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ESSAY

A MATTER OF EVIDENCE OR OF LAW? BATTERED WOMEN CLAIMING SELF- DEFENSE IN CALIFORNIA

Rachel A. Van Cleave*

INTRODUCTION

Domestic violence is a nationwide concern.¹ The problem of domestic violence is of particular concern to women. The statistics overwhelmingly demonstrate that the vast majority of the victims of domestic violence are women.² Thirty to fifty percent of all women murdered are killed by their male partners.³ In an attempt to alleviate this violence, California has adopted measures which focus on the behavior of the batterer. For example, California provides procedures by which victims of domestic violence can obtain restraining orders against their batterers, as well as other measures.⁴ Such measures are extremely important and

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1. Violence Against Women Act of 1993, H.R. 1133, 103d Cong., 2d Sess. (1994) (authorizing federal monies to encourage arrests of batterers, for example). See also *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 110-16 (1990) (testimony of Angela Browne, Ph.D.).

2. See *Developments in the Law - Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1501 nn.1-5 (1993).

3. Cal. S.B. 1144, 1993-94 Reg. Sess. § 1(a) (50%); *Developments in the Law*, *supra* note 2, at 1501 n.5 (30%); Nancy Gibbs, 'Til Death Do Us Part, TIME, Jan. 18, 1993, at 38, 41 (30-50%).

4. CAL. FAM. CODE §§ 6200 *et seq.* (West 1994). One important aspect of this law is that it outlines the imposition of restraining orders against batterers. See CAL. PENAL CODE § 262 (West 1994) (defining spousal rape); CAL. PENAL CODE § 602(u)

California must continue to pursue them. However, where these measures fail to prevent the repeated battery of victims, a battered woman may resort to violence herself in an effort to save her own life.

When a woman kills her batterer she must be given a fair opportunity to present a claim of self-defense to a jury. The most controversial cases involve battered women who kill their batterers in "non-traditional confrontational" settings,⁵ because courts have difficulty finding that danger of death or bodily injury to the woman was *imminent*.⁶ Currently, such women face numerous hurdles to fully presenting their self-defense claims. Traditional self-defense law permits a defendant to present evidence of prior threats made by the batterer-victim against the defendant's life and safety.⁷ She can also present instances of prior violence or abuse she suffered at the hands of her batterer.⁸ But such evidence is usually insufficient to establish the reasonableness of her use of self-defense in a non-traditional confrontational setting, due to the requirement that danger be imminent before self-defense is permitted. Furthermore, where the woman has killed in a non-traditional confrontational setting, some courts have decided that she did not act in self-defense as a matter of law and thus find such evidence irrelevant.⁹ For example, when a battered woman kills in reaction to her batterer picking up a beer

(West 1994) (including the refusal to leave a battered women's shelter in the definition of "trespass"); CAL. PENAL CODE §§ 1000.91 *et seq.* (West 1994) (allowing referral of those charged with acts involving domestic violence to approved batterer's programs).

5. This phrase is borrowed from Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 139 (1985) (noting that Battered Woman's Syndrome expert testimony is often excluded when the woman has killed in a non-traditional, confrontational situation).

6. *People v. Aris*, 264 Cal. Rptr. 167, 175 (Cal. Ct. App. 1989); *see also State v. Stewart*, 763 P.2d 572, 577 (Kan. 1988); *State v. Norman*, 378 S.E.2d 8, 13-16 (N.C. 1989). *But see State v. Hennum*, 441 N.W.2d 793, 798 (Minn. 1989).

7. *See People v. Bush*, 148 Cal. Rptr. 430, 436 (Cal. Ct. App. 1978) (holding that the trial court erred in not instructing the jury to consider prior threats as relevant to the reasonableness of defendant's exercise of self-defense); *see also People v. Moore*, 275 P.2d 485, 490 (Cal. 1954).

8. *See People v. Yokum*, 302 P.2d 406, 497 (Cal. Dist. Ct. App. 1956) (holding that the trial court erred in excluding evidence of the decedent's prior threats and violent conduct toward the defendant who claimed she killed in self-defense).

9. *See Aris*, 264 Cal. Rptr. at 179 (finding that the defendant was not entitled to a "perfect" self-defense jury instruction, but that the expert testimony could support an instruction for "imperfect" self-defense). For a discussion of the difference between perfect and imperfect self-defense, *see infra* note 28 and accompanying text.

bottle, she does not kill in a traditional confrontational setting.¹⁰ Similarly, where she kills her sleeping batterer in reaction to earlier death threats by the batterer, the setting is not traditionally confrontational.¹¹

The findings stated in a bill pending before the California Legislature indicate that at least some members of the Legislature acknowledge that self-defense law as it is currently interpreted by the courts is inadequate to deal with the situations in which a battered woman kills her batterer. The bill reports that "[o]ne half of all women murdered in the United States are murdered by domestic partners or former domestic partners."¹² The bill explains that "[i]n many situations women who are subject to repeated patterns of violence by their domestic partners are unable to flee from the relationship because of intimidation, threats of physical violence, . . . which cause these women to be, in effect, victims of false imprisonment."¹³ Finally, it states that "[s]tudies have shown that the intimidation and threats of violence that make these women victims of felony false imprisonment are real and that women are most likely to be murdered when attempting to report abuse or to leave an abusive relationship."¹⁴ The bill concludes that the

current law of justifiable homicide . . . does not allow these women to claim self-defense because the practical effect of the 'reasonable person' standard imposed upon jurors results in their finding that these women are not entitled to justifiable homicide defenses because they did not attempt to escape what they actually perceived as imminent danger.¹⁵

The bill proposes to alter existing self-defense doctrine by, essentially, creating a separate defense for victims of abuse.

Some commentators argue that the situation of a battered woman who kills her batterer does not fit into traditional self-defense law because the law of self-defense was developed by

10. *State v. Hundley*, 693 P.2d 475, 479 (Kan. 1985) (holding that the use of the word "immediate" rather than "imminent" in jury instructions had the effect of precluding the jury from considering prior abuse inflicted by the decedent with beer bottles, requiring a reversal of the defendant's conviction).

11. *Aris*, 264 Cal. Rptr. at 171. After a vicious beating, he told her that he did not think she would live until the morning and she killed him while he slept. Her conviction of second degree murder was upheld. *Id.*

12. See Cal. S.B. 1144, *supra* note 3, § 1(a).

13. *Id.* § 1(b).

14. *Id.* § 1(c).

15. *Id.* § 1(e).

men and with masculine confrontational settings in mind.¹⁶ The focus of such discussions tends to be on the requirement that a defendant's use of self-defense be reasonable. These commentators suggest relaxing this objective standard, arguing that it is not truly objective.¹⁷ Some propose a "reasonable battered woman" standard.¹⁸ Criticism of this approach includes claims that it will result in a stereotyping of women and will require all women who claim they killed in self-defense to prove that they were also battered women.¹⁹ Other commentators argue that the problem is not with the elements and definitions of self-defense, but rather with how those rules are applied by courts.²⁰ I agree that there should not be a separate self-defense law for either women or battered women. Nor should there be exceptions to traditional self-defense doctrine when a woman or a battered woman is a defendant. However, courts should not unduly restrict evidentiary rules and elements of self-defense when a battered woman kills her batterer while he sleeps, as occurred in *People v. Aris*.²¹

This essay examines the obstacles battered women face in the form of evidentiary rules and in the definitions of certain elements of self-defense, focusing specifically on the appellate court opinion in *Aris*. The essay then evaluates existing and pending legislation in California which has sought to undo the narrowing effected by *Aris*. Finally, the essay proposes statutory language which would be more effective in ensuring that battered women who kill their batterers in non-traditional confrontational situations may fully present their claims of self-defense. Where a defendant claims self-defense and presents evidence regarding the Battered Woman Syndrome ("BWS"), my proposal would re-

16. See CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE 31-49 (1989) (stating that the law of self-defense was originally intended to handle barroom brawls and attacks by strangers during the perpetration of a crime); see also Alison M. Madden, *Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum*, 4 HASTINGS WOMEN'S L.J. 1, 22-25 (1993).

17. See Cal. S.B. 1144, *supra* note 3, § 1(a).

18. See, e.g., Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 415-22 (1988).

19. See Crocker, *supra* note 5, at 144-46 (citing *State v. Kelly*, 655 P.2d 1202, 1203 (Wash. Ct. App. 1982), *rev'd on other grounds*, 685 P.2d 564 (Wash. 1984) (seeming to conclude that in order to acquit the defendant the jury had to find that she was a battered woman and that she acted in self-defense)).

20. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 432-37 (1991).

21. 264 Cal. Rptr. 167 (Cal. Ct. App. 1989).

quire judges to instruct juries to consider such testimony when evaluating the reasonableness of the defendant's use of self-defense. Furthermore, where the defendant alternatively argues for "imperfect" self-defense, the proposal clarifies the definition of "imminence" to be whether the defendant actually believed the danger to her life was imminent.

I. SELF-DEFENSE AND BATTERED WOMAN SYNDROME

In California, murder is defined as "the unlawful killing of a human being . . . with malice aforethought."²² One way to prove that the defendant acted with malice is to show that "no considerable provocation" was present.²³ The Penal Code provides that murder is excused when "committed . . . in the heat of passion, upon any sudden and sufficient provocation."²⁴ Thus, the presence of sufficient provocation mitigates murder to manslaughter, while its absence is one way to prove the element of malice aforethought under California law.²⁵ Murder is *justified* "[w]hen committed in the lawful defense of [the defendant] . . . , when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished."²⁶ This defense has been interpreted as requiring the defendant to show that she honestly (or actually) believed she had to defend herself and that a reasonable person in the same circumstances would have believed that self-defense was necessary.²⁷ Where a defendant kills in the honest and reasonable belief that she needs to defend herself, she acts with justification and must be found not guilty. The California Supreme Court has held that where a defendant charged with murder is able to prove that she honestly believed self-defense was necessary, but fails to satisfy the reasonableness requirement, she establishes "imperfect self-defense" and is guilty only of manslaughter.²⁸

22. CAL. PENAL CODE § 187(a) (West 1988).

23. *Id.* § 188.

24. *Id.* § 195(2).

25. See PHILLIP E. JOHNSON, CRIMINAL LAW: CASES, MATERIALS AND TEXT 159-62 (4th ed. 1990).

26. CAL. PENAL CODE § 197(3) (West 1988).

27. *People v. Aris*, 264 Cal. Rptr. 167, 172 (Cal. Ct. App. 1989); see also *People v. Williams*, 142 Cal. Rptr. 704, 709 (Cal. Ct. App. 1977).

28. *In re Christian S.*, 872 P.2d 574 (Cal. 1994) (holding that the California Legislature did not eliminate "imperfect self-defense" in amendments to the penal code); *People v. Flannel*, 603 P.2d 1, 7 (Cal. 1979) (holding that the existence of an honest but unreasonable belief in the need for self-defense is inconsistent with the

A battered woman charged with the murder of her batterer may attempt to bolster her claim that she killed in self-defense by introducing evidence of the BWS. BWS is not, in and of itself, a defense to murder,²⁹ nor is it a disease.³⁰ Rather, it describes a set of circumstances in which *any* woman might find herself. BWS evidence can help a jury to evaluate a battered woman's claim of self-defense. An expert on BWS can describe to the jury the three phase cycle of violence characteristic of BWS.³¹ The first, "tension-building" phase, consists of minor batterings by the woman's intimate partner, such as slaps, as well as psychological abuse such as name-calling and other verbal abuse.³² This phase is followed by an "acute battering incident" consisting of an uncontrollable release of tension and is distinguished by its "savagery, destructiveness, and uncontrolled nature."³³ It is during this second phase that the woman suffers the most severe physical injuries. The batterer inflicts serious physical injury in any number of ways. He pushes her down stairs breaking her ribs,³⁴ he uses his fists to beat her,³⁵ or he employs other weapons, such as hammers,³⁶ or steel-toed boots.³⁷ He might also abuse her sexually, forcing her to submit to sado-masochistic sexual acts.³⁸ The third phase, the "loving contrition phase," follows the acute battering incident.³⁹ During this phase the batterer might promise to stop beating the woman,⁴⁰ beg her forgiveness,

malice element of Penal Code § 187). The honest but unreasonable belief doctrine has also been called either "imperfect" or "partial" self-defense.

29. GILLESPIE, *supra* note 16, at 159. However, sometimes courts refer to the syndrome as the "battered wife defense." See *State v. Anaya*, 456 A.2d 1255, 1266 (Me. 1983).

30. LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 20-21 (1979); see also Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense": Towards a New Understanding*, 19 *FORDHAM URB. L.J.* 567, 578 (1992) (arguing that BWS should be viewed as "the responses and characteristics of a normal woman who finds herself in a defective or dysfunctional relationship"); Kinports, *supra* note 18, at 417 n.90.

31. LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 42 (1989).

32. *Id.*

33. *Id.* at 43.

34. See *State v. Hundley*, 693 P.2d 475, 475 (Kan. 1985).

35. See *Ibn-Tamas v. United States*, 407 A.2d 626, 629 (D.C. 1979).

36. See *Commonwealth v. Craig*, 783 S.W.2d 387, 388 (Ky. 1990), *overruled by Dyer v. Commonwealth*, 816 S.W.2d 647 (Ky. 1991).

37. See *State v. Hennum*, 441 N.W.2d 793, 795 (Minn. 1989).

38. See *Fielder v. State*, 756 S.W.2d 309, 311 (Tex. Ct. App. 1988), *rev'd on other grounds*, 834 S.W.2d 509 (Tex. 1992); see also WALKER, *supra* note 30, at 47-51.

39. WALKER, *supra* note 31, at 44.

40. See *State v. Hundley*, 693 P.2d 475, 477 (Kan. 1985).

and even admit that he has a problem.⁴¹ However, in many battering relationships, this phase becomes shorter and shorter in duration, amounting to simply a cessation of violence.⁴² It is this third phase that gives the battered woman hope that he will change which "provides positive reinforcement for [her] remaining in the relationship."⁴³

The expert can also explain why, in many situations, a battered woman does not leave the violent relationship, or even seek help.⁴⁴ The notion of staying in a relationship fraught with violence is incomprehensible to most jurors who have not lived in such a relationship.⁴⁵ An expert might explain to the jury reasons why a battered woman might stay in such a relationship, and that such women do *not* remain in the relationship because they enjoy the beatings.⁴⁶ An expert can explain that *any* woman could find herself in a battering relationship: "[t]here is no predisposing prototype for these [battered] women."⁴⁷ It is clear that in California BWS expert testimony is admissible to convey this general information to the jury.⁴⁸

California's and most states' laws allow the expert to state her conclusion that the particular defendant in fact suffered from BWS at the time she killed her batterer.⁴⁹ This is important, be-

41. See *Fielder*, 756 S.W.2d at 311.

42. WALKER, *supra* note 30, at 96.

43. *Id.* Describing what happened after incidents of battering by her husband, Rita Collins stated, "[a]fterward he'd soothe me, and I'd think, he's a good man. What did I do wrong?" Gibbs, *supra* note 3, at 38.

44. CHARLES P. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 20 (1987).

45. GILLESPIE, *supra* note 16, at 157-60.

46. See Kinports, *supra* note 18, at 400-01. For example, women might remain in such relationships for economic reasons, or due to feelings of helplessness.

47. See WALKER, *supra* note 31, at 101-02 ("Battered women come from all types of economic, cultural, religious, and racial backgrounds. . . . They are women like you. Like me."); *Developments in the Law, supra* note 2, at 1501 ("No segment of society is immune from this violence - battering is prevalent among every economic, racial and ethnic group.").

48. See *People v. Aris*, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989); MIGUEL MENDEZ, CALIFORNIA EVIDENCE § 15.09, at 293 (1993); James O. Pearson, Jr., Annotation, *Admissibility of Expert or Opinion Testimony on Battered Wife or Battered Woman Syndrome*, 18 A.L.R. 4TH 1153 (1982).

49. Pearson, *supra* note 48, at 1153. However, the admission of such a conclusion by the expert does not establish self-defense, nor should the preclusion of this testimony bar a claim of self-defense. Women who kill should not have to prove both that they suffered from BWS *and* that they were justified in killing their batterers. See Crocker, *supra* note 5, at 145-46. Nonetheless, the conclusion that the defendant is in fact a battered woman may still be necessary to avoid a situation in which jurors may conclude that since the expert did not say she suffered from BWS,

cause the general BWS testimony may be confusing to jurors unless the expert links this to the particular defendant. Furthermore, jurors will likely feel ill-equipped to determine whether the defendant suffered from BWS. For example, in her appeal, Ms. Aris argued that "Dr. Walker's inability to testify that appellant was a battered woman led at least one [juror]—the foreperson—to conclude that Ms. Aris did not [suffer from] the syndrome because they were not told she had the syndrome."⁵⁰ However, beyond the uses of BWS testimony described above, it is not clear the extent to which an expert can testify as to the specific circumstances in which a particular defendant found herself. For example, it is not clear whether a BWS expert can state her opinion that the defendant honestly feared for her life when she killed her batterer, or that a reasonable woman in the defendant's situation would have feared for her life and would have killed in self-defense. Most courts are wary of allowing such testimony, fearing that the jury will adopt the expert's conclusion without analyzing the facts on its own.⁵¹ In addition to these evidentiary issues surrounding BWS, California law has become muddled as to the definitions of "imminence" and "reasonableness" within the context of self-defense law. The following section explores these ambiguities, focusing on *People v. Aris*.⁵²

II. PEOPLE V. ARIS

In *Aris*, a jury convicted the defendant of second degree murder for killing her sleeping husband.⁵³ At trial, Ms. Aris testified to the violence and abuse to which her husband subjected her over the course of their ten-year marriage.⁵⁴ She also testified that her husband had severely beaten her that evening and

she must not have, and therefore, is not entitled to claim that she killed in self-defense.

50. Brief for Appellant at 104, *People v. Aris*, 215 Cal. App. 3d 1178 (1989) (No. E005418).

51. E.g., Anne L. Braswell, Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620, 621-22 (1987); Rick Brown, Note, *Limitations on Expert Testimony on the Battered Woman Syndrome in Homicide Cases: The Return of the Ultimate Issue Rule*, 32 ARIZ. L. REV. 665 (1990).

52. 264 Cal. Rptr. 167 (Cal. Ct. App. 1989).

53. The trial court sentenced Ms. Aris to 15 years to life in prison. In June, 1993, California Governor Pete Wilson reduced her sentence by making her eligible for parole one and a half years earlier than she would have been otherwise. *Wilson's Cautious Clemency*, SACRAMENTO BEE, June 4, 1993, at B6.

54. *Aris*, 264 Cal Rptr. at 171.

had threatened that he did not think he would let her live until the morning.⁵⁵ The trial court permitted Ms. Aris to present general expert testimony regarding BWS, that is, to describe the three cycles of violence and to explain why it is difficult for a battered woman to leave the relationship. However, the trial court did not allow the expert, Dr. Lenore E. Walker, to state her opinion that Ms. Aris suffered from BWS when she shot her husband, nor to testify as to how Ms. Aris' "experiences as a battered woman affected her perceptions of danger, its imminence, and what actions were necessary to protect herself."⁵⁶ Nor did the trial court instruct the jury on perfect self-defense; instead, it instructed the jury on imperfect self-defense and second degree murder.

The court of appeal found that the trial court erred in these respects.⁵⁷ The court found that the expert's opinion that the defendant suffered from BWS was not barred by *People v. Bledsoe*.⁵⁸ In *Bledsoe*, an expert was not allowed to state that the rape victim suffered from "Rape Trauma Syndrome" (RTS) in the prosecution of the alleged rapist.⁵⁹ The California Supreme Court determined in *Bledsoe* that it would be too prejudicial to allow the expert to conclude that since the victim exhibited the symptoms of RTS, the victim was in fact raped. Further, the court reasoned that there was no support that RTS could reliably prove whether a rape had been committed. In contrast, the defendant in *Aris* sought the admission of the expert's opinion that she had been battered *not* to prove that her husband had committed a crime, but rather to support her claim of self-defense.⁶⁰ The appellate court further found that Dr. Walker's proposed testimony regarding how Ms. Aris' experiences as a battered woman affected her perceptions of danger and imminence were rel-

55. Brief for Appellant at 113, *People v. Aris*, 215 Cal. App. 3d 1178 (1989) (No. E005418).

56. *Aris*, 264 Cal. Rptr. at 180.

57. While the reviewing court found that the trial court committed error, the court upheld Ms. Aris' conviction on the grounds that these errors were harmless. *Id.* at 180-82.

58. 681 P.2d 291 (Cal. 1984) (holding that an expert could not opine, based upon the victim's behavior according to Rape Trauma Syndrome ("RTS"), that the victim had actually been raped, but finding the erroneous admission was harmless in this case).

59. See also *In re Sara M.*, 239 Cal. Rptr. 605 (Cal. Ct. App. 1987) (holding that the expert could not testify, based upon Child Sexual Abuse Accommodation Syndrome, that the child had actually been abused).

60. *Aris*, 264 Cal. Rptr. at 181.

evant to the issue of whether Ms. Aris *genuinely* believed that it was necessary to defend herself, but emphasized that such testimony could not be used to support the reasonableness of her use of self-defense.⁶¹ In other words, where a battered woman claims self-defense and presents expert BWS testimony, "trial courts should instruct [the jury] that such testimony is relevant only to prove the honest belief requirement for both perfect and imperfect self-defense, *not* to prove the reasonableness requirement for perfect self-defense."⁶²

Additionally, the appellate court determined that the trial court properly prohibited Dr. Walker from stating her opinion that Ms. Aris "actually perceived that she was in imminent danger and needed to kill in self-defense."⁶³ The appellate court held that the expert's opinion regarding Ms. Aris' genuine and honest belief in the need for self-defense violated Penal Code section 29 which states that an expert "shall not testify as to whether the defendant had or did not have the required mental states, which include, . . . malice aforethought, *for the crimes charged*."⁶⁴ The court then concluded that "having an actual perception that one is in imminent danger negates malice aforethought, . . . [therefore] Dr. Walker was properly prohibited from stating an opinion that the defendant actually perceived that she was in imminent danger and needed to kill in self-defense."⁶⁵

The court reached this conclusion based on two cases. First, in *People v. Flannel*,⁶⁶ the California Supreme Court held that an honest, but unreasonable belief in the need for self-defense *negates* the malice aforethought element of murder as a matter of law, thus affirming the so-called "imperfect" or "partial" self-defense doctrine. Without this analysis, a defendant who acted in self-defense under an honest but unreasonable belief of immi-

61. *Id.* ("[S]uch [expert testimony] is relevant only to prove the honest belief requirement . . . not to prove the reasonableness requirement for perfect self-defense.")

62. *Id.* (emphasis added).

63. *Id.*

64. CAL. PENAL CODE § 29 (West 1988) (emphasis added).

65. *People v. Aris*, 264 Cal. Rptr. 167, 180 (Cal. Ct. App. 1989) (citations omitted). *Contra*, MENDEZ, *supra* note 48, at 393 n.24.

66. 603 P.2d 1 (Cal. 1979). In *Flannel*, two men had a history of violent relations, and the defendant shot the victim after threatening him, but believing that he was reaching for a pocket knife. After shooting the victim, the defendant stated that the victim deserved to die and no one would care. *Id.* at 3. The Supreme Court held that the trial court did not err in failing to instruct the jury sua sponte on the "unreasonable belief" doctrine. *Id.* at 8.

ment danger would be convicted of murder. Instead, under imperfect self-defense analysis such a situation would result in a negation of malice aforethought, reducing the conviction to manslaughter.⁶⁷

The doctrine of imperfect self-defense is somewhat analogous to the "heat of passion" doctrine. Where a defendant kills in the heat of passion, the malice element required for murder is negated and the conviction is reduced to manslaughter.⁶⁸ However, the analogy is not complete. California follows the common law definition of malice for murder as the *absence* of provocation.⁶⁹ Thus, the absence of provocation may prove the existence of malice as a matter of law and of evidence.⁷⁰ Self-defense, on the other hand, is a justification, and its elements are separate from those of the crime charged. It is "in the nature of confession and avoidance;"⁷¹ the defendant admits she had the intent to kill, but she was justified in doing so because she had to protect herself from an imminent threat.⁷² The absence of a genuine belief in the need to kill does not prove the existence of malice under California's definition of murder. An honest but unreasonable belief in the need for self-defense negates malice aforethought as a *matter of law* only by reducing the charge to manslaughter. Such an honest belief is simply inconsistent with the element of malice aforethought for murder, again, as a matter of law.⁷³ The appellate court in *Aris* incorrectly relied on *Flannel* to support its conclusion that Penal Code section 29, a rule of evidence, barred Dr. Walker from stating her conclusion that Ms. Aris honestly feared for her life when she killed her husband. That conclusion is not related to a mental state required for the crime charged, as a matter of evidence; rather, it relates to the presence of an honest belief in the need for self-defense. Therefore, it is not an element of the crime of murder, but instead supports an affirmative defense to murder.

67. This has been called "imperfect self-defense."

68. See CAL. PENAL CODE § 192 (West 1994) ("[M]anslaughter is the unlawful killing . . . without malice . . . upon a sudden quarrel or heat of passion."); *id.* § 195 (Homicide is excused "when committed . . . in the heat of passion.")

69. *Id.* § 188.

70. See JOHNSON, *supra* note 25, at 159-62.

71. MENDEZ, *supra* note 48, § 15.09, at 393 n.24.

72. *Id.* § 15.09, at 293.

73. Despite recent arguments that either the legislature or the voters eliminated the doctrine of imperfect self-defense when they abolished diminished capacity, the California Supreme Court recently reaffirmed the doctrine in *In re Christian S.*, 872 P.2d 574 (Cal. 1994).

The second relevant case relied on by the appellate court in *Aris*, *People v. Czahara*,⁷⁴ involved a defendant who claimed that he attempted murder in the "heat of passion upon provocation," and requested that the trial court allow his expert to so testify.⁷⁵ Relying on section 29 of the Penal Code, the trial court in *Czahara* held that the expert's opinion was not admissible because section 29 prohibits an expert from opining as to whether the defendant had or did not have the mental state required for the crime charged.⁷⁶ Affirming, the appellate court stated that "[h]eat of passion upon sufficient provocation is not merely evidence that malice was absent, it is by legal definition the absence of malice. To prove heat of passion and provocation is to prove that the defendant did not kill, or attempt to kill, with malice aforethought."⁷⁷ Again, by statute the state can prove the malice element of murder by showing the absence of provocation or heat of passion. Therefore, where the expert states an opinion that the defendant acted in the heat of passion, the expert necessarily states that the defendant "did not have the required mental state . . . for [murder]."⁷⁸ The expert opinion was offered to *disprove* the element of malice required for murder, as a *matter of evidence*, thus the evidentiary rule set out in Penal Code section 29 barred the testimony offered in *Czahara*.⁷⁹

Comparing Penal Code section 29 to a similar provision under the Federal Rules of Evidence is instructive in illustrating the erroneous analysis of the *Aris* court. Federal Rule of Evidence 704(b) bars expert testimony as to the mental state of a criminal defendant in the form of "an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged *or a defense thereto*."⁸⁰ The federal rule would more clearly bar the admission of an expert's opinion as to a defendant's honest belief in the need for self-defense, since this would be a mental state re-

74. 250 Cal. Rptr. 836 (Cal. Ct. App. 1988).

75. *Id.* at 841.

76. *Id.* at 842. The court permitted the expert to testify as to the "profound agitation" and "emotional turmoil" which "short circuited" the defendant's reason and judgment. Therefore, the court determined that even if Penal Code § 29 barred the expert from using the words "heat of passion," such testimony would not have resulted in a different verdict. Thus, the court affirmed Czahara's conviction for the attempted murder of his former girlfriend. *Id.*

77. *Id.* at 841.

78. CAL. PENAL CODE § 29 (West 1988).

79. *People v. Czahara*, 250 Cal. Rptr. 836, 836 (Cal. Ct. App. 1988).

80. FED. R. EVID. 704(b) (emphasis added).

quired for a defense to the crime of murder. However, the California version of this rule, Penal Code section 29, does not bar an expert's opinion testimony as to the defendant's mental state which relates to a claim of self-defense. Applying the above reasoning to *Aris*, under self-defense law, where the defendant offers expert testimony that the defendant genuinely believed self-defense was necessary, she is not attempting to disprove malice, as a matter of evidence. Rather, she seeks to support her affirmative claim of perfect or imperfect self-defense as a matter of law only.

The court in *Aris* relied on the *Flannel* court's affirmation of imperfect self-defense doctrine to support its determination that a defendant's actual belief in the need for self-defense proves the absence of malice. The court then also relied on the *Czahara* court's application of Penal Code section 29 to preclude testimony that the defendant was not acting in the heat of passion since it proves the absence of malice. The *Aris* court incorrectly combined the analysis of these two cases and determined that since an honest but unreasonable belief in the need for self-defense negates malice aforethought, the expert's opinion that the defendant had an honest belief violates section 29 of the Penal Code. Essentially, the court treated the existence of a genuine belief in the need for self-defense as *disproof* of malice aforethought as a matter of law and of evidence, thus subjecting it to the requirements of Penal Code section 29. The court's reasoning on this point is brief: "Since having an actual [honest] perception that one is in imminent danger negates malice aforethought we hold that Dr. Walker was properly prohibited from stating an opinion that defendant actually perceived that she was in imminent danger and needed to kill in self-defense."⁸¹ This analysis is incorrect. The existence of a genuine belief in the need for self-defense, while negating malice as a matter of law under the court's holding in *Flannel*, does *not* disprove malice as a matter of evidence. Evidence that the defendant killed in the heat of passion proves that the defendant did not kill with malice aforethought. However, evidence that the defendant killed in the actual belief in the need to defend herself does *not prove* the lack of malice aforethought. Rather, the defendant's actual belief in the need for self-defense is an element of self-defense, not

81. *People v. Aris*, 264 Cal. Rptr. 167, 180 (Cal. Ct. App. 1989) (citations omitted).

an element of the crime of murder. Section 29 of the Penal Code applies in *Czahara* because the defendant sought to include the expert's opinion that the defendant attempted murder while acting in the heat of passion to prove the lack of malice aforethought. Section 29 does not apply in *Aris*, since the expert's testimony that the defendant actually believed she had to kill would have supported her claim that she acted in self-defense, not to prove the absence of malice aforethought. Certainly, the effect of such evidence might negate malice as a matter of law under *Flannel*, but it would not disprove, as a matter of evidence, the lack of malice aforethought. Imperfect or partial self-defense is separate from the elements of murder, by definition because elements of self-defense do not disprove the element of malice aforethought required for murder.

While the court in *Flannel* held that an honest but unreasonable belief in the need for self-defense negates malice aforethought, the court emphasized that the doctrine of unreasonable belief is not "bound with or limited by concepts of . . . heat of passion."⁸² The California Supreme Court recently reiterated the separation of the doctrines of imperfect self-defense and diminished capacity in *In re Christian S.*⁸³ The court held that statutory amendments which sought to eliminate the defense of diminished capacity did not affect the doctrine of imperfect self-defense.⁸⁴ The court stated that while these doctrines can mitigate murder to manslaughter, imperfect self-defense is "independent of [heat of passion] and independent of diminished capacity."⁸⁵ The court in *Aris* incorrectly linked heat of passion with imperfect self-defense in its application of Penal Code section 29. The expert's opinion that the defendant honestly believed her life was in danger does not disprove the malice aforethought element of murder, but rather supports the defendant's affirmative claim of self-defense. Therefore, section 29 is not intended to bar an expert's opinion that a battered woman honestly believed that she was in imminent danger.

The appellate court also concluded that the trial court correctly excluded Dr. Walker's statement that in her "professional

82. *People v. Flannel*, 603 P.2d 1, 5 (Cal. 1979); see also *In re Christian S.*, 872 P.2d 574, 579-80 (Cal. 1994) (rejecting the argument that imperfect self-defense was developed from diminished capacity and was therefore abolished by Proposition 8).

83. 872 P.2d 574 (Cal. 1994).

84. *Id.* at 578-80.

85. *Id.* at 578.

opinion . . . [Ms. Aris] had a reasonable perception of danger."⁸⁶ To support this conclusion, the *Aris* court delved into a discussion distinguishing justification from excuse.⁸⁷ The court stated that justification focuses on the defendant's *act*, while excuse focuses on the *actor*.⁸⁸ Since self-defense is a justification, the court determined that it was only concerned with the reasonableness of the defendant's conduct, not with the reasonableness of her mental processes. Therefore, according to the court, the expert's opinion that the defendant's belief in the need for self-defense was reasonable is irrelevant.⁸⁹ While there is a theoretical difference between excuse and justification, the distinction is not helpful where reasonableness is not a purely objective standard, but includes a consideration of the defendant's situation and the circumstances in which the defendant employed self-defense.

In California, when a defendant claims that he acted in self-defense, juries are instructed that the killing was justified if the defendant "honestly and reasonably believe[d] . . . [t]hat it was necessary *under the circumstances* to kill the other person to prevent death or great bodily injury to herself."⁹⁰ By instructing the jury on the amount of force a defendant might use to defend herself, a court tells a jury that a defendant "may use all force and means which she believes to be reasonably necessary and which would appear to a reasonable person, *in the same or similar circumstances*, to be necessary to prevent the injury which appears to be imminent."⁹¹ Circumstances which a jury may consider include prior acts of violence by the decedent against the defendant.⁹² For example, in *People v. Torres*,⁹³ the defendant claimed

86. *People v. Aris*, 264 Cal. Rptr. 167, 179 (Cal. Ct. App. 1989). While the expert might be permitted to state conclusions as to hypotheticals posed by the attorney, unless the expert does not state a final conclusion linking those hypotheticals to the defendant being tried, jurors might be more confused. See Braswell, *supra* note 51, at 635. This is similar to the situation where the expert is not permitted to state whether, in her professional opinion, she thinks that the defendant in fact suffered from BWS; jurors are likely to conclude that if the expert did not say so, she must not have. See *supra* note 50 and accompanying text.

87. *Aris*, 264 Cal. Rptr. at 178-79.

88. *Id.*

89. *Id.*

90. CALJIC, CRIM. 5.12 (emphasis added).

91. CALJIC, CRIM. 5.30 (emphasis added).

92. *People v. Torres*, 210 P.2d 324, 326-28 (Cal. Dist. Ct. App. 1949) (finding that it was reversible error for the court to fail to instruct the jury that they could consider the prior threats of violence by the decedent in evaluating the reasonableness of the defendant's exercise of self-defense).

93. *Id.*

that he thought the victim was reaching for a knife in his pocket.⁹⁴ Although the defendant was mistaken, the court determined that a reasonable jury could find the defendant's mistake reasonable upon considering the prior threats by the decedent to the defendant.⁹⁵ Therefore, the reasonableness prong of self-defense includes not only the reasonableness of the *act* but also the reasonableness of the defendant's *belief*, or mental process, in evaluating the need for self-defense.

Early in the *Aris* opinion itself, the court sets out the law of self-defense and states that one requirement of self-defense is that "a reasonable person *in the same circumstances* would have had the same *perception* and done the same acts."⁹⁶ This supports the proposition that reasonable self-defense law is not concerned only with the reasonableness of the defendant's actions but also with the reasonableness of her perception and belief in the need for self-defense. Therefore, expert testimony which links the circumstances of the battered woman defendant to the reasonableness of both her belief in the need to defend herself and her act of self-defense is relevant to her claim of self-defense.

In sum, as to the evidentiary issues, the *Aris* court held that Penal Code section 29 bars a BWS expert from stating her opinion that the defendant honestly believed her life was in danger. The court also held that the reasonableness of the defendant's *belief* is irrelevant, stating that the justification of self-defense is concerned only with the reasonableness of the defendant's *act*.⁹⁷ As a result of these holdings Ms. Aris was unable to present a claim of perfect self-defense, nor was she able to bolster her claim of imperfect self-defense. These holdings demonstrate how a court's narrowing of self-defense doctrine combined with its incorrect application of evidentiary rules can make it impossible for a battered woman to get her claim of self-defense to a jury.

In addition to the evidentiary holdings in *Aris*, the appellate court further precluded Ms. Aris' claim of self-defense by upholding unduly narrow applications of reasonableness and imminence. The appellate court upheld the trial court's refusal to instruct the jury on perfect self-defense on the ground that the defendant's use of self-defense was unreasonable as a matter of

94. *Id.* at 325-26.

95. *Id.* at 327.

96. *People v. Aris*, 264 Cal. Rptr. 167, 172 (Cal. Ct. App. 1989) (emphasis added).

97. *Id.* at 179.

law. The court reached this conclusion based on the evidence that Ms. Aris' husband-batterer was sleeping at the moment when she fired the gun at him, and no "jury composed of reasonable men could have concluded that" a sleeping victim presents an imminent danger of great bodily harm."⁹⁸ The court's conclusion that Ms. Aris' use of self-defense was unreasonable as a matter of law precluded the jury from considering whether Ms. Aris' use of self-defense was, in fact, reasonable.

Moreover, this holding illustrates the difficulty battered women have in presenting their claims of self-defense when they kill in a non-traditional confrontational setting.⁹⁹ The issue of "whether the circumstances would cause a reasonable person to perceive the necessity of [self-defense] . . . , [is] normally [a] question of fact for the trier of fact to resolve."¹⁰⁰ While evidence of abuse alone is insufficient to warrant an instruction on self-defense, in *Aris* the defendant testified that her husband had beaten her that evening and had threatened that he did not think he would let her live until morning.¹⁰¹ She also presented expert testimony which explained how a woman who lives in a battering relationship may fear for her life in situations where others would not hold such a fear, to support the reasonableness of her use of self-defense against her sleeping batterer.¹⁰² The defendant thus presented sufficient evidence from which a jury composed of reasonable persons could have concluded that she acted in self-defense.¹⁰³ A court should not take such a factual issue away from the jury except where a defendant has failed to present any evidence to support an instruction. Furthermore, where a defendant has presented evidence to support a defense, the trial court should not "undertake to weigh the credibility"¹⁰⁴ of such evidence, since this is "a task exclusively relegated to the jury."¹⁰⁵

98. *Id.* at 176 (quoting *People v. Flannel*, 603 P.2d 1, 10 (Cal. 1979)).

99. *See supra* notes 5-11 and accompanying text.

100. *People v. Clark*, 181 Cal. Rptr. 682 (Cal. Ct. App. 1982).

101. Brief for Appellant at 113, *People v. Aris*, 215 Cal. App. 3d 1178 (1989) (No. E005418).

102. *Id.*

103. *See People v. Flannel*, 603 P.2d 1, 10 (Cal. 1979) (requiring trial courts to give requested instructions where a defendant presents substantial evidence to support the instruction).

104. *Id.* at 8.

105. *Id.*; *see also Maguigan, supra* note 20, at 439-42 (arguing that this procedural issue is critical to the defendant's ability to get her claim of self-defense to a jury).

While the trial court did instruct the jury on imperfect self-defense, the court's definition of "imminence" effectively precluded the jury from finding that the defendant believed she was confronted with an imminent threat.¹⁰⁶ The appellate court upheld the trial judge's explanation that "[i]mmminent peril, . . . means that the peril must have existed at the *very time* the fatal shot was fired."¹⁰⁷ The effects of this instruction were several. First, the instruction focused the jury's attention on the moment at which Ms. Aris fired the gun. However, California law permits juries to consider evidence of prior threats by the deceased to the defendant in determining the honesty of the defendant's belief in the need to use self-defense.¹⁰⁸ Second, the court's definition of "imminence" included the statement that "the peril must appear to the defendant as *immediate* and present and not prospective or even in the near future."¹⁰⁹ Use of the word "immediate," which connotes a much shorter time frame than "imminent,"¹¹⁰ similarly precluded the jury from considering the years of violence and abuse which the decedent inflicted upon Ms. Aris. Finally, by not emphasizing the factual nature of the question of imminence,¹¹¹ the court gave the impression that an absolute, or objective definition of "imminence" exists.¹¹²

106. See Madden, *supra* note 16, at 30. The instruction equated "imminent" with "immediate": "[t]he peril must appear to the defendant as immediate and present and not prospective or even in the near future." *People v. Aris*, 264 Cal. Rptr. 167, 173 (Cal. Ct. App. 1989). One juror later commented that "once [the judge] gave us his definition it was no longer a jury case; he decided the case." Madden, *supra* note 16, at 30 n.121 (quoting Candy J. Cooper, *Juror Tells of Pressure to Say Guilty*, S.F. EXAMINER, Aug. 31, 1992, at A9).

107. *Aris*, 264 Cal. Rptr. at 172. (emphasis added).

108. *People v. Pena*, 198 Cal. Rptr. 819, 826 (Cal. Ct. App. 1984). In *Aris*, the jury initially had been instructed to consider Mr. Aris' prior threats to and abuse of Ms. Aris to determine whether she honestly believed she had to defend herself. However, this came before the jury began deliberations. On at least three occasions, the jury interrupted their deliberations to request more instruction on the definition of "imminence"; however, they were not reinstructed specifically on the effect of prior violence by the decedent. Brief for Appellant at 136-137, *People v. Aris*, 215 Cal. App. 3d 1178 (1989) (No. E005418).

109. *Aris*, 264 Cal. Rptr. at 173. (emphasis added).

110. See *State v. Hundley*, 693 P.2d 475, 477-81 (Kan. 1985) (holding that the use of "immediate" rather than "imminent" to describe the feared danger improperly limited the jury's consideration of prior abuse of the defendant by the decedent).

111. See *People v. Torres*, 210 P.2d 324 (Cal. Dist. Ct. App. 1949).

112. This is illustrated by the fact that the jury asked the court whether "there [is] a length of time for [imminence]? Hours, days?" The court responded with "[t]hat's something you'll have to decide." Brief of Appellant at 127, *People v. Aris*, 215 Cal. App. 3d 1178 (1989) (No. E005418).

Essentially, the court's definition of "imminence" required the jury to find that Ms. Aris acted out of fear of a danger or threat which would have appeared imminent to a reasonable person. However, if the jury had so concluded, they would have determined that Ms. Aris had acted in *complete* self-defense.¹¹³ The appellate court's affirmance indicates that the definition of "imminence" is the same whether the defendant claims perfect self-defense, or claims that she acted upon an honest but unreasonable belief in the need for self-defense.¹¹⁴ However, in *Flannel*, the court stated that "[i]t is the *honest belief of imminent* peril that negates malice."¹¹⁵ An honest perception that an imminent danger exists, even if not imminent to a reasonable person, is what distinguishes imperfect from perfect self-defense. Thus, the court in *Aris* erroneously defined "imminence" in the context of imperfect self-defense. If the jury in *Aris* believed that Ms. Aris honestly feared for her life, they should have convicted her of manslaughter rather than second degree murder; Ms. Aris should not have been required to convince the jury that the danger was also imminent to a reasonable person.¹¹⁶ The trial court's definition of "imminence" and its determination of unreasonable self-defense as a matter of law, in addition to the court's evidentiary holdings, hindered Ms. Aris' ability to fully present her claims of perfect and imperfect self-defense and led to an unfair conviction of second-degree murder.

III. LEGISLATIVE ACTIONS

As mentioned earlier, the California Legislature has attempted to remedy the problems faced by women like Ms. Aris from two angles. Initially, California lawmakers opted for an evi-

113. However, as discussed earlier, the jury was not instructed on perfect self-defense.

114. *People v. Aris*, 264 Cal. Rptr. 167, 172-73 (Cal. Ct. App. 1989).

115. *People v. Flannel*, 603 P.2d 1, 7 (Cal. 1979) (emphasis added). The court in *Flannel* also quoted *People v. Lewis*, 9 Cal. Rptr. 263, 270 (Cal. Dist. Ct. App. 1960), which found that the trial court erred by refusing to instruct on manslaughter, stating "[a] jury might well find that defendant was acting in [genuine] fear, but that under the circumstances [where the deceased was unconscious when the defendant ran to get a hatchet], . . . he was not acting in a reasonably founded belief of imminent peril to life or great bodily harm."

116. While the California Supreme Court has recently cited to the *Aris* definition of "imminence" in a claim of "imperfect self-defense," *In re Christian S.*, 872 P.2d 574, 583 (Cal. 1994), the court failed to clarify that the focus must be on whether the defendant feared an imminent danger to her life, not whether a reasonable person would have perceived an imminent danger.

dentiary approach and, in 1991, added section 1107 to the Evidence Code, providing for the admission of expert testimony regarding BWS in criminal cases.¹¹⁷ The provision provides, in part, that:

expert testimony is admissible by either the prosecution or the defense regarding battered women's [sic] syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act . . . of abuse which form the basis of the criminal charge.¹¹⁸

Section 1107 clearly addresses any potential objections that BWS testimony is unreliable scientific evidence, stating that "[e]xpert opinion testimony on battered women's [sic] syndrome shall not be considered a new scientific technique whose reliability is unproven."¹¹⁹ Thus, where the defendant can establish that the testimony is relevant, and that the expert is otherwise qualified, section 1107 permits an expert to testify that the woman suffered from BWS when she killed her batterer.¹²⁰

However, it is not clear whether section 1107 allows an expert to state an opinion as to the honesty of the defendant's belief that it was necessary to kill her batterer to avoid death or great bodily injury. Certainly, such testimony is relevant to this element of self-defense, but section 1107 does not expressly indicate whether such testimony is barred by section 29 of the Penal Code as the *Aris* court determined. Nor does section 1107 indicate whether an expert's opinion that a reasonable woman in the defendant's circumstances would have also employed self-defense is irrelevant, as *Aris* held.

Evidence Code section 1107 suggests that the Legislature has overruled the *Aris* court's interpretation of Penal Code section 29 as barring an expert's opinion that the defendant actually believed she had to kill. Evidence Code 1107(d) states "[t]his section is intended as a rule of evidence only and no substantive change affecting the Penal Code is intended." Penal Code section 29 is not a substantive rule of law. Rather, it is a rule of evidence in criminal cases, barring expert opinion testimony as to whether a defendant had or did not have a particular state of

117. CAL. EVID. CODE § 1107 (West Supp. 1993).

118. *Id.* § 1107(a).

119. *Id.* § 1107(b).

120. This appears to codify the *Aris* court's finding that failure to allow the expert to state such an opinion is error.

mind required for an offense charged. The report of the Assembly Committee on Public Safety cites as "current law" section 29 and the *Aris* holding that BWS is relevant to prove the honesty of a defendant's belief.¹²¹ The report then states that this bill would authorize the admissibility of expert BWS testimony.¹²² In addition, one version of section 1107 would have included language that the legislature did not intend to affect the holding in *Aris*,¹²³ but this was dropped in a subsequent amendment.¹²⁴ The legislative history is rather vague as to the precise effect of section 1107, nonetheless, these comments indicate that the Legislature was examining both the *Aris* opinion and Penal Code section 29 when it considered section 1107. Since the *Aris* court relied on Penal Code section 29 to bar an expert's opinion as to the honesty of a defendant's belief in the need for self-defense, the report's statement that BWS evidence is admissible under section 1107 would imply that even if Penal Code section 29 applies,¹²⁵ Evidence Code section 1107 is an exception.¹²⁶

As to an expert's opinion that the defendant's belief in the need for self-defense was reasonable, the Senate Committee on the Judiciary's report on the penultimate version of section 1107 states that the new section would allow expert opinion testimony which is "related to a subject that is sufficiently beyond common experience that the opinion of the expert would assist the trier of the fact."¹²⁷ This language is similar to the *Aris* court's rationale that expert testimony that the defendant's belief in the need for self-defense was *reasonable* is irrelevant because reasonableness is not beyond the jury's common experience.¹²⁸ Since this was not subsequently altered, it appears that section 1107 codifies this aspect of the *Aris* holding, barring an expert from stating an

121. REPORT OF THE CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, Cal. A.B. 785, 1991-92 Reg. Sess. 1 (1991).

122. *Id.*

123. Cal. A.B. 785, 1991-92 Reg. Sess. § 2 (stating that "[i]t is the intent of the Legislature that this act not abrogate the holding of *People v. Aris*, 215 Cal. App. 3d 1178").

124. *Id.*

125. See *supra* notes 66-85 and accompanying text for the argument that Penal Code § 29 does not apply.

126. See MENDEZ, *supra* note 48, at 293 n.24 (stating that "section 1107 could be seen as creating an exception to section 29").

127. CALIFORNIA SENATE COMM. ON THE JUDICIARY, Cal. A.B. 785, 1991-92 Reg. Sess. 3-4 (1991).

128. *People v. Aris*, 264 Cal. Rptr. 167, 179 (Cal. Ct. App. 1989).

opinion that the defendant *reasonably* believed that she had to defend herself.

Section 1107, however, does not clarify whether the jury may consider *general* BWS testimony when assessing the reasonableness of a defendant's use of self-defense. In *Aris*, the court emphasized that while general expert BWS testimony is admissible, a jury should not use such testimony to establish whether a defendant's use of self-defense was reasonable.¹²⁹ While no cases have yet directly applied section 1107, in *People v. Romero*,¹³⁰ an appellate court pointed to the new section to bolster its conclusion that the defendant had been denied effective assistance of counsel when her attorney did not investigate the possibility of introducing BWS evidence to support her defense of duress. The court stated "the [expert BWS] evidence is *relevant* to the woman's credibility and to support her testimony that she entertained a good-faith *objectively reasonable* and honest belief that her act was necessary to prevent an imminent threat of greater harm."¹³¹

The court's reasoning in *Romero* makes sense. Evidence that a defendant has been subjected to abuse is one of the circumstances which a jury should consider in evaluating the reasonableness of a defendant's conduct and perception, just as a history of bad relations or violence between a defendant and a victim is relevant to the element of reasonableness in other cases.¹³² Certainly, in other instances, the jury is told to consider context when evaluating the reasonableness of the defendant's conduct and beliefs.¹³³ Thus, while codifying the admissibility of expert BWS testimony, section 1107 should have specifically stated that such testimony could be considered by a jury in evaluating the honesty *and* reasonableness of the defendant's belief in the need to use deadly force, and should have explicitly overruled this holding of *Aris*.

Pending Senate Bill 1144 (SB 1144), introduced in the California Legislature's 1993-1994 Regular Session, recognizes that the "current law of justifiable self-defense . . . is too narrowly

129. *Id.* at 180-81; *see also supra* note 62 and accompanying text.

130. 13 Cal. Rptr. 2d 332, 338-42 (Cal. Ct. App. 1992) (holding that section 1107 did not apply to cases tried before its enactment).

131. *Id.* at 338-39 (emphasis added).

132. *People v. Torres*, 210 P.2d 324 (Cal. Dist. Ct. App. 1949) (holding that failure to instruct on prior threats of violence was reversible error).

133. *See Madden, supra* note 16, at 28.

drawn to allow . . . a fair trial [for victims of domestic violence]."¹³⁴ In situations where a battered woman resorts to deadly force to defend herself:

current law of justifiable homicide, . . . does not allow these women to claim self-defense because the practical effect of the "reasonable person" standard imposed upon jurors [which] results in their finding that [battered] women are not entitled to justifiable homicide defenses because they did not attempt to escape what they actually perceived as imminent danger.¹³⁵

Despite these laudable findings, the proposed new law does not alter the definition of a "reasonable person" nor does it change the definition of "imminence."

SB 1144 proposes three additions to the Penal Code. First, SB 1144 appears to codify the "honest but unreasonable belief" doctrine in *People v. Flannel*,¹³⁶ by adding the following language to the definition of manslaughter:¹³⁷ "the intentional killing of a human being when, at the time of the killing, the person who kills has an *honest but unreasonable belief* in the necessity to defend against imminent peril to life or great bodily injury."¹³⁸ This could prevent future challenges to the court-created doctrine of imperfect self-defense.

The second addition proposed by SB 1144 creates a new and separate justification for victims of domestic violence who kill their batterers. Section 198.7 of the bill provides that one who "has been subjected to a history or pattern of repeated willful infliction of corporeal injury resulting in a traumatic condition, or a victim of rape, sodomy, or repeated sexual abuse by the decedent,"¹³⁹ is justified in killing the abuser if she honestly believed "that there was imminent danger that the decedent would kill or inflict great bodily injury on the person, . . . [and] that it was necessary under the circumstances to use deadly force."¹⁴⁰ The defendant also must have believed "at the time he or she used deadly force . . . that [she] was a victim of felony false imprison-

134. Cal. S.B. 1144, *supra* note 3, § 1(f).

135. *Id.* § 1(e).

136. 603 P.2d 1 (Cal. 1979); *see supra* note 27 and accompanying text.

137. CAL. PENAL CODE § 192 (West 1994).

138. Cal. S.B. 1144, *supra* note 3, § 1(e) (emphasis added). The California Supreme Court recently relied, in part, on this section of SB 1144 in finding that 1981 amendments to several sections of the Penal Code, while eliminating the defense of diminished capacity, did not alter the doctrine of imperfect or partial self-defense. *In re Christian S.*, 872 P.2d 574, 582 (Cal. 1994).

139. Cal. S.B. 1144, *supra* note 3, § 3(b) (adding Penal Code § 198.7(b)).

140. *Id.* (adding Penal Code § 198.7(c)).

ment.”¹⁴¹ At first blush, this change appears to permit a battered woman to present a claim of perfect self-defense based only on her honest belief in the need to defend herself, and a showing that she was a victim of felony false imprisonment, thus eliminating the need for her to additionally prove that she reasonably feared for her life. However, closer examination reveals otherwise.

The final addition to the Penal Code defines felony false imprisonment as a situation in which “the victim . . . is intentionally and unlawfully restrained or confined by violence or express or implied threats of harm, by word or act, which threats cause the victim to fear harm, . . . and that fear is not unreasonable.”¹⁴² The effect of the last two changes is not entirely clear. The proposed addition of section 198.7 to the Penal Code seems to provide that where a defendant has been in a battering relationship and the victim of felony false imprisonment, use of self-defense may be justified based on only the honest belief in the need for self-defense. This reading of proposed section 198.7 would eliminate the requirement of reasonableness for victims of the double-felony of physical or sexual abuse and false imprisonment. This would change current self-defense law tremendously, making the standard entirely subjective and eliminating any requirement that the battered defendant show that her use of self-defense was reasonable. Battered women who kill in non-traditional confrontational situations thus would have a much fuller opportunity to prove that their conduct was justified.

However, a defendant claiming justification under proposed section 198.7 must also show that she believed that she was a victim of felony false imprisonment.¹⁴³ The proposed addition of section 237.1 to the Penal Code defines felony false imprisonment as a situation in which “the victim . . . is intentionally and unlawfully restrained or confined by violence or express or implied threats of harm, by word or act, which threats cause the victim to fear harm, or injury to . . . herself . . . and *that fear is not*

141. *Id.* (adding Penal Code § 198.7(d)).

142. *Id.* (adding Penal Code § 237.1).

143. *Id.* § 3(d). The California Alliance Against Domestic Violence (“CAADV”) disagrees with an approach which focuses on “imprisonment” as the reason women remain in such relationships, arguing that fear of violence is only *one* reason. Also, CAADV disagrees with the requirement that a defendant battered woman come forward with evidence corroborating their claims of abuse. Nina Martin, *Reasonable Women*, CAL. LAW., Mar. 1994, at 58, 62–63.

unreasonable.¹⁴⁴ This specification, that the victim's fear of harm not be unreasonable, seems to indirectly incorporate a reasonableness standard into the new definition of justification set out in proposed section 198.7. Under proposed section 198.7, the defendant must have genuinely believed that she was a victim of felony false imprisonment; however, false imprisonment requires that the victim's fear of harm be reasonable.

One possible interpretation is that the reasonableness requirement is relevant only to prove that the batterer is guilty of false imprisonment. A batterer may not be found guilty based only on the genuine belief of the woman that she was a victim of false imprisonment; her fear must also be reasonable. Certainly, this makes sense. However, where the defendant is the battered woman, rather than the batterer, a court could find that the reasonableness of a woman's fear required for false imprisonment is incorporated into the new definition of justification, since proposed section 198.7 makes no mention of reasonableness. If this is so, a battered woman who kills in a non-traditional confrontational setting will most likely be unable to prove that her fear was reasonable, just as Ms. Aris was unable to do. While SB 1144 proclaims that the "reasonable person" standard is the problem, it should either explicitly eliminate the reasonableness requirement, or codify a requirement that juries be instructed to consider evidence of BWS when they evaluate the reasonableness of the defendant's fear.

Proposed changes to the definitions of both voluntary manslaughter and justification require that the defendant still have an honest belief in the need to defend against an *imminent* danger. The *Aris* court held that the definition of "imminence" is the same for both perfect and imperfect self-defense claims.¹⁴⁵ The court concluded that regardless of whether the defendant honestly perceived an imminent danger, the danger must have been actually imminent in order to support the defendant's claim of imperfect self-defense. The proposed changes to manslaughter and justification do not alter the definition of imminence as set forth by the appellate court in *Aris*. A future battered woman defendant who has killed in a non-traditional confrontational setting similar to that of Ms. Aris, would nonetheless have to prove that the danger to her was actually imminent, not simply that she

144. Cal. S.B. 1144, *supra* note 3 (adding Penal Code § 237.1).

145. See *supra* notes 98-105 and accompanying text.

believed that she was in imminent danger from her sleeping batterer (to prevail under either the new definition of justification or the new definition of manslaughter). Without a change to the *Aris* court's definition of "imminence," despite the good intentions of the Legislature, a woman who kills in a non-traditional confrontational setting will be guilty of second-degree murder.

Rather than create a separate justification for women who kill their batterers in the context of an abusive relationship, it makes more sense to remedy the erroneous definition of "imminence" set forth in *Aris*, with respect to imperfect self-defense. As discussed at the beginning of this essay, the problems presented by situations in which battered women kill their sleeping batterers are not necessarily due to the construct of self-defense law, but rather, as illustrated by the holdings of the *Aris* court, are due to the unduly restrictive manner in which courts apply self-defense elements to battered women. Rather than formulate a separate law of self-defense, it would be better to enact legislation which corrects the narrowing effected by the *Aris* court.

Under SB 1144, the main difference between finding voluntary manslaughter or justification is a matter of substantiating the defendant's situation. First, to prove justification, a battered woman must corroborate her claim that her abuser subjected her to a pattern of repeated corporeal injury. Corroborating evidence must be "sufficient to substantiate enough of the [defendant's] testimony to establish his or her credibility."¹⁴⁶ In most situations, there are witnesses who can testify that the defendant has been subjected to such abuse, or there are medical records to support her claim of abuse. Interestingly, when defendants not suffering from battered woman syndrome claim self-defense, their testimony alone may be sufficient to support the defense.¹⁴⁷ Second, to justify a killing, a defendant must prove that she honestly believed that she was a victim of felony false imprisonment.¹⁴⁸

Another pending bill combines the evidentiary and substantive changes described above. Assembly Bill 947 would amend Evidence Code section 1107 to include the following subdivision:

In any case in which a defendant charged with murder under section 187 of the Penal Code, or manslaughter under section

146. Cal. S.B. 1144, *supra* note 3, § 3(b) (adding Penal Code § 198.7).

147. See Martin, *supra* note 143, at 86.

148. See *supra* notes 142-45 and accompanying text.

192 of the Penal Code, raises as a defense, partial or complete justification, or excuse . . . the defendant, *in order to establish the defendant's reasonable belief* that the use of deadly force was necessary to defend against imminent peril to life or great bodily injury, *shall* be permitted to offer relevant evidence pursuant to this section that the defendant had been the victim of acts of domestic violence . . . by the deceased.¹⁴⁹

Because this proposed change would allow BWS expert testimony to establish the reasonableness of a defendant's use of self-defense, it requires courts to instruct the jury to consider this evidence when evaluating her self-defense claim. Also, a court could not determine that a battered woman's use of self-defense was *unreasonable* as a matter of law and refuse to instruct on perfect self-defense, as *Aris* held. By requiring the admission of BWS evidence to support reasonableness, the legislation would necessarily limit the judge's ability to determine unreasonableness as a matter of law whenever the defendant introduces evidence that she was the victim of domestic violence.

While this proposal combines BWS evidence with substantive law, it nonetheless fails to address the issue of how courts should define "imminence." Assembly Bill 947 would also amend the law of manslaughter by adding section 192.1, similar to the change proposed by Senate Bill 1144, to state that one who kills in the "honest but unreasonable belief in the necessity to defend against imminent peril" is guilty of manslaughter.¹⁵⁰ Like Senate Bill 1144, Assembly Bill 947 does not require that a danger actually be imminent for a jury to convict only of manslaughter, rather it is sufficient if the defendant honestly believed that the danger was imminent, given her history of abuse. Without making such clarification, again, a battered woman who kills in a non-traditional confrontational situation will be found guilty of second-degree murder, as Ms. Aris was, because she will be unable to convince the jury that her sleeping batterer presented an actual imminent danger. The legislature should clarify that a claim of imperfect self-defense should lead to manslaughter if the jury finds that a defendant honestly believed she was in imminent danger of death or serious bodily injury, whether or not she was

149. Cal. A.B. 947, 1993-94 Reg. Sess. § 1(d) (amending CAL. EVID. CODE 1107) (emphasis added).

150. *Id.* § 2(a) (adding Penal Code § 192.1). In addition, Assembly Bill 947 provides that a defendant in the above situation would be guilty of voluntary manslaughter if she manifests an intent to kill, while one who does not manifest such an intent would only be guilty of involuntary manslaughter. *Id.* § 2(a)(1), (2).

actually in such danger, or a reasonable person would have believed the danger was not imminent.

I acknowledge that most battered women do not kill their batterers while they sleep.¹⁵¹ Furthermore, I do not believe that a separate defense for battered women who kill is necessary or even a good idea. However, given the narrowing of self-defense law by the appellate court in *Aris*, the California Legislature should attempt to ensure that such battered women defendants are able to present fully their claim of self-defense to the jury. Therefore, I applaud the California Legislature's recent remedial attempts. Nonetheless, the focus should not be on creating a separate defense for battered women, but rather on setting forth definitions of "imminence" and "reasonableness" which would allow a *jury* to consider the facts and effects of such abuse in evaluating both the imminence of the danger presented by the abuser, as well as the reasonableness of the defendant's belief in the need for self-defense.

While Evidence Code section 1107 eliminated several obstacles to the admission of BWS evidence,¹⁵² a battered woman may still be denied a fair opportunity to present a claim of self-defense to a jury since section 1107 does not require courts to instruct the jury that this evidence is relevant to whether the defendant's use of self-defense was reasonable. The changes to self-defense law proposed by SB 1144 are ill-advised in that they create a separate law for battered women who kill their batterers. Furthermore, SB 1144 does not correct the narrowing of the element of imminence effected by the court in *Aris*. Nor would simply redefining the element of imminence be sufficient. Without the use of expert testimony, most jurors will not find that the defendant is acting in self-defense when she kills in a non-traditional confrontational setting. California is on its way to remedying this problem, but emphasis should not be on creating a new law of self-defense, but rather on expressly permitting juries to consider BWS evidence in their evaluation of reasonableness, and clarifying the definition of "imminent danger" when a defendant relies on imperfect self-defense.

151. See Maguigan, *supra* note 20, at 397. The author analyzed 223 incidents of battered women who killed their batterers and found that twenty percent of the killings were done in "nonconfrontational" situations. Four percent of these were "contract killings", eight percent were "sleeping batterers", and in eight percent of the incidents, the defendant was the "initial" aggressor during a lull in the violence. *Id.*

152. See *supra* notes 117-20 and accompanying text.

The California Legislature should adopt section one of AB 947 as it amends section 1107 of the Evidence Code.¹⁵³ In addition, I suggest amending section 29 of the Penal Code to add the following language: This section does not prohibit an expert from testifying as to whether the defendant had or did not have the required mental states to support an affirmative defense which include duress and self-defense. This would remedy the *Aris* court's incorrect interpretation of Penal Code section 29 as a bar to an expert's testimony that the defendant honestly believed she was in imminent danger of death or serious bodily injury.

Further, the legislature should adopt the following proposed section 192.1 of the Penal Code: In addition to section 192, manslaughter is the unlawful killing of a human being when, at the time of the killing, the person who killed honestly believed that he or she was in imminent danger of death or great bodily injury and honestly believed that he or she had to defend himself or herself, even if the danger was not actually imminent or even if a reasonable person would not have believed such danger was imminent. This amendment would remedy the incorrect definition of imminence with respect to imperfect self-defense. It would also clarify an important distinction between perfect and imperfect self-defense. Perfect self-defense requires the defendant to show that a reasonable person in her situation would have believed the danger to be imminent, while under the doctrine of imperfect self-defense, a defendant need only show that she honestly believed the danger was imminent.

Such changes to the Evidence Code and to the Penal Code will, without creating a separate law of self-defense for battered women, provide such women who kill their batterers with a better opportunity to present claims of perfect and imperfect self-defense within the context of traditional self-defense law.

153. See *supra* note 149 and accompanying text.

