

Battered Wives Who Kill: Civil Liability and the Admissibility of Battered Woman's Syndrome Testimony

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I. The Crime: Mariticide

A man is found dead in a hotel room—shot by his wife. Six weeks before the shooting, she had been hospitalized for injuries from “unknown causes.”¹ After leaving the hospital, she went back to live with her husband who then knocked her down, kicked her and choked her into unconsciousness. The incident prompted her to move into a motel. Her husband continued to harass her by calling her day and night, threatening her life and the lives of her family. She became so frightened that she began to carry a gun. On the day she shot him, her husband had broken into her motel room, hit her, choked her and threatened to kill her. He forced her to shower with him while he roughly and violently shaved her pubic hair, nicking and cutting her. Next, he forced her to have sexual intercourse with him. Pounding a beer bottle on a night stand, he threw a dollar at her and demanded that she go out and buy him cigarettes. Instead, she went to her purse, pulled out a gun and demanded that he leave. “You are dead, bitch, now,” he replied, and reached for his frequent weapon, the beer bottle. She closed her eyes and fired.²

Betty Hundley killed her husband Carl, but only after he had subjected her to ten years of abuse. He had knocked out several of her teeth, broken her nose five times, threatened to cut her eyeballs out and her head off, kicked her downstairs, and repeatedly broken her ribs. Betty had diabetes, and Carl often prevented her from taking her insulin by hiding it or diluting it with water. She would then fall into diabetic comas.³

Although Betty's plight arouses sympathy, a jury convicted

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1. *State v. Hundley*, 236 Kan. 461, 461, 693 P.2d 475, 476 (1985).

2. *Id.* at 461, 693 P.2d at 476.

3. *Id.*

her of manslaughter. Judges, juries, and the media sometimes fear that acquittals of battered women will result in an "open season" on men⁴ or that battered women may feel justified in killing merely as a revenge for past abuse.⁵ This belief ignores the cumulative effect of repeated beatings on the battered woman's reasonable perceptions of her attacker and his intentions.⁶ She knows the danger she is in and responds with deadly force. This act differs from killing the batterer as a punishment for his past abuse of her. The defense is self-defense, not that he deserved to die.

II. The Problem: Wife-Beaters

The term wife-beating is now included in the label of "domestic or spouse abuse," although the vast majority of victims are women, not men.⁷ Husbands beat their wives by pushing, kicking, slapping, dragging, stabbing and shooting them. They also throw

4. Jennifer Baker Fleming, *Stopping Wife Abuse: A Guide to the Emotional, Psychological, and Legal Implications for the Abused Woman and Those Helping Her* 236 (1979) (citing magazine articles that suggest that the women's movement has precipitated an "open season on men"). See, e.g., *The Right to Kill*, Newsweek, Sept. 1, 1975, at 69; *A Killing Excuse*, Time, Nov. 28, 1977, at 108. These articles ignore the analogous "open season" on women that has always existed. Rape, wife-beating, and pornography have been tormenting women throughout history.

5. See *Jahnke v. State*, 682 P.2d 991, 997 (Wyo. 1984). In *Jahnke* an abused male teenager waited in ambush for his father to return home from the movies. When the father returned home, his son shot him. Since the trial court found there were no circumstances showing an actual or threatened parental assault, it ruled that the reasonableness of the defendant's conduct was not in issue. Accordingly, the court refused to allow the hearsay testimony of a forensic psychiatrist regarding the defendant's home life. The court rejected the defendant's argument that abuse victims have a special defense:

Although many people, and the public media, seem to be prepared to espouse the notion that a victim of abuse is entitled to kill the abuser that special justification defense is antithetical to the mores of modern civilized society To permit capital punishment to be imposed upon the subjective conclusion of the individual that prior acts and conduct of the deceased justified the killing would amount to a leap into the abyss of anarchy.

Id. at 997.

6. Cf. *Commonwealth v. Whitfield*, 475 Pa. 297, 304, 380 A.2d 362, 366 (1977) (citing with approval, *Commonwealth v. McCusker*, 448 Pa. 382, 292 A.2d 286 (1972)), supporting the proposition that the trier of fact may rely on the "cumulative impact of a series of related events in making the objective determination as to what constitutes legally adequate provocation." 475 Pa. at 304; 380 A.2d at 366. This murder appeal involved a mitigating provocation defense rather than the complete defense of self-defense, however, past experiences should be considered in each type of case.

7. Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* 214, 214 n.16 (1982) (citing *Facts: A Focus on 'Battered Husbands'*, Aegis: Magazine on Ending Violence Against Women, Jan.-Feb. 1979, at 21; the Lafayette, Louisiana Task Force on Domestic Violence found that in 1976, 95% of the domestic violence calls to law enforcement agencies were from women victims).

objects at them and burn them with cigarettes. Battering husbands may also sexually abuse their wives by forcing them to have sex with them or with other men, women or animals. It is estimated that violence occurs in about thirteen to sixteen percent of all marriages.⁸ The problem is not limited to husbands and wives. Unmarried men also beat the unmarried women with whom they are intimate.

An increasing number of courts are admitting expert testimony regarding the battered woman's syndrome (BWS).⁹ While the purpose of the testimony is only to supplement the self-defense claim,¹⁰ it is sometimes erroneously thought of as a defense in itself.¹¹ BWS evidence does not give a battered woman a license to kill.¹² Rather, the admission of BWS evidence acknowledges her right to protect herself from serious bodily injury or death.¹³

While the admissibility of expert testimony regarding battered woman's syndrome may result in an increased number of acquittals, the battered woman may still be subject to civil liability.¹⁴ A criminal action does not preclude a subsequent wrongful death action. In Betty Hundley's case, the Kansas Supreme Court reversed the manslaughter conviction and remanded *Hundley* for a new trial. On remand, expert testimony will be admissible to prove the nature and effect of wife beating.¹⁵ Neither another conviction nor a subsequent acquittal will prevent a wrongful death action.¹⁶

8. Susan Atkins & Brenda Hoggett, *Women and the Law* 124-25 (1984).

9. *Hawthorne v. State*, 470 So. 2d 770, 781 (Fla. Dist. Ct. App. 1985). See Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 Harv. Women's L.J. 121, 138 n.77 (1985) for a listing of courts considering admissibility of battered woman's syndrome testimony.

10. *State v. Leidholm*, 334 N.W.2d 811, 819-20 (N.D. 1983). See also Elizabeth Bochnak, *Case Preparation and Development in Women's Self-Defense Cases* 42-43 n.76 (1981).

11. *Leidholm*, 334 N.W.2d at 819-20; Bochnak, *supra* note 10, at 43-44; Michael Buda & Teresa Butler, *The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence*, 23 J. Fam. L. 359, 373 n.101 (1985).

12. Bochnak, *supra* note 10, at 42; *State v. Kelly*, 33 Wash. App. 541, 544, 655 P.2d 1202, 1203 (1982) ("The existence of the syndrome in a marriage does not of itself establish the legal right of the wife to kill the husband, the evidence must still be considered in the context of self-defense") (footnote omitted).

13. *Kelly*, 33 Wash. App. at 544, 655 P.2d at 1203.

14. See *Morrison v. Bradley*, 622 P.2d 81 (Colo. App. 1980), *rev'd on other grounds*, 655 P.2d 385 (Colo. 1982) (wrongful death action brought by son and daughter of decedent against defendant, the decedent's girlfriend; battered woman's syndrome not accepted as a defense to a wrongful death action based on negligence).

15. *State v. Hundley*, 236 Kan. 461, 467-68, 963 P.2d 475, 477 (1985).

16. See *Stevens v. Stevens*, 231 Kan. 726, 727-28, 647 P.2d 1346, 1347-48 (1982) (Stepchildren brought a wrongful death action against the stepmother for the death of their father. The stepmother claimed the shooting was accidental, but she was

The motivation to bring suit against a battered wife for killing her husband is varied. Upset relatives may pressure a personal representative to bring suit. Such relatives of the decedent may not have known he was a wife-beater, or if they did know, they may accuse the woman of being a vigilante. The relatives may not believe that she killed in self-defense. If the decedent was a well-respected man in the community whose wifebeating was unknown outside the immediate family, relatives may wish to lessen the embarrassment and seek to blame the wife to "save the family name." Wife abuse cuts across class lines¹⁷ and thus if the decedent had money, although relatives may be reluctant to see the wife go to jail, they may not be so reluctant to see that she does not get life insurance proceeds¹⁸ or the benefit of the estate.

Some states have laws, termed "slayer statutes," which prevent the spouse who killed the other from inheriting his estate.¹⁹ In other states, the slayer is allowed to inherit, but any property will be placed in a constructive trust.²⁰ In many states, however, the slayer is allowed to directly inherit the estate.²¹ If the wife

convicted of involuntary manslaughter nonetheless. The conviction did not bar the subsequent wrongful death action).

17. See, e.g., Laura Elliott, *Shattered Dreams*, The Washingtonian, Apr. 1986, at 100. John Fedders, chief of enforcement for the Securities and Exchange Commission, was a man who had it all—not only money, fame and power, but a terrible temper as well. His exposure as a wife-beater during his divorce proceedings forced him to resign his position. Despite the pattern of abuse, Charlotte Fedders continued to be pressured to make the marriage work. Even though the divorce judge heard testimony on the abuse, he nonetheless called the couple's lawyers into his chambers and "strongly suggested an attempt at reconciliation." *Id.*

18. Most states do not have general statutes governing the rights of life insurance beneficiaries nor specific statutes dealing with a slaying beneficiary. Courts are split on whether or not a claimant acquitted of criminal charges is disqualified from receiving proceeds. See, e.g., *State Mut. Life Assurance Co. of Am. v. Hampton*, 696 P.2d 1027, 1034 (Okla. 1985). In this action, the wife sued the administrator of the estate for life insurance proceeds. The court held that the "slayer" wife's acquittal did not automatically entitle her to deceased husband's insurance proceeds. Instead, the issue of whether the killing was intentional or unjustified could be relitigated in the civil action for life insurance proceeds. Under the policy, she could not collect if the killing was felonious, intentional, or unjustified. Cf. *Commercial Travelers Mut. Acc. Ass'n v. Witte*, 406 S.W.2d 145 (Ky. 1966) (The wife was previously convicted of involuntary manslaughter of her husband, but was not barred from recovering under deceased husband's policy); *Moore v. Prudential Ins. Co.*, 342 Pa. 570, 576, 21 A.2d 42, 45 (1941) (Although the wife was serving a sentence for voluntary manslaughter, she was allowed to recover life insurance proceeds as administratrix of her husband's estate. The court held that if she did indirectly receive part of the proceeds through inheritance, it was permissible because the Intestate Act allowed it).

19. John Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 Harv. L. Rev. 715, 715 n.1 (1936).

20. Page on Wills § 17.19 p. 847 (Bowe-Parker Revision 1960 & Supp. 1986).

21. See *Campbell v. Ray*, 102 N.J. Super. 235, 245 A.2d 761 (1968) (spouse who was found to be insane when she murdered her husband entitled to life insurance

can prove self-defense she will be able to take what she is thereby entitled to.²² Even when convicted of the voluntary manslaughter of her husband, an Idaho wife was entitled to inherit his intestate estate because there was no legislative declaration to the contrary.²³ If the battered wife lives in a jurisdiction with no slayer statute, and she is allowed to inherit her husband's estate, she will then have assets providing an incentive to bring a wrongful death action against her. Children of a prior marriage may also want to bring a wrongful death action, especially if they are adults and stand either to gain estate assets through a damage judgment or to inherit the estate if such an action is used by the probate court to forfeit the wife's share.²⁴

A. Interspousal Tort Immunity

Whether a wrongful death action can be brought depends upon whether the doctrine of interspousal tort immunity is followed in the particular jurisdiction. Interspousal tort immunity is based on the legal fiction that a married couple becomes one person in the eyes of the law.²⁵ The "one person," however, is the man. Married women have no capacity to sue or be sued without

proceeds because recovery was not against public policy); *Anstine v. Hawkins*, 92 Idaho 651, 447 P.2d 677 (1968) (absent contrary legislative intent, wife convicted of manslaughter entitled to inherit the intestate estate of her deceased husband); *In re Wirth*, 59 Misc. 2d 300, 298 N.Y.S.2d 565 (1969) (husband acquitted of wife's murder on insanity grounds given his share of spouse's intestate estate).

22. See *Ovalle v. Ovalle*, 604 S.W.2d 526 (Tex. Civ. App. 1980); *Ward v. Ward*, 174 Va. 331, 6 S.E.2d 664 (1940); *Floyd v. Franklin*, 251 Ala. 15, 36 So. 2d 234 (1948).

23. *Anstine v. Hawkins*, 92 Idaho 561, 447 P.2d 677 (1968). *Accord In re Seipel*, 29 Ill. App. 3d 71, 329 N.E.2d 419 (1975) (wife convicted of involuntary manslaughter not statutorily barred from inheritance); cf. *Conner v. Holbert*, 49 Tenn. App. 319, 354 S.W.2d 809 (1961) (husband convicted of voluntary manslaughter of his wife barred by statute from inheritance of property).

24. See, e.g., *Morrison v. Bradley*, 622 P.2d 81 (Colo. App. 1980). The defendant had killed her abusive boyfriend. His son and daughter then brought a wrongful death action against her for damages. She alleged negligence of the deceased. A jury found the deceased 40% negligent and the defendant 60% negligent. The defendant testified that the deceased had struck or threatened her at various times the last two years and had severely beaten her the day before the shooting. On the day of the shooting, the deceased had struck her on the chin with his fist which caused her to "stagger from the office." *Id.* at 82. She returned with a gun and shot him. A psychologist testified as to the emotional state of the defendant, the causes of her condition, and the role of the batterer. The court said the thrust of the woman's case was that her actions resulted from being a battered woman. The court believed this "theory" was offered as a defense in the wrongful death action and stated: "We neither accept nor reject the validity of the general theory. However, insofar as it would require a change in the rules of evidence in a wrongful death action based on negligence, we decline to apply it in this case." *Id.*

25. *Bounds v. Caudle*, 560 S.W.2d 925, 926 (Tex. 1977).

joinder of the husband.²⁶ He becomes liable for his wife's torts.²⁷

Under the interspousal immunity doctrine, one spouse does not have a cause of action against the other.²⁸ Such immunity is thought to preserve domestic harmony and avoid collusive or frivolous claims.²⁹ Criminal or divorce proceedings are to be alternatives to tort actions.³⁰ Law enforcement officers' refusal to consider wife beating a crime, however, renders the criminal remedy useless.³¹ Neither is divorce a realistic remedy. Not only is it disapproved, but usually the woman only wants the beatings, not the marriage, to end.³² Divorce proceedings will remove her from the battering situation, but this does not remedy the physical injury. Divorce as a remedy condones wife-beating by implying that a man cannot change his behavior.³³ The wife-beater's "punishment" is merely the loss of his wife. Once divorced, the man is free to remarry and beat his new wife. Society has not told him that his behavior was wrong; it merely tells him that one woman (his ex-wife) was not willing to tolerate it. He simply needs to find someone else.

This ineffective form of punishment for wife-beating is inconsistent with the purpose of the criminal justice system. A murderer is not punished by simply taking away his weapon. Society

26. *Id.*

27. *Id.*

28. *Id.*

29. James Russell Wells, *Torts-Interspousal Immunity—Unliquidated Tort Claims Between Spouses No Longer Barred, Pennsylvania Abrogates Doctrine of Interspousal Tort Immunity as Unsupported by Law, Logic or Public Policy*, 27 Vill. L. Rev. 432, 446 n.65 (1982).

30. *Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506, 508 (Md. 1983). See also Roger Langley & Richard C. Levy, *Wife Beating: The Silent Crisis* 56 (1977) (citing Robert Calvert, *Criminal and Civil Liability in Husband-Wife Assaults* 88-90 (Suzanne K. Steinmetz & Murray A. Straus ed. 1974)).

31. Langley & Levy, *supra* note 30, at 56 (quoting *People v. Jones*, 191 Cal. App. 2d 478, 482, 12 Cal. Rptr. 777, 780 (1961)). An abused woman carried a gun to defend herself from her husband and shot and killed him. Under California law, it was a justifiable homicide to kill someone while resisting a felony. Nonetheless she was convicted. The court said, "[I]n creating the statutory felony of wife-beating the purpose of the legislation was not to issue a license for a wife to kill her husband but to provide a means of dealing with a particular family situation." 191 Cal. App. 2d at 482, 12 Cal. Rptr. at 780. Note how wife-beating becomes a mere "family situation," not really a crime.

32. Langley & Levy, *supra* note 30, at 128. One woman said, "I loved him, and it took me thirty years to get over it. I knew in 1964 I didn't need him, but I couldn't get over wanting him. He beat me, he knocked me around ever since we were married, but I still loved him." *Id.* at 128.

33. *Id.* at 184. Insensitivity to a battered woman's situation is shown by the common attitude that termination of the marriage, not punishment of the batterer, is the solution. The authors tell of one family court judge who refused to issue a warrant to a battered woman. His comment was, "Any woman dumb enough to marry such a jerk deserves what she gets." *Id.* at 184.

has a strong interest in preventing him from repeating his crime. Suitable punishment demands loss of liberty.

Interspousal tort immunity persists in our legal system under the rationale of preserving family harmony, although based on the now-rejected legal fiction that the man and woman are one.³⁴ "A man's home is his castle" implies that the kingdom of the family is beyond the interference of the law.³⁵ The law, however, does selectively interfere. It sets minimum age requirements, prohibits marriage between close relatives, and specifies how marriages may be dissolved. What the law prefers to ignore, however, is what goes on behind closed doors. What a man does to his wife is considered none of the state's business.³⁶

This selective ignorance stems from the belief that a husband should have control over his wife.³⁷ Interfering with this control weakens the family unit much as a nation is weakened if the government loses control of its citizens.³⁸ As a result, when police officers are called to respond to a domestic "dispute," they often feel as though they are invading another man's domain and interfering with his "legitimate" control over his wife.³⁹ Police are most often instructed to use crisis intervention techniques to calm the parties down.⁴⁰ They then leave. The reluctance or refusal to arrest the

34. See *Hill v. Hill*, 415 So. 2d 20, 23 (Fla. 1982) (the court supported interspousal tort immunity in an intentional tort action, stating, "Protection of the family unit is a significant public policy and we are greatly concerned by any intrusion that adversely affects the family relationship or the family resources").

35. Louise Armstrong, *The Home Front: Notes from the Family War Zone* 74 (1983).

36. Schechter, *supra* note 7, at 158 (citing James Bannon, "Law Enforcement Problems with Intra-Family Violence," Reprinted by American Friends Service Committee, Women's Issues Program 1 (undated)) (domestic violence considered a "personal problem").

37. See *Boblitz v. Boblitz*, 296 Md. 242, 243, 462 A.2d 506, 507 (1983). The court termed interspousal immunity as "a rule in derogation of married women." The court commented that the woman "became subservient to [the husband's] will and fitted with a distasteful yoke of servitude and compelled obeisance that was galling at best and crushing at worst." *Id.* See also Schechter, *supra* note 7, at 218-24.

38. See Susan Edwards, *Male Violence Against Women: Excusatory and Explanatory Ideologies in Law and Society* in *Gender, Sex and the Law* 183, 189-90 (citing Blackstone's Commentaries):

[W]e [must] recollect that if the feme kills her baron, it is regarded by the law as a much more atrocious crime as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominated her crime a species of treason, and condemns her to the same punishment as if she had killed the king.

Id. at 189-90.

39. See generally Maria K. Pastoor, *Police Training and the Effectiveness of Minnesota "Domestic Abuse" Laws*, 2 *Law & Inequality* 557, 559-64 (1984).

40. See generally Del Martin, *Battered Wives* 92-94 (1981); see also Pastoor, *supra* note 39, at 586-89 (discussing police policy and procedure).

batterer may communicate to the batterer that what has happened is not serious and will not be punished.⁴¹

Intrinsic in the concept of control is the right to discipline. Since society gives men the right to discipline their wives and children, wife-beating is perceived as a husband disciplining his wife.⁴² Many people believe there must be "some reason" for the beating. Women who stay with batterers are thought to be masochistic.⁴³ Why is it that men who beat women are not considered sadistic? Instead, society focuses on the woman and asks, "why does she put up with it if she doesn't like it?" rather than "why does he beat her when she doesn't like it?"

If there is no reason for the beatings, they must be treated as unjustifiable, and the woman should be given the same rights as any other citizen. If the right-to-discipline attitude prevails, then the purported reasons for the beatings justify the disciplinary actions. The husband often thinks his wife should be his servant. If dinner is late or the house is a mess, he believes he has the right to exercise his control and punish her. But does society really believe she deserves to be beaten for these reasons? If the answer is "yes," then severity of the abuse, short of inflicting death, is a matter of discretion left to the man and not subject to review by the law. Interference with this right will only irritate the male and worsen the female's plight.⁴⁴ If the husband's right to beat his wife is presumed, then society's only remedy is to remove her from the environment of violence.

If wife beating were considered criminal, the situation would be treated as other criminal actions. The criminal would be removed from the victim and potential victims (other members of society). No one would seriously suggest that vulnerable members of society be taken away and locked up so they cannot be victimized. Yet that is what happens to battered wives who are victims of abuse from their husbands. The responsibility is on them to "escape," not on the batterer to either stop his behavior or be incarcerated for it. The emphasis on "preserving the family" is not valid when the husband destroys the harmony of his family by using unjustified force.⁴⁵

41. Nancy Loving, *Responding to Spouse Abuse and Wife Beating: A Guide for Police* 61 (1980).

42. See generally Schechter, *supra* note 7, at 209-40.

43. *Battered Women* 20 (Donna M. Moore ed. 1979).

44. Lenore Walker, *The Battered Woman* 96 (1979). Walker writes: "Police often advise a woman not to file a complaint: 'Ma'am, if you do that, you'll never survive it.' Abuse is punishable. On paper." *Id.* at 96.

45. See *Coffindaffer v. Coffindaffer*, 161 W. Va. 557, 562, 244 S.E.2d 338, 343 (W.

B. Battered Woman's Syndrome

Women who experience physical and emotional abuse in an intimate relationship over an extended period of time develop psychological characteristics identified by psychologists as battered woman's syndrome.⁴⁶ The typical battering cycle consists of three phases. In phase one, "the tension-building stage," the battering male engages in minor battering incidents and verbal abuse, while the woman, fearful and tense, tries to be placating and passive in order to prevent more serious violence.⁴⁷

Phase two is the "acute battering stage" during which the male beats the woman more frequently and more severely. The triggering event that initiates this stage is most often an internal or external event in the batterer's life, but the woman who can no longer tolerate or control her phase-one anger and anxiety may deliberately provoke him in order to reach phase three.⁴⁸ The woman's sense of powerlessness against him results in "learned helplessness,"⁴⁹ because she cannot predict or control the violence.⁵⁰ Numbed by fear, she may be unable to think clearly about the means to escape because she is more concerned with day-to-day survival.⁵¹ Her emotional paralysis is reinforced by her traditional beliefs about the sanctity of the home and family and false hope that things will improve.⁵²

False hope stems from phase three, which is a temporary lull in the physical abuse. During this phase, the batterer may plead for forgiveness and demonstrate very loving behavior.⁵³ He may promise to seek professional help, to stop drinking, and to refrain

Va. 1978). The court rejected interspousal tort immunity as a defense in an intentional assault action:

Our law before today practiced a cruel paradox. Under the guise of promoting family harmony, it permitted the wife beater to practice his twisted frustrations secure in the knowledge that he was immune from civil action, except for a divorce, and that any criminal penalty would ordinarily be a modest fine. If nothing else, the knowledge of a monetary judgment with punitive damages may stay such violence.

Id. at 562, 244 S.E.2d at 343-44.

46. *People v. Torres*, 128 Misc. 2d 129, 133, 488 N.Y.S.2d 358, 361 (1985).

47. *State v. Kelly*, 97 N.J. 178, 193, 478 A.2d 364, 371 (1984). *See also State v. Allery*, 101 Wash. 2d 591, 594, 682 P.2d 312, 315 (1984) (citing Lenore Walker, *The Battered Woman* 56-59 (1979)).

48. *Kelly*, 97 N.J. at 193, 478 A.2d at 371.

49. *State v. Allery*, 101 Wash. 2d 591, 594, 682 P.2d 312, 315 (1984).

50. *People v. Torres*, 128 Misc. at 129, 488 N.Y.S.2d at 361.

51. Roberta K. Thyfault, *Self-Defense: Battered Woman Syndrome on Trial*, 20 Ca. W.L. Rev. 485, 490 (1984).

52. *Id.*

53. *State v. Kelly*, 97 N.J. 178, 193-94, 478 A.2d 364, 371 (1984).

from further violence.⁵⁴ For some couples, this period of relative calm may last several months, but then the contrition and affection fade, and phase one starts again.⁵⁵ The length of phase three tends to decrease the longer the relationship lasts.⁵⁶

1. Why she stays.

The natural response to the battered woman's plight is to ask why she stays. This question blames the victim for her situation. It takes the man's battering behavior as a given—something men do—and if women do not like it they must simply leave. Instead, what society should ask is: "Why does a 'normal' man find it necessary to beat his wife?" Of all the people with whom he interacts, he only beats her. The answer to this latter question is an unpleasant reality. He beats his wife because there is no penalty for doing so. He does not beat others because he would be punished if he did. The law has given him a human punching bag to vent his frustrations upon.

If a battered woman does leave, the man often pursues her.⁵⁷ The cases are replete with accounts of men who, although under court order to leave the woman alone, persist in tracking her down, cross-country if necessary, to find and beat her.⁵⁸ Her act of leaving very often precipitates heightened violence,⁵⁹ thus making the battered woman all the more fearful for her safety.

A battered woman remains in an abusive relationship for any

54. *Id.* at 194, 478 A.2d at 371.

55. *Id.*

56. Thyfault, *supra* note 51, at 488.

57. Martin, *supra* note 40, at 77-79. A woman divorced for three years wrote the following to a woman's group:

In every place where I have lived, my house has been watched so closely by my ex-husband that I have been endlessly followed and relentlessly pursued Two weeks ago he cornered me in the drug-store. He repeatedly and very forcefully threatened my life in front of a dozen witnesses. When I finally escaped his grasp, I ran home. I called the police, but they didn't come. I'm afraid to leave the house Yesterday my husband parked his car in front of my home for six hours. I don't know what to do. My life is in jeopardy.

Id. at 79.

58. See Ann Jones, *Women Who Kill* 298-99 (1980). The author writes of Patricia Gross's husband, who tracked her from Michigan to Mississippi and then threatened to kill her relatives, thus forcing her to return to him. Judy Austin's live-in boyfriend chased her from California to Arizona to Wyoming.

59. See *State v. Allery*, 101 Wash. 2d 591, 682 P.2d 312 (1984) (after the husband was served with restraining orders and divorce proceedings were initiated, he broke into her house and threatened to kill her); *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985) (the husband found and followed the wife to the hotel where she was staying); *Terry v. State*, 467 So. 2d 761 (Fla. Dist. Ct. App. 1985) (the wife moved into her mother's house, but her husband pursued her and threatened to shoot her. When she moved into an apartment, he broke in several times and beat her).

number of reasons. Society encourages people to get married and to stay married.⁶⁰ She may not want to admit having "failed" at marriage, especially if it is her second one.⁶¹ She may be embarrassed to admit to physical and sexual abuse.⁶² She may feel a need to keep up appearances so her peers do not find out she is a battered wife.⁶³ Many battered women feel they are somehow to blame, and the fact that they were beaten shows there is something wrong with them.⁶⁴ She may feel that he won't get upset if she keeps the environment stress-free. If she "tries harder," then things will get better.⁶⁵ She may love him (when he does not beat her) and want to stay with him.⁶⁶ The woman may feel she is the man's property, and he has a right to "punish" her.⁶⁷ She may not want to ruin his career by exposing his brutal actions.⁶⁸ She may feel helpless and unable to make decisions.⁶⁹ She may hope the

60. Martin, *supra* note 40, at 81. The author tells of one woman who felt compelled to stay married: "I didn't think I had the right to talk about it. You just didn't let anyone else know about anything [i.e. battering] like that. There had never been a divorce in our family. No one ever admitted that there was anything wrong in their marriage." *Id.* at 81.

61. *Id.* Martin writes, "Women in our culture are encouraged to believe that the failure of a marriage represents their failure as women." *Id.* at 81.

62. Langley & Levy, *supra* note 30, at 128.

63. Terry Davidson, *Conjugal Crime: Understanding and Changing the Wifebeating Pattern* 131-54 (1978). The author tells of her father, a Christian minister, who beat her mother consistently throughout their marriage. Her mother never told any outsiders of the violence at home.

64. Elizabeth Stanko, *Intimate Intrusions: Women's Experience of Male Violence* 55-56 (1985). One woman wrote, "The feeling of helplessness due to the fact that it was my fault that I got battered, which I think is common that a woman is blamed because she provoked him. Certainly my husband immediately blamed me. 'If you had done so and so; if you hadn't done so and so.'" *Id.* at 56.

65. *Id.* at 58. Another woman wrote: "[I returned to my husband] because I was sure there was something in me that could make the marriage work. I was quite positive about that." *Id.* at 58-59.

66. *Battered Women*, *supra* note 43, at 23. *See also* Walker, *supra* note 44, at 65-66. Walker writes of women who soon after the acute battering incident went from being "lonely, angry, frightened, and hurt to being happy, confident, and loving." Walker, *supra* note 44, at 66. During the final phase of the cycle theory, the loving-contrition phase, the husband behaves in a charming, loving manner, begging for forgiveness and promising never to hurt her again.

67. Langley & Levy, *supra* note 30, at 127. The authors quote Dr. Gelles:

Our research on marital violence suggests that many victims of family violence do not view these acts as violence or as problems. Women who have been beaten severely by their husbands often state that they "deserved to be hit," that they "needed to be hit" or that "husbands are supposed to hit their wives."

Id.

68. Davidson, *supra* note 63, at 148. The author tells of a statement her mother had put in a safe deposit box in case her father ever got too violent. The last sentence was: "The reason I did not leave my husband was that I realized that if the truth were known, it would mean the end of his ministry." *Id.*

69. *See Battered Women*, *supra* note 43, at 24.

man will change, especially if he promises never to beat her again.⁷⁰ If the shelters for battered women are full or if she does not have the economic resources, then she may have no place to go.⁷¹ If children are involved, she may not be able to get out safely with them or she may be unable to find a shelter with enough space for all of them.⁷² Finally, she may fear reprisal from her husband if she does leave.⁷³

2. Psychological reactions.

The woman's learned helplessness may lead to a feeling of surrender where she becomes unable to recognize the avenues of escape.⁷⁴ In addition, she may experience frustration, stress disorders, depression, low self-esteem, and the isolating effect of losing contact with family and friends.⁷⁵ They may not believe she is actually being beaten or they may feel embarrassed or uncomfortable around her. They may not wish to "interfere."⁷⁶ Some women may perceive the battering cycle as normal, especially if they grew up in a violent household.⁷⁷ Others may not want to admit the reality of their situation.⁷⁸ A woman who becomes demoralized and fearful may believe her husband is omnipotent, and any action on her part against him would be futile.⁷⁹

70. Walker, *supra* note 44, at 129. Walker says that economics can trap women in a relationship in two ways. One is by her fear of becoming poor, and the other is by the use of money as a coercive weapon. In the latter case, women may be either dependent on their husband's income or if they have their own income it is usually spent to support their families.

71. Langley & Levy, *supra* note 30, at 133.

72. *Id.* at 134-35. The authors note that very few shelters have group accommodations for a family. If the battered woman leaves without the children, she may lose them for "failing to provide for them." *Id.*

73. State v. Kelly, 97 N.J. 178, 195, 478 A.2d 364, 372 (1984).

74. State v. Kelly, 102 Wash. 2d 188, 190, 685 P.2d 564, 567 (1984) (testimony from expert witness for petitioner, Ms. Kelly, concerning the battered woman syndrome).

75. *Id.*

76. Martin, *supra* note 40, at 18. Martin tells of a feminist friend in Oakland, California, who witnessed a street fight in which a husband was hitting his pregnant wife in the stomach. When she tried to intervene, the male bystanders who stood by watching shouted at her, "You can't do that! She's his wife!" and "You shouldn't interfere; it's none of your business." *Id.*

77. See Richard J. Gelles, *No Place to Go: The Social Dynamics of Marital Violence*, in *Battered Women, A Psychosociological Study of Domestic Violence* 60 (Maria Roy ed. 1977). See also Martin, *supra* note 40, at 79.

78. State v. Kelly, 97 N.J. at 194, 478 A.2d at 372 (citing Davidson, *supra* note 63, at 50).

79. Martin, *supra* note 40, at 78-79. "It is the fear of knowing someone is searching for you and will beat you when he finds you. In the mind of someone who has been badly beaten this fear blots out all reason. The man seems to be omnipotent." *Id.*

3. Special perception develops.

Because of her situation, the battered woman becomes very attuned to the emotional and physical signs her batterer displays before the periods of violence.⁸⁰ She learns to distinguish subtle changes in his tone of voice and facial expression.⁸¹ Unlike the situation where someone is attacked by a stranger, the battered woman is in a better position to know if and when the batterer will act on his threat.⁸² She has lived with him and observed his mannerisms. She has learned to read his moods. Her experiences with the batterer influence her perceptions when he beats her, so that she may not only focus on what is presently occurring, but also on the potential harm she knows he is capable of inflicting upon her at some future time.⁸³ Her thoughts are only to protect herself from that harm. She believes she has only two choices: she can actively strike back or passively submit to an intolerable existence in which she risks death.⁸⁴

III. One Response: Homicide

Killings by battered women are often considered "preventive strikes."⁸⁵ A preventive strike is one done to prevent anticipated harm. Anticipated harm, however, does not necessarily mean imminent harm. Self-defense is a complete defense to a homicide if it is in response to imminent danger. Thus, although a woman may have suffered from years of abuse, at some point she may fear that instead of "simply" beating her, the assaultive male actually means to kill her.⁸⁶

This is a realistic fear. In 1984 alone, 18% of all murders nationwide involved family relationships.⁸⁷ Forty-eight percent of

80. Bochnak, *supra* note 10, at 45 n.5.

81. *Id.*

82. *Id.*

83. Thyfault, *supra* note 51, at 494-95.

84. Doris Del Tosto, *Pennsylvania Crimes Code*, 26 Vill. L. Rev. 105, 112 (1980).

85. Jones, *supra* note 58, at 288.

86. See *Borders v. State*, 433 So. 2d 1325, 1326 (Fla. Dist. Ct. App. 1983). The woman tried to prevent her battering husband from re-entering the house. She had armed herself with a kitchen knife, and her husband said, "I see that knife. I ain't scared of that knife. You don't have as much strength as I have." *Id.* at 1326. See also *State v. Branchal*, 684 P.2d 1163 (N.M. Ct. App. 1984). Defendant stated:

I was thinking that I didn't want to kill him. I just wanted to get him scared like he used to get me scared. But it didn't work out. He just showed anger and more anger. That's when I figured that if I didn't shoot at him he was either gonna kill me, take the gun away from me or kill one of the kids, or kill me, or something.

Id. at 1166.

87. U.S. Dept. of Justice, *Uniform Crime Reports: Crime in the United States* 11 (1984).

the murders were spouse killing spouse, and of these, 62% were husbands killing wives.⁸⁸ When a woman kills her husband in his sleep because she fears that when he wakes up, he will kill her, she will most likely be charged with first-degree murder.⁸⁹ Historically, women who killed their husbands pled temporary insanity or diminished capacity.⁹⁰ Society viewed their action as a "solution" to the problem of a battering husband. That a woman would kill her husband to save her own life was incomprehensible. The law ignored wife-beating, and when the abuse could not be ignored, it was tolerated.⁹¹ The preventive strike tactic did not fit within the normally recognized confines of the self-defense justification, even though the next time he threatened her, she may have been defenseless, and he would have been able to kill her.⁹²

In the *Hundley* case, discussed in the beginning of this article, the prosecution attempted to rebut the use of self-defense by showing that Carl was unarmed, and his attention had been directed toward the beer bottle when Betty shot him. She was also not physically blocked from going to the door. The evidence showed, however, that he had beaten her with beer bottles before.⁹³ After he threatened her life and refused to leave, his reaching for the beer bottle caused her to fear for her life. Betty's belief that she faced death or great bodily harm was a reasonable one under the circumstances.

The Supreme Court of Kansas agreed, and held that a self-defense instruction stating that the harm must be "immediate" was reversible error. Remanding the *Hundley* case, the court said:

[T]he use of the word "immediate" . . . places undue emphasis on the immediate action of the deceased, and obliterates the

88. *Id.*

89. *See, e.g.,* *People v. Powell*, 102 Misc. 2d 775, 424 N.Y.S.2d 626 (1980); *State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161 (1983); *People v. Giacalone*, 242 Mich. 16, 217 N.W. 758 (1928).

90. *Bochnak, supra* note 10, at 29.

91. *Langley & Levy, supra* note 30, at 53 (quoting *Bradley v. State*, 1 Miss (1 Walker) 156, 158 (1824)). The Mississippi Supreme Court held that a husband should be permitted to "moderately chastise his wife without subjecting himself to vexatious prosecutions for assault and battery, resulting in the discredit and shame of all parties concerned"). *Id.* at 158.

92. *State v. Kelly*, 97 N.J. at 220 n.23, 478 A.2d at 385 n.23; *See generally Crocker, supra* note 9, at 139-42. *Accord* *McMorris v. State*, 58 Wisc. 2d 144, 150, 205 N.W.2d 559, 562 (1973). The court said:

[W]here there is a sufficient factual basis to raise the issue of self-defense, and the turbulent and violent character of the victim is an essential element of the defense, proof should be admitted as to both the reputation of the victim and the defendant's personal knowledge of prior relevant conduct of the victim.

Id. at 562.

93. *State v. Hundley*, 236 Kan. 461, 462, 693 P.2d 475, 476 (1985).

nature of the buildup of terror and fear which had been systematically created over a long period of time. "Imminent" describes the situation more accurately . . . [T]he law of self-defense recognizes one may reasonably fear danger but be mistaken.⁹⁴

IV. The Defense: Self-Defense

If the civil wrongful death action is allowed against women who kill their batterers, then the battered woman will have a defense if she killed in self-defense. Criminal law usually supplies the context for self-defense, but it is also applicable in tort actions. Conduct otherwise classified as tortious battery may be justified as self-defense or defense of others.⁹⁵ When the defensive conduct is justified, no civil liability attaches.⁹⁶

Self-defense involves two concepts. The first concept is that only equal force should be used in response to the threatening force.⁹⁷ The second concept is that the person claiming self-defense has a reasonable apprehension of the danger and a reasonable perception of its imminence.⁹⁸

While the law of self-defense varies from jurisdiction to jurisdiction, there are two main standards. The majority view is an objective standard: whether a reasonable man would have believed himself to be in imminent danger.⁹⁹ The minority view is a subjective standard: whether the defendant believed himself to be in imminent danger.¹⁰⁰ Many jurisdictions require the belief to be both honest and reasonable.¹⁰¹

While in theory the objective standard seems fair, often it does not work for battered women because the "reasonable man" ideal does not take into account the inherent sex bias.¹⁰² The "rea-

94. *Id.* at 463, 693 P.2d at 477.

95. *Duplechain v. Turner*, 444 So. 2d 1322, 1325 (La. Ct. App. 1984).

96. *Id.*

97. *Bochnak*, *supra* note 10, at 17.

98. Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault* in *Women's Self-Defense Cases* 16 (Elizabeth Bochnak ed. 1981).

99. Wayne R. LaFave & Austin W. Scott, Jr., *Handbook on Criminal Law* 391, 393-94 (1972).

100. *Id.*

101. *See, e.g.*, *State v. Kelly*, 97 N.J. 178, 199, 478 A.2d 364, 374 (1984). In New Jersey, a proposed Code of Criminal Justice would have eliminated the reasonableness requirement, and allowed self-defense whenever the defendant honestly believed in the imminent need to act. However, the proposed change was not accepted by the Legislature. N.J. Stat. Ann. § 2C:3-4 (1985) as finally enacted retained the "reasonable" requirement.

102. *Crocker*, *supra* note 9, at 128 n.33.

sonable man" is based on *male* models and expectations.¹⁰³ It ignores differences in social upbringing, physical size and strength, and that a woman's perceptions of danger may differ from a man's.¹⁰⁴

If a woman shoots an unarmed man, it appears that she used deadly force against non-deadly force.¹⁰⁵ The "reasonable man" standard, however, fails to take into account that a man is capable of beating a woman to death with his bare hands or inflicting pain by cruel means.¹⁰⁶ Moreover, women are less likely to have had any type of defense training and more likely to be of slighter build.¹⁰⁷ Her batterer may be stronger, faster, and more violent than she. Often the only weapon available to her will be a knife or gun. While she may intend to use these weapons only to scare him off, it often only makes the batterer more violent, since he may not really believe she will actually use it.¹⁰⁸ When she fails to frighten him and he advances, her only choice is to use the weapon.¹⁰⁹

103. *Id.* at 152 (citing Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635, 636 (1983)).

104. Crocker, *supra* note 9, at 127.

105. See *State v. Hundley*, 236 Kan. 461, 461-63, 693 P.2d 475, 475-77 (1985). If she were in a jurisdiction which imposes a duty to retreat or has an objective standard which only takes into account the immediate event of the shooting, then she would have a difficult time proving she shot in self-defense. The battered woman suffers a great injustice by a legal system which imposes unrealistic standards on the situation of battered women. A "reasonable" man may have a gun and be able to successfully scare another into retreating, however, a "reasonable" woman with a gun will not only fail to frighten the man, but accentuates the violence toward her by challenging his authority.

106. *Id.*

107. Schneider & Jordan, *supra* note 98, at 18; Susan Brownmiller, *Against Our Will* 360 (1975). Brownmiller writes:

According to the odds, she is three inches shorter and 24 pounds lighter than her male assailant. This works to her disadvantage psychologically as well as physically, but worse than the difference in size is the lifelong difference in mental attitude toward strength. He has been encouraged from childhood to build his muscles and toughen his fists. She has been encouraged to value soft skin, her slender wrist, her smooth, unmuscled thigh and leg. His clothing gives him maximum mobility. His shoes are sturdy; thick heels give him power. Her clothing hampers free movement by design, and fragile materials add to her vulnerability.

Id. at 360-61.

108. See *Borders v. State*, 433 So. 2d 1325 (Fla. Dist. Ct. App. 1983); see also *State v. Branchal*, 684 P.2d 1163 (N.M. Ct. App. 1984).

109. See *State v. Thomas*, 66 Ohio St. 2d 518, 521, 423 N.E. 2d 137, 140 (1981); see also *May v. State*, 460 So. 2d 778, 780 (Miss. 1984). Seventy-year-old decedent, who drank a fifth of whiskey a day, and who had threatened to kill his fifty-two year old wife in the past, struggled with her, chased her, and threatened her. Fearful of being severely beaten with a walking stick, she first fired warning shots. When this failed to stop the angry man's advances, she shot him. Her manslaughter conviction was confirmed on appeal.

Nevertheless, some courts have rejected the use of battered woman's syndrome (BWS) to prove the reasonableness of the defendant's belief. The peculiarities of a particular defendant's psyche are irrelevant if the standard is objective.¹¹⁰ The court will determine reasonableness by viewing only the facts as they appeared at the time of the killing.¹¹¹

Even reasonable people, however, will be affected by their knowledge of the attacker's behavior and violent tendencies. The error in disregarding any past violence by the batterer as irrelevant is that the battered woman's past experiences with him contribute to her belief that the danger is imminent. Under the objective standard, a "reasonable" male who knows his assailant is especially violent would take this knowledge into account in a subsequent assault situation.¹¹² Knowledge is interwoven with perception; the two should not be separated. Thus, the objective standard should not preclude taking the batterer's past violence into account when assessing the "reasonableness" of the battered woman's belief that her life is in danger.

Unlike victims in other assault situations, the battered woman may be blamed for being in a battering relationship.¹¹³ Thus, the battered woman, by staying with an abusive partner, appears to have willingly placed herself in an assaultive situation.¹¹⁴ If she has been in the relationship for some time, a jury may not understand why she killed him this time when she survived the other beatings.¹¹⁵

110. Del Tosto, *supra* note 84, at 123.

111. *Id.*

112. See *Jones v. State*, 13 Md. App. 677, 685, 284 A.2d 635, 639 (1971) (violent character of victim known to defendant can create an apprehension of harm); *McMorris v. State*, 58 Wisc. 2d 144, 150, 205 N.W.2d 559, 562 (1973) (past conduct of a person "markedly affects what others may reasonably expect from him in the future").

113. Elissa Krauss, *Leslie Almond* in *Women's Self-Defense Cases* 147, 175 (Elizabeth Bochnak ed. 1981). After the trial of Leslie Almond (not her real name), one of the jury alternates interviewed was May Glaze. She was unsympathetic toward the plight of this particular battered woman:

I can't understand anybody living with a person that way. I question whether he abused her the way she said, sexually. I can't picture a man abusing her sexually that way But she could have packed her bag and gone out. . . . There must have been something that we didn't get. He always called her a whore when he beat her up Why would he say this to someone who was supposedly in love with him? Maybe she was running around. It could be that she might have been doing something.

Id. at 175.

114. *Id.*

115. *People v. Torres*, 128 Misc. 2d 129, 130, 488 N.Y.S.2d 361, 362 (1985).

V. A Supplement: BWS Testimony

A battered woman learns to distinguish between varying degrees of danger and violence exhibited by the batterer.¹¹⁶ Testimony regarding BWS can help a jury understand how, at the time of the killing, the batterer's violence had, in the defendant's mind, passed from "normal and tolerable" (relatively speaking) into "abnormal and life-threatening."¹¹⁷

Under the objective standard, BWS testimony should be admitted to show the objective reasonableness of the woman's perception.¹¹⁸ Society should not "assume" that a battered woman's homicidal action against her husband was unreasonable. The testimony can be used to show that a reasonable woman who has been subjected to abuse in the past will know when her life is threatened¹¹⁹ and thus be justified in killing in self-defense.

The subjective view of self-defense takes the individual's perceptions into account, so the use of BWS is especially relevant. The belief that one's life was in danger does not always have to be honest as long as the action was necessary to prevent death or serious injury.¹²⁰ BWS testimony can be used to assess the reasonableness of a woman's belief that her life was in danger.¹²¹

In non-confrontation situations, the jury may question whether the danger was truly imminent. Unless the killing was in response to a direct attack, the jury may not see the danger as imminent.¹²² Such a perception fails to take into account that the male may have blocked avenues of escape or made threats. The battered woman may very well perceive the danger to be imminent, even though he is no longer threatening her with a weapon.¹²³

116. Schneider & Jordan, *supra* note 98, at 44-45 n.76.

117. *People v. Torres*, 128 Misc. 2d 129, 130, 488 N.Y.S.2d 361, 362 (1985). A battered woman learns to distinguish between varying degrees of danger and violence, thus acquiring "acute discriminatory powers."

118. *State v. Kelly*, 97 N.J. 193, 204, 478 A.2d 364, 377 (1984).

119. *Thyfault*, *supra* note 51, at 495.

120. *See Brown v. United States*, 256 U.S. 335 (1921). Justice Holmes' famous remark: "Detached reflection cannot be demanded in the presence of an uplifted knife." *Id.* at 343.

121. *People v. Torres*, 128 Misc. 2d at 130, 488 N.Y.S.2d at 362; *State v. Kelly*, 97 N.J. at 207 n.13, 478 A.2d at 378 n.13.

122. *State v. Nunn*, 356 N.W.2d 601 (Iowa Ct. App. 1984). The defendant stabbed the decedent after their argument had ended and while he was unarmed. The jurors were not persuaded by her testimony that the threats he had made against her that same day put her in imminent harm. They convicted her of second degree murder.

123. *Meeks v. Bergen*, 749 F.2d 322, 324 (6th Cir. 1984). After 10 years of a physically-abusive marriage, decedent assaulted and threatened to kill his wife. She was rendered unconscious. Upon waking, she went to the garage to get gasoline to

A. Some Common Myths

Battered women often have to fight misconceived stereotypes. Some of the myths facing battered women are that they enjoy their beatings, purposely provoke their husbands, and are free to leave their abusers at any time, but choose not to.¹²⁴ Expert testimony aids a jury in interpreting the circumstances contributing to the defendant's behavior. The jury is then better able to assess the reasonableness of her behavior. To a jury who may not understand why the defendant would remain in a battering relationship, BWS testimony becomes crucial to enlightening them. The court in *People v. Torres*¹²⁵ allowed testimony describing BWS because it counteracted the conclusion that the beatings and threats the defendant testified to could not have been all that bad or else she would have left long before the killing. The court said it would help the jury understand how the defendant could reasonably fear serious harm from her mate, yet remain with him.¹²⁶

Jurors need to understand that BWS is not a mental disease or defect releasing the defendant from criminal liability.¹²⁷ Nor is the syndrome considered an extreme emotional disturbance rendering the defendant unable to distinguish between right and wrong.¹²⁸ The defense is self-defense, not insanity or diminished capacity. The defendant seeks to introduce BWS testimony to show that she reasonably believed the danger was imminent, and that it was necessary to take her abuser's life in order to save her own.¹²⁹

B. Use of BWS Testimony

A majority of courts either conditionally or unconditionally hold that the study of battered woman's syndrome is a sufficiently

throw on him if he attempted another assault. When he returned home, he said he intended to finish the job he hadn't finished the day before (killing her). He then assaulted her and threatened her with a knife. When he left the bedroom, she tried to lock the door. He returned, and she doused him with gasoline. She then lit a paper and ignited him. She was convicted of second-degree murder and sentenced for a term of 10-20 years.

124. *State v. Kelly*, 97 N.J. 193, 196, 478 A.2d 364, 370 (1984) (citing Lenore Walker, *The Battered Woman* 19-31 (1979)).

125. 128 Misc. 2d 129, 130, 488 N.Y.S.2d 361, 362 (1985).

126. *Id.* at 130, 488 N.Y.S.2d at 362.

127. *Id.* at 129, 488 N.Y.S.2d at 361.

128. *Terry v. State*, 467 So. 2d 761 (Fla. Dist. Ct. App. 1985), *rev. denied*, 476 So. 2d 675 (Fla. 1985).

129. *State v. Walker*, 40 Wash. App. 658, 663, 700 P.2d 1168, 1173 (1985), *rev. denied*, 104 Wash. 2d 1012 (1985).

scientifically developed area to support expert testimony.¹³⁰ When BWS testimony is determined by the court to be relevant, an expert witness is called to describe BWS and its effects. The expert witness will explain to the jury how the battered woman can develop a psychological paralysis that makes her incapable of seeking help.¹³¹ The expert also points out similarities between the BWS model and the defendant.¹³² Finally, she will render an opinion on whether the defendant fits the symptoms of BWS.¹³³ The expert is usually not allowed to render an opinion on the reasonableness of the defendant's belief that her life was in danger.¹³⁴ This is considered the jury's question.

C. Criteria for Admissibility

While criteria for admissibility of BWS expert testimony vary, many courts have used the three-prong test articulated in the *Dyas*¹³⁵ case: (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the subject matter must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.¹³⁶

Expert testimony on BWS satisfies the first criterion because it aids the jury in understanding the unique pressures on the battered woman. It enables jurors to recognize assumptions they have about battered women as common myths instead of informed knowledge.¹³⁷ If the homicidal event seems too remote in time from the beatings,¹³⁸ a court may disallow the testimony as irrele-

130. *Hawthorne v. State*, 470 So. 2d 770, 781 (Fla. Dist. Ct. App. 1985) (citing *State v. Allery*, 101 Wash. 2d 591, 596, 682 P.2d 312, 315 (1984)).

131. Annie E. Thar, *The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis*, 77 Nw. U.L. Rev. 348, 354 (1982) (footnote omitted).

132. *Id.*

133. *Id.*

134. *State v. Kelly*, 97 N.J. 193, 206, 478 A.2d 364, 378 (1984); see also *Ibn-Tamas v. United States*, 407 A.2d 626, 632 (D.C. 1979), *appeal after remand*, 455 A.2d 893 (D.C. 1983) (expert preempts the jury's function when speaking to "matters in which the 'jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions'" (citation omitted)).

135. *United States v. Dyas*, 376 A.2d 827, 832 (D.C. 1977), *cert. denied*, 434 U.S. 937 (1977).

136. *Id.* at 832 (quoting McCormick on Evidence § 13 (Edward W. Cleary 2d ed. 1972)).

137. *State v. Kelly*, 97 N.J. at 206, 478 A.2d at 378.

138. *State v. Moore*, 72 Or. App. 454, 457, 695 P.2d 985, 987 (1985), *rev. denied*, 299 Or. 154, 700 P.2d 251 (1985). Defendant called a counselor at a local women's crisis center 100 times over two months. The last call, however, was seven months before the shooting, so the court disallowed testimony regarding specific acts of alleged abuse during the four-year relationship. The court expressed concern that the

vant if the court thinks the average juror could evaluate the situation of the homicide.¹³⁹

The second criterion is usually the hardest to meet.¹⁴⁰ The majority of courts use the *Frye*¹⁴¹ test to determine whether or not a particular scientific methodology is generally accepted. *State v. Kelly*¹⁴² cites three methods of demonstrating this general acceptance. One is by introducing expert testimony describing the general acceptance of the premises on which a particular analysis is based.¹⁴³ The second is by acknowledging authoritative scientific and legal writings which indicate acceptance of the premises.¹⁴⁴ The third method is through judicial opinions that indicate general acceptance of the expert's premises.¹⁴⁵

The lack of unanimity in the scientific community about the causes and characteristics of domestic violence is an obstacle to satisfying the *Frye* test. This has resulted in some courts considering BWS testimony to be unreliable and thus inadmissible.¹⁴⁶

The Federal Rules of Evidence do not follow the "generally accepted" explanatory theory.¹⁴⁷ Under Rule 702, the court must determine whether the proposed testimony is relevant and whether it will assist the trier of fact. Cross-examination should be used to attack the testimony, and the jury will then determine the weight it should be given.¹⁴⁸

New York has a two-fold test for determining admissibility:¹⁴⁹ "(1) does the opinion testimony 'depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence' and (2) is the state of the pertinent art or

proceeding was "degenerating into a trial of the defendant's and the victim's relationship." 72 Or. App. at 457, 695 P.2d at 987.

139. *State v. Thomas*, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 140 (1981). The court ruled the subject of battered woman syndrome was within the understanding of the jury, and not sufficiently developed as a matter of commonly accepted scientific knowledge to warrant testimony under the guise of expertise. The court found that the prejudicial impact of allowing expert testimony on BWS would outweigh its probative value, and that it was irrelevant and immaterial to the issue of whether or not the defendant had acted in self-defense. *Id.*

140. M. Julianne Leary, *A Woman, A Horse, A Hickory Tree: The Development of Expert Testimony on the Battered Woman Syndrome in Homicide Cases*, 53 UMKC L. Rev. 386, 400 (1985).

141. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

142. 97 N.J. 178, 210, 478 A.2d 364, 380 (1984).

143. *Id.* (citing *State v. Cavallo*, 88 N.J. 508, 521, 443 A.2d 1020, 1026 (1982)).

144. *Id.*

145. *Id.*

146. *State v. Hawthorne*, No. 77-235C (Fla. Cir. Ct. July 14, 1982) (Order on Defendant's Suggestion of Admissibility of Testimony of Lenore Walker, Ed.D.).

147. Thyfault, *supra* note 51, at 508.

148. Fed. R. Evid. 702.

149. *People v. Torres*, 128 Misc. 2d 129, 130, 488 N.Y.S.2d 361, 362 (1985).

scientific knowledge sufficiently developed to permit a reasonable opinion to be asserted even by an expert." The New York *Torres* court held that BWS "has indeed passed beyond the experimental stage and gained a substantial enough scientific acceptance to warrant admissibility."¹⁵⁰ Even though a majority of courts find BWS sufficiently credible to support an expert opinion, some courts are still skeptical¹⁵¹ and may allow non-expert witnesses to impeach a methodology in a field beyond their expertise.¹⁵²

150. *Id.* at 134; 488 N.Y.S.2d at 363.

151. *Cf.* *State v. Necaise*, 466 So. 2d 660 (La. Ct. App. 1985) The decedent had held an open knife to defendant's throat, threatened to cut her head off, and kicked her in the back. He forced her at knifepoint to engage in sexual relations, made her lie next to him in bed and told her to "count every second . . . I want you to wonder what minute I'm going to cut your throat." *Id.* at 662-63. The defendant, terrified of being killed, slipped her gun from beneath the mattress and as she eased out of bed in an attempt to escape, she turned and saw the decedent raising up with a clenched fist. She then fired the fatal shot. The court disallowed testimony on BWS because she had failed to plead "not guilty and not guilty by reason of insanity." It rejected the use of evidence to show state of mind. *Id.* at 665.

152. *Hawthorne v. State*, 470 So. 2d 770 (Fla. Dist. Ct. App. 1985) [hereinafter *Hawthorne III*], illustrates the confusion courts have in the proper application of BWS testimony. Joyce Bernice Hawthorne was convicted of first degree murder in 1979. On her first appeal (*Hawthorne I*), the appellate court reversed and remanded, holding, *inter alia*, that "[t]estimony as to the deceased's prior threats and acts of violence toward the defendant, her children, and third persons was improperly disallowed." *Hawthorne v. State*, 377 So. 2d 780, 781 (Fla. Dist. Ct. App. 1979) [hereinafter *Hawthorne I*]. On remand the testimony was introduced, and she was convicted of second-degree murder.

On the second appeal in 1982, the appellate court held, *inter alia*, that testimony of a clinical psychologist on BWS should have been admitted below so the case was reversed and remanded. *Hawthorne v. State*, 408 So. 2d 801, 806 (Fla. Dist. Ct. App. 1982). On remand, the trial court refused to admit testimony of the expert witness on BWS. 470 So. 2d 770, 774 (Fla. Dist. Ct. App. 1985) [hereinafter *Hawthorne III*]. Defendant was convicted of manslaughter.

On the third appeal (*Hawthorne III*) in 1985, the appellate court said the refusal to admit the expert testimony was not an abuse of discretion under the circumstances, but reversed and remanded on other grounds.

At trial, the defendant testified that the first thing she remembered after firing the shotgun was calling the sheriff's department for an ambulance. The prosecutor tried to impeach this testimony by asking her if she had actually called her lawyer first. The trial court allowed the prosecutor's question, but the appellate court held this to be reversible error since the source of the impeachment was an illegally obtained statement. The *Hawthorne II* court conditioned the admissibility of the expert testimony on the trial court's determination that the expert, Dr. Lenore Walker, was qualified and that the syndrome was found to be sufficiently developed to support an expert opinion.

Dr. Walker is one of the ten best known professionals in the area of BWS. She is a licensed psychologist in private practice in Denver, Colorado. She has an Ed.D. from Rutgers and has received training in community psychology at Harvard University. She has been awarded a Diplomate in Clinical Psychology from the American Board of Professional Psychology. She has taught psychology at the college level and has done studies on battered women.

The *Hawthorne III* court found that, because the trial court has broad discretion in determining the range of subjects on which an expert could testify, only a

Improper impeachment of expert witnesses can be avoided by heeding the advice the Washington, D.C. court gave in *Ibn-Tamas v. United States*: "[S]atisfaction of the third *Dyas* criterion [the general acceptance standard] begins—and ends—with a determination of whether there is general acceptance of a particular scientific methodology, not an acceptance, beyond that, of a particular study's results based on that methodology."¹⁵³ Accordingly, Ms. Hawthorne argued, and commentators agree with the *Ibn-Tamas* court, that if the methods are acceptable, then different conclusions, interpretations, and criticisms of the findings should go to the weight of the testimony rather than its admissibility.¹⁵⁴

clear showing of error would cause the decision to be overturned on appeal. *Hawthorne III*, 470 So. 2d at 773.

On the second remand, the trial court focused mainly on the qualifications of Dr. Walker. The trial court held hearings for over three days to determine the adequacy of Dr. Walker's qualifications as an expert witness, and to determine the extent of acceptance of her methodology. While the court was supposed to determine whether or not the methods used by Dr. Walker had gained general acceptance in the field, it rejected Dr. Walker as an expert witness because her findings were not generally accepted. *Id.* at 773. The impeaching witnesses provided by the state were critical of Dr. Walker's methodology. *Id.* at 777 (Ervin, J., concurring in part and dissenting in part). Dr. Marc Gertz, an associate professor of criminology at Florida State University, criticized Dr. Walker's methodology as "biased, over generalized and unreliable." Dr. William Glen Doerner, also an associate professor of criminology at Florida State University (and reserve police officer for the Tallahassee Police Department) criticized Walker's methods as lacking a control group of non-battered women whose characteristics could be compared with those of battered women. Neither of the witnesses, however, were themselves experts in the field of clinical psychology nor were they familiar with testing techniques commonly used in that field. Nonetheless, the trial court found that: "The depth of study in this field has not yet reached the point where an expert witness can give testimony with any degree of assurance that the state of the art will support an expert opinion." *Id.* at 773. Ironically, both sides agreed that Dr. Walker was eminently qualified as a BWS expert and that the syndrome was a subject sufficiently developed and able to support an expert opinion. *Id.* at 774. The court, however, determined that the criticism leveled against Dr. Walker's study outweighed her qualifications.

Dicta in *Hawthorne III* indicated that on remand, the defendant would not be precluded from re-offering Dr. Walker or any other witness as an expert on the subject:

Our determination that the trial court did not abuse its discretion in failing to permit Dr. Walker to testify as an expert witness does not, of course, preclude the defense on retrial to reoffer this witness or any other witness as an expert on this subject. Again, the trial court has the discretion to determine the qualifications of the expert and whether the subject can support an expert's opinion.

Id. at 774. This may not, however, help the defendant because she will need to produce an expert whose methodology and particular test results are generally accepted.

153. *Ibn-Tamas v. United States*, 407 A.2d 626, 638 (D.C. 1979), *appeal after remand*, 455 A.2d 893 (D.C. 1983).

154. *Hawthorne III*, 470 So. 2d at 778 (Ervin, J., concurring in part and dissenting in part).

Inconsistency in the law regarding the admission of BWS testimony places battered women facing homicide charges at the mercy of the particular jurisdiction in which they are prosecuted. One court may consider a witness to be an expert, while another court considers the same witness to be unqualified.¹⁵⁵ While some appellate courts will reverse the trial court if BWS testimony was not admitted, this will only happen if the trial court did not rule on whether the proposed expert was adequately qualified. The trial court's broad discretion to determine whether an expert witness will be allowed to testify is a ruling rarely reversed on appeal.¹⁵⁶

Courts should be uniform in the admissibility of BWS testimony. Uniformity can only be accomplished if courts agree on the qualifications necessary to classify a witness as an expert. Admitting BWS testimony does not guarantee an acquittal, nor should it. Not every killing by a battered woman may be justified. Even if BWS testimony were uniformly admissible, the trial court would still have to determine its relevancy to the particular case at hand. It would also retain its discretion in determining whether a prospective witness was sufficiently qualified to testify regarding BWS. As the courts interpret BWS now, the defendant not only has to show that she killed in self-defense, but also prove that she is truly a battered woman who has *all* the symptoms of BWS.¹⁵⁷ This judicial view has caused the prosecution to introduce evidence to rebut the testimony that the defendant was suffering from the syndrome.¹⁵⁸ This is a trap for the unwary because it does not address the true issue at trial—whether the defendant killed in self-defense. She is not on trial because of her status; she is on trial because of her actions.

155. At the time the *Hawthorne* trial court excluded Dr. Walker's testimony because it found that she was not "qualified," her testimony had only been excluded four times in 35 previous cases involving battered women. 470 So. 2d at 776.

156. *People v. Torres*, 128 Misc. 2d 129, 134, 488 N.Y.S.2d 361, 363 (1985) (citing *People v. Henson*, 33 N.Y.2d 63, 74, 349 N.Y.S.2d 657, 665, 304 N.E.2d 358, 364 (1973)); *Hawthorne III*, 470 So. 2d at 773.

157. Crocker, *supra* note 9, at 145.

158. *State v. Kelly*, 97 N.J. 178, 206, 478 A.2d 364, 375 (1984). The prosecutor argued that the decedent would probably tell a different story than the defendant. In an attempt to impeach, prosecution questioned her about her use of alcohol, drugs, and about her premarital sexual conduct. The State in closing arguments attempted to minimize the past beatings:

I'm not going to say they happened or they didn't happen, but life isn't pretty. Life is not a bowl of cherries. We each and every person who takes a breath has problems. Defense counsel says bruised and battered. Is there any one of us who hasn't been battered by life in some manner or means?

Id. at 208, 478 A.2d at 378.

The battered woman may face conviction if the jury is allowed to be side-tracked from the issue of whether she killed in self-defense to whether she displayed all the symptoms of BWS.¹⁵⁹ Thus, if the woman had a job¹⁶⁰ or ever fought back¹⁶¹ or had been separated from her batterer only to be later reunited,¹⁶² the prosecution may argue that she was not truly suffering from battered woman's syndrome. However, this analysis erroneously casts BWS as a diminished capacity or insanity defense which must be proved or disproved.¹⁶³ The true issue is whether her status as a battered woman caused her to reasonably believe her life was in danger, and that she needed to kill to preserve it.

VI. The Tort: Wrongful Death

Regardless of the outcome of the criminal trial, the battered woman can still be subject to a civil suit for wrongful death. If the battered woman was married to the man she killed, then her liability will depend on the provisions of the wrongful death statute and whether the jurisdiction upholds the doctrine of interspousal tort immunity. Although each state has its own wrongful death statute whose provisions vary, most statutes allow an action:

Whenever the death of a person shall be caused by a wrongful act, neglect or default . . . as would if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof . . . although the death may have been caused under such circumstances as amount in law to a felony.¹⁶⁴

159. *State v. Kelly*, 102 Wash. 2d 188, 190, 685 P.2d 564, 567 (1984). Prosecution produced neighbors who testified that: defendant had threatened them, was verbally abusive and had threatened to injure him; she had pounded on the back door of her home with a shovel when Mr. Kelly was inside and had locked her out. The evidence was used to rebut the "isolation" and "learned helplessness" characteristics of a battered woman.

160. *State v. Anaya*, 456 A.2d 1255, 1266 (Me. 1983) (testimony that defendant's boyfriend did not have a steady job and therefore defendant's reason for staying with him was not economic dependence); *see also* *Borders v. State*, 433 So. 2d 1325 (Fla. Dist. Ct. App. 1983) (defendant was provider for the household).

161. *Mullis v. State*, 248 Ga. 338, 282 S.E.2d 334 (1981) (defendant repeatedly defended herself against husband's physical attacks); *Anaya*, 456 A.2d at 1266 (defendant once stabbed boyfriend in back during a fight in which he had kicked her, held a knife to her throat, and threatened to kill her); *Buhrle v. State*, 627 P.2d 1374, 1375 (Wyo. 1981) (defendant once threatened husband with shovel—his response was to beat her about the head, neck and shoulders with a pair of work boots).

162. *State v. Kelly*, 97 N.J. at 205-06, 478 A.2d at 369. During the cross-examination of Ms. Kelly, the prosecutor referred to Mr. Kelly's temporarily leaving the marital home by repeatedly asking, "You wanted him back, didn't you?" *Id.* at 212, 478 A.2d 377.

163. *See* *State v. Necaise*, 466 So. 2d 660 (La. Ct. App. 1985).

164. *See* Ark. Stat. Ann. § 27-906 (1947); *see also* Ill. Ann. Stat. ch. 70 § 1 (Smith-Hurd 1959); Me. Rev. Stat. Ann. tit. 18A § 2-804 (1964); Md. Ann. Code art. 3 § 902

Others may add the words "omission" or "negligence."¹⁶⁵ New Hampshire allows an action for death "caused by the injury complained of."¹⁶⁶ Delaware¹⁶⁷ and Pennsylvania¹⁶⁸ allow an action if unlawful violence or negligence caused the death. Kentucky¹⁶⁹ and Georgia¹⁷⁰ are the only states with provisions specifically relating to deaths caused by homicide. Kentucky explicitly states that self-defense is a release from liability.¹⁷¹

A. *Who May Sue in Wrongful Death Actions*

A wrongful death action can only be brought by and in the name of the person designated by statute.¹⁷² Beneficiaries may not

(1984); Mich. Comp. Laws Ann. § 600.2972 (West 1968); Neb. Rev. Stat. § 30-809 (1943); N.M. Stat. Ann. § 41-2-1 (1978); N.C. Gen. Stat. § 28A-18-2 (Supp. 1983); N.D. Cent. Code § 32-21-01 (1978); R.I. Gen. Laws § 10-7-1 (1985); S.C. Code Ann. § 15-51-10 (Law. Co-op. 1977); S.D. Codified Laws Ann. § 21-5-1 (1979); Vt. Stat. Ann. tit. 14 § 1491 (1974); Va. Code § 8.01-50 (1984); Wash. Rev. Code Ann. § 4.20.010 (1962).

Other statutes include first and second degree murder or manslaughter: Ariz. Rev. Stat. Ann. § 12-612 (1982); Ohio Rev. Code Ann. § 2125.01 (Page 1976); W. Va. Code § 55-5-7-5 (1966); Wyo. Stat. § 1-38-101 (1977); N.J. Rev. Stat. § 2A:31-1 (1985) (crime).

The following statutes allow an action for "wrongful act, neglect, or default": Colo. Rev. Stat. § 13-21-202 (1973); D.C. Code Ann. § 16-2701 (1981); Hawaii Rev. Stat. § 663-3 (1976); Mo. Ann. Stat. § 537.080 (Vernon 1953); Nev. Rev. Stat. § 41.085 (1986); N.Y. Est. Powers & Trusts § 5.41 (McKinney 1981); Wis. Stat. Ann. § 895.03 (West 1983).

The following statutes allow an action only for "wrongful act, neglect": Cal. Civ. Proc. Code § 377 (1973); Idaho Code § 5-311 (1979); Mont. Code Ann. § 27-1-513 (1980); Utah Code Ann. § 78-11-7 (1977).

Other statutes have unique characterizations of those acts allowing the wrongful death action: Conn. Gen. Stat. Ann. § 52-555 (West 1960) (party legally at fault); Fla. Stat. Ann. § 768.16 (West 1964) (wrongful or negligent act, default, breach of contract or warranty of any party); Iowa Code Ann. § 613.15 (West 1946) (wrongful or negligent injury or death); La. Civ. Code Ann. art. 2315 (West 1979) ("caused by offense or quasi-offense"); Tenn. Code Ann. § 20-5-103 (1980) (tortious or wrongful act causing death).

165. Ala. Code § 6-5-410 (1977) (omission, negligence); Alaska Stat. § 09.55.580 (1978) (omission); Ind. Code § 34-1-1-2 (1973) (omission); Kan. Stat. Ann. § 60.1901 (1983) (omission); Ky. Rev. Stat. § 411.130(1) (1970) (willful negligence, gross negligence); Mass. Gen. Laws Ann. ch. 229, § 2 (1986) (negligence, willful, wanton or reckless act, gross negligence); Minn. Stat. § 573.02 (1984) (omission); Miss. Code Ann. § 11-7-13 (1972) (omission, negligence); Okla. Stat. tit. 12 § 1053 (West 1961) (omission); Or. Rev. Stat. § 30.020 (1981) (omission).

166. N.H. Rev. Stat. Ann. § 556.12 (1974).

167. Del. Code Ann. tit. 10 § 3704 (1975).

168. 42 Pa. Cons. Stat. Ann. § 8301 (1982).

169. Ky. Rev. Stat. § 411.130 (1970).

170. Ga. Code § 51-4-2 (1982).

171. Ky. Rev. Stat. § 411.150 (1970). The Kentucky wrongful death statute originated from an 1851 statute providing for recovery in favor of the widow and minor child of one killed in a duel. The defendants were the "surviving principal, the seconds, and all others aiding or promoting the duel." *Moore v. Citizens Bank of Pikeville*, 420 S.W.2d 669, 671 (Ky. 1967).

172. Stuart Speiser, *Recovery for Wrongful Death* § 5.24, 6.46 (2d ed. 1975).

personally sue where the right of action is given to the personal representative of the deceased for the beneficiaries.¹⁷³ A personal representative is a person appointed by the court with fiduciary duties to administer the decedent's estate. In a majority of the states, the personal representative is the person designated to bring the action.¹⁷⁴ Ten other state statutes designate other persons for that duty.¹⁷⁵

B. Statutory Immunity

In three states, the surviving spouse is immune from suit according to the provisions of the wrongful death statute. In Colorado, where interspousal tort immunity has been abolished, if the spouse fails to file suit within a year, the children or their descendants are allowed to sue.¹⁷⁶ If the children are minors, however, they would be unlikely to bring a cause of action against the mother unless a guardian were appointed for them to litigate on their behalf. The statutes provide that next-of-kin can sue if no one else is entitled to bring the action.¹⁷⁷ Although the wife is entitled to sue, she simply would not do so because then she would be both plaintiff and defendant.¹⁷⁸

In Georgia, only the surviving spouse can sue.¹⁷⁹ Since Geor-

173. *Id.* at 215.

174. See, e.g., Ill. Ann. Stat. ch. 70 § 1 (Smith-Hurd 1959); N.Y. Est. Powers & Trusts § 5-4.1 (McKinney 1981).

175. Colo. Rev. Stat. § 13-21-201 (1973) (spouse, heirs); Del. Code Ann. tit. 10 § 3704 (1975) (spouse, personal representative); Ga. Code Ann. § 51-4-2 (1982) (spouse, children); La. Civ. Code Ann. art. 2315 (West 1979) (spouse, children); N.D. Cent. Code tit. 32-21-03 (1976) (spouse, children, mother, father, personal representative); Tenn. Code Ann. § 20-5-107 (1980) (spouse, children, personal representative, next of kin); Md. Ann. Code tit. 3 § 904 (1973) (spouse, parents, children); Minn. Stat. Ann. § 573.02 (West 1984) (trustee); Mo. Rev. Stat. § 537.080 (1953) (spouse, if none, then children, if none, then parents, if none, then administrator or executor); N.J. Rev. Stat. § 2A: 31-2 (1952) (administrator ad prosequendum if died intestate, and executor or administrator if died testate).

176. Colo. Rev. Stat. § 13-21-201(b) (1973); *Niven v. Falkenburg*, 553 F. Supp. 1021 (D. Colo. 1983) (children given right only if no surviving spouse).

177. *Id.*

178. For a similar case where the husband claimed interspousal tort immunity as a defense because, if sued, he would be both the plaintiff and the defendant, see *Moore v. Citizens Bank of Pikeville*, 420 S.W.2d 669, 671 (Ky. 1967). In *Moore*, the defendant argued that absent a conviction, he would be entitled to inherit his wife's (the decedent's) estate. Thus any recovery in a wrongful death action would ultimately benefit him. The Kentucky court said such an action was precluded if no children were involved. Another court arrived at the opposite result, however, in *Korman v. Carpenter*, 216 Va. 86, 216 S.E.2d 195 (1975) where a childless spouse was held to be subject to suit.

179. Ga. Code Ann. § 105-1302 (1976); *Watkins v. United States*, 462 F. Supp. 980 (S.D. Ga. 1977), *aff'd* 587 F.2d (2d Cir. 1979); *Lambert v. Allen*, 146 Ga. App. 617, 619, 247 S.E.2d 200, 202 (1978).

gia still retains interspousal tort immunity, battered wives in Georgia are thoroughly protected from a wrongful death action.¹⁸⁰

In Louisiana, the surviving spouse and children of the deceased are both given the right to sue.¹⁸¹ This presents the same situation as in Colorado. A surviving parent of the decedent would be allowed to sue only if the decedent had left no surviving spouse or child. Where a surviving spouse is left, the doctrine of interspousal tort immunity would protect her from liability.¹⁸²

C. *Classification of Wrongful Death Statutes*

A legislature's classification of the wrongful death statute determines how a court will construe it. In a majority of states, a wrongful death action is considered a new cause of action and is not derived from the decedent's personal injury claim.¹⁸³ Courts have construed wrongful death statute provisions as reaching the tortious act itself rather than the person committing the tort.¹⁸⁴ Thus, because interspousal immunity is personal and does not adhere to the tort itself, it will not bar a wrongful death action under this interpretation.¹⁸⁵

Other jurisdictions have considered the wrongful death action to be a continuation of the decedent's personal injury action, and have classified the wrongful death statute as a survival statute.¹⁸⁶ The court must then determine whether the decedent would have been able to sue his wife had he been alive. Courts have ruled that under this classification of a wrongful death statute, an action for the death of one spouse, by or on behalf of beneficiaries other than the "wrongdoing" spouse, will be barred by the doctrine of interspousal immunity.¹⁸⁷

D. *Interspousal Tort Immunity: Current Legal Status*

In the intentional tort context, the doctrine of interspousal

180. See *Jones v. Swett*, 244 Ga. 715, 261 S.E.2d 610 (1979) (interspousal tort immunity applies to wrongful death actions).

181. La. Civ. Code Ann. art. 2315, subd. 1109, 1124 (1979); see also *Lewis v. Allis-Chalmers Corp.*, 615 F.2d 1129, 1130 (5th Cir. 1980).

182. *Smith v. Southern Farm Bureau Cus. Ins. Co.*, 247 La. 695, 174 So. 2d 122 (1965). Oddly enough, because of conflicting statutes, La. Civ. Code Ann. art. 2315 and La. Rev. Stat. Ann. § 9:291, the spouse is given a cause of action, but has no remedy to enforce it.

183. Speiser, *supra* note 172, at 638.

184. See *Prem v. Cox*, 20 Ohio St. 3d 149, 443 N.E.2d 511 (1983); *In re Pickens v. Pickens*, 255 Ind. 119, 263 N.E.2d 151 (1970).

185. 255 Ind. 119, 263 N.E.2d 151.

186. See, e.g., Conn. Gen. Stat. Ann. § 52-555 (West 1958) as construed by *Hinde v. Butler*, 35 Conn. Supp. 292, 408 A.2d 668 (1979).

187. Speiser, *supra* note 172, at 639 n.99.

tort immunity has been severely criticized.¹⁸⁸ One court has noted the doctrine's inconsistent application, limited utility, and questionable efficacy as a legal principle.¹⁸⁹ Georgia¹⁹⁰, Hawaii¹⁹¹ and Louisiana¹⁹² have statutes upholding the immunity. These statutes, however, protect a woman only if she is considered the "spouse" of the deceased. In one state where interspousal tort immunity is generally favored, the courts may have decided that the policy considerations favoring immunity are no longer valid when one spouse is dead, and the interspousal tort immunity has not been applied to wrongful death actions.¹⁹³ A growing number of courts now rule that an action for the death of one spouse can be maintained against the other spouse, or his or her estate, even though immunity existed during life.¹⁹⁴

The irony of interspousal tort immunity is that for years it has worked against battered wives. Since they were denied tort actions against their abusive husbands, they were left with no remedy except for criminal sanctions or divorce. Abrogation of the immunity has allowed battered wives a redress for the abuse their battering husband has inflicted on them. In the case of battered wives who kill their husbands, however, interspousal tort immunity was the only insulation against a civil wrongful death action.¹⁹⁵ Presently, forty-two states have abrogated the doctrine.¹⁹⁶

188. See generally Speiser, *supra* note 172, at 640-44 (citing *Bogen v. Bogen*, 219 N.C. 51, 12 S.E.2d 649 (1941)):

Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, poisoned her body, he is not exempt from liability to her on the ground that he vowed at the altar [sic] to 'love, cherish, and protect her.' We have progressed that far in civilization and justice.

219 N.C. at 53, 12 S.E.2d at 651.

189. *Merenoff v. Merenoff*, 76 N.J. 535, 542, 388 A.2d 951, 955 (1978).

190. Ga. Code Ann. § 51-1-9 (1933).

191. Hawaii Rev. Stat. § 573-5 (1955).

192. La. Rev. Stat. Ann. § 9:291 (1980).

193. Florida adheres to interspousal tort immunity for tort actions, but the immunity does not apply to wrongful death actions. See *Hill v. Hill*, 415 So. 2d 20 (Fla. 1982) (interspousal tort immunity applies in tort actions); *Dressler v. Tubbs*, 435 So. 2d 792 (Fla. 1983) (wife's estate sues husband's estate to collect insurance for death caused by negligent operation of an airplane which crashed and killed both parties).

194. Speiser, *supra* note 172, at 640.

195. Nine states still retain the doctrine of interspousal tort immunity. See, e.g., *Alfree v. Alfree*, 410 A.2d 161 (Del. 1979); *Raisen v. Raisen*, 379 So. 2d 352 (Fla. 1979); *Robeson v. Int'l Indemnity Co.*, 248 Ga. 306, 282 S.E.2d 896 (1981); *Peters v. Peters*, 634 P.2d 586 (Haw. 1981); *Williams v. Williams*, 439 N.E.2d 1058 (Ill. 1982); La. Rev. Stat. Ann. § 9:291 (1980); *McNeal v. Administrator of Estate of McNeal*, 254 So. 2d 521 (Miss. 1971); *Renfrow v. Gojohn*, 600 S.W.2d 79 (Mo. Ct. App. 1980); *State Farm Mut. Automobile Ins. v. Leary*, 544 P.2d 444 (Mont. 1975); *McKinney v. McKinney*, 59 Wyo. 204, 135 P.2d 940 (1943).

196. For an excellent, although slightly outdated discussion of the status of the immunity, see *Boblitz v. Boblitz*, 462 A.2d 506, 522 app. A (Md. 1983). Since that

For these women, the abrogation of interspousal tort immunity has created liability.

E. On Trial Again

In the majority of jurisdictions, a battered wife will not be protected by the provisions of a wrongful death statute or interspousal tort immunity. The issue of civil liability for battered wives has only recently become a serious threat. The abrogation of interspousal tort immunity has exposed battered wives to liability from which they were previously exempt. Historically, wives who killed their husbands were routinely convicted and spent the rest of their lives in jail or the insane asylum.¹⁹⁷ Today, with the increasing awareness of the plight of battered women and the admissibility of testimony of battered woman's syndrome, these women have a better chance for acquittal or conviction with a short or suspended sentence. Thus, a battered wife who kills her husband in self-defense has a good chance of facing two trials—one where she faces loss of liberty and another where she faces loss of everything else she owns.

F. Self-Defense: Burden of Proof Problems

If the battered woman is acquitted in a criminal trial, she will not likely be able to plead collateral estoppel on the issue of self-defense in a subsequent civil trial.¹⁹⁸ An acquittal may merely signify the state's failure to meet the higher standard of "proof beyond a reasonable doubt" required for a conviction.¹⁹⁹ The preponderance of the evidence standard in a wrongful death action could produce a different result.²⁰⁰

Proving self-defense transforms an otherwise wrongful act into a justified and thus rightful act. While it would seem that the law of self-defense would be the same in both civil and criminal actions, procedural differences and a potential shift in the burden of proof belie the similarity.²⁰¹ While tort cases examining the

decision the following states have abrogated the immunity: *Jones v. Pledger*, 363 F.2d 986 (D.C. Cir. 1966); *Stevens v. Stevens*, 231 Kan. 726, 647 P.2d 1346 (1982); *Prem v. Cox*, 20 Ohio St. 3d 149, 443 N.E.2d 511 (1983); *Landers v. Landers*, 216 A.2d 183 (Or. 1966); *Luna v. Clayton*, 655 S.W.2d 893 (Tenn. 1983).

197. See *supra* note 90 and accompanying text.

198. *State Mut. Life Assurance v. Hampton*, 696 P.2d 1027, 1036 (Okla. 1985) ("An acquittal on a criminal charge is never a bar—not even between the government and the accused—to a civil action arising out of the same facts on which the criminal proceeding was based.").

199. *Id.* at 1033.

200. *Id.*

201. In a criminal case, the burden of proof is on the prosecution to prove the

substantive law of self-defense are few,²⁰² Prosser says tort rules appear to be completely identical with those of criminal law.²⁰³ Case law, however, sometimes contradicts this.

In a criminal case, self-defense is a complete defense justifying the act of homicide.²⁰⁴ The only difference between criminal and civil actions is the different level of proof required.²⁰⁵ Whether self-defense is classified as either an excuse or a justification in a criminal action is important in determining how self-defense will be viewed in a wrongful death action. An excuse acknowledges the criminal nature of the conduct, but excuses it because the person believed circumstances existed vindicating her conduct when, in fact, they did not.²⁰⁶ Justification, on the other hand, requires a determination that certain circumstances actually existed which made proper and legal what would otherwise be criminal conduct.²⁰⁷ Self-defense is such a justification. When an act is justified, no liability—civil or criminal—should attach.²⁰⁸

When the defendant in a criminal homicide case introduces evidence of self-defense, the burden shifts to the prosecution to disprove the defense of self-defense beyond a reasonable doubt.²⁰⁹ In a wrongful death action, however, courts disagree as to who has the burden of proof regarding self-defense. Stuart Speiser, a leading authority on wrongful death law, says that when the plaintiff's evidence does not have a built-in defense, the general rule is that the defendant has the burden of justifying or excusing her actions.²¹⁰ This would cast the burden of proving self-defense on the defendant.

In *Ambrose v. Wheatley*,²¹¹ a wrongful death action against state troopers for the shooting of the decedent, the court stated that the plaintiff does not have to disprove all possible justifying

elements of the crime charged. If the defendant produces substantial evidence to put self-defense in issue, then the prosecution has the burden of disproving self-defense beyond a reasonable doubt. LaFave & Scott, *supra* note 99, at 50 n.40.

202. See *Harris v. Hodges*, 291 S.E.2d 346, 347 (N.C. Ct. App. 1982).

203. *Id.*, citing William Prosser, *Handbook of the Law of Torts* § 19, 108 n.12 (4th ed. 1971).

204. LaFave & Scott, *supra* note 99, at 391.

205. *Id.*

206. Kris H. Davick, *Criminal Law—Self-Defense—Jury Instructions Given on Subjective Standard of Reasonableness in Self-Defense do not Require a Specific Instruction on Battered Woman's Syndrome*, 60 N.D.L. Rev. 141, 145 (1981).

207. *Id.*

208. *Johnson v. Baltimore & O.R. Co.*, 208 F.2d 633, 634 (3d Cir. 1953) (citing *Restatement of Torts* § 65 (1934)).

209. *State v. Walker*, 40 Wash. App. 658, 661, 700 P.2d 1168, 1171 (1985) (citing *State v. Acosta*, 101 Wash. 2d 612, 683 P.2d 1069 (1984)).

210. Speiser, *supra* note 172, at 292.

211. 321 F. Supp. 1220 (D. Del. 1971).

circumstances, such as self-defense, unavoidable accident, or privileged use of force in an arrest.²¹² The court thus rejected the presumption that an intentional killing is justifiable,²¹³ and reasoned that the justification must be proved by the party asserting it.²¹⁴ A person asserting self-defense as an affirmative defense acknowledges the existence of *prima facie* liability, but if self-defense is proved, avoids any liability.²¹⁵

In recent cases involving self-defense in wrongful death actions, however, the courts have considered self-defense an inferential rebuttal issue.²¹⁶ An inferential rebuttal issue disproves the existence of an essential element submitted in another issue.²¹⁷ The plaintiff has the burden of pleading and proving that the killing of the deceased was "wrongful."²¹⁸ If the plaintiff proves an intentional killing, then the burden of showing the death was wrongful is met. But, if the defendant raises an issue of justification, such as self-defense, then the plaintiff has the burden of proof to overcome by a preponderance of the evidence the defense of self-defense.²¹⁹ If the plaintiff cannot, then the plaintiff has failed to prove the death was wrongful.²²⁰ The inferential rebuttal characterization represents the better-reasoned view. To prevail on a wrongful death cause of action, the plaintiff should be required to prove all the elements of the tort. Since the main element of this tort is that the death be "wrongful," the mere fact that the killing was intentional should not be enough to prove this element, especially if the defendant killed in self-defense. Adopting the affirmative defense characterization does not take into account the nature of self-defense. Compare self-defense to one of the traditional affirmative defenses such as contributory negligence. Contributory negligence must be proved by the defendant in order to deny the plaintiff recovery. Contributory negligence,

212. *Id.* at 1224.

213. *Id.*

214. *Id.*

215. Foster v. H.E. Butt Grocery Co., 548 S.W.2d 769, 772 (Tex. Civ. App. 1977), *writ ref'd n.r.e.* (Cadena, J., dissenting).

216. Liveoak v. Ingham, 644 S.W.2d 566, 568 (Tex. Civ. App. 1982), *writ ref'd n.r.e.* (citing Norris v. Branham, 557 S.W.2d 816 (Tex. Civ. App. 1977)).

217. Cooper v. Boyar, 567 S.W.2d 555, 559 (Tex. Civ. App. 1978), *writ ref'd n.r.e.* (citing Wirtz v. Orr, 533 S.W.2d 468, 472 (Tex. Civ. App. 1976)).

218. Cooper v. Boyar, 567 S.W.2d at 559 (citing Grieger v. Vega, 153 Tex. 498, 271 S.W.2d 85 (1954)). *Accord* Floyd v. Franklin, 251 Ala. 15, 36 So. 2d 234 (1948) (suit by widow against her husband's mother who claimed the estate; burden was on the administrator to prove that the killing was felonious).

219. Bradford v. Fort Worth Transit Co., 450 S.W.2d 919, 922 (Tex. 1970), *writ ref'd n.r.e.* (citing Grieger v. Vega, 153 Tex. 498, 271 S.W.2d 85 (1954)).

220. Liveoak v. Ingham, 644 S.W.2d 566, 568 (Tex. App. 1982) (citing Bradford v. Fort Worth Transit Co., 450 S.W.2d 919, 922 (1970)).

however, is not a justification for the action. When a defendant pleads contributory negligence, fault may be conceded, but the plaintiff is denied recovery because the plaintiff is also at fault. In self-defense, however, the defendant's fault is *never* conceded. The defendant's action is not an excuse, but rather a justification for the killing. A justified killing does not result in a "wrongful" death. Accordingly, it is erroneous to characterize self-defense in a civil action as an affirmative defense.

The classification of self-defense affects the battered woman's case in the following ways: if self-defense is characterized as an affirmative defense to be proven by the defendant, then admission of BWS testimony is especially crucial. While a jury may be hesitant to incarcerate a battered woman, it may not be as reluctant to award civil damages. To prove self-defense, the battered woman would use BWS testimony in the same way as in a criminal trial. With the burden of proof placed on the defendant, use of BWS is just as crucial in a civil case as in a criminal one.

When the defense of self-defense is considered an inferential rebuttal issue, the burden of proof shifts back to the plaintiff. This is beneficial to the battered woman since the plaintiff will have to disprove the use of self-defense. Since the preponderance of the evidence standard is a lower burden of proof, however, the battered woman faces a greater likelihood of liability than in a criminal trial. Testimony regarding BWS can be used to add credibility to her self-defense claim. BWS testimony is also necessary to rebut evidence the plaintiff may introduce to deny that the woman has BWS, and to show that her fear for her life was reasonable.

VII. Conclusion

Testimony on BWS has attained the professional acceptance and scientific reliability required to qualify as expert opinion. Accordingly, it should be admissible in both criminal and civil trials to support a self-defense claim. Uniformity is needed in determining whether or not a witness is qualified to be an expert. A lack of uniformity has deprived battered women of crucial testimony. While trial courts need discretion in this area, they should closely scrutinize whether the expert testimony is relevant to the particular defendant. While the trial court needs to determine whether a witness is qualified to testify as an expert, judicial notice should be taken of other cases where a particular expert has been accepted.

Unlike criminal actions where the standards are fairly uniform, wrongful death statutes vary greatly from state to state. Both self-defense standards and the burdens of proof differ.

Whether the state has abrogated the doctrine of interspousal tort immunity and how the state applies the doctrine in wrongful death actions also determine whether an action can be maintained.

The battered wife's liability is determined by the provisions of the particular wrongful death statutes whose damage provisions vary greatly. Because criminal liability does not preclude a civil action, the battered wife could find herself not only in jail, but totally without assets when she is finally released. If the conviction results in a suspended sentence, the wife will have paid a high price for freedom from a life of abuse.