Reforms to Criminal Defense Instructions: New Patterned Jury Instructions Which Account for the Experience of the Battered Woman Who Kills Her Battering Mate

Deborrah Ann Klis
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DEFENSE INSTRUCTIONS: NEW
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Deborah Ann Klis*

“I was transfixed with horror, and over me there swept the sudden conviction that hanging was a mistake - worse, a crime. It was my awakening to one of the most terrible facts of life - that justice and judgment lie often a world apart.”

Few issues in the American legal system evoke such varied, yet often passionate, arguments as those surrounding the legal treatment of the battered woman who kills her battering mate. One view holds that society places a great value on human life and that a battered woman must look to restraining orders, shel-

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2. Debra J. Saunders, If Helplessness Could Kill, S.F. Chron., May 24, 1993, at A14 (“[T]here’s the claim that women with BWS suffer from ‘learned helplessness,’ which makes them incapable of leaving their husbands and presumably is a justification of sorts for seeing only a bloody way out of a relationship. Translation: It’s OK to kill mean men.”).
ters\textsuperscript{9} and criminal prosecution of the batterer in order to resolve her problems.\textsuperscript{4}

On the other hand, proponents of reform to self-defense jurisprudence argue that many battered women are powerless against their battering mates and recognize that the constructs of battered woman syndrome and learned helplessness theory often render the fatal acts defensive rather than retaliatory. Notwithstanding the defensive nature of the fatal act, the battered woman who kills confronts the presumption that the intentional killing was done with malice.\textsuperscript{8} The battered woman confronts inadequate legal defense doctrines to either rebut the presumption of malice, or instead, to demonstrate that the use of force was justified for full acquittal. The following analysis focuses on the plight of the battered woman who, by refusing to take one more beating, becomes a criminal in the justice system.

California penal law distinguishes murder from manslaughter by determining whether the perpetrator harbored malice at the time of the fatal act.\textsuperscript{6} Under California law, a presumption

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\item[3.] Tom Levy, \textit{Reining in Rage on the Homefront}, S.F. CHRON., September 8, 1992, at D3. A San Francisco Domestic Violence Consortium joined forces with designer, Liz Claiborne, to push domestic violence to the top of San Francisco’s issues list. The article noted a worsening crisis, namely that “four-fifths of battered women needing emergency shelter must be turned away.” Id.
\item[4.] People v. Aris, 264 Cal. Rptr. 167, 174 (Ct. App. 1989). In Aris, the defendant killed her battering mate while he slept. The court permitted generalized testimony of battered woman’s syndrome at trial; however, the expert witness was not permitted to testify as to whether the defendant personally suffered from battered woman’s syndrome. The jury found Aris guilty of second degree murder and sentenced her to 15 years to life in prison. In May 1993, California Governor Pete Wilson granted clemency to Aris, thereby commuting her sentence to 12 years to life and allowing her to be considered for parole sooner. Id.
\item[5.] This presumption applies to all intentional killings. \textit{See}, \textit{e.g.}, People v. Bobo, 3 Cal. Rptr. 2d 747, 756 (Ct. App. 1990). This opinion has been certified for publication with the exception of parts III through XIII; the unpublished portion of the opinion illustrates the distinction between medical diagnosis of a serious mental disease and the legal definition of insanity. In Bobo, the court of appeal affirmed defendant’s convictions of arson and first degree murder. Bobo stabbed her three children, immersed them in the bathtub and set fire to her apartment. The jury found that Bobo was sane during the commission of the crimes. The court held that no other mental state need be shown other than a deliberate intention unlawfully to kill. The court further held that once such an intention is proved in the context of an actual killing, the offense can be no less than murder unless the killing results from a sudden quarrel or heat of passion upon adequate provocation, or perhaps an honest but unreasonable belief in the need to defend. \textit{See id.}
\item[6.] \textit{See} \text{CAL. PENAL CODE §§ 188, 189, 192} (West 1988 & Supp. 1993). Section 192
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of malice exists when an intentional homicide occurs. Malice is express when the defendant manifested a deliberate intention to unlawfully take the life of another human being. Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart. In order to mitigate murder to manslaughter, a defendant has the burden of raising a reasonable doubt in the minds of the jury as to the presence of malice. For full acquittal, a defendant has the burden of raising a reasonable doubt that such force was justified.

This comment uses the plight of Brenda Denise Aris to illustrate the criminal defenses available to a battered woman who kills her aggressor. Since the 1989 decision in Aris, California Governor Pete Wilson granted executive clemency to Aris. Governor Wilson reduced Aris’ fifteen years to life sentence to twelve years to life. Another significant event since the decision in Aris is the passage of California Assembly Bill 785 in 1991. The Bill added Section 1107 to the California Evidence states in part, “Manslaughter is the unlawful killing without malice.” Manslaughter is of three kinds: 1. voluntary - upon a sudden quarrel or heat of passion provocation; 2. involuntary - in the commission of an unlawful act not amounting to a felony; or in the commission of a lawful act which might produce death in an unlawful manner; or 3. vehicular manslaughter.” Id. Section 188 provides:

Such malice may be expressed or implied. It is expressed when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart. When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness or an obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.

7. See Bobo, 3 Cal. Rptr. 2d at 756.
8. See supra note 6.
9. See WAYNE R. LAFAYE & AUSTIN M. SCOTT, JR., CRIMINAL LAW § 1.8(c) (2d ed. 1986); see also People v. Flannel, 603 P.2d 1, 9 (Cal. 1979) (recognizing the imperfect self-defense doctrine in California and declaring that the unreasonable belief rule should, henceforth, be considered a general principle for purposes of jury instructions).
10. Aris, 264 Cal. Rptr. at 167.
12. Id.
Code,\textsuperscript{13} which permits expert testimony regarding battered woman syndrome. The testimony may include expert opinion concerning the physical, emotional, or mental effects of the battering upon the beliefs, perceptions, or behavior of domestic violence victims.\textsuperscript{14} The proponent of the evidence must only establish its relevancy and the proper qualifications of the expert witness.\textsuperscript{15} Despite these changes, the \textit{Aris} decision provides an effective vehicle to demonstrate the obstacles confronting a battered woman when she enters the justice system.

Brenda Aris killed her batterer, who was also her husband, while he slept.\textsuperscript{16} The State of California prosecuted \textit{Aris} for murder despite that on the night of the killing, Aris' husband had beaten her and had threatened to kill her when he awoke.\textsuperscript{17} Aris testified that during her ten year marriage her husband had beaten her, often severely, and that she had left him many times.\textsuperscript{18} By a mixture of threats and cajoling, he invariably convinced her to take him back.\textsuperscript{19} Numerous witnesses for the de-

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\item \textsc{Cal. Evid. Code} § 1107 (West Supp. 1993), which states:
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  \item (a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.
  \item (b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on battered women’s syndrome shall not be considered a new scientific technique whose reliability is unproven.
  \item (c) For purposes of this section, “abuse” is defined in Section 6203 of the Family Code and “domestic violence” is defined . . . in Section 6211 of the Family Code.
  \item (d) This section is intended as a rule of evidence only and no substantive change affecting the Penal Code is intended.
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fense testified to the beatings. Aris testified that on the night of the killing, her husband beat her and threatened that he did not think he was going to let her live until the morning. She believed he was "very serious." When Aris' husband fell asleep she went next door to get some ice to ease the pain the blows to her face had caused. There she found a handgun on top of the refrigerator and took it "for protection." Aris testified that this measure of protection was necessary because she felt her husband would probably be awake and he would start hitting her again. Aris stated that when she returned to the bedroom, she then sat down on the bed and felt that she had to do it; she felt that when her husband awoke he would hurt her very badly or even kill her. Aris killed her husband by shooting him five times in the back while he slept. A jury convicted Aris of second degree murder. She was sentenced to fifteen years to life in prison.

The court of appeal affirmed the conviction despite Aris' contentions that the trial court erred in: (1) excluding expert testimony that she was a battered woman and that it had affected her mental condition at the time of the killing; (2) refusing to instruct the jury on self-defense; (3) incorrectly instructing on "imminence" as part of the unreasonable self-defense doctrine; (4) incorrectly instructing the jury about "heat of passion" and "cooling off"; and (5) excluding evidence of her husband's violent character. Essentially, the court of appeal affirmed a finding of retaliation rather than justified resistance.

The jury found the presence of malice despite expert testimony concerning battered woman's syndrome and Aris' testimony involving her honest and actual belief in the need to defend herself. The following comment focuses on the phenomenon of battered woman syndrome, and how the syndrome interplays with the viability of the current criminal de-
fenses that are available to a battered woman who kills her aggressor. Finally, this comment proposes reform to criminal defense instructions which presently prevent battered women from asserting an effective defense.

I. BATTERED WOMAN SYNDROME

National estimates of the pervasiveness of domestic violence suggest that there are as many as four million incidents of domestic violence against women each year. According to Federal Bureau of Investigation statistics, a woman is beaten every eighteen seconds. The Surgeon General indicates that domestic violence is one of the leading causes of injury to women. In fact, recent commentary suggests that more American women, whether rich or poor, are injured by the men in their lives than by car accidents, muggings and rape combined. Most women do not strike back. Of the 1.6 to 4 million women who are beaten each year, approximately 800 to 1000 will be charged with the murder of an abusive spouse or companion. These figures indicate that the frequency of deadly force, applied by millions of battered women, is minimal.

The term “battered woman” describes a woman who is the victim of violence perpetrated by her partner and who remains in the relationship after repeated incidents of violence. The

29. Id. at 1501 (citing Donna Moore, Editor's Introduction: An Overview of the Problem, in Battered Woman 7, 14 (Donna Moore ed., 1979)).
30. Id. (citing Antonia C. Novello, From the Surgeon General, U.S. Public Health Service, 267 JAMA 3132, 3132 (1992) (noting that "a recent study found violence to be the 'leading cause of injuries to women ages 15 through 44 years'").
32. Between 20% and 64% of battered women kill their abusive spouse or companion. See Erich D. Andersen & Anne Read-Andersen, Constitutional Dimensions of the Battered Woman Syndrome, 53 Ohio St. L.J. 363, 366 (1992) (discussing, among other issues, the possible violations of the constitutional right to present a defense where a victim of domestic violence establishes a foundation for battered woman syndrome expert testimony, yet such testimony is excluded).
33. See People v. Day, 2 Cal. Rptr. 2d 916, 920-21 (Ct. App. 1992). Day stabbed
term "battered woman syndrome" is a psychological doctrine that explains the victimization of women and how the process of victimization further entraps them. The result is a psychological paralysis to leave the relationship; the "rationale is the construct of learned helplessness."34

A. COMPONENTS OF BATTERED WOMAN SYNDROME

Battered women include wives or women in any form of an intimate relationship. In order to be classified as a battered woman, the couple must go through the battering cycle at least twice.35 If the woman remains in the relationship after the second incident, she is defined as a battered woman.36 Repetitious violent behavior directed at the woman typically occurs in three distinct and continual stages which vary in duration and intensity depending on the individuals involved.37 Phase one of the

Brown, her boyfriend, in self-defense when he broke in the bathroom where she had barricaded herself after an evening of violence and threats. Brown opened the door and approached her with a knife. They fell to the floor and then to the bed. Day did not recall stabbing Brown so severely; so she fled assuming he would come after her. Day had never filed a formal complaint against Brown despite a history of severe physical abuse. Day even hesitated to phone the police after arriving at a girlfriend's house because the police had treated her badly in the past. Despite the fact that the killing occurred at the height of a battering incident, Day was prosecuted for voluntary manslaughter and found guilty of involuntary manslaughter and assault with a deadly weapon. The court of appeal reversed on grounds that Day was prejudiced by counsel's failure to present evidence of battered woman syndrome. The court noted that evidence of battered woman syndrome would have "bolstered appellant's credibility and lent credence to her self-defense claim." Id.; see also Denise Bricker, Fatal Defense: An Analysis of Battered Woman Syndrome Expert Testimony For Gay Men and Lesbians Who Kill Abusive Partners, 58 BROOK. L. REV. 1379, 1381 (1993) (concerning the applicability of battered woman syndrome expert testimony for intimate violence for gay and lesbian victims of abuse).

34. Lenore Walker, Battered Women and Learned Helplessness, in WOMEN AND THE LAW, 601-07 (Mary Joe Frug ed., 1992). See also Aris, 264 Cal. Rptr. at 177 in which the court stated, "The battered woman often does not know why she is beaten on any particular occasion. The violence is perceived by the woman 'as random and aversive stimulation.' Because of its randomness, she believes she is incapable of doing anything to prevent the abuse and, as a result, feels helpless."

35. Aris, 264 Cal. Rptr. at 177.

36. See id.; see also New Jersey v. Kelly, 478 A.2d 364 (N.J. 1984). Kelly fatally stabbed her husband with a pair of scissors. The Supreme Court of New Jersey reversed and remanded the reckless manslaughter conviction as it was error to exclude expert testimony on battered-woman syndrome. On remand, the trial court received an instruction to admit the testimony, if relevant to the honesty and reasonableness of Kelly's belief that deadly force was necessary to protect her against death or serious bodily injury.

37. See Aris, 264 Cal. Rptr. at 176; see also Kelly, 478 A.2d at 370-72 (discussing Dr.
battering cycle is referred to as the tension-building stage. During this stage the battering male engages in minor battering incidents and verbal abuse while the woman attempts to be as placating and passive as possible in order to stave off more serious violence.88

Phase two is the most violent point of the cycle.89 In this acute phase, the violence seems to last somewhere between a few hours to possibly twenty-four to forty-eight hours.40 Battered women often describe the violent incidents during this phase as random. It is not uncommon for the batterer to wake a woman from a deep sleep to begin the assault.41

Phase three of the battering cycle is characterized by extreme contrition and loving behavior on the part of the battering male.42 The man will often “mix his pleas for forgiveness and protestations of devotion with promises to seek professional help.”43 The period of relative calm may last as long as several months.44 However, in some cases phase three is so short that it may not be noticeable. The tension may quickly start to build again and the cycle begins anew.45

The cyclical nature of the battering may explain why a battered woman simply does not leave her abuser.46 The batterer’s loving behavior towards his mate during phase three may convince her that her mate will change. This may keep her bound to

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Lenore Walker's book The Battered Woman).

39. See Lenore E. Walker, How Battering Happens and How to Stop It, in BATTERED WOMEN 68-69 (1979); see also Gina Boubion, Women Who Killed Their Mates Seeking Clemency in California, SAN JOSE MERCURY NEWS, Mar. 8 1992, where the author discusses the plight of Brenda Clubine. At the time Clubine killed her abusive husband, he was wanted on a charge of felony battery for rubbing his wife's face so hard on the carpet that her skin came off. She weighed 88 pounds to his 260. In the previous six years, he broke her ribs and fractured her skull repeatedly. She suffers from mild brain damage which may have been caused by repeated beatings.
40. See Walker, supra note 39, at 68-69.
41. Id.
42. Id.
43. Kelly, 478 A.2d at 371.
44. Id.
45. See Walker, supra note 39, at 71; see also Andersen, supra note 32, at 370 (noting that as cycles recur within the abusive relationship, the violence escalates in severity and acute beatings occur more frequently).
The woman's response to her situation varies from silence and denial to demoralization and degradation so severe that a psychological paralysis results.

While the above three-stage normative model may accurately describe the battering cycle occurring in the lives of many battered women, proponents of reform in self-defense jurisprudence have expressed concern over strict adherence to such a model. Strict adherence to a proto-typical, distinctive stage model may preclude testimony of battered woman syndrome. A trial judge may refuse to admit evidence of domestic violence because the pattern of abuse does not precisely fit into the three stages. Accordingly, this comment suggests that the three phase model should not be relied on to establish the relevancy for battered woman syndrome expert testimony at trial. Instead, it should emphasize that (1) a battering incident has occurred more than once and (2) the woman remained in the situation. The broader offer of proof will not bring about meritless claims. The justice system has previously recognized the basic two-part definition suggested above as the basis for classifying a victim of domestic violence as a battered woman.

B. LEARNED HELPLESSNESS AND SOCIAL FACTORS

1. Learned Helplessness

Learned Helplessness theory comprises the second component of battered woman syndrome. Based on social learning and

47. Id.; see also People v. Day, 2 Cal. Rptr. 2d 916, 918 (Ct. App. 1992). Day testified that Brown, her mate, began beating her early in their relationship. Day loved Brown despite his violent behavior. She attributed the beatings to his alcohol problem and believed if she stayed with him and they worked together, their relationship would improve. However, Brown's violence against Day increased with time in both frequency and duration. Id.
49. See Panel Discussion, Courtroom, Code and Clemency: Reform in Self-Defense Jurisprudence for Battered Women, 23 Golden Gate L. Rev. 829, 833 (1993). Attorney Rebecca Isaacs expressed concern over the propriety of strict adherence to a normative model. Isaacs suggests that "expert testimony should include a broad conception of battering in society, including the obstacles faced in leaving a relationship, social and cultural factors, the dynamics of abuse, as well as the specific experiences of the woman on trial." These issues were a few of the topics raised in a discussion of the problems with laws regarding battered woman syndrome admissibility. Id.
50. Id.
51. See, e.g., Aris, 264 Cal. Rptr. at 176.
cognitive and motivational theoretical principles, the theory explains the psychological paralysis that maintains the victim status of a battered woman. Martin Seligman developed the learned helplessness theory during an experiment in which dogs received repetitious, unavoidable shocks. After repeated shocks, the dogs failed to attempt to escape the shock. The principle of learned helplessness has been shown to apply equally to humans.

The first phase within the theory of learned helplessness, as applied to victims of domestic violence, occurs when continuous aversive events cause battered women to feel powerless. The powerlessness over the violence creates a belief that control is not possible. Battered women do not attempt to gain freedom from a battering relationship because they do not believe they can escape the domination. They learn that their voluntary responses have no effect on the consequences in their lives.

2. External Social and Economic Factors

The feeling of powerlessness to escape the repetitious violence is also reinforced by social stereotypes. A “happy family” stereotype promotes isolation from friends and family so others

52. See Walker, supra note 34, at 601-04 (discussing the basic components of the learned helplessness theory, the applicability of the theory on the human species, battered women’s pervasive belief of powerlessness and the belief that they are helpless to control violence administered against them).


54. Id. In the original study, different groups of dogs went through a two-phase experiment. In Phase One, they received painful, unavoidable shocks which some dogs could escape by learning to press a switch. The others continued to receive the shock no matter what they did. In Phase two, the dogs were put into a different apparatus, in which escape was possible simply by jumping over a small hurdle. A tone (conditioned stimulus) signaled that the shocks were about to start. The subjects that had learned to escape in the earlier situation quickly learned the new response, but the others rarely did so. Instead, they just crouched, passively getting shocked. This general response following non-contingent, inescapable shocks was termed “learned helplessness”. Id.

55. Id.

56. See Aris, 264 Cal. Rptr. at 177.

57. See Walker, supra note 34, at 604-05.

never discover how profoundly violent the woman’s life actually is. Some battered women lie so frequently that they confuse their own reality; they make excuses for their men and assume self-blame. Sometimes women do not leave their batterers because they grow up in cultures that are so immersed in violence that they fail to comprehend that there are alternative, non-violent places to go. Despite academic and career independence, when it comes to relationships with men, many battered woman resort to traditional stereotyped behavior. Moreover, when children are involved, the stigma that attaches to a woman who leaves such a family unit may keep her from leaving.

Women who want to leave their abusive mates may have difficulty because of a lack of material resources. Women often earn less money and have more responsibility in taking care of the household and children. Although a typical first reaction to a confrontation with violence may be to flee, a battered woman often realizes that she has no place to go.

When victims of domestic violence endure unprovoked repetitious violence, which is coupled with social pressures and expectations, severe emotional and motivational deficits result. Battered women typically do not accept assistance because they believe it will not be effective. They see their batterers as all powerful and themselves as powerless. Consequently, they see no safety for themselves. Viewing a domestic violence victim’s behavior in this light provides a rationale why women remain in a

59. See Walker, supra note 34, at 604-05.
60. See Gibbs, supra note 31, at 42-43 (discussing the absence of options for the battered woman, which is evident by conditions such as: 1) the fact that New York has about 1300 beds for a state with 18 million people, and 2) that in 1990, the Baltimore zoo spent twice as much to care for animals as the state spent on shelters for victims of domestic violence).
62. Id.
63. See e.g., Janet Holmgren McKay, Don’t Equate Mills With the Citadel as Single Sex College, S.F. EXAM., Mar. 13, 1994, at A18. The President of Mills College comments that despite that women are now a slight majority in college classrooms, the 1990 census data shows that female college graduates have lifetime earnings equal to the earnings of male high school graduates. See also Beverly Medlyn, Pay Disparity Rated Top Worry at Women’s Business Gathering, ARIZONA BUSINESS GAZETTE, Mar. 10, 1994 at 6 (“Women earn 76 percent of men’s median pay, even though the equal-pay law has been in effect for 30 years,” said Rebecca Winterscheidt, a Phoenix lawyer who spoke on employment law to the 1994 Governor’s Conference on Women and Business.).
64. Id.
violent relationship or return to a dangerous relationship once they have empowered themselves to leave. A logical result of repetitious violence is that battered women perceive harm in a different light than people who have not endured continuous violence and demoralization.

II. LEGAL DEFENSES AND BATTERED WOMAN’S SYNDROME

Brenda Aris testified that on the night that she killed her husband, she was sure she would not live until morning. On the night which might have proved most dangerous to her life, Aris found the means to defend herself. Although Aris suffered ten years of victimization, the jury found her actions to be retaliatory rather than defensive.66

Our legal system assigns to the jury the duty of applying the defenses raised by the battered woman who kills.66 With the addition of Evidence Code section 1107,87 the jury will, henceforth, receive expert testimony concerning battered woman syndrome when the defense establishes its relevance. Consequently, many of the issues discussed above may now be considered when the jury deliberates on the criminal defenses raised at trial. Notwithstanding the permissibility of expert testimony under section 1107, the battered woman on trial for an intentional killing will confront obstacles under the present criminal defense instructions.

III. THE EFFECT OF BATTERED WOMAN SYNDROME, THE PRESENT CRIMINAL DEFENSE DOCTRINES IN CALIFORNIA AND THE NEED FOR REFORM

Justice demands defense doctrines which consider the defi-

65. See Aris, 264 Cal. Rptr. at 175-76.
66. CAL. EVID. CODE § 312 (West 1992):
Jury as trier of fact - Except as otherwise provided by law, where the trial is by jury: (a) All questions of fact are to be decided by the jury; (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.
icits of learned helplessness, battered woman’s syndrome, and the constructs of social stereotyping. The woman who kills her batterer will not receive a fair trial if the defense doctrines do not consider her perceptions in their totality. Women and men may respond to situations in different manners. A man’s reaction to a situation may be unjustifiable. The same reaction on the part of a woman may be justifiable resistance, not mere retaliation. The jury disregards a battered woman’s lower degree of culpability when it fails to consider the facts in their totality, including the gender differences and the harmful consequences of battered woman syndrome. Therefore, it is imperative that legal doctrines accommodate the perceptions of fear at the moment in time when a battered woman staves off one more beating.

In light of the criminal defense doctrines presently available, a battered woman would be best advised to premeditate the fatal act. That is, by planning to have a weapon accessible during a future assault, the woman’s perfect self-defense strategy for complete exoneration will more readily correspond to the present aggressor situation in which men often find themselves. Undoubtedly, modern jurisprudence does not intend to encourage premeditation, however, the criminal justice system’s non-empathetic treatment of the battered woman’s perceptions of danger renders premeditation necessary to justify the use of force.

Amendments to the justification doctrine of perfect self-defense must acknowledge the lower degree of culpability of a battered woman who kills. Courts would not abuse their duty to society by going so far as to adopt an instruction of a “reasona-


[L]aw, made by men, for men, and amassed down through history on their behalf, codifies masculine bias and systematically discriminates against women by ignoring the woman’s point of view. Today the law is still largely enforced . . . by men; so it still works in the interests of men as a group . . . [T]he result for women is the same: they are deprived at every step of equal protection under the law; and even those women who receive fair and equal treatment are likely to be thought of as having gotten away with something.

Id.
ble battered woman standard" when applying the reasonable requirement of self-defense. Neither a reasonable man standard, nor even a reasonable person standard can adequately contemplate the plight of the battered woman. Although Aris suffered ten years of abuse, her mental state and perceptual abilities were simply disregarded under a reasonable, non-battered individual standard. It would not be special treatment to apply a battered woman standard that acknowledges the gender and situational differences of a battered woman. Instead, by broadening the standard for reasonableness, the courts would recognize the totality of the facts. The viewpoint that battered women must “look to . . . restraining orders [and] shelters . . . ” is not viable in light of the learned helplessness theory. Battered women feel powerless against their mates; they will often be manipulated or threatened into abandoning their steps of empowerment. Attention to the battered woman’s right to gender-equal treatment of the laws must become a legislative and judicial priority.

In addition to amending justification doctrines, such as perfect self-defense, it is equally necessary to modify the defense instructions to mitigate murder to manslaughter. By broadening the scope of provocation to include anything that provides a reasonable explanation for extreme emotional disturbance, the mitigation defense would thereafter consider the battered woman’s plight. Additionally, by allowing the jury to consider the battered woman’s experiences when evaluating the cooling off period, the battered woman’s emotional trauma and subsequent defensive acts will not be seen as retaliatory. Instead the acts may be found to be a justifiable response to the fear induced by her mate’s aggression and threats.

Application of the other mitigation tool of an honest, but unreasonable belief (the imperfect self-defense doctrine) equally requires amendment. One option is to allow the jury to consider the sorts of external and internal forces which might make a reasonable person more likely to fail to satisfy the reasonable element of self-defense. Consideration of these forces would lend credence to the battered woman’s honest belief. This modification would render the imperfect self-defense doctrine an effec-

69. See Aris, 264 Cal. Rptr. at 174.
The following discussion explores the present legal defenses available when an intentional killing occurs. The killing will be classified as murder unless the battered woman either negates malice or obtains an acquittal through the doctrines of justification or excuse. Some of these defense instructions were requested in the Aris case and subsequently denied.

A. Justification Through Perfect Self-Defense

Whenever justification exists, malice is ameliorated and the defendant is not guilty of any crime. A homicide may be justified if committed in self-defense. Most states render acts of self-defense lawful when used to resist offenses capable of injury against one's person or family. The amount of resistive force must be commensurate with the degree of force applied by an assailant. The typical standard for complete exoneration is that force which is reasonably necessary to prevent imminent injury.70 The use of deadly force is not justifiable unless the actor reasonably believes that such force is necessary to protect herself against imminent death or serious bodily injury.71 While the existence of actual necessity is not required, a valid plea of self-defense does have a two-fold requirement. First, the law requires an actual or honest belief on the part of the defendant in the necessity of using force. An honest belief alone does not suffice for complete exoneration under the perfect self-defense doctrine. A defendant must also establish the reasonableness of her belief in the necessity to use deadly force.72

Determining whether a defendant's belief in the necessity to use deadly force was reasonable does not call for an evaluation of the defendant's subjective state of mind. Instead, California law requires an objective evaluation of the defendant's assertedly defensive acts.73 The judicial system phrases the standard for perfect self-defense in the objective terms of whether a reasonable person, as opposed to the defendant, would have be-

71. See LaFave & Scott, supra note 9, § 5.7(c).
72. Id.
73. Aris, 264 Cal. Rptr. at 179.
lieved and acted as the defendant did.\textsuperscript{74}

The court of appeal in \textit{Aris} held that “expert testimony about a defendant’s state of mind is not relevant to the reasonableness of the defendant’s self-defense.”\textsuperscript{75} The \textit{Aris} holding is significantly different from the court of appeal decision three years later in \textit{People v. Day.}\textsuperscript{76} Even though Day killed her batterer in the height of a battering incident and had endured many years of severe violence, the prosecution charged her with voluntary manslaughter.\textsuperscript{77} The jury convicted Day of involuntary manslaughter and assault with a deadly weapon. The court of appeal reversed on grounds that Day was prejudiced by counsel’s failure to present evidence of battered woman syndrome.\textsuperscript{78} The court noted that evidence of battered woman syndrome would have “bolstered appellant’s credibility and lent credence to her self-defense claim.”\textsuperscript{79} The court stated that “because counsel was unaware of the battered woman syndrome he was unable effectively to counter the prosecutor’s contention that [Day’s] conduct was inconsistent with self-defense.”\textsuperscript{80}

Notably, the California judiciary maintains incompatible opinions concerning the utility of battered woman syndrome testimony. The fact that the California legislature added Evidence Code section 1107 in 1991 may have had an impact on the divergent opinions of \textit{Aris} and \textit{Day}. Section 1107 permits expert testimony about battered woman syndrome to explain how the battered woman’s particular experiences affect her perceptions of danger and her honest belief in the imminent need to defend herself from that danger.\textsuperscript{81} Despite the addition of this statute, when a woman kills her batterer and pleads perfect self-defense,

\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} 2 Cal. Rptr. 2d. 916 (Ct. App. 1992); \textit{see supra} note 33.
\textsuperscript{77} Id. at 917.
\textsuperscript{78} Id. at 924-25.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} \textit{See} People v. Romero, 13 Cal. Rptr. 2d 332, 333-35 (Ct. App. 1992). Debra and Terrance Romero were both charged with one count of second degree robbery and four counts of attempted robbery. Debra claimed a duress defense. She admitted the crimes but claimed she participated because she was afraid Terrance would kill her if she did not do as he demanded. The court of appeal agreed with Romero’s claim that her lawyer was ineffective because he failed to present expert testimony explaining battered woman syndrome.
she still must establish the reasonableness component of that doctrine.

In People v. Romero, the court of appeal agreed that it was error to exclude expert testimony concerning battered woman syndrome in order to substantiate Romero's duress defense.\textsuperscript{82} This 1992 opinion recognized that although Romero was tried in 1990 and Evidence Code section 1107 was added in 1991, there is apparently no legislative prohibition to retroactive application of that section.\textsuperscript{83} The court extended the use of section 1107, stating that the duress defense is the same as self-defense since in both "the key issue is whether the defendant \textit{reasonably} and honestly believed she was in imminent danger of great bodily harm or death."\textsuperscript{84} At the present time, there are no published opinions applying section 1107 to a battered woman's perfect self-defense claim. Without express language in section 1107 which authorizes the court to consider battered woman syndrome testimony when the court considers the "reasonable" element of perfect self-defense, battered women have no assurance of self-defense reform. If future opinions follow the court's reasoning in \textit{Aris}, in cases where the battered woman maintains an honest belief in the need to kill in self-defense, the court's failure to permit the jury to consider the reasonableness of the woman's action as a battered woman will cause the perfect self-defense claim to fail. An honest belief alone is insufficient to constitute complete justification for acts of resistance.\textsuperscript{85}

As a general rule, a court must provide a requested defense instruction if there is substantial evidence to support the defense asserted.\textsuperscript{86} On appeal, \textit{Aris} argued that the trial court erred in failing to instruct the jury on perfect self-defense. The court disagreed and stated that "[g]iven the definition of imminent danger in California Law . . . there was no evidence of any reasonable indication in the sleeping victim's behavior that he was about to attempt to harm the defendant."\textsuperscript{87} The court con-

\textsuperscript{82} Id.
\textsuperscript{83} See id.; but see Scott Gregory Baker, \textit{supra} note 13.
\textsuperscript{84} Id. at 1160 (emphasis added).
\textsuperscript{86} \textit{Aris}, 264 Cal. Rptr. at 176 (citing \textit{Flannel}, 603 P.2d 1, 10 (Cal. 1979)).
\textsuperscript{87} \textit{Aris}, 264 Cal. Rptr. at 176.
cluded that the requisite imminent danger to Aris' life was not apparent from the facts because there was no substantial evidence that a reasonable person under the same circumstances would have perceived an immediate danger manifesting a need to kill in self-defense. The court stated, "no 'jury composed of reasonable men could have concluded that' a sleeping victim presents an imminent danger of great bodily harm, especially when the defendant was able to, and actually did, leave the bedroom, and subsequently returned to shoot him."

If a court refuses to instruct on perfect self-defense because "reasonable men" would not believe that an imminent danger was present, then battered woman syndrome testimony per section 1107 is ineffective. Instead, when a defendant raises a perfect self-defense claim, jury instructions must assist in explaining the battered woman's perception of imminent danger. Absent reform, future judges may exclude a perfect self-defense instruction where the raw facts at the time of the killing fall short of the substantial evidence standard required to support an instruction. The outcome of the Aris case supports the inference that in spite of Dr. Walker's testimony, the court disregarded the evidence of battered woman syndrome. The court focused solely on the fact that Aris' husband slept at the time Aris fired the fatal shot.

Additionally, despite the modern trend for courts to implement a reasonable "person" standard, rather than the reasonable man standard, such instruction may nonetheless violate a battered woman's right to equal protection. In Washington v. Wanrow, the court held that use of male pronouns in the self-defense instruction violated the female defendant's right to equal protection of the law. The court stated that the defend-

88. Id. at 181.
89. Id. at 176 (emphasis added).
90. See Naomi R. Cahn, The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice, 77 CORNELL L. REV. 1398, 1414-16 (1992) (arguing that despite its many benefits, the reasonable woman standard is problematic). "[T]he reasonable woman standard is reminiscent of earlier dominant images of white middle class women . . . [which] depicted women as pure, chaste, virtuous, and altruistic. . . . [T]he reasonable woman standard establishes certain expectations for women that are different than those for men . . . [and] does not accommodate the experiences of all women." Id.
ant was entitled to have the jury consider her actions in light of her own perceptions of the situation.\textsuperscript{92} Failure to recognize how a woman's status may affect her perception of danger denies a woman "a trial by the same rules which are applicable to male defendants."\textsuperscript{93} The error was compounded by utilizing language suggesting that the defendant's conduct must be measured against that of a reasonable male finding himself in the same circumstances. By refuting the use of a reasonable man standard, and instead, positing the necessity to consider the defendant’s own perceptions, the court sanctions a subjective standard when the jury applies the “reasonable” requirement of the perfect self-defense doctrine.

Although the jury instructions provided in the Aris case were gender neutral, the jury did not consider Aris' actions in light of her perceptions of the situation.\textsuperscript{94} Instead, the court applied the identical defense doctrines which would be applied in a situation where a male engaged in a brawl with a total stranger. Since Aris did not kill a stranger and she suffered from battered woman syndrome, it was inappropriate to solely examine the raw facts when the judge decided against a self-defense instruction.

Other jurisdictions have reduced the defense burden when a battered woman kills through modified applications of self-defense doctrines. For example, a North Dakota court adopted a subjective standard of reasonableness. In \textit{State v. Leidholm}, the court required the jury to find only that, from the defendant's point of view, she honestly and reasonably believed she was in imminent danger of great bodily harm or death.\textsuperscript{95}

\textsc{CALJIC} 5.12 provides the jury with an instruction for justifiable homicide in self-defense. Since the perfect self-defense in-

which held that the use of a reasonable man objective standard of self-defense violated Wanrow's right to equal protection of the laws. Wanrow shot an intoxicated, unarmed man whom she knew had a reputation for violence when he approached her in a threatening manner. At the time of the killing, Wanrow was 5'4" tall, had a broken leg and was using a crutch. The Court held that the use of the reasonable man standard in the jury instructions was improper because it deprived Wanrow of the right to have the jury consider her conduct in light of her fear and perceptions of danger as affected by her status as a woman. \textit{Id.}
\textsuperscript{92} \textit{Id.} at 559.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{See Aris}, 264 Cal. Rptr. at 176.
\textsuperscript{95} \textit{See State v. Leidholm}, 334 N.W.2d 811, 818 (N.D. 1983).
struction is the battered woman's only chance for acquittal, it must contemplate her perceptions at the time of the defensive act.

1. Present Instruction per CALJIC 5.12

CALJIC 5.12 states:

The killing of another person in self-defense is justifiable and not unlawful when the person who does the killing honestly and reasonably believes: 1. That there is imminent danger that the other person will kill [him] [her] or cause [him] [her] great bodily injury; and 2. That it was necessary under the circumstances to kill the other person to prevent death or great bodily injury to [himself] [herself]. In order to justify killing another person in self-defense, actual danger or great bodily injury is not necessary. On the other hand, a mere fear of death or great bodily injury is not sufficient.96

2. CALJIC 5.12 Revised 97

"The killing of another person in self-defense is justifiable and not unlawful when the person who does the killing honestly and reasonably believes: 1. That there is imminent danger that the other person will kill [him] [her] or cause [him] [her] great bodily injury; and 2. That it was necessary under the circumstances to kill the other person to prevent death or great bodily injury to [himself] [herself].

In order for the defendant to harbor an honest belief in the necessity to defend against imminent peril, it is essential that an aggressor presently threatens or previously threatened force. Where the defendant, at the time the fatal act occurred, harbored an honest, actual and genuine perception of the need to repel imminent peril, such defendant does not harbor malice. Relevant to the honesty of the defendant's belief are the internal and external forces existing in the defendant's life.

97. The italicized portion indicates proposed revisions to the instruction.
which lend credence to the genuine need for subsequent defensive conduct against the present victim.

The reasonable belief requirement for the killing of another person in self-defense requires consideration of the defendant's perceptions of the situation and the totality of the circumstances at the time of the killing. The totality of the circumstances' analysis considers whether a reasonable person, similarly situated under the very same facts and circumstances, would perceive that it was necessary to kill to prevent death or great bodily injury to [himself] [herself]. Consideration of the very same circumstances requires evaluation of the testimony offered concerning the defendant's perceptions at the time of the fatal act. The circumstances to be considered include those which preceded the killing if the person claiming justifiable homicide demonstrates that earlier incidents directly contributed to the perception of imminent danger. Actual danger or great bodily injury is not necessary.”

3. Significance of the Revisions to CALJIC 5.12

By allowing the jury to consider the internal as well as the external forces which factor into the person who kills' honest and actual belief of the present need to repel danger, a battered woman's heightened perception of a threat will not be disregarded. The revised application of the reasonableness requirement permits the jury to consider a subjective standard while retaining the reasonable objective standard. The instruction liberally considers the person who kills' perceptions of danger only when that person can demonstrate that a direct and reasonable correlation exists between the circumstances preceding the death and the belief of the need to use deadly force.

B. Negating Malice to Reduce Murder to Manslaughter

In California, as elsewhere, the penalty for manslaughter is significantly less than that for murder. First degree murder is punishable by a term of twenty-five years to life, and second degree murder, where there is no showing of premeditation or de-
liberation, results in confinement for fifteen years to life.\footnote{98}{See CAL. PENAL CODE § 190 (West 1988 & Supp. 1993).} In turn, voluntary manslaughter is punishable by imprisonment for three, six or eleven years, and involuntary manslaughter is punishable by confinement for two, three or four years.\footnote{99}{See CAL. PENAL CODE § 193 (West 1988 & Supp. 1993).} If a battered woman is precluded from asserting a perfect self-defense argument, then an alternative defense strategy would be to contend that despite the intentional act, she did not harbor malice.

1. Legislative Opposition to Negating Malice

Presently under California law, reform to the mitigation doctrines faces a major, although not insurmountable, legislative obstacle. In 1981, the California legislature amended Penal Code sections 28, 29, 188, and 189 through Senate Bill No. 54.\footnote{100}{S. 54, Regular Session (1981-1982); see People v. Bobo, 3 Cal. Rptr. 2d 747, 758-59 (Ct. App. 1990) see supra note 5; see also People v. Saille, 820 P.2d 588, 592-93 (Cal. 1991).} The legal consequences of those amendments are that express malice and intent to unlawfully kill are now one and the same, and the California judicial system has abolished the partially excused defenses of diminished capacity defense and insanity.\footnote{101}{Bobo, 3 Cal. Rptr. 2d at 758-59, see supra note 5.}

Prior to the amendments, Penal Code sections 28 and 29 permitted murder to be reduced to manslaughter, not only on the statutory basis of the reasonable person objective standard of provocation,\footnote{102}{See CAL. PENAL CODE § 192 (West 1988 & Supp. 1993).} but also on the subjective standard of defendant’s voluntary intoxication or mental impairment.\footnote{103}{See Saille, 820 P.2d at 592-93.} Penal Code section 28, as modified, provides in pertinent part that evidence of mental illness “shall not be admitted . . . to negate capacity to form any mental state . . . but is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought when a specific intent crime is charged.”\footnote{104}{See CAL. PENAL CODE § 28 (West 1988 & Supp. 1993).}

A provision abolishing the defense of diminished capacity was also included in the initiative measure adopted in June 1982 known as Proposition 8. Proposition 8 added Section 25 to the
California Penal Code. That section provides: "The defense of diminished capacity is hereby abolished. In a criminal action . . . evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the . . . intent, motive, malice aforethought . . . or other mental state required for the commission of the crime charged."\(^{105}\)

Penal Code section 188 now provides: "When it is shown that the killing resulted from the intentional doing of an act with express or implied malice . . . no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice."\(^{106}\) Thus, once an intentional killing is shown, malice aforethought is established.

The Legislature's narrowing of the definition of express malice and the resulting restriction on the scope of voluntary manslaughter through amendments to sections 25, 28, and 29, curtails the use of mens rea defenses.\(^{107}\)

In *People v. Saille*, the defendant argued that these amendments present a due process problem.\(^{108}\) The Supreme Court disagreed; instead, it stated that "the Legislature can limit the mental elements included in the statutory definition of a crime."\(^{109}\) The court further held that "[i]n amending section 188 in 1981, the Legislature equated express malice with an intent unlawfully to kill. Since two distinct concepts no longer exist, there has been some narrowing of the mental element included in the statutory definition of express malice."\(^{110}\) However, the court noted that sections 28 and 29 still permit expert testimony to show that because of mental illness or voluntary intoxication, the defendant did not actually form the in-

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106. CAL. PENAL CODE § 188.
107. Mens rea is Latin for a guilty state of mind. It defines the mental states accompanying a forbidden act: (1) intent; (2) knowledge; (3) recklessness; or (4) gross (criminal) negligence. BLACK'S LAW DICTIONARY 985 (6th ed. 1990).
109. Id.
110. Id.
tent to unlawfully kill. A defendant still may negate malice which would in turn render the only supportable verdict to be involuntary manslaughter or acquittal.

2. Survival of the Other Mitigation Tools

The court, in People v. Bobo, expressly held that the only statutory mitigation tool that survived the 1981 legislation is codified in Penal Code section 192. Section 192 proposes that malice is presumed to be absent from a killing resulting from sudden quarrel or heat of passion upon sufficient provocation. In Bobo, the court stated that "perhaps" voluntary manslaughter still encompasses the imperfect self-defense doctrine delineated in the 1979 Flannel decision. The court further noted that because the imperfect self-defense doctrine did not apply to the case at hand, it would not decide whether Proposition 8 and the 1981 legislation abrogated the Flannel concept.

Although the defense of heat of passion or provocation survived the legislative amendments, suggested reform to this mitigation doctrine in order to simplify its application will likely encounter strong legislative opposition. Additionally, reform to the present, yet tenuous, non-statutory imperfect self-defense doctrine, which might allow jurors to better empathize with the plight of the battered woman who kills, stands to encounter even greater opposition.

C. STATUTORY VOLUNTARY MANSLAUGHTER: HEAT OF PASSION AND PROVOCATION

Voluntary manslaughter is the intentional killing of a human in which malice is lacking because the fatal act occurred under circumstances of a sudden quarrel or heat of passion, otherwise known as adequate provocation. To reduce a murder

111. Id.
112. Id.
113. See People v. Bobo, 3 Cal. Rptr. 2d 747 (Ct. App. 1990) see supra note 5.
115. See Bobo, 3 Cal. Rptr. 2d at 760; see also People v. Flannel, 603 P.2d 1, 8 (Cal. 1979).
116. Bobo, 3 Cal. Rptr. 2d at 760, see supra note 5.
117. See LAFAVE & SCOTT, supra note 9, § 7.10(a-b).
charge to manslaughter upon the ground of adequate provocation the defendant must satisfy two requirements: "[T]he provocation must be of such character and degree as naturally would excite and arouse such passion and the assailant must act under the smart of that sudden quarrel or heat of passion.""118

The first element requires the presence of such passion “as would naturally be aroused in the mind of an ordinarily reasonable person . . . of average disposition to act rationally and without deliberation and reflection and from such passion rather than from judgment.”119

The second requirement, which is paramount to the efficacy of this defense, is that the defendant must act out of fear. This defense largely requires that after “‘heat of passion’ was reasonably and justifiably engendered, ‘hot blood had not had time to cool. . . .’”120 A court will not allow a homicide defendant to succeed under a claim of heat of passion/provocation when the use of force followed a “cooling off” period.121

In Aris, the court found that her fear “must have subsided somewhat after the assault and threats ended.”122 The court disregarded Aris’ contention that because her “passion” was aroused by a series of events over a considerable period of time, it could not be subject to a standard “cooling off” period. The court focused on the fact that Aris’ husband was sleeping and commented that: “A reasonable inference from the facts is that the defendant experienced a peak of fear while she was beaten and threatened which must have subsided somewhat after the assault and threats ended.”123 The general testimony concerning battered woman syndrome did not assist her in a heat of passion defense. The court did not want to burden the jury further by requiring them to consider additional emotions in a case of voluntary manslaughter through heat of passion.124 Essentially, the court rationalized its indifference to the plight of the battered

118. Aris, 264 Cal. Rptr. at 182 (emphasis added).
119. Id.
121. See Aris, 264 Cal. Rptr. at 183.
122. Id.
123. Id.
124. Id. at 1202-03.
woman through an argument of judicial efficiency.

Modern voluntary manslaughter doctrine in the United States is the successor to sixteenth and seventeenth century English common law. The commonplace wearing of weapons turned drunken brawls into deadly affairs. The subsequent difficulties in proving self-defense, and the fact that capital punishment was an unfair result for those who killed in mutual combat, prompted jurists to mitigate the crime of murder to manslaughter if the defendant was shown to have acted in the heat of passion. Present defense doctrines, which are derived from the common law, contemplate the sudden, male, barroom-brawl situation, and in turn, fail to consider some of the scenarios which exist when battered women kill their aggressors.

The four elements of this common law defense still influence modern voluntary manslaughter doctrine: (1) a provocation that would arouse a reasonable man to the heat of passion; (2) the defendant was actually aroused to the heat of passion; (3) a reasonable man would not have cooled off; and (4) the defendant did not, in fact, cool off.

The “reasonable” components in criminal defense doctrines are often very problematic. In Donna A. Coker’s article, Heat of Passion and Wife Killing, she considers the proposition that as provocation must be such that a “reasonable” person would also have been swayed by such passion, what does reasonableness mean when “reasonable” people are never moved so entirely by provocation to kill? Coker explores the work of Joshua Dressler, who upon contemplating this question, suggested that voluntary manslaughter applies to those killings committed

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125. Donna A. Coker, Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill, 2 Rev. of Law and Women’s Stud. 71, 79 (1992) (discussing the historical irony concerning heat of passion killing. Males justify their violence on the grounds that their adulterous female mates deserved it, or more subtly, the man was acting in “emotional” self-defense).
126. Id.
127. Id.
128. See CALJIC 8.42 which defines Sudden Quarrel or Heat of Passion and Provocation using “an ordinarily reasonable person” standard.
129. See CALJIC 8.43 which interprets the Cooling-Off Period according to “the average or ordinarily reasonable person.”
130. See Coker, supra note 125, at 79.
131. Id. at 99-101.
under provocation that would cause the "ordinarily law-abiding person to lose self-control." Dressler's words "ordinarily law-abiding person" contemplate the key boundary which might render reform to the provocation definition to be perceived favorably by the California legislature. The California Penal Code currently defines voluntary manslaughter in section 192:

Every person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of voluntary manslaughter in violation of Section 192 of the Penal Code.133

No malice aforethought exists if the killing occurred [upon a sudden quarrel or heat of passion] [or] [in the honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury].134

CALJIC 8.42 and 8.43 provide the primary source of guidance for a jury when it applies a voluntary manslaughter instruction.135 The goal of the proposed modifications is to draft new pattern instructions which contemplate the battered woman's emotional trauma and view subsequent acts in a more accurate and deferential manner. A compatible goal is to remain within the confines of the legislature's disdain for mitigation doctrines.

1. Present Instruction per CALJIC 8.42

Current CALJIC 8.42 instructs as follows:

"Sudden Quarrel or Heat of Passion and Provocation Explained: To reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of such character and degree as naturally would excite and arouse such passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.

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132. Id. at 100 (citing Joshua Dressler, Rethinking Heat of Passion: A Defense in Search of a Rationale, 73 J.L. & CRIMINOLOGY 421, 425-29 (1982)).
134. Id.
The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his] [her] own standard of conduct and to justify or excuse [himself] [herself] because [his] [her] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] [her] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. [Legally adequate provocation may occur in a short, or over a considerable, period of time.]

The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.

If there was provocation, [whether of short or long duration,] but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed such provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.”

2. CALJIC 8.42 Revised

To reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of such character and degree as naturally would cause excitement and arousal to such passion in an ordinarily law-abiding person,

137. The italicized portion indicates proposed revisions to the instruction.
and that person must act under the influence of that sudden quarrel or heat of passion.

The heat of passion which will reduce a homicide to manslaughter must be of such passion as naturally would cause an ordinarily law-abiding person to lose self-control in the same circumstances or situation. Relevant to the ordinarily law-abiding person standard is evidence admitted at trial which either demonstrates, or fails to demonstrate, a history of conduct depicting a loss of control and excitability to commit violent unlawful acts. Where such person’s ability to reason is frequently obscured or disturbed by some passion to act rashly or without due deliberation or reflection, then the loss of control and excitability in the fact situation presented at trial ought to be viewed without consideration of the proffered explanation for extreme emotional disturbance above and beyond the fact situation immediate to the administration of the lethal act.

Conversely, where the evidence proffered at trial suggests the perpetrator does not demonstrate a commonplace propensity to excitability to such a degree that reason is obscured or disturbed by some passion causing that person to act rashly or without due deliberation or reflection, where the loss of control resulting from the events appears to have provoked an otherwise ordinarily law-abiding person, then it is proper to consider the totality of the admissible facts proffered by that person.

The totality of facts shall include a reasonable explanation for extreme emotional disturbance at the time of the lethal act, even where such extreme emotional disturbance may encompass events prior to the facts immediately surrounding the lethal act. A defendant is not permitted to set up [his] [her] own standard of conduct and to justify or excuse [himself] [herself] because [his] [her] passions were aroused unless the circumstances in which the defendant was placed and the facts confronted [him] [her], were such as also would have aroused the passion of the ordinarily reasonable law-abiding person faced with the same situation, in light of the totality of the circumstances described above.

The totality of the facts presented at trial which shall be considered in determining whether the defendant has proffered
evidence of legally adequate provocation may include facts which occur over a short or long period of time.

Slight or remote provocation will not reduce an offense of murder where the unlawful killing of a human being otherwise satisfies all the elements of murder. Provocation which may otherwise appear slight or remote when viewed narrowly to the facts surrounding the administration of the lethal act may in fact be reasonable, and thus, shall be found to be legally adequate where such provocation included other provoking circumstances arising slowly over time, where such ordinarily law-abiding person is provoked to violence beyond the extent to which an ordinarily law-abiding person in similar circumstances or similarly situated would be expected to be provoked.

If sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, the provocation will not reduce the offense to manslaughter.

3. Significance of the CALJIC 8.42 Revisions

The legal consequences of the modifications to CALJIC 8.42 for a defendant who requests a voluntary manslaughter instruction is not per se an effortless avenue to negating malice. The instruction broadens the scope of provocation by allowing the jury to consider anything which provides a reasonable explanation for extreme emotional disturbance if it caused an otherwise law-abiding person to lose control. The standard of "law-abiding" and "reasonable" furnishes a restraint on the application of the doctrine. A battering male who kills his wife in a fit of rage will not be afforded the broadened consideration of facts which would precipitate a finding of legally adequate provocation. On the other hand a battered woman, who is otherwise law abiding, but responds to the emotional trauma induced by her mate's aggression and threats of violence, shall receive the broader consideration. Expert testimony "negating the inference of a predisposition to commit the charged crimes may be admissible as character evidence."138

138. Susan Rutberg, Not Guilty By Reason of Victimization, 20 CACJ FORM 36, 40, No. 4 (1993) (discussing Post Traumatic Stress Disorder's (PTSD) effect on the behavior of people who have survived a variety of traumatic experiences and the links be-
A prosecutor who anticipates application of the proposed instruction will gather all admissible evidence which portrays the defendant as non-law abiding, or one who is easily provoked to lawless violence. In cases where the defendant’s past acts preclude this proposed deferential standard, a jury will be constrained to the immediate facts at the time of the lethal acts. The correct standard shall therefore be the objectively reasonable standard. A pretrial inquiry into prior convictions for similar violent acts is pertinent to the determination whether the defendant is within the law-abiding standard. In domestic violence cases, the number of police responses due to reports of unrest will be equally relevant.

Use of prior bad acts will not violate California Evidence Code section 1101; that section precludes specific instances of defendant’s prior conduct when offered to prove that his present conduct comported with those prior instances of bad acts. The distinction between the type of evidence invited under the modifications to CALJIC 8.42 and the prohibitions delineated in section 1101 is that a defendant would seek to present evidence of prior conduct to show conformity with the otherwise law-abiding standard. It is the defendant who places her good character at issue and then, the prosecution in turn, may rebut that evidence.

A defendant would be entitled to a voluntary manslaughter instruction if such instruction is supported by substantial evidence proffered at trial. When a homicide defendant seeks to benefit by the broadened provocation instruction, which would be available for otherwise law-abiding citizens, that defendant assumes the risk of prior specific instances of similar criminal conduct being proffered by the prosecution.

In a criminal prosecution of a battered woman who kills, the broadened definition of provocation more aptly addresses the battered woman’s plight than the present instruction which was derived to accommodate the sixteenth and seventeenth century weapon-toting male. The revised instruction implicitly invites testimony of battered woman syndrome.

4. Present Instruction per CALJIC 8.43

CALJIC 8.43 instructs the jury with a standard for analyzing whether or not the defendant [in fact] acted under the passion aroused by the victim. The present instruction states:

Cooling Period: To reduce a killing upon a sudden quarrel or heat of passion from murder to manslaughter the killing must have occurred while the slayer was acting under the direct and immediate influence of such quarrel or heat of passion. Where the influence of the sudden quarrel or heat of passion has ceased to obscure the mind of the accused and sufficient time has elapsed for angry passion to end and for reason to control his conduct, it will no longer reduce an intentional killing to manslaughter. The question as to whether the cooling period has elapsed and reason has returned is not measured by the standard of the accused, but the duration of the cooling period is the amount of time it would take the average or ordinarily reasonable person to have cooled such passion and for that person's reason to have returned.\(^{140}\)

5. CALJIC 8.43 Revised\(^{141}\)

"To reduce a killing upon a sudden quarrel, heat of passion or provocation from murder to manslaughter the killing must have occurred while the defendant was acting under the direct and immediate influence of such quarrel, heat of passion or provoking circumstances. Where the influence of the sudden quarrel, heat of passion or provocation has ceased to obscure the mind of the accused and sufficient time has elapsed for the loss of control and obscured or disturbed reason to end, and where the ability to act with due deliberation and judgment returns, that influence will no longer reduce an intentional killing to manslaughter.

The question as to whether the cooling period has elapsed

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\(^{140}\) See CALJIC 8.43.

\(^{141}\) The italicized portions indicate revisions to the instruction.
and reason has returned shall be measured by the duration of time it would take the average or ordinarily reasonable person, who was similarly situated in the same facts and circumstances as proffered at trial and were proper for consideration under CALJIC 8.42, to have cooled such passion and for that person's reason to have returned.”

6. Significance of the CALJIC 8.43 Revisions

By allowing the jury to consider all the facts which are relevant to whether provocation was adequate, and whether the cooling period has passed, the battered woman’s defensive actions are less likely to be seen as retaliatory. In Aris, the court held that her fear “must have subsided somewhat after the threats and assault ended.”142 The court also disregarded Aris’ contention that her passion could not be subject to a standard cooling period because it was aroused by a series of events occurring over a considerable period of time.143 Accordingly, it is critical for a proper defense of a battered woman that the jury consider battered woman syndrome and the totality of the facts and circumstances at the time of the fatal act.

Aris believed that she would not live until morning.144 The need to secure a weapon prior to returning to her own home evidences her state of mind prior to firing the fatal shot. Specifically, unless a woman suffered from a motivational and emotional deficit, why would she leave a potentially safe-harbor and return to the home when she believed that she might not live until morning? Returning to the home suggests that her judgment had not returned. A juror who does not suffer from battered woman syndrome, nor receives defense instructions which address that syndrome and the principles of learned helplessness, may label the behavior of returning to the home and killing the sleeping abuser as a premeditated retaliatory action.

A critical legal distinction exists between an isolated battering incident which may occur in a bar and one which occurs to a battered woman. If the batterer’s violence and threats

142. Aris, 264 Cal. Rptr. at 183.
143. Id.
144. See id. at 171.
which occurred the night of Aris' fatal actions were isolated, then it would be appropriate to exclusively consider the facts and circumstances in which she was placed at the time of the fatal shot. An isolated instance of abuse does not trigger the need for consideration of extraneous variables. When there is an on-going pattern of abuse, however, application of the present heat of passion or provocation doctrine is legally insufficient to provide a battered woman with a viable, gender-equal defense.

D. NON-STATUTORY MANSLAUGHTER: IMPERFECT SELF-DEFENSE

The other type of voluntary manslaughter, under the imperfect self-defense doctrine, continues to be recognized in California. The non-statutory doctrine applies to "reduce an intentional killing from murder to manslaughter when a person kills under an honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury." Accordingly, imperfect self-defense issues arise when a defender intentionally kills an assailant with a belief which, although honestly held, fails to meet the reasonable person standard.

The California Supreme Court, in *People v. Flannel*, held that an honest but unreasonable belief in the need to defend oneself from imminent peril to life negates malice aforethought. The *Flannel* doctrine arose under the following factual scenario: in a street brawl, the defendant shot the victim under a mistaken belief that the victim approached him with a switchblade knife. Compatible with the provocation and heat of passion defense, the imperfect self-defense doctrine arose under a circumstance of a sudden onset of force which would be present in an isolated

145. *People v. Saille*, 820 P.2d 588, 590 n.1 (Cal. 1991). The court granted review to resolve conflict in the courts of appeal concerning the impact of legislation abolishing diminished capacity on the crime of manslaughter. In affirming the first degree murder and attempted murder convictions, the California Supreme Court held that the law of the state no longer permits a reduction of murder to non-statutory manslaughter due to involuntary intoxication and/or mental disorder. *Id.*

146. *Id.* (citing *People v. Flannel*, 603 P.2d 1 (Cal. 1979)).

147. See *Flannel*, 603 P.2d at 4.

148. *Id.* at 2. The court rejected defendant's argument that the court erred in failing to instruct the jury, sua sponte, that defendant's honest but unreasonable belief that he must defend himself from deadly attack negates malice to reduce the defense from murder to manslaughter. The unreasonable self-defense doctrine was not a general principle of law at that time; consequently, the trial court had no sua sponte duty to instruct on that defense. See *id.*

149. *Id.* at 3.
aggressive situation.

Although the Aris court instructed the jury on the imperfect self-defense doctrine, it nonetheless found the presence of malice. The court held that Aris simply could not have maintained an honest belief in the need to defend herself from her sleeping husband's prior threats. By reforming the imperfect self-defense instruction to allow consideration of the heightened sensitivity to danger, which is intrinsic in a woman suffering from battered woman syndrome, the jury may view the battered woman's honest and genuine belief in a more deferential manner.

1. Present Instruction per CALJIC 5.17

CALJIC 5.17 provides the instruction for an honest but unreasonable belief in the necessity to defend. Where the evidence warrants this instruction, it is usually provided in conjunction with CALJIC 8.40 which defines Voluntary Manslaughter.

CALJIC 5.17 instructs a jury as follows:

“A person, who kills another person in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an honest but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter.”

2. CALJIC 5.17 Revised

In order for the defendant to harbor a reasonable belief in the necessity to defend against imminent peril, it is essential

150. See Aris, 264 Cal. Rptr. at 172.
153. The italicized portions indicate revisions to the instruction.
that there is a present aggressor manifesting a threat to carry out previously threatened force. Where the defendant, at the time the fatal act occurred, harbored an honest, actual and genuine perception of the need to repel imminent peril, although factually such belief is unreasonable, such defendant does not harbor malice. Relevant to the honesty of the defendant's belief are the internal and external forces existing in the defendant's life which lend credence to the genuine need for subsequent defensive conduct against the present victim. Such an honest but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter.

3. Significance of the Revisions to CALJIC 5.17

The revised portion of CALJIC 5.17 again implicitly enables the battered woman who kills to assert a defense which addresses battered woman syndrome. The modified instruction considers internal and external forces which are relevant to the defendant's genuine perception. Evidence of battered woman syndrome not only explains how a battered woman might think, react or behave, it places the behavior in an understandable light. How the fact-finders may think the average, reasonable person would behave, or how they think they personally would behave are not necessarily similar to the manner in which a battered woman may behave. Although the honesty of a defendant's belief is not viewed in an objective light, the jury might reach conclusions concerning the honesty of the belief based on their own good faith misconceptions.154

The proposed revisions to CALJIC 5.17 are consistent with the California Legislature's 1991 addition to the California Evidence Code. Newly added section 1107 provides: "In a criminal action, expert testimony is admissible by either the prosecution or defense regarding battered women's syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence. . . ."155 Although section 1107 was not intended to substantively alter the


Penal Code,156 enactment of this section may be seen as an ac­knowledgement of the misconceptions concerning battered woman syndrome. Reform to the imperfect self-defense instruction, like the adoption of Evidence Code section 1107, directly enhances the battered woman who kills' chance for a fair defense.

The revisions to CALJIC 5.17 will not apply to every defendant seeking to negate malice through the honest but unreasonable defense doctrine. The new language which permits consideration of those “internal or external factors” which lend credence to the honest belief for the “genuine need to use force against the present victim” precludes evidence of a generalized diminished capacity. That is, a defendant who does not suffer from battered woman syndrome may not assert that he maintained a heightened perception to danger. In contrast, the defendant who harbors a lower degree of culpability and who suffers from battered woman syndrome or who acted under some other internal or external force must receive a defense instruction which addresses those factors.

The motivational and emotional deficits Aris suffered are not present in the situation in which one must suddenly defend oneself in a brawl with a stranger. Battered women, therefore, have a valid argument that the legal defense instructions violate their right to an adequate criminal defense.157 Failure to contemplate the plight of a battered woman when administering the defense instructions precludes women like Aris from an adequate defense.

V. CONCLUSION

The addition of Evidence Code section 1107 allows the jury to consider battered woman syndrome when applying the criminal defense instructions to a fact situation. This initial reform provides the jury with insight into why a battered woman acts as she does. Only with added insight may a jury fairly decide the ultimate question whether there was a justified use of force or whether manslaughter is more appropriate than a murder ver-

156. Id. § 1107(d).
157. See, e.g., U.S. Const. amend. V & XIV (guaranteeing right to due process of law).
dict. However, absent the reforms suggested above, a trial judge may continue to preclude a requested defense instruction for the battered woman who kills. Until defense instructions expressly or impliedly recognize extrinsic and internal factors which distort perceptions of danger and lead to emotional and motivational deficits, courts will continue to disregard a battered woman who kills' lower culpability. Since a juror may never walk a day in Aris' shoes, or any other battered woman's, the jury must be provided with defense instructions which consider the plight of the battered woman in light of all the facts. Only then will the criminal defense doctrines ensure that the battered woman who refuses to take one more beating receives a fair trial.