Wanrow: "[C]are must be taken to assure that our self-defense instructions afford women the right to have their conduct judged *in light of the individual physical handicaps which are the product of sex discrimination.*" 88 Wash. 2d 221, —, 559 P.2d 548, 559 (1977) (emphasis added).
71. PERKINS, *supra* note 46, at 997.
72. *See* text surrounding note 65 *supra*.
73. 88 Wash. 2d 221, —, 559 P.2d 548, 555 (1977).
74. *Id.* at —, 559 P.2d at 557.

The reasonableness of her response does not depend on one overt act, but on "all the circumstances as they appear to her at the time." [75] Thus, any previous experience the woman has had with her assailant or any frightening information she may know or believe to be true about him may be crucial to establishing her state of mind. Similarly, the entire course of the decedent's conduct must be taken into account in determining whether the defendant acted reasonably.[76]

4. *Decedent's reputation for violence*

The decedent's general reputation for violence or his prior commission of specific acts or threats of violence is clearly relevant and crucial to the reasonableness of a woman's conduct in apprehending danger of imminent bodily harm. Generally, proof of the decedent's reputation for violence, if known to the defendant, is admissible to show who was the aggressor in the attack. It can also be used to support the reasonableness of the defendant's conduct. It is almost universally held that once the defendant has produced evidence that the deceased attacked her, she may introduce testimony of the reputation of the deceased for violence.[77] If the deceased had earlier threatened or violently assaulted the defendant, there is support for the proposition that a quicker, harsher response was justifiable.[78]

This type of evidence puts before the jury a clearer picture of the person against whom the woman was defending. An individual may not be justified in using a weapon against a man about whom she knows nothing. However, she may be perfectly and reasonably justified in reaching for a weapon against a man whom she knows to be violent. While it is critical to develop this area in any self-defense case, it is particularly important in cases involving women. In such cases, the assailant's reputation for violence may have had a more severe impact on the state of mind of a woman who feels unable to defend herself. This may be especially true for the woman who has been denied judicial or law enforcement protection.

5. *Rage*

Many people, including many lawyers, think that if a woman's response is even partially motivated by anger at the victim, the defense of self-defense is precluded.[79] In cases involving rape, sexual assault, or wife assault, rage is a perfectly legitimate response, and a self-defense defense should not automatically be ruled out.

As women become increasingly educated and self-conscious about the problems of rape, child molestation and wife-assault, rage may well be one of the several components of a woman's mental state at the time she responds. Viewed from the woman's perspective, it is apparent that the absence of anger would be abnormal and unreasonable. A reasonable and self-protective response to the situation may well be rage rather than acceptance. To some extent, this may include the urge to retaliate.[80]

Traditionally, retaliation and anger have no place in the self-defense exception to homicide culpability.[81] In responding to an attack, however, rage is rarely the sole motivating force.[82] A woman's state of mind at the time of the homicide is complex. It probably

75. *See, e.g.*, State v. Dunning, 8 Wash. App. 340, 342, 506 P.2d 321, 322-23 (1973).

76. This view has already been recognized by some courts. The New Jersey Supreme Court has held that provocation can include a "course of ill treatment" not limited to events immediately preceding the homicidal act. State v. Guido, 40 N.J. 191, 211, 191 A.2d 45, 56 (1963). The court stated that "prolonged oppression" and an accumulation of events can become a "detonating force, no different from that of a single blow of injury." *Id.* *See also* English v. People, 178 Colo. 325, 497 P.2d 691 (1972), Ferrin v. People, 164 Colo. 130, 433 P.2d 108 (1967).

77. C. McCormick, Handbook on Law of Evidence § 160 (1954). *Accord* Fed. R. Evid. 404(a)(2). The decedent's reputation for violence, however, need not have been personally known to the defendant.

78. People v. Torres, 94 Cal. App. 2d 146, 210 P.2d 324 (1949).

79. Indeed, it is interesting to note that women who commit violent acts are either seen as insane or acting out of anger, although the prevailing image of a man protecting himself is that he is cool-headed.

80. For example, who can imagine not saying "I'd like to kill the guy who raped me." In fact, when asked in voir dire in both Garcia trials, "What would you do to the man who you learned raped your wife/daughter?" male jurors uniformly responded, "I would like to kill the guy."

81. There are two situations in which an aggressor may justifiably defend herself. 1) An aggressor who begins an encounter using no weapon or a non-deadly weapon and who is met with deadly force, may then justifiably defend herself against the then deadly attack. This is so because the aggressor's victim, by using deadly force against non-deadly aggression, uses unlawful force. 2) Also, an aggressor who in good faith effectively withdraws from any further encounter with her victim (and to make effective withdrawal she must notify the victim, or at least take reasonable steps to notify him/her) is restored to her right of self-defense. LaFave & Scott, *supra* note 41, at 394-95. *See also* Perkins, *supra* note 46, at 1015.

In some states, courts have held that, where possible, a person must retreat rather than use deadly force if attacked outside her home or business. However, in most states, a person has no duty to retreat in the face of a deadly attack. Even in those jurisdictions which require retreat, the defender need not retreat unless she knows she can do so in complete safety; and she need not retreat from her home or place of business, or place where she is rightfully. *See, e.g.*, King v. State, 233 Ala. 198, 171 So. 254 (1936); State v. Abbott, 36 N.J. 63, 174 A.2d 881 (1961). Moreover, the doctrine of deadly force does not encompass any right to use deadly force for the purpose of revenge. After an attacker has been disarmed or if he has retreated, there is no present and immediate danger which further justifies killing him.

82. If it were, of course, and the woman was not afraid, then a defense or self-defense might be difficult and strong consideration of an impaired mental state defense should be given.

includes some feeling of fear, immediate or otherwise, rage, panic, humiliation, shame, abject terror, and an excited state of mind in which judgment is impaired. The degree and importance of each of these factors vary from case to case. If rage is put before the jury within the context of the other emotions that naturally and reasonably accompany it, the rage will be perceived as reasonable. This approach no longer conflicts with the assertion of self-defense.

Even though rage can be an acknowledged component of a woman's mental state, it must be handled with extreme delicacy. Defense counsel must be sensitive to the fact that rage is an issue which most strongly sparks the myths of women and violence. Additionally, prosecutors uniformly seek retaliation instructions [83] in an attempt to defeat self-defense justifications where rage has been an issue in the case.

IV. Defenses of Impaired Mental State

Our focus on self-defense reflects a dissatisfaction with the use of traditional impaired mental state defenses for women charged with homicides. These defenses tended to imply that such women were insane. We believe that analysis of the circumstances which force women to respond to life-threatening situations usually leads to a self-defense perspective. We recognize, however, that not all cases involving women responding to sexual or physical assault can or should be defended from the standpoint of self-defense. Accordingly, we have set forth the preliminary outlines of an impaired mental state defense.

The law has always recognized that responsibility for criminal conduct cannot be fixed on persons whose mental capacities were in some way impaired at the time of the incident. The range of defenses available for impaired mental capacity varies from state to state. They generally include insanity, which is a total defense to criminal conduct, and some form of partial responsibility such as heat of passion [84] or diminished capacity.[85] Automatism, or unconsciousness defense, also limits criminal responsibility. This defense rests either on the ground that the defendant did not have the requisite mental state to commit a crime or that she did not commit a voluntary act.[86] There may also be other variations on the impaired mental state defense.[87]

Women generally have been viewed as more prone to hysteria and panic than men. Women who violated that stereotype by being strong and independent or violent were treated as hysterics.[88] It is our belief that many women who committed homicides and were considered disturbed by society, their lawyers, and even themselves, might now be viewed as having acted in self-defense.

In the past, defense attorneys relied almost automatically on an impaired mental state defense for a woman who committed a homicide.[89] Today, an im-

83. A typical retaliation instruction for a jury appeared in People v. Triolo, 332 Ill. 410, 163 N.E. 784 (1928):

> If you believe from the evidence, beyond a reasonable doubt, that he had no reasonable cause to apprehend the approach of immediate injuries to himself, and did so . . . from a motive of revenge or retaliation, then the defendant can not avail himself of the law of self-defense and you can not acquit on that ground.

Id. at 414, 163 N.E. at 785.

84. Although heat of passion is also discussed in the section on self-defense, it is conceptually akin to an impaired mental state defense in that it suggests that the mental state of the defendant was less than normal. Perkins, *supra* note 46, at 866, 869.

85. This can reduce first or second degree murder to manslaughter if the provocation was "reasonable". LaFave & Scott, *supra* note 41, at 573. Diminished capacity is a potential complete defense in some states; in other states it is entirely precluded as a defense. *See Recent Developments: Diminished Capacity—Recent Decisions and an Analytical Approach*, 30 Vand. L. Rev. 213, 215, 222 (1977).

86. LaFave & Scott, *supra* note 41, at 337.

87. For example, there is also the xyy chromosome defense for men which bases lack of criminal responsibility on genetic factors or voluntary intoxication which is usually a partial defense to specific intent crimes. *Id.* at 332-37, 341-51.

88. Indeed, the literature suggests that women who are violent and display criminal tendencies are more likely to end up in mental hospitals than in jails. *See, e.g.*, P. Chesler, Women and Madness (1972) at 78-82, 107, H. Derosis & V. Pellegrino, The Book of Hope: How Women Can Overcome Depression (1976), at 3.

89. *See, e.g.*, Blitman & Green, *Inez Garcia on Trial*, Ms. Magazine (May, 1975).

paired mental state defense should be considered only as a last resort, with full awareness of its social implications.[90] In particular, the use of an insanity defense must be evaluated in light of the procedures which follow an acquittal by reason of insanity. In some jurisdictions, commitment to a mental hospital for treatment is mandatory after such an acquittal.[91] In all other non-federal jurisdictions, commitment is possible but not mandatory.[92]

If it is necessary to use an impaired mental state defense, counsel can still accurately and fully inform the jury of the conditions and circumstances which affected the woman's state of mind. For example, when a woman has suffered years of physical or sexual abuse by her husband, has experienced a prior rape or incident of child molestation, or has a particularly severe cultural or social reaction to sexual assault, it is important for her defense to explain these background factors. This can be done through sociological, psychological, or psychiatric testimony,[93] the defendant's own testimony, and voir dire. The defense would suggest that the woman was driven to the breaking point by the circumstances of her situation.[94]

In choosing an impaired mental state defense, it is important to consider that juries not only generally mistrust psychiatric defenses, but may, as with self-defense, apply a different standard to women. The jury may require a woman who asserts an impaired mental state defense to sound truly insane. A woman who sounds too angry or too calm may not fulfill the juror's role expectations. The jury may then feel punitive toward her for not conforming to the stereotype. Prosecutors have played on this bias by using tape recordings of a defendant's voice to the police or other persons after the incident. These recordings are used to suggest that the woman sounded too calm to have been acting under an impaired mental state. The prosecution may also seek jury instructions stating that anger or frustration are not insanity. This problem is particularly severe where other myths are operating as well. Prosecutors may, for example, imply that women are masochists and are themselves responsible for the precedent assaults.[95]

We believe that as more legal people begin to work in this area, they will develop a more thorough feminist legal analysis of impaired mental defenses which includes the woman's perspective. This work is needed to represent women in these circumstances more effectively through a wider range of defenses.

V. Trial Tactics and Strategies

After the defense strategy is chosen, myths and misconceptions which would prevent the jury from seeing the defendant's acts as reasonable must be identified.[96] If the myths surrounding physical or sexual assault are openly discussed and disputed in an evidentiary setting, homicide can be understood as a response to a vicious physical assault. The jury will not consider that the assault was an "enjoyable experience." Defense strategy can then proceed as in any other criminal case. The strategy devised will determine the evidence presented, tenor of the defense and of the defendant's testimony,[97] and the jury instructions.

Analysis of the trial and re-trial of Inez Garcia presents a valuable case study in the development of defense theory and its application to specific trial considerations. In the first trial, her defense was largely based on the theory of diminished capacity; that is, as a result of the rape she was acting in an abnormal state of mind when she shot Miguel Jimenez, the man who earlier had been an accomplice in raping her. Inez Garcia's act was presented as that of an unreasonable woman. But Garcia herself perceived her act as reasonable. At retrial, her attorneys presented evidence to show this to be so.

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90. This reinforces the general defense view that psychiatric defenses are usually resorted to only after everything else has failed.

91. *See, e.g.*, Mass. Ann. Laws. ch. 123, § 48 (Michie/Law. Co-op 1972 & Supp. 1977); Neb. Rev. Stat. § 29.2203 (1975); Wis. Stat. Ann. § 957.11 (West 1958).

92. LaFave & Scott, *supra* note 41, at 317. In these jurisdictions commitment may be ordered upon a judicial finding that the defendant's insanity continues or that she or he is dangerous. In most jurisdictions, the power to release the defendant from commitment is vested in the trial court. The defendant bears the burden of seeking release and establishing grounds for release beyond a reasonable doubt. It should be noted that these release provisions are often more severe than the release provisions for patients civilly committed.

93. It may be difficult, however, to find a psychologist or psychiatrist who can testify about the background circumstances and the woman's state of mind in a non-sexist, clear, and comprehensive manner.

94. This kind of defense was apparently successful in the case of Francine Hughes, a battered woman who set fire to the bedroom in which her sleeping husband lay. *See Self-Defense Standard at Stake in Michigan Trial*, In These Times, Aug. 10-16, 1977, at 6; *Wife Cleared in Mate's Death*, The Record, Nov. 4, 1977, at A-4. For an analogous application of this defense for poor and minority people, see Harris, *Black Rage: Political Psychiatric Defenses*, Frontier Issues in Criminal Litigation, Aug. 1977.

95. Walker, The Battered Woman Syndrome Revisited: Psycho-Social Theories (1977) (paper presented at the American Psychological Association Annual Convention, San Francisco, Cal.).

96. The National Jury Project, P.O. Box 675, Brookline Village, Mass. 02147, is an excellent resource for jury selection. The Project consists of 30 people, located around the country, who apply social science techniques to jury composition, venue, voir dire, and selection problems. The Project assisted in the cases of Joan Little and Inez Garcia. A priority of the Project's work is cases involving women's self-defense.

97. A self-defense defense necessarily involves having the defendant testify. The considerations in preparing her testimoney are suggested by the ideas explored herein, but are outside the scope of this article.

In preparation for retrial, Garcia's trial team analyzed which factors had led to her conviction. At the outset it appeared that she had an excellent self-defense case, since the victim died with his own knife only inches from his body. This indicated that he had intended to use it, or at least had had it drawn. It was also apparent from juror interviews after the first trial that at least some of them perceived the rape as an act which Inez Garcia should have enjoyed. These factors, among others, led the trial team to conclude that the failure to present Garcia's act as reasonable was an error in strategy at her first trial.

Throughout the retrial, the strategy employed was to identify and expose myths and misconceptions which would prevent the jury from viewing the evidence with an open mind. The defense presented one consistent message to the jury: Garcia's act of shooting her assailant was reasonable. Every problem was faced and resolved consistently with that strategy. The jury acquitted Garcia because they felt that anyone in her situation would have done the same.[98]

A. Voir Dire

Voir dire[99] examination of the jury should include the theory of the case, as well as some preliminary consideration of the makeup of the ideal jury.[100] An extensive voir dire examination is useful in laying out to the jury the defendant's theory of the case. It also begins to remove certain biases and prejudices from the jury. In the Garcia trial, voir dire examination helped to expose and eliminate the myths of rape which had been seen as detrimental to her defense.[101]

Voir dire may be used to identify and rebut other myths about women. For example, the myth that men use weapons as a matter of right whereas women should not use them at all is critical in a homicide case involving a woman. Women may be seen as hysterical in their decision to use a weapon. In voir dire examinations, these different attitudes should be explored. If properly done, the bias reflected in these attitudes will be exposed to the jurors. When the evidence of the weapon is presented in the trial, the previously examined juror will at least have been urged to take an unbiased view of the evidence presented.

In selecting jurors for a woman's self-defense case, consideration must be given to the issues the defense will raise, how the defense and counsel will be perceived, and the issues raised by trial strategy. We do not posit one type of juror, male or female, who can best accomplish the job of being fair-minded.[102] The desired composition of the jury for each particular case depends upon the defendant, the witnesses, and counsel's theories of jury selection. The Garcia jury consisted of ten men and two women,[103] not because this sexual composition was considered ideal, but because these particular jurors appeared to be the most fair and open-minded. Experience in the Garcia trial indicates that men as well as women can be sensitive to women's issues in a criminal trial if the issues are presented correctly.

98. The circumstances that were brought to the attention of the jury to demonstrate the reasonableness of Inez Garcia's conduct included the following: that she had seen the man she shot, Miguel Jimenez, beat up her housemate earlier in the evening; that later that night Jimenez had acted as an accomplice to her rape; that shortly after the rape he threatened her over the telephone; that when she left the house carrying a loaded rifle she was terrified, angry, and humiliated by having been raped; that when she came upon Jimenez and the rapist, Jimenez was holding a knife. All of this convinced her that he was capable of killing her. This factual evidence was supplemented by testimony from experts on the issue of rape.

99. Voir dire, meaning in French to speak the truth, usually refers to the examination by the court or by the attorneys of prospective jurors to determine their qualifications for jury service.

100. The scope of voir dire examination of the jury varies from state to state. Some states will allow an extensive voir dire by counsel and a minimal voir dire by the judge, *see, e.g.*, CAL. PENAL CODE § 1078 (1970 & Supp. 1977). In other states, as well as in federal court, the voir dire is largely conducted by the judge, *see, e.g.*, MASS. ANN. LAWS. ch. 234 § 28 (Michie/Law. Co-op 1974 & Supp. 1977). In many cases it may be appropriate to move for an expanded voir dire. This motion can also serve to educate the judge about the issues underlying the homicide, since their complexity is a reason why voir dire must be expanded.

For sources on voir dire and jury selection, see A. GINGER, JURY SELECTION IN CRIMINAL TRIALS (1975); Van Dyke, *Voir Dire: How It Should Be Conducted to Ensure That Our Juries Are Representative and Impartial*, 3 HASTINGS CONST. L. Q. 65 (1976).

101. The jurors were extensively interviewed on the subject of rape with the following series of questions: 1) Do you believe that women invite rape? 2) Do you believe that rape is a violent act, and 3) if so, do you believe that women enjoy it? 4) Have you or anyone close to you ever been raped? 5) Do you permit your daughter to go out alone late at night? If not, why not? 6) What would you do if your wife or daughter were raped? This series of questions produced valuable interchanges between defense counsel and the jurors, and was significant in pointing out to the jury myths surrounding rape.

102. In post-verdict interviews, it was apparent that the male jurors had been receptive to the expert testimony about rape. They had learned from it, and as planned, had ultimately seen the act of rape and the resulting homicide from the defendant's perspective.

103. This composition was the result of several factors. Primary among them was the fact that the prosecution used pre-emptory challenges on all prospective women jurors who appeared sympathetic to Inez Garcia and/or to the women's movement. In addition, the defendant found some women jurors hostile to the women's movement and to Inez Garcia due in large measure to the publicity and turmoil surrounding her first trial. The main objective was to find jurors, male or female, who were openminded about the case, and who could make a fair determination of the defense position that Inez Garcia, fearing for her life, shot her victim in self-defense. The jurors who were ultimately selected demonstrated those qualities.

B. Education of the Judge

Defense counsel in cases alleging homicide by an abused woman have found it useful to provide the court, either before or during trial, with memoranda, literature, and media presentations on the issues upon which the defense is based.[104] For example, the Garcia attorneys, prior to trial, provided the judge with a feminist study on rape.[105] Counsel felt that the judge, if educated, would understand the defense perspective and permit introduction of evidence surrounding it. At the very least, counsel hoped that, if the judge himself believed any of the myths, he would be fairer if aware of his own prejudice. Recent research provides a firm foundation for the defense approaches described in this article. This research should be used at every opportunity to educate the court.

C. Presentation of Expert Testimony

Expert testimony can be used effectively to neutralize stereotypical prejudices and ideas which interfere with a proper consideration of a woman's defense. In determining whether or not to present such testimony, however, counsel should consider what myths or misconceptions surround the area. The effect an expert witness will have on the jury[106] and the jury's ability to understand defendant's actions, given the circumstances, must also be weighed.

If the subject is sufficiently beyond common experience so that expert opinion will assist the trier of fact, it is admissible at trial.[107] The judge, however, may need to be convinced that the subject is beyond common experience. In the Garcia trial rape was a subject which, in its scientific entirety, was beyond the common knowledge of both the jury and the judge. The brief demonstrated that scientific literature contradicted commonly held views of rape and that the proposed expert testimony would be crucial to an understanding of Garcia's state of mind at the time she committed the homicide.[108] Similar motions for expert testimony should be made in cases where child molestation or wife-assault is involved.

In the Garcia trial, two experts testified for the defense about the effect of rape on a rape victim. The testimony of one included statistics on the reactions of rape victims and whether rape victims called the police following a sexual assault.[109] The second expert testified to defendant Garcia's racial and cultural background as a Latina. The specific effect of a rape on the emotional makeup of a woman of her background was stressed.[110] This testimony proved to be very helpful in explaining Garcia's act as that of a reasonable woman in her circumstances.

D. Jury Instructions

Jury instructions must reflect and be consistent with the theory of the case. They must affirmatively try to solve any special problems. In a case involving a woman on trial for murder, jury instructions are particularly crucial. Many of the concepts developed in this article arose out of jury instruction challenges. The attorney must be extremely sensitive to the subleties and nuances of the tone of the instruction, the use of masculine gender, and the incorporation of male-defined standards. Jury instructions embody, direct, and reflect to the jury the male-defined standard of self-defense in its purest form. Such instructions divert the jury from the woman's perspective, even when this perspective has been incorporated into the trial.

E. Resources

The theoretical basis of the approach set forth in this article has its foundation in women's movement resources. The original work in the area of rape was done within the women's movement.[111] It included attempts by women to make legislative changes in the law,[112] to set up rape crisis and intervention centers,[113] to focus media exposure on the problem of rape, and to distribute substantial literature on the subject. Similar work is now being done in the areas of wife-assault and child molestation.[114]

104. In many cases, it may be possible to file a motion to dismiss the indictment in the interest of justice which will provide an opportunity to educate the judge by appending useful literature to the motion and supporting briefs.

105. In the Garcia trial, when the defense presented a brief in support of expert testimony on the issue of rape, supplemental scientific literature was provided in support of the motion.

106. If the defense is one of impaired mental state, the testimony of an expert on that mental state may be required.

107. *See, e.g.*, FED. R. EVID. 702.

108. *See Points and Authorities in Support of Defendants of Expert Testimony on the Subject of Reaction of Rape Victims to the Act of Rape*, People v. Garcia, FRONTIER ISSUES IN CRIMINAL LITIGATION (August 1977).

109. Studies indicate that there is no correlation between the incidence of rapes reported to the police and the actual number of rapes for only a small minority of rape victims contact the police. *See* QUEENS BENCH FOUNDATION RAPE: PREVENTION AND RESISTANCE (1976). This testimony was particularly useful to the defense since the prosecution's theory was that Garcia's failure to report the rape to the police meant she had not been raped.

110. One of the jurors interviewed after Garcia's acquittal remarked that he reacted negatively to expert testimony that Latina women reacted more adversely to being raped than other women because of their cultural background. He felt that his wife would be just as upset. Despite his stated negative reaction to this testimony, his remark indicated that it had substantial impact on his perceptions that women do not like being raped.

111. *See* material cited in note 22 *supra*.

112. *See generally* RAPE: THE FIRST SOURCEBOOK FOR WOMEN (N. Connell & C. Wilson, eds. 1974).

113. *Id.*

114. *See* notes 21 & 35 *supra*.

Many communities now have rape crisis centers, shelters for battered women, women's centers, women's switchboards, and women's bookstores. In addition, women's projects frequently can be found within sociology, psychology, history, women's studies, and criminology departments of major universities. Together these provide fruitful resources and should be sought out by the lawyer representing a woman in these circumstances. Studies and expert witnesses to testify about them are also available from these sources.[115]

115. In our experience, an expert from a university, for example, who has never testified before, may well make a valuable expert witness. The requirements for good expert testimony are less in testifying experience than in the ability to present information clearly and sympathetically to a jury. Juries react adversely to jargon, but react positively to information being shared with them in a non-condescending way. Often the inexperienced but well-prepared witness will be able to appear fresh and capable to the jury and will be very effective in conveying the information. The practitioner, however, should be careful to prepare the expert witness for both direct and cross-examination so that the danger of alienating the jurors can be avoided.

VI. Conclusion

The legal analysis set forth in this article has proven successful because of the social, political, and scientific foundation upon which it is based. The courts have begun to accept this analysis, and it provides a framework in which lawyers faced with similar cases may counsel a woman defendant.

The subtleties of sex discrimination in criminal law, however, are only beginning to be explored. Increasing numbers of women find themselves facing criminal charges without lawyers who understand their circumstances, their states of mind, or who can translate their perspective into the courtroom setting. Much creative work remains to be done in this area. Courts can and will accept the woman's point of view, if adequately and sensitively presented. The contours of criminal law must be expanded to include the woman's perspective.