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Superhuman in the Octagon, Imperfect in the Courtroom: Assessing the Culpability of Martial Artists Who Kill During Street Fights

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SUPERHUMAN IN THE OCTAGON, IMPERFECT IN THE COURTROOM: ASSESSING THE CULPABILITY OF MARTIAL ARTISTS WHO KILL DURING STREET FIGHTS

ABSTRACT

This Comment offers a new way for subjective characteristics to influence the criminal law of self-defense. Specifically, this Comment proposes a higher standard of self-defense for martial artists who kill their opponents outside competition settings, by denying the martial artists, as a matter of law, the ability to claim two distinct partial defenses: imperfect self-defense and provocation. For a martial artist, a proportional use of force should rarely require killing the aggressor because martial artists possess special fighting skills that are designed to subdue opponents without killing them. Courts should allow juries to judge a martial artist's culpability for homicidal violence by considering his skills according to what this Comment introduces as the "martial sufficiency test."

The martial sufficiency test serves two functions. First, the test balances a martial artist's skills with the limitations of his training to determine if he has killed his opponent through a disproportionate use of his skill. This will rein in martial artists who abuse their abilities and protect those who use their skills responsibly. Second, the test provides a framework for courts to determine under what circumstances a martial artist should be denied the partial defenses. The test has five factors designed to give ordinary jurors insight into martial arts training so they can fairly decide self-defense cases involving combatants with specialized skills.

Passing the test results in "martial sufficiency," a heightened standard of self-defense in which only a perfect self-defense can exculpate a defendant. While the test is designed to apply to anyone with specialized combat skills, such as police officers or soldiers, this Comment applies the test to the population of martial artists in particular. By applying the test to martial artists, this Comment emphasizes the need for the law and the martial arts community to adapt to each other. The martial sufficiency test is a vehicle to begin this adaptive process.

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INTRODUCTION

In December of 2001, Bryan Richards grabbed a handgun and entered the martial arts facility of Rafael Torre, a professional mixed martial arts (MMA) fighter.¹ Richards confronted Torre because he believed Torre had an affair with his wife.² Though before Richards could pull the trigger, Torre disarmed him and applied a classic MMA chokehold³ to subdue Richards. Richards died as a result of the chokehold, and Torre was subsequently prosecuted for murder.⁴

During Torre's trial, the cause of Richards's death received much attention. The medical examiner testified that, although Richards's neck was broken, he died of manual strangulation, caused by Torre choking him for several *minutes*.⁵ Accordingly, the jury rejected Torre's self-defense argument because applying a chokehold for so long far exceeds what is necessary to disable someone.⁶ He was convicted of first-degree murder and sentenced to life without parole.⁷

Only Torre truly knows why he choked Richards for so long,⁸ but this Comment suggests two likely possibilities. One possibility frames Torre as an innocent martial artist. In this scenario, Torre's instructors may only have taught him how to fight in the octagon⁹ (the ring in which MMA fights take

¹ People v. Torre, No. E039015, 2007 Cal. App. Unpub. LEXIS 5104, at *3, *6 (Ct. App. June 25, 2007). Torre was also a bouncer. *Id.* at *6. This is relevant for application of the third factor of the martial sufficiency test discussed below in Part IV.

² *Id.* at *6.

³ *Id.*; see also GENE "ARANHA" SIMCO, BRAZILIAN JIU-JITSU: THE MASTER TEXT 238 (2001). The move is referred to as the "Mata Leo," "Lion Kill Choke," or rear-naked choke. *Id.*

⁴ Torre, 2007 Cal. App. Unpub. LEXIS 5104, at *7–8.

⁵ Nationwide Life Ins. Co. v. Richards, 541 F.3d 903, 908 n.3 (9th Cir. 2008). This case was the subsequent case to resolve the insurance claims that arose in Torre and provides additional details not available in the first decision.

⁶ See E. Karl Koiwai, *Deaths Allegedly Caused by the Use of "Choke Holds" (Shime-Waza)*, JUDO INFO. SITES, <http://judoinfo.com/choke6.htm> (last updated July 17, 2003). When the rear-naked choke is applied properly, it restricts blood flow through the carotid artery and the opponent passes out within eight to fourteen seconds due to lack of oxygen. *Id.* Once the opponent has passed out, the fighter can leave the scene and the opponent will wake up dazed but otherwise unharmed within ten to twenty seconds. *Id.*

⁷ Torre, 2007 Cal. App. Unpub. LEXIS 5104, at *1–2.

⁸ *Id.* at *1–8. The jury found that Torre committed the murder for financial gain, as they apparently believed the prosecution's argument that Torre and Mrs. Richards conspired to kill Mr. Richards to collect his life insurance money. *Id.* at *6. Due to the success of the prosecution's argument, the jury never even received a self-defense instruction. *Id.* at *1. The facts of Torre, not its holding, are key to the subject of this Comment.

⁹ See *About—Fact Sheet*, ULTIMATE FIGHTING CHAMPIONSHIP, http://www.ufc.com/about/Fact_Sheet/ (last visited May 4, 2011). The octagon is the arena in which professional mixed martial arts bouts take place

place), or his instructors may not have taught him how to modify his response to self-defense situations outside the professional fight setting because they were ignorant of self-defense law. When a real self-defense scenario materialized, it may have been so different from the context in which Torre had trained that he could not generate a defensive response without unlawfully killing his opponent. As a result, Torre may have lost his cool and acted like any person who loses his self-control. Had Torre instead executed skills designed with self-defense law in mind, to generate a legally acceptable defensive response (i.e., release the choke sooner and escape), perhaps the jury would not have convicted him. This first theory demonstrates a martial artist applying his skills as taught, but due to the gaps between his training, the experience of a real fight, and self-defense law, he was convicted for an inappropriate response. This type of martial artist may be noble, but he and his system need education about self-defense law.

The other possibility is more nefarious. Perhaps Torre wanted to kill Richards even though he could have subdued him without killing him, and was fortunate that Richards attacked first, enabling Torre to feign a self-defense claim. If Torre killed Richards intentionally in a cool and calm manner, Torre is an example of a martial artist who utilized his training for evil. This type of martial artist is very dangerous because he threatens the sanctity of human life by misusing his abilities. In this situation, he should be convicted of intentional homicide.

In the first scenario, the martial artist should have the legal doctrines of imperfect self-defense and provocation available to him. In trying to subdue his opponent, the martial artist did not intend to kill him, and either the martial artist did not account for legal consequences or his experience in a real fight was so different from his training that he lost his self-control just like any other person might. In the second scenario, the martial artist should be denied these defenses because he intentionally killed in a cool manner and did not need to do so to protect himself. Given the variations in the killings by martial artists, the law needs to provide a nuanced and contextualized response to punish the different defendants appropriately.

and in which several standard safety controls like referees, doctors, and rules are provided to protect the fighters. See *UFC Rules and Regulations*, FIGHTING-MMA, <http://www.fighting-mma.com/ufc-rules-and-regulations.php> (last visited May 4, 2011). There is no reason for a fighter to hold back any force in these fights (within the rules) since referees and doctors are there to ensure the fighters' safety and to stop the fight when a fighter is in danger. See *id.*

This Comment proposes a higher standard of self-defense for a small category of exceptionally well-trained traditional martial artists and mixed martial artists (collectively, martial artists) by denying them, as a matter of law, the ability to claim two distinct partial defenses: imperfect self-defense and provocation. Only perfect self-defense should be available to those martial artists who qualify as “martially sufficient”¹⁰ under the circumstances. The proposed martial sufficiency test (MST) will determine under what circumstances a court should deny a martial artist the partial defenses and will serve as a deterrent to martial artists who might respond with disproportionate force.¹¹ The MST improves on previous tests that also support higher standards of self-defense for martial artists.¹² The MST denies defendants the partial defenses for their abuse of martial arts skills and can thus be applied broadly to anyone with specialized combat skill, such as police officers or soldiers.

This Comment arrives at the MST by analogizing to instances where others have used subjective characteristics to influence the criminal law of self-defense. For example, battered women already attempt to introduce evidence of their situations in self-defense cases in order to have the jury interpret the reasonableness and imminence requirements of self-defense law more leniently.¹³ Similarly, police officers attempt to introduce evidence of their skills in combat to help jurors understand why their actions were reasonable. However, this evidence may work against the defendant if it reinforces the jury’s preconceptions.¹⁴ By examining defendants with combat skill through

¹⁰ *Martial sufficiency* or *martially sufficient* refers to those martial artists who pass the proposed test (MST) in Part IV below.

¹¹ The MST applies general and specific deterrence for its purposes of punishment.

¹² See CARL BROWN, *THE LAW AND MARTIAL ARTS* 196–99 (1998). Brown proposes, among other tests, the Martial Arts Liability Test, which is used for claims of assault and battery when a self-defense claim is not plausible. Its elements include:

Was the martial artist an expert? Was the injury caused by a technique which the martial artist knew or should have known as a result of training? Was the martial artist self-taught, or was he “trained” by other experts? Was the injury caused by a martial arts technique as opposed to “street fighting?”

Id. See generally KARL J. DUFF, *MARTIAL ARTS & THE LAW* (Mike Lee ed., 1985) (describing liability issues for martial artists and the law).

¹³ See *infra* Part II.A.

¹⁴ See *infra* Part II.B. See generally *Kaufman v. People*, 202 P.3d 542 (Colo. 2009) (allowing evidence of the defendant’s self-defense knife skills class to help determine whether he intended to inflict knife wounds on the victim, but excluding evidence of martial arts classes as irrelevant because the defendant killed the victim with a knife, not a martial arts technique).

the MST, ordinary jurors will be better able to decide self-defense cases when martial artists, or other skillful individuals, are the defendants.

This Comment proceeds in five parts. Part I reviews the provisions of self-defense doctrine, imperfect self-defense, and the provocation defense. Part II examines how subjectivity has influenced the law of self-defense in two ways. First, it looks at how battered women defendants' use of subjective evidence encourages juries to apply the self-defense doctrine leniently. It then contrasts this lenient approach with how subjective evidence of combat skills may hurt a defendant police officer's case. Part III discusses the skills of traditional martial artists and mixed martial artists to justify why the martial arts is a new area in which subjectivity should influence self-defense law. Specifically, Part III argues that courts should hold certain exceptionally well-trained martial artists to heightened standards of self-defense. Part IV then introduces the five-factor MST as a way to reconcile the skills and limitations of martial artists so that courts can identify the special martial artists who should be denied the partial defenses. Finally, Part V concludes with the changes the legal and the martial arts communities can make to implement the test and to promote awareness of self-defense law.

I. TRADITIONAL LEGAL FOUNDATION

This Part presents an overview of American self-defense doctrine as defined in the American common law and the Model Penal Code (MPC). Section A explains the elements of self-defense and the first partial defense, imperfect self-defense, while section B explains the second partial defense, the provocation defense.

A. *Self-Defense*

This section discusses self-defense in the common law and the MPC generally and then explains the jurisdiction-specific rules of the retreat doctrine and the true-man doctrine. It then describes the self-defense requirements by separating them into the attacking elements in subsection 1 and the responsive elements in subsection 2. The attacking elements include an imminence requirement and an unlawful attack requirement. The responsive elements have a proportionality requirement and both a subjective and objective belief

that the force used was necessary.¹⁵ Lastly, subsection 3 explains the partial defense of imperfect self-defense.

Under the American common law, self-defense is an exculpatory legal defense for someone accused of murder, manslaughter, attempted murder, assault, battery, and other crimes against a person.¹⁶ According to the self-defense doctrine as applied to killing,¹⁷ an individual is legally justified in committing an intentional killing when he reasonably believes that such force is necessary to repel the imminent use of unlawful deadly force by an attacker or “aggressor.”¹⁸

In contrast to the common law, the MPC focuses more heavily on the actor’s subjective belief. It states that “the use of force upon or toward another person is justifiable when the actor 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.”¹⁹ Compared to the common law approach, the MPC makes the actor’s belief sufficient to support the defense. If his belief is mistakenly formed, he will be prosecuted for a recklessness or negligence offense, but not for an offense requiring purpose for culpability.²⁰

In some jurisdictions, defendants may not use either the common law or the MPC claim of self-defense unless they have fulfilled the “duty to retreat.” The retreat doctrine aims to prevent unnecessary death or serious bodily injury.²¹ It requires that, before using deadly force, a defender²² must flee—not fight the aggressor—if the defender knows that he can successfully avoid harm by

¹⁵ The responsive elements are central to the martial sufficiency test in Part IV below.

¹⁶ WAYNE R. LAFAVE, CRIMINAL LAW § 10.4, at 539 (4th ed. 2003). This Comment focuses on self-defense cases where the defendant killed the victim.

¹⁷ See Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 28–29 (1986) (listing the elements required for self-defense).

¹⁸ An aggressor is anyone who commits an “unlawful act reasonably calculated to produce an affray foreboding injurious or fatal consequences.” *United States v. Peterson*, 483 F.2d 1222, 1233 (D.C. Cir. 1973). An aggressor who attacks with nondeadly force loses his right to self-defense but can regain it in two ways. First, if the defender responds with deadly force to the aggressor’s attack, the aggressor can use deadly force. *Watkins v. State*, 555 A.2d 1087, 1088–89 (Md. Ct. Spec. App. 1989). Second, the aggressor can withdraw his initial attack in good faith and take reasonable steps to notify the defender of his withdrawal, such that a reasonable man would have known that the assault ended. *People v. Toler*, 9 P.3d 341, 350 (Colo. 2000).

¹⁹ MODEL PENAL CODE § 3.04(1) (1985).

²⁰ *Id.* § 3.04(1) explanatory note.

²¹ LAFAVE, *supra* note 16, § 10.4(f), at 547.

²² This Comment uses *defender* to mean the person being attacked, not the defendant at trial.

running away from the aggressor.²³ However, it does not apply when a party only needs nondeadly force to stop the aggressor,²⁴ or when the defender cannot retreat safely;²⁵ there is also usually no requirement to retreat when attacked in one's own home.²⁶

As an alternative to the retreat doctrine, courts have also developed the "true man"²⁷ doctrine in an attempt to avoid requiring "cowardly" and "humiliating" retreats by defenders.²⁸ The "true man" is someone who is not at fault in provoking the confrontation, who is lawfully in a location, and who has a reasonable fear of being attacked.²⁹ The true man has the right, without retreating, to stand his ground no matter where he is and to repel force with force.³⁰ The true man doctrine is the majority rule in the United States.³¹

While common law or MPC states may choose to apply either the duty to retreat or the true man doctrine, all states apply four core factors for a perfect self-defense claim. These elements can be divided into characteristic elements of the attack and characteristic elements of the response.

1. *Characteristic Elements of the Attack*

As an initial matter, the self-defense doctrine only protects a person who responds to a threat or use of *unlawful* force. A person cannot invoke self-defense to counter the use of justified force, such as a lawful arrest.³² Some

²³ See, e.g., *State v. Cooper*, 867 N.E.2d 493, 499 (Ohio Ct. App. 2007).

²⁴ See LAFAVE, *supra* note 16, § 10.4(f), at 547 n.65 (stating that some modern laws expressly claim that one need not retreat if only nondeadly force will be applied); *State v. Canady*, 664 S.E.2d 380, 386 (N.C. Ct. App. 2008) ("In [assaults made with non-deadly force] the person assaulted may not stand his ground and kill his adversary if there is any way of escape open to him, although he is permitted to repel force by force and give blow for blow." (alteration in original) (quoting *State v. Pearson*, 215 S.E.2d 598, 602–03 (N.C. 1975)) (internal quotation marks omitted)).

²⁵ *State v. Anderson*, 631 A.2d 1149, 1152 (Conn. 1993).

²⁶ See, e.g., *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006).

²⁷ See, e.g., *People v. Toler*, 9 P.3d 341, 347 (Colo. 2000). It is also known as the true person doctrine or the "no duty to retreat rule." *Id.* (internal quotation marks omitted).

²⁸ *Anderson*, 631 A.2d at 1154.

²⁹ *Toler*, 9 P.3d at 347–48.

³⁰ *Runyan v. State*, 57 Ind. 80, 84 (1877).

³¹ Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 259 (2008); see also LAFAVE, *supra* note 16, § 10.4(f), at 547 ("The majority of American jurisdictions holds that the defender (who was not the original aggressor) need not retreat, even though he can do so safely, before using deadly force upon an assailant whom he reasonably believes will kill him or do him serious bodily harm.").

³² MODEL PENAL CODE § 3.04(2)(a)(i) (1985); *State v. Oliphant*, 218 P.3d 1281, 1291 (Or. 2009) (en banc) (noting that the person may nevertheless invoke self-defense to counter against what the person believes

jurisdictions allow for nondeadly force against an unlawful arrest, but the common law does not allow deadly force to prevent an unlawful arrest because mechanisms are already in place to challenge such an event.³³ Questions of what constitutes unlawful force often arise when police officers attempt arrests.³⁴

Second, for a person to invoke self-defense under the common law or the MPC, the attack he fears must also be imminent—meaning immediately forthcoming.³⁵ The imminence requirement limits a person’s ability to claim self-defense to only those attacks that occur in the present, as there will usually be alternatives to force that could prevent potential future conflicts.³⁶ If the danger will occur in the future, the attack is not imminent;³⁷ the law regards violence taken to prevent such future attacks as preemptive strikes rather than self-defense.³⁸ Additionally, self-defense does not apply to revenge killings because of, among other things, this lack of imminence.³⁹

2. *Characteristic Elements of the Response*

The criminal law is also uniform for the responsive elements, because the common law⁴⁰ and the MPC⁴¹ both require that a defender’s response be

to be the arresting officer’s excessive use of force when making the arrest, and that excess force is unlawful and may thus be countered by self-defense).

³³ LAFAVE, *supra* note 16, § 10.4(h), at 549 n.81 (“The unlawfully arrested person may apply to a magistrate for release upon a writ of habeas corpus, but he will not be entitled to release in spite of the unlawful arrest if at the time of the hearing on the writ there is established probable cause to believe he has committed the crime.”).

³⁴ See, e.g., *Oliphant*, 218 P.3d at 1291; *Commonwealth v. Finkey*, 603 A.2d 651, 652 (Pa. Super. Ct. 1992).

³⁵ LAFAVE, *supra* note 16, § 10.4(d), at 544.

³⁶ *Id.* § 10.4(d), at 544–45.

³⁷ *State v. Norman*, 378 S.E.2d 8, 13 (N.C. 1989) (defining “imminence” as the “immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law” (quoting BLACK’S LAW DICTIONARY 676 (5th ed. 1979)) (internal quotation marks omitted)).

³⁸ *People v. Truong*, 553 N.W.2d 692, 699 (Mich. Ct. App. 1996); cf. *BROWN*, *supra* note 12, at 199 (discussing when preemptive strikes are allowed); *DUFF*, *supra* note 12, at 13–14 (same). The imminence requirement is controversial in battered woman’s syndrome cases and is discussed in Part II *infra*.

³⁹ *People v. Batac*, 631 N.E.2d 373, 384 (Ill. App. Ct. 1994).

⁴⁰ *E.g.*, *State v. Cook*, 515 S.E.2d 127, 137 (W. Va. 1999) (“Our Court has previously held that the amount of force that can be used in self-defense is that normally one can return deadly force only if he reasonably believes that the assailant is about to inflict death or serious bodily harm; otherwise, where he is threatened only with non-deadly force, he may use only non-deadly force in return.” (citing *State v. W.J.B.*, 276 S.E.2d 550, 557 (W. Va. 1981))).

⁴¹ Compare MODEL PENAL CODE § 3.04(1) (1985), with *id.* § 3.04(2).

proportional to the force of the original attack. A proportional response uses an amount of force reasonably related to the threatened harm. For example, a person may use nondeadly force in self-defense to counter a nondeadly force attack,⁴² and a person can use deadly force in self-defense for an attack reasonably believed to be capable of causing death or serious bodily harm.⁴³ Factors that generally affect whether deadly force is necessary include the aggressor's size or sex, health differences between aggressor and defender, the violent nature of an aggressor, the aggressor's use of weapons, and the presence of multiple attackers.⁴⁴

In addition to proportionality, the other responsive elements of self-defense are the defender's subjective and objective beliefs. The subjective component requires that the defender *personally* believe that he is in danger of an imminent threat of unlawful deadly force against him and that deadly force is required to defend against it.⁴⁵ If the defender does not believe either that he was threatened or that he must use deadly force to respond, he cannot claim self-defense.⁴⁶ Yet, if the subjective standard is met, then even if the defender hates his attacker or takes pleasure in the retaliation, he retains his self-defense protections.⁴⁷

The objective element requires a defender to have reasonably believed that he needed to apply the level of force used.⁴⁸ Hence, a defender's belief in the need to use force must be not only sincere but also reasonable.⁴⁹ A reasonable belief does not require factual correctness; a party only needs a reasonable perception that an attacker threatened imminent deadly force against him to meet the objective belief standard.⁵⁰ This is true regardless of whether the

⁴² *Id.* § 3.04(1); LAFAVE, *supra* note 16, § 10.4(b), at 541 n.11.

⁴³ *Beard v. United States*, 158 U.S. 550, 564 (1895).

⁴⁴ LAFAVE, *supra* note 16, § 10.4(b), at 542 nn.17–21 (citing to cases where these factors determine whether deadly force is appropriate).

⁴⁵ *Josey v. United States*, 135 F.2d 809, 810 (D.C. Cir. 1943) (denying self-defense for the defendant since he failed to state that he actually believed the threat was imminent). “One of the determining elements in self-defense is the belief of the accused, concerning the imminence of danger. While it is necessary, therefore, that he have reasonable grounds to believe, it is necessary, also, that his mind react to those grounds, to the extent of believing both that danger is imminent, and that force must be used to repel it.” *Id.* (emphasis omitted); accord *State v. Martinez*, 718 A.2d 22, 26 n.3 (Conn. App. Ct. 1998).

⁴⁶ *See, e.g., Josey*, 135 F.2d at 810.

⁴⁷ *E.g., Golden v. State*, 25 Ga. 527, 532 (1858).

⁴⁸ *See People v. Goetz*, 497 N.E.2d 41, 50 (N.Y. 1986) (explaining that if the “reasonably believes” element was a subjective standard that meant reasonable to the defendant, a defendant's perceptions could completely exculpate him from criminal liability).

⁴⁹ *Id.*

⁵⁰ *State v. Marr*, 765 A.2d 645, 652 (Md. 2001).

attacker intended to use (or actually used) deadly force against the defender.⁵¹ The attacking and responsive elements together comprise perfect self-defense.⁵²

Beyond the full protection afforded by perfect self-defense, some states recognize two partial defenses to intentional homicides. The partial defenses are imperfect self-defense and the provocation defense.

B. Partial Defense One: Imperfect Self-Defense

Some jurisdictions allow use of the imperfect self-defense doctrine to mitigate culpability for what otherwise appears to be an intentional homicide.⁵³ It applies when the defender honestly, but unreasonably, believed that he needed to use deadly force to defend himself from an imminent attack and killed his attacker as a result.⁵⁴ Imperfect self-defense is a peculiar doctrine according to some courts because “[o]utside of homicide law, the concept [of imperfect self-defense] doesn’t exist With respect to all other crimes, the defendant is either guilty or not guilty There is no ‘in between.’”⁵⁵

In contrast, the MPC recognizes imperfect self-defense as a mistake of fact.⁵⁶ Under the MPC, a court cannot convict a person of an intentional killing if he mistakenly concludes, by either recklessness or negligence, that the use of deadly force is necessary. But such recklessness or negligence in assessing the situation may establish culpability for an unintentional homicide.⁵⁷

⁵¹ *Id.*

The fact that the defendant’s perception is incorrect does not necessarily make it unreasonable; human beings often misunderstand their surroundings and the intentions of other people. . . . In those kinds of circumstances, the jury would have to determine the reasonableness of the defendant’s conduct in light of his reasonable, though erroneous, perception.

Id. (citing *Starr v. United States*, 153 U.S. 614 (1894)).

⁵² *State v. Ammons*, 606 S.E.2d 400, 404 (N.C. Ct. App. 2005). If a third person acts in defense of another, the third person will have a perfect self-defense claim if the defender would have had one. *Mack v. State*, 348 So. 2d 524, 527 (Ala. Crim. App. 1977). The complexities with regard to the defense of others are beyond the scope of this Comment.

⁵³ *E.g., In re Lazor*, 92 Cal. Rptr. 3d 36, 46 n.12 (Ct. App. 2009) (“California law recognizes the doctrine of imperfect self-defense, under which a defendant who kills with an actual but unreasonable belief in the need for self-defense is not guilty of murder but may be guilty of manslaughter.” (quoting *People v. Martinez*, 74 P.3d 748 (Cal. 2003)) (internal quotation marks omitted)).

⁵⁴ LAFAVE, *supra* note 16, § 10.4(i), at 550.

⁵⁵ *Bryant v. State*, 574 A.2d 29, 32–33 (Md. Ct. Spec. App. 1990)).

⁵⁶ MODEL PENAL CODE § 3.09(1) (1985).

⁵⁷ *Id.* § 3.09(2).

Imperfect self-defense differs from perfect self-defense in its effect on the defendant. A defendant is completely exonerated when acting in perfect self-defense because he committed an action that the law regards as justifiable. In contrast, a defendant acting in imperfect self-defense is not justified, but only less culpable than one who commits an intentional homicide.⁵⁸ Imperfect self-defense is a common law rule of mitigation that reduces a murder conviction to manslaughter on the premise of an absence of malice.⁵⁹

C. Partial Defense Two: Provocation

Similar to imperfect self-defense, the provocation defense is an intermediate category of culpability recognizing that a defender who kills his provoker should not be guilty of murder, but should be guilty of *some* crime—the result is a conviction for voluntary manslaughter.⁶⁰ The provocation defense recognizes that if sufficiently provoked, even a reasonable man can lose the self-control that would normally prevent him from killing.⁶¹ Like imperfect self-defense, a provocation claim is only a partial, not a complete, defense. This section explains common law provocation by examining the provocation elements in subsection 1 and the cooling off elements in subsection 2. Subsection 3 examines the MPC version of provocation, and subsection 4 explores the reasoning behind the defense's origin.

Under the common law, a successful provocation claim reduces an intentional killing from murder to voluntary manslaughter. Provocation has four elements: (1) the defender was provoked, (2) by something that constitutes legally adequate provocation, (3) “[a] reasonable man so provoked would not have cooled off in the time between the provocation and the killing,” and (4) the defender did not cool off during the time between the provocation and the killing.⁶²

1. The Provocation Elements

The first two elements focus on whether the defendant's perception of the provocation was subjectively and objectively reasonable. The first element is subjective and the second element is objective.⁶³ The defender cannot raise a

⁵⁸ *E.g.*, UTAH CODE ANN. § 76-5-203(4)(c)(ii) (West 2009).

⁵⁹ *In re Lazor*, 92 Cal. Rptr. 3d 36, 46 n.12 (Ct. App. 2009).

⁶⁰ LAFAVE, *supra* note 16, § 15.2(b), at 777.

⁶¹ *State v. Rambo*, 951 A.2d 1075, 1080 (N.J. Super. Ct. App. Div. 2008).

⁶² LAFAVE, *supra* note 16, § 15.2(a), at 777.

⁶³ *Rambo*, 951 A.2d at 1080.

common law provocation claim if he was not actually provoked.⁶⁴ Hence, people with exceptionally cool and calm tempers may not be able to avail themselves of this defense. The provocation must also be legally sufficient.⁶⁵ Generally, legally sufficient provocations include a physical attack, an unlawful arrest, or the discovery of a cheating spouse, but never include a trespass or mere words.⁶⁶ Light blows that could constitute battery do not amount to legally sufficient provocation, but a violent and powerful blow could.⁶⁷ Some statutes categorize mutual combat scenarios⁶⁸ or “sudden quarrel[s]” as adequate to constitute provocation.⁶⁹ In extreme cases, an aggressor’s unsuccessful attempt to shoot the defender could constitute adequate provocation.⁷⁰ Courts have considered whether a defender’s unique mental or physical traits that can cause him to lose control more easily should weigh in favor of supporting a provocation defense, but the majority of courts reject this position because it fails the objective reasonable person requirement.⁷¹

2. *The Cooling Off Elements*

For the third and fourth provocation factors, if a reasonable person would have cooled off during the time in question, or if the defender subjectively cooled off, then the defender cannot make use of the provocation defense.⁷² The third element is objective and the fourth element is subjective.⁷³ If so little time has passed that both a reasonable person and the defender could not have cooled off or regained self-control, then these elements will not bar the

⁶⁴ Lewandowski v. State, 483 S.E.2d 582, 583 (Ga. 1997).

⁶⁵ Courts find an act legally sufficient to constitute provocation if a reasonable person could be provoked into killing in this circumstance. *E.g.*, State v. Munoz, 827 P.2d 1303, 1304 (N.M. Ct. App. 1992) (finding the defendant was provoked when he killed the victim after the defendant learned that the victim’s family member had sexually molested his wife, because this information would cause a temporary loss of self-control in the average person as defined by the statute).

⁶⁶ LAFAVE, *supra* note 16, § 15.2(b), at 777.

⁶⁷ *Id.* § 15.2(b)(1), at 778.

⁶⁸ However, illegal mutual combat scenarios are agreements by the parties that usually preclude a claim of self-defense. *E.g.*, Kaufman v. People, 202 P.3d 542, 561 (Colo. 2009) (explaining that, under state law, self-defense does not apply to mutual combat scenarios).

⁶⁹ LAFAVE, *supra* note 16, § 15.2(b)(2), at 778 n.27.

⁷⁰ Stevenson v. United States, 162 U.S. 313, 320 (1896).

⁷¹ LAFAVE, *supra* note 16, § 15.2(b)(10), at 784 n.78. Essentially, this Comment argues the opposite: a martial artist defender’s unique mental or physical traits that cause him to *retain* control more easily should weigh in favor of *denying* a provocation defense. The MST decides whether a defendant is eligible for this treatment. *See infra* Part IV.

⁷² LAFAVE, *supra* note 16, § 15.2(f), at 788.

⁷³ State v. Rambo, 951 A.2d 1075, 1080 (N.J. Super. Ct. App. Div. 2008).

provocation defense. Whether enough time passed for the defender to cool off is a question of fact decided by the jury in common law jurisdictions.⁷⁴ However, some jurisdictions have found as a matter of law that certain spans of time are too short to allow for cooling off.⁷⁵

3. *The MPC Provocation Provision*

Though the objective elements tend to dominate provocation analysis in common law jurisdictions, the MPC allows for more subjectivity.⁷⁶ The MPC considers a killing to be provoked when “committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse,”⁷⁷ where reasonableness is “determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”⁷⁸ While the “reasonable explanation or excuse” language is an objective element meant to analyze a situation from the reasonable person’s point of view, the “as he believes them to be” language is a subjective element meant to temper the focus on objectivity. The “extreme mental or emotional disturbance” language is another important subjective element also meant to temper the focus on objectivity by looking to the defender’s state-of-mind at the time of the killing.

The MPC’s emphasis on subjectivity broadens the common law definition of provocation from a “sudden heat of passion” killing to include even reckless homicide,⁷⁹ thus expanding the opportunities for a defender to be convicted of a lesser homicide than murder.⁸⁰ However, just like in the common law, a defender cannot raise the MPC provision if he was not actually provoked⁸¹ or if the provocation did not cause him an extreme emotional disturbance.⁸² For example, if the defender has a cool temperament or has had training that allowed him to stay calm, this calmness would prevent him from claiming he

⁷⁴ LAFAVE, *supra* note 16, § 15.2(d), at 786–87 & nn.93–94.

⁷⁵ See, e.g., *Carter v. State*, 505 A.2d 545, 548–49 (Md. Ct. Spec. App. 1986) (finding that “some 60 to 90 seconds” was not “sufficient as a matter of law for a ‘hot-blooded’ passion to subside and to allow for ‘cool deliberation’”).

⁷⁶ See MODEL PENAL CODE § 210.3 (1985).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* § 210.3(1)(a).

⁸⁰ *Id.* § 210.3 explanatory note; see also Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1340 (1997).

⁸¹ *Lewandowski v. State*, 483 S.E.2d 582, 583 (Ga. 1997).

⁸² E.g., *Baze v. Parker*, 371 F.3d 310, 324 (6th Cir. 2004).

was provoked. Accordingly, his temperament may prevent him from satisfying the extreme emotional disturbance component of MPC provocation.

4. *Provocation's Origins*

Both the common law and MPC provocation defenses account for human limitations by recognizing natural human weakness.⁸³ The defense exists because of the belief that the ordinary man may lose control and act violently in an extreme circumstance.⁸⁴ As one commentator explains:

[T]he present rationale for heat-of-passion manslaughter is that when the provocation is so great that the ordinary law abiding person would be expected to lose self-control so that he could not help but act violently, yet he would still have sufficient self-control so that he could avoid using force likely to cause death or great bodily harm in response to the provocation, then . . . the actor's moral blameworthiness is found not in his violent response, but in his *homicidal* violent response. He did not control himself as much as he *should* have, or as much as common experience tells us he *could* have, nor as much as the ordinary law abiding person *would* have.⁸⁵

In other words, a reasonable person may lose his self-control without necessarily killing someone. Even while angered and provoked, a person is still responsible for tempering his response. Accordingly, the criminal action is *killing* in response to provocation, not simply acting out violently. Provocation remains a partial defense because courts ultimately deem the killing unjust, no matter what provoked the aggressor into killing. Yet, in some situations, juries use evidence of subjectivity to “soften” the legal requirements and mitigate the actions of some defenders.⁸⁶

Besides imperfect self-defense and provocation, battered woman's syndrome is another important example of how the law accounts for human weakness and lack of self-control. In the following pages, Part II describes how battered women defendants introduce evidence of subjective characteristics to establish the reasonableness of their perceptions of imminent danger and why they feel that killing an unsuspecting (usually sleeping) abuser is a proportional response. Part II also discusses police officers' difficult

⁸³ See LAFAVE, *supra* note 16, § 15.2(h), at 789.

⁸⁴ *Id.* § 15.2(h), at 789–90.

⁸⁵ *Id.* (alterations in original).

⁸⁶ See, e.g., *State v. Leidholm*, 334 N.W.2d 811, 820 (N.D. 1983) (stating that evidence of battered woman's syndrome (BWS) must be considered in a self-defense claim).

burden as defendants in self-defense cases because a subjective inquiry into an officer's training may rob him of any sympathy the jury may have once they learn of the officer's skill, thus raising the officer's standard of self-defense.

II. SUBJECTIVITY ALREADY INFLUENCES STANDARDS IN THE LAW

Despite the clarity that objective standards provide, some cases may benefit more from the use of subjectivity. For example, many battered women are not prepared to handle violent scenarios, and subjective evidence can explain why.⁸⁷ Section A explains how experts have used evidence of battered woman's syndrome (BWS) to help juries understand why a battered woman honestly believed she was in imminent danger from an unsuspecting abuser who was not attacking her at the time she defended herself. In BWS self-defense cases, juries use subjective evidence to effectively lower standards according to a defendant's individual characteristics so that BWS defendants are not judged as harshly as others would be in a similar situation.⁸⁸ Section B then contrasts the BWS example with a use of subjectivity that may hold police officers to higher standards of self-defense.⁸⁹ Police officers are already held to heightened standards when using force, and introducing more evidence of an officer's training could potentially hurt the defendant's case.⁹⁰ Both uses of subjectivity redefine the reasonable person⁹¹ so that the standard becomes less objective and more particularized, and may result in a more lenient or a stricter interpretation of self-defense law than the conventional interpretation allows.⁹²

A. *Battered Woman's Syndrome*

This section explains BWS and then demonstrates how subjective standards allow jurors to see the unique situation of a battered woman who kills her abuser. By considering the world from her perspective, juries understand how and why a battered woman may reasonably perceive imminent danger and feel

⁸⁷ See *infra* Part II.A.

⁸⁸ See *infra* Part II.A.

⁸⁹ See *infra* note 115 and accompanying text.

⁹⁰ See *infra* note 115 and accompanying text.

⁹¹ While BWS does not create a new standard of self-defense, the BWS evidence can be relevant when the jury evaluates the self-defense or provocation claims. *Leidholm*, 334 N.W.2d at 820 (stating that evidence of BWS must be considered in a self-defense claim).

⁹² These examples serve as the justification for why martial artists, who are better equipped to handle violent scenarios, should be held to a higher standard for self-defense; that argument is discussed below in Part III.

that killing her abuser is a proportional response. For this reason, evidence of BWS often leads to more lenient jury verdicts in homicide cases.

BWS⁹³ is a pattern of psychological and behavioral symptoms displayed by women living in abusive relationships.⁹⁴ There are four general characteristics of the syndrome: the woman (1) “believes that the violence was her fault”; (2) is unable “to place the responsibility for the violence elsewhere”; (3) “fears for her life and/or her children’s lives”; and (4) “has an irrational belief that the abuser is omnipresent and omniscient.”⁹⁵ Courts have described BWS in three phases according to the framework developed by Dr. Lenore Walker.⁹⁶ Phase one is the “tension-building stage,” where a man physically and verbally abuses a woman.⁹⁷ In response, she tries to be as submissive and passive as possible in an effort to prevent more intense violence.⁹⁸ Phase two is the “acute battering incident,” where more serious violence occurs and is triggered by an event in the man’s life or when the woman provokes the man because she can no longer tolerate his violence.⁹⁹ Phase three is characterized by extreme loving behavior by the man where he begs the woman for forgiveness and promises to change.¹⁰⁰ The third phase contributes to why battered women do not leave these relationships. After this phase, the cycle usually begins again.¹⁰¹ Since battered women usually cannot fend off their attackers directly, those women who retaliate may do so when the man is off guard, such as while he is asleep.¹⁰² A battered woman may choose to use deadly force on the abuser when he is sleeping or during the abuser’s physical attack in order to survive.

⁹³ See 3 MONROE L. INKER ET AL., MASS. PRACTICE SERIES: FAMILY LAW AND PRACTICE WITH FORMS § 57:2 (3d ed. 2002). The syndrome is not limited to women in traditional male–female relationships: it can be exhibited in men and by persons in same-sex relationships as well. *Id.* The syndrome is now known by descriptions like “intimate partner battering and its effects.” *In re Walker*, 54 Cal. Rptr. 3d 411, 413 n.1 (Ct. App. 2007). However, for the reader’s ease, this Comment refers to a female victim and a male assailant.

⁹⁴ *State v. Kelly*, 478 A.2d 364, 371 (N.J. 1984).

⁹⁵ *What Is Battered Woman’s Syndrome?*, DIVORCENET.COM, http://www.divorcenet.com/states/oregon/or_art02 (last visited May 4, 2011) (excerpting a 1993 Trial Memorandum prepared by Lori S. Rubenstein).

⁹⁶ *E.g., Kelly*, 478 A.2d at 371. See generally LENORE E. WALKER, THE BATTERED WOMAN (1979) (identifying and categorizing battered woman’s syndrome).

⁹⁷ See WALKER, *supra* note 96.

⁹⁸ *Kelly*, 478 A.2d at 371.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See, e.g., *Commonwealth v. Grove*, 526 A.2d 369 (Pa. Super. Ct. 1987) (finding a battered woman who killed her sleeping husband guilty of first-degree murder).

Introducing evidence of BWS is an attempt to show juries why they should interpret the imminence and proportionality requirements of self-defense differently to favor leniency.¹⁰³ As one court says, “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.”¹⁰⁴ The court noted that juries could use this evidence to determine only the subjective reasonableness of her belief of imminent danger, but not the objective reasonableness of whether she truly was in danger.¹⁰⁵

A battered woman who kills a sleeping abuser would fail the imminence requirement of self-defense because a sleeping man—no matter how abusive—poses no immediate threat to anyone.¹⁰⁶ Because the battered woman was not in immediate danger under traditional self-defense doctrine, she either committed a killing in revenge or as a preemptive strike. Either way, she has no claim to perfect self-defense and would be convicted. As a result, defendants on trial for such killings argue that their belief in imminent danger was reasonable due to the frequent battering and the belief that the abuser was omnipresent and omniscient.¹⁰⁷ BWS defendants hope to succeed on an imperfect self-defense or provocation claim to mitigate their culpability.¹⁰⁸

In addition to imminence, juries may also interpret the proportionality element differently if provided with evidence of BWS.¹⁰⁹ According to one scholar,

Most often, a woman simply is not strong enough either to repel an attack using just her hands, or to inflict sufficient injury to disable her assailant long enough to get away. In fact, attempts to defend herself may only further enrage the batterer, resulting in an escalation of his violence.¹¹⁰

¹⁰³ See *State v. Myers*, 570 A.2d 1260, 1266 (N.J. Super. Ct. 1990).

¹⁰⁴ *Kelly*, 478 A.2d at 372.

¹⁰⁵ *State v. McClain*, 591 A.2d 652, 657 (N.J. App. Div. 1991) (citing *Kelly*, 478 A.2d at 375–77).

¹⁰⁶ LAFAVE, *supra* note 16, § 10.4(b), at 545.

¹⁰⁷ See 40 AM. JUR. 2D *Homicide* § 144 (West 2009).

¹⁰⁸ *State v. Tierney*, 813 A.2d 560, 571 (N.J. Super. Ct. App. Div. 2003) (holding that the BWS defendant was not harmed by the lack of an imperfect self-defense instruction to the jury when the instructions included provocation and other lesser offenses).

¹⁰⁹ See *Robinson v. State*, 417 S.E.2d 88, 91 (S.C. 1992).

¹¹⁰ Maryanne E. Kampmann, *The Legal Victimization of Battered Women*, 15 WOMEN’S RTS. L. REP. 101, 108–09 (1993). But martial arts may give these kinds of women the confidence and ability needed to defend

This is why a woman feels she must kill her abuser when she gets the chance. In fact, BWS evidence has been combined with the true man doctrine to establish the principle that a wife does not have a duty to retreat in her own home since both a husband and a wife have an equal right to occupy their home.¹¹¹ The subjectivity analysis shows that, for some battered women, killing a sleeping batterer is a justifiable form of self-defense.¹¹²

By introducing evidence of subjectivity into the legal analysis, jurors can learn of the horrors associated with BWS and consider it in their decision making.¹¹³ If courts excluded BWS evidence, battered defendants would not have the opportunity to present their case in the most accurate and compelling way. The subjective investigation into the syndrome explains that “reasonable” battered women might kill their abusers while they sleep. By providing this explanation, BWS demonstrates that subjectivity can temper the objective elements of self-defense law to produce a more accurate standard. BWS is one instance where courts have allowed evidence of defendants’ characteristics to be introduced for their own benefit.¹¹⁴

B. Heightened Standards for Police Officers

Subjective evidence of specialized combat training may also be helpful in evaluating self-defense claims for police officers. This section explains that

themselves against their attackers, and it is important not to discourage such pursuits through changes in the law. See Monica L. Lowe, “*Momma Said Knock You Out!*”: *Women in Boxing*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 48, 51 (2003) (“Like martial arts, boxing is empowering and it gives women the self-defense skills to make them less vulnerable to violence. ‘In a society in which men hit women, and women rarely defend themselves or hit back effectively . . .’, self-defense matters. From verbal abuse to degrading and antagonistic comments, boxing makes a woman mentally tough and helps her fight back in more ways than her fists.” (alteration in original) (quoting Mariah Burt Nelson, *Why We Should Pay Attention to Female Boxers*, MARIAH BURT NELSON (2000), <http://www.mariahburtonnelson.com/Articles/boxers.htm>). However, extensive discussion of how women should respond to violence with self-defense is beyond the scope of this Comment.

¹¹¹ Commonwealth v. Derby, 678 A.2d 784, 785 (Pa. Super. 1996) (reversing a conviction of voluntary manslaughter and holding that a wife has no duty to retreat in her own home—even though she may safely retreat—when she fears death or serious bodily injury from her husband).

¹¹² A battered woman is usually incapable of effective retaliation when the batterer is attacking her. See Kampmann, *supra* note 110, at 108–09 (arguing that the equal force rule requiring a proportional response fails to take into account that women are generally not physically equal to men and may need weapons to defend themselves against unarmed men).

¹¹³ LAFAVE, *supra* note 16, § 10.4(d), at 545.

¹¹⁴ E.g., People v. Johnson, 205 A.D.2d 344, 344 (N.Y. App. Div. 1994) (reducing the sentence of a battered woman for first degree manslaughter from six-to-eighteen years to four-to-twelve years).

police officers are held to heightened standards when using force,¹¹⁵ and that subjective evidence may actually make the defendant's case worse even if it clarifies the case for the jury.¹¹⁶ In self-defense, the heightened standard for police in some states is that of a reasonable officer.¹¹⁷ For this standard, evidence of police training is useful to determine whether an officer acted reasonably in self-defense.¹¹⁸ Police departments train their officers to operate within a continuum of force that begins with the least amount of force and escalates up to deadly force when they make arrests and act in self-defense.¹¹⁹ When police officers violate these standards, evidence of their specialized training may work against them in self-defense claims.¹²⁰

¹¹⁵ See, e.g., TEX. PENAL CODE ANN. § 9.51 (West 2003) (describing the steps a peace officer needs to complete before using nondeadly and deadly force). Whether a police officer has used excessive force may be judged under the Fourth Amendment. See *Bell v. City of Albany*, 436 S.E.2d 87, 91 (Ga. Ct. App. 1993) (“The reasonableness of a particular use of force must be judged from the perspective of a *reasonable officer* on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” (alteration in original) (emphasis added)).

¹¹⁶ E.g., *Kaufman v. People*, 202 P.3d 542, 556 (Colo. 2009) (holding that evidence of the defendant taking a self-defense knife skills class and a military bayonet training class was relevant to show that he had knife skills and whether he intended to cause the knife wounds that killed the victim). The prosecution further attempted to show that the defendant’s experience in Tai Chi, Aikido, and Kung Fu made him well-versed in martial arts techniques, which showed evidence of a killer’s mind. *Id.* at 557.

¹¹⁷ E.g., *State v. Smith*, 807 A.2d 500, 516–19 (Conn. App. Ct. 2002) (holding, among other things, that the trial court abused its discretion by excluding expert testimony on the use of deadly force by police officers in self-defense; it was appropriate for experts to testify on the reasonable police officer standard of self-defense as defined by Connecticut law, and thus the exclusion of that testimony was not harmless); *Kopf v. Skyrm*, 993 F.2d 374, 379 (4th Cir. 1993) (describing what the jury had to know when evaluating the situation from a reasonable officer’s perspective).

¹¹⁸ *Smith*, 807 A.2d at 516–19.

¹¹⁹ See Nicholas Riccardi, *Demand Up for Less-Deadly Force*, L.A. TIMES, Feb. 5, 1995, at B1 (“Police departments operate on the principle that an officer uses the minimal amount of force necessary to subdue a suspect. Most are trained to follow what is called a ‘continuum of force,’ which instructs officers to first give verbal commands. If those fail, officers are told to use physical force, such as a wrist hold or a less-than-lethal weapon—such as a baton—and, as a last resort, lethal force.”); see also Peter Hobart, *Law of Self-Defense*, BLACK BELT, Nov. 2008, at 130, 133 (“In determining the appropriate response to any kind of physical threat, many law-enforcement agencies teach their officers to consider a force continuum of escalating responses to the aggressor’s behavior. In recent years, such models have become so widely accepted in this community that they’re increasingly viewed as the ‘industry norm.’”).

¹²⁰ See Sara Fogan, *CDT*, BLACK BELT, Oct. 2002, at 87, 88 (“[I]n numerous cases across the country, law-enforcement officers and private citizens who defended themselves with overzealous self-defense techniques could not defend their actions in court. ‘The reason for this is that approximately 97 percent of all altercations are low-level force and non-deadly[]’ . . .”).

For example, in *State v. Smith*, a police officer was convicted in the trial court of first-degree manslaughter.¹²¹ The officer chased after the victim as part of a lawful pursuit and yelled, “Stop, police.”¹²² Consistent with his training, the officer drew his gun and pointed it toward the victim, then took hold of him, and led him to a clearing where he pinned the victim face down and stepped on his back.¹²³ According to the officer, despite his repeated commands for the victim to show his hands, the victim did not do so, and the officer shot and killed him.¹²⁴ However, none of the testifying witnesses said they observed a struggle between the officer and the victim.¹²⁵

The trial court excluded two of the officer’s expert witnesses and limited the testimony of a third expert.¹²⁶ The experts had trained the officer in: “mechanics and laws of arrest, firearms training, police defensive tactics, police use of force, police use of deadly force, and judicial decisions concerning police use of force.”¹²⁷ On appeal, the court reversed this evidentiary ruling and granted the officer a new trial because the excluded testimony concerned his state of mind.¹²⁸ The officer’s state of mind was the subject of the jury’s inquiry because it would help them decide if the officer had an objectively reasonable and honest fear of the victim’s imminent use of deadly force against him.¹²⁹ Since the jury did not have experience in police training, the testimony would have helped the jury evaluate the defendant according to the reasonable police officer standard.¹³⁰ However, the court noted that the jury was free to reject all of this subjective evidence or to use it to find that self-defense was disproved beyond a reasonable doubt.¹³¹ If, for example, evidence about the continuum of force had been introduced, the jury may have concluded that using the baton, not shooting the victim, was the next step on the continuum of force.¹³² This would have given the jury more of a reason to deny the officer’s self-defense claim.

¹²¹ *Smith*, 807 A.2d at 502.

¹²² *Id.* at 503.

¹²³ *Id.* at 503–04.

¹²⁴ *Id.* at 503–04, 509 n.6.

¹²⁵ *Id.* at 504.

¹²⁶ *Id.* at 513–14.

¹²⁷ *Id.* at 511–12.

¹²⁸ *Id.* at 517.

¹²⁹ *Id.*

¹³⁰ *Id.* at 514.

¹³¹ *Id.* at 510.

¹³² See *Kopf v. Skyrn*, 993 F.2d 374, 379 (4th Cir. 1993) (“Where force is reduced to its most primitive form—the bare hands—expert testimony might not be helpful. Add handcuffs, a gun, a slapjack, mace, or some other tool, and the jury may start to ask itself: what is mace? what is an officer’s training on using a gun?”)

The preceding sections on BWS and the police show that subjectivity can be used to alter conventional legal standards. It can help accommodate battered women by lowering their legal burden for claiming self-defense or heightening standards for those with special skills, like police officers. Next, Part III shows that martial artists are a class of defenders who deserve stricter treatment based on their special skill set. Just as in BWS and police self-defense cases, where the context of the violence—including the location of the attack, the person attacked, the psychology of the defendant, and other factors—matters, the context of the violence matters to determine if martial artists should be denied the partial defenses.

III. MARTIAL ARTS: THE NEW FRONTIER FOR SELF-DEFENSE AND SUBJECTIVITY

This Comment argues that martial artists will have difficulty satisfying the objective reasonableness component of self-defense because they are trained to perform optimally in confrontational scenarios.¹³³ In other words, if a reasonable person would not think an attack required a response with deadly force, it is unlikely a trained martial artist—a person with additional fighting skill—would think an attack required a response with deadly force. For example, in response to a deadly force attack, an unskilled person's use of deadly force is proportional. In contrast, a martial artist's use of a nondeadly force technique to disarm and subdue a deadly force aggressor may be proportional.¹³⁴ Any martial artist who responds with deadly force when it would be objectively unreasonable to do so cannot claim self-defense. For reasons explained below, in certain situations courts should deny such a martial artist imperfect self-defense and the provocation defense as a matter of law. In those situations, if a martial artist kills in self-defense, perfect self-defense should be his only argument for acquittal; if that fails, the court should convict him.¹³⁵

Since the martial artist is primed to recognize and defuse threats of violence, he should only be killing in objectively reasonable scenarios.

how much damage can a slapjack do? Answering these questions may often be assisted by expert testimony.”).

¹³³ See generally FORREST E. MORGAN, *LIVING THE MARTIAL WAY* (1992) (explaining that martial artists possess special skills designed for physical confrontations).

¹³⁴ See E. PAUL ZEHR, *BECOMING BATMAN: THE POSSIBILITY OF A SUPERHERO* 153 fig.9.3 (2008).

¹³⁵ The martial artist may also be able to claim the true man doctrine. See *supra* notes 27–31 and accompanying text.

Ordinary people who respond with unnecessary deadly force suffer a lapse in self-control, resulting in moral blameworthiness.¹³⁶ A martial artist who does the same suffers a catastrophic failure of self-discipline and combat strategy. If a martial artist were to kill when it was objectively unreasonable to do so, he would have failed to control himself as much as he should have, as much as common experience says he could have, and as much as the ordinary person would have.¹³⁷ Moreover, he would have failed to control himself according to his training.¹³⁸ This Part compares traditional martial arts in section A with mixed martial arts in section B. Then section C discusses the skills common to both martial arts, and section D explains why subjectivity would be useful to a jury in deciding when to justify a martial artist defendant's treatment under a heightened standard.

A. *Traditional Martial Arts*

This section describes the origins, philosophy, and training methods of "traditional martial arts."¹³⁹ Traditional martial arts are limited to specific fighting disciplines that exist independently of other fighting styles, and carry with them techniques and traditions that are specific to the region and country from which they originated.¹⁴⁰ Some arts have their origins in religion and others were designed for warfare or personal self-defense, but most arts include a versatile array of skills usually suitable for warfare.¹⁴¹ Traditional martial arts include Karate, Tae Kwon Do, Shotokan, and various styles of Kung Fu, and they all vary in their philosophical and cultural value systems and fighting styles.¹⁴² Students instructed in traditional martial arts are

¹³⁶ LAFAVE, *supra* note 16, § 15.2(h), at 790.

¹³⁷ Recall the quote from Part I.C.4 on the reason why provocation exists. *See supra* note 85 and accompanying text.

¹³⁸ If the martial artist has been trained to kill in that scenario, then the martial art itself must adapt its teachings to current law. *See infra* note 154 and Part V.

¹³⁹ MORGAN, *supra* note 133, at 5 ("The term 'martial art' is used in Western idiom to describe a wide variety of Asian combative systems and sports."):

¹⁴⁰ *Id.* at 4 ("[O]n an exhaustive quest to learn what philosophical foundations underpin the martial arts. . . [w]hat emerged was a common way of thinking, feeling, and living among the warriors who developed the various martial arts and among those who still truly practice them today. Of course, there are cultural differences between warrior groups in different parts of the world, but there is also a core attitude, common to these groups, that separates them from non-warrior people within their own cultural strains. Asian warriors and all classical martial artists know of this common bond. They call it the *Martial Way*."); *see also* BROWN, *supra* note 12, at 16–23 (describing several of the most prevalent martial arts in America); DAVID T. MAYEDA & DAVID E. CHING, *FIGHTING FOR ACCEPTANCE: MIXED MARTIAL ARTISTS AND VIOLENCE IN AMERICAN SOCIETY* 126–28 (2008) (comparing the values of "traditional" martial arts and MMA).

¹⁴¹ *See* MORGAN, *supra* note 133, at 5–6.

¹⁴² *Id.*; *see also* MAYEDA & CHING, *supra* note 140, at 126–28.

generally instructed to follow certain philosophical principles, including respecting the opponent, using skills responsibly, and avoiding confrontations whenever possible.¹⁴³ Most traditional martial arts espouse the theory that the greater amount of skill one possesses, the less force one should use when defending against an attacker.¹⁴⁴ It is not only a matter of skill, but also a matter of duty. One martial artist explained, “As warriors, we have a moral obligation to attend to the cause of honor. We have a responsibility to see that justice is served in any area in which our duty leads us.”¹⁴⁵ The idea is that as the warrior grows stronger, he inherits the responsibility to become an ethical leader and to use his skills in a just manner to benefit society.¹⁴⁶ He must not use his skills to terrorize weaker members of society.¹⁴⁷

In addition to strong values, traditional martial artists also strive to attain supreme self-control.¹⁴⁸ Traditional martial arts worldwide utilize intense training methods that push the person’s physical and mental abilities to the limit.¹⁴⁹ The martial artist trains to see things in the moment, to avoid confrontation whenever possible, and when conflict arises, to summon the mental stability to take command of the situation.¹⁵⁰

¹⁴³ See generally MORGAN, *supra* note 133 (explaining the principles of traditional martial arts).

¹⁴⁴ See, e.g., ZEHR, *supra* note 134, at 153 fig.9.3. Zehr provides a helpful figure of a good guy and bad guy in combat to illustrate how a defender deals with threats from opponents differently as his skill level increases, saying:

The way the good guy, dressed totally in white, deals with the threat and attack of the bad guy, wearing some black, shows how ethics in combat change with skill. At the lowest skill level, the easiest response of the novice is to deal lethal force in response to lethal force. With intermediate skills, the good guy has a weapon but defeats the attacker by disarming him without injuring him. At the culmination of training as an expert, the good guy defeats and then disarms the bad guy without using any weapons at all.

Id.; see also DUFF, *supra* note 12, at 10. This code is best expressed in Aikido, where “Ai” stands for harmony, “Ki” for spirit, mind, or universal energy, and “Do” for the way. *Translation*, AIKIDO OF SAN LUIS OBISPO, <http://www.aikido-of-slo.com/translation.htm> (last visited May 4, 2011).

¹⁴⁵ MORGAN, *supra* note 133, at 158.

¹⁴⁶ See *id.* at 159.

¹⁴⁷ See *id.* at 163.

¹⁴⁸ *Id.* at 54 (“Friends, acquaintances, even family often think warriors are obsessed or compulsive, but that isn’t true. Obsessive and compulsive behavior are, by definition, traits of individuals who are unable to control themselves. The warrior is just the opposite; he is the model of control.”).

¹⁴⁹ See *id.* at 59 (“It involves hardening the spirit through severe training or some extreme physical test. The ritual takes different forms in different cultures, but they all have a common element: the warrior drives himself, or is driven, to a level of endurance beyond what he previously believed possible.”).

¹⁵⁰ BRUCE LEE, STRIKING THOUGHTS: BRUCE LEE’S WISDOM FOR DAILY LIVING 105 (John Little ed., 2000) (“*You control the confrontation.* – No one can hurt you unless you allow him to.”).

One way of developing these abilities is by envisioning and practicing various situations in which one may be attacked, and by formulating plans on how to survive. As one martial artist notes, “Mental programming is an excellent tool for developing conceptual responses, but effective strategic planning isn’t a head game alone. [One has to] translate those mental programs into physical reactions. That requires dedicated, repetitive practice.”¹⁵¹ Martial artists also develop anticipatory senses by training to read an opponent’s moves and also practice how to counter the attacks they sense.¹⁵² These responses are often taught, practiced, and further developed in a coordinated set of moves performed as exercises called *kata*.¹⁵³

By performing *kata*, a traditional martial artist gains the skills to fight an opponent who presents the physical and mental threats for which he has trained. Depending on the environmental and cultural conditions in which the martial art developed, the threats envisioned and the responsive skills developed will differ.¹⁵⁴ Each type of martial art is designed to subdue an opponent in a particular setting through specific means;¹⁵⁵ one martial art is not equivalent to any other. Some traditional martial arts even developed “deadly techniques,” which are too dangerous to be utilized in practice at full force.¹⁵⁶

At the pinnacle of a traditional martial artist’s mental abilities is a mental state some martial arts call *mushin*.¹⁵⁷ One martial artist explained, “This mental state is the principle source of the traditional warrior’s quick reaction[s], extrasensory perception, and steely calm. In fact, *mushin* is probably the biggest discriminating factor between modern martial artists and

¹⁵¹ MORGAN, *supra* note 133, at 86.

¹⁵² *See id.* at 88–90.

¹⁵³ Joe Talbot, *What Is Kata?*, TRACY’S KARATE STUDIOS, http://www.tracys.com/art_kata.html (last visited May 4, 2011).

¹⁵⁴ *Savate*, for example, is a French martial art that uses kicks and open-handed slaps. Terence Bridgeman, *History of Savate*, COMPLETE MARTIAL ARTS.COM, <http://www.completemartialarts.com/information/styles/french/savate.htm> (last visited May 4, 2011). The kicks are performed to allow the kicker to use another hand to grab onto something for balance. *Id.* The open-handed slaps are used to avoid the legal penalties of attacking with a closed fist, which was once considered a lethal weapon. *Id.*

¹⁵⁵ MORGAN, *supra* note 133, at 46 (“[T]he problem with most martial doctrines isn’t that they aren’t valid—they usually work within the context for which they were designed—the problem is that no one of them works in all situations.”); *see also* BROWN, *supra* note 12, at 50 (“[T]hose who practice martial arts long enough to acquire good fighting skills are usually the last to injure others. . . . [O]nce they truly become proficient as fighters they are chary to use their fighting skills unless backed into a wall.”).

¹⁵⁶ *See* DUFF, *supra* note 12, at 10. Deadly techniques refer to moves that can maim or kill instantly and cannot easily be practiced safely, such as eye gouges, strikes to the heart or back of the head, and groin strikes. *Id.*

¹⁵⁷ MORGAN, *supra* note 133, at 124.

true warriors of the past and present.”¹⁵⁸ In this state, the martial artist stops thoughts so that all attention is focused in the moment:

A warrior in *mushin* is in complete control of his actions [H]e absorbs the tactical situation and reacts—all without thought The warrior in *mushin* acts directly from will!¹⁵⁹

This higher level of consciousness allows the user to sense his opponent expertly while eliminating his own fears and perceived limitations, but it requires conditioned responses, years of training, an ability to silence the chatter of internal thoughts, and much practice in self-defense scenarios before a martial artist can use it in a real confrontation.¹⁶⁰

B. *Mixed Martial Arts: The Modern Warriors*

In contrast to traditional martial arts described above, this section describes the origin of mixed martial arts (MMA), explains how MMA separated from the traditional arts, and argues that it lacks a guiding philosophy, which may pose legal consequences for its fighters.

MMA has been defined by state athletic commissions, for example, as: “any match in which any form of martial arts or self-defense is conducted on a full-contact basis and where other combative techniques or tactics are allowed in competition including, but not limited to, kicking, striking, chokeholds, boxing, wrestling, kickboxing, grappling, or joint manipulation.”¹⁶¹ MMA is simply a combination of skills from several traditional martial arts that has evolved around sport competition.¹⁶² MMA fighters believe that it is better to practice “nondeadly”¹⁶³ techniques at full force in order to become proficient at those skills in a real scenario rather than never to apply one’s skill in a “real” fight.¹⁶⁴ MMA fighters feel this practice has more self-defense value¹⁶⁵ than

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 125.

¹⁶⁰ *See id.* at 127–28. Even further states of consciousness like *zanshin* have been attained with additional training. *Id.* at 128–29.

¹⁶¹ MO. ANN. STAT. § 317.001(13) (West 2008).

¹⁶² *See* Ryan Pratt, *Sport Specific Training for MMA (Mixed Martial Arts)*, GRAPPLEARTS, <http://www.grapplearts.com/Sport-Specific-MMA-Training.htm> (last visited Mar. 1, 2011) (explaining that MMA fighters need a background in the skills of some traditional martial arts).

¹⁶³ *See* SIMCO, *supra* note 3 (describing various nondeadly martial arts techniques). Techniques considered nondeadly generally include punches, kicks, and other strikes, throws, takedowns and joint locks that can be released once the opponent has indicated he has been defeated through a “tap out” or verbal submission. *Id.*

¹⁶⁴ *Id.*

the traditional arts, and the number of MMA fighters who believe in this system is growing.¹⁶⁶

Many lay people believe that MMA is a new style of fighting, but MMA has its origins in an ancient Grecian sport called *pankration*.¹⁶⁷ The sport was rediscovered in 1993 when the Gracie family¹⁶⁸ introduced Brazilian jiu-jitsu, a submission grappling martial art, to the United States¹⁶⁹ through a promotion known as the Ultimate Fighting Championship (UFC). The UFC sought to crown an “Ultimate Fighting Champion” through “a tournament of the best athletes skilled in the various disciplines of all martial arts, including karate, jiu-jitsu, boxing, kickboxing, grappling, wrestling, sumo and other combat sports.”¹⁷⁰ The early UFC fights were attempts to identify which of the martial arts, in a one-against-one, style-against-style competition, was the most effective.¹⁷¹

When the UFC introduced MMA in the United States, it caused a sharp decline in traditional martial arts¹⁷² like Aikido, various Kung Fu styles, and Tae Kwon Do, because of the alleged fanciful and impractical nature of those styles.¹⁷³ Fighting styles like Brazilian jiu-jitsu, Thai-boxing, and wrestling

¹⁶⁵ *See id.*

¹⁶⁶ *See* Julio Anta, *Mixed Martial Arts Versus Traditional Martial Arts*, USADOJO.COM, <http://www.usadojo.com/articles/julio-anta/mma-vs-traditional-ma.htm> (last visited May 4, 2011).

¹⁶⁷ SIMCO, *supra* note 3, at 28. *Pankration* originated approximately three thousand years ago as the first mixed martial art that combined striking and submission grappling techniques. *Id.* Alexander the Great’s spread of *pankration* to the East, where it allegedly developed into the traditional Asian martial arts. *Id.*

¹⁶⁸ Edward Pollard, *Foreword* to THE ULTIMATE GUIDE TO BRAZILIAN JIU-JITSU 5 (Sarah Dzida et al. eds., 2008). The Gracie family is largely responsible for “energizing and rejuvenating the practice of martial arts” because Royce Gracie, a 176-pound man, defeated several larger opponents in an open competition. *Id.*

¹⁶⁹ *The History*, MMAFACTS, <http://www.mmafacts.com/> (follow “History” hyperlink) (last visited May 4, 2011).

¹⁷⁰ *About UFC*, UFCHEAVEN.COM, http://ufcheaven.com/about_ufc.html (last visited May 4, 2011).

¹⁷¹ *See About Mixed Martial Arts*, MMA WORLDWIDE, http://mmaworldwide.com/page/About_MMA/ (last visited May 4, 2011).

¹⁷² *Id.* The decline was almost a backlash against traditional martial arts. As traditional martial artists lost matches in the early UFC events, the traditional martial arts also began to lose students as many people switched to more “effective” martial arts.

¹⁷³ Min-ju Chiang, *Modern MMA Fighters: Are Traditional Martial Arts Relevant in MMA?*, SUITE101.COM (July 30, 2009), <http://www.suite101.com/content/modern-mma-fighters-a135603> (“Most of the modern MMA fans are convinced that traditional martial arts are not efficient enough to be of any relevance in the context of MMA competitions. Among the most popular of the traditional martial arts which has lost its mystical appeal included all forms of Chinese kung fu, Japanese Karate, and Korean Taekwondo; just by telling MMA practitioners that you are a practitioner of such disciplines can elicit certain degrees of condescendence.”); *see also* Richard Ryan, *Full Contact*, BLACK BELT, Mar. 2009, at 52, 54 (“[Q]uite a few common techniques have died on the vine or lost most of their appeal as a result of [MMA’s] proliferation.”).

prevailed in the octagon and in popularity.¹⁷⁴ The natural selection of the successful fighting styles caused the MMA community to break with the philosophical and cultural roots of traditional martial arts and, consequently, to abandon the principle of using as little force as possible to defeat the attacker.¹⁷⁵ UFC marketing implicitly replaced this principle with a “no rules,”¹⁷⁶ and no-holds-barred marketing campaign¹⁷⁷ that centered on depicting its competitors as fierce and intense, and by using nicknames that captured these traits.¹⁷⁸ Over time, the UFC has made strides in portraying the safety of the sport,¹⁷⁹ the human side of its fighters,¹⁸⁰ and the academic and athletic accomplishments of its fighters,¹⁸¹ which has helped in its public acceptance and recognition in over forty states.¹⁸² The UFC also changed its format to include a formal set of rules to help in its campaign for legalization.¹⁸³

¹⁷⁴ See *supra* note 173 and accompanying text.

¹⁷⁵ Anta, *supra* note 166 (“[M]ost traditional martial arts schools are totally against the growth of the mixed martial arts. They claim that it is too violent and that it doesn’t teach the values and philosophy that the traditional martial arts do. . . . They say that they do not want to see thugs beating each other up without values, honor and respect. I agree yet also disagree with that statement. Yes, many mixed martial arts schools cater to tough thugs and they do not teach values. Teaching fighting without values is just street fighting. . . . I can appreciate both schools of martial arts, the traditional, for the respect and values, and the more realistic UFC.”); see also DUFF, *supra* note 12, at 13 (noting aggression is good for sport but should not be combined with martial arts and used offensively to attack others); FRANK SHAMROCK, MIXED MARTIAL ARTS FOR DUMMIES 20 (2009) (“Always aim to inflict the most amount of damage to your opponent with the least amount of effort and damage to yourself.”); THE ULTIMATE GUIDE TO BRAZILIAN JIU-JITSU, *supra* note 168, at 11 (“Another thing missing from Gracie jiu-jitsu is adherence to Oriental etiquette and traditions. For example, in Gracie jiu-jitsu, nobody bows. ‘That’s a part of Japanese culture,’ Rorion Gracie says. ‘I don’t teach Japanese culture; I teach Gracie jiu-jitsu, which is from Brazil. . . .’ Gracie claims this departure from tradition helps new students gain self-confidence and be more comfortable. ‘A student doesn’t need to feel we’re above him or anything’ . . .”).

¹⁷⁶ *The History*, *supra* note 169.

¹⁷⁷ Kendall Hamilton, *Brawling over Brawling: Politicians Try to Finish off ‘Human Cockfighting,’* NEWSWEEK, Nov. 27, 1995, at 80.

¹⁷⁸ DAVID L. HUDSON JR., COMBAT SPORTS: AN ENCYCLOPEDIA OF WRESTLING, FIGHTING, AND MIXED MARTIAL ARTS 154, 178, 183, 259 (2009). Nicknames include: Quinton “Rampage” Jackson, Chris “the Crippler” Leben, Chuck “the Iceman” Lidell, and Jens “Little Evil” Pulver. *Id.*

¹⁷⁹ *About—Fact Sheet*, *supra* note 9; *Myth Versus Reality*, MMA FACTS, <http://www.mmafacts.com/> (follow “Myth vs Reality” hyperlink) (last visited May 4, 2011).

¹⁸⁰ Fans get to know the fighters through reality shows like *The Ultimate Fighter*, which pits teams of fighters against one another in competition for a contract with the UFC. See, e.g., *The Ultimate Fighter: The Quest Begins* (Spike TV television broadcast Jan. 17, 2005).

¹⁸¹ *The Athletes*, MMA FACTS, <http://www.mmafacts.com/> (follow “Athletes” hyperlink) (last visited May 4, 2011).

¹⁸² *Mixed Martial Arts Regulation in North America*, MMA FACTS, http://www.mmafacts.com/images/FE/chain226siteType8/site195/client/mma_map_081610.pdf (last updated August 16, 2010). At the time of this Comment’s publication, MMA is legal in forty-five of the forty-eight states with athletic commissions, and legislation to legalize MMA in New York is pending.

¹⁸³ See *About UFC*, *supra* note 170.

Despite the rapid growth and reform of MMA, most new fighters may remain ignorant of the law and are bound by no restraining principle such as using minimum force in self-defense. For that reason, more fighters will likely appear in court if they apply their skills outside the octagon.¹⁸⁴ Many people, including reckless ones like the defendant Torre described in the opening anecdote, are now able to train in MMA. Yet, they are taught the fighting techniques without the traditional martial arts value system,¹⁸⁵ the legal standards of police officers,¹⁸⁶ or other ways to responsibly use their training in nonsport settings. This is not because MMA fighters are immoral barbarians,¹⁸⁷ but mostly because MMA, although a combat sport, is still a sport, and it is not primarily concerned with philosophy, as the traditional martial arts are.¹⁸⁸ Notwithstanding the fact that both MMA fans and martial arts practitioners alike tend to adopt the training regimens and beliefs of winning fighters,¹⁸⁹ traditional martial arts values are not responsible for the tremendous growth and excitement of MMA. Instead, “reality fighting”¹⁹⁰ is

¹⁸⁴ See BROWN, *supra* note 12, at 57.

¹⁸⁵ E.g., SHAMROCK, *supra* note 175, at 20; cf. Koiwai, *supra* note 6 (“Using the choke hold, officers may afford themselves maximum safety while subjecting the suspect to a minimum possibility of injury.”).

¹⁸⁶ Police departments’ continuum of force is similar to the principle of using the least amount of force valued by traditional martial artists. See *supra* note 119 and accompanying text.

¹⁸⁷ *People v. Torre*, No. E039015, 2007 Cal. App. Unpub. LEXIS 5104, at *5 (Ct. App. June 25, 2007). Even Torre’s friend, a marine and martial arts student, knew the boundaries of sport fighting, saying,

Rafiel [Torre], you don’t want to be any part of that. We are not professional killers, you know. We’re professional fighters. We’re martial artists. That’s not our deal. You don’t want to be in any scope with doing away with her husband. . . . Personally, I won’t have anything . . . to do with it.

Id. (alterations in original).

¹⁸⁸ See *About—Fact Sheet*, *supra* note 9.

¹⁸⁹ Lyoto Machida is an example. He has his base training in Machida karate, similar to the traditional martial art of Shotokan, and he is restoring the perception of traditional martial arts among MMA circles. See *Lyoto Machida Bio*, LYOTO “THE DRAGON” MACHIDA, <http://lyotomachida.net/lyoto-machida-bio/> (last visited May 4, 2011). He has been training with Steven Seagal, an Aikido master, and won his most recent fight against UFC legend Randy “the Natural” Couture at UFC 129 by knock out with a jumping front snap kick, a typical karate maneuver which had never been used successfully against a high profile MMA opponent. See Carlos Arias, *MMA: Machida Gives Seagal Props for KO*, KEEP PUNCHING BLOG (May 5, 2011, 12:18 PM), <http://punch.ocregister.com/2011/05/05/mma-machida-gives-seagal-props-for-ko/15143>. In my opinion, integrating traditional martial arts skills into MMA training camps will become the competitive advantage of the future in MMA competition.

¹⁹⁰ See ZEHR, *supra* note 134, at 149. While the public perceives mixed martial arts to be “as real as it gets,” and a type of “reality fighting,” thanks to the branding of the UFC, see, e.g., *UFC 37.5 As Real As It Gets: Belfort vs. Liddell* (pay-per-view television broadcast June 22, 2002), it is clear that the constraints of MMA as a combat sport prevent it from being the true reality fighting that is described by Zehr, which aims to mimic the emotional states experienced during real warfare and combat. See RORY MILLER, *MEDITATIONS ON VIOLENCE: A COMPARISON OF MARTIAL ARTS TRAINING & REAL WORLD VIOLENCE* 29–30 (2008). See

the name of the game, and that game does not focus on using the least amount of force necessary to subdue an opponent,¹⁹¹ as proportionality under self-defense doctrine requires.

C. Special Skills Are Shared by Traditional and Mixed Martial Artists

Although MMA fighters differ from their traditional martial arts counterparts in philosophical values, they have not abandoned the extremely rigorous training techniques that allow them to maintain self-control when on the defensive. If anything, they have combined the most effective training techniques from a variety of martial arts, thereby acquiring the optimal set of skills for a one-on-one fight in an enclosed cage—the octagon.¹⁹² They share the ability of traditional martial artists to tailor their response to the physical threat presented.¹⁹³ For example, Brazilian jiu-jitsu is a key MMA style that focuses on finishing the fight quickly and efficiently by utilizing leverage and joint manipulations to provide ways to control an aggressive and stronger opponent.¹⁹⁴ MMA fighters might not have a traditional value system embedded in their fighting philosophy, but they do have the ability to control themselves in a fight scenario more so than an untrained person.

Likewise, both traditional and MMA practitioners learn cognitive self-defense techniques that allow them to control their emotions. Understanding how to react to distance is one such cognitive skill commonly used to perceive threats. For example, Bruce Lee¹⁹⁵ once instructed a student to draw a circle on the floor that was the length of the student's extended leg; the student then stood in the circle.¹⁹⁶ Bruce then moved toward him at various points outside and inside the circle.¹⁹⁷ When Bruce stepped inside the circle, the student

generally Ben Cohen, *Merging Mixed Martial Arts with Reality-Based Self-Defense*, BLACK BELT, Apr. 2006, at 109 (describing the difference between reality fighting systems like Krav Maga and MMA and creating a hybrid system, Complete Combat, that exploits both methodologies).

¹⁹¹ See *supra* note 175.

¹⁹² See, e.g., MARTIN ROONEY, TRAINING FOR WARRIORS: THE ULTIMATE MIXED MARTIAL ARTS WORKOUT 31 (2008).

¹⁹³ *Id.* However, this ability is limited by the scope of their training.

¹⁹⁴ SIMCO, *supra* note 3, at 2. For other examples with different martial arts skills, see BROWN, *supra* note 12, at 44–45.

¹⁹⁵ Bruce Lee is respected in both traditional and MMA disciplines and is considered a founder of MMA. See, e.g., Chad Edward, *Bruce Lee: The Original Mixed Martial Artist, and He's Coming Back*, FIGHTERS.COM (Feb. 17, 2010), <http://www.fighters.com/02/17/bruce-lee-the-original-mixed-martial-artist-and-hes-coming-back>.

¹⁹⁶ JOE HYAMS, ZEN IN THE MARTIAL ARTS 74 (Bantam ed. 1982) (1979).

¹⁹⁷ *Id.*

instinctively moved backward.¹⁹⁸ Bruce said, “When your opponent is inside your circle and you cannot or will not retreat any farther, you must fight. But until then, you should maintain your control and your distance.”¹⁹⁹ Bruce’s instruction is considered a teaching of traditional martial arts, and it reflects the common law self-defense duty to retreat. Physical and mental skills such as these give martial artists more control over their actions during a fight.²⁰⁰

D. Using Subjectivity in Martial Arts

Since most martial artists train specifically for physical confrontations,²⁰¹ adjusting the law to account for martial artists’ abilities merely recognizes the responsibility that comes with their great skill. A jury can better understand whether an action appeared reasonable to that martial artist if they understand how a martial artist has been trained.²⁰² Without a subjectivity analysis to understand the mental state martial artists strive to attain, it will be difficult for a jury to judge the defendant against the self-defense doctrine because martial artists react differently than others. Forrest Morgan says it best:

Faced with a physical attack, most men and nearly all women, crumble in shock. But it’s different for a warrior. Once a confrontation turns physical, the warrior’s[] body, mind, and spirit fuse into an unthinking, unfeeling weapon. At this point, there are no considerations of honor, no thought of consequences. In this mode, the warrior will only think of destroying his enemy. So it’s vitally important he doesn’t cross this threshold unless he’s physically threatened. Restraint is still a crucial component of honor.²⁰³

Given the increasing potential of defendants who think of themselves as warriors, it is necessary for juries to understand a defendant’s skills. Martial

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Tate Littlepage, *The Criminal Mind: Firsthand Research with the Perpetrators and Victims of Violence Reveals the Best Strategy for Staying Safe!*, BLACK BELT, Dec. 2008, at 97 (“If you’re like most martial artists, you spend countless hours fine-tuning your body and mind so you can function better under the stress of a physical altercation.”).

²⁰¹ MORGAN, *supra* note 133, at 6 (“[A] number of combative systems were developed by common people for personal self defense. Karate is perhaps the best example.”).

²⁰² Fogan, *supra* note 120 (“[I]n numerous cases across the country, law-enforcement officers and private citizens who defended themselves with *overzealous* self-defense techniques could not defend their actions in court. ‘The reason for this is that approximately 97 percent of all altercations are low-level force and non-deadly.’” (emphasis added) (quoting former martial artist Thomas J. Patire)). In these overzealous self-defense situations, the threat is neutralized, but the martial artists continue to attack using force not proportional to the attack. At that point, the self-defense has escalated to an attack.

²⁰³ MORGAN, *supra* note 133, at 164–65.

artists, both traditional and mixed, may differ in their origins, styles, and training methods, but the martial arts are all fighting systems designed for some kind of physical confrontation. Through practice and sport, martial artists hone the physical and mental skills to become fighting machines, and these skills are not left behind in the octagon, the dojo, or the gym. Although not invincible, martial artists have an edge in dictating the outcome of a physical confrontation. Compared to untrained people, they are usually in better control of themselves during a confrontation and can apply their skills to subdue aggressors.²⁰⁴ As Part IV discusses, prosecutors can—and perhaps should—explain the physical and mental skills of traditional and mixed martial arts to juries to help them better understand the defendant's options in a real world street fight against an aggressor.

IV. THE MARTIAL SUFFICIENCY TEST AS A NEW ANALYSIS FOR SELF-DEFENSE

This Part proposes the martial sufficiency test (MST) as a way to reconcile the skills and limitations of martial artists with current legal standards.²⁰⁵ The test gives courts a tool to determine which martial artists, because of their elevated skills, should be denied the partial defenses as a matter of law.²⁰⁶ While martial arts skills are formidable, not all martial artists are trained to respond to real self-defense situations. The key to applying martial arts skills in self-defense is the ability to recover.²⁰⁷ Recovery is the ability to overcome the initial freeze that paralyzes a person when assaulted.²⁰⁸ The best way to overcome the freeze is by having a conditioned response that allows a person to attack without thinking—a response like *mushin*.²⁰⁹ Yet, it is dangerous for martial artists to rely on this state for two reasons. First, it takes too long to acquire the skills and intuition needed to attain this mindset; second, no matter

²⁰⁴ BROWN, *supra* note 12, at 199.

²⁰⁵ Just as in BWS and police self-defense cases, evidence of martial arts training outlined in the martial sufficiency test (MST) is relevant when the jury evaluates the self-defense or provocation claims. It is relevant evidence in the martial arts scenario because the nature of the conflict is what the trial is about. When presented according to the MST, it is unlikely that unfair prejudice will outweigh the probative value. *See, e.g., State v. Myers*, 570 A.2d 1260, 1266 (N.J. Super. Ct. App. Div. 1990) (discussing BWS as an appropriate subject for expert testimony because it bears on the issue of whether the defendant's perception of imminent danger was reasonable); BROWN, *supra* note 12, at 50–51.

²⁰⁶ The MST can help when examining other skilled individuals not addressed here, such as off-duty police officers and military personnel who kill in nonwarfare settings. Courts can apply the MST to mixed martial artists, traditional martial artists, and any person with skill in combat to determine whether he has achieved a level of training such that application of deadly force was unreasonable given his background.

²⁰⁷ *See* MILLER, *supra* note 190, at 8.

²⁰⁸ *See id.*

²⁰⁹ *See id.*

how rigorous one's training is, a "chemical cocktail" of hormones will affect the body in a real self-defense situation that cannot be replicated reliably in training.²¹⁰

The factors of the MST account for these issues. The MST improves upon previous tests for martial artists because the MST can apply to any individual with combat skills and provides a framework more easily tailored to isolate whether the defendant used his skills in self-defense.²¹¹ First, section A explains the MST and how each factor accounts for limitations in martial arts training in real self-defense scenarios. Section B then applies the MST using Torre's scenario as an example.

A. *The Martial Sufficiency Test*

The MST identifies those fighters whose skill level is sufficiently high such that they no longer deserve the protections provided by the partial defenses. The focus on skill level is crucial because the aim of the MST is to include only expert fighters who do not exercise sufficient restraint, not just anyone who has ever attended a martial arts class.²¹² The MST allows ordinary jurors to account for the skills and limitations of a defendant's martial arts training during deliberation. Accordingly, this section will explain the elements of the MST.

²¹⁰ See *id.* at 57–58. Stress hormones affect the body in ways that diminish the effectiveness of martial arts training. *Id.* But see Gary Stix, *The Neuroscience of True Grit*, SCI. AM., Mar. 2011, at 29, 30–31 (explaining that the fight-or-flight response works through the chemical cascade involving the brain's hypothalamus, which secretes corticotropin-releasing hormone, which then causes the pituitary gland to secrete adrenocorticotropin hormone into the blood, which in turn triggers the adrenal glands to release cortisol). Interestingly, Stix suggests that this response is dampened in certain biologically "resilient" individuals who often face stressful situations. The implication of a martial artist dampening his stress response through repeated, and presumably stressful training, goes against Sergeant Miller's contention that a martial artist's training has limited usefulness. However, the counterargument is that the martial artists cannot dampen their stress response because their training does not trigger the stress response cascade in the first place, so it cannot be dampened by conditioning. The result matters because the stress cascade directly impacts both the subjective and objective reasonableness elements of self-defense law elements by changing the lens through which a martial artist sees his confrontation, i.e., calmly or under judgment-clouding stress. The chemical cocktail is discussed more below.

²¹¹ The tests described by Carl Brown do not extrapolate as well to others with combat skill and are not as nuanced as the MST. See BROWN, *supra* note 12, at 196–99. However, these tests provide an important foundation upon which the MST builds. *Id.*

²¹² See *Kaufman v. People*, 202 P.3d 542, 558 (Colo. 2009) (excluding evidence of advanced Kung Fu manuals and the defendant's participation in several martial arts classes, despite his novice ability in those arts, because they "only served to further the prosecution's portrayal of [the defendant] as an evil and dangerous individual trained to kill"). Even if novice martial artists are trained when to use their skills in accordance with self-defense law, they may not remember the specifics of how to do so. *Id.* at 557.

The MST has five elements. When all five elements of the test are met, the defendant is declared martially sufficient. The elements of the test are: (1) whether the martial art in which the defendant studied teaches the skills necessary to deal with the type of conflict that occurred; (2) whether the defendant was trained, by a competent instructor, in the skills needed to defuse the scenario; (3) whether the student had reached a proficiency through which he could be expected to exercise the skills in a real self-defense scenario; (4) whether the student was physically prevented from exercising his skills by a temporary physical or psychological handicap; and (5) whether the defendant intended to kill the victim with the skill used. If a jury determines that all five elements are met,²¹³ then the court should deny the defendant imperfect self-defense and the provocation defense in those jurisdictions that allow the partial defenses.²¹⁴

1. First Element, Skills of the Art

The first element of this framework, whether the martial art teaches the necessary skills, can be established with evidence of the history of the martial art in which the defendant is trained. This element helps the jury evaluate the defendant's subjective belief that the force used was necessary by evaluating the situations for which the defendant has trained. The element also recognizes that it is unrealistic to argue that a martial artist is prepared for all self-defense situations.²¹⁵ Each martial art was developed for a particular context, including terrain, weapons, body-type, and a "win." In a real self-defense situation, what is considered a "win" is different.²¹⁶ Sometimes a knockout blow is required, other times it may be a submission, and still others may require only a chance to scream for help or enough time to draw a weapon.²¹⁷ Those who have trained only for one of these "wins" will be at a disadvantage when the goal is

²¹³ See BROWN, *supra* note 12, at 63. One commentator has posited that juries have a presumption that martial artists are "deadly fighting machines capable of death and chaos far beyond the fighting feats of mere mortal men." *Id.* The MST should help dispel this presumption.

²¹⁴ However, a martial artist who meets the elements of this test could still avail himself of perfect self-defense and the true man doctrine. See *supra* Part I.A.

²¹⁵ See *supra* note 155.

²¹⁶ See SIMCO, *supra* note 3, at 63 (describing submissions and points as ways to win in Brazilian jiu-jitsu).

²¹⁷ See MILLER, *supra* note 190, at 30. Sergeant Miller notes that one parameter that self-defense instructors fail to address is not getting sued. *Id.*

different from what their training has taught them,²¹⁸ so training in only a specific set of techniques will be too narrow for real life.²¹⁹

Martial artists who claim, for example, that the skills needed to defend against an unarmed one-on-one duel are the same as those needed to defend against an ambush by a street gang are misguided, both in their assumptions about fighting and in their own abilities.²²⁰ Some argue that even combat sports like MMA are not well suited for actual self-defense.²²¹

Even though combat sports appear to match our assumptions of what a “real fight” looks like, many of our impressions about fighting and violence come from movies, not from reality.²²² Martial artists have altered training techniques for safety reasons, and such safety modifications may teach students to move too slowly, or to rely on protective equipment, and thus to develop unrealistic expectations about self-defense.²²³ In fact, most students of traditional martial arts are not even used to being hit,²²⁴ being hit in a real fight can cause the martial artist to either freeze or overreact. Once the martial artist is frozen into inaction or provoked into a rage, he becomes just like the ordinary man, and courts should analyze such a situation under traditional self-defense doctrine.²²⁵ Accordingly, just because a person has trained in a specific skill set does not mean he is always prepared to respond according to the highest levels of his training in any violent situation.

²¹⁸ See *id.*

²¹⁹ See *id.* This situation is analogous to the innocent martial artist scenario described in the Introduction.

²²⁰ See *id.* at 19.

²²¹ *Id.* at 29–30 (“In combat sports, three major factors make it difficult to extrapolate from the ring to uncontrolled violence. The most critical and hardest to train for is surprise. You know if you have a tournament next Saturday. You know if your club practices free sparring on Monday and Wednesday nights. You do not know when, if ever, you will be attacked. You cannot warm up for it or stretch or eat right or get enough sleep. The second factor is similar—you know what is likely to happen in a combat sport. You know how many opponents you will face and what size they are and whether they will be armed. You know what the footing and lighting will be like. Rules and safety considerations are the third factor. Some rules are instituted for safety. Most grappling styles don’t allow fingerlocks or strikes to the brainstem. Other rules are based on increasing the entertainment value of the art as a spectator sport. Cops pin face down. The samurai used to pin face down and finish things off with a knife in the back of the neck, but wrestling and Judo pin face up because it makes for a better fight if your opponent can use all of his or her weapons.”).

²²² See *id.* at 18–19.

²²³ See *id.* at 107; see also SIMCO, *supra* note 3, at 58.

²²⁴ See MILLER, *supra* note 190, at 108.

²²⁵ This situation is also analogous to the innocent martial artist scenario described in the Introduction.

2. *Second Element, Instructor Competency*

The second element, whether the instructor was competent and taught the relevant techniques, can be determined by deposing the instructor,²²⁶ the instructor's students, the instructor's peers, and the martial artist defendant.²²⁷ Evidence of belt rank, belt integrity,²²⁸ and other achievements may be helpful, but should not be determinative. These accomplishments may hide the fact that the quality of instruction at the school is so poor that the lessons are useless.²²⁹ As an unfortunate result, martial artists may be fooled into thinking that they have skills that can protect them, when in fact they would never be able to subdue an assailant attacking at full force.²³⁰ The second element helps determine whether the student was even taught the appropriate skills needed to defend himself or whether he would act just like any other person in this scenario. If the student learned the appropriate skills, whether he could apply them is the subject of the third element.

3. *Third Element, Defendant's Ability*

The third element, whether the defendant could exercise his skills in the scenario, can be determined by testimony from the defendant, the instructor, and others who have fought with the student either inside or outside of controlled settings. This will be the most difficult element to assess because the ability to use skills in an actual scenario can only be known definitively through the defendant's experience in combat.²³¹ The third element should try to identify some intentional action of the martial artist—not simply a lucky

²²⁶ See SIMCO, *supra* note 3, at 15 (describing how to determine if an instructor is qualified or unqualified and advising students to be on the lookout for scam instructors simply trying to make money).

²²⁷ The jury will need to determine the credibility of the deponents depending on who is available. In my opinion, if the instructor is unavailable, the instructor's students, the instructor's peers, and then the defendant should be deposed, in that order of preference, to avoid as much bias as possible.

²²⁸ See BROWN, *supra* note 12, at 183. Belt integrity refers to ensuring that ranks are earned and not awarded undeservedly or self-awarded. *Id.*

²²⁹ DUFF, *supra* note 12, at 11 (“Sadly, there are some who claim the honor and dignity of *dan* rank who are less than competent.”).

²³⁰ See MORGAN, *supra* note 133, at 64 (“[T]oo often, a student becomes complacent during the learning stage and never attacks more than half-heartedly even later, after his partner masters the mechanics of the technique.”).

²³¹ See ZEHR, *supra* note 134, at 149 (“Many people can have the skill to do the physical performance needed but not everyone has the ‘grace under pressure’ to perform calmly when needed. Let’s consider what police and paramilitary forces use more and more these days to get at full-on live-fire situations in training. They use what is called ‘reality-based training.’ In very basic terms the main point of reality-based training is to incorporate training and responses in environments that can be very chaotic and that mimic the kind of stressors that a police officer might experience during a real encounter.”).

blow—that killed the victim, or to identify that a particular martial arts skill caused the victim’s death.²³²

The third element is necessary because when an unfamiliar attack situation is combined with an adrenaline rush, even a martial artist may experience conditions sufficient for common law provocation or extreme emotional disturbance, and not react as trained.²³³ The chemical cocktail may influence his subjective belief about imminent deadly force against him and neutralize his training, thus making his subjective perception reasonable. Accordingly, the mindset in which martial artists train is not always the mental state that exists during a fight;²³⁴ he instead might act as the ordinary, reasonable, unskilled man would. Evidence suggests that the skills of martial artists can actually degrade during a real self-defense confrontation because fine motor skills are more difficult to perform²³⁵:

The chemical cocktail makes most people more dangerous. It often makes trained fighters *less* dangerous. It increases strength [and] short-term speed, and lowers pain tolerance[,] . . . all good things. It *decreases* skill sets and fine and complex motor skills. Fine and complex motor skills only apply to trained fighters. Untrained people are going to flail anyway and the hormone dump makes flailing more efficient. Trained people will often be forced to flail, eroding their efficiency.²³⁶

For example, if an MMA fighter were challenged in an unarmed one-on-one fight while surrounded by fences, he might—analagizing to the octagon—feel as if the situation was one in which he had control and a legitimate chance to defend himself. Yet, the same may not be said about that MMA fighter

²³² See *Kaufman v. People*, 202 P.3d 542, 557 (Colo. 2009) (citing *People v. Corbett*, 611 P.2d 965, 967 (Colo. 1980) (finding evidence of defendant’s martial arts training irrelevant because the victim died of a stab wound, rather than from a surface blow to the body)).

²³³ Even if a martial artist’s hands or feet would be considered deadly weapons under a state statute by a jury, that determination is not a substitute for applying the MST because of the disconnect between martial arts training and self-defense. However, a classification of a body part as a lethal weapon might be helpful in determining the third element. See, e.g., *McCray v. State*, 643 So.2d 610, 614 (Ala. Crim. App. 1992) (finding that hands used to choke someone were used as deadly weapons).

²³⁴ See MILLER, *supra* note 190, at 57, 58; Stix, *supra* note 210.

²³⁵ MILLER, *supra* note 190, at 58–59 (“Skilled technique degrades under stress. It degrades a lot. . . . Some of the hormonal affects [sic] are physical. Under the stress hormones, peripheral vision is lost and there is physical ‘tunnel vision.’ . . . Blood is pooled in the internal organs, drawn away from the limbs. Your legs and arms may feel weak and cold and clumsy. You may not be able to feel your fingers and you will not be able to use ‘fine motor skills,’ the precision grips and strikes necessary for some styles such as Aikido.”).

²³⁶ *Id.* at 63 (alteration in original).

being attacked by three armed aggressors at night after the fighter has just finished dinner. In the first case, the MMA fighter may be able to exercise his training to subdue the attacker, but in the second scenario, he would likely act as any person in that situation would. The chemical cocktail and different circumstances between training and real fights²³⁷ can prevent martial artists from fighting with a cool and calm mind. Accordingly, the third element must be used to decide whether the defendant acted as a martial artist or as an ordinary person.

4. *Fourth Element, Prevention of Skill*

Juries can determine the fourth element, whether the defendant was prevented from using his skill, with evidence of the defendant's physical and mental health at the time of the incident. This element assists juries in deciding the subjective and objective reasonableness of the defendant's belief because it helps them understand the range of defense options available to him. However, if the defendant was physically or psychologically impaired such that he could not utilize his training, then courts should not deny him the partial defenses. A defendant can only be martially sufficient if he used his skills to kill. If the defendant meets the first three elements but kills the victim through means outside the scope of his training, such as with a weapon,²³⁸ because he is injured, or otherwise impaired, a different analysis applies.²³⁹ For example, the defendant may have had a broken limb and could not fight so he needed to use a gun to kill the victim in self-defense.²⁴⁰ Or, if the defendant was drunk and stabbed the victim with a knife, then martial arts skills were not applicable, and the case would proceed as a normal homicide trial.²⁴¹

²³⁷ See *id.* at 57, 58.

²³⁸ While many martial arts train students to use weapons, this Comment focuses on unarmed combat; weapons use is outside the scope of this Comment. If, however, the defendant kills the victim with a martial arts weapon in such a way that satisfies the first three factors, then this killing would show that the defendant was not prevented from using his skill, thereby satisfying the fourth factor.

²³⁹ *E.g.*, *Kaufman v. People*, 202 P.3d 542, 557 (Colo. 2009) (involving claim by defendant that his only means of defense was a knife because his hand was injured and he could not make a fist).

²⁴⁰ See, *e.g.*, *State v. Babbitt*, 815 P.2d 1077, 1079–81 (Idaho Ct. App. 1991) (affirming the prosecution's cross-examination of the defendant regarding his boxing experience to refute defendant's self-defense argument that he shot the victim because his abdominal surgery prevented him from fighting the victim).

²⁴¹ *E.g.*, *Kaufman*, 202 P.3d at 557 (excluding evidence of the defendant's martial arts training as irrelevant to prove intent to kill, where the defendant stabbed the victim with a knife, which he held with an injured hand with which he could not make a fist).

5. *Fifth Element, Intent*

The fifth and final element of the MST, whether the defendant intended to kill the victim with his skill, is crucial for proportionality analysis. This element also assists juries in deciding the subjective and objective reasonableness of the defendant's belief. This element gets to the crux of whether the martial artist abused his skill.²⁴² If martial artists intentionally kill with a cool mindset in self-defense, courts should only permit use of perfect self-defense, the highest standard, to curb disproportionate responses. It may be difficult to determine intent if the defendant struck and killed the victim, because the full impact of a strike is delivered in an instant. The first element (the principles of the martial art) may assist with whether the defendant intended injury or death because it could determine the abstract purpose of the strike, such as whether it was a known deadly technique. In contrast, for moves that require time to kill the opponent, such as chokes or joint manipulations, that time may give the defendant an opportunity to cool off; failure to do so suggests intent to kill. The fifth element is crucial—the MST denies a defendant the partial defenses because he has abused his martial arts skills, not simply because he is a martial artist.

The MST's elements recognize that martial artists have skills that do have some self-defense applicability, but due to the varying circumstances in which attacks occur, their training may or may not help. The MST has harsh consequences, so denying martial artists the partial defenses makes sense only if they have developed, through their training, the ability to keep a steely calm during self-defense scenarios.

B. *Applying the Martial Sufficiency Test*

Prosecutors would find the MST helpful in homicide trials where martial artist defendants claim self-defense. The MST may affect how a prosecutor frames a case, giving her the tools to argue that the defendant is a trained killer. In contrast, the test also provides defendants the opportunity to show that the prosecutor's allegations are unwarranted. The prosecutor should also be mindful of the costs of using the defense: the temporal costs of time in court, the monetary costs of using expert witnesses to establish the MST factors, and the extra mental energy the jury will need for considering the MST test.

²⁴² A martial artist may incorrectly perceive a situation, but it may nevertheless be reasonable for him to do so based on his training; the jury decides whether his subjective judgment was unreasonable. *See supra* note 51 and accompanying text.

Nevertheless, the MST will help prosecutors defeat the partial defenses in appropriate cases. The following pages consider how the MST would have affected the prosecution of Rafael Torre, discussed in the Introduction.

If courts had applied the martial sufficiency test in *People v. Torre*,²⁴³ Torre would have been found martially sufficient and been denied the imperfect self-defense and provocation defenses. Recall that Richards attacked Torre in Torre's training facility, and that Torre saw the attack coming. Torre disarmed Richards of the gun and choked him for several minutes.²⁴⁴ Under the martial sufficiency test, a court would assess Torre's liability as follows, and reach the conclusion that he was martially sufficient.

First, MMA teaches the skills to deal with one-on-one conflict. It does not teach practitioners specifically to disarm attackers with weapons, but anticipation of an attack, the ability to handle a threat, and quick reactions are a by-product of the MMA training that Torre used to disarm Richards. Since Torre actually disarmed Richards,²⁴⁵ he still satisfies the first element because he demonstrated that he was calm enough to get within range to disarm Richards without being injured.

Second, Torre was apparently taught the rear-naked choke, but no evidence exists in the case to show if he was taught the choke correctly. From the information available, it is unknown if his instructor was competent, but the instructor could be deposed to determine if he was. If the instructor could be shown to have taught the choke correctly, Torre would satisfy this element.²⁴⁶

Third, Torre seems to have had the proficiency to apply his training in a self-defense scenario. He had served as a bouncer and presumably had applied his skills before in real self-defense scenarios.²⁴⁷ The dominant performance Torre unleashed against Richards supports the conclusion that Torre would satisfy this element.

²⁴³ No. E039015, 2007 Cal. App. Unpub. LEXIS 5104 (Ct. App. June 25, 2007).

²⁴⁴ *Id.* at *6.

²⁴⁵ *Id.*

²⁴⁶ To illustrate how the MST ideally works, this Comment assumes the evidence could be obtained.

²⁴⁷ *Torre*, 2007 Cal. App. Unpub. LEXIS 5104, at *3. However, only prior altercations similar to the incident would likely be admitted for this factor. See *Kaufman v. People*, 202 P.3d 542, 560 (Colo. 2009) (recognizing that evidence of prior bar fights should have been excluded because they were not similar to the altercation being tried, but finding in that specific case there was no prejudice found because of the admission).

Fourth, Torre was not prevented from using his skills by a handicap—he was found physically and mentally sound before the attack.²⁴⁸

Finally, Torre used a choke for several minutes on Richards.²⁴⁹ Since chokes can be released and still render the victim unconscious, Torre’s use of the choke for several minutes showed his intention to kill Richards with that technique.²⁵⁰ Therefore, Torre is martially sufficient under the MST, and a court should deny him imperfect self-defense and provocation. Perfect self-defense would be his only option. Since it was objectively unreasonable for Torre to have applied his chokehold for so long, Torre’s conviction and sentence were appropriate.²⁵¹ Although the outcome in *Torre* remains the same under the MST, the framework provides a structured basis of analysis for the jury to make its decisions in similar cases.

For exceptionally well-trained or “martially sufficient” martial artists, a proportional use of force should rarely require killing the aggressor because these martial artists have been legally deemed to have mastered the special fighting skills designed for their particular self-defense confrontation.²⁵² The martially sufficient have their skills as their advantage in battle; the untrained have imperfect self-defense and provocation to make up for their unreasonable, but understandable, actions in battle. It would be both unfair and dangerous to allow the martially sufficient to have both their skills and the partial defenses available because it would encourage their use of deadly force over nondeadly alternatives. In essence, the martially sufficient are trained to kill, and the law should not create incentives for them to kill by treating them like untrained people. These individuals should only have to kill when they could establish a perfect self-defense in order to keep them on their best behavior. As one martial artist observed, restraining these individuals is an honorable pursuit.²⁵³ The law can provide this honorable restraint for them through the martial sufficiency test.

²⁴⁸ The jury did not believe that Torre’s hand was injured as he had claimed. *Torre*, 2007 Cal. App. Unpub. LEXIS 5104, at *7–8.

²⁴⁹ *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 908 n.3 (9th Cir. 2008).

²⁵⁰ Despite Torre’s statement that he only wanted to render Richards unconscious, the medical testimony about how strangulation was caused over several minutes showed otherwise. *Id.*

²⁵¹ However, the MST does not deny lesser included offenses, such as voluntary manslaughter, even if the defendant is martially sufficient. The MST only eliminates the partial defenses; the determination of what the defendant is convicted of is otherwise decided normally.

²⁵² See *infra* note 267 for an example of a trained mixed martial artist subduing a criminal outside the octagon and using only minimal force required to subdue him and keep him alive.

²⁵³ MORGAN, *supra* note 133, at 164–65.

V. HOW THE MARTIALLY SUFFICIENT CAN ACHIEVE PERFECT SELF-DEFENSE

This Part recommends changes that legislatures and the martial arts community can make to give notice of the new standard and of self-defense law in general. If courts could then apply these changes and adopt the MST to determine whether to deny imperfect self-defense and provocation, martial artists will be obliged to adhere to the proportionality requirement of self-defense law. This change will signal that both the law and the world of martial arts value the sanctity of human life. As the retreat doctrine protects the sanctity of human life by requiring flight over fight, raising standards for martial artists will discourage them from using their skill at lethal levels and will further protect life. Section A discusses what legislatures can do to help effect change. Then section B argues that the martial arts community should also adapt its teachings to current self-defense law.

A. Legislative Changes

Legislatures should require martial arts instructors to be knowledgeable about self-defense basics, including the elements of the attack and response. To ensure that martial artists are not ignorant of the law, martial arts institutions should be required to certify that their instructors know some self-defense law.²⁵⁴ Modifying martial arts through this requirement should give notice of existing legal standards to the next generation of martial artists. In addition, all martial arts institutions should include in their curriculum the responsibilities of fighters inside and outside of the competition setting.²⁵⁵ This idea expands on the philosophy of traditional martial arts but would modernize rules and responsibilities to fit current self-defense scenarios. These adjustments will likely reduce incidents of excessive violence by all martial artists, no matter the specialty. To implement this idea, legislatures

²⁵⁴ See BROWN, *supra* note 12, at 183 (describing how Alabama has regulated martial arts to make sure that instructors are worthy of their title).

²⁵⁵ *E.g.*, Koiwai, *supra* note 6 (“The number of fatalities resulting from the use of choke holds will decrease if the following procedures are followed: 1. Choke holds to be taught by trained and certified instructors: [a] to be familiar with the anatomical structures of the neck and where the pressure is to be applied (carotid triangle)[, b] to know the physiology of choking, that only a small amount of pressure is needed to cause unconsciousness[, c] to recognize immediately the state of unconsciousness and to release the pressure immediately[, d] to learn proper resuscitation methods if unconsciousness is prolonged[, and e] to prevent aspiration of vomitus and not to place the restrained suspect face down. Keep the suspect under constant observation. 2. To revise the police training manuals to emphasize the above procedures. These are the procedures and principles taught by judo instructors which have prevented deaths caused by shime-waza in the sport of judo for over 100 years.”). Additionally, pertinent information could be included in waivers, and classes could be tailored for sport or self-defense.

should also require all martial arts schools to educate their students on basic self-defense legal principles in their jurisdiction. Legislatures could require organizations like the UFC to give instructional self-defense law courses to their fighters before a state athletic commission could sanction such organizations in the state.²⁵⁶ These changes could join with other efforts to modernize the way martial arts are practiced today.²⁵⁷ A change in martial arts instruction should accompany the change in the law to provide adequate notice to all practitioners.²⁵⁸

B. The Martial Arts Community Must Adapt to Current Legal Standards

Irrespective of whether the law is changed, the martial arts community must teach its practitioners to fight within the rule of law. The martial arts have evolved based on battlefield, sport, and unconstrained street environments. Against this backdrop, it would behoove the next generation of martial artists, particularly those who teach self-defense to civilians, to refocus their methodology away from continuing to attack the aggressor once they are legally “down and out.”²⁵⁹ Incorporating an applied self-defense law into martial arts lessons will help protect students and teachers of the martial arts physically and legally. Just as fighters learn that certain techniques are forbidden in the octagon, they must learn that there are rules on the street—

²⁵⁶ With Zuffa’s (UFC’s) recent acquisition of the Strikeforce mixed martial arts organization, it has become the dominant MMA organization in the world. See Ariel Helwani, *Zuffa Purchases Strikeforce*, MMAFIGHTING.COM (Mar. 12, 2011, 1:13 PM), <http://www.mmafighting.com/2011/03/12/zuffa-purchases-strikeforce/> (video interview with UFC President Dana White about the Strikeforce acquisition). With the UFC’s intent to spread mixed martial arts throughout the globe, legislatures have an opportunity to institute a culture of educating fighters about self-defense law that might create an institutional awareness of the self-defense law of particular jurisdictions. I contend that such a relationship between the law and martial arts is desperately needed and would benefit self-defense law and martial artists the world over.

²⁵⁷ See Michael Kim, *Mixed Martial Arts: The Evolution of a Combat Sport and Its Laws and Regulations*, 17 SPORTS LAW. J. 49, 71 (2010) (“[T]he laws and regulations governing MMA must evolve correspondingly with the sport to address safety and legal concerns.”); Brendan S. Maher, *Understanding and Regulating the Sport of Mixed Martial Arts*, 32 HASTINGS COMM. & ENT. L.J. 209 (2010) (arguing for federalization and unionization within MMA); Geoff Varney, Note, *Fighting for Respect: MMA’s Struggle for Acceptance and How the Muhammad Ali Act Would Give It a Sporting Chance*, 112 W. VA. L. REV. 269 (2009) (arguing for reforming the protections for mixed martial artists).

²⁵⁸ See DUFF, *supra* note 12, at 10, 96.

²⁵⁹ See *id.* at 9–11. Other martial arts legal scholars have called for refocusing training to use a legally proportional amount of force as well. See *id.*; Peter Hobart, *Self Defense Law and the Martial Artist*, KORYU BUDO – THE ONLINE JOURNAL OF THE ITTEN DOJO, <http://www.ittendojo.org/articles/general-4.htm> (last visited May 4, 2011) (“Use only the amount of force necessary to deter the attack. This does not require the use of ineffective technique, but rather mature reflection prior to a confrontation about what technique (including flight) is appropriate in which situation. It would be wise to introduce this as part of training.” (emphases omitted)).

legal rules such as disproportionate responses to force—that forbid certain actions. Self-defense always has a context: from the number of opponents, to the type of techniques used, to the legal jurisdiction in which the combat takes place. Awareness of a new self-defense analysis providing clarification of martial artists’ legal limits would likely be well received by the martial arts community. After all, the biggest legal problem for martial artists is their ignorance of self-defense law.²⁶⁰

Fogan reminds us that “the problem of many so-called self-defense systems is that [martial artists] *are taught to finish the person even when he is down and out*. That is where the law goes against us.”²⁶¹ Because martial artists are trained to injure, cripple, or kill another person, whenever training or drills are altered for safety reasons, instructors must make their students aware of the difference between training and reality.²⁶² Martial artists have a variety of techniques at their disposal to subdue an opponent, whether rendering him unconscious, injuring him to allow the martial artist to escape, defusing the situation, or avoiding the situation altogether. With the proposed legal changes, a greater emphasis could be put on the cognitive skills that address recognizing dangerous self-defense situations before they escalate to violence.²⁶³

Changing the law, in conjunction with martial artists learning the legal implications of self-defense, should be the next step in the evolution of martial arts and the law. Martial artists should be taught to leave the scene once their opponent is down and out. Skills like the rear-naked choke, the move used in *Torre*, can kill an opponent if applied long enough.²⁶⁴ Irresponsible or ignorant martial artists who react with disproportionate force, like Torre,

²⁶⁰ See BROWN, *supra* note 12, at 57.

²⁶¹ Fogan, *supra* note 202 (emphasis added); see also DUFF, *supra* note 12, at 52–53.

²⁶² See MILLER, *supra* note 190, at 107.

²⁶³ The law has shaped martial arts before. See *supra* note 154 (discussing the example of *Savate*); see also DUFF, *supra* note 12, at 9–10. Perhaps techniques that stun opponents and leave martial artists time to escape, rather than life-threatening holds, should be stressed for real life application. Alternatively, use of techniques that involve manipulating or knocking an opponent unconscious as quickly as possible may reduce the chance that the encounter will become a criminal homicide. These changes are realistic; CDT is a new martial art founded in 1992 that exemplifies the idea of teaching a legal-oriented personal protection system. See CDT PERSONAL PROTECTION TRAINING (July 16, 2009), <http://www.cdtsystem.com/wordpress/> (“CDT was designed for real world situations to physically control or disarm a hostile aggressor, and keep him in compliance until completely restrained or until help arrives.”).

²⁶⁴ See, e.g., *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 908 n.3 (9th Cir. 2008) (explaining that Torre applied the choke for several minutes).

threaten the reputation,²⁶⁵ and diminish the integrity, of all martial arts and martial artists.

C. *Responsible Martial Artists: The Reigning Champions*

A legal framework that holds martial artists accountable yet encourages them to do what they do best, self-defense, is not without hope. Trained martial artists—and even civilians with barely any martial arts background²⁶⁶—are putting these skills and ideas into practice today. On March 20, 2011, hours before his fight against the UFC Light Heavyweight Champion Mauricio “Shogun” Hua, at UFC 128, challenger Jon Jones and his two MMA coaches saw a robbery in progress.²⁶⁷ A man was breaking into cars and stealing items.²⁶⁸ Jones and his trainers shouted at the robber who

²⁶⁵ See, e.g., BROWN, *supra* note 12, at 52–53 (noting the reputational damage to martial arts resulting from several murder convictions of defendants with martial arts training).

²⁶⁶ When attacked by a serial killer with a knife while on a New York City subway, Joe Lozito subdued a murderer, and kept both himself and the murderer alive to be brought before justice. Mike Chiappetta, *Years of Watching MMA Helped Heroic Joe Lozito Help End Murder Manhunt*, MMAFIGHTING.COM (Feb. 26, 2011, 8:00 PM), <http://www.mmafighting.com/2011/02/16/years-of-watching-mma-helped-heroic-joe-lozito-help-end-murder-m/>.

Though he’s never trained in MMA due to his work hours and commute, Lozito credits his years of watching the sport with helping him to keep a presence of mind about the situation. “It was my instinct to get him down,” Lozito said. “Like getting an opponent down in MMA, what do you do? You go for the legs. When we were on the ground he was flailing at me with that knife. I just wanted to get control of that right wrist. In the process, he got me on my thumb and left triceps, but I was aiming towards getting control of his wrist for sure. . . . MMA’s most vocal opponent in the state has been Assemblyman Bob Reilly, who infamously said, “Violence begets violence,” theorizing that the sport is bad for society. Yet, here we have an MMA fan who is a good family man, a fan who was put in a situation where he says watching MMA is partly responsible for the instincts that helped him end a manhunt, capture an alleged multi-murderer, and stay alive.

Id. This is the path toward a responsible martial artist.

²⁶⁷ Ron Sylvester, *Jon Jones Detains Robber Hours Before Winning UFC Title*, NBC SPORTS OFF THE BENCH (Mar. 20, 2011, 2:20 PM), <http://offthebench.nbcsports.com/2011/03/20/jon-jones-detains-robber-hours-before-winning-ufc-title/>. The article also refers to an earlier crime that was thwarted due to mixed martial arts techniques. *Id.*; see also Steve Cofield, *Hours Before the Biggest Fight of His Life, Jones Subdues a Robber*, YAHOO! SPORTS CAGewriter (Mar. 19, 2011, 5:35 PM), <http://sports.yahoo.com/mma/blog/cagewriter/post/Hours-before-biggest-fight-of-his-life-jones-an?urn=mma-wp309>. These noble acts by martial artists cut strongly against the opposition that New York Assemblyman Bob Reilly marshals against mixed martial arts legalization in New York because it shows the character, respect, and sense of justice that these martial artists have—in contrast to Assemblyman Reilly’s accusations of their barbarism. See S.C. Michaelson, *NY State Assemblyman Bob Reilly Says UFC Promotes Violence on Inside MMA..and I Agree?*, WATCH KALIB RUN (Sept. 8, 2010, 12:00 PM), <http://www.watchkalibrun.com/2010/9/8/1674880/ny-state-assemblyman-bob-reilly>.

²⁶⁸ Sylvester, *supra* note 267.

fled.²⁶⁹ Jones and his coaches rushed after the robber, subdued him, and pinned him down until the police arrived.²⁷⁰ Sweeps, arm-bars, leg locks, and double-leg takedowns—all non-lethal standard MMA moves—were used to hold the robber down until the police arrived.²⁷¹ If martial artists can make this type of offensive citizen arrest, a defensive mindset that subdues attackers using the least amount of force necessary is also plausible. Jones went on to win his match later that night to become the youngest ever UFC champion at twenty-three years old, proving that with a high level of skill, you do not need to kill, even on the street, and can still be a successful competitive martial artist.²⁷²

CONCLUSION

The criminal law already takes characteristics of defendants into account when special circumstances warrant a different analysis under existing legal standards. The use of subjective evidence has already relaxed standards because of personal characteristics (as in BWS)²⁷³ and raised them because of special training (as for police).²⁷⁴ Therefore, courts should allow an opportunity for subjective evidence to heighten standards for martially sufficient martial artists, because their personal characteristics make them superior combatants in physical confrontations compared to untrained people.

If a martial artist satisfies the MST, then courts should deny him imperfect self-defense and provocation as a matter of law. A person who satisfies the test would presumably be well-versed in the martial arts and have superb mental and physical control. Indeed, he would have such superior skill that it would be improbable that he would need to kill someone in a manner an untrained person would find was unreasonable.²⁷⁵

With proper notice to martial artists, this test will serve to deter them from using their maximum skill to kill unless it is necessary to do so. If a martial artist must kill, a perfect self-defense claim would appropriately justify his action. The goals of the MST are three-fold: to rein in martial artists who use disproportionate force in self-defense, to protect martial artists who use their

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *See supra* Part II.A.

²⁷⁴ *See supra* Part II.B.

²⁷⁵ *See, e.g.,* Sylvester, *supra* note 267.

skills responsibly, and to give ordinary jurors insight into martial arts so they can fairly decide self-defense cases involving martial artists. The MST protects the sanctity of life similar to the duty to retreat, adopts a more subjective approach (as the MPC does), and requires the best application of a martial artists' physical and mental training. Responsible, competent martial artists would still have perfect self-defense available if they did have to resort to killing another. Perfect self-defense should provide adequate protection for truly justified killings, just as the true man doctrine does.

Martial artists have long been excluded from specialized scrutiny under the law. However, the martial arts and legal communities are capable of adapting to each other to promote a strong culture of responsible martial artists. With the popularity of MMA bringing martial arts into the foreground of societies around the world, now is an appropriate time to address the issue of how to deal with undisciplined, but highly skilled, fighters before the problem gets out of hand.

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* Articles Editor, *Emory Law Journal*; J.D. Candidate, Emory University School of Law (2011); B.A., Columbia University (2006). First, I would like to thank my advisor, Professor Kay L. Levine, for her enthusiasm, dedication, and making this Comment possible. Next, to my martial arts instructors throughout the years: Jason T. Yang, Renzo Gracie, Sifu David Machin, and Victor Valentin, for their training and philosophy. Thanks also to my parents, Nancy and Peter Kunen, for always believing in me. A special thank you to my brother Jason Kunen, who frequently discussed martial arts philosophy with me until the late hours of the night. And to the entire legal team at the Ultimate Fighting Championship, for giving me key insight into their organization. Finally, I want to thank all my colleagues on the *Emory Law Journal* and at Emory University School of Law for their great ideas and thoughtfulness when discussing this topic with me. I hope for this Comment to be the beginning of a broader discussion about the law and martial arts.