WHEN BATTERED WOMAN'S SYNDROME DOES NOT GO FAR ENOUGH: THE BATTERED WOMAN AS VIGILANTE

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Carole Herriman's crime was grabbing a rifle and firing through the bathroom door at her husband, a man who had raped and beaten her with wooden two-by-fours, a man who shouted that he was going to kill her.1 Herriman did not wait for the police because she did not believe they could get there fast enough to save her.2 A jury convicted her of first degree murder and she is now serving a twenty-five year to life sentence.3

It is unclear how many women are affected by domestic violence.4 While statistics on the number of battered women are alarming, they vary wildly. The National Coalition Against Domestic Violence, for example, estimates that more than twenty-seven million women will experience violence in their marriage and that eighteen million women are battered repeatedly every year.5 However, the National Family Violence Survey shows that men's violence against women decreased by forty-three percent between 1985 and 1992.6 Whether or not the incidence of domestic violence has decreased, the National Family Violence Study, sponsored by the National Institute of Mental Health, estimates that 188,000 women per year are battered severely.

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1. Cathryn Creno, Do 'Victims' Who Kill Deserve Relief?, A.Z. REPUB., Mar. 23, 1993, at El (discussing a proposal which would set up a review panel to consider early release for women convicted of killing their abusers).
2. Id.
3. Id.
4. See Armin A. Brott, Hyped Stats on Wife Abuse Only Worsen the Problem, WASH. POST, July 31, 1994, at C1 (arguing that the various statistics estimating the annual abuse of women are inaccurately high).
5. Id. (stating that these statistics are over-inflated estimates).
6. Id. (showing that there is a great disparity in the statistics regarding women affected by domestic violence).
enough to require medical attention. Moreover, the Federal Bureau of Investigations (FBI) estimates that 1,400 women, about six percent of all murders, were killed by their spouses or partners in 1992 alone. The problem of battered women, while perhaps not accurately quantifiable, is grave.

Under a retributivist, or repaired crimes analysis, a batterer gains unfair advantages over a woman every time he beats her; he gains domination, power and the right to disregard laws against battery. Thus, a woman who kills in self-defense removes these unfairly won advantages. "Arguing that the man's death corrects past wrongs may seem like vigilante justice. Indeed, those arguing that battered woman's syndrome is dangerous fear that it allows 'a private right to impose the death penalty.' But is this necessarily bad? If a "morally justified" person is one who acts after correctly evaluating all conflicting demands, can a woman be morally justified in killing her batterer?

This paper first discusses battered women who kill their abusers and Battered Woman's Syndrome ("BWS") as an element of self-defense. Section II contends that BWS is not the justice system's only appropriate response to battered women who kill. Section II argues that battered women who kill their abusers are morally justified vigilantes. Section III of this paper concludes that since battered women's acts are morally justified, the justice system should encourage jury nullification for battered women convicted of killing their abusers.

I. BATTERED WOMEN WHO KILL

In Arizona, women who kill their batterers are likely to be charged with premeditated first-degree murder. A man who beats and kills

7. Id.
8. Id. (noting that not all of these murders were a result of domestic abuse. Not only women are killed by their spouses, the FBI notes that 41% of spousal murder victims in 1992 were male.). Id.
9. See Alison M. Madden, Clemency For Battered Women Who Kill Their Abusers: Finding A Just Forum, 4 HASTINGS WOMEN'S UJ. 1, 56 (1993) (arguing that since the justice system failed most of the women in a California group petitioning for clemency, Governor Wilson should recognize that the group does not deserve to be incarcerated). Madden's argument apparently was not persuasive as Wilson commuted the sentence of only one of dozens of petitioners. Id. at 1-4.
10. Id. at 56.
11. Id. at 58.
13. See Creno, supra note 1 (describing the abusive situations of 11 women, some of whom are serving first-degree murder sentences in Arizona prisons for killing their abusers).
his spouse is typically charged with unplanned second-degree murder. This disparate treatment of men and women who kill their spouses is, according to some, the norm. After examining FBI statistics, one author concluded that fewer men are charged with first or second-degree murder for killing a woman known to them than are women who killed a man known to them. The author also found that women often face harsher penalties than men: of the thirty-six women studied who killed their partners, each was charged with first-degree murder. Twenty of the women received jail time, and one received a sentence of fifty years.

A woman may be justified in killing under the law of self-defense when she has a reasonable belief in the necessity of force and the imminence of danger. Many battered women who kill their batterers, however, have had difficulty justifying their crime under traditional self-defense laws. One response to the unique problem posed by battered women who kill their abusers has been the promulgation of BWS. BWS is not a defense in and of itself; rather, it is a means to prove the reasonableness of the battered woman’s belief that she was in imminent danger of death or serious bodily injury.

Expert testimony on BWS is needed to bolster a defendant’s credibility. Credibility is crucial because if the jury does not believe

14. See generally ANGELA BROWNE, WHEN BATTERED WOMEN KILL 11 (1987) (showing that when women kill their abusers they receive harsher sentences than men who kill their wives).
15. See Nancy Gibbs, *Til Death Do Us Part*, *Time*, Jan. 18, 1993, at 41, 42-43 (comparing the average prison sentences for men and women who kill their mates). Women who kill their male mates receive an average sentence of 15 to 20 years while men who kill their female mates receive an average sentence of two to six years. *Id.*
17. *Id.*
18. *Id.* But see Brott, *supra* note 4 at Cl (noting that statistics obtained by the Department of Justice indicate that women who kill their partners get an average sentence of six years while men who kill their partners get an average sentence of 17 years).
20. *Id.* at 1580.
21. See McMaugh v. Rhode Island, 612 A.2d 725 (R.I. 1992) (illustrating that BWS is not restricted to those crimes in which battered women kill their abusers). The McMaugh court found BWS relevant where a battered woman and her abuser were charged with murdering a third party. The court found that, as a result of BWS, the defendant was unable to participate in the preparation of her defense independent of her husband’s influence. *Id.* at 733. Her case was remanded for a new trial. *Id.* at 734.
23. See New Jersey v. Kelly, 478 A.2d 364, 375 (N.J. 1984) (holding that expert testimony is relevant under New Jersey’s standard of self-defense to determine the objective reasonableness
that the battered woman reasonably feared imminent death or serious bodily harm, it cannot find that she acted in self-defense. Because of myths and stereotypes about battered women, juries may not believe a battered woman who claims she reasonably believed she was in danger. Jurors, without the benefit of expert testimony, may assume that a woman subject to vicious and severe abuse would simply leave. Jurors may not understand that battered women are apt to feel psychologically paralyzed, as if resistance is hopeless and they have no place to go. Without expert testimony on BWS, jurors may not understand the battered woman’s belief that leaving will only cause a more vicious reprisal or that the battering is normal. The New Jersey Supreme Court stated:

[O]nly by understanding these unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman’s state of mind be accurately and fairly understood.

BWS, therefore, is a lens through which jurors can understand the hell a battered woman suffers and how this impacts the reasonableness of her belief that she was in imminent danger.

Unfortunately, expert testimony on BWS is unavailable for many battered women who kill their abusers. Some feminist scholars argue that current self-defense law is unable to deal fairly with battered women who kill because of underlying gender bias. That of the battered woman’s belief that deadly force was necessary to prevent serious bodily harm or death). But see Pennsylvania v. Miller, 634 A.2d 614, 620-22 (Pa. Super. Ct. 1993) (stating that it is inappropriate to use expert testimony on BWS to bolster the defendant’s credibility). The Miller court asserted that BWS testimony should be used to aid the jury in determining the defendant’s state of mind in light of the abusive environment.

24. Kelly, 478 A.2d at 375 (explaining that credibility is crucial to the woman’s defense as she must convey to the jury that she truly believed she was in imminent danger of death or serious bodily injury).
25. Id.
26. Id.
27. See id. at 372 (discussing the various perceptions battered women typically have of the abusive relationship).
28. Id.
29. Kelly, 478 A.2d at 372.
30. Harvard Law Review Association, supra note 19, at 1574-75 (stating that in the cases of one hundred battered women charged with homicide, 63 of the 85 who pleaded self-defense were convicted).
is, the paradigms of self-defense law are not responsive to the circumstances under which battered women kill.\textsuperscript{32} As a result of the bias inherent in the law and the myths held by society concerning battered women, such as the “she could have just left” stereotype, judges often exclude evidence concerning the woman’s perceptions and circumstances.\textsuperscript{33} Moreover, even if there is not gender bias in the law itself, some commentators argue that judges do not admit the evidence of BWS because they believe it impossible that a woman who killed her abuser acted reasonably.\textsuperscript{34} Thus, even where BWS should have been available to a defendant, a judge may, in his or her discretion, refuse to admit it.\textsuperscript{35}

Even if a judge admits evidence on BWS, a narrow interpretation of the self-defense theory may preclude the use of BWS for some women.\textsuperscript{36} There may be a technical imminency problem. While some courts accept that imminency need not equate with immediacy,\textsuperscript{37} others have rejected evidence of BWS where the abuser was asleep or the battered woman hired a third party to commit the crime.\textsuperscript{38} Moreover, deadly force may be seen as an unreasonable and thus unjustifiable response to a non-deadly threat.\textsuperscript{39} That is, using deadly force against an abuser who attacks with his fists, makes verbal threats or is sleeping may be seen as excessive and, therefore, unreasonable.\textsuperscript{40}

\textsuperscript{32. Harvard Law Review Association, supra note 19, at 1574, 1576 (describing the first paradigm as one in which a person is suddenly attacked by a stranger. In the other paradigm, a dispute between two persons of equal size and strength escalates into a deadly situation.).}
\textsuperscript{33. See generally Harvard Law Review Association, supra note 19, at 1575-76, 1581 (asserting that judges tend to believe battered women would leave batterers if they were truly frightened and therefore exclude evidence of the womens' perceptions and circumstances when contrary to the “reasonable” view of the judge).}
\textsuperscript{34. Harvard Law Review Association, supra note 19, at 1581.}
\textsuperscript{35. Harvard Law Review Association, supra note 19, at 1576.}
\textsuperscript{36. Harvard Law Review Association, supra note 19, at 1593.}
\textsuperscript{37. See Washington v. Janes, 850 P.2d 495 (Wash. 1993) (holding that a threat of imminent harm can be present where the triggering behavior and abusive episode are divided by time). An otherwise innocuous comment occurring days before the homicide can be highly relevant when the evidence shows that such a comment inevitably signaled an abusive episode. \textit{Id.} at 506.}
\textsuperscript{38. See \textit{Ex Parte} Haney, 603 So.2d 412, 418 ( Ala. 1992) (convicting Judy Haney of capital murder and sentencing her to death for soliciting the murder of her abuser where the court found that Ms. Haney was not in imminent danger of abuse because she went to her sister’s home several days before the killing actually took place); Hill v. Alabama, 507 So.2d 554 ( Ala. Crim. App. 1987) (excluding evidence of BWS where the defendant shot her abuser three times while he was sleeping).}
\textsuperscript{39. See Harvard Law Review Association, supra note 19, at 1576 (explaining that in most jurisdictions, a woman is only justified in using deadly force when she reasonably believes her attacker is about to use, or is using, deadly force).}
\textsuperscript{40. See Harvard Law Review Association, supra note 19, at 1575-76 (discussing the unequal treatment and results experienced by battered women who try to use self-defense law).}
A final problem with BWS is that, like self-defense law, which generally is not applicable to battered women, BWS excludes those women who do not fit the stereotype of a battered woman. Moreover, it is argued that BWS perpetuates images of women as helpless, passive or emotionally disturbed. Ironically, while BWS should emphasize the reasonableness of a woman’s behavior, it actually connotes incapacity and insanity. Thus, BWS may be available only for women who either fit the stereotype of the battered woman or are willing to portray themselves as insane.

The use of BWS as a legal defense, therefore, does not sufficiently address the needs of all battered women who kill. It may not be a viable option where the technical requirements of self-defense are not met, where a judge is influenced by myths and stereotypes, or where a woman is unable or unwilling to present herself as anything other than rational and reasonable.

II. THE BATTERED WOMAN AND VIGILANTISM

BWS is but one moderate reaction of the judicial system to the plight of battered women. As discussed above, BWS may not reach far enough to help many women. It may not express the community’s sense of outrage at the violence done to women and its sanctioning of at last seeing justice done. Accepting the battered woman as a vigilante is one means by which the community and justice system can find a battered woman morally justified in killing her abuser.

Vigilante is generally interpreted as a “pejorative word, and it is used to criticize or warn. It is a powerful word that suggests willful violence masquerading as justice. It is a delegitimizing term... [that is both] a reproach and a warning.” To some, vigilantism equates with racism.

As with any term, however, these negative connotations are not the only ones possible. Vigilant, for example, is an adjective with positive

41. *See* Harvard Law Review Association, *supra* note 19, at 1592 (explaining that courts and defense attorneys tend to stress female passivity and incapacity instead of emphasizing how an abused woman’s actions are reasonable under self-defense law. This focus may create a situation where expert testimony is admitted only when the battered woman fits a preconceived stereotype.).
43. *Harvard Law Review Association, supra* note 19, at 1592-93; *Madden, supra* note 9, at 48-49 (arguing that this is especially true where the defendant is a woman who has resisted violence in the past. Courts are unwilling to accept such defendants as “good” battered women.).
connotations—society respects a watchdog that is ever-vigilant. A neutral definition describes a vigilance committee as "a group of persons organized without legal authorization professedly to keep order and punish crime when ordinary law enforcement agencies apparently fail to do so." Vigilantism is thus equated with taking the law into one's own hands. In the context of battered women who kill, vigilante should be seen as a word connoting justice and empowerment.

A. The Battered Woman as Vigilante

The phenomenon of vigilantism has been explored from many different angles. Several of these explications are helpful in defining battered women as vigilantes. First, while vigilantism has historically been related to groups, the modern vigilante is often an individual who is seen as a defender of justice against the law. This individual has a dual character; she is both a law-abiding hero and a law-breaking villain. The battered woman embodies this dual character. She has, often for many years, abided by the law, taking abuse without retaliation. She has often turned to the justice system for help, generally to no avail. Yet when she finally strikes and defends herself, it is she who becomes the villain, the pariah disrupting home and hearth. She is the murderous monster.

Second, a distinction exists between organized and spontaneous vigilantism. That is, for some, organization is an essential part of vigilantism while for others, vigilantism occurs when "bystanders not only apprehend a criminal but also mete out punishment themselves." A spontaneous vigilante, thus, may be the actual or potential victim herself. The battered woman is by definition a victim, one who has not received justice, one who has not seen her

46. WEBSTER'S UNABRIDGED DICTIONARY 1028 (2nd ed. 1979).
48. See Timothy Lenz, Republican Virtue and the American Vigilante, 12 LEGAL STUD. FORUM 117, 124 (1988) (stating that in the past, vigilantism has been associated with movements or mobs rather than with the individual).
49. Id. at 124 (noting that the vigilante tradition has enjoyed considerable legitimacy in American history). Five vigilantes became United States Senators, eight became state governors, and both Andrew Jackson and Teddy Roosevelt, as presidents, supported vigilantism. Grayson, supra note 47, at 27.
50. Lenz, supra note 48, at 129.
51. See ANGELA BROWNE, WHEN BATTERED WOMEN KILL 10 (1987) (discussing police responsiveness to domestic violence homicides).
52. Grayson, supra note 47, at 23.
53. See Grayson, supra note 47, at 23 (pointing out that when a potential or actual victim responds by apprehending a criminal and meting out punishment, he or she is acting as a spontaneous vigilante).
batterer punished for the abuse he has heaped upon her.\(^\text{54}\) Thus, by killing her batterer, the battered woman becomes a spontaneous vigilante—she apprehends a criminal that the law has failed to bring to justice and metes out the punishment he richly deserves.

Third, "the line between self defense and vigilantism may be seen as both thin and negotiable."\(^\text{55}\) A vigilante, therefore, is not necessarily outside of the law. Rather, a vigilante may be one who does not wait for the state when a crime has been committed, when the "moral order" has been ruptured.\(^\text{56}\) The battered woman should be seen as operating within the law. Self-defense may be technically unavailable for the battered woman due to the reasons discussed above.\(^\text{57}\) Moreover, the battered woman has often waited for the state to repair the moral order and bring her abuser to justice, to no avail. Thus, rather than continue waiting for the state, all the while receiving beating after beating, the battered woman, by killing her abuser, repairs the moral order herself.

Finally, one sociologist has posited that several conditions must be met before vigilantism emerges: 1) a violation of norms, 2) existing law enforcement agencies and the judicial system must be deemed unable to cope with the violation, and 3) vigilantism must be viewed as consistent with social values.\(^\text{58}\)

For battered women, social norms have been repeatedly violated; criminal behavior violates social norms and battery is a crime.\(^\text{59}\) Law enforcement agencies are perceived as unable to cope with this violation.\(^\text{60}\) Forty-two percent of Americans in one poll responded that they had "not very much confidence" in the ability of police to protect them and eight percent replied that they had none at all.\(^\text{61}\)

\(^{54}\) \textit{Contra} Edward Gondolf \& Ellen Fisher, \textit{Battered Women as Survivors: An Alternative to Treating Learned Helplessness} (1988) (asserting that battered women are active survivors as opposed to helpless victims); A. Renée Callahan, \textit{Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome}, 3 Am. U.J. Gender \& L. 117 (1994) (proposing a legal characterization of battered women which incorporates elements of learned helplessness and survivor theories).

\(^{55}\) Gondolf \& Fisher, \textit{supra} note 54 at 24 (stating that those who "apprehend a criminal and also mete out punishment need not be bystanders: they can be potential or actual victims themselves").

\(^{56}\) \textit{Id.}

\(^{57}\) \textit{See supra} notes 30-43 and accompanying text (discussing common problems faced by women who kill their abusers and try to use BWS in a self-defense plea).

\(^{58}\) \textit{See Grayson, supra} note 47, at 30 (discussing the conditions which are generally required before the emergence of vigilantism).


\(^{60}\) \textit{Id.}

\(^{61}\) \textit{See Grayson, supra} note 47, at 31 (citing a 1989 Gallup poll discussing the public's perception of the ability of police to protect them).
For women who have been physically abused and summoned the police to no avail, that number must be dramatically higher. Similarly, the judicial system often fails the battered woman. While statistics are unavailable, anecdotal evidence indicates that the number of batterers who are ultimately held accountable for their actions and serve time in prison is minute. In 1990, for example, the Illinois Task Force on Gender Bias in the Courts found that domestic violence offenders do not serve any time at all!

The last factor, society's viewing of vigilantism as consistent with social values, is the most problematic for battered women. While vigilantism is generally viewed as consistent with social values in the United States, a 1985 Gallup poll conducted just after the Bernard Goetz incident showed that seventy-four percent of Americans believed vigilantism was "sometimes" justified while another eight percent believed it was "always" justified. The battered woman, however, has not gained the same popular support. This paper argues that she should. The battered woman who kills her abuser should be seen as a spontaneous vigilante, a defender of justice, one repairing the moral order where the state has failed to do so.

B. Why Must the Batterer's Punishment Be Death?

To some, the death of the abuser may seem an inappropriate or excessive way for the battered woman vigilante to punish her abuser and repair the social order. Deadly force on the part of the battered woman, however, may be justified in several ways. First, death may be necessary because lesser degrees of force may be insufficient. The battered woman may not be able to confront the batterer without a

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62. See Alan Jay Lincoln & Murray A. Strauss, Crime and the Family 196 (1985) (stating that in some instances, police do not respond to domestic violence calls at all because the calls are given low priority with no immediate dispatch of police units). Researchers have found that between three and ten percent of domestic violence calls culminate in arrest; the arrests typically occur after the abuser has been disrespectful to the police officer or has in some way challenged the officer's authority. Id.; Deborah L. Rhode, Justice and Gender: Sex Discrimination and the Law 289 (1989) (stating that one-third of police calls are related to domestic violence, roughly one-third of police injuries are inflicted in such disputes and less than two percent of police training hours are devoted to the problem of domestic violence).

63. See Brott, supra note 4 (noting that the National Coalition Against Domestic Violence presents the shocking figure that women who leave their batterers increase their chance of getting killed by 75%. The Coalition admits this figure is an estimate with no concrete evidence to back it up).

64. See Cynthia Bowman, Spouse Abuse: A Disparity of Power, CHI. TRIB., June 23, 1994, at 27 (explaining that few batterers are ever sentenced to prison).

65. Id. (reporting that batterers' sentences typically involve an order of supervision and a requirement that they seek counseling; in 1989, only 87 defendants of 1,391 convicted in Cook County were ordered to serve any jail time).

66. Grayson, supra note 47, at 32.

67. Grayson, supra note 47, at 32.
deadly weapon because of disparities in size, strength or emotional control. The lower degree of force a woman typically exerts upon a man may have little or no impact on a physically stronger abuser. Indeed, a woman's lesser degree of force may only incite a vicious retaliation by the abuser.

In addition to believing that a lesser degree of force will be insufficient, many women may believe that leaving is not possible. Those that do attempt to leave report that their abusers follow them, continuing the harassment and violence. Thus, if one accepts the premise advanced by BWS that battered women are, for a variety of reasons, unable to leave the batterer, and are often weaker than their abusers, then death may be the only means by which battered women can escape the abuse.

Moreover, the use of deadly force is legally permissible in circumstances other than self-defense. In California, for example, deadly force is permitted by any person, not just a police officer, if necessary to apprehend any person for any felony. In these situations, a citizen must also have a reasonable fear that his or her life is in danger. While this law has most often been applied to persons who have shot intruders entering their homes, such reasoning is broad enough to include battered women. Battered women should be seen as apprehending the batterer for committing a felony, the battery itself.

Finally, death may be justified under a retributive analysis in which the battered woman is seen as punishing the batterer. Regardless of whether one morally approves of capital punishment, it has been sanctioned by the Supreme Court and many states. If the battered

69. Bowman, supra note 64 (discussing continued physical, psychological and sexual abuse).
70. See Washington v. Janes, 850 P.2d 495, 500 (Wash. 1993) (finding it relevant that the defendant, a battered child, truly, though wrongly, believed that the only way he could stop the abuse of himself and his mother was by killing his abuser).
71. See Nieson Himmel, Police Say Watch Shop Owner Kills 4th, 5th Suspects, L.A. TIMES, Feb. 21, 1992, at B1 (noting that Lance Thomas has killed five men who attempted to rob his watch shop and all of the killings were deemed justifiable).
72. Id.
73. It may be argued that battered women are more justified in killing their abusers because they know their abusers' history of violence. Richard McAdams, Class Discussion at Chicago-Kent College of Law (Spring, 1994). The typical male vigilante, on the other hand, shoots a stranger, with no knowledge of his victim's history of violence. Thus, whereas the battered woman knows that her abuser will be violent again, the vigilante who kills a stranger has no such knowledge. The battered woman is therefore preventing almost certain future crime. For the male vigilante, any such prevention is only speculation.
74. See Madden, supra note 9 at 54-56 (discussing the retributive theory of justice).
75. See Woodson v. North Carolina, 428 U.S. 280 (1976) (approving the imposition of the death penalty in certain cases but holding that North Carolina's mandatory death sentence for
woman is stepping in where the state has failed, then she should be permitted to exercise the same powers as those possessed by the state. While the punishment may not seem to fit the crime, other, less extreme, forms of punishment or force may not be available to the battered woman.

Other forms of violence—Lorena Bobbit's maiming, drawing and quartering and torture—are not permissible under this rationale because they are not state-sanctioned punishments. While it may seem odd to advocate killing and not other forms of force, this is a decision made by the states and accepted by a large portion of American society. The death of the batterer, therefore, is a permissible solution for battered women.

C. Vigilantism Justified by Social Contract Theory

Vigilantism as a permissible mode of self-help for battered women may be justified under social contract theory in two ways. First, the breakdown of the social compact occurs when the state fails in its obligation to protect the individual. This breakdown justifies the individual's resort to self-help. Second, women were not part of the original contract and thus may not be required to adhere to its obligations.

Some theorists argue that law and legal systems developed as a desirable alternative to private justice. Social contractarians, in particular, argue that the individual, in giving up the norm of private vengeance, is entitled to the state's protection. Thus, the "central
claim of contract theory is that contract is the means to secure and enhance individual freedom.\textsuperscript{82}

Under social contract theory, if the state fails in its obligation to protect citizens, the government is considered dissolved and the people are entitled to provide for their own protection.\textsuperscript{83} One philosopher concludes that where the state fails to protect its citizens, protecting oneself is not considered civil disobedience or vigilantism.\textsuperscript{84} One may extrapolate this premise to conclude that vigilantism is morally justified by the state's failure to uphold its end of the compact.\textsuperscript{85}

If one accepts social contract theory, one accepts that individuals are members of the state and deserve physical protection.\textsuperscript{86} One feminist, however, has argued that women are excluded from the original social contract since only men consented, or were allowed to consent, to the social compact.\textsuperscript{87} Social contractarians such as John Locke and Thomas Hobbes posited that women were a disruptive influence who could bring about the state's destruction because they were incapable of a sense of justice.\textsuperscript{88} Women, therefore, were subjugated to men since they lacked the capacity, \textit{i.e.}, the sense of justice, to enter into the social contract, and were thus naturally subversive of the political order.\textsuperscript{89} Since women are not part of this social contract, they may not be bound by the contractarian stricture against self-help.\textsuperscript{90}

\textbf{D. Vigilantism and the Courts}

Courts have long been threatened by vigilantism.\textsuperscript{91} The legal system, fearing vigilantism, claims that retribution is the objective of the criminal justice system.\textsuperscript{92} The Supreme Court, in an opinion obligations to its citizens).

\textsuperscript{82} PATEMAN, supra note 78, at 62.
\textsuperscript{83} PATEMAN, supra note 78, at 62.
\textsuperscript{84} PATEMAN, supra note 78, at 2.
\textsuperscript{85} PATEMAN, supra note 78, at 2. \textsuperscript{86} HOBBS AND LOCKE, supra note 77, at 18. Hobbes and Locke, however, believed that vigilantism was one of the reasons people left the state of nature. \textit{Id.}
\textsuperscript{87} PATEMAN, supra note 78, at 2.
\textsuperscript{88} PATEMAN, supra note 78, at 5-6.
\textsuperscript{90} This is not Pateman's conclusion. Indeed, she might very well advocate the opposite conclusion. Note also that under social contract theory, women were subjugated to their husbands. A woman who defied her husband in the ultimate manner, by taking his life, would probably be reviled by contractarians as subversive of all order.\textsuperscript{91} PATEMAN, supra note 78, at 54, 96.
\textsuperscript{92} See Idaho v. Landreth, 798 P.2d 458, 461 (Idaho Ct. App. 1990) (holding that while retribution may be unappealing to some, it is essential to an ordered society where citizens are
supporting capital punishment, stated that the justice system must express society's outrage at offensive conduct where society asks its citizens to rely on the justice system rather than resorting to vigilanti.sm. The Court continued:

[T]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon the criminal offender the punishment they "deserve," then there are sown the seeds of anarchy of self-help, vigilante justice, and lynclaw.

For the courts, evenhanded distribution of justice is paramount in maintaining the justice system and preventing the arrival of a state of anarchy wherein normally law-abiding citizens become vigilantes. While society may have revoked the individual's right of private vengeance, when the justice system fails, the individual may still have a "fundamental, natural yearning to see justice done . . . the urge for retribution." The Supreme Court, however, leaves abuse victims without recourse. While the Court discourages vigilantism, it also holds that the United States Constitution provides no protection for victims of abuse:

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.

expected to rely on the legal system as opposed to self-help to vindicate wrongs).

94. Id. at 183 (quoting Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)).
95. Wilcher v. Mississippi, 635 So.2d 789, 801 (Miss. 1993) (Smith, J. dissenting) (noting that when the judicial system allows cases to linger in a seemingly never-ending path of review and appeal, some normally law-abiding citizens become vigilantes, taking matters into their own hands).
97. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195 (1989) (holding that the state had no constitutional duty to protect a child from his father after receiving reports of possible child abuse). When Joshua Deshaney was four years old, his father beat him severely enough to cause permanent brain damage. The Department of Social Services was aware of Joshua's abuse but did nothing to protect him. Id. at 193. In a vigorous and compassionate dissent, Justice Brennan contended that "inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it." Id. at 212 (Brennan, J. dissenting). Unfortunately for Joshua and all victims of abuse, Justice Brennan's word is not the law.
This absence of any affirmative duty by states to protect individuals against private violence, makes vigilantism one of the few viable options for victims of domestic violence.

Stories about battered women are replete with failed appeals to police, courts, social service agencies, churches, friends and neighbors.\footnote{Cf. Thurman v. City of Torrington, 595 F. Supp. 1521 (Conn. 1984) (holding that a wife's complaint stated a cause of action for violation of her right to equal protection under the Fourteenth Amendment where she showed that the city and police implemented a classification system affording domestic violence less protection than victims of non-domestic violence).} Take, for example, Judy McBride, a victim of battering who repeatedly called the police only to be told that they would not get involved because hers was a domestic violence case.\footnote{Sandy Rovner, The Ultimate Conflict: Killing the Abuser; A Woman Convicted in Husband's Murder Tells Her Side of the Story, WASH. POST, Aug. 11, 1987, at Z13.} She tried calling a family therapy organization, but the telephone number was not in service.\footnote{Id.} A Catholic social service group told her to try and work things out with her husband.\footnote{Id.} McBride's husband continued tormenting her after she filed for legal separation.\footnote{Id.} Ultimately, McBride hired someone to hurt her abuser.\footnote{Id.} The abuser was killed and McBride was sentenced to life in prison without parole.\footnote{Id. (pointing out that the killer also received a life sentence).}

The failure of the criminal justice system, where the state does not or will not enforce the law, is one reason vigilantism continues to garner sympathy from contemporary America.\footnote{See Lenz, supra note 48, at 131 (discussing how dissatisfaction with the administration of justice in the United States has contributed to the maintenance of the American vigilante tradition).} One author notes, "[t]he American tradition has been for citizens to trust themselves more than they trust the government."\footnote{See KOPEL, supra note 45 at 381 (explaining that in a racist society where innocent citizens are killed, oftentimes by police officers, many citizens end up taking the law into their own hands).} Why then is not this same sympathy extended to victims of domestic abuse who become vigilantes?

One answer may be found in vigilantism's uniquely male tradition.\footnote{KOPEL, supra note 45 at 324 (citing Richard M. Brown, The American Vigilante Tradition, in VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 154 (Hugh D. Graham and Ted R. Gurr eds., 1969) as stating that vigilantism in the United States is a uniquely male tradition).} Vigilante groups in the nineteenth century were composed of most of the adult males in the community, with the wealthiest and
most powerful men as leaders. Women, who were not part of the community's civic life, were not members of vigilante groups. The modern bias towards the acceptance of the archetypal vigilante as male may be seen in their portrayal.

E. Junior G-men: The Archetypal Vigilante is Male

The American public sees the vigilante as male. This male is a cartoon superhero who is larger than life, an acceptable myth. Vigilantes are the men portrayed in DEATH WISH and RAMBO movies that assuage feelings of helplessness, fear and rage that the public harbors towards crime and criminals. To be acceptable to the American public, therefore, the vigilante must be a male of mythic proportions.

Consider Lance Thomas of Los Angeles who has, in separate instances, killed five men and wounded another who attempted to rob his watch shop. All of the shootings were ruled justifiable. Glued inside the store's display window is a cartoon in which a woman says "I Like Lance. He reminds me of Wild Bill Hickock" to which her cartoon friend replies, "Lance IS Wild Bill Hickock."

In New York, Kenny Mendoza was hailed as a hero for killing an intruder who threatened his pregnant neighbor. "A lot of people..."
wrote me letters saying I did the right thing . . . . They said they wish there were more people like me," reported Mendoza.\footnote{Id.} He was cleared of any wrong-doing by a grand jury.\footnote{Id.} In Arizona, the Sheriff of Maricopa County has amassed an unpaid force of 2,300 citizens to eradicate crime in southwest Phoenix.\footnote{Id.} The force is mostly white and male.\footnote{Id.} The head of the Phoenix chapter of the American Civil Liberties Union criticized the posse as "a bunch of junior G-men who want to be Batman. It's a comic book version of crime fighting and I'm worried that something bad will eventually happen."\footnote{Id.} Arizona State University Professor Dennis Palumbo was also leery of the program saying that the Sheriff's methods will do little to reduce crime in the long run.\footnote{Id.} Professor Palumbo said the Sheriff "is clever politically, but simply feeds the notion that we must watch our backs and escalates fears."\footnote{Id.}

Bernard Goetz, who shot four black youths, alleged muggers, on a New York subway in December of 1984, is perhaps the most famous modern vigilante.\footnote{Id.} He became a symbol to crime-weary citizens, a hero who fought back in a dangerous situation.\footnote{Id.} To his victims and others, especially those in the black community, Goetz became a symbol of racist retaliation.\footnote{Id.} The media generally portrayed Goetz as a hero around whom the American public rallied.\footnote{Id.} Yet initially no one mentioned that two of his victims were shot in the

\footnote{119. Id.}
\footnote{120. Id. (noting that another New York grand jury refused to indict two half-brothers for killing a thief who robbed their cousin). See also Joseph Fried, For 2 Youths, No Indictment in a Killing, N.Y. TIMES, Aug. 31, 1994, at B1 (recounting the half-brothers' argument that they hit the robber with a metal fence post to detain him until the police arrived).


122. Id.

123. Id.

124. Id.

125. Id.


127. See RUBIN, supra note 111, at 9, 74 (explaining how many citizens who were victims of crime and afraid to walk the streets regarded Goetz as a hero).

128. See Klansky, supra note 126, at 1149 n.2 (analyzing the racist sentiments discussed in N.Y. Justice System Faces Tough Issues In Vigilante Case, 16 CRIM. JUST. NEWSLETTER, at 1 (1985)). Many contend that had Goetz been black and his victims white, he would have been considered a villain. However, in 1980, a black man shot two white teenagers who accosted him on the subway. The jury refused to indict him and all of the charges against him were dropped. Id. Thus, fears of victimization and sympathy with vigilantes may cross racial boundaries.

129. RUBIN, supra note 111, at 74 (explaining that Goetz was depicted in newspapers and television as a hero who enjoyed the support of the American public).
back, that one of them was shot twice and the second bullet caused permanent paralysis and brain damage.\(^{130}\)

A host of charges were originally levied against Goetz, including attempted murder.\(^{131}\) The first grand jury, however, indicted him only for criminal possession of weapons.\(^{132}\) A second grand jury indicted Goetz on charges of attempted murder, assault, criminal possession of a weapon and reckless endangerment.\(^{133}\) Goetz was eventually convicted only of illegal gun possession, sentenced to one year in jail and fined $5,000.\(^{134}\)

The district attorney prosecuting Goetz pointed out that "there was a huge gap between the 'myth' of Goetz as 'an innocent victim of life in New York' and the 'sad reality that this defendant is a sick man.'\(^{135}\) Goetz, on the other hand, told the court that he felt the case was really more about the deterioration of society than it was about him.\(^{136}\) The district attorney recognized the myth of Goetz.\(^{137}\) Goetz, on the other hand, saw himself as a superhero: a defender of society in its time of need.\(^{138}\) This myth was the image promulgated by the media and embraced by a vocal portion of American society.\(^{139}\)

The treatment of male vigilantes stands in stark contrast to that of vigilante women. One woman who received extensive press coverage, Ellie Nesler, was at first lauded by the public and press for killing her

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130. See Rubin, supra note 111, at 74, 153, 190 (noting that Goetz shot Darrell Cabey in the back as he lay wounded, pleading not to be shot. Goetz apparently stated, “you seem to be doing all right, here’s another.” Cabey eventually lapsed into a coma from which he emerged permanently physically and mentally disabled.).

131. Klansky, supra note 126, at 1153.

132. See Klansky, supra note 126, at 1153 (noting that Goetz’s criminal possession of weapons charges were issued because Goetz had one gun on the subway and two more guns in his apartment).

133. Rubin, supra note 111, at 237. Goetz’s case was procedurally complex. The lower court dismissed charges of attempted murder and assault finding that the district attorney improperly instructed the jurors on the law of self-defense. While the Appellate Division upheld the lower court’s dismissal, the New York Court of Appeals, New York’s highest court, reversed, reinstating the entire indictment and holding that neither the prosecutor’s erroneous charge nor newly discovered evidence of perjured testimony required dismissing any of the charges). Klansky, supra note 126, at 1156.


136. Goetz Sentenced, Fined WASH. POST, Jan. 14, 1989, at A10 (quoting Goetz as stating, “I do feel this case is really more about the deterioration of society than it is about me. Society needs to be protected from criminals.”).

137. Kurtz, supra note 135.


139. See Kurtz, supra note 135 (discussing how Goetz became a “hero to many in this crime-weary city”).
son's abuser. Nesler shot her son's alleged abuser five times at a preliminary hearing to decide whether he would stand trial on molestation charges. At first, she “found herself a local darling and a beacon for people everywhere besieged by crime and frustrated at a porous legal system.” She was embraced as a virtuous mother pushed over the edge. This image was quickly rejected when it was discovered that Nesler had a criminal record and methamphetamine in her blood at the time of the shooting. Ultimately, Nesler was found guilty of manslaughter and sentenced to ten years in prison.

Nesler was rejected by the media and the public. She did not fit the archetypal image of the vigilante. Not only was Nesler a real, multidimensional human with problems, but she was a female, and as such, easily toppled from her pedestal. The lesson of Goetz and Nesler, then, is that mythical men are acceptable as vigilantes and multidimensional women are not.

Much as the public rejected Nesler as a heroine, so too has it rejected battered women. Battered women are not seen as superheroes; rather, they are seen as victims responsible for their own fate. A feminist view of battered women who kill, however, perceives the battered woman as a representation of justice. She is Lady Liberty, ever-vigilant, vanquishing the brutal male, striking a blow for parity between the sexes. She is avenging herself and society, righting the moral order and preventing social decay. The American public, therefore, should extend the same respect and sympathy to the battered woman vigilante as it does to the archetypal male vigilante.

140. Mark Arax, A Bitter Mom With a Gun Gels Her Deadly Revenge, SEATTLE TIMES, Apr. 13, 1993, at A2 (noting the large amount of support Nesler received from the American public who regarded her as a heroine for protecting her child from evil). See also Laura Miller, We Like Our Avenging Angels to be Pure, S.F. EXAMINER, Oct. 31, 1993, at D3 (describing the media sensationalism and support Ellie Nesler received from the public).

141. Arax, supra note 140 (describing how Nesler shot her son's alleged abuser after witnessing the abuser smirk at her son while the boy was vomiting into a plastic bag).

142. Arax, supra note 140.

143. Arax, supra note 140 (explaining that Ellie Nesler was initially regarded as a virtuous woman).


145. Around the Nation, WASH. POST, Jan. 9, 1994, at A21 (reporting that Nesler, from Jamestown, California, was found guilty of shooting her son's molester).

146. See generally BROWNE, supra note 14, at 11 (battered women who kill receive harsher sentences than men who kill their spouses); Madden, supra note 9, at 72 (discussing the public backlash in Maryland after several battered women were granted clemency).
F. Concerns about Vigilantism Allayed

Vigilantism raises the specter of anarchy, of society run amuck.\textsuperscript{147} As applied to the battered woman, however, vigilantism may be more palatable because concerns about control, accountability and racism are not applicable. One concern with vigilantism is the lack of control over a group's activities.\textsuperscript{148} This concern is not applicable to a battered woman who will presumably kill only once.\textsuperscript{149} As a one-time offender, she is not likely to form a group whose purpose is to search out and punish batterers.\textsuperscript{150} In fact, most battered women who kill have no history of prior violent behavior and have far less extensive criminal records than other women charged with homicides.\textsuperscript{151}

Accountability is another concern for those opposed to vigilantism.\textsuperscript{152} Because it is no mystery who killed when a battered woman kills her abuser, the battered woman will be held socially, if not criminally, responsible; she does not escape unknown or unacknowledged.\textsuperscript{153} Moreover, the battered woman has already been punished for years by her batterer.\textsuperscript{154} She will continue to be punished for killing her abuser in so far as the stigma, guilt and shame will haunt her for years.\textsuperscript{155}

\textsuperscript{147} Korrach, \textit{infra} note 187, at 143 (outlining the arguments in opposition to an instruction on jury nullification).

\textsuperscript{148} Dodge, \textit{supra} note 44, at 336 (discussing critics' concern that vigilante groups, specifically street patrols organized to protect homosexual victims of gay-bashing, may roam around uncontrolled and unmonitored, taking retributive action against aggressors and engaging in mob-like behavior).

\textsuperscript{149} Nancy Gibbs, \textit{Battered Women and the Courts: An Overview}, in \textit{VIOLENCE AGAINST WOMEN} \textit{259, 268} (Karin L. Swisher et al. eds., 1994) (explaining that battered women generally do not pose a violent threat to others; rather, they reach a breaking point and fight back only against their abusers).

\textsuperscript{150} Id.

\textsuperscript{151} Harvard Law Review Association, \textit{supra} note 19, at 1591 (relying on a study comparing the criminal records of women who killed their batterers with the criminal records of women charged with killing persons not classified as abusers).

\textsuperscript{152} Dodge, \textit{supra} note 44, at 336 (discussing critics' concern that street-patrol vigilante groups may act out of rage and ultimately be held unaccountable for their actions).

\textsuperscript{153} See DONALD T. LUNDE, \textit{MURDER & MADNESS} 10 (1976) (stating that in 85\% of decedent-precipitated interspousal homicides, the wife kills an abusing husband); see \textit{also} M. DALY & M. WILSON, \textit{HOMICIDE} 278 (1988) (stating that "when women kill, their victims are . . . most typically men who have assaulted them.")

\textsuperscript{154} KOPEL, \textit{supra} note 45, at 416 (explaining that most domestic homicides take place after a long history of violent physical abuse).

\textsuperscript{155} David France, \textit{Life After Death: Battered Women Who Kill Their Husbands}, \textit{GOOD HOUSEKEEPING}, July 1995, at 110 (depicting the life-stories of women who were convicted of killing their abusers and explaining that many women feel a sense of shame and regret about their actions).
Racial concerns are similarly not applicable to the battered woman vigilante. While the term vigilantism connotes the lynch mobs of the South, domestic violence begins and ends with the abuser and the abused.\textsuperscript{156} It may be that there are instances where a white woman kills her black abuser; however, the impetus for most vigilante behavior is not race but the battered woman's need to save her own life.\textsuperscript{157} Indeed, this proposal may actually help more black women than white since all-white police forces traditionally ignore black-on-black violence.\textsuperscript{158} A black woman may justifiably have less faith in the police than a white woman and may be more justified in resorting to self-help.

Finally, the proposal in this paper would be strictly limited to battered women and children who kill.\textsuperscript{159} It would not extend to anti-abortion activists who kill abortion providers, to anti-vivisectionists\textsuperscript{160} or to any others who claim to be defending those who cannot defend themselves. The key for allowing the vigilantism proposed herein is that the battered woman knew her victim; that she had personally suffered years of abuse at his hands; that she therefore knew there was a real threat of present and/or future violence. Others who claim to act for society, such as the recently convicted murderer Paul Hill, do not know and were not personally abused by their victim.\textsuperscript{161} Thus, they could not claim to be a vigilante as proposed by this paper.

\textsuperscript{156} See Lenz, supra note 48, at 118 (explaining that to most Americans, the term vigilantism means lynching or a modern variation of that practice).
\textsuperscript{157} Madden, supra note 9, at 57.
\textsuperscript{158} Norman Lockman, Community Policing Needed by Police, Not Vigilantes, WILMINGTON NEWS JOURNAL, Sept. 8, 1994 at A12.
\textsuperscript{159} See Washington v. Janes, 850 P.2d 495 (Wash. 1993) (holding that testimony on battered child syndrome was admissible but technically insufficient). Janes involved a seventeen year old defendant who shot and killed his long-time abuser coming through the front door of their home. \textit{Id.} at 497. At trial, the defendant presented extensive evidence of the deceased's abusive behavior and showed that Child Protective Services had been contacted many times but failed to intervene. \textit{Id.} at 498-99. The defendant stated that he believed killing his abuser was the only way to stop the abuse. \textit{Id.} at 500. The Supreme Court of Washington held that testimony on battered child syndrome was admissible to prove self-defense and remanded the case to the trial court. \textit{Id.} at 500.
The defendant in Janes had a technical imminency problem—his abuser was not being abusive at the time he was shot. Under this paper's proposed regime, however, the defendant would have been justified as a child vigilante; one who, like the battered woman, was repairing the social order.

\textsuperscript{160} See MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1322 (10th ed. 1993) (defining vivisection as (1) the cutting of or operation on a living animal, usually for physiological or pathological investigation; (2) animal experimentation, especially if considered to cause distress on the subject).

\textsuperscript{161} See Mike Clary, Abortion Foe Is Convicted of Brutal Slayings, L.A. TIMES, Nov. 3, 1994, at A1 (discussing Paul Hill's necessity defense). Paul Hill is a former minister convicted of slaying an abortion clinic doctor and his volunteer escort in Florida. Acting as his own lawyer, Hill argued that his actions were justified to prevent a greater harm; namely, the killing of fetuses. \textit{Id.}
III. ENCOURAGING JURY NULLIFICATION

There has been a recent increase in popular support for battered women. Congress, for example, as part of The Violent Crime Control and Law Enforcement Act of 1994, passed the $1.8 billion Violence Against Women Act. The Violence Against Women Act has a wide variety of provisions, including an increase in money for battered women’s shelters and other services and a recommendation that states allow evidence of BWS in criminal trials.

In Washington state, a statute was passed to help battered women who kill their abusers. The statute allows judges to give more lenient sentences if the killers or their children were continually abused by their abuser/victim and applies to persons convicted before and after July of 1989. Ironically, four men, but only one woman, are in a position to benefit from the law because it does not mention aggravated murder, the charge against many of the women whom the statute was intended to help.

Similarly, another indicator of popular support, clemency for battered women who kill their abusers, is on the rise. The

162. Doris Sue Wong, D.A. Pushes Bill to Help Abuse Victims Move Out, BOSTON GLOBE, Mar. 22, 1994, at 56 (discussing recent legislative support for battered women, particularly in Norfolk County, Massachusetts where legislators supported a program to provide housing vouchers to victims of domestic violence in order to supply them with a safe haven from their abusers).

163. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C.A. ch. 136, subch. III (appropriating funds for several programs designed to aide women who have been victimized by violence). Appropriations include $6 million to be allocated over three years (1996-98) to help reduce stalker and domestic violence, as well as $600,000 for fiscal year 1996, to support programs designed to educate and train judges and court personnel in state courts about domestic violence and its effects).

164. See Megan Rosenfeld, Mercy for a Cuckolded Killer, WASH. POST, Oct. 19, 1994, at C1 (explaining that The Act was passed in part to educate judges about domestic violence and its consequences); see also Don Colburn, Domestic Violence: AMA President Decries ‘A Major Public Health Problem,’ WASH. POST, June 28, 1994, at Z10 (explaining that the funds will be used to help prosecute, treat and prevent domestic violence).

165. See Colburn supra note 164 (discussing a bill sponsored by Rep. Connie Morella (R-Md.) which provides, among other things, funds for training seminars for judges who are unfamiliar with or insensitive to violence against women); see also HARVARD LAW REVIEW ASSOCIATION, supra note 19, at 1595 (explaining that some funding from the Act would be used to provide training materials to assist defense attorneys and defendants in the use of BWS testimony).

166. WASH. REV. CODE ANN. § 9.95.045(1)(a) (West 1993).

167. See Nancy Montgomery, 'Abused Mates' Law Has Ironic Result, SEATTLE TIMES, Apr. 22, 1994, at A1 (pointing out that while legislators believed between 12 and 25 women inmates might qualify for hearings under the law, only three actually qualified).

168. Id. (describing how the hearings of two women convicted of aggravated murder were canceled because the law precludes sentence reductions by anyone for any reason).

169. See Madden, supra note 9, at 1 (discussing how, in California, a large number of battered women in prisons for killing their abusers have petitioned Governor Pete Wilson for pardon or commutation of their sentences). Clemency is a movement whereby imprisoned women petition the governor of the state in which they are incarcerated for pardon or for commutation of their prison sentences to time already served. Id.
clemency movement has met with varying degrees of success. The first politicians to grant clemency for battered women were Governor Richard Celeste of Ohio, who granted clemency to twenty-six women, and Maryland’s Governor William Schaefer, who commuted the sentences of ten women. Governor Schaefer recently stated that the release of every one of these women “has worked out well.”

In California, on the other hand, of the 100 women who sought early release from Governor Pete Wilson and the Parole Board because of abuse, only one was granted clemency. She served eight and a half years for a second degree murder conviction. Governor Wilson’s reaction to the petitions was that a history of abuse cannot excuse “coldblooded, premeditated murder.”

In Illinois, Governor Jim Edgar recently pardoned four women who were convicted of killing their abusers. He rejected the clemency applications of another eight. The polarization of opinion on clemency is evidenced by the statements of two politicians. The Arizona State Attorney General said, “[t]his is not the normal situation where a woman can turn to law enforcement and expect help. A police officer cannot stand guard at your house. It’s an unusual situation in our society where people who are defenseless are left to fend for themselves.” But Arizona State Representative

170. See Creno, supra note 1 (noting that several states have chosen to review the cases of battered women and grant clemency to some).
171. See Creno, supra note 1 (noting that Governor Celeste granted clemency petitions in December of 1990 and, thereafter, Governor Schaefer reduced the sentences of ten women in Maryland).
172. See Kent Jenkins, Jr., Morella Bill Would Provide Aid for Defense of Battered Spouses, WASH. POST, Aug. 7, 1992, at B3 (describing how Gail Hawkins, a woman who stabbed her abusive husband and served ten years in prison before her sentence was commuted, has been successfully employed as a counselor at a battered women’s shelter since her release).
173. See Virginia Ellis, Battered Wife Who Killed Husband Gets Early Release, L.A. TIMES, Aug. 24, 1994, at Al (noting that Brenda Avis endured nearly ten years of severe beatings and mental abuse, including death threats, which were described to Governor Wilson by family members, including the batterer’s father); see also BLACK'S LAW DIcTIoNARY 173, 768 (6th ed. 1991) (defining pardon as an act of grace from a governing power which mitigates the punishment the law demands for the offense. A pardon releases the offender from the entire punishment prescribed whereas clemency results in a lesser punishment for the offense.).
174. Ellis, supra note 173, at Al.
175. Ken Chavez, Battered Women Denied Clemency, SACRAMENTO BEE, May 29, 1993, at A1 (commenting on his denial of clemency to more than a dozen female inmates claiming to be victims of battered women’s syndrome, Governor Wilson said “society simply cannot condone preventative murder or homicidal self-help”).
176. Bowman, supra note 64 (describing the release of four women who suffered years of severe physical abuse and noting that none of these women had any prior criminal convictions).
177. Bowman, supra note 64.
178. Creno, supra note 1 (discussing a proposal in Arizona to set up a special board to review the sentences of battered women who have killed. Of the seven women serving time for killing their abusers, four were convicted of second degree and three of first degree murder. Their sentences range from thirteen years to twenty-five years to life.).
Tom Smith (R) asserts, "I know I'm not a woman, but I have a hard
time understanding someone sitting there year after year and taking
abuse." Clemency is but one response to the problem of battered
women who kill their abusers. It has attracted support in only a few
states and affects very few women. Of the women clemency
does effect, many have already spent considerable time in jail.

Another reaction reflecting the community's sense of morality and
justice—the sense that a battered woman may be morally justified in
killing her abuser—is jury nullification. The power of the jury is
evident in the case of Judy McBride, discussed supra in Section I.
McBride arranged for a friend to 'hurt' her batterer and he was
found stabbed thirty-eight times. A journalist covering the story
said, "[the jury] hated her . . . . They were very unforgiving. They
somehow didn't buy the battered woman thing . . . . [C]rows would
be waiting at the courthouse door to yell things like, 'I hope you
hang.' In 1982, a jury convicted McBride of conspiracy to kill
her husband and sentenced her to life in prison with no opportunity
for parole. Rather than hate, as manifested by this community
through its jury, the justice system should urge compassion for
battered women who kill. Such compassion should be manifested in
the form of jury nullification.

The Supreme Court observed that "'one of the most important
functions any jury can perform' in exercising its discretion . . . is 'to
maintain a link between contemporary community values and the
penal system.'" Jury nullification is "not a 'defense' recognized

179. Creno, supra note 1.
180. See Madden, supra note 9, at 5 n.14 (stating that clemency has been considered for
battered women in Ohio, Maryland, Illinois, Florida, Texas, Michigan, New Hampshire, New
York, Iowa, Washington, Nebraska, Louisiana, Tennessee, California and New Jersey).
181. Madden, supra note 9, at 6.
182. See Barnet, supra note 12, at 40 (defining jury nullification as the power of a jury in a
criminal trial to judge the facts of a case and the propriety of applying the law set forth by the
court); see also Korrach, infra note 187, at 131 (defining jury nullification). Jury nullification
originated in England in 1544 when Sir Nicholas Throckmorten, charged with high treason, was
acquitted by the jury. Id. at 133. In the United States, jury nullification was common during
the early nineteenth century in prosecutions for seditious statements. Jury nullification also
proved to be an important tool for abolitionists in antebellum America. Id. at 134.
183. Rovner, supra note 16 (noting that McBride arranged for a male boarder in her home
to kill her abuser husband).
184. Rovner, supra note 16.
185. Rovner, supra note 16.
391 U.S. 510, 519 (1968)). The Woodson court noted that "American juries have persistently
refused to convict a significant portion of persons charged with first degree murder of that
offense under mandatory death penalty statutes." Id. at 302. The Court cited Witherspoon to
demonstrate that even juries with sentencing discretion do not impose the death penalty with
great frequency in first degree murder cases. Id. at 295.
by the law, but is rather a mechanism by which a jury, acting as the community conscience, effectively is permitted to disregard the letter of the law by determining that applying it to a particular case would not be justified."\(^{187}\)

Juries, while finding that a defendant is technically guilty, may nonetheless refuse to convict. For example, jurors may be willing to regard acts that are excessive or punitive as self-defense.\(^{188}\) Some call this an expansive view of self-defense, others call it the popular acceptance of vigilantism.\(^{189}\) Whatever the label, juries should be encouraged to refuse to convict when law and justice conflict. That is, they should be encouraged to refuse to convict a battered woman who kills her batterer, especially when BWS evidence and self-defense are unavailable to the defendant.

One problem with jury nullification is that juries do not know that they have the power to reject the law as unjust.\(^{190}\) While jury nullification is both a common law and a Constitutional right,\(^{191}\) only Maryland and Indiana instruct the jury that it is free to reject the judge's advice on the law.\(^{192}\) Proponents of a jury nullification instruction argue that "failing to inform the jury of its power to nullify usurps its basic function—that is, to serve as the conscience of the community and to safeguard the individual citizen from unfair laws and oppressive prosecutorial practices."\(^{193}\) Critics of nullification, on the other hand, contend that a nullification instruction would lead to chaos and anarchy.\(^{194}\)

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187. Robert E. Korrach & Michael J. Davidson, Jury Nullification: A Call For Justice or an Invitation to Anarchy, 139 MILITARY L. REV. 131 (1993) (citing United States v. Dougherty, 473 F.2d 1113, 1140 (D.C. Cir. 1972) as holding that refusal to instruct the jury of its right to acquit without regard to the law and evidence was not improper).

188. Grayson, supra note 4, at 24 (drawing on the Goetz incident as an example of an excessive act defined by the jury as self-defense).


190. Korrach, supra note 187, at 139.


192. Korrach, supra note 187, at 139 n.58 (referring to V. HANS & N. VIDMAR, JUDGING THE JURY 21, 157 1986) which states that judges in Maryland and Indiana instruct the jury that it is free to reject the judge's advice on the law. But see Walker v. Indiana, 445 N.E.2d 571 (Ind. 1983) (holding that a jury does not possess the power of nullification under the laws of Indiana).

193. Korrach, supra note 187, at 139 n.58.

194. Korrach, supra note 187, at 143 (citing California v. Fernandez, 26 Cal. App. 4th 710, 715 (1994) which held that the trial court was not required to advise the jury of its power to nullify, and stating: "to give every juror the option of disregarding with impunity any law personally judged morally untenable is akin to telling all drivers to drive as fast as they think appropriate without posting a limit as a departure. It risks, if not chaos, at least caprice."
Fears of juries running rampant are excessive. When carefully instructed, a jury should still act reasonably and with full respect for the law and its own power.¹⁹⁵ Courts should have faith in a jury’s “sense of justice.”¹⁹⁶ Faith in the jury reflects that the jury is the final arbiter of justice, that the “law, in the last analysis, must reflect the general community sense of justice.”¹⁹⁷

One alternative for those who worry that a nullification instruction would carry the judge’s imprimatur and consequently great weight with the jury, is permitting attorneys to argue nullification in closing arguments.¹⁹⁸ Most courts, believing it to be a threat to the law, do not permit attorneys to encourage juries to violate their oaths to follow a court’s instructions.¹⁹⁹ Technically, however, attorneys are allowed to argue both the evidence and any conclusions to be drawn from the evidence.²⁰⁰ One conclusion logically drawn from the evidence may be that convicting the defendant would be unjust.²⁰¹ Moreover, if the right of jury nullification is part of the law, then attorneys should be able to argue it. In other words, they should not be restricted to arguing only the law of the crime with which their client is charged.²⁰² Whether in the form of an instruction from the judge or an attorney’s closing argument, juries should be informed of their nullification power, especially in cases where battered women have killed their abusers. While a battered woman may have technically violated the law, the jury should be permitted to reflect the

¹⁹⁵. See Korrach, supra note 187, at 139 n. 56 (citing Kansas’ former Pattern Instruction 51.03 which stated: “[a]ccordingly, you are entitled to act upon your conscientious feeling about what is a fair result in this case and acquit the defendant if you believe that justice requires such a result. Exercise your judgment without passion or prejudice, but with honesty and understanding. Give respectful regard to my statements of the law for what help they may be in arriving at a conscientious determination of justice in this case. That is your highest duty as a public body and as officers of this court.”).

¹⁹⁶. See New Jersey v. Maldonado, 645 A.2d 1165, 1181 (N.J. 1994) (reflecting the court’s faith in the jury’s ability to understand and apply a portion of a strict liability statute which held manufacturers and distributors of certain dangerous controlled substances strictly liable when death resulted from ingestion of those substances).

¹⁹⁷. Id. at 1181 (quoting Frances B. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 70 (1933)).

¹⁹⁸. See Korrach, supra note 187, at 148 (describing cases wherein defense counsel appealed to the jury in closing to ignore the judge’s instructions and use their conscience and understanding in judging the defendant).


²⁰⁰. Korrach, supra note 187, at 149 (citing MODERN CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(C)(4) and 75 Am. Jur. 2d Trial Sec. 632, at 233-34 (1991) as standing for the proposition that during closing argument counsel may argue any inferences logically drawn from the evidence).

²⁰¹. Korrach, supra note 187, at 149.

²⁰². Korrach, supra note 187, at 149.
community's conscience and the possible belief that the battered woman may have been morally justified in her action. This is not to say that all juries must absolve all battered women who kill. Rather, juries must be informed of, and allowed to exercise, their prerogative to choose justice over the law.

Encouraging jury nullification for battered women is not a radical proposal. Indeed, there are signs that juries have been more lenient with victims of abuse. The justice system, however, through instruction or argument to the jury, should encourage juries to act as the moral reflection of the community and acquit battered women who kill.

IV. CONCLUSION

Carole Herriman's story, mentioned at the beginning of this paper, would have ended differently had the jury been allowed to nullify the law. Instead of serving a twenty-five year to life sentence for killing the man who terrorized her for years, she would have been acquitted by the jury. Rather than being judged a villain, Herriman would have been perceived as a vigilante punishing a deserving felon.

If one is worried that the preceding suggestions will cause large numbers of women to "get-off," it is important to note that fewer than one percent of women surveyed in a Harris Poll claimed to have been beaten up, much less choked or threatened by their partners with a weapon. Thus, the number of people affected by extreme violence, the type of violence that leads women to kill their abusers, may not be very high. But just because the numbers may be relatively low does not mean the problem is not severe and a solution is not important for the women who are the victims of vicious abuse. Thus, in the exceptional instances where a battered woman kills her abuser and BWS evidence is somehow legally insufficient, the jury, as a reflection of the community's sense of morality and outrage, should be encouraged to acquit.


204. See Brott, supra note 4 (arguing that statistics regarding wife abuse are greatly exaggerated and used irresponsibly, and citing The National Family Violence Survey, which found that of the sixteen percent of families that do experience violence, only three to four percent engage in severe violence).