J. L. AUSTIN, A PLEA FOR EXCUSES

57 Proceedings Aristotelian Socy. 1, 2-3 (1956-1957)

One way of [defending conduct] is to admit flatly that he, *X*, did do that very thing, *A*, but to argue that it was a good thing, or the right or sensible thing, or a permissible thing to do, either in general or at least in the special circumstances of the occasion. To take this line is to *justify* the action, to give reasons for doing it . . .

A different way of going about it is to admit that it wasn't a good thing to have done, but to argue that it is not quite fair or correct to say *baldly* "*X* did *A*." We may say it isn't fair just to say *X* did it; perhaps he was under somebody's influence, or was nudged. Or, it isn't fair to say baldly he *did A;* it may have been partly accidental or an unintentional slip. Or, it isn't fair to say he did simply *A* — he was really doing something quite different and *A* was only incidental, or he was looking at the whole thing quite differently. Naturally these arguments can be combined or overlap or run into each other.

In the one defence, briefly, we accept responsibility but deny that it was bad: in the other, we admit that it was bad but don't accept full, or even any, responsibility.

By and large, justifications can be kept distinct from excuses. . . . But the two certainly can be confused, and can *seem* to go very near to each other, even if they do not perhaps actually do so. [W]hen we plead, say, provocation, there is genuine uncertainty or ambiguity as to what we mean — is *he* partly responsible, because he roused a violent impulse or passion in me, so that it wasn't truly or merely me acting "of my own accord" (excuse)? Or is it rather that, he having done me such injury, I was entitled to retaliate (justification)? . . . But that the defences I have for convenience labelled "justification" and "excuse" are in principle distinct can scarcely be doubted.

B. PRINCIPLES OF JUSTIFICATION

1. *Protection of Life and Person*

UNITED STATES v. PETERSON

United States Court of Appeals, District of Columbia Circuit
483 F.2d 1222 (1973)

ROBINSON, J. . . . Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone's time, . . . But "[t]he law of self-defense is a law of necessity"; the right of self-defense arises only when the necessity begins, and equally ends with the necessity; and never must the necessity be greater than when the force employed defensively is deadly. The "necessity must bear all semblance of reality, and appear to admit of no other alternative, before taking life will be justifiable as excusable." Hinged on the exigencies of self-preservation, the doctrine of homicidal self-defense emerges from the body of the criminal law as a limited though important exception to legal outlawry of the arena of self-help in the settlement of potentially fatal personal conflicts.

So it is that necessity is the pervasive theme of the well defined conditions which the law imposes on the right to kill or maim in self-defense. There must have been a threat, actual or apparent, of the use of deadly force against the defender. The threat must have been unlawful and immediate. The defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save himself therefrom. These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances. It is clear that no less than a concurrence of these elements will suffice.

PEOPLE v. GOETZ

New York Court of Appeals
68 N.Y.2d 96, 497 N.E.2d 41 (1986)

WACHTLER, C.J. A Grand Jury has indicted defendant on attempted murder, assault, and other charges for having shot and wounded four youths on a New York City subway train after one or two of the youths approached him and asked for $5. The lower courts, concluding that the prosecutor's charge to the Grand Jury on the defense of justification was erroneous, have dismissed the attempted murder, assault and weapons possession charges. We now reverse and reinstate all counts of the indictment.

The precise circumstances of the incident giving rise to the charges against defendant are disputed, and ultimately it will be for a trial jury to determine what occurred. We feel it necessary, however, to provide some factual background to properly frame the legal issues before us. Accordingly, we have summarized the facts as they appear from the evidence before the Grand Jury. We stress, however, that we do not purport to reach any conclusions or holding as to exactly what transpired or whether defendant is blameworthy. The credibility of witnesses and the reasonableness of defendant's conduct are to be resolved by the trial jury.

On Saturday afternoon, December 22, 1984, Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen boarded an IRT express subway train in The Bronx and headed south toward lower Manhattan. The four youths rode together in the rear portion of the seventh car of the train. Two of the four, Ramseur and Cabey, had screwdrivers inside their coats, which they said were to be used to break into the coin boxes of video machines.

Defendant Bernhard Goetz boarded this subway train at 14th Street in Manhattan and sat down on a bench towards the rear section of the same car occupied by the four youths. Goetz was carrying an unlicensed .38 caliber pistol loaded with five rounds of ammunition in a waistband holster. The train left the 14th Street station and headed towards Chambers Street.

It appears from the evidence before the Grand Jury that Canty approached Goetz, possibly with Allen beside him, and stated "give me five dollars." Neither Canty nor any of the other youths displayed a weapon. Goetz responded by standing up, pulling out his handgun and firing four shots in rapid succession. The first shot hit Canty in the chest; the second struck Allen in the back; the third went through Ramseur's arm and into his left side; the fourth was fired at Cabey, who apparently was then standing in the corner of the car, but missed, deflect-

ing instead off of a wall of the conductor's cab. After Goetz briefly surveyed the scene around him, he fired another shot at Cabey, who then was sitting on the end bench of the car. The bullet entered the rear of Cabey's side and severed his spinal cord.

All but two of the other passengers fled the car when, or immediately after, the shots were fired. The conductor, who had been in the next car, heard the shots and instructed the motorman to radio for emergency assistance. The conductor then went into the car where the shooting occurred and saw Goetz sitting on a bench, the injured youths lying on the floor or slumped against a seat, and two women who had apparently taken cover, also lying on the floor. Goetz told the conductor that the four youths had tried to rob him.

While the conductor was aiding the youths, Goetz headed towards the front of the car. The train had stopped just before the Chambers Street station and Goetz went between two of the cars, jumped onto the tracks and fled. Police and ambulance crews arrived at the scene shortly thereafter. Ramseur and Canty, initially listed in critical condition, have fully recovered. Cabey remains paralyzed, and has suffered some degree of brain damage.

On December 31, 1984, Goetz surrendered to police in Concord, New Hampshire. . . . [A]fter receiving *Miranda* warnings, he made two lengthy statements, both of which were tape recorded with his permission. In the statements . . . Goetz admitted that he had been illegally carrying a handgun in New York City for three years. He stated that he had first purchased a gun in 1981 after he had been injured in a mugging. Goetz also revealed that twice between 1981 and 1984 he had successfully warded off assailants simply by displaying the pistol.

According to Goetz's statement, the first contact he had with the four youths came when Canty, sitting or lying on the bench across from him, asked "how are you," to which he replied "fine." Shortly thereafter, Canty, followed by one of the other youths, walked over to the defendant and stood to his left, while the other two youths remained to his right, in the corner of the subway car. Canty then said "give me five dollars." Goetz stated that he knew from the smile on Canty's face that they wanted to "play with me." Although he was certain that none of the youths had a gun, he had a fear, based on prior experiences, of being "maimed."

Goetz then established "a pattern of fire," deciding specifically to fire from left to right. His stated intention at that point was to "murder [the four youths], to hurt them, to make them suffer as much as possible." When Canty again requested money, Goetz stood up, drew his weapon, and began firing, aiming for the center of the body of each of the four. Goetz recalled that the first two he shot "tried to run through the crowd [but] they had nowhere to run." Goetz then turned to his right to "go after the other two." One of these two "tried to run through the wall of the train, but . . . he had nowhere to go." The other youth (Cabey) "tried pretending that he wasn't with [the others]" by standing still, holding on to one of the subway hand straps, and not looking at Goetz. Goetz nonetheless fired his fourth shot at him. He then ran back to the first two youths to make sure they had been "taken care of." Seeing that they had both been shot, he spun back to check on the latter two. Goetz noticed that the youth who had been standing still was now sitting on a bench and seemed unhurt. As Goetz told the police, "I said '[y]ou seem to be all right, here's another,'" and he then fired the shot which severed Cabey's spinal cord. Goetz added that "if I was a little more under self-control . . . I would have put the barrel against his forehead and

fired." He also admitted that "if I had had more [bullets], I would have shot them again, and again, and again." . . .

Penal Law article 35 recognizes the defense of justification, which "permits the use of force under certain circumstances." One such set of circumstances pertains to the use of force in defense of a person, encompassing both self-defense and defense of a third person. Penal Law §35.15 (1) sets forth the general principles governing all such uses of force: "[a] person may . . . use physical force upon another person when and to the extent he *reasonably believes* such to be necessary to defend himself or a third person from what he *reasonably believes* to be the use or imminent use of unlawful physical force by such other person" (emphasis added).

Section 35.15 (2) sets forth further limitations on these general principles with respect to the use of "deadly physical force": "A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless (a) He *reasonably believes* that such other person is using or about to use deadly physical force . . . or (b) He *reasonably believes* that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery" (emphasis added). . . .

Because the evidence before the second Grand Jury included statements by Goetz that he acted to protect himself from being maimed or to avert a robbery, the prosecutor correctly chose to charge the justification defense in section 35.15 to the Grand Jury. The prosecutor properly instructed the grand jurors to consider whether the use of deadly physical force was justified to prevent either serious physical injury or a robbery, and, in doing so, to separately analyze the defense with respect to each of the charges. He elaborated upon the prerequisites for the use of deadly physical force essentially by reading or paraphrasing the language in Penal Law §35.15. The defense does not contend that he committed any error in this portion of the charge.

When the prosecutor had completed his charge, one of the grand jurors asked for clarification of the term "reasonably believes." The prosecutor responded by instructing the grand jurors that they were to consider the circumstances of the incident and determine "whether the defendant's conduct was that of a reasonable man in the defendant's situation." It is this response by the prosecutor — and specifically his use of "a reasonable man" — which is the basis for the dismissal of the charges by the lower courts. As expressed repeatedly in the Appellate Division's plurality opinion, because section 35.15 uses the term "*he* reasonably believes," the appropriate test, according to that court, is whether a defendant's beliefs and reactions were "reasonable to *him*." Under that reading of the statute, a jury which believed a defendant's testimony that he felt that his own actions were warranted and were reasonable would have to acquit him, regardless of what anyone else in defendant's situation might have concluded. Such an interpretation defies the ordinary meaning and significance of the term "reasonably" in a statute, and misconstrues the clear intent of the Legislature, in enacting section 35.15, to retain an objective element as part of any provision authorizing the use of deadly physical force.

Penal statutes in New York have long codified the right recognized at common law to use deadly physical force, under appropriate circumstances, in self-defense. These provisions have never required that an actor's belief as to the intention of another person to inflict serious injury be correct in order for the use

of deadly force to be justified, but they have uniformly required that the belief comport with an objective notion of reasonableness. . . .

In 1961 the Legislature established a Commission to undertake a complete revision of the Penal Law and the Criminal Code. The impetus for the decision to update the Penal Law came in part from the drafting of the Model Penal Code by the American Law Institute, as well as from the fact that the existing law was poorly organized and in many aspects antiquated. . . . While using the Model Penal Code provisions on justification as general guidelines . . . the drafters of the new Penal Law did not simply adopt them verbatim.

The provisions of the Model Penal Code with respect to the use of deadly force in self-defense reflect the position of its drafters that any culpability which arises from a mistaken belief in the need to use such force should be no greater than the culpability such a mistake would give rise to if it were made with respect to an element of a crime. Accordingly, under Model Penal Code §3.04 (2) (b), a defendant charged with murder (or attempted murder) need only show that he "*believe[d]* that [the use of deadly force] was necessary to protect himself against death, serious bodily injury, kidnapping or [forcible] sexual intercourse" to prevail on a self-defense claim (emphasis added). If the defendant's belief was wrong, and was recklessly, or negligently formed, however, he may be convicted of the type of homicide charge requiring only a reckless or negligent, as the case may be, criminal intent (see, Model Penal Code §3.09 . . .).

New York did not follow the Model Penal Code's equation of a mistake as to the need to use deadly force with a mistake negating an element of a crime, choosing instead to use a single statutory section which would provide either a complete defense or no defense at all to a defendant charged with any crime involving the use of deadly force. The drafters of the new Penal Law adopted in large part the structure and content of Model Penal Code §3.04, but, crucially, inserted the word "reasonably" before "believes."

The plurality below agreed with defendant's argument that the change in the statutory language from "reasonable ground," used prior to 1965, to "he reasonably believes" in Penal Law §35.15 evinced a legislative intent to conform to the subjective standard contained in Model Penal Code §3.04. This argument, however, ignores the plain significance of the insertion of "reasonably." Had the drafters of section 35.15 wanted to adopt a subjective standard, they could have simply used the language of section 3.04. "Believes" by itself requires an honest or genuine belief by a defendant as to the need to use deadly force. Interpreting the statute to require only that the defendant's belief was "reasonable to *him*," as done by the plurality below, would hardly be different from requiring only a genuine belief; in either case, the defendant's own perceptions could completely exonerate him from any criminal liability.

We cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. . . .

We can only conclude that the Legislature retained a reasonableness requirement to avoid giving license for such actions. . . .

Goetz also argues that the introduction of an objective element will preclude a jury from considering factors such as the prior experiences of a given actor and thus, require it to make a determination of "reasonableness" without regard to the actual circumstances of a particular incident. This argument, however, falsely presupposes that an objective standard means that the background and other relevant characteristics of a particular actor must be ignored. To the contrary, we have frequently noted that a determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation." Such terms encompass more than the physical movements of the potential assailant. [T]hese terms include any relevant knowledge the defendant had about that person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances. . . .

The prosecutor's instruction to the second Grand Jury that it had to determine whether, under the circumstances, Goetz's conduct was that of a reasonable man in his situation was thus essentially an accurate charge. . . .

Accordingly, the order of the Appellate Division should be reversed, and the dismissed counts of the indictment reinstated.

NOTES ON THE GOETZ *CASE*

The jury subsequently convicted Goetz on the charge of carrying an unlicensed concealed weapon, but acquitted him on all other counts. N.Y. Times, June 18, 1987, at B6. He was sentenced on the weapons count to one year in jail, with the possibility of release after 60 days. N.Y. Times, Jan. 14, 1989, at 1.

The *Goetz* case became a cause célèbre. Two book-length studies appeared. George Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial (1988); Lilian Rubin, Quiet Rage: Bernie Goetz in a Time of Madness (1988). Consider the following reactions.

Joseph Berger, Goetz Case: *Commentary on Nature of Urban Life, N.Y. Times, June 18, 1987, at B6:* The jury's decision in the Bernhard Goetz case seemed to be a verdict on the nature of contemporary urban life, churning up issues of vulnerability, rage and racial tensions that lie just beneath the surface.

The acquittal of Mr. Goetz on charges of attempted murder broke no dramatic new legal ground, in the opinion of legal experts. But in the context of the national debate on the balance between self-defense and social order, it appeared to widen the circumstances that justify the use of deadly force. . . .

There was almost no evidence presented that any of the four youths who approached Mr. Goetz had actually tried to rob him before he shot them. Thus the jury, by rejecting the charge of attempted murder, seemed to be saying that in the nervousness that courses through much of urban experience, from riding the subway at night to walking a darkened street, such evidence may not matter all that much. Perceptions, the jury suggested, can attain the power of facts.

"The jury decided that no man is reasonable when he's surrounded by four

thugs," said Alan Dershowitz, professor of law at Harvard Law School. "It's hard to pay attention to lines drawn by academics in a classroom."

Mr. Dershowitz, noting that jurors often nullify self-defense standards set by the law, said he believed that what Mr. Goetz did was by definition illegal in New York State and every other state. It is illegal, he said, to shoot a person after the immediate danger has passed. "It doesn't change the law," he said of the verdict. "It may show the law is somewhat out of line with people's passions today."

The jury's decision also seemed to be a back-handed commentary on the effectiveness of the police and the courts. Burt Neuborne, a professor at New York University Law School, said, "The jurors had so little faith in the criminal justice system, both to protect us and to bring the guilty to justice, that they were willing to tolerate a degree of vigilante behavior that I think rationally cannot be justified." . . .

Crime has become such a daily feature of urban life that several of the jurors had themselves been victims. It is often on people's minds, determining where they live, how and when they travel, and how they spend their time.

The jury seemed to be saying that the fear of crime, in someone who has been a previous mugging victim like Mr. Goetz, can weigh so heavily on one's emotions that it can lead to conduct that might normally be considered wrongful. The jury in the Goetz case apparently believed there was not enough evidence to show that Mr. Goetz acted out of any motive other than fear. . . .

Underlying the issue of crime in this case was the issue of race. Scholars such as Dr. Kenneth B. Clark, professor emeritus of psychology at the City University of New York, have expressed doubt that Mr. Goetz would have shot four white youths asking him for money.

However, Marvin E. Wolfgang, a criminologist at the University of Pennsylvania, said that perceptions about who is more likely to commit a crime have some statistical basis. The rates of crime for four violent offenses — homicide, rape, robbery and aggravated assault — are at least ten times as high for blacks as they are for whites, he said.

"The expectation that four young black males are going to do you harm is indeed greater than four young whites," he said. "I can understand the black position that this is a racist attitude, but it's not unrealistic."

It is possible that jurors have absorbed such racially based perceptions about who is going to commit a crime. Elijah Anderson, a black sociologist at the University of Pennsylvania who spent three years studying street-corner life in a tough, black neighborhood in Philadelphia, said law-abiding people, black and white, have a distinctive way of relating "to people they assume to be members of the black underclass."

People, he said, "can be very intimidated by young black males or people who seem to represent this so-called underclass by their dress or comportment, very intimidated." . . .

Because it raises such issues, the jury verdict may pose some hard questions for the American public to deal with. Will some New Yorkers come to feel that they can now make hair-trigger assumptions about the character of people who somehow threaten them, and if they have a gun, use it in self-defense? Will blacks have to fear that if they look at someone the wrong way or dress too casually they may be mistaken for criminals? . . .

Stephen L. Carter, When Victims Happen to be Black, 97 Yale L.J. 420, 425-26 (1988):
Shortly after a New York jury acquitted Bernhard Goetz [a cartoon appeared of a] post-Goetz subway car: two elderly women seated side-by-side in a car empty of other passengers, a screwdriver lying nearby, and outside, a crowd of people, eyes widened with fear, running away from the car. One of the women says to the other: 'Heavens! . . . I was just reaching for my lipstick.'

[T]he artist managed . . . to capture the shuddering tensions apparent in public reactions to the Goetz incident and the verdict in his trial, and much more besides. Mr. Goetz's public — those who declared him a hero from the first — can find in this cartoon a portrait of salvation of a sort. The people fleeing are thugs and toughs, the anonymous yet ubiquitous individuals who frequent New York's subway trains and cast terror with a glance. . . .

[T]he story of the subway car as perceived by Mr. Goetz's public — the choice of transgressor, the choice of victim — might have been starkly different had Mr. Goetz been black and the others white, and had Mr. Goetz cried 'self-defense' while the others insisted that when he pulled the gun, they had been minding their own business. For in that event, a public with no real knowledge of the facts other than the stories told by the participants and the skin colors of the shooter and his victims would not have raced at once to Mr. Goetz's defense. . . .

Against this background, consider once more the cartoon [just described], this time from the point of view of Mr. Goetz's critics, the ones who have condemned the verdict as opening the hunting season on young black men. Now the people fleeing the car are frightened innocents, victims themselves, probably black or brown, who can no longer be certain which gesture of impatience or annoyance someone else will take as a threat, who are now loathe to ask directions or change of a dollar for fear of a fatal misinterpretation. The elderly women left alone in the car are . . . aging, they are women, they are white. . . . And because in society's eyes they are the archetypal victims, were they to shoot and to testify to their fear, their story would be readily believed; the tale told by their tormenters would surely be doubted. . . .

These law-abiding people of color who might feel obliged to flee the subway car are not victims in the [traditional] sense, for there are no transgressors angrily forcing them out of the subway car. Yet if they nevertheless choose flight, it does no good to tell them that they are not victims because there are no transgressors who might be punished for causing their fear. The dominant culture is unable to rationalize that fear within its vision of victimhood, but for the frightened, fear is itself a truth. Because the dominant culture constructs victimhood in a way that denies this truth, those who see in the lionization of Bernhard Goetz a reason for terror, rather than a cause for celebration, might offer another perspective on what should count as victimhood.

Jody D. Armour, Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes, 46 Stan. L. Rev. 781, 787-788, 790, 792, 794, 795 (1994):
The Reasonable Racist asserts that, even if his belief that blacks are "prone to violence" stems from pure prejudice, he should be excused for considering the victim's race before using force because most similarly situated Americans would have done so as well. For inasmuch as the criminal justice system operates on the

assumption that "blame is reserved for the (statistically) deviant,"[18] an individual racist in a racist society cannot be condemned for an expression of human frailty as ubiquitous as racism. . . .

The flaw in the Reasonable Racist's self-defense claim lies in his primary assumption that the sole objective of criminal law is to punish those who deviate from statistically defined norms. For even if the "typical" American believes that blacks' "propensity" toward violence justifies a quicker and more forceful response when a suspected assailant is black, this fact is legally significant only if the law defines *reasonable* beliefs as *typical* beliefs. The reasonableness inquiry, however, extends beyond typicality to consider the social interests implicated in a given situation. Hence not all "typical" beliefs are per se reasonable. . . . If we accept that racial discrimination violates contemporary social morality, then an actor's failure to overcome his racism for the sake of another's health, safety, and personal dignity is blameworthy and thus unreasonable, independent of whether or not it is "typical." . . .

A second argument which a defendant may advance to justify acting on race-based assumptions is that, given statistics demonstrating blacks' disproportionate involvement in crime, it is reasonable to perceive a greater threat from a black person than a white person. . . .

Although biases in the criminal justice system exaggerate the differences in rates of violent crime by race, it may, tragically, still be true that blacks commit a disproportionate number of crimes. Given that the blight of institutional racism continues to disproportionately limit the life chances of African-Americans, and that desperate circumstances increase the likelihood that individuals caught in this web may turn to desperate undertakings, such a disparity, if it exists, should sadden but not surprise us. . . .

To the extent that socioeconomic status explains the overinvolvement of blacks in robbery and assault (assuming that there is, in fact, such overinvolvement), race serves merely as a proxy for socioeconomic status. But if race is a proxy for socioeconomic factors, then race loses its predictive value when one controls for those factors. . . .

The use of race-based generalizations in the self-defense context has an especially grievous effect: . . . Ultimately, race-based evidence of reasonableness impairs the capacity of jurors to rationally and fairly strike a balance between the costs of waiting (increased risk for the person who perceives imminent attack) and the costs of not waiting (injury or death to the immediate victim, exclusion of blacks from core community activities, and, ultimately, reduction of individuals to predictable objects). In fact, such evidence may be so effective at tapping the racism — conscious or unconscious — which has been proven to infect jury deliberations, that it should arguably be excluded under the "more prejudicial than probative" standard of most states' evidence codes, of which the provisions in section 403 of the Federal Rules of Evidence are illustrative.[55]

18. Mark Kelman, Reasonable Evidence of Reasonableness, 17 Critical Inquiry 798, 801 (1991).

55. See Fed. R. Evid. 403. Rule 403 reads, in relevant part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."

For exploration of the juror impact of stereotypes about African-Americans, as well as widely held stereotypes about Asian-Americans and Latinos, see Cynthia Kwei Yung Lee, Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 Minn. L. Rev. 367, 402-452 (1996).

NOTES ON REASONABLENESS

1. A subjective test? Is the conventional position requiring that the defendant's defensive action must be reasonable preferable to a wholly subjective rule? Professor Glanville Williams advanced the following argument in behalf of a subjective view (quoted in Model Penal Code and Commentaries, Comment to §3.09 at 152, n. 10 (1985)):

> The criminal law of negligence works best when it gives effect to the large number of rules of prudence which are commonly observed though not directly incorporated into the law. Such rules include the rule against pulling out on a blind corner, the rule against carrying a gun in such a way that it is pointing at another person, the rule against deliberately pointing a gun at another person, even in play, and so on. These rules are not part either of enacted or of common law, but as customary standards of behavior they become binding via the law of negligence. Are there any similar rules of behavior applicable when a person acts in self-defense or in making an arrest? It must be recollected that the injury he inflicts on the other is in itself intentional, so that the usual rules of prudence in respect to the handling of weapons are not in question. The only question is whether the defendant was negligent in arriving at the conclusion that the use of the force in question was called for. It is hard to imagine what rules of prudence could normally serve in this situation. Either the defendant is capable of drawing the inferences that a reasonable man would draw or he is not. If he is not, and he is a peace officer, his tendency to make miscalculations would certainly justify his dismissal from the police force. But there is no obvious case for the intervention of the criminal courts.
>
> The only common situation in which a person makes an unreasonable mistake in what he believes to be self-defense is when he is drunk or otherwise in an abnormal mental state. For example, a drunken person may misconstrue a gesture as an attempt to kill, and, acting under this misconception, he may take a knife and kill or nearly kill the person whom he mistakenly supposes to be an assailant. It is submitted that the solution of this problem lies in provisions directed specifically to it. There should be a specific offense of being drunk and dangerous. . . . Where the defendant is insane or feeble-minded, the problem of treatment belongs to the wider problem of insanity and feeblemindedness in the criminal law.

Consider the following critique of the reasonableness requirement. R. Restak, The Fiction of the "Reasonable Man," The Washington Post, Sunday, May 17, 1987, at C3:

> As a neurologist and neuropsychiatrist with over a decade of experience in conducting pretrial interviews of individuals who have acted violently, the "reasonable person" argument seems an illogical and outdated approach to fully understanding events such as occurred on the New York subway in December of 1984 when Bernhard Goetz shot and injured four teenagers.
>
> On the basis of what I know about the human brain I'm convinced that there are

no reasonable people under conditions in which death or severe bodily harm are believed imminent.

Deep within the brain of every reasonable person resides the limbic system: an ancient interconnected network of structures that anatomically and chemically haven't changed much over hundreds of thousands of years. We share these structures with jungle animals as well as animals that many reasonable people keep as pets. Moreover, the limbic system is capable under conditions of extreme duress of overwhelming the cerebral cortex wherein are formulated many of the reasonable person's most reasonable attributes, like interpretation, judgment and restraint.

. . . Emotions are not incidental and subsidiary to rational processes. Instead, the reasonable person, even at his or her most reasonable moments, is influenced by emotional processes. . . .

In view of what we now know of such cases, the logic of the "reasonable man" standard — in the Bernhard Goetz case or similar cases in the future — may be inherently flawed.

"We don't contend that the defendant had no cause for apprehension" said Assistant District Attorney Gregory Waples on the first day of the trial. He went on to argue that Goetz, once aroused, should have been capable of stopping himself at some point. The firing of a second shot into Darrell Cabey — after, as the prosecution has contended, the immediate threat was over — is crucial to the state's argument. "When he fired that last shot," Waples said, "beyond the slightest doubt, Cabey was seated helpless doing nothing to threaten or menace Bernhard Goetz." . . .

The prosecutor's logic is this: Once Goetz coolly discerned that he was out of danger, he should have calmed down, put away his gun and awaited the arrival of the police.

[S]uch expectations are neurologically unrealistic. Once aroused, the limbic system can become a directive force for hours, sometimes days, and can rarely be shut off like flipping a switch. The heart keeps pounding, the breathing — harsh and labored — burns in the throat; the thoughts keep churning as fear is replaced by anger and finally, murderous rage. . . .

Consider Goetz' response to the question "Did you just shoot each one of these people just once?"

Goetz: "Well, you see that's why I, that's, that's one of the things that puzzles me. . . . Because you know what you're doing, you cannot do something and not know it. I mean, how could I do it and not know it? But if you can accept this, I was out of control, and that's, you know, but that's, that's, it's true, maybe you should always be in control, but if you, if you put people in a situation where they're threatened with mayhem, several times, and then if, then if something happens, and if a person acts, turns into a vicious animal. . . . That's not the end of the shooting. That's what. . . . It's not the end. I ran back to the first two, to make sure."

Is that what a reasonable person would do under such circumstances?

Although lawyers and judges love to explore such questions, . . . I'm convinced that they're . . . products of an outmoded mentality that places an overemphasis on empty intellectualization to the exclusion of those deep and powerful emotional currents of fear, self-preservation or territoriality that can surface in any one of us and overpower the cogitations of reason.

Granted that this isn't a pretty or elegant arrangement. But as long as our brain is put together the way it is, no one should be too confident that he or she would remain completely reasonable under conditions where their life is perceived to be in imminent danger. Moreover, this critical perception of threat isn't based on rationality. It's fueled by those limbic derived emotions that have promoted the survival of our species.

Isn't it preferable therefore to face up courageously to these sometimes frightening and unpleasant realities instead of pretending that questions such as those being asked about Bernhard Goetz can be answered by courtroom speculations about how a reasonable person would have responded in his place?

To expect reasonable behavior in the face of perceived threat, terror and rage is itself a most unreasonable expectation.

Questions: (1) What would it mean for the law "to face up courageously to these . . . realities"? Is it Restak's point that the law should allow a complete defense whenever the defendant subjectively fears for his life, regardless of the circumstances?

(2) Consider Justice Holmes' oft-quoted epigram: "Detached reflection cannot be demanded in the presence of an uplifted knife." Brown v. United States, 256 U.S. 335, 343 (1921). Does the evidence of the operation of the limbic system say something different from that? Reconsider the arguments for and against criminal liability for negligence, page 434 supra.

2. Qualifications to the objective rule. As in other instances in which the law employs an objective standard, there is always the question of just how objective the standard is to be — that is, how far should features of defendant's particular situation be taken into account in determining whether the choice of defensive force was reasonable? Compare the discussion of the reasonable-provocation standard, page 420 supra, and the discussion of the definition of negligence and recklessness, page 434 supra. Recall the Model Penal Code standards (§2.02), calling for a judgment (in the case of recklessness) whether the risk is of a nature and degree that "its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe *in the actor's situation*" and (in the case of negligence) whether that risk "involves a gross deviation from the standard of care that a reasonable person would observe *in the actor's situation.*" (Italics added.) The Model Penal Code's position represents a partial individualizing of the objective standard of the reasonable person. See page 438 supra, where this issue is discussed in connection with the definition of criminal negligence. Was the jury's verdict in the *Goetz* case defensible under the Model Penal Code approach?

3. Beliefs and actions. What is it, precisely, that must be reasonable? In the *Goetz* case, for example, should the result turn exclusively on whether Goetz's *belief* in an impending danger was reasonable, or should it be necessary for the defendant to show, in addition, that the *actions* he took were reasonable?

In principle, there should be no doubt that reasonableness must extend to actions as well as beliefs. Indeed in theory, there may be little difference between saying that a belief in the need to shoot was reasonable, and saying that the act of shooting was reasonable. But in many states, model jury instructions emphasize that beliefs and fears must be reasonable, without making explicit that the defendant's actions must be reasonable as well. See Lee, supra, 81 Minn. L. Rev. at 469-471.[2] The result, Professor Lee finds, is that jurors may too readily accept

2. The Model Penal Code suffers from a similar ambiguity. Section 2.02(2)(d) defines negligence as a "failure to perceive," and it is this failure to perceive, rather than the defendant's conduct itself, that must involve "a gross departure from [a reasonable] standard of care." Similarly in connection with self-defense, §3.04 provides that the use of force "is justifiable when the actor believes" that certain facts exist; §3.09(2) withdraws this defense for under certain conditions if "the actor is reckless or negligent *in having such belief.* . . ."

self-defense claims in cases like *Goetz*, where a fear might arguably seem reasonable, but the actions taken in response to that fear are not.

4. A grading problem. Where reasonableness is required for total exculpation, how should the law deal with a person who holds an honest but unreasonable belief in the need to use lethal force? Assume such a person kills because she genuinely believes it is the only way to save her life, but she comes to her conclusion on grossly unreasonable grounds. She has killed intentionally and, under the prevailing objective test, she has no defense of self-defense. Thus, she would be guilty of murder, just like the person who kills for revenge or gain. This appears to be the generally prevailing view.[3] But several states avoid this result through various doctrines of mitigation. One, known as the doctrine of "imperfect self-defense," classifies the crime as voluntary manslaughter, on the theory that "malice" is lacking and that the lesser culpability in a killing of this sort is similar to that in a killing in a heat of passion.[4] The other approach, even less common, is to classify the killing as involuntary manslaughter.[5] A problem for this theory is that involuntary manslaughter presupposes an unintentional killing, while a killing in self-defense is ordinarily intentional. The justification, nonetheless, is that actor's culpability most closely approximates that of a person whose criminal negligence causes an unintentional death.

The Model Penal Code is similar to this last approach: a person who kills in the honest but unreasonable belief in the need to kill would be guilty of negligent homicide. The drafting device through which the Model Penal Code achieves this result is to specify in the various justification provisions the circumstances that the actor must believe to exist in order for his or her action to be justified and to employ the following general provision (§3.09(2)) to deal with mistaken belief in those circumstances:

> When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under §§3.03 to 3.08 but the actor is reckless or negligent in having such belief or acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

The approach has not been influential in state statutory reform. See Note, Justification: The Impact of the Model Penal Code on State Law Reform, 75 Colum. L. Rev. 914, 920 (1975).

5. Problem. As we have seen, the Model Penal Code and the New York self-defense formulations differ in the way they deal with the reasonableness requirement. Consider how the following hypothetical should be analyzed under each formulation: The defendant shoots to kill *Z* in the honest but unreasonable belief that it is necessary to do so to save the defendant's life. He misses, and *Z* escapes unharmed. Is the defendant guilty of attempted murder? Of attempt to commit manslaughter?

3. E.g., State v. Abdalaziz, 725 N.E.2d 799 (1999); State v. Beeler, 1999 WL 506234 (Mo. App. 1999); State v. Shaw, 721 A.2d 486 (Vt. 1998).

4. See, e.g., Faulkner v. State, 458 A.2d 81 (Md. App. 1983). Some state statutes also take this approach, e.g., Pa. Cons. Stat. tit. 18, §2503(b), supra page 392.

5. E.g., Shannon v. Commonwealth, 767 S.W.2d 548 (Ky. 1988).

STATE v. KELLY

Supreme Court of New Jersey
91 N.J. 178, 478 A.2d 364 (1984)

WILENTZ, C.J. . . . On May 24, 1980, defendant, Gladys Kelly, stabbed her husband, Ernest, with a pair of scissors. He died shortly thereafter at a nearby hospital. . . .

Ms. Kelly was indicted for murder. At trial, she did not deny stabbing her husband, but asserted that her action was in self-defense. To establish the requisite state of mind for her self-defense claim, Ms. Kelly called Dr. Lois Veronen as an expert witness to testify about the battered-woman's syndrome. After hearing a lengthy voir dire examination of Dr. Veronen, the trial court ruled that expert testimony concerning the syndrome was inadmissible on the self-defense issue. . . .

Ms. Kelly was convicted of reckless manslaughter. [We] reverse.

The Kellys had a stormy marriage. Some of the details of their relationship, especially the stabbing, are disputed. The following is Ms. Kelly's version of what happened — a version that the jury could have accepted and, if they had, a version that would make the proffered expert testimony not only relevant, but critical.

The day after the marriage, Mr. Kelly got drunk and knocked Ms. Kelly down. Although a period of calm followed the initial attack, the next seven years were accompanied by periodic and frequent beatings, sometimes as often as once a week. During the attacks, which generally occurred when Mr. Kelly was drunk, he threatened to kill Ms. Kelly and to cut off parts of her body if she tried to leave him. Mr. Kelly often moved out of the house after an attack, later returning with a promise that he would change his ways. Until the day of the homicide, only one of the attacks had taken place in public.

The day before the stabbing, Gladys and Ernest went shopping. They did not have enough money to buy food for the entire week, so Ernest said he would give his wife more money the next day.

The following morning he left for work. Ms. Kelly next saw her husband late that afternoon at a friend's house. She had gone there with her daughter, Annette, to ask Ernest for money to buy food. He told her to wait until they got home, and shortly thereafter the Kellys left. After walking past several houses, Mr. Kelly, who was drunk, angrily asked "What the hell did you come around here for?" He then grabbed the collar of her dress, and the two fell to the ground. He choked her by pushing his fingers against her throat, punched or hit her face, and bit her leg.

A crowd gathered on the street. Two men from the crowd separated them, just as Gladys felt that she was "passing out" from being choked. Fearing that Annette had been pushed around in the crowd, Gladys then left to look for her. . . .

After finding her daughter, Ms. Kelly then observed Mr. Kelly running toward her with his hands raised. Within seconds he was right next to her. Unsure of whether he had armed himself while she was looking for their daughter, and

thinking that he had come back to kill her, she grabbed a pair of scissors from her pocketbook. She tried to scare him away, but instead stabbed him.[1]

The central question in this case is whether the trial court erred in its exclusion of expert testimony on the battered-woman's syndrome. That testimony was intended to explain defendant's state of mind and bolster her claim of self-defense. We shall first examine the nature of the battered-woman's syndrome and then consider the expert testimony proffered in this case and its relevance. . . .

As the problem of battered women has begun to receive more attention, sociologists and psychologists have begun to focus on the effects a sustained pattern of physical and psychological abuse can have on a woman. The effects of such abuse are what some scientific observers have termed "the battered-woman's syndrome," a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives. Dr. Lenore Walker, a prominent writer on the battered-woman's syndrome, defines the battered woman as one

> who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman. [L. Walker, The Battered Woman (1979) at xv.]

According to Dr. Walker, relationships characterized by physical abuse tend to develop battering cycles. Violent behavior directed at the woman occurs in three distinct and repetitive stages that vary both in duration and intensity depending on the individuals involved.

Phase one of the battering cycle is referred to as the "tension-building stage," during which the battering male engages in minor battering incidents and verbal abuse while the woman, beset by fear and tension, attempts to be as placating and passive as possible in order to stave off more serious violence.

Phase two of the battering cycle is the "acute battering incident." At some point during phase one, the tension between the battered woman and the batterer becomes intolerable and more serious violence inevitable. The triggering event that initiates phase two is most often an internal or external event in the life of the battering male, but provocation for more severe violence is sometimes provided by the woman who can no longer tolerate or control her phase-one anger and anxiety.

Phase three of the battering cycle is characterized by extreme contrition and loving behavior on the part of the battering male. During this period the man will often mix his pleas for forgiveness and protestations of devotion with promises to seek professional help, to stop drinking, and to refrain from further violence. For some couples, this period of relative calm may last as long as several months, but in a battering relationship the affection and contrition of the man will eventually fade and phase one of the cycle will start anew.

1. This version of the homicide — with a drunk Mr. Kelly as the aggressor both in pushing Ms. Kelly to the ground and again in rushing at her with his hands in a threatening position after the two had been separated — is sharply disputed by the State. The prosecution presented testimony intended to show that the initial scuffle was started by Gladys; that upon disentanglement, while she was restrained by bystanders, she stated that she intended to kill Ernest; that she then chased after him, and upon catching up with him stabbed him with a pair of scissors taken from her pocketbook.

The cyclical nature of battering behavior helps explain why more women simply do not leave their abusers. The loving behavior demonstrated by the batterer during phase three reinforces whatever hopes these women might have for their mate's reform and keeps them bound to the relationship. R. Langley & R. Levy, Wife Beating: The Silent Crisis 112-114 (1977).

Some women may even perceive the battering cycle as normal, especially if they grew up in a violent household. . . . Other women, however, become so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation. There is a tendency in battered women to believe in the omnipotence or strength of their battering husbands and thus to feel that any attempt to resist them is hopeless.

In addition to these psychological impacts, external social and economic factors often make it difficult for some women to extricate themselves from battering relationships. A woman without independent financial resources who wishes to leave her husband often finds it difficult to do so because of a lack of material and social resources. . . . Thus, in a violent confrontation where the first reaction might be to flee, women realize soon that there may be no place to go. Moreover, the stigma that attaches to a woman who leaves the family unit without her children undoubtedly acts as a further deterrent to moving out.

In addition, battered women, when they want to leave the relationship, are typically unwilling to reach out and confide in their friends, family, or the police, either out of shame and humiliation, fear of reprisal by their husband, or the feeling they will not be believed.

Dr. Walker and other commentators have identified several common personality traits of the battered woman: low self-esteem, traditional beliefs about the home, the family, and the female sex role, tremendous feelings of guilt that their marriages are failing, and the tendency to accept responsibility for the batterer's actions.

Finally, battered women are often hesitant to leave a battering relationship because, in addition to their hope of reform on the part of their spouse, they harbor a deep concern about the possible response leaving might provoke in their mates. They literally become trapped by their own fear. Case histories are replete with instances in which a battered wife left her husband only to have him pursue her and subject her to an even more brutal attack.

The combination of all these symptoms — resulting from sustained psychological and physical trauma compounded by aggravating social and economic factors — constitutes the battered-woman's syndrome. Only 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.

The voir dire testimony of Dr. Veronen, sought to be introduced by defendant Gladys Kelly, conformed essentially to this outline of the battered-woman's syndrome. . . .

In addition, Dr. Veronen was prepared to testify as to how, as a battered woman, Gladys Kelly perceived her situation at the time of the stabbing, and why, in her opinion, defendant did not leave her husband despite the constant beatings she endured.

Whether expert testimony on the battered-woman's syndrome should be admitted in this case depends on whether it is relevant to defendant's claim of self-defense, and, in any event, on whether the proffer meets the standards for admission of expert testimony in this state. We examine first the law of self-defense and consider whether the expert testimony is relevant.

. . . The use of force against another in self-defense is justifiable "when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." N.J.S.A. 2C:3-4(a). Further limitations exist when deadly force is used in self-defense. The use of such deadly force is not justifiable

> unless the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm. . . . [N.J.S.A. 2C:3-4(b)(2).]

Gladys Kelly claims that she stabbed her husband in self-defense, believing he was about to kill her. The gist of the State's case was that Gladys Kelly was the aggressor, that she consciously intended to kill her husband, and that she certainly was not acting in self-defense.

The credibility of Gladys Kelly is a critical issue in this case. If the jury does not believe Gladys Kelly's account, it cannot find she acted in self-defense. The expert testimony offered was directly relevant to one of the critical elements of that account, namely, what Gladys Kelly believed at the time of the stabbing, and was thus material to establish the honesty of her stated belief that she was in imminent danger of death. . . .

As can be seen from our discussion of the expert testimony, Dr. Veronen would have bolstered Gladys Kelly's credibility. Specifically, by showing that her experience, although concededly difficult to comprehend, was common to that of other women who had been in similarly abusive relationships, Dr. Veronen would have helped the jury understand that Gladys Kelly could have honestly feared that she would suffer serious bodily harm from her husband's attacks, yet still remain with him. This, in turn, would support Ms. Kelly's testimony about her state of mind (that is, that she honestly feared serious bodily harm) at the time of the stabbing.

On the facts of this case, we find that the expert testimony was relevant to Gladys Kelly's state of mind, namely, it was admissible to show she *honestly* believed she was in imminent danger of death. . . .

We also find the expert testimony relevant to the reasonableness of defendant's belief that she was in imminent danger of death or serious injury. We do not mean that the expert's testimony could be used to show that it was understandable that a battered woman might believe that her life was in danger when indeed it was not and when a reasonable person would not have so believed. . . . Expert testimony in that direction would be relevant solely to the honesty of defendant's belief, not its objective reasonableness. Rather, our conclusion is that the expert's testimony, if accepted by the jury, would have aided it in determining whether,

under the circumstances, a reasonable person would have believed there was imminent danger to her life.

At the heart of the claim of self-defense was defendant's story that she had been repeatedly subjected to "beatings" over the course of her marriage. . . . When that regular pattern of serious physical abuse is combined with defendant's claim that the decedent sometimes threatened to kill her, defendant's statement that on this occasion she thought she might be killed when she saw Mr. Kelly running toward her could be found to reflect a reasonable fear; that is, it could so be found if the jury believed Gladys Kelly's story of the prior beatings, if it believed her story of the prior threats, and, of course, if it believed her story of the events of that particular day.

The crucial issue of fact on which this expert's testimony would bear is why, given such allegedly severe and constant beatings, combined with threats to kill, defendant had not long ago left decedent. Whether raised by the prosecutor as a factual issue or not, our own common knowledge tells us that most of us, including the ordinary juror, would ask himself or herself just such a question. [O]ne of the common myths, apparently believed by most people, is that battered wives are free to leave. To some, this misconception is followed by the observation that the battered wife is masochistic, proven by her refusal to leave despite the severe beatings; to others, however, the fact that the battered wife stays on unquestionably suggests that the "beatings" could not have been too bad for if they had been, she certainly would have left. The expert could clear up these myths, by explaining that one of the common characteristics of a battered wife is her *inability* to leave despite such constant beatings; her "learned helplessness"; her lack of anywhere to go; her feeling that if she tried to leave, she would be subjected to even more merciless treatment; her belief in the omnipotence of her battering husband; and sometimes her hope that her husband will change his ways. . . .

The difficulty with the expert's testimony is that it *sounds* as if an expert is giving knowledge to a jury about something the jury knows as well as anyone else, namely, the reasonableness of a person's fear of imminent serious danger. That is not at all, however, what this testimony is *directly* aimed at. It is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion. . . . After hearing the expert, instead of saying Gladys Kelly could not have been beaten up so badly for if she had, she certainly would have left, the jury could conclude that her failure to leave was very much part and parcel of her life as a battered wife. The jury could conclude that instead of casting doubt on the accuracy of her testimony about the severity and frequency of prior beatings, her failure to leave actually reinforced her credibility.

Since a retrial is necessary, we think it advisable to indicate the limit of the expert's testimony on this issue of reasonableness. It would not be proper for the expert to express the opinion that defendant's belief on that day was reasonable, not because this is the ultimate issue, but because the area of *expert* knowledge relates, in this regard, to the reasons for defendant's failure to leave her husband. Either the jury accepts or rejects that explanation and, based on that, credits defendant's stories about the beatings she suffered. No expert is needed, however, once the jury has made up its mind on those issues, to tell the jury the logical

conclusion, namely, that a person who has in fact been severely and continuously beaten might very well reasonably fear that the imminent beating she was about to suffer could be either life-threatening or pose a risk of serious injury. What the expert could state was that defendant had the battered-woman's syndrome, and could explain that syndrome in detail, relating its characteristics to defendant, but only to enable the jury better to determine the honesty and reasonableness of defendant's belief. Depending on its content, the expert's testimony might also enable the jury to find that the battered wife, because of the prior beatings, numerous beatings, as often as once a week, for seven years, from the day they were married to the day he died, is particularly able to predict accurately the likely extent of violence in any attack on her. That conclusion could significantly affect the jury's evaluation of the reasonableness of defendant's fear for her life.

Having determined that testimony about the battered-woman's syndrome is relevant, we now consider whether Dr. Veronen's testimony satisfies the limitations placed on expert testimony by Evidence Rule 56(2) and by applicable case law. . . . In effect, this Rule imposes three basic requirements for the admission of expert testimony: (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

[The court remanded for a hearing on these issues.[a]]

NOTES ON THE BATTERED WOMAN'S SYNDROME

1. *The problem of domestic violence.* Justice Department surveys indicate that in a single recent year, almost one million women were severely beaten by their spouse or other domestic partner. Men too are frequently slapped, kicked or beaten by their spouse or girlfriend, but they are much less likely to be victims of the most serious assaults; in the Justice Department survey, 148,000 men were victims of significant domestic violence. Thus, women are almost seven times more likely to be the victim of a serious domestic assault. And although the debate about battered spouse syndrome has focused attention on women who kill their spouses, men are three times more likely than women to kill their spouse or partner.[6]

Wife beating has a long, ignominious history; at one time the common law explicitly granted the husband a legal privilege to chastise and punish his wife.[7] This prerogative disappeared in the nineteenth century, but police and prosecutors continued to ignore or tolerate the practice (and more severe physical abuses) until very recent times. Until the 1980s, many police departments had rules expressly discouraging officers from making an arrest in response to a domestic-violence complaint. The battered woman's perception that legal authorities offered no recourse often was well grounded in fact.

a. On remand, the prosecution did not challenge the admissibility of the expert's evidence on the battered woman's syndrome. Instead it offered its own experts to support the conclusion that the defendant did not meet the criteria of a battered woman. Apparently the strategy was successful because at the second trial she was again convicted of reckless manslaughter. See Bergen (N.J.) Record, June 27, 1985, p. A21; Elizabeth Schneider, Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering, 9 Women's Rights L. Rptr. 195, 205n.59 (1986).—Eds.

6. U.S. Dept. of Justice, Natl. Institute of Justice, Batterer Programs: What Criminal Justice Agencies Need to Know 2 (July 1998).

7. See Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L. J. 2117 (1996).

This picture began to change, at least to some extent, in the 1980s.[8] Many police departments began to encourage or even mandate an arrest in domestic-violence cases. Advocates for battered women strongly urged the adoption of mandatory-arrest policies and "no-drop" policies to prevent prosecutors from declining to prosecute such cases. An initial empirical study, conducted in Minneapolis, provided strong support for the hypothesis that mandatory arrest would deter battering, but subsequent studies raised concern about possible countervailing effects. Because battered women often are economically dependent on, and fearful of, their male partners, mandatory-arrest policies in some instances seemed to deter reporting and calls for help by women, more than they deterred violence by men. There was also some evidence that mandatory-arrest policies sometimes prompted the arrested men to be to *more* violent toward their spouses afterward, especially over the long run. One scholar who initially supported mandatory arrest cautioned that in light of later studies, the mandatory-arrest approach to domestic violence "may make as much sense as fighting a fire with gasoline."[9]

The jury is still out on this issue, but in the meantime many advocates for battered women also have begun to question mandatory-arrest and no-drop policies, arguing that these approaches give too little weight to the victim's own sense of what kind of official intervention would be best for her.[10] Few professionals in this field believe that vigorous prosecution and punishment of batterers can be sufficient by themselves. Current proposals often seek enhanced possibilities for arrest, prosecution, and court orders of protection, while coordinating these criminal-justice responses with more social and economic support for victims, an improved system of shelters for battered women and their children, and social/psychological treatment for batterers.[11]

Needless to say, implementation of approaches like these and the resources devoted to them vary widely from community to community. Awareness of what help is available can vary among abused women as well. Although substantial progress has been made in the past two decades, the problems of domestic violence are still a long way from being solved. Thus, as in the past, women at times may in some sense be trapped in an abusive relationship, or have reasons to believe they are.

8. See Lawrence W. Sherman, Policing Domestic Violence: Experiments and Dilemmas (1992); Stephen J. Schulhofer, The Feminist Challenge in Criminal Law, 143 U. Pa. L. Rev. 2151, 2158-2170 (1994); Joan Zorza, The Criminal Law of Misdemeanor Domestic Violence, 83 J. Crim. L. & Criminology 46 (1992).

9. Sherman, supra at 210.

10. Linda G. Mills, Killing Her Softly: Intimate Abuse and the Violence of State Intervention, 113 Harv. L. Rev. 550 (1999). Compare Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 Harv. L. Rev. 1849, 1909 (1996), assessing the problems and concluding that "leaving the choice of prosecution to the victim . . . creates more problems than it solves."

11. See U.S. Dept. of Justice, supra note 6. A related "survivor-centered" approach places the victim's emotional needs at the center of attention. Mills, supra note 10.

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